

**Hearing on
The State of FOIA: Assessing Agency Efforts to Meet FOIA Requirements**

**Subcommittee on Information Policy, Census, and National Archives
Committee on Oversight and Government Reform
United States House of Representatives**

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February 14, 2007

Chairman Clay, Ranking Member Turner and Members of the Subcommittee on Information Policy, Census and National Archives, I'm honored to appear before you today to speak in favor of efforts to strengthen the Federal Freedom of Information Act.

I am testifying on behalf of the National Security Archive (the "Archive"), a non-profit research institute and leading user of the FOIA. We publish a wide range of document sets, books, articles, and electronic briefing books, all of which are based on records obtained under the FOIA. In 1999, we won the prestigious George Polk journalism award for "piercing self-serving veils of government secrecy" and, in 2005, an Emmy award for outstanding news research.

In my five years at the Archive, I have overseen five audits of federal agency FOIA processing, including two that identified the ten-oldest pending FOIA requests in the federal government and one that examined the proliferation of sensitive but unclassified information labeling policies. Through those audits, through my colleagues' FOIA requests, through litigation, and through training federal agency FOIA officers, I have learned about both the good and the bad of the Freedom of Information Act.

Let me briefly touch on some of the good news. FOIA makes a difference. It empowers citizens to learn about their government and engage in informed advocacy and voting. Attached to my written testimony is a list of almost 100 selected news stories from the last several years that are based on records released under FOIA. These stories demonstrate the power of FOIA to shake loose vital information about government operations and public health and safety. For instance, journalists and concerned citizens have used FOIA to show that more than 80 military recruiters were disciplined in 2005 for sexual misconduct with potential enlistees; that DOJ is owed \$35 billion in litigation fees and billions more in unpaid penalties against corporations for safety and environmental violations; that federal inspections showed levels of salmonella bacteria in ground turkey produced at one company's plants more than twice the national average; that Interior Department officials disregarded recommendations from government biologists about protecting eight endangered species; and, that a DOD prime vendor program allowed some contractors to set their own prices for products sold to the Pentagon, including \$20 each for ice cube trays and \$1000 for toasters and popcorn makers. I ask you to look at the list and get a sense of the range of issues that get attention as a result of citizens using FOIA to find out about how their government agencies are addressing matters of public concern.

Now, let me tell you the bad news. The FOIA system remains plagued by inefficiency, delay and sometimes outright obstruction. Despite many outstanding people administering FOIA programs throughout the government – and they deserve praise for their work – there are far too many FOIA offices that fail to live up to the expectations of

the law and the needs of the taxpaying public. Unfortunately, the FOIA statute does not provide the needed incentives to improve those poorly functioning FOIA programs.

As you know, the FOIA requires agencies to process requests within 20 business days. In 2003 the Archive conducted an audit that identified unprocessed FOIA requests as old as 16 years.

(<http://www.gwu.edu/%7Ensarchiv/NSAEBB/NSAEBB102/press.htm>) When we repeated the audit in 2005, we found requests as old as 17 years.

(<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB182/press.htm>) One of the oldest requests identified in both audits was submitted in 1989 by a graduate student at the University of Southern California asking the Defense Department for records on the U.S. "freedom of navigation" program. So much time had elapsed that the requester, William Aceves, is now a full professor at California Western School of Law. Other oldest requests identified by those two audits were languishing at the Federal Bureau of Investigation, the Central Intelligence Agency, the Air Force, the Department of Energy and the National Archives and Records Administration. In January we began another 10 oldest audit and already we have found requests more than 10 years old.

Addressing delays will require a combination of (1) **better reporting**, so problems are identified before a decade elapses; (2) **better tracking** of requests by agencies, so that problems in the system can be fixed; (3) **better leadership**, including from the Chief FOIA officers appointed as a result of Executive Order 13,392; (4) **more resources**, including perhaps requiring agencies to fix FOIA budgets as a percentage of

their growing public affairs' budgets; and (5) **penalties for delay**, including perhaps disallowing agencies from collecting any processing or duplication fees if they cannot meet the 20-day deadline.

Better reporting is an essential part of the package. FOIA annual reports do not permit Congress to conduct quality oversight, do not permit agency managers to identify problems and improve processing, and do not permit the public to press for responses. For example, remember Professor Aceves' 17-year-old FOIA request? You would never have imagined that the "Freedom of Navigation" request, the oldest pending at Department of Defense in Fiscal Year 2005, could have existed if you looked at DOD's FY 2005 annual report and read that DOD's "median processing time" in that year was 15.5 business days for simple requests and 85 business days for complex requests. (<http://www.dod.mil/pubs/foi/FY2005report.pdf>) That is a lot shorter than the over 4000 business days that Professor Aceves "Freedom from Navigation" request had been pending. The data is simply misleading.

Similarly, the Veterans Administration reports some of the shortest processing times of any federal agency. Even though it claimed in FY 2002 that its median processing time was between 4 and 24 days, the agency was not able to respond within ten months to the Archive's simple request for VA's ten oldest pending FOIA requests. (<http://www.va.gov/foia/report/FY2002/Compliance.html>) The disconnect between VA's annual report data and our experience with VA's processing of FOIA requests is partly due to the fact that the VA aggregates its FOIA request data with its Privacy Act request

data. The Privacy Act requests include the easy to find and easy to release records sought by individual veterans about themselves. The problem is that the annual reports make it look like VA has the highest FOIA caseload and the quickest processing times. That is not the reality.

The data are also misleading because each agency uses different standards in terms of when they will begin counting the days between receipt of a FOIA request and response to a FOIA request. Agencies have many ways to delay the running of the clock on their 20 day response time. Fee status disputes are one of the most prevalent tactics. Take the example of Dr. Jeffrey Richelson, a noted author of 10 books and numerous articles regarding the organization and operations of the U.S. intelligence community, U.S. military space activities, and presidential national security directives. Starting in 2001, agencies began challenging his news media status. In every case he was successful in obtaining news media status, but the dispute created prolonged delay in his work. In the case of the Central Intelligence Agency, the matter took 7 ½ months to resolve. In the case of the National Security Agency, the dispute held up his request for 6 months, and he later was again denied news media status by the NSA. In the case of the Department of Energy Albuquerque Operations Office, the process took 8 months between Dr. Richelson's assertion of news media status and resolution of the issue. Chances are that none of these agencies started running their response time until after these disputes were resolved.

I urge the subcommittee to require better, more reliable reporting, including requiring data on: average processing times, range of processing times, oldest pending requests, the number of requests abandoned by requesters due to delay, the number of requests rejected because the records are operational files, the number of expedited requests received, the number denied, and the processing times for expedited requests. In addition, the subcommittee should require more standardized reporting, including measuring response time from receipt of the FOIA request and disaggregating FOIA requests from Privacy Act requests.

I assure you, such transparency and exposure will have an impact. Just to lighten the mood a bit I wanted to let you know that this month we learned Professor Aceves' highly-publicized FOIA request is finally complete 17 years after it was filed. DOD's FOIA staff even wrote an "Ode to Freedom from Freedom of Navigation" in honor of the completion of the processing of the request!

What about tracking? Can it make a difference? Our audits exposed serious backlog problems with the Air Force. When we sued, we learned that the Air Force had no system-wide tracking system – so there were no tools in place to manage FOIA requests, even if they had wanted to. We also learned that many FOIA requests were simply thrown out or lost. We were able to persuade a federal judge to find that the Air Force has a "pattern or practice" of not processing FOIAs. Just last week when we tried to file a FOIA request with the Air Force Materiel Command, we discovered that the fax number listed on the Air Force FOIA Web site for submitting a request to Materiel

Command is actually the phone number for a patient room in a hospital maternity and delivery ward. We could not locate a proper fax number anywhere despite extensive research. After we finally managed to get the request forwarded to the Air Materiel Command FOIA office, we were told that it would be forwarded to all Materiel Command components because the main FOIA office does not keep track of all requests to Materiel Command components. Obviously, with a system like that, tracking won't solve the problem. It will, however, enable FOIA requesters and agency managers to identify where the problems lie and take steps to fix the problems.

As if it were not hard enough for your ordinary FOIA requester to get attention in this system, when a requester seeks to pursue the matter and litigate a denial, the agencies play games that waste requester and taxpayer resources. For example, in 1990 the Archive won a lawsuit against the CIA in which a federal court found that the Archive is to be treated as a representative of the news media for the purpose of charging processing fees. For 15 years the CIA abided by that ruling. Suddenly and without explanation, starting in October 2005, the CIA took the position that it – and not the media – was entitled to decide what was “newsworthy.” The CIA then began to deny the Archive's requests for news media status. We tried to administratively appeal the denials, but the Agency refused to accept the appeals. Finally, we sued in federal court. Only after a complaint and motion for summary judgment had been filed by the Archive in the United States District Court for the District of Columbia did the CIA purport to reverse its determinations for the 42 FOIA requests at issue, but even then the CIA fell short of committing to abide by controlling judicial precedents.

Now the CIA is arguing that the case is moot and the court should not issue a ruling. Next they will argue we are not entitled to attorneys' fees under FOIA's private attorney general provision that allows successful FOIA litigants to receive the attorneys' fees incurred in bringing the litigation. In essence, the CIA wasted money and time for the Archive, the Department of Justice lawyers who had to defend the Agency, and the judicial system, because there is nothing in the FOIA statute to require the Agency to take a responsible legal position until they get worried that a court might rule against them. Instead, they were able to simply delay for nine months and then change their position at the last minute. This is only one of many similar stories I have heard from people who have tried to enforce their rights through the judicial system. I urge this subcommittee to pursue FOIA attorneys' fees reform and support, with some minor changes, the language introduced in the Restore Open Government Act of 2005, H.R. 2331 109th Cong., 1st Sess. (2005).

There are many other changes to the FOIA system that could improve processing and end delay. Innovations such as requiring agencies to receive FOIA requests and send FOIA responses electronically, to provide an index of denied records to requesters, to set up a more independent administrative appeal system within each agency, to establish interagency processing arrangements, to proactively post electronically records that are likely to be requested under FOIA, and to make focused technology investments, all could contribute to improving FOIA administration.

Some of these ideas are identified in the Agency FOIA Improvement Plans issued pursuant to Executive Order 13,392, entitled “Improving Agency Disclosure of Information,” issued by President Bush. At the Archive, we have read each one of the 91 FOIA Improvement Plans published by agencies. Upon reading the Attorney General’s Report to the White House summarizing those plans, we responded with grave concern that the Report failed to acknowledge that many of the admirable goals set by the agencies can only be met with an increased commitment of resources – a commitment that the Executive Order makes clear is not being considered by the Administration. Further, many of the most intractable interagency problems, such as the sending of FOIA requests to other agencies on referral or for consultation, are not addressed at all, thus highlighting the absence of any cross-agency authority over FOIA policy matters. (<http://www.gwu.edu/~nsarchiv/news/20061019/index.htm>) The Executive Order is useful because it forced agencies to examine their programs – and some agencies used the opportunity to conduct serious evaluations. For example, despite the issues I raised about delay at the Department of Defense, it is clear from their improvement plan that they are on the right track, including examining tracking, training, professionalizing their personnel, and technology. But it is also clear that they can only do what they envision with high level support and some funding. In some cases, problems will not be solved unless Congress mandates solutions. Thus, I urge you to pursue FOIA reform and continue to conduct focused oversight activities to help create a truly transparent and accountable government.