

**Statement of
Congressman Brad Sherman
for the Oversight Hearing on**

**Implementing FOIA – Does the Bush Administration’s
Executive Order Improve Processing?**

House Government Reform Subcommittee on
Government Management, Finance, and Accountability

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Thank you, Chairman Platts and Ranking Member Towns for inviting me to testify and for scheduling this important hearing on Bush Administration Executive Order 13392 and its impact on the processing of Freedom of Information Act requests, and on the broader issues of open government and ensuring press and public access to government information. I am delighted to be appearing with Senator Cornyn and Senator Leahy, two Senators with longstanding interests and commitments to the cause of open and responsive government, who share my belief that we must improve the accountability, accessibility, and openness of the federal government by improving FOIA.

Executive Order 13392, Improving Agency Disclosure of Information, issued on December 14, 2005, requires agencies to review their FOIA operations, develop an agency specific plan, and report to the Attorney General and the OMB Director on their review, development and implementation of the agency plan by June 14, 2006. Three of the twenty five major agencies referenced in the May 11, 2005 GAO Report on Implementation of the Freedom of Information Act have not provided the report summarizing the review of their FOIA operations and agency-specific implementation plans as required by the Executive Order. I hope that the Department of Homeland Security, U.S. AID, and the State Department will report soon. Agencies are also required to report on progress in implementing the Executive Order in their annual reports for FY 2006 and 2007. While helpful, the Executive Order fails to get at the root of key problems with FOIA, namely, (i) exemptions that are too broad, (ii) the complete lack of any meaningful penalties, for either individuals or agencies that violate FOIA, and (iii) the difficulty of recovery of attorneys fees when litigation is successful.

While I believe that the Bush Administration’s Executive Order 13392 represents a positive first step, it is clear that a tremendous amount remains to be done to improve the timeliness, the completeness, and the accuracy of governmental responses to FOIA requests. Both individual citizens and news organizations still face far too many bureaucratic backlogs and administrative hurdles in obtaining access to information.

Departmental and agency compliance with the Executive Order's FOIA agency specific plan requirements remains spotty, and the Executive Order does little to address the critical issue of the timeliness of governmental responses to FOIA requests. All of us know that, in many instances, an untimely response from the government to a FOIA request is no better than no response at all. We must recognize and acknowledge the sad reality that some of the agencies sometimes still stonewall FOIA requestors. In other cases, untimely responses are the result of poor planning and procedures or a resource shortfall.

Whether delayed responses to FOIA requests are intentional or inadvertent, the impact on the requestor is the same. We must ensure that proper procedures are in place and adequate resources deployed to provide for timely responses to FOIA requests; audit periodically to ensure that the proper FOIA request handling procedures are actually employed by the agencies and departments; and provide remedies with teeth for requestors whose FOIA requests are not handled properly. We also need to standardize agency reporting of FOIA response times, create core responsibilities and guidelines for Chief FOIA Officers and FOIA Public Liaisons, and make better use of technology to reduce response times.

The July 4th 2006 Report on FOIA and Executive Order 13392 prepared by Open The Government.Org paints a bleak and very different picture of agency compliance with the Executive Order. The report found that the agency specific plans for the 17 agencies in the study did not address 43 percent of the 27 areas for improvement published by DOJ. The Open The Government group rated 12 percent of the plans as "Poor" and 36% of the plans as merely "Adequate" when measuring each of the 17 agency plans against the 27 areas of improvement identified by DOJ. Only 3 percent of the plans were rated as "Good" by Open The Government.Org.

Senators Cornyn and Leahy have offered two bills dealing with FOIA, the *Open Government Act of 2005* and the *Faster FOIA Act*. Congressman Lamar Smith and I have sponsored identical bills in the House. As you know, I am a cosponsor of H.R. 867, *the Open Government Act*, a bill that Senator Leahy and Senator Cornyn offered in the Senate and Congressman Smith offered in the House, and the sponsor of H.R. 1620, *the Faster FOIA Act*, a bill that Senators Cornyn and Leahy offered in the Senate, and that Congressman Smith cosponsored in the House. While the Executive Order incorporated certain proposals that were included in the *Open Government Act*, the two bills each address a number of issues not covered by the Executive Order.

The *Open Government Act* would provide meaningful deadlines for agency action and impose real consequences on federal agencies for missing statutory deadlines. It would enhance provisions in current law which authorize disciplinary action against government officials who arbitrarily and capriciously deny disclosure. The bill would establish the Office of Government Information Services to review the FOIA process; implement a better tracking system for FOIA claims; set a 20 day time limit for agencies to decide whether to comply with claims; and allow easier recovery of legal fees for claimants who successfully litigate to gain information.

Specifically as to legal fees, the bill would make agencies in more instances pay legal costs related to efforts to pry open records, such as when courts overturn agency decisions to turn down information requests. The current law makes agencies pay attorneys' fees when the news

media or others who sought government records “substantially prevailed.” Under the *Open Government Act*, a requestor could recoup legal costs if he obtained a “substantial part of requested relief,” or caused an agency to change its position on the disclosure of records.

Similarly, the *Faster FOIA Act* would establish an advisory commission of experts and government officials to study what changes in federal law and federal policy are needed to ensure more effective and timely compliance with the FOIA law. The *Faster FOIA Act* would direct the commission to report to Congress and the President on how to reduce the lengthy delays in the federal government’s handling of FOIA inquiries. The committee study would specifically attempt to identify methods of reducing delay in FOIA processing, create an efficient and equitable processing system, and examine whether the charging of fees and granting of waivers needs to be reformed. It would be required to issue a report within one year of the enactment of this authorizing legislation.

I urge the Committee to schedule a markup for H.R. 867, the *Open Government Act*, and H.R.1620, the *Faster FOIA Act*. Thank you again for allowing me to appear before the Subcommittee this afternoon.

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