

**AGENCY RESPONSE TO THE ELECTRONIC  
FREEDOM OF INFORMATION ACT**

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**HEARING**

BEFORE THE  
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,  
INFORMATION, AND TECHNOLOGY  
OF THE  
COMMITTEE ON  
GOVERNMENT REFORM  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

JUNE 14, 2000

**Serial No. 106-220**

Printed for the use of the Committee on Government Reform



Available via the World Wide Web: <http://www.gpo.gov/congress/house>  
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U.S. GOVERNMENT PRINTING OFFICE

72-077 DTP

WASHINGTON : 2001

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## AGENCY RESPONSE TO THE ELECTRONIC FREEDOM OF INFORMATION ACT

WEDNESDAY, JUNE 14, 2000

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,  
INFORMATION, AND TECHNOLOGY,  
COMMITTEE ON GOVERNMENT REFORM,  
*Washington, DC.*

The subcommittee met, pursuant to notice, at 2 p.m., in room 2154, Rayburn House Office Building, Hon. Stephen Horn (chairman of the subcommittee) presiding.

Present: Representatives Horn, Ose, Turner, and Maloney.

Staff present: J. Russell George, staff director and chief counsel; Heather Bailey, professional staff member; Bonnie Heald, director of communications; Bryan Sisk, clerk; Will Ackerly, Chris Dollar, and Meg Kinnard, interns; Trey Henderson, minority counsel; and Jean Gosa, minority assistant clerk.

Mr. HORN. The Subcommittee on Government Management, Information, and Technology will come to order.

As e-commerce and e-mail continue to supplant traditional paper forms of communication, Congress enacted and the President signed into law the Electronic Freedom of Information Amendments of 1996. The goal of these amendments was two-fold: to provide citizens with readily available electronic access to the most commonly requested information generated by Federal departments and agencies, and also to decrease the logjam of public requests for information that in some cases took agencies years to provide.

Unfortunately, the Electronic Freedom of Information Act has not been as successful as intended. Journalists and private citizens say that some agencies still take a year or more to provide information requested under the Freedom of Information Act. Other critics, such as OMB Watch, which is represented here today, report that some agencies still have not identified their most commonly requested documents, much less placed them online. In part, some agencies do not know what the law requires, which has resulted in the deletion of electronic reading rooms, handbooks, and documents from agency Web sites.

The subcommittee will examine these and other issues today in our effort to determine whether Federal departments and agencies are complying with the Electronic Freedom of Information Act.

[The prepared statement of Hon. Stephen Horn follows:]

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*Subcommittee on Government Management,  
Information, and Technology*

**“Agency Response to the Electronic Freedom of Information Act”**  
OPENING STATEMENT  
REPRESENTATIVE STEPHEN HORN (R-CA)  
Chairman, Subcommittee on Government Management,  
Information, and Technology  
June 14, 2000

A quorum being present, this hearing of the Subcommittee on Government Management, Information, and Technology will come to order.

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Unfortunately, EFOIA has not been as successful as intended. Journalists and private citizens say that some agencies still take a year or more to provide information requested under the Freedom of Information Act. Other critics, such as OMB Watch, which is represented here today, report that some agencies still have not identified their most commonly requested documents, much less placed them online.

In part, some agencies do not know what the law requires, which has resulted in the deletion of electronic reading rooms, handbooks and documents from agency web sites.

The subcommittee will examine these and other issues today in our effort to determine whether Federal departments and agencies are complying with the Electronic Freedom of Information Act.

I welcome our witnesses, and look forward to their testimony.

Mr. HORN. We will proceed. We note that this is panel one, and we will—let me just go through the ground rules. We swear in all witnesses before subcommittees and the full committee of Government Reform, and we go down the agenda, just as you see it before you. Automatically, when I call your name to begin your presentation, your full statement is already going to be in the record, so what we would like you to do is maybe 5 minutes, 8 minutes, 10 minutes at the most—to have you not read it. Yet, despite my saying this, people still mumble, mumble, mumble, and I do not need that. We have got that in the record. What I do need is a simple explanation of where you are on this issue, and just tell it like it is and use your own words, not your bureaucracy, and we will get along fine.

On the swearing in, I would like to have all the people that are from your staff in the particular agency—the clerk will note who has taken the oath so we do not have to give them when they are giving you ideas in the questions and answer period.

If you and the people that support you would stand and raise your right hands, we will give you the oath.

[Witnesses sworn.]

Mr. HORN. The clerk will note the three witnesses affirmed the oath.

We will now then begin with our first witness, and that's Joshua Gotbaum, the Executive Associate Director and Controller, the Office of Management and Budget.

Mr. Gotbaum is a regular here. We don't give frequent flyer points, but we are always glad to see you. It's your show.

**STATEMENTS OF JOSHUA GOTBAUM, EXECUTIVE ASSOCIATE DIRECTOR AND CONTROLLER, THE OFFICE OF MANAGEMENT AND BUDGET; ETHAN POSNER, DEPUTY ASSOCIATE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE; AND HENRY J. MCINTYRE, DIRECTOR, DIRECTORATE FOR THE FREEDOM OF INFORMATION SECURITY AND REVIEW, DEPARTMENT OF DEFENSE**

Mr. GOTBAUM. Thank you, Mr. Chairman.

Mr. HORN. Right.

Mr. GOTBAUM. I will, with your permission, summarize our view of the main points here.

I don't want to spend a whole lot of time telling the committee that we think access to information is important, but I think it is essential that at least we affirm that we do so. Our view is that taking advantage of information technology to provide greater accountability, greater transparency, more information for citizens about their government and information from citizens is an essential part of the basic task of Government management. We take that one very seriously.

And I think it is important, when we talk about EFOIA and talk about FOIA and talk about the transmission of information, that we do so in context, because the first point that we ought to get on the table is that we view EFOIA as an enabling statute. This statute said, with regard to requests for Government information, "To the extent you can, you should move to electronic transmission. You should take advantage of information technology, take advan-

tage of the Internet,” and we believe that the administration is doing so with a vengeance.

I’ve listed examples in my testimony, so I’m not going to go over them here. There is case after case after case in which agencies have taken advantage of technology to put basic data bases online, to start soliciting information from citizens online.

I don’t want to gild the lily, but I think it is really quite important, Mr. Chairman, that we recognize that that is consistent with and, in our view, the spirit of EFOIA.

EFOIA, itself, provides some mandates with regard to taking advantage of electronic technology. It says, “You will have electronic reading rooms.” It says, “You will have online indexes.” And it says, “You will provide an electronic option for what I’ll call the ‘traditional’ FOIA requests.” And the law also says that OMB should provide guidance to agencies on compliance and on online indexes, and we have done so. We have provided guidance. We have worked with the Department of Justice. And I will defer to Ethan Posner to talk about the very extensive efforts by the Department of Justice to give agencies guidance. I think it is worth noting and I think it is worth someone outside the Department of Justice saying this. They have gone the extra mile with regard to FOIA and EFOIA in the sense that not only have they provided guidance, but they have provided online training sessions, they have provided how-to books, etc.

From our perspective, we are using what I’ll call the “new economy broadcast model of information,” which I think EFOIA was intended to engender.

We have provided general guidance, both as to the kinds of handbooks that agencies should provide and working with the Department of Justice on guidelines. We have, in this case and in dozens of others, encouraged agencies to go online to provide electronic information and other matters.

This is a piece of the Clinger-Cohen mandate that this committee laid down with and which we are complying with which we agreed in GPEA. We have implemented that, as we have other initiatives, by, two things, Mr. Chairman. One is generic guidance on information systems that they should be thought about in advance and the standards they should meet, etc. And two is to say to agencies, “We will bring into the budget process requests for information that do meet these standards, that are consistent with the program.”

If you asked the question, “What really does OMB do in this area?” I would characterize it as general guidance and encouragement. We support individual agencies in their efforts to provide more-specific guidance—in this case the Department of Justice—and then we bring agency requests for improvements in IT and improvements in personnel, etc., into the budget process. From our perspective, the traditional FOIA model—although an important one, one that has been a bedrock of Government information provision—should be a last resort. We don’t think that people should have to send a letter through snail mail to some agency and ask the question in exactly the right way and have someone spend 10 or 20 days figuring out whether they do or don’t have the information and then send a snail mail response. We think that doesn’t make sense.

What we think makes infinitely more sense is that what we believe EFOIA and the other pieces of legislation before this committee would say: the Government should aggressively, affirmatively put information out and online, and this is something which we are doing. Agency after agency is putting information online. Agency after agency has created online reading rooms. Agency after agency is creating online indexes.

And so we view this issue, Mr. Chairman, as one in which we are making very, very substantial progress. We acknowledge that the information revolution is changing the very business of Government and we are responding to that, but we think that we are responding to it quite aggressively and in a way that is entirely consistent with the spirit of this legislation that we all support.

Mr. HORN. That's very helpful.

[The prepared statement of Mr. Gotbaum follows:]



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

Statement of Hon. Joshua Gotbaum  
Acting Deputy Director for Management  
US Office of Management And Budget

before the

Subcommittee on Management, Information, and Technology  
Committee on Government Reform and Oversight  
US House of Representatives

June 14, 2000

Good afternoon, Mr. Chairman and members of the Subcommittee. I am here today to discuss the policies that foster citizen access to information from and about the Federal government, in particular the Freedom of Information Act (FOIA) and the Electronic Freedom of Information Act Amendments of 1996 (EFOIA).

**Access to Government Information**

The basis of FOIA is that democracy requires an informed citizenry. This principle has been recognized and supported by administrations of both parties for many years.

This Administration has undertaken many initiatives to improve citizen access to government information. It has been an Administration priority to use information technology to improve the dissemination of government information, as well as other services to the public. From the beginnings of this Administration, with the National Performance Review and the work on the National Information Infrastructure, the work we did with this committee, and the work that we do with the agencies on the Government Paperwork Elimination Act, we continue to advance initiatives in this area.

The Administration has recognized the vast potential of the Internet from the earliest days. In July 1997 we put out the e-commerce principles, which relied heavily on industry self-regulation. Adherence to these principles has allowed the Internet to flourish in a manner that is generally free from government restrictions. In December 1999, the President issued three directives to build on these principles and promote e-commerce. The first, on the digital divide, discusses the need to focus on segments of the society that may not have access to technology. The second calls upon agencies to improve the way that we live with technology -- using technologies such as telemedicine to improve peoples' lives. The third directive encourages electronic government, with two major efforts: a) create a common, user-friendly entry point for on-line government information and services and b) develop common technical standards for doing business with different agencies, so that businesses and consumers will not have to "reinvent their electronic wheels" each time they contact a new agency.

Activities that have resulted from these efforts can be seen throughout the Federal government:

- *FedStats.Gov* is a web site that provides the public a single point of entry to the wide array of federal statistics maintained by various federal agencies. The public now no longer needs to understand how our decentralized statistical system works, and who is responsible for which statistics, to obtain information that they might have accessed

through FOIA in the past. They simply need to know what topic they care about and go to [www.fedstats.gov](http://www.fedstats.gov) to find the information. Since its inception in 1997, FedStats has logged close to 3 million user sessions and has garnered enthusiastic public support.

- Travelers can now check up-to-the-minute information for weather-related delays at forty major U.S. airports using the Federal Aviation Administration's web site [www.fly.faa.gov](http://www.fly.faa.gov). The web site has received almost one million visitors since its launch on April 3, 2000, and the number of travelers accessing the site nearly doubles each week.
- Consumers and healthcare professionals can access reliable information on over 1,000 health-related issues at the U.S. Department of Health and Human Services' healthfinder web site, [www.healthfinder.gov](http://www.healthfinder.gov). Visitors to the site have access to a variety of services, including online publications, information on support and self-help groups, and links to government agencies and not-for-profit organizations that produce reliable information for the public. Launched in April 1997, healthfinder served over 1.7 million visitors in its first year online and more than 4.5 million in 1999.
- The Toxic Release Inventory ("TRI") is an EPA on-line database of toxic chemicals that are being used, manufactured, treated, transported, or released into the environment, found at [www.epa.gov/tri/](http://www.epa.gov/tri/). TRI enables citizens to become more aware of toxic chemicals in their own neighborhoods checking the status of their area. It encourages dialogue between individuals and companies that may change poor environmental practices. Additionally, many emergency management agencies, such as fire departments and emergency medical services, use TRI to identify chemicals in use and map facility layouts for a more effective, quicker response to emergencies.
- Citizens can find the Medicare health plan option that works best for them by accessing the Health Care Financing Administration's (HCFA) Medicare Compare Database, found at [www.medicare.gov](http://www.medicare.gov). Medicare Compare is an interactive database that provides comprehensive information on various Medicare health plan options, detailing the cost, quality, and benefits of each plan.

These examples are just the beginning. There are many more.

#### **The Freedom of Information Act**

The Freedom of Information Act, the first law to establish an effective statutory right of access to government information, has evolved a great deal since it was first passed 34 years ago. In addition to enabling any person to find out information about the operations, policies, and workings of their government, it now is a major conduit for valuable commercial data and an important source of information for authors, historians, political scientists, university researchers, representatives of the news media, and many others.

FOIA has stood the test of time. It has been amended six times to meet changing information needs of the public interest. Generally it has been broadened to include more information and expand citizen access. In addition, FOIA requests to the Federal government

regularly total more than 600,000 records a year. The FOIA process continues to be an information resource to the public.

As the potential of electronic information transmission, via the Internet and other means, has been recognized, the principles underlying FOIA have been extended several times. One, of course, is EFOIA, the principal subject of this hearing.

Since electronic transmission is usually far more efficient than via paper, agencies have responded by converting from paper to electronic means, and from individual responses to broader distribution and dissemination. In general, obtaining information under this policy -- whether through libraries, public affairs offices, or on-line -- is the most efficient means for the public to gain access to commercially valuable information, basic information about government activities and policies, and frequently requested information.

#### **Electronic Freedom of Information Act Amendments of 1996**

In order to further facilitate the electronic dissemination of information Congress passed and the President signed the Electronic Freedom of Information Improvement Act in October 1996. As this Committee knows, EFOIA was intended to expand public access to Federal government information electronically and reduce agency backlogs. EFOIA includes three major points:

- **Electronic Reading Rooms:** Agencies should create electronic "reading rooms", permitting remote access to specific agency information and frequently requested documents.
- **On-Line Indexes:** Agencies should create electronic indexes of major information systems. A description of major information and record locator systems should be put on-line.
- **Electronic Option on FOIA Requests:** FOIA information disclosures are required to give an electronic option if possible.

Federal agencies have been working to implement these mandates. Although there is variation in agency practice, both OMB and DOJ believe compliance is both the goal and the norm.

EFOIA also established certain procedures to facilitate these changes. OMB was required to consult with the Department of Justice in developing annual reporting guidelines for a new web-enabled annual report. That report is now both available and successful and can be found at [http://www.usdoj.gov/04foia/04\\_6.html](http://www.usdoj.gov/04foia/04_6.html). EFOIA also required agencies to develop and make available a handbook of citizen access to agency information, whether through FOIA requests or other means. OMB provided guidance on placing the index and description of information systems on-line and also provided guidance on developing the agency EFOIA handbooks in 1997; this was updated in 1998.

The Department of Justice continues to provide training and extensive guidance on how to meet the requirements of the EFOIA amendments and FOIA in general. OMB continues to consult and support the Department in its role as the primary provider of guidance on FOIA.

Other factors besides EFOIA have motivated agencies to put information on-line. Under the Paperwork Reduction Act of 1995, managers of information are directed to "ensure that the public has timely and equitable access to the agency's public information." (44 U.S.C. Sec. 3506(d)). Electronic dissemination is also encouraged by information dissemination policies under OMB Circular A-130 and the Government Paperwork Elimination Act.

As noted above, in many cases providing information this way is vastly more efficient. Furthermore, since FOIA fees are small and do not support agency activities, by putting important information on-line agencies save themselves time and resources. At a time of constrained budgetary resources this provides a powerful incentive in itself.

Of course, there is substantial variation among agencies and their missions, and substantial variation in the extent to which they have provided automatic dissemination of information. To some extent, this is a legacy of information infrastructure. Agencies use a variety of electronic systems, including a range of databases and different kinds of proprietary and non-proprietary software, to create and maintain records. Even within many departments, component agencies have difficulty sharing electronic data among themselves, much less with the public. On-line access to agency records may be limited by issues as banal as obsolete wiring, the absence of an employee trained to reprogram old computer code, or the lack of space or funds to set up an agency server and hire an employee to maintain it. We are attempting to address these concerns through the budget process as new systems are implemented, by ensuring that different systems work together, can evolve as technology and program needs change, and will be increasingly accessible to citizens.

We are also encouraging agencies to respond to basic requests for information, such as press releases, copies of laws, and other widely available information, by referral the agency web site or other on-line sources. If agencies can provide better service to the public by directing them to go on-line, they should do so. Thus, the broad information dissemination policy articulated in the PRA and OMB Circular A-130 is generally more efficient than the traditional FOIA case-by-case approach.

Nevertheless, it would be neither feasible for the government nor essential for the requester that *all* government information be placed on-line or published affirmatively. In addition to resource constraints, the public's right of access to government information must be balanced against other concerns, such as protection of private intellectual property or proprietary information, an individual's right to privacy, the government's deliberative process for making and implementing policy, and national security classified information. Therefore, it is critical to recognize that the FOIA, which requires disclosure of information where the information is not otherwise exempt, should continue to be available as the avenue of last resort, as it has since 1966.

**The Role of OMB**

OMB exercises broad authority for overseeing government-wide information policy to achieve these goals. OMB is charged under the Paperwork Reduction Act (44 U.S.C. 35) with providing leadership and oversight for the information resource management activities of the Federal government. This wide array of responsibilities includes monitoring agency activities under the Computer Security Act and the Privacy Act. As you know, we were also the focal point for the very successful Federal agency transition for Year 2000 and provided significant staff support to John Koskinen and the Y2K Conversion Council. We continue to work with agencies on their implementation of the Government Paperwork Elimination Act (GPEA). Finally, we are in the process of incorporating comments based on a proposed revision to OMB Circular A-130, "Management of Federal Information Resources" which sets broad policy for IRM in a number of areas. This proposed revision is an important step toward the incorporation of the language and intention of the Clinger-Cohen Act.

Under EFOIA, OMB provided guidance on meeting EFOIA obligations. Under EFOIA and FOIA more broadly we continue to provide guidance on setting fees. In these areas OMB continues to cooperate with the Department of Justice to provide consistency in support of agency efforts.

**Conclusion**

The Administration is working hard to improve agency affirmative dissemination practices and increase disclosure while protecting privacy, national security, and other legitimate interests. Our hope is to decrease reliance on individual FOIA responses by use of the approaches contained in EFOIA and elsewhere, and to increase public access to other more efficient and useful information venues. We are taking deliberate advantage of technological innovation, particularly the Internet and the World Wide Web, to facilitate this change in direction and emphasis.

The challenges we are facing in this area are primarily managerial, technical, and resource related, rather than based on legal or policy concerns. The two major challenges facing the Federal government today are improving agency practices regarding the management of information in electronic formats, and designing and fielding the information technology infrastructure necessary to facilitate information sharing. The changes and improvements over the past several years in the management and implementation of information technology have been dramatic, and we anticipate continued rapid improvement in the years to come.

We consider these efforts to be very important and we believe the US Government has made extraordinary progress. Even before EFOIA in responding to the Freedom of Information Act the United States had to done one of the best jobs in the world in making government information available to the public. Now, as much as any government in the world, we are seeking to take advantage of the Internet to provide unparalleled information to our citizens. We look forward to continuing these efforts, and hope to continue the constructive dialogue with the Congress to support them.

Mr. HORN. We next have Ethan Posner, the Deputy Associate Attorney General representing the U.S. Department of Justice.

Mr. POSNER. Mr. Chairman, members of this subcommittee, good afternoon. I am pleased to testify about the EFOIA amendments today.

As Attorney General Reno has stated repeatedly, FOIA and EFOIA are at the heart of open Government and democracy. As I know from personal experience, the Attorney General has fostered a personal and sustained commitment to FOIA throughout the entire Justice Department. Under her leadership, we have placed a sustained priority on improving our FOIA service to the American people.

Just in the past year, Mr. Chairman, the Department of Justice has processed almost a quarter million FOIA requests, releasing hundreds of thousands of pages of important Government information to the public.

And let me also add, in the spirit of Mr. Gotbaum's remarks, we have, of course, also made available on our Web site an extraordinary number of documents that, although not requested by FOIA, it is part of the spirit of EFOIA. It is part of getting our information out to the public directly so that, as Mr. Gotbaum accurately put it, hopefully 1 day FOIA becomes the last resort.

We believe FOIA was strengthened greatly with the 1996 enactment of EFOIA. We believe Federal agencies are in substantial compliance with EFOIA. And, in particular, we believe Federal agencies have done an excellent job posting a wide variety of Government information on the Internet. All of this, or virtually all, has occurred just in the last few years.

Just in the last 2 years, for example, numerous Federal agencies have developed particular FOIA Web sites, they have posted approximately 100,000 pages of important FOIA-related documents on these sites. This accomplishment is a testament to the importance and, we believe, success of EFOIA.

In particular, we are very proud of the Department of Justice's comprehensive FOIA Web site, which is easily accessed through a specific FOIA link on our main Department of Justice home page. Today, the Department's FOIA Web site offers tens of thousands of pages of records, FOIA reference material. You can access all sorts of FOIA guides. You can learn how to make a request from our Web site. You can find all the FOIA contacts at the Department of Justice. You can browse through enormous electronic reading rooms containing all sorts of information. You can get Justice Department policy statements. You can get all of our major manuals, like the U.S. Attorney's Manual. You can get all sorts of annual reports on a wide variety of subjects—press releases, FOIA guides, Office of Legal Counsel opinions, Immigration decisions, antitrust guidelines. And you can get records of dozens of closed FBI investigations, including those on Al Capone and Julius and Ethel Rosenberg, to name just a few.

In addition, Mr. Chairman, to complying with EFOIA and maintaining our own Justice Department FOIA Web site, we help other agencies comply and refine their own FOIA Web sites.

We appreciated Mr. Gotbaum's remarks about the Department's effort. Obviously, we agree with that. Although under EFOIA each

agency is responsible for implementing EFOIA, we have taken considerable action to encourage agency compliance in accordance with the statute.

I set a lot of that out in my prepared remarks. Let me just highlight a few things.

We've issued extensive written guidance about what is required under EFOIA and how to comply. We've held all sorts of training sessions. We've issued frequently asked questions and answers. We've issued detailed guidelines for model agency Web sites. We've told Federal agencies, for example, to maintain a FOIA home page on their Web site, to link the main page to their FOIA page. We've explained how to make FOIA Web sites more user friendly. We've held a specific conference attended by FOIA professionals that was just devoted to agency Web sites. We reinforced our guidance there and we emphasized an important issue, which is the coordination of agency FOIA staff with agency technical staff, because it is the technical staff, obviously, that play the critical role in posting the information on the Internet.

In fact, the Attorney General followed up that conference with a memorandum to department and agency heads in which she stressed the importance of EFOIA. She feels very strongly about it. I have heard her say that personally, myself, repeatedly. And she reminded everybody why it is critical for the agency FOIA and technical staff to work together to post information on the Web.

We have this FOIA counselor service, where our Office of Information and Privacy responds to thousands of phone calls and questions. They are in virtually daily contact with the FOIA professionals at Federal agencies around the United States.

In our view, Mr. Chairman, Federal agencies generally have followed the Department's extensive guidance and training. They've developed effective FOIA Web sites, and they have otherwise complied with EFOIA.

There will always be more work to do and there will always be more progress to make, and we will make it and we believe the other agencies will make it. But we also believe that the Department of Justice and other Federal agencies have provided considerably better service and more-responsive Government to the American people just in the last 24 months through our online access efforts.

We will continue to encourage compliance with EFOIA. We will continue to work the Federal agencies to improve their FOIA sites and improve their compliance with EFOIA, and we will continue to work to post as much information as possible on not only our own Web site but other Web sites.

We look forward to working with the chairman and the subcommittee on these important issues, and I'd be happy to answer any questions.

Mr. HORN. Well, we thank you very much.

[The prepared statement of Mr. Posner follows.]



# Department of Justice

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STATEMENT

OF

ETHAN M. POSNER  
DEPUTY ASSOCIATE ATTORNEY GENERAL

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, INFORMATION, AND TECHNOLOGY  
COMMITTEE ON GOVERNMENT REFORM  
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

THE ELECTRONIC FREEDOM OF INFORMATION ACT AMENDMENTS OF 1996

PRESENTED ON

JUNE 14, 2000

Mr. Chairman and Members of the Subcommittee:

Good afternoon. I am Ethan Posner, Deputy Associate Attorney General at the United States Department of Justice. The Office of the Associate Attorney General oversees the Department's civil litigating components, including the Antitrust, Civil, and Civil Rights Divisions, as well as numerous other Department components and offices, including the Office of Information and Privacy ("OIP"). My particular oversight responsibilities include OIP, which manages the Department's responsibilities related to the Freedom of Information Act ("FOIA") and the Privacy Act.

On behalf of the Department, I am pleased to testify about the Electronic Freedom of Information Act Amendments of 1996 ("EFOIA"), 5 U.S.C. § 552 (1998). For more than thirty years, FOIA (as amended by EFOIA) has been used by our citizens to learn about their government's operations and activities. Today, FOIA is a vital part of our democratic system of government.

Attorney General Janet Reno has been strongly committed to FOIA, to its proper implementation, and to the principles of openness in government that it embodies. As the Attorney General

told hundreds of FOIA agency personnel last year, "FOIA is at the heart of open government and democracy cannot be effective unless its people understand [FOIA's] processes." Through these and other statements, the Attorney General has fostered a personal and sustained commitment to FOIA throughout the Department of Justice. Under her leadership, we have placed a sustained priority on improving our FOIA service to the American people by making available to the public as much government information as possible.

**I. The EFOIA Amendments**

FOIA was strengthened greatly with the 1996 enactment of EFOIA, which brought FOIA into the electronic information age by promoting the use of advanced information technology, including the Internet, to disclose Federal agency information to the public. EFOIA requires federal agencies to perform three major tasks:

- make available in an agency reading room released information that has "become or [is] likely to become the subject of subsequent requests for substantially the same records" ("frequently requested records");
- make available the reading room records "created on or after November 1, 1996" in "electronic reading rooms," such as on the Internet; and

- use "reasonable efforts" to search for information in electronic form in response to a FOIA request and to produce information in the particular format preferred by the requester.

EFOIA also requires agencies to make a "general index" of the frequently requested records available on computer by December 31, 1999; and to maintain "a guide" (or reference material) that would assist the interested public in obtaining agency records. Finally, EFOIA established new reporting requirements for the contents of the annual FOIA reports that are prepared by all Federal agencies. Under EFOIA, these annual reports were shifted to a fiscal year timetable and were required to be made available to the public by the Department of Justice at "a single electronic access point."

Overall, we believe federal agencies are in substantial compliance with EFOIA. Indeed, just in the past few years, federal agencies have posted approximately 100,000 pages of important FOIA-related documents on the Internet. This accomplishment is a testament to the importance and success of EFOIA.

**II. The Department of Justice FOIA Web Site**

Since the enactment of EFOIA, agency FOIA web sites have proliferated and today have become the principal means by which agencies comply with EFOIA. Over the past few years, the Department of Justice has developed a comprehensive FOIA web site, which is easily accessed through a specific FOIA link on the Department's home web page, [www.usdoj.gov](http://www.usdoj.gov). The Department's FOIA web site is organized by seven major categories -- "Making a Request," "Reading Rooms," "Reference Guide," "Department Components," "Other Agencies," "Annual Reports," and "Reference Materials." Taken together, these categories offer the public tens of thousands of pages of released records, FOIA reference materials, and other relevant and informative documents.

For example, under the section entitled "Making a Request," the Internet-using public can access DOJ's FOIA and Privacy Act regulations and the DOJ FOIA Reference Guide, which explains how to make a FOIA request to the Department and provides relevant addresses. In the "Reading Rooms" section, the public can browse through tens of thousands pages organized by Department components - e.g., policy statements of the Attorney General, Deputy Attorney General, and other Department components, the

Department's health care fraud annual reports, the 660-page DOJ Guide to the FOIA, OIP's FOIA Updates, final opinions of the Board of Immigration Appeals, the Antitrust Division's Horizontal Merger Guidelines, and staff manuals such as the United States Attorneys' Manual and the Criminal Division's Federal Grand Jury Practice Manual. We have also made available such frequently requested records as the Office of the Inspector General's FBI Laboratory Investigation and more than 100 Office of Legal Counsel opinions. In addition, the Department electronically posts hundreds of documents, publications, and press releases that are of general public interest but are not specifically required to be made available under EFOIA. Similarly, although also not required by the statute, we have posted the records of dozens of closed FBI investigations, including those on such deceased public figures as Al Capone and Julius and Ethel Rosenberg.

Under "Department Components," interested parties are given a list of each Department component (e.g., Office of the Attorney General, Office of the Associate Attorney General, Civil Division) and a name, address, and phone number of the person to whom FOIA requests should be directed. Likewise, under "Other Agencies," our site links to the FOIA web sites of dozens of

federal departments and agencies and provides the names, addresses, and phone numbers for the FOIA coordinators at these departments and agencies. Under "Annual Reports," we have made available, at "a single electronic access point" as EFOIA requires, the FOIA annual reports received from federal departments (starting with the FY 98 reports), as well as DOJ's Annual FOIA Reports and the Department's annual, calendar year EFOIA-required report to the Congress on pending litigation and our efforts to "encourage agency compliance" with FOIA. Finally, the Internet user can obtain an array of informative FOIA guides by accessing our "Reference Materials" section, including DOJ's FOIA Guide, DOJ's Privacy Act overview, and the very useful publication issued by this Committee entitled "A Citizen's Guide to FOIA."

### **III. Encouraging Agency Compliance With EFOIA**

There is no central office in the government which processes FOIA requests for all federal agencies. Each agency is responsible for implementing FOIA and responding to requests for its own records. Likewise, under EFOIA, each individual Federal agency is responsible for implementing EFOIA. The Department of Justice "encourages agency compliance with" FOIA in accordance

with the statute. Over the past several years, we have taken the following steps to encourage compliance with the EFOIA amendments.

First, the Department has educated other agencies about the provisions and requirements of EFOIA. Shortly after the enactment of EFOIA, the Department issued written guidance to all Federal departments and agencies and issued OIP Guidance on "Amendment Implementation Questions." More recently, we have disseminated numerous other EFOIA-related publications, such as "Electronic FOIA Amendments Implementation Guidance Outline," "Recommendations for FOIA Web Sites," and "Locating and Maintaining Accurate Information on FOIA Home Pages."

In our "Electronic FOIA Amendments Implementation Guidance Outline," we advised that, although not entirely required by EFOIA, each agency should:

- determine which records fall within EFOIA's new "previously processed records" reading room category based upon its familiarity with the records' subject matter, its knowledge of FOIA requests received in the past, and its best judgment of the types of requests likely to be received by the agency in the future;

- make newly created reading room records available electronically in "electronic reading rooms";
- maintain a record in its conventional "paper" reading room even if that record is placed in its "electronic reading room";
- maintain and make available a copy of a current subject-matter index of all reading room records, which should be updated at least quarterly and made available electronically; and
- explore the capability to receive FOIA requests electronically through agency FOIA sites on the World Wide Web.

In our "Recommendations for FOIA Web Sites," we advised that each agency should take the following steps, most of which again go beyond the requirements of the statute:

- maintain a main FOIA home page and Web site for purposes of FOIA administration;
- place on the agency's main home page (and those of major agency components) an item entry (or "button") that allows immediate access to the FOIA home page from that main home page;
- ensure that main home page item entries are clear and distinct (e.g., through use of the terms "Freedom of Information Act" or "FOIA") in identifying the subject and allowing the Web site user direct access to it;
- ensure that an agency's FOIA Web site includes:

- the agency's FOIA Reference Guide (including a description of how a FOIA request can be made);
  - the agency's current FOIA/Privacy Act regulations (including any proposed regulations);
  - links to all main FOIA home pages of subsidiary agency components;
  - the agency's annual FOIA reports, listed by year; and,
  - the agency or agency component's electronic reading room;
- 
- designate clearly electronic reading rooms as "reading rooms" and ensure that such reading rooms contain index listings of agency reading room contents (with direct links to reading room records that are electronically available);
  - ensure that each main FOIA home page contains a return link to the agency's or component's main home page for ease of Web site navigation by users;
  - check links regularly (at least quarterly) to ensure that they are still accurate and current; and
  - check regularly the text content of all FOIA home pages, including descriptions of links, to ensure that everything remains up to date.

Second, under the leadership of OIP, we have held a wide variety of FOIA-training programs that range from introductory training sessions for new employees to advanced FOIA seminars

conducted for the most experienced agency FOIA personnel. Each year, the Department provides FOIA training to more than a thousand agency FOIA personnel, and EFOIA's requirements have featured prominently in this training. For example, OIP held a conference for the principal FOIA officers of all Federal agencies in order to discuss the Department's FOIA Web site recommendations. This conference stressed the importance of agency Information Resource Management (IRM) personnel to FOIA, and we asked each agency to bring an IRM representative. Finally, OIP staff has addressed hundreds of questions about EFOIA and its implementation through the Department's FOIA Counselor service, in which we also respond to thousands of other agency questions each year by telephone.

Third, as required, the Department issued extensive, formal guidelines to all Federal agencies, in consultation with the Office of Management and Budget, on the preparation and submission of annual FOIA reports under the new procedures and timetable prescribed by EFOIA.

Fourth, Attorney General Reno recently sent a memorandum to the heads of all Federal departments and agencies that specifically addressed the importance of coordinating an agency's

FOIA and technical staff. In her memorandum of September 3, 1999, the Attorney General stated that compliance with EFOIA and effective agency FOIA web sites "require[] that an agency's FOIA officers and its IRM personnel work together in a new partnership, with strong institutional ties[.]" For this reason, the Attorney General stated that "[i]t should be a primary mission of each agency's IRM staff [to] facilitate the prompt and accurate disclosure of information through [its] agency's FOIA sites." "This assistance is now vital to the full and proper administration of the Act[,]" the Attorney General added. In an effort to disseminate this message throughout all agency IRM (as well as FOIA) channels, Attorney General Reno asked the heads of all departments and agencies to pay "particular attention to [the memorandum's] distribution to all agency IRM personnel."

In our view, federal agencies generally have followed the Department's extensive guidance and training to develop effective FOIA web sites and otherwise comply with EFOIA. Although there is more work to be done and more progress to be made, we believe that the Department of Justice and other federal agencies have provided materially better service and more responsive government to the American people through our online access efforts. We will continue to encourage compliance with EFOIA and work with

federal agencies to improve their FOIA web sites and the kinds of information and FOIA services that are made available to the public via the Internet. We also look forward to working with this Subcommittee on these important issues. I would be pleased to respond to your questions.

Mr. HORN. I might add, I hope all three of you can stay through the second panel, because I'd like to see a dialog here and not just have everybody in the administration escape and then other things come up and there's no use—I mean, if we can do it today, fine; otherwise, we've got to have another hearing and bring you all up again, and that's wasting your time and my time.

I appreciate your statements.

Let me just ask on this point—and then we'll go to the Department of Defense—has the Department of Justice or OMB taken an inventory with regard to the agencies and departments, such as, “Do you have this—“ let's say an electronic room, so forth? Has any work been done along that line, either by OMB, Department of Justice, since you say there's no central office here that really worries about this?

Mr. POSNER. We certainly—we have sort of a daily dialog about a range of FOIA issues with the FOIA professionals. Some of that—some of those conversations are, you know, “When is your annual report going to be ready,” and “Where's this” and “Where's that,” so there is clearly some of that. We do review other agency Web sites, and that is part of our overall dialog with them. I mean, we don't do an exhaustive survey every week, but we are certainly aware of what is on the other sites, and as part of our training and our ongoing—our daily dialog with the FOIA professionals in the other agencies, certain those issues come up, Mr. Chairman.

Mr. HORN. Because we would be interested, if you have a document somewhere that just solves some of the basics, and to see to what extent—we can always ask GAO to do it, but if you have it we can save them another mission.

Mr. POSNER. We have a very thick notebook, I think, we printed out of a lot of the pages from the other agency Web sites, if that is what you are referring to.

Mr. HORN. Yes, just a check mark as to, “Did they do this under the law or didn't they?” That's what we're interested in in this series of hearings.

Mr. McIntyre, Henry J. McIntyre, is Director, Directorate for Freedom of Information Security and Review, Department of Defense.

Thank you for coming, Mr. McIntyre.

Mr. MCINTYRE. Thank you, Mr. Chairman.

Mr. Chairman, my directorate develops the FOIA policy for the Department of Defense and processes the requests for records under the control of the Office of the Secretary of Defense and the Joint Staff. Because of the missions, functions, and size of the Department of Defense, it is decentralized into the separate military departments and defense agencies. The FOIA program, to include implementation of the EFOIA, is, likewise, decentralized within the Department of Defense components that consist of the Army, Navy, and Air Force, the departments of those services, and 12 Defense agencies. These DOD components conduct their own FOIA programs under the policy guidance of the DOD regulation which we publish.

For purposes of directly implementing the legislation, my Directorate was and is responsible for 80 staff offices within Office of Secretary of Defense, the Joint Staff, and the nine unified combat-

ant commands, as well as five OSD components that are geographically separated from Washington.

We began implementing the EFOIA after its passage in April 1997. We sent a memo to the combatant commands and those five OSD components that are geographically separated from us and informed them of the EFOIA requirements and instructed them to implement the legislation. The memorandum was also forwarded to the DOD components, the military services, and the Defense agencies, and told them to prepare their regulations and implement the legislation.

We, of course, published a revised DOD FOIA regulation, DOD 5400.7-R, in September 1998—and it is our understanding that we were the first agency to change our regulation to include the EFOIA amendments.

In response to—not necessarily as a result of the FOIA, the Department of Defense established a Web site called “DefenseLINK.” It has a wealth of information on it. It has links to the Defense agencies, to the CINCs. It lists, among other things, the annual report of the Secretary of Defense to Congress, the chairman’s posture statement, and the DOD budget. It is constantly updated with news releases and top stories and it has links to other sites.

One of the most valuable things, with regard to that Web site, are direct links to “Gulf Link” and to the POW/MIA Web site, which are high interest areas for the public so that they have access to those documents.

We did establish an electronic reading room on the Web site which is accessible through DefenseLINK for the purpose of posting frequently requested documents on the Web. We have posted on documents on the electronic reading room. We are in the process of updating that site to make it more user-friendly, and this redesigned Web site will allow better access to other Web pages, as I mentioned—Gulf Link, Prisoner of War—for those high-interest items that we consider the public may require.

We have not had sufficient requests yet to identify documents as “frequently-requested” FOIA documents to qualify for placement on the Web. We have in place a high-speed scanner so images of qualified documents can be put on the Web. We have a reading room in the Pentagon where we have paper documents for a number of documents that have been released in the last 30 years, and we plan on, with this high-speed scanner to scan the documents and again make them available, on the Web. At the moment we are awaiting final approval of a contract to get the technical experts to install the software and to teach us how to do it.

Another provision to the legislation that my directorate has implemented is to make requesters aware that we have an e-mail address. We have a computer set aside in our office to receive electronic requests via e-mail, and at the moment that e-mail address is on the Justice Department Web site, also. We only get about five requests a week, but overall for an entire year that is 250—some requests that can come in by e-mail and that we will answer.

We, of course, answer by snail mail, not by e-mail, so that we have a permanent record, and, if we release documents, so that we have those documents on file.

We also provide training to the Office of the Secretary of Defense and any of the Defense agencies or combatant commands who require or request it. Our goal is to provide at least two training sessions a year for the OSD staff.

The DOD, I believe, has been successful in satisfying the requirements of the EFOIA to provide records in any form or format requested by any person. We provide records, if requested, on floppy disk, on CD-ROM, or magnetic tape.

Again, I believe that the DOD has taken appropriate steps within the means at our disposal to implement the EFOIA amendments. Resources in the form of additional personnel and funding for server-based technology will be required to enable the DOD to establish and maintain the services required. We will continue to work with the IRM—information resource management—people and our chief information officer who works with the Chief Information Officer Council to use their influence to give those of us involved in implementing the EFOIA the support we need.

Thank you, Mr. Chairman.

Mr. HORN. Thank you very much. We appreciate the statement. [The prepared statement of Mr. McIntyre follows:]

STATEMENT OF

HENRY J. MCINTYRE

DIRECTOR

DIRECTORATE FOR FREEDOM OF INFORMATION AND SECURITY REVIEW  
WASHINGTON HEADQUARTERS SERVICES

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, INFORMATION, AND  
TECHNOLOGY

COMMITTEE ON GOVERNMENT REFORM

14 JUNE 2000

**Statement**

I am Henry J. McIntyre, Director of the Directorate for Freedom of Information and Security Review, Washington Headquarters Services. I am pleased to have the opportunity to discuss the Department of Defense's (DoD) implementation of the 1996 Electronic Freedom of Information Act (EFOIA) amendments with you today.

My Directorate develops the FOIA policy for DoD and processes requests for records under the control of the Office of the Secretary of Defense and the Joint Staff (OSD/JS). Because of the mission, functions, size and geographic dispersion of the DoD, it is decentralized into separate military departments and defense agencies. The FOIA program, to include implementation of the EFOIA, is likewise decentralized within 15 DoD components that consist of the Army, Navy, Air Force, and 12 defense agencies. These DoD components conduct their own FOIA programs under the policy guidance of the DoD regulation.

For purposes of directly implementing the legislation, my Directorate was and is responsible only for those 80 staff offices of the OSD/JS, the nine Unified (Combatant) Commands, and five OSD Components geographically separated from the Pentagon.

To begin implementation of the EFOIA, my Directorate sent a memorandum dated April 24, 1997 to the Combatant Commands and the five OSD components to inform them of the EFOIA requirements and to instruct them to implement changes within their organizations in order to comply with the EFOIA. My Directorate also implemented the EFOIA on behalf of the remaining 80 OSD/JS staff offices. A copy of the memorandum was also forwarded to the 15 DoD Components for their use as guidance in implementing their own changes to their regulations and procedures. We

published the revised FOIA Regulation incorporating the legislative changes in September 1998. I understand we were the first agency to do so.

My Directorate established an Internet web site that was and is maintained as part of DefenseLink, the official web site of the Department of Defense. The web site contains the DoD FOIA handbook and the DoD FOIA Regulation, our (a)(2)(D) materials, the last four combined DoD Annual Reports, and other publications. The Handbook and other publications are available in paper form. I have provided copies of the handbook for your use. We are currently updating and redesigning the DoD FOIA page to make it more user friendly. Paper copies of the DefenseLink home page and the DoD FOIA home page have been provided to you.

An electronic reading room was included in the web site for the purpose of posting frequently requested documents on the web. We have posted documents in the DoD electronic reading room. Other web sites, such as GulfLINK, have large document sets available on their web sites. The web site located on DefenseLink also contains electronic links to other DoD component FOIA web sites, as well as facilitating access to the Government Information Locator Service (GILS). The redesigned FOIA web site will make it more user friendly and allow the public better access to areas of high interest such as GulfLINK and the site maintained by Defense POW/Missing Personnel Affairs Office. We also expect to review the large amount of information maintained in our public reading room in the Pentagon and post additional documents to the electronic reading room. We will continue to place documents in the electronic reading room as multiple requests for information are received. We have in place a high-speed scanner and software to begin the process of capturing documents and placing them on our web

site. A soon to be finalized contract will allow us to obtain the technical assistance needed to store images of original and redacted information.

Another provision of the legislation that my Directorate has implemented is to make requesters aware that they can use e-mail to request information under the FOIA. An e-mail address has been made available for this purpose, and that address has been provided to the Department of Justice for their publication of a list of such addresses. The publication of this e-mail address has resulted in an average of five FOIA requests a week received through the e-mail.

My Directorate is also responsible for providing FOIA training to the Offices of the OSD/JS, the Combatant commands, and other organizations within the DoD requesting such training. Explanation of the requirements of the EFOIA has been an integral part of the training sessions since the passage of the legislation. The FOIA briefing is available on our web site.

Each of the agencies and components of the DoD has made efforts to satisfy requirements of the EFOIA. The DoD as a whole has been successful in satisfying the requirements of the EFOIA to provide records "in any form or format requested by the person." Records provided in requested formats have included floppy disks, magnetic tape, and compact disks. Other examples of efforts made to satisfy the requirements include the thousands of pages posted on component web sites in the form of agency determinations of frequent requests, statements of policy, staff manuals, and opinions made in the adjudication of cases. These postings will become more user friendly as components continue to revise and improve their web sites.

I believe that the DoD has taken appropriate steps within the means at our disposal to implement the EFOIA amendments. Resources in the form of additional personnel and funding for server based technology will be required to enable the DoD and others to establish and maintain the services required. We will continue to work with the Information Resource Management community and the Chief Information Officer Council to use their influence to give those of us involved in the implementation of the EFOIA the support we need.

Thank You

The DoD components are:

- Office of the Secretary of Defense
- Department of the Army
- Department of the Navy
- Department of the Air Force
- Defense Information Systems agency
- Defense Contract Audit Agency
- Defense Finance & Accounting Service
- Defense Intelligence Agency
- Defense Security Service
- Defense Logistics Agency
- Inspector General of the Department of Defense
- Defense Threat Reduction Agency
- National Imagery & Mapping Agency
- National Reconnaissance Office
- National Security Agency

The Combatant Commands and the five geographically dispersed OSD elements are:

- Commander in Chief, U.S. Atlantic Command
- Commander in Chief, U.S. European Command
- Commander In Chief, U.S. Pacific Command
- Commander In Chief, U.S. Southern Command
- Commander In Chief, U.S. Special Operations Command
- Commander In Chief, U.S. Central Command
- Commander In Chief, U.S. Space Command
- Commander In Chief, U.S. Transportation Command
- Commander In Chief, U.S. Strategic Command
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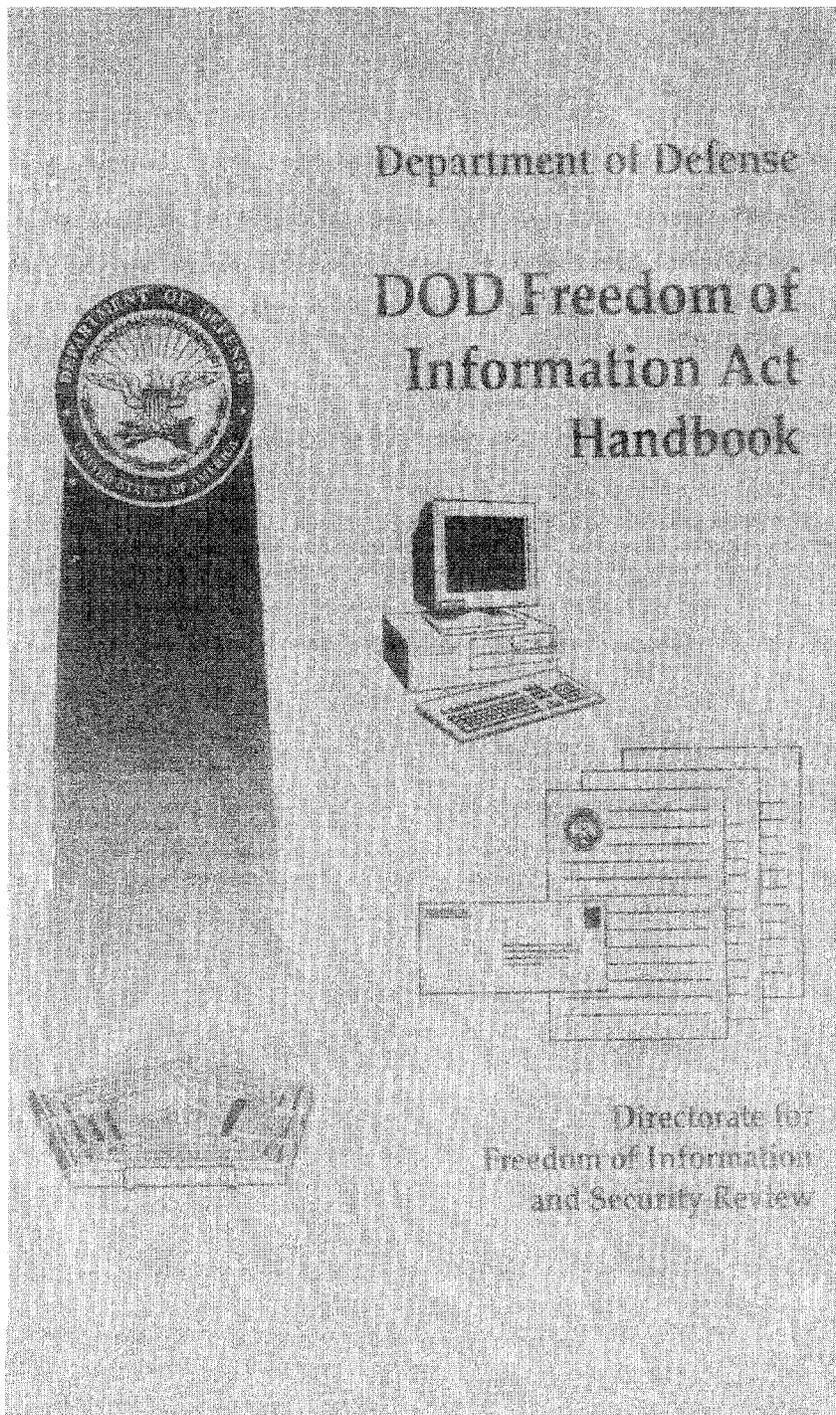
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- [Kosovo: One Year Later](#)
- More [news stories](#)



### ***Freedom of Information Act (FOIA) Program***

- [Department of Defense \(DoD\) Freedom of Information Act Handbook \(148K bytes\)](#). This document provides basic information about the Freedom of Information Act (FOIA) Program within the Department of Defense (DoD).
- [Department of Defense \(DoD\) Freedom of Information Briefing \(2K bytes\)](#)
- [Department of Defense \(DoD\) Freedom of Information Act Program Regulation \(html index of PDF files\), DoD 5400.7-R, September 1998](#). This document provides guidance regarding administration of the Freedom of Information Act (FOIA) Program within the Department of Defense (DoD).
- Annual Freedom of Information Act (FOIA) Program Reports:
  - [Fiscal Year 1999 Report](#)
  - [Fiscal Year 1998 Report](#)
  - [Calendar Year 1997 Report](#)
  - [Calendar Year 1996 Report](#)
- [Office of the Secretary of Defense/Joint Staff Electronic Reading Room](#). The Freedom of Information Act, FOIA [5 USC 552(a)(2)(D)], requires that certain documents of interest to the general public be published electronically. The Directorate for Freedom of Information and Security Review is making these documents available to the general public in electronic form.
- Find descriptions of documents currently in the FOIA Electronic Reading Room, by [BROWSING](#) or [SEARCHING](#) the DoD Resource Locator which provides an on-line index for the FOIA Reading Room in GILS (Government Information Locator Service) format. Any DoD organization can load a FOIA Reading Room document onto their web site and then go to the DoD Resource Locator and [REGISTER](#) that document. This provides a single searchable list of document descriptions for all DoD. Note that the information you provide will be validated to ensure that it has been submitted by an official DoD organization.
- Links to Other DoD Component FOIA Electronic Reading Rooms:
 

<a href="#">Defense Contract Audit Agency (DCAA)</a>	<a href="#">National Imagery and Mapping Agency (NIMA)</a>
<a href="#">Defense Finance and Accounting Agency (DFAS)</a>	<a href="#">National Reconnaissance Office (NRO)</a>
<a href="#">Defense Information Systems Agency (DISA)</a>	<a href="#">National Security Agency (NSA)</a>
<a href="#">Defense Intelligence Agency (DIA) (not yet on-line)</a>	<a href="#">Office of the Inspector General (IG)</a>
<a href="#">Defense Logistics Agency (DLA)</a>	<a href="#">Army</a>
<a href="#">Defense Security Service (DSS)</a>	<a href="#">Navy</a>
<a href="#">Defense Special Weapons Agency (DSWA)</a>	<a href="#">Air Force</a>
- For Electronic Reading Room copies of final opinions, adjudications, statements of policy, and administrative staff manuals, go to [Washington Headquarters Services \(WHS\)](#). Click on "FOIA A2 FILES" under "DoD Issuances".



“A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives.”

*James Madison*

## Introduction

This handbook is intended to assist you in making Freedom of Information Act (FOIA) requests for Department of Defense (DoD) records. It will get you started and provide you with a brief description of your rights and the manner in which DoD will respond to your requests. The information contained herein is not intended to be definitive or exhaustive.

The FOIA, which is known by its legal cite as 5 U.S.C. § 552, along with the DoD Regulation, governs how requests will be processed within the DoD. DoD Regulation 5400.7-R, “Department of Defense Freedom of Information Act Program,” can be found at Part 286 of Chapter 32 of the Code of Federal Regulations, which is available in most libraries. It can also be purchased from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161, for \$12.50, and may be found on the World Wide Web by entering:

<http://www.defenselink.mil/>

click on “Publications”

click on Freedom of Information Act (FOIA)

click Department of Defense (DoD) Freedom of Information Act  
Program Regulation

Due to its size and complexity, the Department of Defense’s FOIA program is decentralized among the several “DoD Components,” which operate their own FOIA offices and respond directly to the public for their own records. If you desire records from these Components, please write to them using the addresses beginning on page 6 of this handbook. This office, the Directorate for Freedom of Information and Security Review is responsible for responding to requests for records of the Office of the Secretary of Defense and the Chairman of the Joint Chiefs of Staff. Our address is the first one listed on page 6.

## Frequently Asked Questions

### *What is the FOIA?*

The FOIA is a Federal law that establishes the public's right to request existing records from Federal government agencies.

### *Who can file a FOIA request?*

Any "person" can file a FOIA request, including U.S. citizens, foreign nationals, organizations, universities, businesses, and state and local governments.

### *Who is subject to the FOIA and what type of information can be requested?*

The FOIA's scope includes Federal Executive Branch Departments, agencies, and offices, Federal regulatory agencies, and Federal corporations. Congress, the Federal Courts, and parts of the Executive Office of the President are not subject to the FOIA. State and local governments are likewise not subject to the Federal FOIA, but some states have their own equivalent access laws for state records. At the Office of the Secretary of Defense/Chairman of the Joint Chiefs of Staff level, you may expect to find policy, planning and budgetary information for the DoD.

### *What is a record?*

A record is the product(s) of data compilation, such as all books, papers, maps, and photographs, machine readable materials, inclusive of those in electronic form or format, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law in connection with the transaction of public business and in Department of Defense possession and control at the time the FOIA request is made.

### *Can we ask questions under the FOIA?*

The FOIA does not require Federal Agencies to answer questions, render opinions, or provide subjective evaluations. Requesters must ask for existing records, such as those mentioned above.

### *How do I file a FOIA request?*

- Label your request "Freedom of Information Act Request," preferably within the request letter and on the envelope, and address the request to the DoD Component(s) likely to have the information you seek. If you do not know which Component is likely to maintain the information you seek, you may call the Directorate for Freedom of Information and Security Review, at

(703) 697-1160/1180, or write to us at the address below (first one on page 6) for assistance.

- State your willingness to pay applicable fees. If you seek a fee waiver, provide a justification for such a waiver.
- Describe the specific records you are requesting in enough detail so that they can be located with a reasonable amount of effort. Generally, a record is reasonably described when the description contains sufficient file-related information (type of document, title, subject area, date of creation, originator, etc.); or the request contains enough event-related information (date and circumstances surrounding the event the record covers) to permit the conduct of an organized, non-random search.

**Note:** A sample request letter can be found at the end of this handbook.

*What are the reasons for not releasing a record?*

The reasons why the Office of the Secretary of Defense/Chairman of the Joint Chiefs of Staff may not release a record when a request for the record is made under the FOIA. They are:

- A reasonable search of files failed to identify responsive records.
- The requests if transferred to another DoD Component, or to another Federal Agency.
- The request is withdrawn by the requester.
- The requester is unwilling to pay fees associated with a request; the requester is past due in the payment of fees from a previous FOIA request; or the requester disagrees with the fee estimate.
- A record has not been described with sufficient particularity to enable the DoD Component to locate it by conducting a reasonable search.
- The requester has failed unreasonable to comply with procedural requirements, other than fee-related, imposed by DoD 5400.7-R or DoD Component supplementing regulations.
- The information requested is not a record within the meaning of the FOIA and this Regulation.
- The request is a duplicate request (e.g. a requester asks for the same information

more than once). This includes identical requests received via different means (e.g. electronic mail, facsimile, mail, courier) at the same or different times.

- Any other reason a requester does not comply with published rules other than those outlined above.
- The record is denied in whole or in part in accordance with procedures set forth in the FOIA.

*What are the FOIA exemptions?*

Records (or portions of records) will be disclosed unless that disclosure harms an interest protected by a FOIA exemption. The nine FOIA exemptions are cited in the Act as 5 U.S.C. § 552(b)(1) through (b)(9):

- (b)(1)—records currently and properly classified in the interest of national security;
- (b)(2)—records related solely to internal personnel rules and practices, which if released would allow circumvention of an agency function;
- (b)(3)—records protected by another law that specifically exempts the information from public release;
- (b)(4)—trade secrets and commercial or financial information obtained from a private source which would cause substantial competitive harm to the source if disclosed;
- (b)(5)—internal records that are deliberative in nature and are part of the decision making process that contain opinions and recommendations;
- (b)(6)—records which if released, would result in a clearly unwarranted invasion of personal privacy;
- (b)(7)—investigatory records or information compiled for law enforcement purposes;
- (b)(8)—records for the use of any agency responsible for the regulation or supervision of financial institutions; and
- (b)(9)—records containing geological and geophysical information (including maps) concerning wells.

*Can I appeal a denial?*

Yes. If your request is initially denied in whole or in part under one or more of the above exemptions or denied for some other reason, you will be advised of your appeal rights and the proper procedures for submitting the appeal which must be postmarked within 60 days of the date of the denial letter. You may also appeal any determination which you consider to be adverse. As with appeals of denied information, an appeal of an adverse determination also must be postmarked within 60 days of the date of the letter advising you of the adverse determination.

*How long will it take for my request to be processed?*

This is a difficult question to answer because of the size of DoD and its worldwide locations. In fairness to all requesters, DoD processes requests in order by date of receipt and according to their complexity. These are called easy and hard queuing tracks. Whenever possible, an initial determination to release or deny a record is made within 20 working days after receipt of the request by the official who is designated to respond. However, due to the thousands of requests received annually, the DoD is unable to answer all of them within the statute's time requirements. Therefore, requests will have to wait their turn in the Components' queuing tracks.

Under certain conditions, expedited access may be granted if there is a compelling need, such as a threat to life and safety, if a person engaged in disseminating information has an urgency to inform the public on actual or alleged Federal Government activity, an imminent loss of substantial due process rights, or a humanitarian need.

*Do I have to pay for a FOIA request?*

The FOIA allows fees to be charged to certain types of requesters, but it also provides that waivers or reductions in fees be given if disclosing the information is in the public interest. Public interest is defined as information which significantly enhances the public's knowledge of the operations and activities of the DoD. The FOIA requires that requesters be placed into one of the below categories:

Commercial. Requesters who seek information for a use or purpose that furthers their commercial, trade, or profit interest are considered commercial requesters. Commercial requesters pay all fees for search, review and duplication.

Educational. Institutions of education, including preschools, elementary or secondary schools and institutions of higher learning, qualify as educational institutions. The records must be sought in furtherance of scholarly research. Educational requesters pay only duplication fees, unless it is determined that fees are waived or reduced in the public interest. The first 100 pages are provided at no cost.

Non-Commercial Scientific. A non-commercial scientific institution is operated solely for conducting scientific research. The records must be sought in furtherance of scientific research. Like educational requesters, these requesters pay only duplication fees, unless it is determined that fees are waived or reduced in the public interest. The first 100 pages are provided at no cost.

News Media. A representative of the news media is a person actively gathering news for an entity organized and operated to publish or broadcast news to the public. News media pay only duplication fees, unless it is determined that fees are waived or reduced in the public interest. Again, the first 100 pages are provided at no cost.

"Other" Requesters. Requesters who do not qualify in another category are considered "other" requesters, and normally make requests for agency records for their personal use. "Other" requesters receive two hours search, all review costs, and the first 100 pages at no cost.

All requesters should submit a willingness to pay fees regardless of the fee category, however, this does not mean you will be charged fees. Except for commercial requesters whose fees total more than \$15, waivers are always considered. Fee waivers may be granted when disclosure of the records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government. The following factors are weighed in making a fee waiver determination:

- The subject of the request.
- The informative value of the information to be disclosed.
- The contribution to an understanding of the subject by the general public likely to result from the disclosure.
- The significance of the contribution to public understanding.
- Disclosure of the information is not primarily in the commercial interest of the requester.
- The ability of the requester to disseminate the information.

#### **DoD Components**

*Director, Freedom of Information & Security Review  
1155 Defense Pentagon, Room 2C757  
Washington, DC 20301-1155*

*Department of the Army  
FOIA/Privacy Acts Office  
TAPC-PDR-PF  
7798 Cissna Road, Suite 205  
Springfield, VA 22150-3197*

Department of the Navy  
Chief of Naval Operations  
N09B30  
2000 Navy Pentagon  
Washington, DC 20350-2000

Department of the Air Force  
11CS/SCSR(FOIA)  
1000 Air Force Pentagon  
Washington, DC 20330-1000

Defense Contract Audit Agency  
Attn: CMR  
8725 John J. Kingman Road  
Suite 2135  
Fort Belvoir, VA 22060-6219

Defense Finance & Accounting Service  
Directorate for External Services  
Crystal Mall 3, Rm 416  
Arlington, VA 22240-5291

Defense Intelligence Agency  
Attn: SVI-1  
Washington, DC 20340-5100

Defense Security Service  
Office of FOIA & Privacy V0020  
1340 Braddock Place  
Alexandria, VA 22314-1651

Defense Information Systems Agency  
Regulatory/General Counsel  
Attn: FOIA  
701 South Courthouse Road  
Arlington, VA 22204-2199

Defense Logistics Agency  
Attn: CAAR  
8725 John J. Kingman Road  
Suite 2533  
Ft Belvoir, VA 22060-6221

Defense Threat Reduction Agency  
Attn:SO  
45045 Aviation Drive  
Dulles, VA 20166-7517

*Inspector General of the Department of Defense  
Chief, FOIA/PA Office  
400 Army Navy Drive, Rm 405  
Arlington, VA 22202-2884*

*National Imagery and Mapping Agency  
General Counsel's Office  
GCM  
Mail Stop D-10  
4600 Sangamore Road  
Bethesda, MD 20816-5003*

*National Reconnaissance Office  
Information Access & Release Center  
Attn: FOIA Officer  
14675 Lee Road  
Chantilly, VA 20151-1715*

*National Security Agency/Central Security Service  
FOIA/PA Services  
N5P5  
9800 Savage Road STE 6248  
Ft. George G. Meade, MD 20755-6248*

*\*NOTE: The U.S. Marine Corps is under the Department of the Navy, but you may also write to them at *Commandant of the Marine Corps (ARAD), Headquarters U.S. Marine Corps, 2 Navy Annex, Washington, DC 20380-1775*. The National Guard Bureau is under the Departments of the Army and Air Force, but you may write to them at *National Guard Bureau, Attn: NGB-ADM, (FOIA) 1411 Jefferson Davis Highway, Suite 10800, Arlington, VA 22202-3231**

#### **Reading Rooms**

The Directorate for Freedom of Information and Security Review operates the Office of the Secretary of Defense/Chairman of the Joint Chiefs of Staff Reading Room which contains DoD directives, instructions, manuals, regulations and select documents that have been requested several times under the FOIA (these are called FOIA Processed (a) (2) Records). The Reading Room is open to the general public from 8:30 a.m. - 4:30 p.m. Monday through Friday (excluding Federal holidays). Its location is in the Directorate, Room 2C757, in the Pentagon. Although no appointments are necessary, you must call the Directorate at 697-1160/1180 from the house phone once you arrive at the Pentagon in order to be escorted to the reading room within the Pentagon.

Each Component operates its own Reading Room. For hours of operation, location and access procedures, please contact the Component for which you are interested.

### Electronic Access

At the DoD homepage, you will find a multitude of information including DoD's electronic reading room and the DoD Government Information Locator Service (GILS), which is essentially a card catalog that identifies public information resources. At the DoD homepage, you will also find the DoD FOIA Regulation, as well as the DoD Freedom of Information Act Annual Report. This is a detailed report which provides statistics on DoD's FOIA program such as the number of requests received, the number granted in full, and denied. The World Wide Web address for the DoD homepage and the DoD Government Information Locator Service (GILS) is:

<http://www.defenselink.mil/>

To access the DoD GILS system, select the "Search" button and then click on "Government Information Locator Service" for the GILS entries. Then scroll to the browse Defenselink Locator Records.

To go into the electronic reading room, click on "Publications" from the Defenselink homepage, then scroll down to Freedom of Information Act (FOIA) and click on it. Then select "Office of the Secretary of Defense/ Joint Staff Electronic Reading Room." A list of titles appears. Click the title you are interested in to view that record.

### Conclusion

We trust this information will be helpful to you when pursuing FOIA requests with DoD. If you have any questions, you may call (703) 697-1160/1180 and ask for a FOIA officer.

Sample FOIA Request Letter

DoD Component Head [or FOIA Officer]  
DoD Component  
Address  
City, State, Zip Code

Dear :

This is a request under the Freedom of Information Act (5 U.S.C. 552).  
I request that a copy of the following document(s) be provided to me: [identify the documents as specifically as possible].

In order to help you determine my status for the purpose of assessing fees, you should know that I am [insert one of the descriptions below]

a representative of the news media affiliated with the \_\_\_\_\_ newspaper (magazine, television station, etc.), and this request is made as part of news gathering and not for a commercial use.

affiliated with an educational or noncommercial scientific institution, and this request is made for a scholarly or scientific purpose and not for a commercial use.

affiliated with a private business and am seeking information for use in the company's business.

an individual seeking information for personal use and not for a commercial use.

I am willing to pay fees for this request up to a maximum of \$ \_\_\_\_\_. If you estimate that the fees will exceed this limit, please inform me first.

[optional] I request a waiver of fees for this request because disclosure of the requested information to me is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the DoD and is not primarily in my commercial interest. [Include details about how the requested information will be disseminated by you to the general public.]

[optional] I also include a telephone number at which I can be contacted if necessary to discuss any aspect of my request.

Sincerely,

Name  
Address  
City, State, Zip Code  
Telephone number [optional]

Mr. HORN. We now will move to some questions here, and we'll start with Mr. Posner first.

Concern has been raised that a provision of the Taxpayers' Bill of Rights would supersede the Freedom of Information Act, allowing the Internal Revenue Service greater latitude in determining what type of information they would release to the public.

Can you just tell us how concerned should we be about this issue? And have any questions come up before you in Justice?

Mr. POSNER. Mr. Chairman, not yet. We understand there is a Joint Committee report on this. I think the administration is going to be commenting on that. I know Treasury is going to be issuing some comments.

What I can pledge to you is the Department will look at this very, very carefully, but I think that will be part of the multi-agency review process, of which I'm sure we will be a participant.

Mr. HORN. OK.

Mr. POSNER. But we have not had a chance to take a position yet.

Mr. HORN. When do you estimate that decision will be made?

Mr. POSNER. I don't have an answer for you. I know that Treasury is going to be preparing comments. My understanding is that they are going to be doing it readily, quickly. I know a number of people are looking at this now, but I will get back to you with more detail.

Mr. HORN. Is OMB circulating that issue throughout the administration?

Mr. GOTBAUM. I can't say that I know, Mr. Chairman, so why don't—with your permission, maybe the thing to do would be for us to respond formally to tell you what the timeframe is on which we will express an opinion.

Mr. HORN. Without objection, whatever documents you do send us will be put at this point in the record.

[The information referred to follows:]

**QUESTION: Is there a potential conflict between the Taxpayer Bill of Rights 2000 (TBOR) and the Freedom of Information Act (FOIA)?**

**ANSWER:** The confidentiality provisions of Section 201 of the TBOR, which seek to amend Section 6103, potentially do conflict with the FOIA. However, this is not the first time the confidentiality provisions of Section 6103 have received judicial scrutiny:

- Most courts have treated Section 6103 as an exemption 3 (under FOIA) statute. This means that information that cannot be disclosed under Section 6103 will not be disclosed pursuant to the FOIA.
- A few courts have held that Section 6103 preempts FOIA with respect to access to returns and return information.

Based on this, the question is whether the FOIA and Section 6103 can co-exist. To examine this, we must look at the following specific points:

- Section 201 of TBOR potentially places the IRS outside of the FOIA for requests for tax information.
- Section 201 of TBOR creates a dual track for processing information, which may lead to agency confusion.
- Section 6103 (which Section 201 of TBOR amends) can work effectively with FOIA through exemption 3 of the FOIA.
- If Section 6103 preempts the FOIA, there is not any available procedure for a person requesting return information that does not fall into the category of Section 6103(c), (e), (k)(1), or (k)(2).

Although the TBOR does not specifically override the FOIA, the amendments to Section 6103, which are contained in the TBOR, seem to allow Section 6103 to preempt the FOIA. However, the FOIA and TBOR can coexist by codifying the fact that Section 6103 falls under exemption 3 of the FOIA, instead of adding the language, “notwithstanding any other provision of law.” This would lead to a harmonious coexistence between the two statutes and would not create a dual system for the request and disclosure of information.

If passed, TBOR 2000 will exempt information under Section 6103 from disclosure under FOIA. As mentioned earlier, this will lead to a dual system of disclosure for information, and will place the IRS outside of the FOIA requests for tax information. Thus, our position is that Section 6103 should, instead of preempting the FOIA, be codified as an exemption to FOIA. This will allow these statutes to coexist, and the system for the disclosure of information will remain through the FOIA.

Mr. HORN. I assume the Justice Department would be making this, because that is a legal decision, really, between the privacy acts and the Taxpayer Bill of Rights and the Freedom of Information Act, and so it is a very touchy thing, I would think, that you have to take a look at. So that's one thing we will look forward to.

What percentage would you say of the Freedom of Information Act requests—how close are they responded to the 20-day timeframe that was established in the Electronic Freedom of Information Act? Any data on that from either OMB or Justice?

Mr. POSNER. Within the Department, most of our—at least many, and maybe even most of our components respond under the 20-day requirement. I know my office, the Office of the Associate Attorney General, has an average processing time of 14 days, or something like that. Many of our—it may even be the majority of our components respond under the 20 days, and I believe our average, Department-wide, is under the 20 days.

Mr. HORN. How is the FBI doing?

Mr. POSNER. I'm glad you asked that question, because the FBI—

Mr. HORN. Well, that's what started this series of hearings 4 years ago.

Mr. POSNER. Right.

Mr. HORN. When you couldn't get anything inside of 4 years.

Mr. POSNER. I understand that, Mr. Chairman. The Bureau has made enormous strides with its backlog. I think the backlog has now been reduced from 15,000 to 5,000. It really is an extraordinary success story. Their average processing time I think is still high, because obviously you've got—you still have a backlog, but we have devoted hundreds of additional people to this. The Attorney General, herself, is personally committed to this. I have heard her comment on it and I have heard her ask for continued action on this. The backlog is being reduced sharply, and we've put a lot more people, and the Bureau, obviously, is to be commended for this. We've put a lot more people on this and the backlog is far less than it was just 2 years ago.

Mr. HORN. Now, the FBI, did they ask for the resources to cut that from 4 years down to a year or 20 days or whatever it is now?

Mr. POSNER. I'd have to go back and look at the funding requests, but my understanding is that we, at least a couple of years ago, made some form of a request for additional resources for the Bureau, and several—I think they now have something like 700 FTEs at the Bureau just devoted to FOIA, which I think is at least a 100 percent increase from what it had been a couple years ago, and I think the additional people have had the requisite impact and the backlog is—

Mr. HORN. And are those 700 full-time equivalents, are they on the electronic side, or is there a non-electronic side that is running it up to 700?

Mr. POSNER. Well, a lot of people at the Bureau, of course, spend time just responding to particular requests. To the extent that a request might be frequently requested and that it needs to get—you know, and then if it was created after a certain date it would need to be posted in the electronic reading room. I think that staff also participates in that. So I don't think that there is a separation be-

tween FOIA staff and EFOIA staff. I think they both have a role in working on the EFOIA requirements and getting things posted on the Web.

Mr. HORN. Mr. Gotbaum, does OMB add resources at all to these when they are in the annual budget reviews? To what degree do we use the budget review as a way to make sure the law is being complied with?

Mr. GOTBAUM. Yes, Mr. Chairman, we do. I actually asked the OIRA staff this question in preparation for this hearing, and what they responded is that we know of no case in which EFOIA compliance, in particular, was the stated basis for a request in resources. What we have and what we find is two different kinds of requests, Mr. Chairman. One is requests for generic improvement in FOIA compliance, like the one that Mr. Posner just described, and the second is requests for improvement in systems response, Web site, and other information technology.

As a result, I can't give you a chapter and verse on the specific piece. I can tell you that yes, we are actively engaged every year in budget discussions on IT systems, both because of this legislation and because of Clinger-Cohen and because of GPEA because of the various mandates that the committee has laid down, with which we strongly agree.

Mr. HORN. So do any particular cases come in mind that have bothered OMB because they aren't anywhere near halfway doing the goals set out so you don't have any people that are like our debt collection types, where they aren't doing much, they're just talking?

Mr. GOTBAUM. No, Mr. Chairman. I've got to tell you that, in preparing for this hearing, I felt a lot more comfortable than I did before our FFMIA hearing, for instance.

Mr. HORN. Well, I'm glad you are comfortable, so we'll see how we go.

Mr. McIntyre, what is the Department of Defense response rate?

Mr. MCINTYRE. According to the DOD annual FOIA program report that we compile and submit to Justice and which is on the Web.

For fiscal year 1999, for simple requests, the median age was 20 days, which meets the EFOIA time line. If it is a complex request, the median age was 66 days, and if someone was granted expedited access, the median age was 7 days.

Those are the simple figures for the entire DOD.

Mr. HORN. Does OMB have a similar document for the inventory of the whole executive branch?

Mr. GOTBAUM. We haven't provided the documentation. We keep track of generic numbers of requests and the overall backlog. I don't know that we keep track of—

Mr. HORN. Well, what I'm after are, again, the data that the administration has to administer the law. The law says, "Get it done in 20 days," and electronic reading rooms and all the rest of it, and it seems to me, if the executive branch is implementing the law, why you, the OMB, should be the ones that have what apparently the Department of Defense has done. That's the kind of data—those kinds of data are what we are interested in, just looking at the comparisons and there's progress being made. We know you

can't do everything at the same time, but we'd just like to know who are the laggards, and that's—you know, with Y2K as well as with debt collection, we try to get a laggard panel and the good boys and girls panel. So we just wonder what kind of data you have.

Mr. GOTBAUM. Actually, I think the debt collection example is a good example, Mr. Chairman, if I can compare them and contrast them.

We view our job, as I said in the testimony, as one of providing oversight and guidance. OMB will never be big enough, even in the dreams of those of us who occasionally ask for additional resources, for us to have enough OMB staff, for example, to review individual Web sites. So what we do is we work on summary statistics and we work on generic performance measures.

In the Debt Collection Act, what we set forth and are beginning to get from agencies now is, "Tell us what your delinquent debt is, whether the number is rising or falling." And we then use that to figure out where we have problem children.

In FOIA we have information on the number of requests and whether that is rising or falling.

In the day-to-day business of management in Government, like the Department of Justice we become aware where there are issues that require additional resources, so, as a result, it is not a surprise that DOD requires resources for this purpose. It is not a surprise that Justice requires resources for this purpose.

What we don't do, Mr. Chairman—and I think it is worthwhile explaining why—is we don't set up a separate reporting system for each point of compliance.

Mr. HORN. Yes.

Mr. GOTBAUM. And the reason we don't is we don't think that we should take the resources in OMB off of, say, GPEA, off of encouraging people to go paperless, to reviewing each one of the check marks on the 20,000 or so Federal Web sites. We think it is more effective, given our resources, to work by what I would characterize as a "management by exception" process, which is we lay out guidance.

We know and the world knows that when there is a problem with agency activity there is a place to go. And that's why I think it is important. I mentioned it and I thought it was important and Mr. Posner mentioned it: when there is a problem with agency response under FOIA, people call the Department of Justice. That doesn't mean that the Department of Justice is charged legally with mandating compliance, but it does mean that the Department of Justice is aware of and provides, oversight and encouragement. That, Mr. Chairman, is the most efficient and the most effective way to get agencies, to comply.

Mr. HORN. Does OMB have the authority, if it wanted to, to delegate some of these functions to the Department of Justice, or do you need a law? That's what I'm getting to.

Mr. GOTBAUM. I don't want to be definitive on what the law does. In this case, Mr. Chairman, I will tell you that, for most of the management functions of Government that you have entrusted oversight to us, we have, in fact, worked via delegation with other agencies. This works well whether it is an individual agency like

the Department of Justice on FOIA or the CIO Council or CFO Council for improving grant simplification and grants management or the Federal Credit Policy Working Group, for which Treasury, in effect, is the information collection agent.

So let me just say at this point we don't believe we need additional lawmaking in this area. We think this is an area where what we hope we get from the Congress is what you're doing right now, which is serious periodic oversight and calling people on the carpet and seeing what they're doing.

Mr. HORN. Well, I agree with some that say that one Cabinet officer cannot really coordinate other Cabinet officers unless the President makes them Assistant to the President or something, but we've had that canard for 30 years around this town.

Mr. GOTBAUM. Mr. Chairman, I would say if that one Cabinet officer happens to be involved in the putting together of the budget, at least he gets a hearing.

Mr. HORN. Good.

Let's see here. OMB's responsibilities are essentially the oversight function, I would think, within the administration. I guess I would ask you—a number of you—what's the concerns about the State and Federal legislation and agency regulations with respect to privacy policy? You know, that's a major topic around here for the last 3 years, and nobody can come to focus on it in the legislative branch, and I don't think too much has happened in the Executive except for Ms. Shalala, who had the law. If we didn't do anything, she could do something.

Mr. GOTBAUM. Mr. Chairman, I think it is fair to say that privacy is another area in which we are acting affirmatively on a sustained basis and which, again, the changes in technology and the way both we have to do business and folks outside the Government do business mean that we have to essentially reassess the rules in context.

For example, a year-and-a-half ago we, on our own motion, created a position within the Office of Management and Budget, a coordinator for privacy, precisely because we wanted to make sure that there was a locus for privacy discussions.

We then followed that up with a series of directives, with some legislative suggestions, and some administrative suggestions, and in some cases—and this may be where there is a question on your part—we have consciously chosen to defer to the private sector on some issues. We've said, "We are not going to heavy-handedly impose new restrictions on you unless you prove that you can't, yourself, clean up yourself."

And so I think, Mr. Chairman, this is an area where we have actually put a lot of effort in, not just medical privacy but privacy in the financial services context, privacy in how the Federal Government does its own business. What are the implications of the Privacy Act? The CIO Council, for example, created a working group to review what we were doing and see what else we need to do.

I'd say that is an area, in fact, where there is a lot of motion, even though not all of it is legislation, sir.

Mr. HORN. I'm going to yield now to Mr. Ose, the gentleman from California, to consume such time as he wishes in terms of questioning.

Mr. OSE. Thank you, Mr. Chairman.

I think my question is—I have a retrospective and a prospective approach here.

First of all, for each of you, I'd like to understand, from the agency's performance, what are the best examples we have had so far of the implementation of a FOIA? And then, conversely, where do we need to improve? If you could give me some feedback on that, I'd appreciate that.

Mr. McIntyre, at the DOD—

Mr. POSNER. I'll be happy to respond from the Justice Department's perspective.

I think a lot of agencies have done some exceptional work with FOIA. The Department of Justice processed almost a quarter million FOIA requests last year, generating hundreds of thousands of pages of information. Many of the large Federal agencies do likewise. I mean, there are thousands of FTEs in the agencies that are devoted to—as I mentioned before, there are 700 FTEs just at the FBI who do nothing but FOIA, and so I think all the agencies in town generate a remarkable amount of information.

I think, as to the subject of today's hearing, I think the agencies are making excellent progress in putting information on the Web, which we are all focused on and trying to do more of, and I think, thinking prospectively, I think that's where we want to be headed, continue to head in that direction. This is, obviously, part of the overall administration initiative to place more information on the Web to the public, whether it is requested by FOIA or not.

You know, the Department has maybe about 100,000 pages just in the, I think, in the FOIA reading rooms and accessible under our FOIA Web page, plus, you know, another 100,000 or so pages available on our Web site anyway. That's an extraordinary amount of information to have been put on in a short period of time. I think other agencies have done that.

So I think what I can tell you is that the agencies will continue to focus on putting more and more information on the Web, which we hope will, as Mr. Gotbaum described in the opening, reduce the reliance on FOIA, reduce the reliance on the 20th century letters, and hopefully we'll have 21st century communication and information on the Web, and I think that is where the agencies are headed.

Mr. OSE. It would seem to me, in terms of the volume of the various agencies, like DOJ—you just referenced 200,000 pages in aggregate—in terms of the volume, perhaps the biggest challenge that a citizen may face if they wanted to do research is seeing whether or not that has already been done.

I know the chairman's interest here is finding some means of expeditiously giving citizenry that information. In terms of cataloging or indexing for reference purposes, how do you handle your portal?

Mr. POSNER. I'm sorry? How do you handle—

Mr. OSE. How do you handle the—a citizen who comes to your portal and says, "I want to check out subject X."

Mr. POSNER. Well, you would—obviously, citizens could do this differently, but you could get on the main Justice Department Web site, then you could get onto our FOIA Web site, which is going to direct you to—

Mr. OSE. You click right through?

Mr. POSNER. Click right through. WWW.USDOJ.GOV, main department Web site, FOIA right there. Click FOIA and you're in the FOIA area. Now you're on the FOIA home site and then you can click on any number of things. One of the things you can click on are, reference materials, policy statements. It is going to direct you to an enormous amount of information.

One of the things it is going to direct you to are our reading rooms, which have frequently requested records, as that term is defined, so you can already get what, as you put it, others have requested, and there are a host of things that would fall under that category.

Now, that doesn't even include, obviously, what you can get off the other links on the Department's home page, so I'm just talking about the FOIA home page.

I think I describe our Web site in detail in the prepared remarks, but that is, I think, how many citizens will get access to Department materials.

You know, we also have press releases, briefs, all sorts of things we put on our Web site.

Mr. OSE. How frequently do you update your cataloging of the materials on the Web site?

Mr. POSNER. I'm pretty sure we update our Web site probably virtually every day. I have to check to see how often we update the FOIA portion of the Web site. I suspect it is changing virtually daily, but, you know, I'd have to get more-detailed figures. But certainly we are always scanning things onto our Web site.

Mr. GOTBAUM. Mr. Ose, can I comment on that point?

Mr. OSE. Certainly.

Mr. GOTBAUM. One of the things we are discovering, when we talk about the technological revolution that EFOIA is a part of, is that indexing systems, too, are, being improved over time. So one of the issues that we are now trying to deal with in the Federal Government is to see whether or not there aren't effective search technologies and search engines that would permit one to find things whether or not they have been indexed. One of the issues that we have right now is that most of the way that our indexes work is someone has to take a document, characterize it in some way, shape, or form. It's like the old Dewey Decimal System. They've got to characterize it and then it becomes part of the index.

That means that we'll be slow. It means that we are at the mercy of whomever characterizes—how they characterize this.

Mr. OSE. Your point is well made. I don't want to subject you to the waste, fraud, and abuse problems at HCFA, but the categorization thing is a very serious issue. And I can tell you my biggest problem—and I suggest that most citizens share this—is that when I get on a Web site or when I go the a search engine, usually the thing I'm looking for is number 50, so I've got to go through the first page and the second page and the third page. So I want to explore this a little bit further with you in terms of what you're doing, because I don't have time to go through 49 things to find the 1 that I'm looking for.

How do you cross-reference, if you will?

Mr. GOTBAUM. That's what I'm saying, Mr. Ose. I think it is quite important that we, among other things, work to refine our search methodologies.

Right now, although I will admit it is enormously frustrating to find what you're looking for as the 49th item on a list of 200. It is—let's be clear—a dramatic improvement over the zero that you would get if you went with the old Dewey Decimal System approach and didn't ask for it according to the Dewey decimal category.

And so I think it is an extremely important issue. It is one that we are working on, and that the various agencies are working on. In most cases what we're finding is that they are turning from what I'll call a "categorize it as you post it" approach to one which goes to full content searches—in other words, searching throughout the document. This leaves it to the searcher to choose from among those materials.

There is a cost to that. You're right. It means that you're going to get a list of 200 things, whereas before you got a list of two. But the benefit of that is that you will get that document which mentions the environmental remediation problem in northern California.

Mr. OSE. We don't have any of those. [Laughter.]

Does your search engine—is it portal specific, or is it one that you're buying off the shelf?

Mr. GOTBAUM. Different agencies are using different software—a range of them, actually. And what we are trying to do now—and I mentioned this when I started—right now we are mostly encouraging them to look aggressively at what is out there and what is possible. What we've found is that, if we try to specify a particular one, by the time every agency did it it would be obsolete.

Mr. OSE. Which agencies—going back to my original question, which agencies, in OMB's opinion, are doing a good job and which agencies need improvement in this area?

Mr. GOTBAUM. I can't give you—as I mentioned—

Mr. OSE. Mr. Gotbaum, that's what you told me last time I asked you a question, you couldn't put your finger on anybody.

Mr. GOTBAUM. And I will try very hard to be consistent, at least with what I said a week ago.

Mr. OSE. Perhaps I could submit a question in writing for Mr. Gotbaum to respond to so that he doesn't end up with the embarrassing situation of mentioning names, if you will.

Would that be acceptable, Mr. Chairman?

Mr. HORN. That would be very acceptable, and, without objection, it will be put in the record at this point.

Mr. OSE. All right.

[The information referred to follows:]

Many agencies have been working hard to improve the EFOIA section of their Web Sites. The Department of Justice, the Railroad Retirement Board, the Office of Personal Management, and the National Aeronautics and Space Administration have done an excellent job in their efforts to implement EFOIA.

Mr. OSE. Mr. Posner, let me shift my focus to you, if I may.

In your opinion, which agencies are doing, if you will, the best, and which stand improvement?

Mr. POSNER. On their Web sites, or—

Mr. OSE. In handling the electronic processing of the Freedom of Information Act.

Mr. POSNER. I don't have names for you now. I can certainly say there are obviously—and some agencies are doing a better job. We are, obviously, proud of our efforts. Some of the smaller agencies have done a terrific job, as well—FDIC and the Railroad Board I think has a very good Web site. Unfortunately for you, I don't have, you know, sites that I can tell you right now I want to see improved. I can tell you, though, that there are such sites that we'd like to see updated and made more user friendly.

We've issued an extraordinary amount of guidance. We're encouraging agencies. They are heading in that direction. But I can tell you that there are sites that we would like to see updated and made more user friendly.

Mr. OSE. So tonight, when the chairman and I can't sleep at 2:30 a.m., and we want to check this out, you would suggest, for the agencies that are doing a good job in implementing this, we do look at the FDIC portal or the Railroad portal or the Department of Justice?

Mr. POSNER. You could look at the Department of Justice first if you wanted. Yes, we think that's a very good site.

Mr. OSE. Is there a simple code to access any of these Department's Web site that has, say, common features up to the name of the department? How does the average citizen listening to all this or reading this transcript—what do they get out of it in terms of how they access their Government?

Mr. POSNER. Well, I think, you know, if you typed in "Justice Department," I don't know where it would come up in the number of—you know, one would hope it would come up in the top 10 rather than 50, but I think if you put in "Justice Department," you would get to our Web site pretty quickly.

Now, once you—we think our Web site is easy to navigate, but one of the things you're going to get pretty quickly, you're going to get into the Commerce Department Web site pretty quickly, you're going to get into the Treasury Web site pretty quickly, and you're going to get into the Transportation Web site pretty quickly. You're going to get in a lot of things pretty quickly.

So you type in "Justice Department." You get onto our Web site and it is going to act as a link, as a portal to many, many other Federal agency Web sites. And I'm not even talking about Cabinet departments. You can probably get onto the FDIC's Web site pretty quickly, perhaps in a matter of minutes.

Mr. OSE. What's the one for Justice?

Mr. POSNER. It is WWW.USDOJ.GOV.

Mr. OSE. That's .GOV?

Mr. POSNER. Yes, .GOV. That's our main Web site, and you can get onto a host of information from there.

Mr. OSE. So presumably, if you substitute the others for the DOJ, that one little bit there, we'll access that?

Mr. POSNER. That might be right. I don't know the Web site addresses for all the other Federal agencies, but I'm sure—

Mr. OSE. Unless it is Department of Commerce, Commerce Department, and 18 other ways they can use two words.

Mr. POSNER. In that case it is DOC.GOV.

Mr. OSE. Mr. McIntyre, how about over at DOD?

Mr. MCINTYRE. The Defense Department Web site is WWW.DEFENSELINK.MIL.

Mr. OSE. Slowly again.

Mr. MCINTYRE. OK. WWW—

Mr. OSE. I got that part. [Laughter.]

Mr. MCINTYRE. DEFENSELINK—D-E-F-E-N-S-E-L-I-N-K, one word—.MIL.

Mr. OSE. M-I-L?

Mr. MCINTYRE. M-I-L. Right. We're in the military domain.

Mr. OSE. And if you have—

Mr. MCINTYRE. Army, Navy, Air Force is .MIL.

Mr. OSE. OK.

Mr. MCINTYRE. DIA is .MIL.

Mr. OSE. Does your Web site have a FOIA click-through?

Mr. MCINTYRE. Yes.

Mr. OSE. Is there any feedback you'd care to give us as to the quality or the means by which it is the leading FOIA portal or one that could stand improvement? Don't be bashful.

Mr. MCINTYRE. I represent the entire Department of Defense. From a personal standpoint, some of the links to the services, to the other Defense agencies, are a dream. They are just wonderfully set up. Others are a little more complicated, not necessarily complete.

The Joint Staff has a marvelous Web site which is accessible through DefenseLINK. It lists the chairman's posture statement, it lists their joint vision, 20/20, their guidance documents, their policy statements in a broad sense.

Mr. OSE. How about the FOIA issue?

Mr. MCINTYRE. They're under our FOIA, we are their FOIA office, so they don't have a FOIA link. In general, information that is available to the public, the departments, military departments, have FOIA click-throughs on their sites also and access to electronic reading rooms. I do believe one does not have a direct click-through yet and—see, there's a separation. The FOIA Web pages are usually the IT folks. In the DOD sense it is the, you know, command control communication. Our chief information officer is responsible for the entire IT community and the Web site policies.

The DefenseLINK is maintained by the Assistant Secretary of Defense Public Affairs, and we have—well, we ask them to make sure that we have a direct click-through on FOIA, which gets us to the FOIA page where our handbook is listed, our regulation is listed. We actually have the 40 or 50 slides that our FOIA people use when they give training on the entire FOIA, including the EFOIA requirements.

Mr. OSE. Let me take my question a step forward, and this gets to an issue that has been before Government Reform repeatedly, having to do with the privacy issue.

On any of these situations, whether it is OMB or DOJ or DOD or whomever, in terms of someone clicking in to check or to make a FOIA request, what information is retained at the receiving end in terms of who has made the request?

Mr. MCINTYRE. We have a complete file in our vaulted area of the requester, the requester's correspondence, e-mail, fax. Our answer—

Mr. OSE. Otherwise, you wouldn't be able to respond?

Mr. MCINTYRE. Right.

Mr. OSE. OK.

Mr. MCINTYRE. But there is nothing on the Internet that would indicate who requested it.

Mr. OSE. All right. Same at the DOJ?

Mr. POSNER. Yes, I believe so. I don't think there would be significant—I think there would be concern. We don't post that the chairman, for example, made a FOIA request. I don't think we post that on the Internet, but obviously we keep very detailed records of who has made FOIA requests. That's right.

Mr. OSE. It's just we have had some problems recently with some electronic data that we seem to misplace now and then, and we're interested in avoiding that situation in the future.

Mr. Chairman, I have no other questions. That was the particular area that I was interested in, and I appreciate your giving me the time and the generous allotment.

Mr. HORN. Well, I was going to ask this next question, which is probably dear to our hearts here.

In a recent Supreme Court Case, *Public Citizen v. Carlin*, the Archivist of the United States, the issue was National Archives' disposal of original electronic records under the Records Disposal Act. Journalists and citizens believe that the information was in the public domain and, therefore, should be available.

So has this come to the attention of the Department of Justice?

Mr. POSNER. I believe we are aware of the case, and I think we've thought about it at length, and—

Mr. HORN. Well, I assume you took it to court—

Mr. POSNER. Right.

Mr. HORN [continuing]. If you are acting—so somewhere someone in the Department of Justice, one or more, might know something about this.

Mr. POSNER. They do.

Mr. HORN. Yes. OK. What was their advice to the archivist?

Mr. POSNER. I don't know the answer to that. To the extent that there were privileged communications there, we would, obviously, have some concerns. But I will followup on that particular case because, as you know, the Department was very involved.

Mr. HORN. Yes. Well, I'd like to hear from the Department of Justice. Are they going to appeal that to the Supreme Court?

Mr. POSNER. I will find that out for you, Mr. Chairman, and get back to you quickly.

Mr. HORN. OK. Let us know, because it could be that they are not going to be.

Now, they've had a fire out there, one or two fires, as a matter of fact, in their storage facilities out in Maryland, and the question is: what were those records and what started the fire, etc?

Mr. Gotbaum, can you clarify that?

Mr. GOTBAUM. I'm sorry, Mr. Chairman. No, I cannot—

Mr. HORN. You mean it did not get to the high ears of the Office of Management and Budget?

Mr. GOTBAUM. Let's just say that I am not aware that we know who started the fire or what was burned.

Mr. HORN. Well, it wasn't Mrs. O'Leary. [Laughter.] Does that help?

Mr. GOTBAUM. I know it wasn't Mrs. O'Leary and it wasn't a large amount of ground brush in New Mexico. So if the question, Mr. Chairman, is kind of what's the implications of this fire—

Mr. HORN. Well, I'm just curious. For one, it is on electronic records, on some of it. Now, how easy is it, except for a big magnet I remember, to wipe out electronic records, and is there a worry there by Justice and OMB when they see something like that happen?

[No response.]

Mr. HORN. Well, in other words, Justice hasn't been asked to do anything by either the White House or OMB or the Archivist on this?

Mr. GOTBAUM. Not that I'm aware of, Mr. Chairman.

Mr. HORN. But you're not aware of it. Can you check?

Mr. GOTBAUM. Yes, we will.

Mr. HORN. OK. Find out if there is and what are they planning to do. We can have the Archivist up. We're the oversight agency for the Archives. He's done a wonderful job, but these things happen, and I'd like to know what are people doing about it so they don't keep happening.

You're saying nobody you know of in the Administration is really dealing with that. Did they just read it in the paper and go on? It could have been their records, since we all use the Archives—legislative branch, executive branch. I'm not sure on what the Article Three Judiciary do, but I assume sometimes materials are transferred to the Archives out of the Judiciary with cases and other things.

So anyhow, that's—we'd just like to know what you know about it, since you are all under oath, and have you found out about that, so let us know.

[The information referred to follows:]

**QUESTION: What happened to the records that were caught in the fire at the Washington National Records Center in Suitland, MD?**

**ANSWER:** There were two fires at this location, one on February 29, 2000 and one on April 5, 2000. During the February 29, 2000 fire, the following transpired:

- Initially, over 5,000 boxes were damaged by fire or by water from the sprinkler system and fire hoses. Most of the records have been dried and returned to the shelves in Stack 15 with no loss in informational value.
- NARA is still working on one refrigerator truckload of Veterans Affairs and D.C. Government records which were wet and charred in the fire. At this point, NARA has probably 500-750 boxes to be run through the drying chamber to be processed before being returned to the shelves.
- Although NARA will not have a final figure until this work is completed, it estimates that it may have lost a total of 25-50 boxes of VA and DC Government records in the fire.

During the smaller second fire on April 5, 2000, the following events transpired:

- The fire occurred in Stack 13 and involved over 1,000 records center boxes. All of the records, which were merely wet, are now dry with no loss of informational value. Most have been replaced on the shelves in their original locations and are ready for reference should any be needed.
- NARA is sorting through the remaining boxes to rearrange and identify any boxes that are out of order and verify what was lost in the fire. NARA estimates the loss to be 5 - 10 cubic feet from holdings of the Drug Enforcement Administration, the Defense Contract Audit Agency, and the National Credit Union Administration. These records were closest to the epicenter of the fire.

Mr. HORN. We'll hear from the next panel on that a little bit.

OK. I am going to now go to the second panel, because I hear we've got some votes coming up and I'd like to get as much done as we can so you can all go about your duties.

You can stay there. We're just going to move some chairs up. If you wouldn't mind, I'd like some dialog here, and we'll ask the—we have Lucy Dalglish, executive director of the Reporter's Committee for Freedom of the Press; Dr. Patrice McDermott, policy analyst, OMB Watch; and Ian Marquand, Freedom of Information Chair, the Society of Professional Journalists.

I think some of you have been before us before and you know the routine of taking the oath, and if you have any assistants and they are going to whisper in your ear, let them take the oath, too, because I don't like baptisms going throughout the hearing.

We then will—when we call on you, we will put your written statement in the record there and we'll talk from it.

Is there anybody—assistants that are going to be whispering in your ears? If so, bring them up and the clerk will take the names.

[Witnesses sworn.]

Mr. HORN. The clerk will note that we have the witnesses and the supporters of—roughly six.

So, Ms. Dalglish, executive director of the Reporter's Committee for Freedom of the Press, we are glad to have you here. You've done a lot of work on this over the years and we appreciate it.

**STATEMENTS OF LUCY DALGLISH, ESQUIRE, EXECUTIVE DIRECTOR, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ACCOMPANIED BY REBECCA DAUGHERTY, DIRECTOR, REPORTERS COMMITTEE FOI SERVICE CENTER; PATRICE MCDERMOTT, POLICY ANALYST, OMB WATCH; AND IAN MARQUAND, FREEDOM OF INFORMATION CHAIR, THE SOCIETY OF PROFESSIONAL JOURNALISTS**

Ms. DALGLISH. Thank you, Mr. Chairman. I'd like to thank you for the opportunity to provide our views. As you said, my name is Lucy Dalglish, and I am accompanied today by Rebecca Daughterty, the director of the Reporters Committee FOI Service Center for about the last dozen years.

The Reporters Committee for 30 years has helped reporters who encounter legal difficulties in covering and gathering the news. We run a hotline for reporters who face all types of legal obstacles in their quest to gather the news, and we get more than 3,000 calls a year to our hotline, and by far the greatest number of calls to our hotline concern the inability of reporters to gain access to agency records.

When the Government fails to meet its freedom of information requirements, reporters are greatly inhibited in their ability to report the news to the public. We believe that Congress was very forward-thinking and insightful in its passage of the EFOIA, and it is an act that has greatly enhanced the public's ability to gain access to Government information. Almost every agency, as you heard already today, now has a Web site that can be visited by the public.

Agency freedom of information officers have worked fairly hard to identify data bases that could be useful to the public and make

them available online. Reporters routinely use these Web sites rather than contact agencies directly for much of the stories that they need to write.

Reporters that we have talked to in preparing for testimony today have also said that Government Web sites are getting more and more sophisticated, and, as a result, they are easier to use and more useful, so the testimony that we give today is meant in no way to disparage this enormously beneficial law that came into being largely because this subcommittee secured its safe passage through the House of Representatives. Please don't construe our remarks on the implementation of this law as ingratitude, because we remember when there were no Web sites to visit. But Web sites are not the only answer to this issue.

The authors of this act intended not only to add requirements for providing information electronically, but also to overcome the most serious obstacles preventing the public's successful enjoyment of a Federal FOI program. These obstacles are, first of all, the lengthy delays and, second, the over-broad interpretation of the privacy exemptions that have come to represent a virtual shut-out of information if it personally identifies an individual.

Let me first talk about the delays.

Many reporters simply will not use the FOI Act, claiming that they cannot get information in time for it to be useful. This is very unfortunate. If reporters who cover the Federal Government must rely on the recollections of Government officials or upon leaks of information and not on Government records, they cannot adequately report the news to the public.

Multi-track processing and expedited review that were in the EFOIA amendments are sensible provisions and they can be effective. We have talked to reporters who have sometimes qualified for expedited review of their request when timeliness was very important in getting stories to the public.

But what was intended to be a major tradeoff—and I remember vividly when the discussions were going on back in 1995 and 1996 giving—the tradeoff that gives agencies lengthier deadlines for processing requests but eliminating their ability to routinely invoke extraordinary circumstances to excuse the delays, those requirements and that tradeoff seems to have been merely ignored by most agencies.

The second thing I'd like to talk about is privacy. The first finding in the EFOIA is that the FOI Act is intended to establish and enable enforcement of the right of any person to obtain access to Government records, subject to exemptions for any public or private purpose. That finding was intended to limit the Government's unfettered use of the FOI Act's privacy exemptions to categorically protect information concerning named individuals.

Legal privacy protection has always involved a balance between the intrusion on personal privacy and the public's interest in disclosure, and agencies had considered that balance in determining whether to invoke privacy exemptions.

Now, the scale was thrown out of balance somewhat in the 1989 Supreme Court decision that said the only public interest that could be considered was the FOIA's core purpose, which it said was

to reveal the operations and activities of Government. We disagree with that finding and that court decision.

The legislative history to the FOIA states that the finding that access is to be for any public or private purpose is intended to clear up the misconception of the congressional purpose behind enactment of FOIA. In fact, I doubt that anyone here remembers, but Senator Moss—

Mr. HORN. Excuse me right there. It was not Senator Moss, it was Representative John Moss. Isn't that correct, everybody that knows the history on that.

Ms. DALGLISH. You're right.

Mr. HORN. And it came out of Government Operations, now known as Government Reform. And John Moss was a very vigilant, hard-working, focused person—

Ms. DALGLISH. You're absolutely right, Mr. Chairman.

Mr. HORN [continuing]. Who represented Sacramento, CA, basically.

Ms. DALGLISH. OK.

Mr. HORN. So that's 30 years ago and you probably weren't born then, but—

Ms. DALGLISH. I think it was—

Mr. HORN. I'd appreciate it if you'd change your permanent and have staff clean that up.

Ms. DALGLISH. No problem, Mr. Chairman. You completely embarrassed me.

Mr. HORN. It shows that journalists cannot always be right about history.

Ms. DALGLISH. And I believe he got started at it in 1955.

Mr. HORN. Yes. That's right. And he had a good assistant who really also had focus.

OK, proceed.

Ms. DALGLISH. Representative Moss pushed early and hard for enactment of the FOIA, and he was prompted to do so in frustration over his own inability to get Government information about the performance of certain Postal employees. He would not be able to get that information today.

Former Hostage Terry Anderson, who has probably appeared before your committee in the past, was told he could not have information about his kidnapers without their written release because it would violate their privacy. This privacy exemption claim was dropped after media exposure, and the information is now being withheld because it is classified.

In Texas, Jack McNamara, the editor of the "NIMBY News," could get no information on the former local sheriff who pled guilty after Federal law enforcement agents seized his horse trailer containing 2,500 pounds of cocaine because disclosure would have intruded upon the errant sheriff's privacy.

In our view, if the public cannot learn about the individuals affected by or connected to the Government, it can know very little about Government.

Now, in regard to the use of electronic information, we have heard repeatedly from reporters that the value of the data bases varies widely; that some agencies are likely to use the sites to promote themselves and to explain their missions, and that is very

useful to the public, in some sense, but the real data collected by the Government that could be very useful to reporters is being withheld in many circumstances.

In our assessment, the scientific agencies receive the most complimentary endorsements. There were many favorable comments about the data available and searchable, for example, on the NASA and NOAA sites. The Department of Transportation was praised several times for its Web sites and for the accessibility of its data.

One reporter told us that the National Park Service actually consulted persons likely to use its Web sites when it constructed them.

But, as I said earlier, Web sites are not the only component of compliance with EFOIA. The public needs to be able to find the data bases and find the data bases indexed well enough to actually be researched, and reporters need to be able to talk to the people behind the data.

Sometimes just a simple question to an agency official will mean the difference between a correct and an incorrect interpretation of data, but usually the agencies are structured to keep most agency personnel who can answer these questions out of contact with the public, so if only your FOIA officer can answer a question, data interpretation may never occur.

Now, what we heard the most often was that, in using national Government data for local stories, reporters often want to interpret data for their own communities. We've heard repeatedly that Government information that is in PDF format—that is, when they just essentially take a photograph of a document and post it, but don't allow you to crunch the numbers that are in behind the data—this prevents a lot of very important reportorial interpretation of this information.

For example, the Department of Justice has uniform crime statistics and could make this raw data available. Instead, it is presented in a PDF file and is largely useless to others who could crunch the data to describe how crime in their own communities compares to crime elsewhere.

Similarly, from the IRS, a reporter cannot learn from posted information how much a given county gives to the Federal Government and how much it receives. We were told that the military agencies have data bases that are easy to find and are well organized, but it is difficult to draw data for individual cities.

There were complaints that agencies such as the Small Business Administration possessed data on loans in local communities, but that the data does not appear on a Web site.

There also were complaints that the requirements to post frequently requested data are not met, and there was a suggestion that frequently requested data should be interpreted to encourage posting of data that is requested frequently for specific localities.

For example, if a certain record is requested for Tuscaloosa, then Tacoma, then Texarkana, an agency should be able to infer that other communities have an interest in posting the data for that community, even though maybe only one person in each community has requested that information.

Overall, reporters believed that the more information the agency is willing to make available, the more useful the agency site, particularly if the information is indexed and readily available.

We appreciate the opportunity to present these views. I will definitely correct the transcript so that it is Senator John Moss.

Mr. HORN. Representative John Moss.

Ms. DALGLISH. Representative John Moss.

Mr. HORN. Yes.

Ms. DALGLISH. And Ms. Daugherty—

Mr. HORN. I take it you all have the “Biographical Directory of Congress,” and he will be in there.

Ms. DALGLISH. You know, actually, Representative Moss and I—I’m ashamed to admit this—were both inducted into the FOIA Hall of Fame in 1996, so I do know better and I apologize.

[The prepared statement of Ms. Dalglish follows:]

Testimony of Lucy A. Dalglish  
Executive Director  
Reporters Committee for Freedom of the Press  
Arlington, Virginia

Oversight Hearing on the Implementation of the  
Electronic Freedom of Information Act Amendments of 1996

Before the U.S. House of Representatives  
Committee on Government Reform  
Subcommittee on Government Management,  
Information, and Technology

June 14, 2000

Mr. Chairman, members of the Subcommittee, thank you for the opportunity to present our views on the status of federal agency compliance with the Electronic Freedom of Information Act of 1996.

The Reporters Committee for Freedom of the Press has for 30 years helped reporters who encounter legal difficulties in gathering and covering the news. We run a hotline for reporters who face all manner of legal obstacles in their quest to gather news, and by far the greatest number of questions on our hotline concern the inability of reporters to gain access to agency records. When the government fails to meet its Freedom of Information requirements, reporters are greatly inhibited in their ability to report the news to the public.

We believe that Congress was forward thinking and insightful in its passage of the EFOIA, an Act that has greatly enhanced the public's ability to gain access to government information. Almost every agency now has a Web site that can be visited by the public. Agency Freedom of Information officers have worked hard to identify databases that would be useful to the public and to make them available on-line. Reporters routinely visit Web sites rather than contact agencies to get much of the information that they need for the stories they write. Reporters we talked to said also that government Web sites are getting more and more sophisticated and, as a result, easier to use and more useful.

The testimony that we give today is meant in no way to disparage this enormously beneficial law that came into being largely because this subcommittee secured its safe passage through the House of Representatives. Please do not construe our remarks on implementation of this law as ingratitude. We remember when there were no Web sites to visit.

The authors of this Act intended not only to add requirements for providing information electronically, but also to overcome the most serious obstacles preventing the public's successful

enjoyment of a federal FOI program. Those are 1) the lengthy delays; and 2) the overbroad interpretation of the privacy exemptions (Exemptions 6 and 7c), which have come to represent a virtual shutout of information if it involves a personally identifiable individual.

I. Delays

Many reporters will not use the FOI Act claiming that they cannot get information in time for it to be useful. This is unfortunate. If reporters who cover the federal government must rely only upon the recollections of government officials -- or upon leaks of information -- and not on government records, they cannot adequately report the news to the public.

Multi-track processing and expedited review are sensible provisions and may be effective. We do know that reporters have sometimes qualified for expedited review of their requests when timeliness was very important in getting stories to the public..

But what was intended to be a major tradeoff -- giving agencies lengthier deadlines for processing requests but eliminating their ability to routinely invoke "exceptional circumstances" to excuse delays -- seems simply to have been ignored by agencies.

II. Privacy

The first finding in the EFOIA is that the FOI Act is intended to establish and enable enforcement of the right of any person to obtain access to government records, subject to the exemptions, for "any public or private purpose."

This finding was intended to limit the government's unfettered use of the FOI Act's privacy exemptions to categorically protect information concerning named individuals. Legal privacy protection has always involved a balance between the intrusion on personal privacy and the public's interest in disclosure and agencies had considered that balance in determining

whether to invoke privacy exemptions. The scale was thrown out of balance by a 1989 U.S. Supreme Court decision that said that the only public interest that could be considered was the FOI Act's "core purpose," which it said was to reveal the "operations and activities" of government. Department of Justice v. Reporters Committee, 489 U.S. 749 (1989). The legislative history to the FOI Act states that the finding that access is to be for a "any public or private purpose" is intended to clear up the misconception of the Congressional purpose behind enactment of the FOI Act.

In fact, Senator Sam Moss who pushed early and hard for enactment of the FOI Act, was prompted to do so in frustration over his own inability to get government information on the performance of certain postal employees. He would not be able to get that information today.

Former hostage Terry Anderson was told he could not have information about his kidnapers without their written release because it would violate their privacy. (The privacy exemption claim was dropped after media exposure, and the information is now withheld as classified.) *Nimby News (Texas)* editor Jack McNamara could get no information on the former local sheriff who pled guilty after federal law enforcement agents seized his horse trailer containing 2,500 pounds of cocaine because disclosure would have intruded upon the errant sheriff's privacy. (McNamara v. Department of Justice, 974 F. Supp. 946 (W.D. Tex. 1997).

In our view, if the public cannot learn about the individuals affected by or connected to government, it can know very little about government.

## II. Electronic Information

We heard repeatedly from reporters that the value of agency databases varies widely, that some agencies are likely to use the sites to promote themselves and explain their missions --

which is useful to the public in some senses -- but that real data collected by the government that could be useful to reporters studying many issues is often not available.

The scientific agencies received the most complimentary endorsements. There were many favorable comments about the data available and searchable from the Environmental Protection Agency, NASA and NOAA. The Department of Transportation was often praised for its Web sites and for the accessibility of its data.

One reporter told us that the National Park Service actually consulted persons likely to use its Web sites when it constructed them.

The public needs to be able to find databases and that need to find databases indexed well enough to be researched.

Reporters need to be able to talk to the people behind the data -- sometimes a simple question to an agency official will mean the difference between correct and incorrect interpretation, and yet agencies are structured to keep most agency personnel away from contact with the public. If only the public information officer or the Freedom of Information Act officer can talk to a reporter, data interpretation may never occur.

Reporters need to use national government data for local stories, showing how their communities are doing. We heard repeatedly from reporters that government information in PDF format that precludes further study and use of the data is largely useless for these purposes. For instance, the Department of Justice has Uniform Crime Statistics and could make raw data available. Instead, it is presented in a PDF file and is largely useless to others who could "crunch" data to describe how crime in their own communities compares to crime elsewhere.

Similarly, from the Internal Revenue Service, a reporter cannot learn from posted

information how much money a county gives to the federal government and how much it receives.

We were told that military agencies have databases that are easy to find and are well-organized but that it is difficult to draw out data for individual cities. There were complaints that agencies such as the Small Business Administration possess data on loans in local communities but that data does not appear on a Web site.

There also were complaints that the requirements to post frequently requested data are not met, and there was a suggestion that "frequently requested data" should be interpreted to encourage posting of data that is requested frequently for specific localities. For instance, if records are requested for Tuscaloosa, then Tacoma, then Texarkana, an agency can infer that local communities may have an interest in seeing the data even though each community, singly, may have only one request for the data.

Overall, reporters believed that the more information the agency is willing to make available, the more useful the agency site, particularly if the information is indexed and readily available.

We greatly appreciate the opportunity to present these views.

Mr. HORN. Let me ask you, on the bottom of page 3, where you cite the case of McNamara v. Department of Justice, did that ever go up for appeal, or did you—

Ms. DALGLISH. No.

Mr. HORN. It didn't? So, in other words, you can still—

Ms. DALGLISH. It was a small town editor.

Mr. HORN. Well, I noticed that. The "NIMBY News" editor Jack McNamara could get no information on the former local sheriff who pled guilty after Federal law enforcement agents seized his horse trailer containing 2,500 pounds of cocaine because disclosure would have intruded upon the errant sheriff's privacy." You mean that wasn't appealed, or did they change—

Ms. DALGLISH. Ms. Daugherty actually spoke with them.

Mr. HORN. Really? Go ahead. Identify yourself, if you would.

Ms. DAUGHERTY. I'm Rebecca Daugherty, and I'm the FOI Service Center director, and I talked with Mr. McNamara when he was trying to get this information. He was unable to appeal the case simply because it was financially prohibitive for him to do so.

Mr. HORN. Yes. Well, somebody should have gone in, some pivotal, spirited agency, and made a case out of that. That's so stupid.

See, what motivated in my head was, when I was a university president, the U.S. Department of Education, did this to both Pennsylvania State University and to California State University at Long Beach, which I was heading. Here's what they did—and when I think of leading a corps of presidents to establish the Department, I just couldn't believe the dumbness with which they operated. That is, they said, when they looked at the theses of both institutions, either master's or doctoral dissertations, they said we could not have the public or anyone look at those theses unless they had a release from the author because his privacy might be hurt.

You know, that's the dumbest thing I ever heard, because in the whole history of higher education the whole purpose of a thesis is to do original research, to have it available for professors, for the public, for students, for whoever, and yet they said, "Oh, you've got to have a privacy clearance." That is so dumb I couldn't believe it.

When I wrote the Secretary a rather hot letter, I got sort of a bureaucratic response from—I know—the same guy that did the stupidity. But that's why it bothered me when I saw that. I thought, "Boy, that's one I've been through," you know, because, let's face it, there have been a number of well-known figures in our society where they have plagiarized in their dissertations or their theses and no one would have discovered that if, once the person submitted that thesis and dissertation and they know forever it is locked up and no one can see it. That's just wrong.

They should have had a student paper being backed by you. I don't know. Do you handle student papers?

Ms. DALGLISH. Our colleagues—we share an office suite with the Student Press Law Center, and we often work together, and, yes, that's exactly the type of case we would take.

Mr. HORN. Yes. Well, I wish somebody had taken it, because I bet you they still have the policy down there, but I haven't heard from it lately.

OK. Let's move on then, and then we'll get to the rest of the questions.

We have Dr. Patrice McDermott, policy analyst of OMB Watch. Mr. McDERMOTT. Thank you, Mr. Chairman.

Just for the information of people in the room who may not know who we are, OMB Watch is a nonprofit—

Mr. HORN. Yes, tell us, because you do a good job.

Mr. McDERMOTT. Thank you—research organization that works to encourage greater public participation in Federal Government decisionmaking and to promote a more open, responsive, and accountable Government.

We have been engaged in the arena of public access to public information since the mid-1980's and have issued a number of reports in this area, and we appreciate the opportunity to testify.

I am here today to talk about the report that we issued in January of this year, which is called, "The People Armed." It is a follow-on report to one called, "Arming the People."

Before I go into the details of our study and our recommendations, though, I want to note OMB Watch has believed that the implementation of EFOIA in a way that is faithful to the intent of Congress is fundamental to effective electronic Government and governance. It is essential that the public be able to understand how the Government organizes itself and its records in order for the public to be able to truly hold Government accountable.

Because most Government records, whether digitally created or not, are not online and are not searchable, the indexes and record locators that are required by the amendments are the only key to that information at this point.

I also want to note, because this is a hearing on the impact of technology on access, I want to note the public interest community is very concerned about recent and ongoing initiatives in both the executive branch and in Congress to hollow out the scope of the Freedom of Information Act by claiming, with no credible evidence ever presented, that online access changes everything and puts us all at terrible, if unspecified, risk.

The very technology that promises more accountability is being raised as a specter to limit public knowledge about very real threats, risk, and vulnerabilities, most of which can and should be remedied.

Getting to the report—over a 3-month period between September 1st and November 31, 1999, OMB Watch examined 144 unique Federal Government EFOIA Web sites at the 64 agencies that are listed on DOJ's FOIA site. I would note, and we do note in our report, that 64 agencies are not necessarily the sum total of all the agencies that have begun to comply with the EFOIA amendments, but it is impossible for us to tell and it was certainly impossible for us to go look at every Government agency, but there are only 64 listed on DOJ's site, and there are very many, many more Government agencies.

In each case, we searched for the existence and completeness of the four major categories of information that you noted in your introduction that are required under the 1996 EFOIA amendments. In all cases, we approached the Web sites from the prospective of an average member of the public searching for information.

I would note that we have done this report twice now because, Mr. Chairman, as you have noted, the administration has not been paying attention to the details and there has been no other reporting done on the implementation. I do know that GAO is considering doing a report Government-wide.

Mr. Chairman, you and Mr. Ose also have identified many of the problems that the public has with finding either Freedom of Information Act information or, more specifically, Government records online, and I would note that there is a difference between Government records and generic Government information, which the agencies are very enthusiastically putting online—reports and all sorts of things.

Our study indicates that, overall, agency compliance with EFOIA amendments continues to be overwhelmingly inadequate, and we present four overriding reasons for this conclusion.

The first is that Congress still has not provided the necessary funding to carry out the implementation of the amendments. OMB still has not provided adequate guidance or assistance to agencies during the implementation process.

No. 3, the encouragement to compliance, which the legislators intended to be vested in the Department of Justice, has been insufficient. We do agree and we do note that DOJ has provided excellent training and information on how to meet the requirements of the amendment, but this is clearly not sufficient, given the overall inadequacy of compliance Government-wide.

Finally, the fourth reason is that agencies have yet to make public access to Government information for accountability a priority.

When we released the report, we had four major recommendations. The first of these is that OMB must provide better guidance and support to agencies by articulating exactly what information, as indicated in the amendments and the legislative history, must be included on agency Web sites to be in compliance, and by creating templates for consistent language and format Government-wide.

Pursuant to Mr. Ose's question and to yours, it is not possible to consistently find, by using a single format or a single template, FOIA information on agency Web sites.

OMB needs to establish a clear definition of what constitutes a repeatedly requested record and, most importantly, they need to explain how EFOIA fits into the larger framework of Federal information policy.

OMB should follow what it has done in the area of privacy on agency Web sites and provide leadership in the area of access.

In regard to this first recommendation on OMB, we commend OMB for finally recognizing in its April 2000, proposed revisions to Circular A-130, the significant problems with its memorandum M-9809, which told agencies that a "GILS—" or Government Information Locator Service—"presence was sufficient to comply with the law."

Because, as we have reported elsewhere, OMB has been dilatory in its treatment of the GILS mandate in the 1995 Paperwork Reduction Act, most agencies have no or no useful GILS present; thus, following OMB's recommendation on this matter has put some agencies out of compliance with the statute.

Our second major recommendation is that agencies' information must be better organized to make locating records online a user-friendly experience.

Third, enforcement mechanisms for agency noncompliance must be established immediately. Currently, agencies that do not meet the requirements outlined in the EFOIA amendments are neither identified nor penalized for noncompliance.

Fourth, Congress must provide regular oversight. Since the passage of the amendments, there has been only one other hearing on the implementation, and that was yours, Mr. Chairman. We commend you for that.

We also had five lesser recommendations.

Agencies that have decentralized responsibility for EFOIA implementation must provide a clear procedure for implementation in order to ensure consistency across the agency. There are a number of major agencies that have multiple sites and have decentralized it to their divisions, and it is very, very inconsistent.

Agencies must make categories of EFOIA compliance, handbooks, indexes, repeatedly requested records easily identifiable online and linked from one spot.

All agencies should follow the lead of those that provide forums for submitting FOIA requests online.

All agencies should provide access to their information in text only, as well as graphics versions, for users without access to high-tech equipment.

And, fifth—where we agree with OMB—the goal of EFOIA should be to make so much information publicly available online that Freedom of Information Act requests become an avenue of last resort.

Thank you, and I will be happy to answer any questions that you might have.

Mr. HORN. Thank you. That's a very well-organized presentation and you make some very good suggestions.

[The prepared statement of Ms. McDermott follows:]

**Statement of**

**Patrice McDermott, Ph.D.  
Information Policy Analyst  
OMB Watch**

Before the Subcommittee on Government Management, Information and Technology  
of the  
House Committee on Government Reform

On

The Implementation of the Electronic Freedom of Information Amendments of 1996  
June 14, 2000

My name is Patrice McDermott and I am the information policy analyst for OMB Watch, a nonprofit research and advocacy organization that works to encourage greater public participation in federal government decision-making and to promote a more open, responsive and accountable government. We have been engaged in the arena of public access to public information since the mid-1980s, and have issued a number of reports in this area. Pursuant to your request, Mr. Chairman, OMB Watch has not received any federal grants or contracts in the current and two preceding years, nor are we representing any entity today that has received such funds.

We appreciate the opportunity to testify.

I am here today to talk about the report we issued in January of this year — “*The People Armed?*” The name of our report may sound somewhat inflammatory, but it refers to a famous quotation from James Madison, the first part of which is better known: “A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives.” We believe it was the intent of Congress, with the 1996 “EFOIA” amendments to the Freedom of Information Act, to assist the American people in arming themselves with the power of knowledge about the activities of their government.

Before I go into the details of our study and our recommendations, I want to clarify that OMB Watch conducted this second study on the implementation of the 1996 E-FOIA Amendments from our commitment to the public’s right to know, its right to information needed to make informed personal, social and political decisions, and our belief that the government has an affirmative responsibility to make information available and readily accessible to all the public. It was not, and is not, our intent to “bash” federal government agencies; it is our intent to hold them accountable to statutory mandates for meaningful public access to the information created, collected, and or maintained by or for those agencies.

### The OMB Watch Study

Over a three month period between September 1, 1999 and November 31, 1999, OMB Watch examined 144 unique federal government EFOIA web sites at 64 agencies. Some EFOIA web sites represented entire agencies, while others reflected an agency division or department. The agencies, departments, bureaus and commissions for this study were selected from the Department of Justice's FOIA and "Other Agency FOIA" web sites. In each case, we searched for the existence and completeness of four major categories of information required under the 1996 EFOIA amendments:

- ▶ Records including *Federal Register* notices, opinions from agency adjudications, and interpretations adopted by the agency;
- ▶ An index of all major information systems;
- ▶ A FOIA guide detailing how to request records from the agency;
- ▶ An electronic reading room that contains the information listed above as well as repeatedly requested records created after November 1, 1996.

In all cases, we approached the web sites from the perspective of an average member of the public searching for information. In this way, we were able to separate those agencies that took the time to provide meaningful public access to their information from those that simply implemented the amendments to fulfill their obligation as quickly as possible.

Our research focused exclusively on whether agencies have made the materials required by EFOIA available on the Internet; it did not examine if agencies have made these materials available in other formats or media.

We did not consider pointing to a GILS browser compliant with the requirement for indexing information systems or describing records locators. Nor did we consider them in compliance if, for instance, their FOIA guide points to the Code of Federal Regulations (CFR) or to the agency rules in the Federal Register. The intent of the Act is clearly to make access to this information easy on the public; requiring them to read the CFR is not responsive to that intent. Although OMB has indicated that these practices are acceptable, we did not consider agencies that adopted them to be in compliance with the intent of the law.

Many agencies that did not meet all of the requirements did have some positive elements of electronic dissemination, and others that fulfilled most of the requirements did so in only the most minimal manner, so the categories are useful only for providing an overall picture of compliance.

Unlike our first report on the implementation of the E-FOIA amendments, this study did not note (for reporting purposes) notable practices — good or bad — on individual agency or component web sites.

### Findings

Overall, this study found that:

- ▶ **In a majority of agencies, FOIA information is easier to find online than in early 1998** when we did our first study. It is often visible on the agency's main home page. However, **more than one-third of the web sites do not have links from the agency's home page.** The amendments did not *require* that the information be easily found, but we consider such a link key to useful public access.
- ▶ **More specifically, of the 64 agencies examined, 7 (11%) have no useful E-FOIA presence, 57 (89%) have varying degrees of compliance with the requirements, and, as of November 24 1999, no agency had complied fully with the amendments.**
- ▶ **It is still the case that agencies that have decentralized the responsibility for E-FOIA to satellite offices in different units within the agency often have an uneven dissemination of**

information due to a “hands-off” approach. While some departments or bureaus of an agency have excellent E-FOIA guides, indexes and reading rooms, others have little or no information disseminated online.

- ▶ **It is still the case that agencies are moving at a great speed to provide information online. Unfortunately, this information — in particular, information about agency records and decision-making — still is often unorganized, unrelated, and difficult to find.** In many cases, agencies may have complied with E-FOIA requirements, but we were unable to verify this compliance because no clear markers for this information existed on these web sites.
- ▶ **It is still the case that the Office of Management and Budget (OMB), assigned the responsibility of providing guidance on the implementation of E-FOIA, has (until the proposed revisions to CircularA-130, which I will discuss shortly) done nothing since 1997 to aid agencies in fulfilling their requirements.** Agencies, therefore, have looked to the Department of Justice (DOJ) for detailed explanations of the amendments as well as guidance and examples of implementation and reporting. While the DOJ information can be useful, its availability does not relieve OMB of its responsibility to ensure that agencies have adequate information to implement the law.
- ▶ **The guidance that OMB has provided has led some agencies to be out of compliance with the law.** April 7, 1997 guidance from OMB on the index requirements of the amendments recommended “establishing a Government Information Locator Service (GILS) presence.” Twelve agencies or components (5% of 144 examined) have continued (or, worse, started) to take this advice, regardless of whether their GILS “presence” met the requirements of the Amendments or not.
- ▶ **The Department of Justice has done little other than issuing guides and examples to meet its obligation to encourage agency compliance with the law.** It has provided training and information on how to meet the requirements of the amendments, but this is clearly not sufficient given the overall inadequacy of compliance government-wide.

**This study indicates that overall, agency compliance with the EFOIA amendments continues to be overwhelmingly inadequate.** The four overriding reasons for this conclusion are:

- Congress still has not provided the necessary funding to carry out the implementation of the amendments.
- OMB still has not provided adequate guidance or assistance to agencies during the implementation process.
- The encouragement to compliance, which the legislators intended to be vested in the Department of Justice, has been insufficient.
- Agencies have yet to make public access to government information, especially for accountability, a priority.

**When we released the report, we had the four major Recommendations:**

1. OMB must provide better guidance and support to agencies by:

- ▶ articulating exactly what information (as indicated in the amendments and the legislative history) must be included on agency web sites to be in compliance, and creating templates for consistent language and format government-wide;
- ▶ establishing a clear definition of what constitutes a repeatedly requested record; and most importantly,
- ▶ explaining how E-FOIA fits into the larger framework of federal information policy. OMB should follow what it has done in the area of privacy on agency web sites and provide leadership in the area of access.

**2. Agencies' information must be better organized to make locating records online a user-friendly experience.** Special emphasis should be placed on providing consistent, easily-identified headings for E-FOIA requirements, such as the Index of Major Information Systems, E-FOIA Handbook, and FOIA-Released Repeatedly Requested Records.

**3. Enforcement mechanisms for agency non-compliance must be established immediately.** Currently, agencies that do not meet the requirements outlined in the E-FOIA amendments are neither identified nor penalized for non-compliance.

**4. Congress must provide regular oversight.** Since the passage, there has been only one hearing on the implementation. Congressional oversight must also include attention to reporting by the Department of Justice on their efforts to encourage full agency compliance.

In regard to *Recommendation 1*, we commend OMB for finally recognizing, in its proposed April 2000 revisions to Circular A-130, the significant problems with its Memorandum M-98-09, which ostensibly provided agencies guidance on complying with the 1996 E-FOIA Amendments to the Freedom of Information Act. As we have noted, in our reports and elsewhere, this Memorandum encouraged agencies to be out of compliance with the 1996 Amendments by telling them that a "GILS presence" was sufficient to comply. Because, as we have reported, OMB has been dilatory in its treatment of the GILS mandate in the 1995 Paperwork Reduction Act, most agencies have no—or no useful—GILS presence. Thus, following OMB's recommendation on this matter put them out of compliance with the statute. However, we note that the proposed revision to Circular A-130 presumes that OMB has fulfilled *its* GILS mandate, a presumption far from accurate.

While we commend OMB for recognizing the problems with its previous Memorandum, we would note that there are some problems with OMB's proposed revision to Circular A-130 outlining agency compliance with the requirements of the E-FOIA Amendments—that "an agency must place its index and description of major information systems and records locators systems in its reference material or guide." The proposed revision states that this index and description would include "any...major information and record locator systems the agency has identified." This language—especially taken together with other revisions—will encourage agencies to continue to fail to comply with the requirements of the PRA, the E-FOIA Amendments, and the Clinger-Cohen Act; if any agency has not bothered to "identify" an information or record locator system, it might understand this to mean that it does not have to include them. We have shared this concern, and others about the proposed revision, with OMB.

We also had five lesser recommendations:

**1. Agencies with decentralized responsibility for E-FOIA implementation must provide a**

**procedure for the implementation of E-FOIA** . While we are mindful of the organizational need to decentralize responsibility for E-FOIA, this approach adds additional risk to comprehensive implementation. If “parent” agencies continue to take a “hands off” approach to E-FOIA obligations, the public will continue to receive uneven access to information across the agencies.

**2. Agencies must make categories of E-FOIA compliance — handbooks, indexes, repeatedly requested records — easily identifiable online and linked from one spot.** While the findings of this study are critical of E-FOIA compliance overall, information to fulfill E-FOIA requirements may very well be available online, but could not be located because it was not clearly identified.

**3. All agencies should follow the lead of those that provide forms for submitting FOIA requests online.**

**4. All agencies should provide access to their information in text-only as well as graphics versions for users without access to high-tech equipment.**

**5. The goal of E-FOIA should be to make so much information publicly available online that Freedom of Information Act requests become an avenue of last resort.**

## STUDY RESULTS

### Complying with E-FOIA Requirements – Letter and Spirit

Of the 144 agency, department and bureau web sites examined, as of November 24, 1999, no agency fulfilled all of the 1996 amendment requirements and 7 have no useful electronic FOIA presence.<sup>1</sup> The break-out of the agencies is available in Table 1.

#### Finding E-FOIA Information Online

A first concern for a member of the public looking for agency information that might be of use in her research is how to identify what information an agency has and how it goes about making that information available. In terms of E-FOIA, this means that the citizen must first know or be able to learn that FOIA exists.

Ninety (of 144) web sites have a hot button on the agency/component home page that leads directly to the FOIA/E-FOIA page.

#### No E-FOIA Information Available

All of the sites we examined had *some* reference to FOIA (which is to be expected as they derived from the DOJ site). What is startling to realize is the number of departmental components and agencies that are *not* listed on the Department of Justice site. A cursory examination of some department and agency sites indicated that there is minimal E-FOIA information at some non-listed web sites (such as the International Trade Administration and the Patent and Trademark Office in the Department of Commerce) but examining all sites not listed at DOJ was beyond the scope of this report.

#### OMB Guidance

OMB's suggestions in its April 7, 1997 Memorandum continue to fall far short of what is needed to fulfill

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<sup>1</sup> A listing of all agency E-FOIA web sites examined for this study can be found in Appendix A of the Report.

E-FOIA. OMB seems to have overlooked the intent of the E-FOIA legislation — to provide easier access to government information electronically. Providing an address or phone number for more information, as OMB suggests, only lengthens the search process for citizens. Requiring the public to look up the agency's regulations — even if an electronic link is provided — is also not responsive to the intent of the legislation. Nothing less than providing the actual “how to” guide online at one agency site fulfills the intent of the amendments.

OMB continues to disappoint in matters of access. From its continued lack of enforcement of — or apparent interest in — the Government Information Locator Service to its (until the proposed revisions to Circular A-130) inadequate and, for some agencies misleading, E-FOIA advice to agencies, OMB's actions reflect a pattern of apathy toward public access to government information.

#### **Decentralized Responsibility**

Four large agencies examined for this study — the Departments of Justice, Treasury, Interior, and the Environmental Protection Agency — have decentralized E-FOIA obligations to smaller departments, bureaus or regions within their larger organizations. Because meeting the E-FOIA requirements is a difficult and time consuming task, decentralization of this responsibility seems a useful solution. When some departments or bureaus ignore their decentralized responsibility, however, then this plan leads to uneven compliance across these agencies. While some departments within agencies have taken the responsibility quite seriously and complied fully, others have met only some requirements, and still others have entirely ignored their obligations. Because of this uneven information dissemination, in most cases of decentralization, it seems as if the parent agency has taken a hands-off approach, leaving each department or bureau to fend for itself.

In the case of the Department of Justice (DOJ), each department or bureau has an individual electronic reading room established, but did not necessarily meet all E-FOIA amendment requirements.<sup>2</sup> The Department of Transportation (DOT), like the DOJ, has decentralized its E-FOIA responsibility; in the process, uneven access to information resources online has been permitted. Like DOJ, DOT has centralized some of its E-FOIA information, like the guide and index, but has left other requirements to individual departments that have, in many cases, not fulfilled their obligations.

### **What E-FOIA Information Is Available?**

#### **FOIA Guides to Requesting Information**

The E-FOIA amendments require each agency to create a guide for the public detailing how to request information. While many agencies have provided an online guide, the best agency E-FOIA web sites also explain the rights guaranteed to the public through the FOIA and its amendments. They clearly articulate not only how to go about requesting information, but also what information can and cannot be accessed under the FOIA and E-FOIA (as required in the amendments). This kind of clear language is necessary in providing meaningful public access to federal government information. Many FOIA web sites, however, contain legal or bureaucratic language to describe their guides, index and information holdings online. Seven of the sites examined appear to have followed OMB guidance in this area, to ill effect for the public.

#### **Indexes**

The 1996 E-FOIA amendments require that agencies provide an index of all major information systems. Thirteen of the sites have failed to meet this requirement because they followed OMB's guidance and used their GILS as their E-FOIA index or description of their records locators. As discussed earlier, the GILS

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<sup>2</sup>U.S. Department of Justice: [http://www.usdoj.gov/04foia/04\\_4.html](http://www.usdoj.gov/04foia/04_4.html)

describes “automated information systems” but does not provide “an index of all major information systems of the agency” nor “a description of major information and record locator systems maintained by the agency” as required by E-FOIA. As a result many agencies have fallen short in this area.

It is also often difficult to determine what online indexes are describing. No agency defines what is meant by “major information system,” so the public has no way of knowing what is not indexed — and why.

**Electronic Reading Rooms and “Repeatedly Requested” Records**

Under E-FOIA, online Electronic Reading Rooms should include final opinions from agency adjudications, agency policy statements and interpretations adopted by the agency that are not published in the *Federal Register*, a guide on how to request information, and an index of all major information systems and a description of these and of the agency’s records locators. While many electronic reading rooms exist, none contain all of this information. Most contain a guide but very few contain an index of information systems and even fewer a description of the agency’s records locators systems. Fewer than 30% of the sites examined contained FOIA-released repeatedly requested documents in addition to these other items.

Many agency web sites with an electronic reading room, moreover, have guides or indexes *outside* the reading room, and other “documents” within it. It is, therefore, often difficult to understand the connection between the reading room and the E-FOIA requirements explained in the guide. Quite often, the process by which information is selected for posting remains a mystery and this information’s relationship to the E-FOIA cannot be identified. Are these documents repeatedly requested by members of the public? Are they documents frequently requested by the public—but not through FOIA? The latter appears to be the case frequently.

Mr. HORN. Mr. Ian Marquand is the Freedom of Information Chair for the Society of Professional Journalists. We are glad to have you here.

Mr. MARQUAND. Thank you, Mr. Chairman. And, just for the record, it is Ian Marquand.

I would like to thank my professional colleagues at the Reporters Committee and OMB Watch for the fine work they do. The Society of Professional Journalists is largely a volunteer organization and I am a volunteer committee Chair.

I do want to note, just in deference to the committee, that not only is the late Representative Moss in our FOIA Hall of Fame and not only is Lucy Dalglish in our FOIA Hall of Fame, but also Samuel Archibald, who was the chief of staff for Representative Moss, and I believe Representative Moss was your predecessor. We also have Senators Leahy and Brown in our Hall of Fame that sponsored the EFOIA legislation, and we thank you for your help in getting that passed.

FOIA is for all Americans, and it is pretty apparent that Americans use the law. In 1998, SPJ members in California conducted what I believe is the only public opinion poll on access to government records, and, even though it was a poll on State records, not Federal records, we found it was an overwhelming number of those surveyed favored increased and as much access to government records as possible. We have no reason to doubt they would feel the same way about Federal records.

However, a recent "Washington Monthly" article by Michael Doyle noted that journalists account for a very small percentage of FOIA requests, and we wonder why that is. I think the No. 1 reason, as Lucy noted, is time. It takes a long time to get requests fulfilled.

A television managing editor wrote me recently to say, "If I have to file a FOIA request, I eliminate any hope of that information for New York stories I will file in the near future. Anything that would cut down the required response time would help."

In short, it appears that when reporters need information from Federal agencies, they may be using personal contacts rather than FOIA.

Now, we do appreciate the expedited request portion of EFOIA. Some agencies do appear responsive to those expedited requests. For example, "El Nuevo Dia," Puerto Rico's largest-circulation daily newspaper, was able to obtain expedited processing for many of the records it requested about the Navy's live ammunition practice on the Island of Vieques. Expedited requests may enable a news organization with urgent FOIA requests to obtain processing ahead of the backlog; however, the rate of processing still takes far longer than the timeframe anticipated by Congress.

In "El Nuevo Dia's" case, many of the records requests granted expedited processing still were not processed until 3 months to over a year later.

The Internet should make time delays less of an issue and put information and documents into the hands of anyone with access to a computer, but it is clear that implementation of EFOIA is an unfinished story.

My National Society president, Kyle Neideprun, sent me this: "The Society appreciates the potential of EFOIA, but realizes now, through the experience of working journalists, that the reach of the law is limited."

Many agencies, in an attempt to appear in compliance, are simply posting anything and everything an agency produces, without any particular logic. The information being posted also is not reliable, and in some instances it is inaccurate.

A case in point, the U.S. Environmental Protection Agency posts scores of data bases. Air quality data is posted. In at least one instance, the data indicated that Indiana had worse air quality readings than southern California. A reporter calling up the data would have drawn such a conclusion, but it would have been incorrect. A check going back several calls to find the employee responsible for posting the data would indicate that the data isn't posted with qualifiers—the footnotes to explain why such a comparison would have been flawed. EPA officials told us it is not their responsibility to make sure the data is read correctly, only that it appears.

In 1998, SPJ member Jennifer LaFloor, then working for the "San Jose Mercury News," wrote an article for our national magazine, "Quill," and outlined many of the same concerns that Ms. McDermott's organization has followed up with this year, namely that agencies were not implementing EFOIA completely. We have a copy of that article for your review.

I did make an electronic query of journalists in preparation for today's hearing. I also got a complaint about PDF file formats from a journalist in Idaho. Says this journalist, "PDF files make it uniquely difficult to analyze information in data bases or spreadsheets." He pleads that PDF files be made available in text format.

I did learn from a reporter in my home State of Montana that persistence with agencies can pay off. When this reporter was told by Yellowstone Park and the U.S. Forest Service that his request for data bases could not be fulfilled, he kept asking. He even went to the software provider in one instance. Both entities eventually provided the information in usable electronic formats, as the law requires.

Now, the very access to information EFOIA makes available is also creating fear in some sectors of Government. Now, SPJ has helped sound the alarm on Federal proposals which we believe would erode FOIA and impair the public's right to know. I would like to submit a number of our FOI alerts from the past year, including alerts on medical privacy rules at HHS, worst-case scenario regulations at EPA, and reports on spending by the intelligence community.

Mr. HORN. Without objection, they will be put at this point in the record.

Mr. MARQUAND. And, finally, I would be remiss—and I thank you, Mr. Chairman, for bringing up H.R. 4163, the Taxpayer Bill of Rights, passed in the House, now awaiting action in the Senate, a bill that, for all of its good intentions, appears to us to make the Internal Revenue Service exempt from the Federal FOIA.

In short, Mr. Chairman, Congress has set a high standard. On behalf of my organization, I urge you to use your authority to ensure that executive agencies meet that high standard.

And I also would be remiss to say we need the Federal Government to set a good example for the States [sic], because we are finding many, many problems in the States that a law such as FOIA would probably take care of.

My full written testimony is at your disposal.

Thank you very much.

Mr. HORN. A wonderfully written statement, and we appreciate that input, and especially from a practicing journalist.

[The prepared statement of Mr. Marquand follows:]

Complete Written Testimony of:  
IAN MARQUAND  
National Freedom of Information Committee Chair,  
The Society of Professional Journalists

Before the House Subcommittee on Government Management, Information and Technology  
June 14, 2000  
Washington, D.C.

Mister Chairman, my name is Ian Marquand. I work as the Special Projects Coordinator for the Montana Television Network in Missoula, Montana.

I also serve as the volunteer chair of the national Freedom of Information Committee of the Society of Professional Journalists and am the president and Project Sunshine officer for the Montana Professional Chapter of SPJ.

Our Society was formed in 1909 and is America's largest and most broad-based journalism organization, with a current membership of more than nine thousand (9,376 as of June 8) from Maine to the Northern Marianas.

SPJ's mission is to promote the free flow of information vital to a well-informed citizenry; to inspire and educate the next generation of journalists; and to protect First Amendment guarantees of freedom of speech and press.

#### THE IMPORTANCE OF FOIA & E-FOIA.

I and the Society thank you for the opportunity to speak with the subcommittee today about the Electronic Freedom of Information Act.

SPJ helped produce the first public opinion poll on Americans' view of Freedom of Information laws in 1998 in California.

That poll showed that large majorities of those surveyed favored greater access to government records and information used in the course of government business.

And seven out of ten supported a state constitutional amendment guaranteeing broad access.

Even though this poll dealt with state laws, records and meetings, we have no doubt that the public feels as strongly about access to federal government information as do we in journalism.

That brings us to the federal Freedom of Information Act. Call us charter members of the FOIA Fan Club.

In the 1950's, Sigma Delta Chi, which became SPJ, was instrumental in pointing out the problem of public access to in the federal government, notably when Congressional and executive hearings were closed to the public.

Our organization has not always found sympathetic ears in Congress. Fortunately, a courageous few in these halls have led the way toward more government openness.

When SPJ established its FOIA Hall of Fame a few years ago, four of the hall's charter members were Congressional figures who played leading roles in the establishment of the Freedom of Information Act and its subsequent expansion.

Mister Chairman, one of them is your predecessor, the late Representative John E. Moss of California, the first chairman of the House Subcommittee on Government Information and the legislative father of the original 1966 Act.

We owe a debt to Representative Moss and his chief of staff, a veteran journalist named Samuel J. Archibald, who help draft the FOIA legislation

We also have honored U.S. Senators Patrick Leahy of Vermont and Hank Brown of Colorado for their sponsorship of the Electronic Freedom of Information Act legislation which passed in 1996.

Mister Chairman, we give credit where credit is due.

#### MEDIA USE, PUBLIC USE.

While I appear before you representing the working journalists, students and educators in our ranks, I must note that we as journalists do not claim any special privilege when it comes to using FOIA, whether in traditional or electronic form.

FOIA is for all Americans and it is apparent that Americans actively use the law to seek information for a variety of purposes. In fact, it is interesting to note how seldom journalists are using the act to access federal information.

A recent Washington Monthly article by Michael Doyle entitled "Missed Information: The Reporting Tool That Reporters Don't Use" noted that FOIA requests from journalists account for a very small percentage of total requests at many federal agencies.

I recently did my own very small survey of annual FOIA reports for four agencies in which we in Montana have a significant interest. They are the Department of Agriculture, the Department of Transportation, the Environmental Protection Agency, and the National Indian Gaming Commission.

Of the four reports, only the EPA's offers a breakdown of requests by group. And out of almost 19,000 initial requests made to the EPA in fiscal 1999, only 235 came from the media.

By contrast, the most frequent users were, in order, attorneys, environmental consultants, private industry and environmental auditors. In fact, ordinary private citizens were four times as likely to make a FOIA request to EPA as were members of the media.

This lack of use by reporters is a source of concern for journalism advocates and organizations like mine. But should this be an area of concern for your subcommittee?

I say no, because, as I noted before, FOIA is for all Americans. And a variety of Americans are using it to access information. Their reasons are irrelevant. The information is public and should be made available to any citizen for any reason.

The question remains, however, why is the media unwilling or reluctant to use FOIA to request information? Doyle blames the time factor. It takes a long time for a FOIA request to be processed.

In preparation for today's hearing, I posed an electronic query to journalists around the country, asking for their experiences with FOIA in general and E-FOIA in particular.

One respondent who works as managing editor of a television station described FOIA as an effective stonewalling tool for government agencies.

"In truth," he says, "if I have to file a FOIA request, I eliminate any hope of that information for any stories I'll file in the near future. I'll go to extraordinary lengths to find other ways to get the information before I'll file, because I just don't find it a time efficient way to operate. Anything that would cut down the required response time would help."

Here's what I found about response times in my small survey of annual reports.

The USDA appeared to do its job pretty efficiently in 1999, processing almost all of the 80 thousand initial requests it received, and granting more than 75 thousand of them. However, the backlog of requests pending grew in 1999 from 1,332 to 1,879.

Simple requests at Agriculture were handled in a median of eleven days, while complex requests were handled in a median of 20 days.

The Department of Transportation, meanwhile, took far longer to process requests. DOT took 168 days at median--almost six months--to handle simple requests and 45 days for complex requests. Its backlog of pending requests grew from 2,733 to 3,414.

At the EPA, the median response times were 14 days for "basic" requests and 25 for so-called "unusual requests."

While at the Indian Gaming Commission, it took a median of 40 days to process a grand total of 36 requests during FY99. (At a cost of more than two thousand dollars per request.)

Journalists work in an industry that has become increasingly time-sensitive. As a result, long waits for information become problematic. Doyle suggests that reporters seeking information from federal agencies may be more likely to use personal contacts within agencies in order to avoid the time-consuming formal request process.

#### E-FOIA: UNFINISHED BUSINESS.

This brings me to the heart of today's discussion...the Electronic FOIA amendments of 1996. We all recognize the advantages of the Internet and computer access to information. In preparing this report, I was able to read the annual FOIA reports for federal agencies. I also can find a great deal of information through government web sites.

Within the EPA's website, I can read background summaries and learn the latest actions on a Superfund toxic waste site located a few miles from my city.

Inside the Department of Transportation, I can see Federal Railroad Administration data on accidents along Montana's railroads. I can access accident investigations of the National Transportation Safety Board.

In the Federal Election Commission's site, I can see who has contributed to the campaign of Montana's junior U.S. Senator, Conrad Burns. I also can see the campaign contributions of Montana's wealthiest industrialist. (As an aside, the FEC provides separate, customized, search guides to its site for the media and the general public, as well as one for candidates. I find this an interesting and positive customer-oriented approach.)

Now, to the question of how E-FOIA is working after four years on the books.

I must note at this point that my organization is largely a volunteer affair. Our professional staff is paid to run the organization, not conduct sophisticated journalism research. But our members have paid attention to the way agencies have implemented E-FOIA.

In 1998, SPJ member Jennifer LaFleur, then working for the San Jose Mercury News, contributed an article for the Society's national magazine, Quill, that outlined concerns that many agencies were not implementing E-FOIA completely. I have enclosed a copy of that article for your review.

SPJ also follows and endorses the fine work done by organizations like the Reporters Committee and OMB Watch.

The January report by OMB Watch, "A People Armed?" shows clearly that there still is much work to be done by federal agencies to implement E-FOIA, and much more emphasis placed on E-FOIA requirements by the Office of Management and Budget and the Department of Justice.

Since OMB Watch is represented on today's panel, I will not re-state its report. I echo its conclusions, however.

**E-FOIA IN THE REAL WORLD: JOURNALISTS' EXPERIENCES.**

In preparation for today's hearing, I made an electronic query of journalists around the country, asking for their experience with E-FOIA. (The Reporters Committee for Freedom of the Press made a similar query and some of the responses I cite here also were made to the Committee's questions.)

Federal websites that drew praise from journalists include the Census Bureau, the Centers for Disease Control, the NTSB, the FAA and the Nuclear Regulatory Commission.

Sites that received bad reviews include the Bureau of Labor Statistics (especially when it comes to local wage and employment data,) the FBI and the State Department, which Michael Doyle called a "black hole" in his Washington Monthly story.

It's worth noting that State's most recent annual report states a median response time of 48 days for simple requests, 308 days for complex requests and 543 days for pending requests (of which there are more than five thousand.) Even the 13 expedited requests handled last year by State took a median of 168 days to process.

From here in Washington, a magazine writer complains that the State Department, the FBI and the Secret Service are very slow in responses. This reporter tells of lost or bungled requests at State, and waits of one to two years at the FBI and State. At the same time, this journalist praises the military for excellent responses.

In Pennsylvania, a reporter sought an FBI file on an individual with that individual's blessing. However, the reporter complained that the FBI required unreasonably detailed identification of the individual before releasing the information, thus delaying the request until it was useless.

In Florida, a reporter offered praise for the Justice Department's Office of Justice Programs. This reporter notes that her FOIA request took 20 days to process, even though there was no waiting list for FOIA requests. However, she praised the office's customer service for confirming the receipt of her request electronically and by phone.

From Idaho came a complaint about government documents being available in ".pdf" file format. That format, says this journalist, "makes it uniquely difficult to access information to then analyze in databases or spreadsheets. Basically, I believe that any piece of information put on the Internet as a table in .pdf format should be put in text format as well."

From my own state of Montana, I learned that journalistic persistence can pay off. A reporter asked for specific databases from Yellowstone National Park and the U-S Forest Service Northern Region (Region 1) Headquarters in Missoula.

Both agencies responded by saying they would not--or could not-- comply. But after more effort by the reporter, both entities ended up providing the information in usable electronic formats.

I should note that journalists are routinely advised by their peers to insist that government records be provided in a format that is convenient to the reporter. As I read the E-FOIA amendments, Congress intended that also.

From the offices of Congressional Quarterly came a request that more Congressional information be made available. Specifically, lobbying registrations and reports and Congressional office expense accounts.

SPJ itself has been active in commenting on federal proposals which we believe would impair the public's right to know.

I would like to submit a number of our FOI Alerts from the past year, including alerts on medical privacy rules at HHS, Worst Case Scenario regulations at EPA, and reports on spending by the intelligence community.

And, finally, I would be remiss if I did not mention the concerns of SPJ and a publication called "TaxNotes" over HR 4163, The Taxpayers Bill of Rights 2000, passed in the House and now awaiting action in the Senate.

A bill that, for all of its good intentions, would effectively make the Internal Revenue Service exempt from the federal FOIA. That, ladies and gentlemen, would be a startling precedent and one my organization would like to avoid. SPJ has issued a statement and an "FOI Alert" on the bill.

**FOIA AS A ROLE MODEL FOR THE STATES.**

Mister chairman, we look to the federal government for leadership in many areas. Citizen access to government information is one of them. In fact, it is central to our form of democratic government.

In this area, the Congress has set a high standard to insure that citizens can observe their government's actions and hold their government accountable. Whether citizens approve of government actions is irrelevant. They must be able to see what their government is doing.

In this area, SPJ and other organizations have seen troubling trends in recent years in the 50 states. In state after state, audits of public records conducted by journalists, students and citizens have shown that local governments frequently deny access to records which clearly are public documents.

Access to facilities and inmates in publicly-funded prisons has been curtailed in recent years in some states. I learned recently that in Wyoming, corrections officials will not even confirm or deny the existence of records regarding inmates in an institution, unless the person making the request falls into a select class of individuals.

Only in a handful of states are there public agencies or employees dedicated to keeping public records public. In Indiana, a public access counselor's position was created directly as a result of a public records audit. In Virginia, a similar position has been created, assisted by a records audit in that state.

In other states, journalists represent the vanguard of public access advocates. We at SPJ continue to hear of attacks on the public's right to know in the various states. Media and public interest advocates often go to court to force open meetings and records.

In my state alone, state agencies have had to be forced by judges to open public board meetings and release records dealing with, among other things, a prison riot. Efforts by journalists and their attorneys have led to changes in state laws and policies that provide more openness and transparency in government.

Mister Chairman, Congress has set a high standard for openness and public access. On behalf of my organization, I ask you to use your authority to insure that executive agencies meet that high standard and set a good example for the states.

Thank you.



SOCIETY OF PROFESSIONAL JOURNALISTS



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Oral Testimony of: IAN MARQUAND National Freedom of Information Committee Chair, The Society of Professional Journalists

Before the House Subcommittee on Government Management, Information and Technology June 14, 2000 Washington, D.C.

Mister Chairman, my name is Ian Marquand. I serve as the volunteer chair of the national Freedom of Information Committee of the Society of Professional Journalists...America's largest and most broad-based journalism organization.

I thank you for the opportunity to speak with the subcommittee today about the Electronic Freedom of Information Act.

Mister chairman, we look to the federal government for leadership in many areas. Citizen access to government information is one of them.

Through the federal Freedom of Information Act, the Congress has set a high standard to insure that citizens can observe their government's actions and hold their government accountable.

Unfortunately, in the 50 states, the standards are not always so high. In state after state, audits of public records conducted by journalists have shown that local governments frequently deny access to records which clearly are public documents.

We often must go to court to force open meetings and records. And we've seen efforts to shut off public access to certain records in the name of personal or corporate privacy.

I learned recently that in Wyoming, corrections officials will not even confirm or deny the existence of records regarding inmates in a state prison.

I must note that journalists do not claim any special privilege when it comes to using FOIA, whether in traditional or electronic form.

FOIA is for all Americans...and it's apparent that Americans actively use the law.

In 1998, SPJ members in California conducted a poll on Freedom of Information laws. That poll showed that large majorities favored greater access to government records and information.

Even though this poll dealt with state law and state records and meetings, we have no doubt that the public also wants access to federal information as much as journalists do.

But while journalists support FOIA in principle, we are not the leading users of the act. A recent Washington Monthly article by Michael Doyle noted that journalists account for a very small per centage of FOIA requests.

Why are reporters unwilling or reluctant to use FOIA? One important reason is time.

A television managing editor wrote me recently that, quote, "if I have to file a FOIA request, I eliminate any hope of that information for any stories I'll file in the near future. Anything that would cut down the required response time would help."

In short, it appears that when reporters need information from federal agencies, they may be using personal contacts rather than FOIA.

The Internet should make time delays less of an issue...and put information and documents in the hands of anyone with access to a computer. I know I can find a great deal of information through government web sites.

For instance, I can visit the E-P-A and obtain information on a Superfund site near my city. I can check safety records of Montana railroads in the Department of Transportation. And I can check campaign contribution records through the Federal Election Commission.

That said, it's clear that implementation of E-FOIA is an unfinished story.

In 1998, SPJ member Jennifer LaFleur, then working for the San Jose Mercury News, contributed an article for the Society's national magazine, Quill, that outlined concerns that many agencies were not implementing E-FOIA completely. I have enclosed a copy of that article for your review.

We also endorse the fine work done by organizations like the Reporters Committee and OMB Watch. The January report by OMB Watch, "A People Armed-question mark" shows clearly that there is much work to be done by federal agencies...and much more emphasis placed on E-FOIA requirements by the Office of Management and Budget and the Department of Justice.

I will not re-state the OMB Watch report...but I echo its conclusions.

In preparation for today's hearing, I did make an electronic query of journalists around the country, asking for their experience with E-FOIA.

Federal websites that drew praise from journalists include the Census Bureau, the Centers for Disease Control, the FAA, the National Transportation Safety Board and the Nuclear Regulatory Commission.

Sites that received bad reviews include the Bureau of Labor Statistics, the FBI, and the State Department...which Michael Doyle called a "black hole" in his Washington Monthly story.

From Idaho came a complaint about file formats.

Specifically, government information presented in pdf file format.

That format, says this journalist, "makes it uniquely difficult to analyze information in databases or spreadsheets.

His plea is to make all pdf files available in text format as well.

And from my own state of Montana, I learned that persistence can pay off.

When a reporter was told by Yellowstone Park and the U-S Forest Service that his requests for databases could not be fulfilled...he kept asking.

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SPJ itself has been active in commenting on federal proposals which we believe would impair the public's right to know.

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A bill that, for all of its good intentions, would effectively make the Internal Revenue Service exempt from the federal FOIA.

That, ladies and gentlemen, would be a startling precedent and one my organization would like to avoid.

In summary, let me repeat: Congress has set a high standard for openness and public access.

On behalf of my organization, I ask you to use your authority to insure that executive agencies meet that high standard and set a good example for the states.

Mister Chairman, I would like to submit my full written testimony for the record.

Thank you.



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IAN MARQUAND  
National Freedom of Information Committee Chair,  
The Society of Professional Journalists

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**THE IMPORTANCE OF FOIA & E-FOIA.**

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access to government records and information used in the course of government  
business.

And seven out of ten supported a state constitutional amendment  
guaranteeing broad access.

Even though this poll dealt with state laws, records and meetings, we have  
no doubt that the public feels as strongly about access to federal government  
information as do we in journalism.

That brings us to the federal Freedom of Information Act. Call us charter  
members of the FOIA Fan Club.

In the 1950's, Sigma Delta Chi, which became SPJ, was instrumental in  
pointing out the problem of public access to in the federal government, notably  
when Congressional and executive hearings were closed to the public.

Our organization has not always found sympathetic ears in Congress.  
Fortunately, a courageous few in these halls have led the way toward more  
government openness.

When SPJ established its FOIA Hall of Fame a few years ago, four of the hall's charter members were Congressional figures who played leading roles in the establishment of the Freedom of Information Act and its subsequent expansion.

Mister Chairman, one of them is your predecessor, the late Representative John E. Moss of California, the first chairman of the House Subcommittee on Government Information and the legislative father of the original 1966 Act.

We owe a debt to Representative Moss and his chief of staff, a veteran journalist named Samuel J. Archibald, who help draft the FOIA legislation

We also have honored U.S. Senators Patrick Leahy of Vermont and Hank Brown of Colorado for their sponsorship of the Electronic Freedom of Information Act legislation which passed in 1996.

Mister Chairman, we give credit where credit is due.

#### MEDIA USE, PUBLIC USE.

While I appear before you representing the working journalists, students and educators in our ranks, I must note that we as journalists do not claim any special privilege when it comes to using FOIA, whether in traditional or electronic form.

FOIA is for all Americans and it is apparent that Americans actively use the law to seek information for a variety of purposes. In fact, it is interesting to note how seldom journalists are using the act to access federal information.

A recent Washington Monthly article by Michael Doyle entitled "Missed Information: The Reporting Tool That Reporters Don't Use" noted that FOIA requests from journalists account for a very small per centage of total requests at many federal agencies.

I recently did my own very small survey of annual FOIA reports for four agencies in which we in Montana have a significant interest. They are the Department of Agriculture, the Department of Transportation, the Environmental Protection Agency, and the National Indian Gaming Commission.

Of the four reports, only the EPA's offers a breakdown of requests by group. And out of almost 19,000 initial requests made to the EPA in fiscal 1999, only 235 came from the media.

By contrast, the most frequent users were, in order, attorneys, environmental consultants, private industry and environmental auditors. In fact, ordinary private citizens were four times as likely to make a FOIA request to EPA as were members of the media.

This lack of use by reporters is a source of concern for journalism advocates and organizations like mine. But should this be an area of concern for your subcommittee?

I say no, because, as I noted before, FOIA is for all Americans. And a variety of Americans are using it to access information. Their reasons are irrelevant. The information is public and should be made available to any citizen for any reason.

The question remains, however, why is the media unwilling or reluctant to use FOIA to request information? Doyle blames the time factor. It takes a long time for a FOIA request to be processed.

In preparation for today's hearing, I posed an electronic query to journalists around the country, asking for their experiences with FOIA in general and E-FOIA in particular.

One respondent who works as managing editor of a television station described FOIA as an effective stonewalling tool for government agencies.

"In truth," he says, "if I have to file a FOIA request, I eliminate any hope of that information for any stories I'll file in the near future. I'll go to extraordinary lengths to find other ways to get the information before I'll file, because I just don't find it a time efficient way to operate. Anything that would cut down the required response time would help."

Here's what I found about response times in my small survey of annual reports.

The USDA appeared to do its job pretty efficiently in 1999, processing almost all of the 80 thousand initial requests it received, and granting more than 75 thousand of them. However, the backlog of requests pending grew in 1999 from 1,332 to 1,879.

Simple requests at Agriculture were handled in a median of eleven days, while complex requests were handled in a median of 20 days.

The Department of Transportation, meanwhile, took far longer to process requests. DOT took 168 days at median--almost six months--to handle simple requests and 45 days for complex requests. Its backlog of pending requests grew from 2,733 to 3,414.

At the EPA, the median response times were 14 days for "basic" requests and 25 for so-called "unusual requests."

While at the Indian Gaming Commission, it took a median of 40 days to process a grand total of 36 requests during FY99. (At a cost of more than two thousand dollars per request.)

Journalists work in an industry that has become increasingly time-sensitive. As a result, long waits for information become problematic. Doyle suggests that reporters seeking information from federal agencies may be more likely to use personal contacts within agencies in order to avoid the time-consuming formal request process.

#### **E-FOIA: UNFINISHED BUSINESS.**

This brings me to the heart of today's discussion...the Electronic FOIA amendments of 1996. We all recognize the advantages of the Internet and computer access to information. In preparing this report, I was able to read the annual FOIA reports for federal agencies. I also can find a great deal of information through government web sites.

Within the EPA's website, I can read background summaries and learn the latest actions on a Superfund toxic waste site located a few miles from my city.

Inside the Department of Transportation, I can see Federal Railroad Administration data on accidents along Montana's railroads. I can access accident investigations of the National Transportation Safety Board.

In the Federal Election Commission's site, I can see who has contributed to the campaign of Montana's junior U.S. Senator, Conrad Burns. I also can see the campaign contributions of Montana's wealthiest industrialist. (As an aside, the FEC provides separate, customized, search guides to its site for the media and the general public, as well as one for candidates. I find this an interesting and positive customer-oriented approach.)

Now, to the question of how E-FOIA is working after four years on the books.

I must note at this point that my organization is largely a volunteer affair. Our professional staff is paid to run the organization, not conduct sophisticated journalism research. But our members have paid attention to the way agencies have implemented E-FOIA.

In 1998, SPJ member Jennifer LaFleur, then working for the San Jose Mercury News, contributed an article for the Society's national magazine, *Quill*, that outlined concerns that many agencies were not implementing E-FOIA completely. I have enclosed a copy of that article for your review.

SPJ also follows and endorses the fine work done by organizations like the Reporters Committee and OMB Watch.

The January report by OMB Watch, "A People Armed?" shows clearly that there still is much work to be done by federal agencies to implement E-FOIA, and much more emphasis placed on E-FOIA requirements by the Office of Management and Budget and the Department of Justice.

Since OMB Watch is represented on today's panel, I will not re-state its report. I echo its conclusions, however.

#### **E-FOIA IN THE REAL WORLD: JOURNALISTS' EXPERIENCES.**

In preparation for today's hearing, I made an electronic query of journalists around the country, asking for their experience with E-FOIA. (The Reporters Committee for Freedom of the Press made a similar query and some of the responses I cite here also were made to the Committee's questions.)

Federal websites that drew praise from journalists include the Census Bureau, the Centers for Disease Control, the NTSB, the FAA and the Nuclear Regulatory Commission.

Sites that received bad reviews include the Bureau of Labor Statistics (especially when it comes to local wage and employment data,) the FBI and the State Department, which Michael Doyle called a "black hole" in his Washington Monthly story.

It's worth noting that State's most recent annual report states a median response time of 48 days for simple requests, 308 days for complex requests and 543 days for pending requests (of which there are more than five thousand.) Even the 13 expedited requests handled last year by State took a median of 168 days to process.

From here in Washington, a magazine writer complains that the State Department, the FBI and the Secret Service are very slow in responses. This reporter tells of lost or bungled requests at State, and waits of one to two years at the FBI and State. At the same time, this journalist praises the military for excellent responses.

In Pennsylvania, a reporter sought an FBI file on an individual with that individual's blessing. However, the reporter complained that the FBI required unreasonably detailed identification of the individual before releasing the information, thus delaying the request until it was useless.

In Florida, a reporter offered praise for the Justice Department's Office of Justice Programs. This reporter notes that her FOIA request took 20 days to process, even though there was no waiting list for FOIA requests. However, she praised the office's customer service for confirming the receipt of her request electronically and by phone.

From Idaho came a complaint about government documents being available in ".pdf" file format. That format, says this journalist, "makes it uniquely difficult to access information to then analyze in databases or spreadsheets. Basically, I believe that any piece of information put on the Internet as a table in .pdf format should be put in text format as well."

From my own state of Montana, I learned that journalistic persistence can pay off. A reporter asked for specific databases from Yellowstone National Park and the U-S Forest Service Northern Region (Region 1) Headquarters in Missoula.

Both agencies responded by saying they would not--or could not-- comply. But after more effort by the reporter, both entities ended up providing the information in usable electronic formats.

I should note that journalists are routinely advised by their peers to insist that government records be provided in a format that is convenient to the reporter. As I read the E-FOIA amendments, Congress intended that also.

From the offices of Congressional Quarterly came a request that more Congressional information be made available. Specifically, lobbying registrations and reports and Congressional office expense accounts.

SPJ itself has been active in commenting on federal proposals which we believe would impair the public's right to know.

I would like to submit a number of our FOI Alerts from the past year, including alerts on medical privacy rules at HHS, Worst Case Scenario regulations at EPA, and reports on spending by the intelligence community.

And, finally, I would be remiss if I did not mention the concerns of SPJ and a publication called "TaxNotes" over HR 4163, The Taxpayers Bill of Rights 2000, passed in the House and now awaiting action in the Senate.

A bill that, for all of its good intentions, would effectively make the Internal Revenue Service exempt from the federal FOIA. That, ladies and gentlemen, would be a startling precedent and one my organization would like to avoid. SPJ has issued a statement and an "FOI Alert" on the bill.

#### **FOIA AS A ROLE MODEL FOR THE STATES.**

Mister chairman, we look to the federal government for leadership in many areas. Citizen access to government information is one of them. In fact, it is central to our form of democratic government.

In this area, the Congress has set a high standard to insure that citizens can observe their government's actions and hold their government accountable. Whether citizens approve of government actions is irrelevant. They must be able to see what their government is doing.

In this area, SPJ and other organizations have seen troubling trends in recent years in the 50 states. In state after state, audits of public records conducted by journalists, students and citizens have shown that local governments frequently deny access to records which clearly are public documents.

Access to facilities and inmates in publicly-funded prisons has been curtailed in recent years in some states. I learned recently that in Wyoming, corrections officials will not even confirm or deny the existence of records regarding inmates in an institution, unless the person making the request falls into a select class of individuals.

Only in a handful of states are there public agencies or employees dedicated to keeping public records public. In Indiana, a public access counselor's position was created directly as a result of a public records audit. In Virginia, a similar position has been created, assisted by a records audit in that state.

In other states, journalists represent the vanguard of public access advocates. We at SPJ continue to hear of attacks on the public's right to know in the various states. Media and public interest advocates often go to court to force open meetings and records.

In my state alone, state agencies have had to be forced by judges to open public board meetings and release records dealing with, among other things, a prison riot. Efforts by journalists and their attorneys have led to changes in state laws and policies that provide more openness and transparency in government.

Mister Chairman, Congress has set a high standard for openness and public access. On behalf of my organization, I ask you to use your authority to insure that executive agencies meet that high standard and set a good example for the states.  
Thank you.



SOCIETY OF  
PROFESSIONAL  
JOURNALISTS



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**IAN MARQUAND**  
Freedom of Information Committee Chair

**Biography**

Ian Marquand is Special Projects Coordinator for the Montana Television Network, a group of CBS network stations located in Billings, Bozeman, Butte, Great Falls, Kalispell and Missoula MT. Ian operates out of KPAX-TV in Missoula.

Ian first became president of the Montana Professional Chapter of the Society of Professional Journalists in 1988. In 1994, he re-formed the chapter after a period of dormancy and has been its president ever since. He also has been SPJ's "Project Sunshine" chair for Montana since 1993, monitoring issues involving public access to information. In 1996, he was chosen to attend SPJ's first Ted Scripps Leadership Retreat in Greencastle IN.

In April of 1999, Ian was appointed as chairman of SPJ's national Freedom of Information Committee. In that capacity, he writes a monthly column for SPJ's national magazine, "Quill," organizes professional development programs and is a primary point of contact for journalists across America who face problems accessing public records or meetings.

In April of 2000, the University of Montana's schools of Journalism and Law awarded Ian the "Montana Free Press Award" for his efforts in support of free expression in the state.

Under his leadership, the Montana Pro Chapter of SPJ has won two national awards for Freedom of Information work and another for Campus Relations.

Ian also is a three-time Montana "Television Broadcaster of the Year" and has won numerous awards from the Montana Broadcasters Association, the Greater Montana Foundation and SPJ's Pacific Northwest region for his special programs and on-air news work.

Ian is the producer and reporter for a weekly series about Montana entitled "Under the Big Sky," which airs across Montana. He also is producer and host for "The Montana Academic Challenge," a high school academic competition produced especially for television.

He also is seen frequently on Montana Public Television and has begun a monthly column for the Missoulian newspaper. In May of 2000, a show of his photography opened in Missoula. And in July, he will teach broadcast writing at the inaugural University of Montana summer journalism program for high school students.

Ian is vice-president of the Montana Freedom of Information Hotline and president of the Japan Friendship Club of Montana. In 1999, he was chosen by Rotary International as part of an International Group Study Exchange between Montana and the Kumamoto/Oita district of Japan. He also serves on the Habitat for Humanity of Missoula advisory committee.

Ian is a 1979 graduate of the University of Montana with a B.A. in Radio-Television with High Honors. He was born in Denver, Colorado.

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## EFOIA pluses

Getting electronic data still tough,  
but some Internet sites are good resources

BY JENNIFER LAFLEUR

**T**he Electronic Freedom of Information Act, signed by President Clinton on Oct. 2, 1996, held great promise for reporters who dreamed of stacks of computer tapes rolling their way, quicker processing of requests and fewer headaches.

While EFOIA has prompted some government agencies to develop better online resources for public use, those who regularly request electronic government records have seen little clearing of the rocky path to accessing information.

Reporters still have difficulty getting electronic data, said Kathleen Edwards, manager of the Freedom of Information Center, a University of Missouri-based library of resources about access to government documents ([www.missouri.edu/~foiwww/](http://www.missouri.edu/~foiwww/)). "They seem to still be going to the appeals level to try to get basic documents."

On the plus side, EFOIA has led government agencies to develop Internet sites, which for some agencies provide a good resource of standard reports and information. For other agencies, the sites are pretty pages with little useful content. Under the act, agencies were to have electronic reading rooms either on the Internet or in another electronic format by November 1997. Those reading rooms or other formats were to contain four categories of records created after Nov. 1, 1996:

- Opinions from agency adjudications, policy statements and interpretations adopted by the agency

- Staff manuals

- Agency EFOIA policy guidelines

- Items commonly requested under FOIA

The agency's annual FOIA reports describing the categories under which they have denied records and the amount of money spent processing FOIA requests also were to be included.

"The one thing that has really happened is that the federal government started to see how useful the Web was in terms of

getting information out and keeping reporters out of their hair," said Brant Houston, executive director of Investigative Reporters and Editors, a professional organization for investigative journalists. Houston pointed to sites such as the Environmental Protection Agency ([www.epa.gov](http://www.epa.gov)), the National Transportation Safety Board ([www.ntsb.gov](http://www.ntsb.gov)) and the Federal Aviation Administration ([www.faa.gov](http://www.faa.gov)) as sites he hears reporters say are useful.

An agency that both FOIA users and government agencies point out as a leader in providing information online is the National Aeronautics and Space Administration (NASA), an agency that was ahead long before EFOIA was in place ([www.nasa.gov](http://www.nasa.gov)).

"I was lucky the technology was there; that we had used it and had a lot of information out before I even put a home page up," said Patricia M. Riep-Dice, the FOIA officer for NASA.

NASA, EPA and other agency sites do not reflect the norm in what's available from government agencies online, according to an April 1998 OMB Watch Report on the implementation of EFOIA:

"In a majority of agencies, EFOIA information is difficult to find online. It is rarely visible on the agency's main home page, and often takes a great deal of searching to find even a hint."

OMB Watch is a nonprofit research, educational, and advocacy organization that focuses on budget issues, regulatory policy, nonprofit advocacy, access to government information, and activities at the Office of Management and Budget. The organization's April study of 135 federal agencies found that "agency compliance with EFOIA has been overwhelmingly inadequate."

"Not a lot has changed since then," said Patrice McDermott, OMB Watch information policy analyst. "Agencies are beginning to submit regs for implementation. But overall, it's been pretty minimal because of lack of appropriate guidance from OMB, which is inconsistent and in-

coherent.

"There is no way that a person can go find out what was in every EFOIA reading room," said McDermott. "There is no way to systematically search across the government. It's not consistent from agency to agency."

OMB was charged with helping agencies develop regulations for implementing EFOIA; however, most of that leadership has come from the Department of Justice's Office of Information and Privacy, which came out with EFOIA guidelines this spring, months after all agencies were to have complied.

"A major obstacle has been that the Justice Department was tardy in getting guidance out," said Jane Kirtley, executive director of the Reporters Committee for Freedom of the Press. "Federal agencies tend to follow Justice's lead in implementing regulations."

Aside from delays in FOIA Web pages, much of what journalists hoped for went beyond getting information from the Internet. It was about getting electronic records more easily and in a more timely manner.

"Someone tells me something is on the Web—I don't want it. I want the stuff that no one has ever asked for," said Russell Carollo, projects reporter for the Dayton Daily News. And as far as EFOIA's impact on making getting electronic information easier, Carollo says he hasn't noticed a difference.

"The verdict isn't particularly in whether it's working well or not," said Harry Hammit, editor and publisher of *Access Reports*. "I don't see a lot of stuff happening as a result of EFOIA."

"From what I see within agencies, they seem to be terribly consumed with the minutia of what maintaining a public reading room is all about—when records need to be available electronically—and little time dealing with more typical requests on how to deal with electronic records," Hammit said.

Houston said he still hears "people having the same battles. But at least now there's

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something to rely on. At least we're not having the argument of whether it really belongs under FOIA. Now we're having the familiar arguments we had with paper before."

"In the first month after the law passed, agencies were really trying to follow the law—but we're back to business as usual," said Drew Sullivan, former news data editor for The Associated Press and now a reporter for the Nashville Tennessean. "You're not getting a database in 20 days. It may have been idealistic that they could ever get you a database in 20 days."

One of the potential benefits of EFOIA was the opportunity to request expedited review for quicker processing. "We haven't been hearing about journalists getting that granted," Kirtley said.

Kirtley was one of several EFOIA users who testified in June before the House Subcommittee on Government Management, Information and Technology about the status of implementation of the Electronic FOI Improvements Act of 1996. Kirtley testified along with Patrice McDermott of OMB Watch, James Riccio of Public Citizen's Critical Mass Energy Project and Michael Tankersley of Public Citizen. The subcommittee also heard from a panel of government FOI officers from the Department of Justice's Office of Information and Privacy, the FBI, the Department of Energy and the National Aeronautics and Space Administration.

As users address the success or failure of EFOIA, two other problems with electronic access crop up: the lack of persistence on the part of journalists and the lack of punishment for non-compliance. "It's a law without any sanctions in it at all," Carollo said. "It's better for them [agencies] to stonewall you."

As an example, Carollo said Army crime records that used to take a few months to get, now take about 1½ years. "I start filing FOIAs a year-and-a-half out," Carollo said.

"Most people go away after they reach resistance," Carollo said. "Don't let go. Dig their butts into court and make them work. Otherwise, they'll keep denying the records. Most people who file FOIAs are not taking it to the mat. They've got a 99.9 percent chance you're never gonna take it to court."

Agencies are not held accountable for lack of compliance with the law. "It is not a high priority in Congress. Nothing is going to happen other than people who use FOIA complaining," McDermott said. "There is no direction, no vision, and no

## Tips for getting electronic records

1. Know the law. Know what records are covered and what the exemptions are. For state laws, the Reporters Committee for Freedom of the Press has useful state-by-state guides ([www.rcfp.org](http://www.rcfp.org)).
2. Know what information you want. Don't ask an agency to provide everything it has. Make sure your request is narrow and specific. Don't always ask for the data first—request a list of the databases. Then ask for record layouts for specific databases. The record layout is a map to the data that will help define your request. From a printed report, find out which databases are used to generate that report.
3. Know how the information is kept. Try to find someone in the information systems department at an agency who knows how the information is kept.
4. Know what the appropriate cost should be. You really should only have to pay duplication costs. Ask for costs to be itemized.
5. Know who does the data entry. The best resource to any database is the data entry clerk. They can tell you things such as, "Oh, we usually just skip that information."
6. Know who administers the data. The person in charge of the database can be much more helpful than the PR person. Long before you ever need the data, tour the agency's data processing center—get to know the folks you need to meet.
7. Get paper summary reports. This will give you a way to check your data.
8. Know how many records or pieces of information are in the database. When you get the database make sure you have the correct number of records.
9. Don't settle for less. A government agency may claim that certain pieces of information are confidential. Don't just accept that answer; when you do, you set a precedent. Go to your editor, call the company lawyers, contact the freedom of information chair of the Society of Professional Journalists or the access committee of Investigative Reporters and Editors and find out if that information really is confidential.
10. Go to local software users group meetings—there's usually some data-processing folks from government agencies there.
11. From Russell Carollo, projects reporter for the Dayton Daily News: "File incredibly early—long before you start working on a project. Ask for record layout before it comes."

leadership from the executive branch, which has sent a very clear message to the agencies that you have other things to worry about."

Another problem area regarding electronic records, though not specifically addressed by EFOIA, is cost. "Where I still hear problems is price," Houston said. "I don't have any numbers, but it's my gut feeling that as a profession that we may not be making good enough use of the fee waiver. Agencies one year or one month will decide that someone is worthy of a fee waiver then later will decide they aren't—could even be same reporter and same data."

While agencies continue to play catch-

up with putting materials online, most journalists have yet to see significant progress in the speed of processing requests or the ease of getting electronic information.

When EFOIA first was approved, Sullivan said, he thought it would eliminate most problems getting electronic databases.

"It's prevented one excuse. If an agency doesn't want you to get data, there's still many creative ways of doing that. EFOIA is one step in the right direction," he said. "But, we're not in Oz yet, Toto."

*Jennifer Laffeur is the database editor for The San Jose Mercury News.*

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Web sites at a glance Information available on a sample of federal agency Web sites (as of Aug. 8, 1998)

Agency/Bureau	FOIA Site Address	FOIA site	Accessible from agency site	FOIA policy or guide posted	Instructions on making requests
US Dept. of Agriculture	www.usda.gov/news/foia/main.htm	Y	Y	Y	Y
Forest Service	www.fs.fed.us/m/foia/	Y	Y	Y	Y
Food Safety and Inspection Service	www.fsis.usda.gov/FOIA/index.htm	Y	Y	Y	Y
Dept. of Commerce		N			
Natl. Oceanic and Atmospheric Admin.	www.nos.noaa.gov/foia/index.html	Y	N	Y	Y
Patent and Trademark Office	www.uspto.gov/web/offices/com/foia/index.html	Y	Y	Y	Y
Dept. of Defense	www.defenselink.mil/pubs/foi/	Y	Y	Y	Y
Army (Army Records Management Prog.)	www.rmd.ba.woar.army.mil/	Y	N	Y	N
Navy	www.ogo.secnavy.hq.navy.mil/foia/	Y	Y	Y	Y
Air Force	www.foia.af.mil/	Y	N	Y	Y
Dept. of Education	www.ed.gov/offices/OIG/infocol/info3.html	Y	N	N	Y
Dept. of Energy	vm1.hqadmin.doe.gov:80/es/foia.htm	Y	Y	Y	Y
reading room	www.doe.gov/news/newspr.htm				
Dept. of Health and Human Services	www.hhs.gov/about/foia.html	Y	Y	Y	Y
Centers for Disease Control	www.cdc.gov/od/foia/foi.htm	Y	Y*	Y	Y
Health Care Financing Admin.	www.hcfa.gov/foip	Y	Y	Y	Y
Food and Drug Admin.	www.fda.gov/foia2.htm	Y	Y	Y	Y
Dept. of Housing and Urban Dev.	www.hud.gov/foia/foia.html	Y	Y	Y	Y
Dept. of Justice	www.usdoj.gov/foia/	Y	Y	Y	Y
Federal Bureau of Investigation	www.fbi.gov/foipa/foipa.htm	Y	Y	Y	N
Bureau of Prisons	www.bop.gov/	Y	Y	Y	Y
Dept. of Labor	www2.dol.gov/dol/eol/public/foia/main.htm	Y	N	N	N
OSHA	www.osha-slc.gov/html/foia.html	Y	Y	Y	Y
Bureau of Labor Statistics		N			
Dept. of the Interior	www.doi.gov/foia/	Y	Y	Y	Y
Dept. of Transportation	www.dot.gov/ost/ogp/foia/index.htm	Y	Y	Y	Y
National Highway Traffic Safety Admin.	www.nhtsa.dot.gov/nhtsa/whatsup/foia/	Y	Y	Y	Y
Bureau of Transportation Statistics	none - but lots of data on regular site				
Dept. of Treasury	www.ustreas.gov/foia/	Y	Y	Y	Y
Alcohol Tobacco and Firearm	www.atf.treas.gov/about/foia/foia.htm	Y	Y*	Y	Y
U.S. Customs Service	www.customs.treas.gov/foia/index.htm	Y	Y	Y	Y

\* Only accessed by site search or site map search.  
 \*\* Pieces for information, but under construction during audit.  
 \*\*\* This agency site has a lot of data, much of which is not within FOIA area.  
 \*\*\*\* This information is available from individual departments or bureaus within the agency.

Web sites vary in ease of use

Among the federal government Web sites that journalists turn to for public information are sites such as NASA that have fulfilled their EFOIA obligations by creating electronic reading rooms and others that have not followed the regulations di-

rectly but historically have provided useful information online.

Long before EFOIA, NASA was a leader in providing information online and continued that tradition with its Electronic FOIA site. For users, NASA's site is easy to find and organized in an understandable way.

"Regs are not user friendly," said NASA FOIA officer Patricia M. Riep-Dice, who maintains the NASA FOIA site. "I wanted something that somebody can go in and eas-

ily figure out how to make a FOIA request and find out what's on my home page."

As with some other sites, NASA allows several formats for submitting a request: mail, fax and e-mail. Although all requests must be submitted in writing, the site does provide a list of contacts with phone numbers and e-mail addresses.

As with all agencies, NASA was required to provide "commonly requested" records in its electronic reading room. "It includes



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E-mail or electronic request generator	Fax request	FOIA contacts	FOIA report	Reading room	Data	Layers	Manual	Final opinion	Freq req does list
N	N	Y	Y	Y	N	2	---	---	---
N	N	Y	Y	Y	N	2	Y	Y	Y
N	Y	Y	N	Y	N	2	---	---	---
Y	Y	Y	Y	Y	Y	-	N	Y	Y
N	N	N	Y	Y	---	2	Y	Y	Y
N	N	Y	Y	Y	N	1	-	-	-
N	N	N	N	Y	N	-	---	---	---
Y	Y	N	Y	Y	Y	3	N	N	Y
N	N	N	Y	N	N	-	N	N	N
N	N	Y	Y	N	---	-	N	N	N
N	Y	N	N	Y	N	3	N	N	Y
N	N	Y	N	Y	---	2	N	N	N
Y	Y	Y	N	N	Y	3	Y	N	Y
N	Y	Y	Y	N	Y	2	N	N	N
N	N	N	N	Y	Y	2	N	N	Y
Y	N	N	Y	Y	Y	3	N	N	Y
N	N	Y	Y	Y	N	2	Y	Y	Y
N	N	N	N	Y	N	2	Y	N	Y
Y	Y	N	N	Y	N	2	N	N	Y
N	Y	Y	N	N	N	2	N	N	N
Y	N	N	N	Y	Y	2	N	N	Y
N	Y	N	N	Y	N	2	Y	N	Y
Y	Y	N	N	Y	N	-	N	N	Y
N	N	N	N	Y	N	2	N	N	Y

"EFOIA has allowed the path of many access laws," said Drew Sullivan of the Nashville Tennessean. "The intent has been mangled in the application. The intent of the law was clear, but agencies have interpreted it in a narrow sense. If you look on the Web, they (electronic reading rooms) range from complete and total garbage to pretty good. Certain agencies have interpreted the requirement as an excuse to put up a few Web pages with stuff that was already commonly available."

Another agency that provides useful, well-organized information is the Occupational Safety and Health Administration (OSHA). It has made some of its most important data easy for the public to use. The site includes a search engine to find an establishment's safety record and other records. The site, however, is not 100 percent in compliance because it doesn't provide its FOIA annual reports.

The Small Business Administration ([www.sba.gov](http://www.sba.gov)) is one of a handful of agencies that provide an electronic FOIA request form on their sites. These forms make it easier for the public to make requests because they prompt the user for specific information.

Other agencies that already provided useful information, but not necessarily through an FOIA site, include the Bureau of the Census ([www.census.gov](http://www.census.gov)), which includes a vast amount of statistical data, and the Environmental Protection Agency ([www.epa.gov](http://www.epa.gov)), which provides environmental databases. Neither of these agencies, however, had an FOIA site as of August 9, 1998.

"The government's goal should be to make every electronic database they have searchable through the World Wide Web," Sullivan said. "There's no reason why it can't be done. We have the technology to do it now. Why shouldn't it happen. We'd be able to sift through all the information and actually make meaningful use of it."

—Jennifer Lafleur

anything after the second request, we'll put it up there. We'll also put stuff up we just know there's going to be a lot of requests for," Riep-Dice said. In the end, Riep-Dice said, it saves NASA the trouble of continuing to process those requests.

As far as how well NASA fulfills requests for electronic records that are not online, the jury may still be out. Riep-Dice says she knows to make a better effort.

"We were pretty good about it before

EFOIA, if we had the capability of doing it. Now, we'll look a lot harder to see if we have the capability... now we'll go further," she said.

Some EFOIA users say NASA seems to be one of the few agencies that truly has complied with the EFOIA requirements. Although the law does not require agency sites to be found easily or easy to use, users hoped the spirit as well as the letter of the law would be honored as NASA has done.



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## SPJ Joins Forces with CNPA, FOI Groups To Conduct First-Ever Public Opinion Poll On Freedom-of-Information Issues

**Contacts: Dan Weikel (562) 983-8861  
or Ray Herndon (714) 966-7761**

LOS ANGELES--California voters overwhelmingly support broad changes in state law to improve public access to information held by government, and they believe that too many important government decisions are made behind closed doors, according to a new statewide survey.

In the first poll of its type in the nation, voters by largemajorities said they favor greater access to government records and information used in the course of government business.

Most voters believe government officials regularly thwart the state's open records law, and withhold information that should be made public. By a large margin, they believe government officials who violate open records laws should face civil or criminal penalties.

Currently, state law provides only for the assessment of legal fees against a government body if an individual sues to gain access to government information and prevails in court. The actual amount awarded is left to the court's discretion.

By an overwhelming margin, voters believe the public should have unfettered access to much government information that is now closed to the public, such as the disciplinary records and performance evaluations of public employees, including those of judges, police officers, teachers, prosecutors and prison guards. Seven in 10 likely voters support public access to the names of public employees disciplined for negligence or incompetence on the job.

Pollster Richard Maullin, of Santa Monica-based Fairbank, Maslin, Maullin & Associates, said the poll's results should send a strong message to state lawmakers that the public wants far more information than is currently available under the California Public Records Act, which exempts hundreds of state record types from public disclosure.

Broad support for changes in the law suggest CECEthat no segment of the Legislature should be indifferent to this issue or fail to perceive that a substantial majority of the public favors strengthening Freedom of Information laws in California," Maullin said.

The poll shows that the public also favors increased access to the files of children under court protection, if they are the suspected victims of abuse, neglect and murder. The information, which is now closed to the public, involves youngsters in foster homes and protective custody.

Similarly, the voting public believes that the names of juveniles who commit serious crimes should no longer be kept confidential, nor should their court records. That information, except in rare cases, is now confidential.

There is considerable support for releasing police reports of crimes to the public, as well as the files of closed criminal investigations --both of which are generally kept confidential under current California law.

In addition, more than 8 in 10 voters believe that information regarding unsafe products should be released, even if a California court has ruled that it be kept confidential.

Although California Gov. Pete Wilson has twice frustrated the Legislature's attempts to guarantee the public's right to computerized government information, the poll found that an overwhelming majority of California voters -- about 8 in 10 -- believe this information should be available in electronic form so that people with home computers could review and analyze it.

In vetoing reform legislation that would have obligated government agencies to surrender public information in electronic form, Wilson said it could have proven too burdensome and costly for government agencies to provide, even though the law allows agencies to recover their direct costs for copying such information.

Overall, voters are so concerned about access that 7 in 10 said they would support a state constitutional amendment that requires broad disclosure, including all records that the government relies upon in making policy decisions.

The measure they were asked to consider also would allow judges to order the disclosure of information that is now confidential under current law if the court finds there is an overriding public interest in disclosing the information.

The suggested amendment would declare categorically that the "people of California have a fundamental right of access to government records and meetings."

Although current law states the public now has such a right, it can be over-ridden by other provisions in the law and myriad exemptions. An amendment would elevate the "right to know" to a constitutional right, superseding existing and possibly conflicting statutes.

The poll, the first devoted exclusively to public access issues nationwide, was the brainchild of an *ad hoc* committee of the Southern California chapter of SPJ, the national Society of Professional Journalists.

The committee's members -- Ray Herndon, Dan Weikel and Jean Pasco, staffers of the Los Angeles Times, and Timothy Alger, a media attorney with the Los Angeles office of Gibson Dunn & Crutcher -- enlisted the support of two of the state's public advocacy groups, the California First Amendment Coalition and the First Amendment Project.

With Tom Newton, the general counsel of the California Newspaper

Publishers Assn., they formed the Coalition for Open Government, which commissioned the poll with the financial support of the CNPA and a grant from the John S. and James L. Knight Foundation, obtained through the Dallas-based National Freedom of Information Coalition. Additional financial support was provided by the Orange County Press Club.

Fairbank, Maslin, Maullin & Associates, a Santa Monica-based firm that does opinion research and public policy analysis for clients nationwide, directed the survey.

The poll of 800 likely California voters was conducted by telephone over the period Sept. 2-8, 1998. Poll respondents were selected randomly from an updated list of the state's registered voters who had participated in recent statewide elections. The survey, which took an average of 24 minutes, has a margin of error of plus or minus 3.5 percent at the 95% confidence level.

Although the poll was conducted during a period when there was considerable media attention given to the release of information regarding President Clinton and Monica Lewinsky, the pollster said there was nothing in the poll results to indicate that the national issue affected responses to the California survey.

Full results of the poll will be posted on the web pages of the CNPA, CFAC and FAP. Those web addresses are: [www.cnpa.com](http://www.cnpa.com), [www.cfac.org](http://www.cfac.org), and [www.well.com/user/fap/](http://www.well.com/user/fap/). Results are also available in [Adobe PDF format](#) from SPJ's Web site at the following link:

**FOI Opinion Poll**  
(134kb PDF file)

For more information, please contact Dan Weikel, FOI chair of SPJ's Greater Los Angeles Chapter, at 562 983-8861, or via e-mail to [Dan.Weikel@latimes.com](mailto:Dan.Weikel@latimes.com); or Ray Herndon, regional computer projects editor for the Los Angeles Times, member SPJ ad hoc FOI committee, 714 966-7761 ([Ray.Herndon@latimes.com](mailto:Ray.Herndon@latimes.com)).

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May 2000

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## Missed Information

The Reporting Tool that Reporters Don't use

 By [Michael Doyle](#)

**The Freedom of Information Act (FOIA)** can be a reporter's best friend. But consider this: The Environmental Protection Agency receives about 22,000 FOIA requests annually. One percent come from the media. Or this: In 1998 the Drug Enforcement Administration received more FOIA requests from prisoners than from reporters. Or this: The National Security Agency has received more requests for information about UFOs than for any topic from reporters. Or, symptomatically, this: The apparent 1998 champion for aggressively filing FOIA requests across multiple federal agencies was not a dogged investigative reporter but a political operative seeking dirt on an opponent.

Certainly, a few reporters do use the Freedom of Information Act---sometimes with spectacular results. Reporter Russell Carollo of the Dayton Daily News filed more than 100 FOIA requests for the 1998 Pulitzer Prize-winning series on military medicine he co-authored with Jeff Nesmith. But most reporters never use the law at all. Many FOIA-centered stories in newspapers come, not from reporters' initiative, but from special interests who use the law to dig up information that they then feed to reporters. Moreover, although the whole point of FOIA is to dig up the lid on executive branch operations, the few reporters who do use FOIA often couldn't care less about the executive agency they're demanding information from; they want copies of letters sent from members of Congress to various agencies and aren't really probing bureaucracies so much as seeking evidence of congressional muscle. In one small but illustrative example, the Labor Department's Bureau of Labor Statistics received six FOIA requests from the media in 1998. Three of these sought copies of congressional correspondence. Similarly, Transportation Department headquarters received 22 FOIA requests from reporters in 1998; 13 of these, more than half, sought congressional letters. This FOIA-enabled search for congressional letters, however meritorious, reflects the general tendency among Washington-based reporters to concentrate on Congress and ignore the administrative agencies. More broadly, it highlights just how cramped journalistic FOIA use has become.

### Few and Far Between

The law is pretty easy to understand and generally easy to use. In short, the Freedom of Information Act, passed in 1966, establishes a presumption that

records in the possession of agencies and departments of the executive branch of the government should be accessible to the people. And usually, to get these records, you don't even need a stamp. Requests for documents from executive agencies—Congress, predictably, excluded itself from the law's reach—can now often be faxed to designated FOIA offices. Professional organizations like the Investigative Reporters and Editors run FOIA workshops, and the Reporters Committee for Freedom of the Press's useful Internet site includes an automatic FOIA letter-generator that makes filing a snap (<http://www.rcfp.org>). Recalcitrant agencies can also be prodded by lawsuits. Yes, it can sometimes be a hassle, and, yes, the wait can sometimes be interminable. But the rewards can be abundant; moreover, frequent use of FOIA helps keep bureaucracies on their toes, and helps fend off those who contend the law has lost its Fourth Estate rationale.

"My sense is, it's not being used nearly as much as I think it should be," said Alan Miller, an investigative reporter in the Washington bureau of the Los Angeles Times. "I think reporters become discouraged, understandably, by the amount of time it takes. It's unfortunate, and it's a missed opportunity."

We know this is so, in part, thanks to the law itself. Using the Freedom of Information Act, I obtained the so-called FOIA logs from about two dozen federal agencies. These are the records of requests made during 1998. The logs themselves are a hodgepodge that highlight how different agencies handle FOIA. The Interior Department and Agriculture Department headquarters logs, for instance, were handscrawled, while the Department of Health and Human Services (HHS) headquarters maintained its requests in a handy record-management software package. The federal government may spend roughly \$168 million a year coping with 100 million-plus FOIA requests, but a consistent government-wide system has yet to be developed.

Most important, these logs reveal, in varying detail, who's asking for what. They show, for instance, how Alan Miller cast a wide net across various agencies in 1998 with requests for letters from congressional leaders including Senate Majority Leader Trent Lott and Senate Minority Leader Tom Daschle. The logs also show that former Sen. Carol Moseley-Braun (now the Clinton administration's ambassador to New Zealand), Indiana Republican Rep. Dan Burton, and Sen. Mitch McConnell were favorite targets for reporters.

The FOIA logs also reveal, tellingly, that the champion information-seeker wasn't a reporter at all—although her work, properly laundered, might have fed a story or two. With regard to sheer quantity, an opposition researcher from the San Francisco Bay Area named Cara Brown led the pack. Working quietly for the primary campaign of Democrat Al Checchi, Brown filed myriad requests for information on Republican gubernatorial candidate and former southern California congressman Dan Lungren. From the Legal Services Corp., for instance, Brown requested all "letters, memos, telephone log entries, message receipts, notations of conversations, meeting notes, e-mail messages, fax cover sheets, reports, statistics, [and] calendar entries" dealing with Lungren. Nor did Brown limit herself to Lungren's time in public service: Brown wanted Lungren-related files going back to the time he was 18 years old.

"The basic role of the opposition researcher and FOIA is to come up with information that is prejudicial to the object of the search," said Garry South, the senior political adviser to California Gov. Gray Davis. "It can be almost anything, and in a lot of cases, it's a fishing expedition."

South, who identified Brown as one of Checchi's workers, naturally had his own researchers using the same tool. Obnoxious as it may sound, reporters could learn

something from these political operatives. Ideally, of course, reporters won't presume that the only worthwhile information will be prejudicial to the target; indeed, FOIA is great at revealing the fascinating nuances of government in action.

Opposition researchers aside, the FOIA logs cumulatively reveal the relative infrequency of media requests. The Drug Enforcement Administration, for instance, received roughly 2,000 FOIA requests in 1998, only 57 of which came from the media. Federal prisoners were far more prolific. Similarly, the Public Health Service received about 520 FOIA requests in 1998. Only 25 came from journalists.

Even worse, take the HHS headquarters. Of the 1,100 FOIA requests it received between Oct. 1, 1997 and Sept. 30, 1998 only about nine percent came from reporters and most of the reporter requests were filed by a handful of journalists or media organizations. Nearly one-fifth of all the media requests to HHS headquarters came from just two trade publications, and, of the requests filed by newspapers, one-third came from the Los Angeles Times, Chicago Tribune or Dayton Daily News. Television reporters filed a grand total of five FOIA requests to the HHS headquarters.

#### Use It Or Lose It

This all seems a special shame. Journalists, after all, were not just cheerleaders during the long campaign by the late California congressman John Moss to pass the Freedom of Information Act. They were, emphatically, present at the law's creation. "Moss' greatest allies were the press associations," recalled Washington attorney Michael R. Lemov, a former Moss staffer. "Without the press, he never would have gotten that bill."

Moss, who died in December 1997, was a good-government champion with a stubborn streak. He started his FOIA fight in 1955, calling reporters as the first witnesses before his newly formed subcommittee on government information. The beginning stages were certainly bleak. A survey by the journalism society Sigma Delta Chi found that of 3,105 congressional hearings in 1953, 1,357 were closed to the press. Executive branch deliberations were equally closed. Though the Administrative Procedure Act provided for release of government information, exceptions limited release to those persons deemed "properly and directly concerned," and allowed denial of requests simply for "good cause." Neither Republican nor Democratic presidents were sympathetic to Moss' crusade. At one point, representatives of 27 federal agencies testified in opposition to Moss' bill. A blunt and sometimes impolitic man, Moss stuck to his guns for 11 years, and in 1966 Congress finally sent the legislation on for LBJ's reluctant signature.

The Freedom of Information Act, which has been further modified several times since, tightened the exceptions under which information could be kept secret. It allowed, for the first time, people to take agencies to court to compel release of information, and it dropped the requirement that information-seekers be "properly and directly concerned" with the matter at hand. Federal officials would no longer be in the business of judging the appropriateness of a requester's motives. At the same time, lawmakers made clear their expectations about who would be primary users of the new law.

The House Republican Policy Committee in May, 1966 cited the media first in a recitation of FOIA's potential users. The law, GOP members said, would aid "reporters as representatives of the public, citizens in pursuit of information vital to their interests, and members of Congress as they seek to carry out their constitutional functions." Things haven't of course worked out as planned, though.

"Since 1975, the press and research and scientific journal authors and others have largely abandoned the use of the FOIA," William Taft, then-general counsel for the Department of Defense, told a Senate committee back in 1981. "They are encouraged to elicit information through informal channels, and have found those channels to be satisfactory without resorting to use of the formal request."

In reality, the Reagan administration only cared about reporters abandoning FOIA because that could be justification for limiting the law's reach. If prisoners use FOIA and reporters don't, the argument went, then maybe it was time to roll back the law. This was one unintended and potentially dangerous political consequence of reporters not using FOIA. Carollo attributed the disuse in part to "a failure of the journalism schools" to properly train young reporters in the FOIA arts.

#### **Tied Up With Red Tape**

Part of the reason that journalists so rarely use FOIA is that agencies can take so long in responding that the information often seems stale by the time it arrives.

In the worst agencies, there's deliberate footdragging; and, for good and bad alike, there's a never-ending batch of requests to cope with. The various agencies of the Department of Veterans Affairs, for instance, receive a mind-boggling 210,000 FOIA requests every year---that's more than 800 every workday. The resulting long delays, and the periodic necessity to haul recalcitrant bureaucracies into court, deter some reporters from using the law at all. For every Cleveland Plain Dealer, which used a helpful congressman and the threat of legal action last year to pry open embarrassing records from the stonewalling Department of Housing and Urban Development, there are any number of papers or TV stations that figure the story isn't worth the hassle. Commendably aggressive, The Washington Post in April 1995 took the Agriculture Department to court to compel release of certain crop subsidy information. By the time a judge ordered the Agriculture Department to cough up the information, in October 1996, the Post's reporter on the beat had gone off to other tasks. The State Department, in particular, is a notorious black hole; it is the only federal agency whose backlog of unprocessed FOIA requests is larger than the number of requests it receives each year. It claims a median FOIA response time of 444 days; actual delays can extend for several presidential administrations.

"Often, agency staff use the ordinary delays to deter requesters or to persuade them into narrowing the scope of the reporter's request," says Michael Ravnitzky of APBnet, the online crime-and-justice news service, and one of the most prolific filers. "Depending upon the agency, a FOIA request can take anywhere from a few days to as much as eight or nine years, or even more."

The lawmakers who wrote FOIA knew delay and resistance would be standard bureaucratic responses to information-seekers. That's why they included the provision permitting lawsuits. In other ways, though, FOIA's authors couldn't foresee the law's future use. They certainly didn't anticipate some persistently hot topics. The National Security Agency, for instance, received about 830 FOIA requests in 1998; 15 percent of these, the biggest single share, dealt with Unidentified Flying Objects. The second biggest topic for FOIA requests to the nation's secretive code-breaking agency dealt with contract information. Except for the business about UFOs, the National Security Agency is pretty typical. Commercial entities, government-wide, have long since become the greatest user of FOIA. Businesses are filing requests daily to find out who holds government credit cards, who won certain contracts, what competitors are up to, and how decisions are being made. Of all requests to the EPA, 89 percent came from

attorneys, environmental consultants or private industry.

This is certainly consistent with the law's intent of opening up government; but, at least judging by the legislative debate, this was not explicitly anticipated by FOIA's authors. That's the nature of groundbreaking legislation, though: The real world always surprises, and you never know what might turn up. The same is true, after a fashion, with a Freedom of Information Act request itself. Reporters who use the law regularly know that the more requests they file, the more likely they are to scare up a story that matters. After all, it's hard to catch fish if you don't go fishing.

*Michael Doyle is a reporter in the Washington bureau of McClatchy Newspapers*

Related Links:

- [University of Missouri's Freedom of Information Center.](#)
- [The FOIA law](#)
- [Links to federal agency FOIA office web sites](#)
- [Department of Justice FOIA site](#)
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**FOI Alert Volume 5 Issue 3 (1999-2000)**  
December 1, 1999

**By:** [Joel Campbell](#), SPJ FOI Committee Member (801) 237-2190

## Medical privacy regulation could hinder reporting

If medical records privacy standards proposed by the U.S. Department of Health and Human Services go into effect next year without revision, it could mean new barriers for news organizations trying to obtain the most basic information about patients from the nation's hospitals.

On Oct. 29, HHS Secretary Donna E. Shalala proposed the first-ever set of national standards to protect personal health information after Congress failed to enact specific rules. Under a 1996 law, HHS is required to issue final regulations by Feb. 21, 2000. The proposed Standards for Privacy of Individually Identifiable Health Information would prohibit disclosure of health information without patient consent except to health researchers and law enforcement officials.

The rules fail to recognize the current routine releases of patient condition information to news organizations and the public interest in that information. Widespread hospital policies that allow release of information about patients who are victims of violent crime, traffic accidents and disasters would likely be overturned by the new regulations.

For example, if the proposed rules would had been in effect it is likely that journalists covering the recent bonfire stack collapse in Texas, the Columbine shootings in Littleton, Colo., or Oklahoma City bombings would have been blocked from obtaining names of victims and their medical conditions without victims' consent.

While those are certainly high-profile incidents, the rules could also preclude thorough reporting on more common topics including shootings or other violence that results in injury, traffic accidents, and the hospitalization of public officials and public figures.

Such reporting is widespread. A one year search from Nov. 19, 1998, to Nov. 19, 1999, of U.S. newspapers available on the electronic Dow Jones News Retrieval database showed approximately 28,400 articles which reported either a "serious" or "critical" medical condition of victims of accidents, victims of crime and of public figures or officials.

Central to the HHS proposal is patient consent before hospitals or medical providers release any "personally-identifiable" medical information. The unintended result may be the ending of the current practice of releasing the most basic of medical information to journalists such as condition and types of injuries.

The rules could create a bureaucratic nightmare for those at health care facilities -- usually public relations staff -- charged with gathering patient consent and releasing information to the media. In practice, it would simply be easier to stop giving out the information. Especially since there is steep fines proposed for those who violate the rules. Civil monetary penalties of up to \$25,000 per person, per year, per standard violation are proposed. Journalists could also be subject to severe criminal fines for obtaining "protected" health information. Journalists who obtain and print conditions of patients could conceivably be subject to a \$250,000 fine and up to 10 years in prison for "selling or transferring" such information.

Hospital information officers question the need for tighter restrictions. One public relations director for a large Salt Lake City hospital said he has never had a patient who had been involved in a serious accident ever complain that their name and medical condition appeared in the newspaper.

Outside of daily reporting, privacy issues raised by the standards might also raise new roadblocks for release of information journalists may need for investigating health-care fraud, patient abuse or misprescription of drugs. Individual stories and names are often key to such investigations. And such stories need a human face to be effectively told.

SPJ proposes that HHS include language that would protect access to so-called "public record information." Modeled after hospital association guidelines now in use, SPJ asks that hospitals and other health care providers be allowed to release information without patient consent when:

- Patients are under arrest or held under police surveillance.
- They were transported to the hospital by a public safety agency.
- Patients were involved in shootings, stabbings, poisonings, injury by automobile, bites and other cases which are reportable to government agencies or unusual industrial accidents.
- Disclosure is warranted during times of disaster or emergencies.
- Public officials are hospitalized.

The SPJ FOI committee encourages news organizations, local chapters and/or state Sunshine Chairs to submit comments to HHS requesting the rules allow access to public record information as outlined above. You might include examples from your local area where access to such information is critical in daily crime and accident reports as well as reporting about disasters. Please email a carbon copy to Joel Campbell at [joelc@desnews.com](mailto:joelc@desnews.com) or via fax at 801-237-2121. Comments on the proposed rules are due no later than 5 p.m. on Jan. 3, 2000.

A summary of the proposed rule can be viewed at an HHS web site at:  
<http://aspe.hhs.gov/admsimp/pvcsumm.htm>

Electronic comments can be submitted at the following web site:  
<http://aspe.hhs.gov/admsimp/>.

Comments (1 original, 3 copies, and, if possible, a floppy disk ) can be mailed to the following address:  
U.S. Department of Health and Human Services  
Assistant Secretary for Planning and Evaluation  
Attention: Privacy-P  
Room G-322A, Hubert H. Humphrey Building  
200 Independence Avenue SW  
Washington, DC 20201.

What follows are some examples from only two days of recent reports which include names and conditions of patients as reported by hospitals or medical centers. These kinds of stories would likely be incomplete under new HHS rules:

*Bonfire stack falls, kills Texas students*

St. Petersburg Times, 11/19/1999. Eleven die and 28 are injured when the tower, a Texas A&M tradition, collapses. A creaking sound and then a loud crack like a tree trunk snapping was the only warning 70 students had that the ...

*Shooting is just the latest tragedy*

St. Petersburg Times, 11/19/1999. The shooting of Lisa Erickson and its fallout are blows to families who are no strangers to tough times. At age 79, Marion McElhane is raising a toddler and a teenager. She's strong, she ...

*Clemson player wounded*

The Columbian, 11/18/1999. CLEMSON, S.C. (AP) Clemson running back Jarvis Austin is in critical condition Wednesday night after a gunshot wound to the head. Austin was admitted to the neuro-intensive care unit of the ...

*Donations accepted for crash victims*

The Atlanta Journal - The Atlanta Constitution, 11/18/1999. The Stephenson High School PTSA has set up a memorial fund and a survivors fund for the families of the Stephenson High. School students killed or injured in a crash Oct. 25. ...

*Family Injured in Downtown Oakland Collision / Police say drunk driver hit ...*

The San Francisco Chronicle, 11/18/1999. Two young sisters and their father were critically injured yesterday when their car was broadsided in downtown Oakland by a driver police said was drunk. .

*Transplanted Texan struck in N.Y.*

Deseret News, 11/18/1999. NEW YORK -- Last year, Nicole Barrett made a spur-of-the-moment decision: She was trading in her Texas roots to join the frenetic life in New York. ...

*Deranged man hits woman with brick*

The Kansas City Star, 11/18/1999. NEW YORK - A Texan who moved to New York a year ago was fighting for her life Wednesday after a deranged man bashed her in the head with a brick in a random, unprovoked attack in the middle of the day ...

*Area youth struggles for life after attack in Oklahoma*

The Kansas City Star, 11/18/1999. An Independence youth, who was attacked with baseball bats while on a weekend trip in Oklahoma, lay in critical condition Wednesday in a Tulsa hospital. ...

*Woman on oxygen seriously burned while trying .*

The News Tribune Tacoma, WA, 11/18/1999. A 73-year-old Tacoma woman suffered third-degree burns on her face when she tried to smoke a cigarette while breathing through tubes hooked up to a combustible oxygen tank. ...

*ACCIDENT VICTIMS REMAIN HOSPITALIZED \* THREE LISTED IN CRITICAL. ...*

Allentown Morning Call, 11/17/1999. Three of the four survivors of a fatal car crash on Route 309 in Rush Township Monday were in critical condition late Tuesday. The fourth, a 4-year-old girl whose grandmother was killed in the ...

*Family Injured in Downtown Oakland Collision / Police say drunk driver hit ...*

The San Francisco Chronicle, 11/18/1999. Two young sisters and their father were critically injured yesterday when their car was broadsided in downtown Oakland by a driver police said was drunk. ...

*EDEN WOMAN KILLED, HUSBAND INJURED IN MONDAY ACCIDENT*

Greensboro News & Record, 11/17/1999. An Eden woman was killed and her husband injured in an accident 4:24 p.m. Monday three miles southwest of Eden on N.C. 135. Johnnie Junior Brown, 65, of 518 Early Ave., is in critical...

*Crash kills school girl on east side*

The Detroit News, 11/17/1999. DETROIT -- Four teen-agers fleeing police in a stolen car caused a crash that killed a young girl walking home from school and seriously injured two other children. ...

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Society of Professional Journalists  
**FOI Alert Volume 5 Issue 9 (1999-2000)**  
 May 2, 2000

**Prepared By:** [Joel Campbell](#), FOI Alert Editor and SPJ Utah State Sunshine Chair, (801) 237-2190

## Public's right to know about possible chemical accidents would be curtailed under rule

Federal government officials, saying they are worried about worst-case chemical plant accident scenarios falling into the hands of terrorists, have issued a proposed rule that will severely restrict access to information about the scenarios and track those who view the information.

The proposed rule, released April 27 by the Environmental Protection Agency and United States Department of Justice, restricts the public's right to know about chemical accidents in their communities, regions and around the country in several ways, according to a preliminary analysis released by the watchdog group, OMB Watch.

The information will be released in ways to "minimize the likelihood of accidental releases, the risk of national security associated with posting the information on the Internet, and the likelihood of harm to public health and welfare," the proposed rule reads.

Ironically, under the proposed rules journalists and other researchers may not be able to effectively explain to people the possible dangers posed by chemical manufacturers and similar facilities in their communities. In addition, citizens won't be able to access much of the most key information via the Internet. The proposed rules also raise issues about the government monitoring the activities of journalists reviewing such records.

Chemical fires and spills kill some 250 Americans a year, according to the Working Group on Community Right-to-Know. The group also points out that many facilities' worst-case scenarios are already on the Internet (at [www.rtk.net](http://www.rtk.net)).

In March, several members of the Society of Professional Journalists met with David Savolaine, an aide to Congressman Sherrod Brown, about the proposed restrictions.

The Working Group had proposed using the Freedom of Information Act to gather the information and post it in a useable form on the Internet. "Keeping information off the Internet will not protect communities," said Paul Orum, with the Working Group.

Many of the chemical inventories now required to be disclosed by industries are kept in local government offices including health departments. But few members of the public or press know where to find these hard-copy documents, leaving them out of reach of people who need accurate information about the hazards that exist in their backyards.

The proposed rule follows efforts by Congress to prevent or lessen the effects of chemical accidents, particularly since the 1984 chemical release in Bhopal, India. Since that time, the EPA has required disclosure by facilities that have "threshold" levels of chemicals and required them to assess the potential consequences of the worst-case accident.

According to OMB Watch, the access restrictions on the worst-case scenario information include:

**\*\* Limiting information available on the Internet. The following kinds of information would not be**

placed on the Internet:

- Identity of the chemical involved in the worst-case or alternative case scenario,
- Release rate of the chemical,
- Duration of release,
- Distance to endpoint (i.e., vulnerability zone),
- Population within the vulnerability zone,
- Public receptors (e.g., churches, schools, shopping centers),
- Environmental receptors (e.g., national parks), and
- Graphics such as maps used to illustrate a scenario.

\*\* Requiring, citizens, journalists and researchers to view the information in "reading rooms," but not allowing copying. Local reading rooms could only include information for chemical plants in the geographic area near the reading room. The proposed rule would allow, but not require, fire departments, Local Emergency Planning Committees and State Emergency Response Commissions to establish local reading rooms.

\*\* Other information would have to be obtained in one of 50 state reading rooms where information about users of the information would be recorded and tracked. Individuals would be able to view no more than ten records each month and could take notes but could not make copies of the so-called offsite consequence analyses.

\*\* Creating an online tool that would allow users to enter a street address anywhere in the United States and find out whether that address may be affected by a worst-case chemical accident. There are several limitations including the fact that the data is not precise enough to indicate with certainty whether a particular address would or would not be affected by a chemical accident at a nearby facility.

A public hearing on the proposed rules is scheduled for Tuesday, May 9 in Washington, D.C., at the EPA Auditorium at Waterside Mall, 401 M Street, S.W., Washington, D.C. 20460. Those who want to testify at the hearing should call John Ferris, (202) 260-4043 or Vanessa Rodriguez, (202) 260-7913. Comments should be prepared in triplicate.

Public comments on the proposed rule are due on Thursday, June 8, 2000, and can be mailed to: Environmental Protection Agency, Office of Air and Radiation, Docket and Information Center, Ariel Rios Building, M6102, 1200 Pennsylvania Ave., NW, Washington, DC, 20460, Attn: Docket No. A-2000-20. Comments may be submitted on a disk in WordPerfect or Word formats.

Additional Resources:

- The text of the proposed rule, along with the EPA and Justice Department assessments that formed the basis of this rule (totaling over 200 pages) can be found at:  
<http://www.epa.gov/ceppo/whatnew.html>
- OMB Watch preliminary analysis of the proposed rule can be found at:  
<http://www.ombwatch.org/info/rmrulesum.html>

Contacts:

- Rick Blum, OMB Watch, 202-234-8494.
- Brenda Sue Thornton, trial attorney, criminal division, terrorism and violent crimes section, U.S. Department of Justice, 202-616-5210.
- John Ferris, chemical engineer, Environmental Protection Agency, 202-260-4043.
- Vanessa Rodriguez, chemical engineer, Environmental Protection Agency, 202-260-7913.

*About the author: Joel Campbell is SPJ's Utah Project Sunshine Chair and associate editor in New Media at the (Salt Lake City) Deseret News. Contact Campbell at (801) 237-2190.*

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Society of Professional Journalists  
**FOI Alert Volume 5 Issue 11 (1999-2000)**  
 May 18, 2000

**Contact:** [Bruce Brown](#), SPJ First Amendment legal counsel, Baker & Hostetler, Washington, D.C.

## SPJ Supports Amendment to Disclose Intelligence Spending Information

U.S. Congressman Tim Roemer has submitted an amendment to the Fiscal Year 2001 Intelligence Authorization Bill, H.R. 4392, requiring the public disclosure of aggregate intelligence appropriations figures for the last fiscal year (FY 1999). The amendment would declassify the total amount of last year's intelligence spending and would be an important step in peeling away the concern for secrecy that shrouds the CIA and other intelligence operations.

Society of Professional Journalists President Kyle Elyse Niederpruem has endorsed the amendment, which could be voted on as early as Friday, May 19. You can register your support for the amendment by contacting Roemer, the congressmen copied on Niederpruem's letter and your own congressional representative.

Niederpruem's letter is attached, and addresses for Roemer and other congressmen are included. For a copy of the proposed amendment, contact Julie Grimes, SPJ communications director, at [jgrimes@spjhq.org](mailto:jgrimes@spjhq.org) or (765) 653-3333 ext. 216.

### Letter from Niederpruem to Congressman Roemer

May 16, 2000

By Facsimile and U.S. Mail  
 The Honorable Tim Roemer  
 2352 Rayburn House Office Building  
 Washington, DC 20515-1403

Dear Congressman Roemer:

As national president of the Society of Professional Journalists, I write to endorse your amendment to H.R. 4392, the Intelligence authorization bill for FY 2001. Your proposal would require the public disclosure of aggregate intelligence appropriations data for FY 1999.

The Society has long believed that the secrecy that surrounds this country's intelligence spending is unwarranted and unjustified. Publication of accurate aggregate figures will serve to educate citizens about the conduct of government and promote accountability in public officials. We do not believe that the release of information of such a generalized nature will in any way imperil national security. Congressional action in this area would amount to an important step in peeling away the solicitude for secrecy that shrouds the CIA and other intelligence operations.

The Society is a voluntary non-profit journalism organization representing every branch and rank of print and broadcast journalism. SPJ is the largest membership organization for journalists in the world, and for more than 90 years, SPJ has been dedicated to encouraging a climate in which journalism can be

practiced freely, fully, and in the public interest.

Please feel free to contact me if the Society can be other further assistance to you in your efforts to secure the passage of your amendment to H.R. 4392.

Sincerely,

Kyle Elyse Niederpruem  
President  
Society of Professional Journalists

cc:  
The Honorable David Dreier  
The Honorable John Joseph Moakley  
The Honorable Porter J. Goss  
The Honorable Julian C. Dixon

---

### Contacts

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**The Honorable Julian C. Dixon**  
U.S. House of Representatives  
2252 Rayburn Building  
Washington, DC 20515  
Phone: (202) 225-7084

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The Society of Professional Journalists is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma

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Society of Professional Journalists  
**FOI Alert Volume 5 Issue 12 (1999-2000)**  
 May 24, 2000

**Prepared By:** [Ian Marquand](#), SPJ FOI Committee Chair, (406) 542-4449

## Concern Over New Taxpayer "Bill of Rights": IRS Records May Become Exempt from FOIA

A new "Taxpayers' Bill of Rights" (TBOR) bill contains new language that appears to exempt many Internal Revenue Service records from the federal Freedom of Information Act.

The bill, H.R. 4163, sponsored by Rep. Rob Portman (R-Ohio,) Rep. Amo Houghton (R-N.Y.), and Rep. J.D. Hayworth (R-Ariz.), passed the House very quickly and currently is under consideration by the Senate Finance Committee.

Tax Analysts, a national tax watchdog organization based in Arlington Va., sounded an alarm on the FOIA implications of the bill in April and is looking for other organizations to join in asking the Senate to take a long, close look at the bill's implications.

An issue is new language in the opening sentence of Section 6103 (a) of the Internal Revenue Code, which deals with confidentiality and disclosure of tax returns and return information. Currently, Section 6103 (a) states that no one may release tax return information unless authorized by the rules spelled out in that section. (In general, only the person or entity that files the return can access it.)

The new version, found in Section 201 of the TBOR, keeps the old language, but adds the words "notwithstanding any other provision of law." Attorney Bill Dobrovir, who advises Tax Analysts, believes those words mean that the Internal Revenue Code would trump FOIA and would allow the IRS to reject requests for a wide variety of records based only on its own criteria.

The IRS, said Dobrovir, already uses a very broad definition of "taxpayer information" to deny requests for records. However, under FOIA, records can be presumed open unless an agency can show they fall under one of several specific statutory exemptions.

Form 990 returns for non-profit corporations are not affected by this change in law. Journalists and citizens will still have access to those records as provided in a different section of the Internal Revenue Code.

A report by the federal Joint Committee on Taxation notes that people have used FOIA in attempting to gain access to IRS records closed under Section 6103. The new language is seen by Tax Analysts as a way to shut off FOIA requests to a wide variety of records, including policy documents that have little or no connection with actual tax returns.

By removing FOIA from the picture, said Dobrovir, the IRS could presume any document is secret and block requests for it with no other justification. He said the new version also would prevent courts from forcing the release of documents that might be opened under FOIA. Dobrovir worries that passage of this bill could lead to other federal agencies asking Congress to remove their records from FOIA consideration.

For more information:

- [Ian Marquand](#), SPJ FOI Committee Chair, (406) 542-4449

- Bill Dobrovir, attorney, Warrenton, Va., (504) 341-2183
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To subscribe to the Society of Professional Journalists FOI Alert, contact SPJ at [spj@spj.org](mailto:spj@spj.org) or call 765-653-3333. In your message, provide your name, organization, mailing address, email address, phone number and fax number. There is no fee. We strongly encourage the wide dissemination and publication of these alerts in other forums.

The Society of Professional Journalists is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Mr. HORN. We have a vote about to come. It started at 3:32. It is 15 minutes, so I'm going to have to leave in a recess, but let me ask our friends in the first panel—Mr. Gotbaum, you might want to join us. Mr. McIntyre, you might want to join us. Then we can answer some of the questions here. Mr. Posner, you might want to join us.

Some comments were made about the role of the OMB, for example. Maybe we can get an answer right now.

Let me, in the meantime, say, are you familiar—and this would be panel one and two—are you familiar with the Department of Defense's 1998 policy change that limited the Department's Internet documents to those of general public interest? Many who use the Electronic Freedom of Information Act to obtain information have said that a number of documents were pulled from the DOD Web site. What justifies a decision such as this that appears to go against the Electronic Freedom of Information Act? Do we have any knowledge on that one way or the other?

Is Mr. McIntyre still here?

[No response.]

Mr. HORN. Well, we'll send it to him to put the answer in the record on that.

There were also some of the comments of members on panel two as to the degree to which OMB ought to be doing more in the administration of this law. I don't know if you listened to that, but if you have any remarks, let us know.

Mr. GOTBAUM. If you'd like, Mr. Chairman, we'd be happy to submit an answer for the record.

Mr. HORN. You'd like to submit? OK. Without objection, the statement from the representatives of the Office of Management and Budget will be put in the record at this point.

[The information referred to follows:]

**QUESTION: Why does OMB disagree with OMB Watch's assessment of the Administration's work in this area?**

We think that OMB Watch's approach misses the main point of EFOIA. OMB strongly supports, and is working with agencies to implement the Act's fundamental goal: To provide the public with more information that is easier to access about their government and its activities. However, instead of recognizing the extraordinary expansion in information provided by the government and suggesting ways to accelerate it, OMB Watch is instead focused on refinements to the case-by-case approach to information dissemination that existed before EFOIA and the development of the Internet.

OMB Watch argues about the quality of guidance provided by OMB and the Department of Justice, despite the fact that these agencies have not only provided the guidance required by law, but gone beyond it. The Department of Justice offers continuing guidance, assistance and training to agencies, to help them both comply with the provisions of the law and implement the freer access to information that is its fundamental goal. DOJ holds a variety of FOIA training sessions every year: (1) basic training sessions five or six times per year, (2) introductory training sessions two or three times per year, (3) advanced training sessions twice a year, and (4) FIOA guide training -- which was offered in October, 1998 and again in June 2000, and was attended by 500 to 600 individuals. Additionally, the DOJ has provides voluminous guidance documents to assist agencies, which can be easily accessed at DOJ's Web site ([www.usdoj.gov](http://www.usdoj.gov)).

OMB Watch makes several claims of agency non-compliance based upon its survey of agency Web sites. If an agency did not have a direct link marked "FOIA", they claim that it has not complied with the law, *despite the fact that the law does not require any such direct link*. Many agencies that lack such links nonetheless have extensive electronic indexes; this was ignored by OMB Watch's superficial analysis.

OMB Watch has traditionally viewed OMB oversight of the agencies as overly intrusive. Now, however, OMB Watch wants OMB to prescribe, in great detail, the form and content of each of the more than 20,000 Federal Web sites. This is impractical and inappropriate. We do not think that OMB either can or should specify the details of every agency's Web sites. OMB and DOJ can and do provide guidance, but individual agencies are the best judges of how to provide information that is useful to their constituents and each agency is responsible for ensuring compliance with EFOIA and other laws.

OMB Watch also misrepresented OMB's actions. OMB Watch claimed that OMB had instructed agencies that they could comply with EFOIA's index creation and posting requirement merely by participating in the Government Information Locator Service (GILS). The actual text of OMB's 1998 guidance, however, says something quite different: It says "[w]e expect that this index and description would include. . . GILS *as well as any other major information and record locator system that the agency has identified*."

We think that, contrary to the questionable claims of OMB Watch, overall federal agencies are in substantial compliance with EFOIA. Indeed, over the past couple of years, federal agencies have posted almost 100,000 FOIA-related documents onto the Internet. No one suggests that there

**Response to OMB Watch**

isn't still much work to do. Agencies, and the entire Federal government, can and are working to put more information online and to develop more effective ways for the public to access that information.

As our testimony noted, the Administration is working hard to improve agency affirmative dissemination practices and increase disclosure while protecting privacy, national security, and other legitimate interests. Our hope is to decrease the need for reliance on individual FOIA responses by use of the approaches contained in EFOIA and elsewhere, and to increase public access to other more efficient and useful information venues. We are taking deliberate advantage of technological innovation, particularly the Internet and the World Wide Web, to facilitate this change in direction and emphasis. Just a few examples of this include:

- Consumers and healthcare professionals can access reliable information on over 1,000 health-related issues at the U.S. Department of Health and Human Services' healthfinder Web site, [www.healthfinder.gov](http://www.healthfinder.gov). Visitors to the site have access to a variety of services, including online publications, information on support and self-help groups, and links to government agencies and not-for-profit organizations that produce reliable information for the public. Launched in April 1997, healthfinder served over 1.7 million visitors in its first year online and more than 4.5 million in 1999.
- Citizens looking for government data no longer need to know who in the Federal Government is responsible for collecting which statistics. Individuals can simply enter their query at [www.fedstats.gov](http://www.fedstats.gov) to find the information they seek. FedStats provides the public with a single point of entry to the wide array of Federal statistics maintained by various Federal agencies. Since its inception in 1997, FedStats has logged close to 3 million user sessions and received enthusiastic public support.
- Travelers can now check up-to-the-minute information for weather-related delays at forty major U.S. airports using the Federal Aviation Administration's Web site [www.fly.faa.gov](http://www.fly.faa.gov). The Web site has received almost one million visitors since its launch on April 3, 2000, and the number of travelers accessing the site nearly doubles each week.
- Citizens can find the Medicare health plan option that works best for them by accessing the Health Care Financing Administration's (HCFA) Medicare Compare Database, found at [www.medicare.gov](http://www.medicare.gov). Medicare Compare is an interactive database that provides comprehensive information on various Medicare health plan options, detailing the cost, quality, and benefits of each plan.
- The Toxic Release Inventory ("TRI") is an EPA on-line database of toxic chemicals that are being used, manufactured, treated, transported, or released into the environment, found at [www.epa.gov/tri/](http://www.epa.gov/tri/). TRI enables citizens to become more aware of toxic chemicals in their own neighborhoods checking the status of their area. It encourages dialogue between individuals and companies that may result in a change in poor environmental practices. Manufacturers use TRI data as a basis for reducing large stocks of toxic chemicals located in dense population areas or to lower levels of chemical releases. Additionally, many emergency management agencies, such as fire departments and emergency medical services,

**Response to OMB Watch**

use TRI to identify chemicals in use and map facility layouts for a more effective, quicker response to emergencies. Some other groups who also use this information are health officials, media, and many public interest agencies.

- Currently GSA is working on [firstgov.gov](http://firstgov.gov), a project for a single access point to on-line government information. Its goal is to index federal government on-line information. It will provide access to citizens through a set of topic areas on a search engine, operated by a non-profit organization working in partnership with the federal government. This initiative has been supported by the CIO council and other organizations. It will provide an incentive for information interoperability throughout government, and easy access for citizens and businesses to a significant amount of government information.

Unfortunately, *none of these efforts is even mentioned by OMB Watch* in their report.

OMB strongly supports both the letter and the spirit of EFOIA and we are working with agencies to implement the law. We think that doing so was precisely what Congress intended when it enacted EFOIA: to provide more transparent, more accountable, and better government.

Mr. HORN. What else did we have?

Ms. DALGLISH. Do we get to respond to their responses?

Mr. HORN. Well, go ahead. Maybe we'll add their responses to your responses. We'll keep the record open for all of you, so you might want to boil down some of yours and ask the question, and then we'll get an answer out of OMB.

Mr. POSNER. And, Mr. Chairman, on behalf of the Department of Justice, we will be submitting a number of written comments, as well.

Mr. HORN. OK. We'd welcome that, and we appreciate it, having your cooperation.

So you want to answer these questions, then, and you'd just as soon go back to the office, or what?

Mr. GOTBAUM. Mr. Chairman, partly because of time we'd be happy to.

Mr. HORN. Yes. Well, we'll send you some of the questions, and just give us your best judgment on it. We'll put it in the record at this point.

I have to run for a vote, so I want to thank the staff that worked on this hearing: J. Russell George, staff director, chief counsel, standing up there; Heather Bailey, staff professional working with this particular issue; Bonnie Heald, director of communications; Bryan Sisk, clerk; Will Ackerly, intern; Chris Dollar, intern; Meg Kinnard, intern. We thank you all for that. The minority staff: Trey Henderson, counsel; and Jean Gosa, minority clerk; and the official reporter of debates is Art Emmerson.

We thank you all. We are adjourned.

[Whereupon, at 3:43 p.m., the subcommittee was adjourned.]

[The prepared statement of Hon. Jim Turner and additional information submitted for the hearing record follows:]

**OPENING STATEMENT OF THE HONORABLE JIM TURNER**  
**GMT HEARING: "AGENCY RESPONSE TO E-FOIA"**  
**June 14, 2000**

Thank you, Mr. Chairman. The ability of citizens to access information about their government and hold it accountable for its actions is an essential component our democratic system. The Freedom of Information Act has guaranteed access to that information for over 30 years, and has provided citizens, journalists, and public interest organizations, and citizens with critical information that has used to improve government and benefit all Americans. In 1996, in an effort to bring this law into the "information age," Congress passed the Electronic Freedom of Information Act Amendments (E-FOIA). I would like to commend Chairman Horn for his work in ensuring passage of that legislation, and for holding today's hearings to oversee its implementation.

The 1996 legislation expanded the FOIA law, requiring that, for the first time, federal agencies establish electronic reading rooms that contain information and records on a wide variety of decisions. When fully implemented, the E-FOIA will provide millions of Americans access to a vast array of information, all easily accessible through the Internet. Citizens will be able to obtain this information without the long wait commonly associated with the old FOIA law, and will have access to documents and information from any location.

While federal agencies have made great progress in providing electronic information to the public, I was distressed to learn from a OMB Watch report that a majority of agencies are not compliant with E-FOIA. There are a number of reasons cited for this conclusion, including inadequate funding, insufficient guidance, and a failure to make public access to government information a priority.

Representatives from the executive branch will testify today about their efforts to improve agency compliance. Bringing the federal government into the information age requires a serious commitment. Agencies must establish an

electronic presence, they must make the provision of information about their activities a priority, and they must establish the financial and institutional mechanisms to make this happen. When completed, this effort will have a large payoff. The widespread availability of information about federal government activities will ensure that the government functions at maximum efficiency, and continues to do the work of the people.

All of us -- Democrats and Republicans -- support the principles behind the E-FOIA. It is my hope that as a result of today's hearings we will have a better understanding of how well this law is working and what we need to do to improve it. Again, I commend Chairman Horn for his focus on this issue and welcome the witnesses here this afternoon.

**QUESTION 1: In a recent U.S. District Court decision, Public Citizen v. Carlin, the issue of the National Archives disposal of original electronic records under the Records Disposal Act arose. Journalists and citizens believed these records were in the public domain and, therefore, should not have been destroyed. What is the impact of this decision on the EFOIA?**

**ANSWER:** In its August 1999 decision in Public Citizen v. Carlin (184 F.3d 900), the Court of Appeals for the District of Columbia Circuit upheld the Archivist's issuance of General Records Schedule (GRS) 20. In GRS 20, the Archivist authorized agencies to delete the "live" version of a Federal-record electronic mail message or word processing document (i.e., the version of the message or document that is found in the agency's "live" computer system) only after the agency had transferred a copy of that record into the agency's recordkeeping system. As the D.C. Circuit explained:

“GRS 20 does not authorize disposal of electronic records *per se*; rather, such records may be discarded only after they have been copied into an agency recordkeeping system . . . . Before an agency may discard electronic mail or word processing files, pursuant to GRS 20, it must first copy them to a recordkeeping system . . .” 184 F.3d at 905, 907.

As the D.C. Circuit therefore concluded, “when a record is discarded pursuant to GRS 20, however, it has already been copied to the agency’s recordkeeping system, and there is no risk that information will be lost to future users.” 184 F.3d at 906.

The Federal Records Act and the EFOIA are different statutes. We are not aware of any impact that the Court of Appeals’ decision in Carlin has had on the EFOIA.

**QUESTION 2: How would you define "frequently requested" documents?**

**ANSWER:** The Justice Department has issued guidance to agencies on implementing EFOIA and in doing so has helped them interpret “frequently requested”

“Agencies must include any records processed and disclosed in response to a FOIA request that ‘the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.’ Under this provision, when records are disclosed in response to a FOIA request, an agency is required to determine whether they have become the subject of subsequent FOIA requests or, in the agency's best judgment based upon the nature of the records and the types of requests regularly received, are likely to be the subject of multiple requests in the future. If either is the case, then those records in their FOIA-processed form become ‘reading room’ records, which must automatically be made available to potential FOIA requesters” DOJ FOIA Update, Vol. XVIII, No.1, at 3-4; DOJ FOIA Guide, at 19-20 (May 2000 edition).

**Should agencies automatically place in their reading rooms the FOIA-processed records that they determine have become, or are likely to become, the subject of subsequent FOIA requests?**

Yes, in general. New subsection (a)(2)(D) of the FOIA, 5 U.S.C. § 552(a)(2)(D), as amended by Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (effective Mar. 31, 1997), establishes this new category of FOIA "reading room" records. In the very large percentage of cases, the records in this new "subsequent requests" category will have been processed under the FOIA in a form in which they can readily be made available to the public in an agency's reading room. Before the agency places these records in a reading room, however, the agency must first considering the small possibility that some of those records, or portions of them, might not be appropriate for public disclosure. In an exceptional case, an agency might disclose information to a first-party FOIA requester that it would not disclose to a third-party requester or to the general public. See FOIA Update, Fall 1996, at 1. The primary example is personal information about a FOIA requester that would be withheld from others on the basis of FOIA Exemptions 6 or 7(C), but would not be withheld as exempt from that first-party requester. Accord FOIA Update, Spring 1989, at 5 (an agency "will not invoke an exemption to protect a requester from himself"). Another possible example is business information that falls within Exemption 4 but would not be withheld from the company to which it pertains. In either case, such information might be contained in a subject-matter file that could become the subject of multiple FOIA requests. So in order to avoid any possibility of violating the disclosure prohibitions of the Privacy Act of 1974, 5 U.S.C. § 552a, or the Trade Secrets Act, 18 U.S.C. § 1905, an agency should be sure that the FOIA-processed records that it places in its reading room do not contain any such information.

**Does an agency have an obligation to comply with any subsequent FOIA requests that it receives for the FOIA-processed records that it places in its reading room under new FOIA subsection (a)(2)(D)?**

Yes. Although the ordinary rule for records that are placed in an agency's reading room under FOIA subsection (a)(2) is that they cannot be the subject of a regular FOIA request under the Act, see, e.g., FOIA Update, Winter 1995, at 2 (pointing to language of subsection (a)(3)), Congress made clear that it did not intend this rule to apply to the FOIA-processed records that agencies place in their reading rooms under new subsection (a)(2)(D). See H.R. Rep. No. 104-795, at 21 (1996) ("Since not all individuals . . . are near agency public reading rooms, requestors would still be able to access previously-released FOIA records through the normal FOIA process."); see also FOIA Update, Fall 1996, at 1.

**QUESTION 3: Have Federal Bureau of Investigation requestors been able to access information more easily since the agency decreased its backlogs of Freedom of Information requests?**

**ANSWER:** The FBI will provide this information through the Department of Justice when the Department provides answers to these questions.

**QUESTION 4: Please describe the Government Information Locator Service system and how it provides information to the public. Does this technology comply with EFOIA?**

**ANSWER:** GILS was established under the Paperwork Reduction Act of 1995 (44 U.S.C. 3511) and OMB Bulletin no. 95-01. The purpose of GILS is to identify information resources throughout the Executive Branch, describe the information available, and provide assistance in how to obtain the information. It does this through interoperable agency-based indexes of information resources. On-line queries of government information resources use these indexes to find the agency-based information.

As we noted in Josh Gotbaum's testimony, the goals of GILS have been bolstered and reinforced by the Administration's policy to put more information online in a way that is easier to locate, both generally through the pending development of FirstGov.gov and specifically in agency and specifically under sector-specific portals. GILS technology complies with EFOIA since EFOIA is technology neutral.

**QUESTION 5: Has EFOIA improved the ability of Federal departments and agencies to respond to public requestors seeking Government information?**

**ANSWER:** Over the past couple of years, federal agencies have posted almost 100,000 FOIA-related documents onto the Internet. Currently, agencies, and the entire Federal government, are working to put more information online and to develop more effective ways for the public to access that information.

As our testimony noted, the Administration is working hard to improve agency affirmative dissemination practices and increase disclosure while protecting privacy, national security, and other legitimate interests. Our hope is to decrease the need for reliance on individual FOIA responses by use of the approaches contained in EFOIA and elsewhere, and to increase public access to other more efficient and useful information venues. Although EFOIA did not directly provide more resources to improve agencies' ability to respond to FOIA requests it did reinforce the need to increase the amount of online information previously obtainable only through the cumbersome, case-by-case approach of individual FOIA letters. We are taking deliberate advantage of technological innovation, particularly the Internet and the World Wide Web, to facilitate this change in direction and emphasis. Just a few examples of this include:

- Consumers and healthcare professionals can access reliable information on over 1,000 health-related issues at the U.S. Department of Health and Human Services' Healthfinder web site, [www.healthfinder.gov](http://www.healthfinder.gov). Visitors to the site have access to a variety of services, including online publications, information on support and self-help groups, and links to government agencies and not-for-profit organizations that produce reliable information for the public. Launched in April 1997, Healthfinder served over 1.7 million visitors in its first year online and more than 4.5 million in 1999.

- Citizens looking for government data no longer need to know who in the Federal Government is responsible for collecting which statistics. Individuals can simply enter their query at [www.fedstats.gov](http://www.fedstats.gov) to find the information they seek. FedStats provides the public with a single point of entry to the wide array of Federal statistics maintained by various Federal agencies. Since its inception in 1997, FedStats has logged close to 3 million user sessions and received enthusiastic public support.
- Travelers can now check up-to-the-minute information for weather-related delays at forty major U.S. airports using the Federal Aviation Administration's web site [www.fly.faa.gov](http://www.fly.faa.gov). The web site has received almost one million visitors since its launch on April 3, 2000, and the number of travelers accessing the site nearly doubles each week.
- Citizens can find the Medicare health plan option that works best for them by accessing the Health Care Financing Administration's (HCFA) Medicare Compare Database, found at [www.medicare.gov](http://www.medicare.gov). Medicare Compare is an interactive database that provides comprehensive information on various Medicare health plan options, detailing the cost, quality, and benefits of each plan.
- The Toxic Release Inventory ("TRI") is an EPA on-line database of toxic chemicals that are being used, manufactured, treated, transported, or released into the environment, found at [www.epa.gov/tri/](http://www.epa.gov/tri/). TRI enables citizens to become more aware of toxic chemicals in their own neighborhoods checking the status of their area. It encourages dialogue between individuals and companies that may result in a change in poor environmental practices. Manufacturers use TRI data as a basis for reducing large stocks of toxic chemicals located in dense population areas or to lower levels of chemical releases. Additionally, many emergency management agencies, such as fire departments and emergency medical services, use TRI to identify chemicals in use and map facility layouts for a more effective, quicker response to emergencies. Some other groups who also use this information are health officials, media, and many public interest agencies.



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

August 17, 2000

The Honorable Stephen Horn  
Chairman  
Subcommittee on Government Management,  
Information, and Technology  
Committee on Government Reform  
U.S. House of Representatives  
Washington, DC 20515

Dear Chairman Horn:

Enclosed with this letter are responses to questions you asked of Joshua Gotbaum, Executive Associate Director and Controller of the Office of Management and Budget. These questions follow-up on Mr. Gotbaum's testimony before your Subcommittee at a hearing entitled "Agency Response to the Electronic Freedom of Information Act," held June 14, 2000.

If you have questions regarding these responses, please contact Jonathan Womer, Office of Information and Regulatory Affairs, at (202) 395-7856.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles Kieffer".

Charles Kieffer  
Acting Associate Director  
for Legislative Affairs

Enclosure

**THE  
REPORTERS  
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Lucy A. Daiglish  
Executive Director

August 11, 2000

The Honorable Stephen Horn  
Chairman, Government Management,  
Information and Technology Subcommittee  
Committee on Government Reform  
2157 Rayburn House Office Building  
Washington, D.C. 20515-6143

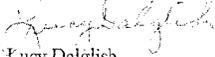
Re: Extended questions regarding Agency Response  
to the Electronic Freedom of Information Act

Dear Representative Horn:

Thank you for your continued interest in our views concerning the Electronic  
Freedom of Information Act.

Enclosed are answers to your questions. We would be happy to respond to  
other questions you might have.

Sincerely,



Lucy Daiglish  
Executive Director

STEERING COMMITTEE:

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*The Washington Post*
- CAROLE SIMPSON  
*ABC News*

*Affiliations appear only  
for purposes of identification.*

**1. Please explain your concerns about State and Federal legislation and agency regulations regarding privacy policy.**

As we testified, the U.S. Supreme Court's decision in Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989), greatly interfered with reporters' ability to gather and report the news. In that decision the court severely altered the balancing test between public and private interests that agencies had used in determining whether and when to invoke the FOI Act's privacy exemptions. The high court ruled that the only public interest the government could consider in the balance was the public's interest in knowing "what the government was up to." The government had not asked the Supreme Court to make that ruling.

The results have been devastating. It is virtually certain today that, if a name of an individual appears on a government record, the government will consider invoking a privacy exemption to the Freedom of Information Act and probably do so.

There are few exceptions. Minimal information about federal government employees, such as name, grade and duty station, is available, but only rarely can the public learn about disciplinary actions or job performance.

If information in federal files concerns a state or local employee or elected official, federal agencies routinely rule that there is no public interest to balance against privacy interests. The only public interest that can be served by the Freedom of Information Act is the public's interest in *federal* government activities, they say. For example, information about closed federal civil rights cases involving investigations of Tampa police were not available in 1991 to the Tampa Tribune because there was no public interest that could be weighed against the policemen's privacy interests.

Wage earners protected by the Davis-Bacon Act cannot be identified, even to learn if there is compliance with the wage and hour provisions of that law, because disclosure would intrude upon their personal privacy. Information on similar wages paid in private projects is open.

Recipients of government loans are kept secret to protect their privacy. Even recipients who default on multiple-million dollar Farmers Home Administration loans will not be named by FmHA. In 1994, Sharon LaFraniere, then a staff writer for The Washington Post, reported on loan recipients whose defaulted loans from the previous five years totaled \$11.5 billion. Because the agency claimed that the privacy exemption protected the names of defaulters, her story was based on leaks and information from other sources. She revealed that the agency had abandoned efforts to collect loans from very, very wealthy individuals.

The story that LaFraniere wrote had been pursued by other reporters from all over the country for several years. They were repeatedly denied any information on the wealthy defaulters in response to their Freedom of Information Act requests.

Reporters have been denied the names of auditors repeatedly rehired by the Department of Housing and Urban Development despite continued reports of shoddy work. They have been denied the names of military doctors moved rather than disciplined after making life-threatening mistakes.

Sometimes even laudable work by federal employees is kept secret for privacy reasons. A video showing investigative work by the U.S. Attorneys' Office in Chicago in uncovering

corruption among some Chicago officials could not be released to protect the privacy of the good guys and the bad, even though transcripts of the video were in court records and the case was current.

The privacy of wrongdoers is heavily protected. In a typical example, a Baltimore Sun reporter could not get a reproducible copy of a photograph of a convicted child molester awaiting sentencing for trafficking in child pornography even though the government entered the picture as part of the evidence in a trial. The copy in court files was unreproducible in the newspaper. To provide the newspaper with a reproducible copy would have violated the guilty man's privacy, the U.S. Customs Service said.

In most federal cases, reporters cannot even learn the names of people who are imprisoned unless they get the information from court rather than prison records. The public knows very little still about the Marielite prisoners because reporters were unable to learn even their identities from the prisons in which they were impounded.

At one time, death was thought to extinguish any privacy right but increasingly privacy is considered to be inherited by family and loved ones who presumably would suffer if any information about the deceased were to be released.

The privacy exemptions are used to deny reporters information about people who are in government, who are affected by government and who do the government's business. They can almost never learn anything about victims or perpetrators from government files. The federal FOI Act is greatly crippled by the overuse of the privacy exemptions. Reporters cannot have access to records they need to do their jobs. And the public knows less and less about the government as a result.

In the Electronic Freedom of Information Amendments of 1996, Congress sought to reaffirm its original vision for the FOI Act. The findings section of the 1996 amendments states that the purpose of the FOI Act is to establish the right of any person to obtain access to agency records "for any public or private purpose."

The Senate Judiciary Report accompanying the 1996 amendments states that the Findings section was intended to overcome the Supreme Court's presumption in Reporters Committee that no public interest existed in FOI Act requests that do not seek to shed light on government operations. S. Rep. No. 272, 104<sup>th</sup> Cong., 2d Sess. 26-27 (1996) (Additional Views of Senator Leahy).

Senator Patrick Leahy, a primary sponsor of the bill, explained the rationale for the Findings section as follows:

The Findings set forth in section 2 of this bill makes clear that the FOI Act requires Federal agencies to make records available to the public in specific ways, including upon the request of any person for any public or private use. ... This finding is intended to address concerns that the reasoning of the Supreme Court in Department of Justice v. Reporters Committee and the U.S. Department of Defense v. Federal Labor Relations Authority analyzed the purpose of the FOI Act too narrowly. The purpose of the FOI Act is not limited to making agency records and information available to the public only in cases where such material would shed light on the activities and operations of Government. Effort by the courts to articulate a "core purpose" for which information should be released imposes a limitation on the FOI Act which

Congress did not intend and which cannot be found in its language and distorts the broader import of the Act in effectuating government openness.

S. Rep. No. 272, 104th Cong., at 26-27 (1996) (Supplemental Discussion of the Bill).

The legislative intent is clear and should be controlling. The only portions of the legislative history that address the issue support the conclusion that the 1996 Amendments were intended to establish that disclosure for any purpose may serve the public interest. It should be noted that the legislative history of the original FOI Act provides no support for the Supreme Court's interpretation that Congress intended the public interest to be limited to shedding light on an agency's performance of its statutory duties.

**2. What is the effect of the Defense Department's Clinger - Cohen regulations on journalists and citizens who are attempting to gather information?**

In its testimony OMB Watch noted the absence from the Office of Management and Budget's proposed revision of A-130 of the requirement in the Clinger-Cohen legislation of 1996 that agencies index their electronic information and send it to GPOAccess.

We do not know how the absence of that provision would affect public access to Department of Defense's information any more or less than it would any other agency. We also suspect that journalists, who regularly cover their beats, might be less dependent on central indexing than requesters who are less familiar with specific agencies.

However, journalists with whom we talked frequently cited the lack of conveniently indexed electronic federal records as a significant barrier to access to agency. A centralized, comprehensive index to electronically available federal information would greatly benefit journalistic research in the same way that it would benefit all researchers who need to use federal data.

We do not suggest though, that in actively contributing to the success of GPOAccess, agencies should spend less time preparing and maintaining their own indices and working on the so that they will better serve requester's needs as they are.

**3. In a recent U.S. District Court decision, Public Citizen v. Carlin, the issue of the national Archives disposal of original electronic records under the Records Disposal Act arose. Journalists and citizens believed these records were in the public domain and, therefore, should not have been destroyed. What is the impact of this decision on EFOIA?**

Paper copies of records are simply not as usable as electronic records, and the U.S. Court of Appeals decision in Public Citizen v. Carlin simply permits agencies to limit access to their records by not posting them electronically. The decision is particularly galling because records today are created electronically, are more conveniently stored electronically, and probably would be used more easily in electronic format by government agencies themselves.

We suspect that when recently created records exist only in paper format, the agency has completed whatever needs it had to search and retrieve information before permitting electronic versions to be destroyed. In other words, for a record to exist only in paper format, an agency will have had to make a conscious determination that it, but not necessarily the public, no longer

needs the benefits of electronic format.

Almost 30 years ago the New Mexico Supreme Court recognized that the "right to inspect public records should . . . carry with it the benefits arising from improved methods and techniques of recording and utilizing information contained in these records, so long as proper safeguards are exercised as to their use, inspection and safety." *Ortiz v. Jaramillo*, 483 P.2d 500 (N.M. 1971). We believe that the Electronic Freedom of Information Act of 1996 was intended to provide the public with at least the same electronic record benefits enjoyed by federal agencies.

#### **4. How would you define a "frequently requested" document?**

A "frequently requested" document should be defined broadly. For instance, widespread allegations of political favoritism by Department of Housing and Urban Development officials in awarding federal housing assistance monies, led to the filing of Freedom of Information Act requests from reporters in cities and towns all over the country who wanted to know if monies allocated for low income housing in their communities had been used to pay lobbyists with strong political connections. HUD demanded that local and regional offices forward the requests to Washington for individual responses saying that they could be better coordinated from headquarters.

Since EFOIA requires posting of "frequently requested" documents, an agency deluged by such requests would simply post the records showing how each community's funds had been allocated, including records showing local payments of funds to consultants.

#### **5. Have Federal Bureau of Investigation requestors been able to access information more easily since the agency decreased its backlogs of Freedom of Information requests?**

We have not heard from reporters who claim that they are now able to access information more easily since the agency decreased its backlogs of requests, but our hotline, which services reporters who are having difficulty in obtaining responses, would not likely be called by a reporter experiencing new success in gaining information from the FBI.

We have noted some changes for the better however. A Supreme Court reporter who reports on the FBI records collected on late Supreme Court justices wrote a story in April based upon the files of the late Justice Lewis Powell which he requested in September 1998 shortly after Powell's death. He is still waiting for a response to his FOI request for records of the late Justice Warren Burger which he requested after Burger's death in 1995.

The public would have been better served by news accounts of the FBI's interest in these Justices at the time of their death, when the media were reporting on other aspects of their lives. However, the public has an enduring interest in these news stories and will read them however long it takes the FBI to provide its records.

That is not the case with most news stories. Most reporters are going to see little difference between two years and six in waiting for records. The stories they are writing will be written or abandoned long before the FBI answers their requests. We are certain that some journalists and authors will benefit from any decrease in delay time, but any long delay jeopardizes newsgathering and reporting..

We have already begun to see the advantages of the FBI's posting of frequently requested documents. When it is clear at the death of a famous person investigated by the FBI that several requests will be forthcoming, the agency can post the files it intends to release and avoid both its own processing times and the requesters' need to wait for exchanges with the agency. For instance, some Frank Sinatra files were available on line soon after his death and while the public was reflecting upon his life.



SOCIETY OF  
PROFESSIONAL  
JOURNALISTS



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IN 1909  
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August 11, 2000

Rep. Stephen Horn  
Chairman, Subcommittee on Gov't Management,  
Information and Technology  
B-373 Rayburn House Office Building  
Washington D.C. 20515

Dear Congressman Horn:

Thank you for the opportunity to contribute further to the discussion of E-FOIA compliance within the federal executive branch.

Unfortunately, I did not receive your questions until they arrived in the mail Wednesday, September 9. With the severity of forest fires in my area, I have been pressed into service to help cover them. As a result, I have been unable to spend much time answering your questions to meet your deadline.

Here, however, are brief responses.

**1) What are your concerns about State and Federal legislation and agency regulations regarding privacy issues?**

The Society of Professional Journalists recognizes that individuals have certain rights to privacy as interpreted by courts and identified in state constitutions such as that of my own state of Montana. We become concerned when legislation places public records out of public view. For instance, SPJ still believes that the Driver's Privacy Protection Act was a mis-guided appeal to privacy hysteria and was motivated by incidents which it would not have prevented if it had been in force. We also believe that where activity is a privilege and dependent upon a government license, information should be available for inspection.

We also have seen states respond to corporate entities claim of a right to privacy through administrative order or legislation regarding tax information that had been public for decades.

We currently are becoming involved in litigation fighting a university's claim of a privacy violation based on misappropriation. (Felsher v. University of Evansville—case # 727 N.E.2nd 783 [Ind. Ct. App. 2000.]

In general, SPJ believes journalists and the public are being denied information because of invasions of privacy by corporate and non-profit entities (solicitations by phone, fax and direct mail) and because of a unspecified fear of predation by criminals spawned by a handful of isolated but well-publicized cases.

**2) What did you conclude from your studies on the government's compliance with E-FOIA? How did you conduct the study?**

Our study was not scientific or sweeping as was OMB Watch's. I solicited comments from SPJ members and other journalists through an e-mail query on very large mailing lists. Our conclusions were as follows:

- \*E-FOIA has produced no new tools for retrieving hard-to-get government information.
- \*Government websites are useful for accessing basic information about agency activity and some database information.
- \*The quality of websites varies greatly from agency to agency.
- \*If raw data is placed on-line, it must include all qualifiers that help viewers interpret it correctly.
- \*The single most significant obstacle and deterrent to journalists' use of FOIA is the slow time of response to requests.

**3) In a recent U.S. District Court decision, Public Citizen v. Carlin, the issue of the National Archives disposal of original electronic records under the Records Disposal Act arose. Journalists and citizens believed these records were in the public domain and, therefore, should not have been destroyed. What is the impact of this decision on E-FOIA?**

I am unable to answer this question at this time because I and SPJ's attorneys are unsure to which decision you refer—the US Court of Appeals decision at 184 F.3d 900 (D.C. Cir 1999) or a more recent district court ruling.

The April 9, 1998 District Court ruling (2 F. Supp. 2d 18) was overturned by the DC Circuit in the above cite. That is the most recent district court ruling of which we are aware.

Once we know which decision you are interested in, the next bit of clarification needed is whether you would like us to offer a "legal" analysis of the ruling's effect on the E-FOIA law or an opinion on the "policy" behind the regulations implementing the Records Disposal Act that were at issue in the case.

**4) How would you define "frequently requested" documents?**

I hesitate to put a numerical value on such a judgment. One knows a "frequently requested document" when one sees it. In talking to FOIA officers, I understand there can be enough variation in requests to make it difficult to categorize one specific document as "frequent requested." In my job, if I get three requests for copies of the same piece of video, that's "frequent." In a smaller agency, three requests for anything might be remarkable. In a larger agency, the number might be 10 or 50 or 100. I simply would advise FOIA officers to set a low threshold for "frequent" and for agencies to listen to those officers.

**5) Have Federal Bureau of Investigation requestors been able to access information more easily since the agency decreased its backlogs of Freedom of Information requests?**

I will pass along a comment I recently received from Michael Ravnitzky, one of the more active requestors at the FBI: "The FBI is making great strides in releasing popular records proactively online." Regarding other good examples, he goes on to say "I have had good experiences with the EPA, which sent me their FOIA Case Log by Email. Also, the Government Services Administration, which emailed me their database of government domain names. The DoD's Defense Technical Information Center is doing an excellent job in releasing data expeditiously. A variety of agencies have wonderful EFOIA reading rooms.

Sincerely,



Ian Marquand  
SPJ FOI Committee Chair

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OMB WATCH

August 11, 2000  
 Stephen Horn, Chairman,  
 Subcommittee on Government Management, Information, and Technology  
 Room B-373 Rayburn House Office Building  
 U.S. House of Representative  
 Washington, DC 20515

Dear Representative Horn:

Thank you for the opportunity to testify at the June 14, 2000, oversight hearing on "Agency Response to the Electronic Freedom of Information Act." As a follow-up to the hearing, the subcommittee requested that I respond to a number of questions. My responses are incorporated below.

**1. What are your concerns about State and Federal legislation and agency regulations regarding privacy policy?**

OMB Watch does not specifically work on privacy policy except as an element of information policy which must be held in appropriate tension with access and openness in government information. We are specifically concerned with some efforts by industry to claim that privacy policy should be extended to incorporate "persons," an effort with which we strenuously disagree.

**2. What is the effect of the Defense Department's Clinger-Cohen regulations on journalists and citizens who attempt to gather information?**

In the testimony I submitted for the record at this hearing, I noted that OMB's April 2000 proposed revision to Circular A-130 (outlining agency compliance with the requirements of the E-FOIA Amendments—that "an agency must place its index and description of major information systems and records locators systems in its reference material or guide") states that this index and description would include "any...major information and record locator systems the agency has identified." I noted that this language—especially taken together with other revisions—will encourage agencies to continue to fail to comply with the requirements of the PRA, the E-FOIA Amendments, and the Clinger-Cohen Act; if any agency has not bothered to "identify" an information or record locator system, it might understand this to mean that it does not have to include them. The specific concern in relation to Clinger-Cohen that I was referencing here has to do with OMB's revisions to Circular A-130, not to any Defense Department's regulations.

The language we sent to OMB in our comments on the proposed revision of Circular A-130 is as follows:

It is, therefore, of great concern that the proposed revision to Circular A-130, Section 9R(7), adds the following language to that taken from the PRA and the E-FOIA Amendments: "an inventory of the agency's other information systems, such as personnel and funding (at the level of detail that the agency determines is most appropriate for its use in managing the agency's information resources." It is not clear why this language was added into the section that is clearly and specifically intended to bring Circular A-130 into accord with the PRA and the E-FOIA Amendments. The noted language appears to be related to the Clinger-Cohen Act, but its inclusion here seems intended to signal agencies that they can very narrowly limit the requirements of Section 3506 of the PRA.

Moreover, OMB has conspicuously failed to include, in this proposed revision of Circular A-130, Section 5403 of the Clinger-Cohen Act which requires that, "...if in designing an information technology system pursuant to this division, the head of an executive agency determines that a purpose of the system is to disseminate information to the public, then the head of such executive agency shall reasonably ensure that an index of information disseminated by such system is included in the directory created pursuant to section 4101 of title 44, United States Code." Section 4101 of Title 44 requires the Superintendent of Documents, under the direction of the Public Printer, to "maintain an electronic directory of Federal electronic information."

We have not followed the Defense Department's implementation of Clinger-Cohen, and so cannot speak to any of its regulations. We do understand, though, that DoD Directive 5230.9 and its Web Site Administration Policies & Procedures (November 25, 1998) have led to the press and the public being unable to gain access to information which had previously been available (and did not does not "place national security, DoD personnel and assets, mission effectiveness, or the privacy of individuals at an unacceptable level of risk") on Defense Department sites.

**3. In your testimony, you discussed the Government Information Locator Service browser. Please describe the GILS system and how it provides information to the public. Does this technology comply with EFOIA?**

GILS is an international standard (Z39.50) for describing information. It is very similar to online cataloging (which also conforms to an international standard). The standard was chosen to be implemented throughout federal executive branch agencies to create, according to the Paperwork Reduction Act (Sec. 3511) a "distributed agency-based electronic Government Information Locator Service" to "identify the major information systems, holdings and dissemination products of each agency." The EFOIA requires agencies to identify (index) their major information systems and to provide a description of the agency's major information and record locator systems. The EFOIA does not require that this information be in the electronic reading room. If, however, agencies have complied with the GILS mandate in the PRA (most have not), this information would already be available in an electronic format in each agency's GILS. So, compliance with the mandate to create agency-based Government Information

Locator Services using the Government Information Locator Standard (Z39.50) would create compliance with a portion of the EFOIA.

**4. How did your most recent report compare to your 1998 report? Have agencies improved in compliance with EFOIA?**

We found minimal improvement. As we noted in our report,

- A stunningly high number of federal government entities are not "registered" on the Department of Justice's "Other Agencies" FOIA web site. Some of these entities may be in compliance with the requirements of the E-FOIA amendments, but the lack of representation on the Justice site raises serious questions about that probability.
- In a majority of the agency sites examined, FOIA information is easier to find online than in early 1998. It is often visible on the agency's main home page. However, more than one-third of the web sites examined do not have links from the agency's home page. In 1998, approximately 23% of all the web sites examined contained no reference to the Freedom of Information Act or its 1996 amendments.
- Of the 64 agencies examined in 1999, 7 (11%) have no useful E-FOIA presence, 57 (89%) have varying degrees of compliance with the requirements, and, as of November 24 1999, no agency had complied fully with the amendments. In 1998, of the 57 agencies examined, 13 (23%) had no EFOIA presence, 44 (73%) had varying degrees of compliance with the requirements, and no agency had complied fully with the amendments.
- Twelve agencies or components (8% of 144 examined) have continued (or, worse, started) to take OMB's April 1997 advice on the index requirements of the amendments recommended, regardless of whether their GILS "presence" met the requirements of the amendments or not. In 1998, eighteen agencies (32%) had followed this advice. Some agencies had ceased to follow it in 1999, but others had begun to do so.

**5. Have Federal Bureau of Investigation requestors been able to access information more easily since the agency decreased its backlogs of Freedom of Information requests?**

We do not work directly with the requestor community, so I can only reply with comments we have received from others. According to FOIA requestors with whom I have spoken, there is some misunderstanding surrounding the FBI's reduction of its backlog. At least some of the reduction has occurred by closing out old requests either by (1) calling the requestor who then closes out the request because so many years has passed; or (2) writing a letter to the

requestor and having it returned. The request is then administratively closed. Moreover, the wait times were 4-5 years, but even now they are generally 3 years.

In terms of access to information, the primary complaint we have heard is that the FBI has a policy of only processing main files, not cross references (referenced pages located in other files). When they find no main files, they respond to requestors as though there were no records whatsoever, when there may in fact be substantial cross references and even when they, reportedly, may actually find cross references and still tell requestors that there are no records. Moreover, there is apparently a separate procedure for requesting such cross-reference records. According to one requestor, he has requested cross references on a couple of files and the FBI refuses to assign them a place in the first-in/first-out line, because they said that they give priority to requests for main files.

**6. In your testimony, you mentioned the necessary roles of the Justice Department and the Office of Management and Budget. You stated that the Justice Department is trying to pick up the slack for the OMB by creating FOIA handbooks and providing guidance. Is the Justice Department's ability to do its job adversely affected by its work on matters within the jurisdiction of the OMB?**

It is OMB's responsibility to provide guidance to the agencies on the content and format of their electronic reading rooms and their handbooks, for consistency across the executive branch of the federal government and it has not done so in a useful manner—and as noted above, some of its guidance has led agencies to be out of compliance with the law. We could not speak to whether OMB's failure to meet its obligations (until its proposed revision to Circular A-130) has adversely affected Justice Department's ability to do its job. This is more appropriately answered by the Justice Department. The public's ability to find information reliably and easily has certainly been affected by OMB's failures in this area.

**7. How would you define "frequently requested" documents?**

Two or more requests (received or reasonably anticipated) for essentially the same information. We understand that this is what many agencies are using as the ad hoc standard.

**8. It has been suggested that there is a conflict between the Internet Security Act and EFOIA. What is your view on this issue?**

We do not see anything in the bill as it appears on Thomas that would conflict with EFOIA. It appears to target the efforts at hackers who engage in "acts that damage or attempt to damage computers used in the delivery of critical infrastructure services such as telecommunications, energy, transportation, banking and financial services, and emergency and government services," which actions can "pose a serious threat to public health and safety and cause or have the potential to cause losses to victims that include costs of responding to offenses, conducting damage assessments, and restoring systems and data to their condition prior to the

offense, as well as lost revenue and costs incurred as a result of interruptions of service.” While there may be civil liberties concerns with the bill, it seems a more appropriate response to these risks than does the Cyber Security Information Act. The latter seems to seek to hide information about risks and vulnerabilities and immunize companies from liability for harms caused by unresolved or unmitigated vulnerabilities.

**9. Are there other examples of legislation that may conflict with the provisions of EFOIA?**

We do not know of others that would conflict with the specific provisions of EFOIA.

**10. At the subcommittee’s hearing in June 1998, you discussed concerns about agency compliance with EFOIA. Have these concerns been resolved?**

We have not revisited the sites covered in our report, so I cannot confidently reply positively or negatively. Most of our concerns had not been resolved by November 1999.

Sincerely yours,



Patrice McDermott  
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