

**Statement Of Senator Patrick Leahy
Subcommittee On Government Management,
Finance, and Accountability,
Committee On Government Reform,
U.S. House Of Representatives
Hearing On “Implementing FOIA:
Does the Bush Administration’s Executive Order Improve Processing”
July 26, 2006**

Good afternoon Chairman Platts, Vice Chairwoman Foxx, Ranking Member Towns, and members of the Committee. Thank you for inviting me to appear before this Committee to discuss the importance of transparency in government and the Freedom of Information Act (FOIA), an issue that I have advocated for since my early days in the Senate. I am pleased to join Representative Sherman and my friend, the distinguished Senator from Texas, Senator Cornyn, here today.

Senator Cornyn has been a great partner and ally in our efforts to strengthen and improve our open government laws. Together we have forged an effective bipartisan partnership, having now together cosponsored three FOIA bills, one of which has passed the Senate and another that has been reported out of the Judiciary Committee. You can be sure that we will keep working on this important issue.

The public's need to know is a constant in our democracy. But fulfillment of the public's right to know ebbs and flows. This month as we mark the 40th anniversary of the Freedom of Information Act, the current ebb tide of public access to government information has been especially severe. After four decades, FOIA – a bulwark of open government – is under a targeted assault.

The setbacks to FOIA and to open government include the overly broad FOIA waiver in the charter for the Department of Homeland Security – the biggest single rollback of FOIA in its history. These setbacks also include muzzling government scientists on issues from climate change to drug approvals; shifting the burden of proof in the FOIA process from federal agencies to the public; the expanding use of government secrecy stamps; threats of criminal prosecutions of journalists; and undermining whistleblowers and the laws that protect them. These setbacks are all especially troubling to those who value transparency in government. But, more importantly, these setbacks are evidence of deeper problems with the implementation of FOIA that have plagued this law for some time.

Chief among the problems with FOIA's implementation is the major delay encountered by FOIA requestors when they seek information from the government. According to a recent report on FOIA by the National Security Archive, the oldest outstanding FOIA requests date back to 1989 – before the collapse of the Soviet Union. In fact, according to this report, the oldest of these outstanding FOIA requests was submitted to the Defense Department in March 1989 by a graduate student who is now a tenured law professor. Of course, this is an example of a more extreme case, but even extreme cases are reflective of the very real problem that delays in FOIA matters are all too commonplace in our government.

Another key concern is the growing use of the exemptions under FOIA to withhold information from the public. Today, federal agencies operate under a 2001 directive from former Attorney General John Ashcroft that gives them the upper hand in FOIA requests, reversing the presumption-of-compliance directive issued earlier by former Attorney General Janet Reno. Also, there is a growing – and troubling -- practice of hiding new exemptions in the laws passed by Congress. Under Section (b)(3) of FOIA, Congress can exempt additional records from FOIA by statute. But, often

the language creating these exemptions is buried deep in legislation, circumventing public scrutiny until after the bill becomes law.

Another recent FOIA-unfriendly move is the placement of limits on the fee waivers afforded to journalists who seek information under FOIA. FOIA provides a search fee waiver for journalists because the news media publishes information to keep the public informed. However, more and more members of the news media are being denied the benefit of this waiver because they are not affiliated with a recognized news organization. For example, earlier this month we learned that the CIA has threatened to rescind the search fee waivers long granted to the National Security Archive, an independent non-government research group that has been a valued information clearinghouse for the press and the public for many years. This change could cost the National Security Archive hundreds of thousands of dollars.

When President Bush issued Executive Order 13392 in December 2005, I said at the time that it was a constructive first step, but not the comprehensive reforms that are needed to properly enforce our federal FOIA law. It is helpful to look inward and examine how federal agencies view

their own performance in responding to FOIA requests, but a truly meaningful review of FOIA must also look outward and get input from FOIA requestors in order to effectively address the shortcomings that I have briefly outlined today.

That is the approach that Senator Cornyn and I took with legislation that we have proposed to strengthen and improve FOIA. Last year Senator Cornyn and I introduced S.394, the OPEN Government Act of 2005. This bill is a collection of commonsense modifications designed to update FOIA and to improve the timely processing of FOIA requests by federal agencies. A provision contained in Section 8 of that bill – which requires that the statutory exemptions under FOIA from now on would cite specifically to the FOIA law – passed in the Senate last year.

Senator Cornyn and I also introduced a second bill last year, S.589, the Faster FOIA Act, which would create a commission to study agency delay. That bill was favorably reported out of the Judiciary Committee last year and we hope the Senate will act on this legislation before the current congressional session ends.

As I mentioned earlier, we saw the single greatest rollback of FOIA in history tucked into the charter for the Department of Homeland Security. This provision created an opportunity for big polluters or other offenders to hide mistakes from public view just by stamping ‘critical infrastructure information’ at the top of the page when they submit information to the Department. I am fighting to repeal this law and to replace it with a reasonable compromise called the Restore FOIA Act, which would protect both sensitive information and the public’s right to know.

FOIA is 40 years young, but the law’s values of openness and transparency in government are timeless in their importance to a government of, by and for the people. No generation can afford to take these protections for granted and it should be the goal of each generation of Americans to hand over to the next the legacy of a stronger and more vibrant FOIA than the one we inherited. I thank the Committee for inviting me to appear at this important hearing and I would be happy to answer any questions.

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