Testimony
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Representing
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Thank you, Mr. Chairman, for the opportunity to discuss ways of strengthening the federal government's implementation of the Freedom of Information Act (FOIA) and the related Executive Order 13392 ("Improving Agency Disclosure of Information").

Introduction

I am Tonda Rush, director of public policy for the National Newspaper Association (NNA). NNA was established in 1885 by weekly and small daily newspaper publishers and it remains the voice of community newspapers in the United States. We represent owners, publishers and editors. Our membership includes over 2,500 newspapers. Our main headquarters is housed at the University of Missouri-Columbia. We have an office as well in Arlington, Virginia.

My testimony today has three purposes:

- To build upon the good work this committee has already done in examining the need to improve 5 USC 552, the Freedom of Information Act;
- To discuss Executive Order 13392, which was a positive step for the executive branch, but does not supplant the need for legislation;
- To suggest elements in H.R. 867, the OPEN Government Act that would help this committee to finish this work.

I appear before this committee as a media attorney with long experience in access law. I am also a former journalist, and I own an interest in community newspapers in Kansas. As public policy director of NNA, I represent newspapers that perform a critical mission in local communities. Most of them are family-owned. Their reporting staffs may range from one to a dozen persons, but are rarely large enough to field a good softball team.

Their focus is local news. These are the newspapers that cover the school board meeting, public business at City Hall and the courthouse, high school sports and traffic accidents on the interstate. They rely heavily upon open meetings and open records laws to enable their reporting. And when the story leads to the federal government, they rely upon the Freedom of Information Act and its related policies to help them explain the workings of Washington to their readers. Both the actual use of FOIA and the critical role the federal open records act plays as a mentoring policy for state and local government laws and the officials who administer them are critical to these newspapers.

I am also testifying today on behalf of the Sunshine in Government Initiative (SGI), a coalition that includes NNA and eight other media organizations committed to promoting policies that ensure the government is accessible, accountable and open.[1]

I have over thirty years experience with FOIA as a journalist and later as a media representative in Washington. I can truly say that this is one of the most challenging times in my experience to work as a journalist covering any level of government. In a time of shrinking newsroom budgets, the indifference and sometimes outright hostility shown the Freedom of Information Act and other open government laws and practices makes the journalist's mission difficult indeed. If journalists, with their training and expertise, find the use of these laws growing ever tougher, the inquiring and concerned citizen must find it nearly impossible. It is important for all of us to remember that access laws exist for the benefit of the public and our democracy, and are not to be ruled by the interests of those who govern, report, adjudicate or other subset of our free society.

Our democracy envisions a free market of ideas with a free flow of information to help people make big and small decisions on everything from determining how our government leaders are doing and which communities provide safe places for raising families, to which dishwashing detergent is the best value.

Not all government information can or should be made public, of course. But the FOIA statute on the books already recognizes that circumstances require withholding of records from the public and gives ample opportunity for agencies to withhold records when, for example, secrecy would be necessary to protect national security, commercial interests or individual privacy, even if we disagree with the decisions that are sometimes made.

According to a compilation by the National Security Archive, stories, using FOIA alerted the public to the following matters of public interest:

- Abnormally high salmonella rates in turkey processing plants and weaknesses in federal food safety programs brought to light in April 2006 by FOIA and the *Minneapolis Star Tribune*

- Patients jeopardized by insufficient Medicare oversight. Investigative work by *The Washington Post* using FOIA found Medicare officials knew about problems at health care facilities. One Florida hospital receives equal reimbursements for new patients and heart patients with recurring infections.

- Unrecovered fines owed taxpayer coffers. Reporters working for the Associated Press, which is a member of SGI, found a large increase in the amount of money owed the federal government in fines. AP reported that the Justice Department

[1] SGI member organizations include the American Society of Newspaper Editors, Associated Press, Association of Alternative Newsweeklies, Coalition of Journalists for Open Government, National Newspaper Association, Newspaper Association of America, Radio-Television News Directors Association, Reporters Committee for Freedom of the Press, and Society of Professional Journalists.

> was owed more than $35 billion in fines from criminal and civil cases alone. In some cases, the government collected a fraction of the assessed fine. In other cases, the government is still waiting to be paid.[2]

Congressional oversight of FOIA is critical

We very much appreciate the attention that the House Government Reform Committee – and this Subcommittee in particular – has given to the problems the public faces in obtaining information from federal agencies. As the full Committee's most recent "Citizen's Guide" to FOIA states in its very first sentence, "The Freedom of Information Act (FOIA) establishes a presumption that records in the possession of agencies and departments of the executive branch of the U.S. Government are accessible to the people." The Guide clearly stated the high standard by which FOIA should operate when it noted:

> With the passage of the FOIA, the burden of proof shifted from the individual to the government. Those seeking information are no longer required to show a need for information. Instead, the 'need to know' standard has been replaced by a 'right to know' doctrine. The government now has to justify the need for secrecy.[3]

In an age when the public can obtain tremendous volumes of information from government and elsewhere with a few keystrokes, FOIA has become less reliable, less effective, and a less timely vehicle for informing the public of government activities and newsworthy stories.

The hearing you held in this committee on May 11, 2005, Mr. Chairman, superbly documented key problems that the public faces in exercising its right to know. Those problems, briefly listed, include delays, backlogs, unwarranted denials and a paucity of alternatives to litigation as a means of resolving disputes.

As you know, the President issued Executive Order 13392 spurring agencies to review operations and create goals, objectives and timelines for improvements. SGI viewed it as a possibly very positive step – but the devil is in the details. Its impact will depend upon how seriously the agencies choose to take it and how vigorously they carry forth its spirit.

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[2] All stories cited in "FOIA in the News – 2004-2006," National Security Archive, http://www.gwu.edu/~nsarchiv/nsa/foia/stories.htm; accessed 7/20/2006. "Salmonella rates high at state plants; Tests at turnkey processors in Minnesota have found levels close to failing federal standards," *Star Tribune* (Minneapolis, MN), April 14, 2006, at 1A , by David Shaffer; "Inefficient Spending Plagues Medicare; Quality Often Loses Out as 40-Year-Old Program Struggles to Monitor Hospitals, Oversee Payments," *The Washington Post*, July 24, 2005, at A1, by Gilbert M. Gaul. "Washington owed billions of dollars: Fraction of fines actually gets paid; Penalties get axed, ignored, forgotten," *Kansas City Star*, March 19, 2006, by Martha Mendoza and Christopher Sullivan, the Associated Press.

[3] House of Representatives Committee on Government Reform, "A Citizen's Guide on Using the Freedom of Information Act and Privacy Act of 1974 to Request Government Records," Sept..20, 2005.

The recent debate and agency Improvement Plans resulting from the executive order make quite clear two fundamental truths.

First, EO 13392 sparked some material improvements and also drew attention to the law, which is a positive step by itself.

Second, the executive order does not address problems that only actions of Congress can truly solve.

FOIA is a statute imposed by Congress upon the executive branch over the agencies' persistent protests. The government's resistance is nothing new. Agencies resisted public access under the Administrative Procedures Act, opposed the 1966 law, opposed the 1974 amendments and have tried to roadblock every improvement this body has contemplated. But Congress has not permitted those objections to thwart its efforts to hold accountable those who spend the public's money and act in the public's name. Congress has recognized that, while greater efficiency within agencies is laudatory, the roles of both Congress and the judiciary must be carried out to ensure the public's rights of access.

H.R. 867, the OPEN Government Act introduced by Rep. Lamar Smith in the House and by Senators Cornyn and Leahy in the Senate as S. 394, seeks to reawaken Congress to this duty. With 31 House co-sponsors (and 5 Senate co-sponsors), it shows the bipartisan willingness of Congress to re-engage in this old duty – making the government responsive to its stakeholders. It contains important provisions to improve FOIA and we support this legislation. It offers several major efficiency improvements that would help make agency FOIA operations more effective. We are especially supportive of the citizen-centered provisions in the bill, including the mediation concept it would establish. These provisions are still needed, even following the Executive Order. H.R. 2331 sponsored by Congressman Waxman, and H.R. 1620 sponsored by Congressmen Brad Sherman and Lamar Smith also are efforts to advance pro-FOIA policies this Congress. We applaud this Subcommittee for holding two hearings on FOIA this Congress and want to continue to work with you to develop needed FOIA improvements legislation. The record created by your 2005 hearings lays an excellent foundation for progress.

The Executive Order has spurred useful introspection by agencies

A review of the Implementation Plans filed by various agencies yields mixed results. Some agencies, such as the Department of Defense, conducted in-depth, comprehensive reviews of their FOIA operations and reported candidly on problems encountered, while setting forth concrete steps to remedy those problems. Other agencies were much less ambitious, instead downplaying problems and pledging more reviews, often with overly extended timetables for implementation.

In addition, many of the problems identified were what could be considered "low hanging fruit", in that they do not constitute major impediments to efficient FOIA processing. For example, one component of the U.S. Department of Justice reported that the inability to search a key database prevented it from tracking the extent of its own backlog of

requests. Other managers encountered problems which also proved easy to fix, such as the need to purchase new photocopiers that automatically paginate scanned documents for easier processing, review and release. Undoubtedly, some agencies, and as a result, some requesters, will benefit from the implementation of the order. But while these common-sense reforms must occur, federal agencies face larger problems that copier purchases and better management of FOIA offices alone simply cannot fix.

The EO does not go far enough

Unfortunately, the meaningful reform so desperately needed to make FOIA work again will not come from the order. It fails to address some of the most pressing problems facing FOIA today, such as the lack of alternatives to litigation to resolve disputes, the lack of incentives to speed processing, and excessive litigation costs caused by unwarranted denials.

Among other issues, it does not place sufficient responsibility upon the agency head. The FOIA officer must at the least have the backing of the agency's political head, but if the agency head is not compelled to act, the FOIA officer's recommendations could lead to little progress in meaningful public access. The cabinet secretary, bureau head, or executive director must begin to afford FOIA requesters the status of any other stakeholder. If FOIA requesters were regarded as seriously, say, as the Food and Drug Administration regards pharmaceutical companies seeking new drug approvals, or the State Department regards consuls from allied countries, in short, if agencies truly made this accountability law one of its missions, and not an afterthought – the EO will have accomplished a great deal. But it does not clearly mandate such seriousness.

It also does not give clear direction on how agencies are to trim the time for requests.

Finally – although this list could go on – the EO provides few positive incentives to agencies for implementing FOIA well. For individuals, career advancement or training, improved pay and training and other career development may strengthen the professionalism of FOIA requests. FOIA processing is not a widely coveted, senior level berth with a promising career path in most agencies. The devotion of many FOIA staff to complying with the law is a testament to their personal commitments, rather than to their response to the usual performance stimuli. Some agencies did examine ways to improve the professionalism of FOIA staff, but far too few agencies have addressed this problem.

In short, the EO turned a spotlight on the same problems this subcommittee has examined. Possibly, the agency reports will spur the Attorney General to more concrete action. That will certainly be helpful. But, Congress still has its own mission.

Key Areas for Strengthening Agency Implementation of FOIA

Looking forward, Congress can go beyond the executive order to address the key obstacles facing requesters, such as the lack of alternatives dispute resolution, the lack of

incentives to speed processing, and excessive litigation costs caused by unwarranted denials.

The next steps lead back to where this law began: the recognition by Congress that citizens need the leverage of federal statutes to break down the many barriers to the records created with their funds, and by their power. This lesson is nothing new. Congressman John Moss and his colleagues spent several Congresses identifying these barriers in the 1960s and they concluded what this subcommittee has realized: the critical role here is the role of Congress.

We next point to key elements in H.R. 867 as fertile ground to explore.

Create a real alternative to litigation through mediation: Draw on many states' successful experiences with open government ombudsman

This is an issue of keen interest to me. Most of NNA's members are small businesses. Even if the federal court review path worked perfectly – and it does not – the time, money and lost opportunity cost is sufficient disincentive to use this act as often as reporters and others should use it.

The inevitable consequence is that Washington becomes ever more distant, and ever stranger, to the people sitting in local communities and relying – as they virtually all do – upon local media to understand their most immediate worlds. By giving reporters no effective alternative to the courts, the FOIA is sometimes a mere illusion.

Impact of few options to mediation. But right now, requesters have little alternative to litigation once an agency gives a final adverse decision. And although federal courts are mandated to expedite review of these decisions, the dozens of comparable expedition statutes that the court administrators must also balance negate a good measure of even this safeguard. Unlike many state governments, Uncle Sam does not require its attorney general to be the public's advocate for openness. Rather, our Justice Department is cast in various, often conflicting roles: it provides some training and guidance, but has little authority to require response; it collects data and analyzes compliance; and then it has to serve as the agency's lawyer when a decision to withhold is challenged in court.

Congress has already passed the law that says public records are presumed to be open. Now it should give the public the tools to use the law.

An independent mediator would field appeals and help the public. The Justice Department can effectively advocate for exempt records and oversee legal policy on behalf of its administration. Let the independent office be the public's helper. The Office would handle appeals from any person and provide a focus of expertise for journalists, researchers, decision-makers and others outside the executive branch.

Mediators work well in the states. The experience of several states shows that an independent ombudsman can be effectively structured in many ways. The model states, in

our estimation, are Connecticut and New York. According to an article in the Spring 2005 issue of *News Media and the Law*, a publication of the Reporters Committee for Freedom of the Press, which is a member of the Sunshine in Government Initiative, both states allow the state ombudsperson to regulate procedural aspects of the state open records law, respond to inquiries from the public and write advisory opinions.[4]

In several states, the Attorney General's office serves as the ombudsman. This structure can create a conflict of interest for that office between assisting the public and defending agencies in FOIA disputes. Because much of the AG's work involves closed access by local governments these conflicts are not as significant as those facing the Justice Department. When the "client" agency has its own counsel, the AG can serve as expert adviser. When the agency has to rely upon the AG as its own attorney, the role of AG as public advocate can be complex.

Texas' solution to this problem is particularly insightful. To mitigate against this conflict, the Attorney General of Texas separates into separate divisions, with the attorneys defending agencies distinct from the attorneys responding to the public. Kentucky does the same. Florida's attorney general handles public inquiries and mediates disputes but does not represent agencies in FOIA disputes (agency lawyers must defend agency decisions). Virginia's commission works for the state legislature and has advisory powers only, but remains influential. And in New York, the highly effective state government Committee on Open Government advises the public and officials and hears appeals. The Committee's annual report recommends improvements to strengthen openness in government.

In short, the states provide a wide array of models. However, the federal government's structure is sufficiently different that a solution tailored to the need probably will be necessary.

Reinstate requesters' ability to recover legal fees (attorney fees)

Congress long ago recognized that the cost of filing suit against the federal government to overturn a denial under FOIA is too expensive for most requesters, so it allowed requesters to recover fees if the requester is successful in that litigation.

But from the beginning, requesters found that the only way to force a decision on a record was to file suit. And then on the eve of oral argument, the government often proffers the information. Courts properly awarded attorneys' fees in cases such as this where the requester substantially prevailed, even if only in settlement.

[4] Connecticut's office is an independent state agency. Ryan Lozar, "Policing compliance," News Media and the Law, Spring 2005 (Vol. 29, No. 2), page 12. Available at http://www.rcfp.org/news/mag/29-2/cov-policing.html; accessed July 11, 2006.

Unfortunately, many requesters have of late been denied financial recovery due to a 2001 court decision unrelated to FOIA [5]. Now, when faced with the real possibility that a court will rule against them, an agency may "voluntarily" grant the request and thereby avoid paying the requester's legal fees. This practice is wasteful – both of the government's resources and of the citizen's – as it encourages litigation that could have been avoided. It is also unfair. It leaves the requester, who is simply trying to exercise his or her legal right to obtain documents from the government under FOIA, stuck with the legal bill for the agency's non-responsiveness. This is a significant loophole in Congress' intent to help requesters with limited resources.

To address this key fault in the implementation of FOIA, Congress should clarify that the courts may award attorney fees to requesters when the judge determines the agency chose to release documents as a result of a lawsuit.

Other Areas for Congress to Review

There are other ways the federal government could improve FOIA processing.

Reduce delays by giving meaning to the deadlines

Agencies should face meaningful sanctions for unnecessary delays. We believe the addition of a mediator or ombudsman would result in fewer delays that are of shorter duration. But history has witnessed many delays that were simply stubborn refusals, or chronic indifference. No mediator will repair those. Congress needs to put teeth into its law. Under the OPEN Government Act, an agency that fails to respond substantively within the statutory time limit of twenty days forfeits its right to withhold documents except to protect national security and personal privacy.

Other possibilities for sanction clearly exist. Reluctance to create or use them – in the face of the resource limitations and mission ambiguities – has prevented their implementation.

A recent report by the Coalition of Journalists for Open Government documented funding woes and processing reductions for several agencies. Backlogs for some agencies would have been eliminated if those agencies had simply processed the same number of requests in 2005 as they processed in 2004.

If better processes eliminated the confused, the under-staffed and the bureaucratically challenged, the remaining non-responses would stand out as better candidates for sanction. We would like to continue to work with the subcommittee on defining these possibilities.

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[5] Buckhannon Board & Care Home, Inc. v. West Virginia Dept. Of Health And Human Resources (99-1848) 532 U.S. 598 (2001)

Ensure adequate public discussion of new "b(3) exceptions" from FOIA

One of the biggest dangers to FOIA is the proliferation of "(b)(3) exceptions," which are passed without adequate deliberation. According to the Justice Department, about 140 of these statutes – so named for the subsection of FOIA that created them – exempt specific information from disclosure under FOIA. Too often these bills sail through Congress without debate because they are attached to larger legislation or caught too late in the process. Collectively, they are a steadily eroding FOIA's effectiveness.

Congress could remedy this in several ways:

- Section 8 of the OPEN Government Act essentially instructs the courts to consider as legitimate (b)(3) exemptions only those statutes that specifically reference the Freedom of Information Act and establish clear criteria for withholding documents. This is a straightforward solution that would ensure the bill's intent is clearly written into the law. In Senate, this provision was incorporated into a stand alone bill, S. 1181, which was reported by the Senate Judiciary Committee, and approved by the U.S. Senate on June 24, 2005. The House of Representatives could take meaningful action this year by taking up and passing this good government, common sense provision before the 109th Congress concludes.

- Through rule or policy, Congress could also ensure greater public debate of b(3) exemptions by exploring development of an Open Government Impact Assessment. All new legislation passing through Congress could be flagged for its impact on open government. We would look forward to exploring with this committee how such assessment could be efficiently conducted.

- This committee should consider seeking referral of all legislation containing (b)(3) for a specific review time. This would allow time for review to see if the (b)(3) is justified and, if it is, to address that need.

Such referrals would not necessarily mean the Committee would be required to take up every bill. But they would avoid the stealth exemptions that have plagued FOIA from its beginning. This committee and its predecessors have long carried the principal burden to strengthen, clarify and refine language so the eventual law that emerges from Congress is strong and clear enough to avoid collateral damage to FOIA. It is important for you to continue in that role.

Raise FOIA's visibility and importance across the executive branch

More attention should be paid to identify and educate federal agencies, the requester community, the public and decision makers about best practices and to strengthen FOIA processing across the executive branch. The Justice Department issues guidance, conducts training programs and remains visible among the community of frequent FOIA requesters. But more needs to be done to elevate the importance of FOIA across the

executive branch, in academia and among the public. More needs to be done to document FOIA's role in holding government accountable, rooting out waste of taxpayer dollars, and catalyzing reforms that make government work better and make the public safer. And agencies should make explicit as part of their core missions affirmatively informing the public of scientific research, health care quality assessments and other information.

In short, the current law already has safeguards to protect the public's right to know *and* the need to keep secrets when necessary. The more people understand the Freedom of Information Act, the less we'll see ill-informed attempts to write overbroad and damaging new laws shielding germs of critical information from the disinfecting powers of sunlight.

Establish a tracking system for requesters. The federal government should create tracking numbers tied to a tracking system so requesters can quickly identify the status of a request. The OPEN Government Act would create such a system.

Improve reporting. Finally, the federal government should standardize, clarify and simplify agency reporting on FOIA compliance in all areas. The Sunshine in Government Initiative identifies numerous reporting improvements that should be made in a letter dated March 17, 2006 to the Attorney General (see attached).

Conclusion

The President's Executive Order was welcome and helpful overall. If it is followed, it should lead to faster and more complete responses and it should help citizens to locate the information they seek. It will be useful only if taken seriously by agency heads, and therefore the language of the order should have been more explicit and directive. However, even in its best light, a presidential order cannot substitute for the check and balance action of Congress in creating sound statutory rules to protect the public's access to information. H.R. 867 and other legislation referenced in this testimony open debate on provisions that Congress should consider. NNA and SGI believe this subcommittee should continue to examine these bills--particularly with respect to the several recommendations we make here. We look forward to working with the committee in reporting out legislation to strengthen the Freedom of Information Act.

Appendix: Financial Disclosure

Pursuant to House Rule XI(2)(g), I declare that the National Newspaper Association almost never requests federal dollars, either in grants or contracts. However, NNA has co-sponsored a program recognizing United States Postal Service employees in the past two years with financial assistance from the Postal Service in amounts varying from $20,000 to $28,000.