

An Agenda for Open Government

The recent elections and the resulting change in congressional control have adjusted the climate for transparency in Washington. The leadership of both the House and Senate are now talking about a more open government and including proposals to open the lawmaking process. The new chairs of the Senate Judiciary Committee, Sen. Patrick Leahy, and the House Government Reform Committee, Rep. Henry Waxman, are strong advocates of FOIA reform.

This raises the possibility of meaningful FOIA reform in the 110th Congress and perhaps for related legislation dealing with B3 statutory exemptions. It also means that other open government proposals may develop that could improve public access to information.

Here's a look at many of those issues and the assessment of the Coalition.

- **FOIA Reform.** The Coalition and member organizations have aggressively supported the OPEN Government Act, which will be re-introduced in the new session. While discussions continue on the most effective way to implement some of these changes, working with the Sunshine in Government Initiative, we've supported:
 - ✓ An effective, independent oversight office – “ombudsman” – with authority to improve the government-wide process and to weigh in on individual disputes.
 - ✓ Legal fee recovery for requesters who prevail in FOIA litigation.
 - ✓ An impact statement that identifies legislation that would limit FOIA and reasonably describes how the new law would effect FOIA..
 - ✓ Automatic joint referral to the respective committees on government reform. (This might have to be achieved by rule, rather than in legislation, since court decisions preclude Congress from binding future lawmakers.)
 - ✓ A broad definition of journalists granted fee waivers
 - ✓ A effective penalty provision aimed at creating an incentive for the agency to meet statutory response guidelines. Individual FOIA officers, frequently constrained by agency policy, should not be personally penalized. (The penalty provision in the original OPEN Government Act has been challenged as inappropriate. The bill seeks to penalize an agency for not meeting the 20-working day deadline by taking away the ability to subsequently withhold a document based on certain exemptions. The problem, of course, is that if the information is legitimately exempt, it's usually not the agency that is hurt by its disclosure.)
 - ✓ Both broadened and improved reporting on performance to require true accountability. We believe the reporting requirements below should be added to the existing data that agencies are required to report annually. In addition, we believe the raw statistical information gathered in compiling these reports should be made available to the oversight (ombudsman's) office to permit further analysis in identifying problems and effecting solutions. We also believe that data base should be public record and available on request.
 - Key performance indicators, including request response time, appeal response time and requests backlogged should be reported by average number of days as well as median days.

- Statistical data should be reported for both the agency as a whole and for each of the component units that separately process FOIA requests.
 - Requests should be tracked from the date received at the agency. The number of working days between the date received and the date a request is “logged-in” and the 20 day clock begins should be a part of the record.
 - The average times from the date a request is logged and the date when the information is initially provided and then fully provided should be reported.
 - In each of these reporting areas, the agency should also reflect the range between date received and date of closure.
 - In their reporting, agencies should distinguish between first person requests and other requests, reporting totals for each.
 - The number of expedited review requests filed and the number granted/denied, along with the average number of days to process those requests should be reported.

- **Limit B3 Exemptions.** The third of the nine exemptions from FOIA covers records that are specifically exempted from disclosure by statute. The B3 exemption requires that the information involved (A) be withheld in a manner that leaves no discretion on the issue, i.e. “all such records shall be withheld,” or, (B) that the law set out particular criteria for withholding or refers to particular types of information to be withheld, such as “names, titles, salaries, etc.”

There are occasions when an agency is dealing with information that does not clearly fall within one of eight other exemptions, despite their breadth, and a specific, statutory exemption is appropriate, and even, possible, desirable. But the problem is that the Congress has had a tendency to write open-ended exemptions. We believe B3 exemption should have a clear statement of necessity, establishing why the information cannot reasonably be protected under a current exemption. That statement should also clearly establish how the public interest in this instance overrides the presumption of openness established in the Freedom of Information Act. The exemption language should then be crafted to be no broader than required to meet the established public interest.

In addition, we believe

- ✓ Each B3 should contain a sunset provision so that the Congress can review the need for such an exemption within a reasonable period of time. We suggest 5 to 7 years.
- ✓ The Congress should establish specific reporting requirements for B3s that make their usage transparent and permit reasonable oversight of the process. As part of this reporting, the oversight office should maintain a list of all B3 exemptions and the frequency of their use by the respective agencies.
- ✓ The mandatory language of (A) gives the agency no discretion to release information that may be vital to the public. The exemption language should be modified to read: “The Department shall not be required under section 552 of title 5, United States Code, to make available to the public protected

information. Alternatively, whenever possible, the statutory authorization should follow the “particular criteria” approach, which does give the agency some discretion to disclose the information in the public interest.

- ✓ Because access to information is guaranteed in the FOIA, Congress should provide by rule that amendments that limit access to government information or meetings may not be included in an appropriations or authorization bill, unless the exemption specifically relates to a funding measure being authorized.
- **Adequately fund FOIA.** There are no line item appropriations for FOIA. In each of the agencies, the processing of FOIA requests is funded from general operating funds. Spending on the handling of FOIA requests has grown only modestly over the past five years, even as request backlogs have increased dramatically and the length of time requesters must wait for a response, and for records if a grant is approved, has increased. Congress needs to maintain sufficient oversight to assure that the public’s right to know is not being short-circuited by a lack of agency funding. It will also need to adequately fund the independent oversight office so that it can maintain its accountability watch. Congress should task the oversight office, if created, or the General Accounting Office in the alternative, to report regularly to it on the adequacy of FOIA funding within each agency.

Other Open Government Issues

- **Opening the Executive Branch:** Secrecy has increased throughout the executive branch with a marked increase in classification of information, a decline in declassification; an exponential increase in the use of pseudo-classification designations, an increased use of state secret assertions, a decline in the number of FOIA requests being honored, and with increased monitoring of media contacts. Here are some changes that have been suggested or could come up.
 - ✓ **HIPAA** – An advisory committee that was influential in shaping the initial privacy provisions is expected to recommend that the Department of Health and Human Services extend the reach of the act’s privacy protections. The current privacy provisions have been used in many jurisdictions to shut down all information on patients, including the names and general medical condition on victims of crimes, accidents and disasters – information whose release is clearly in the public interest. If there is a rewrite or expansion of by either law or regulation, we might want to suggest that the protections for basic identifying information be modified to follow the form used in many police records laws, providing that the kind of basic identifying information on victims of accidents, natural disasters and criminal violence, which are public record under state laws, be made available, along with a patient’s generalized condition.

- ✓ **Sunset the DIA Operational File Exemption.** The Defense Intelligence Agency won a blanket FOIA exemption for its “operational files” in the appropriations bill that passed in December, 2005. We opposed the exemption, lost, but were able to get a two-year sunset. The exemption means the agency doesn’t have to either search for or review any documents designated as an operational file when a FOIA request is made. A similar exemption earlier to the CIA and three other agencies has been widely abused.
- ✓ **Vital Records.** The secretary of HHS is charged with drafting regulations on birth and death certificates, dealing with privacy issues and identity theft. We are watching this and pointing out that restrictions could be put on certified copies of those records without removing the basic information from the public record.
- ✓ **Reverse the Ashcroft and Card memos.** The Ashcroft memo sets out a FOIA policy that is counter to the legislative purpose established in law and reinforced in the Citizen’s Guide to FOIA published by the House Government Reform Committee. The OPEN Government Act, as amended by the House Government Reform Subcommittee, declares the former AG’s guidance memo null and void although it has not been rescinded by the incumbent AG.
- ✓ **The Sunshine Act.** Revisit the federal open meetings provisions. In 2004, nearly two-thirds of the 7,045 federal advisory committee meetings were closed to the public.
- ✓ **Post more information.** Significantly increase the records and information proactively made public in reading rooms and online. A number of agencies said this was one of the steps they planned to take as part of the customer service response to the President’s Executive Order because this would reduce the number of new FOIA requests and allow FOIA officers to quickly respond by informing requesters the information was online. Agencies could also be more conscientious about posting frequently requested records, as required under FOIA, and by more effectively indexing records that are posted.
- ✓ **Solve the pseudo-classification maze.** The overuse of Sensitive But Unclassified markers creates an additional, uncontrolled level of classification, with no accountability and no avenue for public appeal. Information treated as Sensitive but Unclassified for national security reasons should be carefully and narrowly defined. The authority to so designate records should be limited to more senior and properly trained officials. There should be tough reporting standards so Congress and the public can fully and fairly assess, over time, whether the standards are being met. All items designated as SBU should have a sunset date, forcing a new review that would insure that the “sensitivity” that prompted the initial safeguard has not diminished. The statute should prohibit the use of a Sensitive but Unclassified designation for any reason not related to national security, as is often the case now. .

- ✓ **Sensitive Security Information.** SSI began as a limited statutory FOIA exemption, designed to protect airline passenger privacy in legislation prompted by the rash of airline hijackings in the 1970s. After 9/11, with the creation of the Transportation Security Agency, it morphed into a sweeping exclusion for any “sensitive” information related to transportation. The implementation goes too far. Congress this fall directed TSA to release certain SSI in court actions – there have been court challenges over the agency’s refusal to provide information on its passenger search procedures. It also mandated a limited review of disclosure requests and invoked some reporting requirements. The Congress should consider a rewrite of the 1970s law that would limit the agency’s authority or create criteria for designating information as SSI, or both.
- ✓ **State Secrets and “executive privilege.”** Both have been used as a basis for denying access to information. Congress should review this clear expansion of executive authority to be sure its checking and balancing have not been preempted.
- ✓ **Overclassification.** There is broad agreement that the government overclassifies, to the detriment of information sharing that is needed for the government to operate effectively in many national security areas. Correcting this probably requires a combination of tighter standards, better training and some built-in review. Narrowing the use of document classification so that information not related to national security or not truly sensitive can not be sealed from possible disclosure under FOIA would be a start..
- **Making the Congress more transparent.**
 - ✓ **Open Conference Committee Meetings.** Senate Majority Leader Harry Reid made this proposal shortly after the elections. It would give the public an opportunity to know about last minute changes before a bill is voted on. Often that is not the case and key provisions are added or changed without the public having any knowledge of who initiated the change or the deliberations. This would also help ensure that earmarks and their sponsors are fully identified.
 - ✓ **End Anonymous Holds.** After reports that an anonymous hold was holding up the OPEN Government Act, and we saw a similar hold almost scuttle (until the holder was outed) the bill creating a federal contract data base, there may be some sentiment to support a modification of the rules. The alternatives would be to eliminate the practice, put a time limit on the hold, or require that the person applying the hold be identified.
 - ✓ **A 72-Hour Rule.** Make legislation fully public before a vote, by requiring that a complete copy of the bill be public and posted 72-hours before a final vote, unless excepted by a majority of members on specific legislation. Such a bill was introduced in the last session and probably will come up again. This gives both

members of Congress and the public an opportunity to study legislation before the final vote. A possible compromise might be a 24-hour interim. It would also be helpful if all conference committee changes were highlighted so both members of Congress and the public can easily determine the changes made behind now-closed doors.

- ✓ **Post an index of all Congressional Research Service reports.** This would assist members of the public in obtaining copies of CRS reports from their representatives. Currently, the documents fall in a netherworld. They are not released to the public but members of Congress can and do frequently provide copies to requesters. As a result many are posted on online repositories, but often weeks or months after initially made available to Congress. These reports that are available represent a true public treasure. Making them more easily available would help increase public understanding of government workings and policy.
- ✓ **Make Lobbying Transparent.** There are several proposals to put some transparency in the lobbying process through increased reporting. We have our own idea. Require that all background documents and bill drafts presented to members of Congress by lobbyists or advocacy groups to be posted online if and when a bill passes Congress.

If you have any questions about any of these issues, contact Pete Weitzel at the Coalition of Journalists for Open Government. 703-807-2100 or pweitzel@cjog.net