

Statement of

The Honorable John Cornyn

United States Senator
Texas
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U.S. Senate Subcommittee on Terrorism, Technology and Homeland Security
U.S. Senate Committee on the Judiciary
U.S. Senator John Cornyn (R-TX)

"Openness in Government and Freedom of Information:
Examining the OPEN Government Act of 2005"

Tuesday, March 15, 2005, 10 a.m., Dirksen Senate Office Building Room 226

OPENING STATEMENT OF SENATOR JOHN CORNYN

Today's hearing is entitled: "Openness in Government and Freedom of Information: Examining the OPEN Government Act of 2005." It is the third in a series of bipartisan events in recent weeks in which Senator Leahy and I have joined forces. On February 16, shortly before the President's Day recess in February, Senator Leahy and I went to the Senate floor together to introduce the OPEN Government Act - legislation that promotes accountability, accessibility, and openness in the federal government, principally by strengthening and enhancing the federal law commonly known as the Freedom of Information Act, or FOIA. I am pleased to note that the OPEN Government Act is also co-sponsored by Senator Isakson, and that other Senators will be joining in the coming days and weeks as well. Last Thursday, Senator Leahy and I joined forces again, to introduce the Faster FOIA Act of 2005, and I have asked Chairman Specter to place the Faster FOIA Act on the committee's markup calendar for this Thursday, in the hope of enacting this legislation as soon as possible.

There are, unfortunately, many issues in the Senate Judiciary Committee that have become partisan and divisive. So it is especially gratifying to be able to work so closely with Senator Leahy on an issue as important and as fundamental to our nation as openness in government. I am grateful to Senator Leahy and to his staff for all their hard work on these issues of mutual interest and national interest. And I would like to thank and to commend Senator Leahy for his decades-long commitment to freedom of information.

Today is a particular fitting day to examine these issues. This past Sunday, an extraordinary coalition of print, radio, television, and online media associations and outlets began the nation's first-ever Sunshine Week. And tomorrow is national Freedom of Information Day - celebrated every year at a national conference held at the Freedom Forum's World Center in Arlington, Virginia, on James Madison's birthday.

I heard a joke recently - one that is relevant to today's hearing. It is about a person who filed a FOIA request with the FBI. He asked them if they had a file on him. The FBI wrote back, curtly: "There is now."

Freedom of information and openness in government are among the most fundamental founding principles of our government. The Declaration of Independence makes clear that our inalienable rights to life, liberty and the pursuit of happiness may be secured only where "Governments are instituted among Men, deriving their just powers from the consent of the governed." And James Madison, the father of our Constitution, famously wrote that consent of the governed means informed consent - that "a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."

As Attorney General of Texas, I was responsible for enforcing Texas's open government laws. I have always been proud that Texas is known for having one of the strongest and most robust freedom of information laws in the country, and I have long been looking forward to bringing a little of our Texas sunshine to Washington.

After all, it is unfortunate that, as with so many of other founding ideals, all too often we fall short of reaching our goals. This is a bipartisan problem - and we need a bipartisan solution to solve it. As Senator Leahy and I have both noted on occasion, openness in government is not a Republican or a Democratic issue. Any party in power is always reluctant to share information, out of an understandable - albeit ultimately unpersuasive - fear of arming its enemies and critics. Whatever our differences may be on the various policy controversies of the day, we should all agree that those policy differences deserve as full and complete a debate before the American people as possible.

I am glad that it was a President from Texas, Lyndon B. Johnson, who signed the Freedom of Information Act into law on July 4, 1966. As Bill Moyers, LBJ's press secretary, once noted, however - and I quote - "what few people knew at the time is that LBJ had to be dragged kicking and screaming to the signing ceremony. He hated the very idea of the Freedom of Information Act; hated the thought of journalists rummaging in government closets; hated them challenging the official view of reality."

It has been nearly a decade since Congress has approved major reforms to the Freedom of Information Act. Moreover, the Senate Judiciary Committee has not held a hearing to examine FOIA compliance since 1992. I hope that today's hearing will prove to be an important first step towards strengthening our open government laws and to reinforcing our national commitment to freedom of information.

Today's hearing will provide a forum for discussing the Faster FOIA Act, which Senator Leahy and I introduced just last week, to establish an advisory commission of experts and government officials to study what changes in federal law and federal policy are needed to ensure more effective and timely compliance with the FOIA law.

Today's hearing also provides the opportunity to examine the OPEN Government Act. This legislation contains important Congressional findings to reiterate and reinforce our belief that FOIA establishes a presumption of openness, and that our government is based not on the need to know, but upon the fundamental right to know. In addition, the Act contains over a dozen substantive provisions, designed to achieve four important objectives: (1) to strengthen FOIA and close loopholes, (2) to help FOIA requestors obtain timely responses to their requests, (3) to ensure that agencies have strong incentives to act on FOIA requests in a timely fashion, and (4) to provide FOIA officials with all of the tools they need to ensure that our government remains open and accessible.

Specifically, the legislation would make clear that FOIA applies even when agency recordkeeping functions are outsourced. It would require an open government impact statement to ensure that any new FOIA exemption adopted by Congress be explicit. It provides annual reporting on the usage of the new disclosure exemption for critical infrastructure information, and strengthens and expands access to FOIA fee waivers for all media. It ensures accurate reporting of FOIA agency performance by distinguishing between first person requests for personal information and other, more burdensome kinds of requests.

The Act would also help FOIA requestors obtain timely responses by establishing a new FOIA hotline service to enable requestors to track the status of their requests. It would create a new FOIA ombudsman, located within the Administrative Conference of the United States, to review agency FOIA compliance and provide alternatives to litigation. And it would authorize reasonable recovery of attorney fees when litigation is inevitable.

The legislation would restore meaningful deadlines for agency action and impose real consequences on federal agencies for missing statutory deadlines. It would enhance provisions in current law which authorize disciplinary action against government officials who arbitrarily and capriciously deny disclosure and yet which have never been used in over thirty years. And it will help identify agencies plagued by excessive delay.

Finally, the bill will help improve personnel policies for FOIA officials, examine the need for FOIA awareness training for federal employees, and determine the appropriate funding levels needed to ensure agency FOIA compliance.

The OPEN Government Act is not just pro-openness, pro-accountability, and pro-accessibility - it is also pro-Internet. It requires government agencies to establish a hotline to enable citizens to track their FOIA requests, including Internet tracking, and it grants the same privileged FOIA fee status currently enjoyed by traditional media outlets to bloggers and others who publish reports on the Internet.

The OPEN Government Act is the product of months of extensive discussions between my office, Senator Leahy's office, and numerous advocacy and watchdog groups. I am pleased that the bill is supported by a broad coalition of open government advocates and organizations across the ideological spectrum - from the American Civil Liberties Union and People for the American Way to the Free Congress Foundation's Center for Privacy & Technology Policy, the Heritage Foundation's Center for Media and Public Policy, and Texas Attorney General Greg Abbott. Without objection, letters of support from these numerous organizations shall be entered into the record.

I am also pleased by recent positive comments about the legislation from the Department of Justice. I certainly understand that no Administration is ever excited about the idea of Congress increasing its administrative burdens. And I look forward to any technical comments and expressions of concern that the Administration may choose to provide. But I do appreciate that the Justice Department's own website notes that this legislation, and I quote, "holds the possibility of leading to significant improvements in the Freedom of Information Act." As Attorney General Alberto Gonzales and I discussed during his confirmation hearings in January, we plan to work together on ways to strengthen the Freedom of Information Act.

I look forward to working with General Gonzales, and with Senator Leahy and our other colleagues in the Senate and in the House, to moving this legislation through the process.