

Testimony of

Mr. Mark Tapscott

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The Open Government Act of 2005

Testimony before
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MY NAME IS MARK TAPSCOTT. I AM DIRECTOR OF THE CENTER FOR MEDIA AND PUBLIC POLICY AT THE HERITAGE FOUNDATION. THE VIEWS I EXPRESS IN THIS TESTIMONY ARE MY OWN, AND SHOULD NOT BE CONSTRUED AS REPRESENTING ANY OFFICIAL POSITION OF THE HERITAGE FOUNDATION. I APPRECIATE VERY MUCH THE OPPORTUNITY TO TESTIFY ON THE OPEN GOVERNMENT ACT OF 2005.

AMONG SECRETARY OF DEFENSE DONALD RUMSFELD'S LESSER-KNOWN MARKS OF DISTINCTION IN HIS PUBLIC SERVICE CAREER IS THE IMPORTANT ROLE HE PLAYED AS A FRESHMAN REPUBLICAN MEMBER OF THE HOUSE OF REPRESENTATIVE IN WRITING AND HELPING SECURE PASSAGE OF THE 1966 FREEDOM OF INFORMATION ACT.

RUMSFELD OFFERED AN IMPORTANT OBSERVATION DURING A FLOOR SPEECH HE DELIVERED TO THE HOUSE JUNE 20, 1966, THAT HAS GREAT RELEVANCE FOR US TODAY AS WE SEEK TO IMPROVE THE PRESENT FREEDOM OF INFORMATION ACT SYSTEM.

RUMSFELD SAID: "THE LEGISLATION WAS INITIALLY OPPOSED BY A NUMBER OF AGENCIES AND DEPARTMENTS, BUT FOLLOWING THE HEARINGS AND ISSUANCE OF THE CAREFULLY PREPARED REPORT - WHICH CLARIFIES LEGISLATIVE INTENT - MUCH OF THE OPPOSITION SEEMS TO HAVE SUBSIDED.

"THERE STILL REMAINS SOME OPPOSITION ON THE PART OF A FEW GOVERNMENT ADMINISTRATORS WHO RESIST ANY CHANGE IN THE ROUTINE OF GOVERNMENT. THEY ARE FAMILIAR WITH THE INADEQUACIES OF THE PRESENT LAW AND OVER THE YEARS HAVE LEARNED HOW TO TAKE ADVANTAGE OF ITS VAGUE PHRASES.

"SOME POSSIBLY BELIEVE THEY HOLD A VESTED INTEREST IN THE MACHINERY OF THEIR AGENCIES AND BUREAUS AND THERE IS RESENTMENT OF ANY ATTEMPT TO OVERSEE THEIR ACTIVITIES, EITHER BY THE PUBLIC, THE CONGRESS OR APPOINTED DEPARTMENT HEADS."

WHAT RUMSFELD DESCRIBED AS HAVING HAPPENED OVER THE YEARS PRIOR TO 1966 IS STILL WITH US. IT IS THE PROCESS OF CAREER FEDERAL EMPLOYEES - WHO ROUTINELY HANDLE THE VAST MAJORITY OF FOIA REQUESTS - BECOMING EVER MORE FAMILIAR WITH THE VAGUE PHRASES AND LOOPHOLES OF THE FOIA ACT AND ITS IMPEMING REGULATIONS AND CASE LAW OVER THE YEARS.

WE SHOULD RECOGNIZE THAT IN PART THIS PROCESS RESULTS FROM THE INTENTIONAL HEALTHY INSULATION OUR SYSTEM PROVIDES TO CAREER FEDERAL EMPLOYEES TO PROTECT THEM FROM INAPPROPRIATE PRESSURE FROM POLITICAL APPOINTEES. But THAT SAME INSULATION ALSO MAKES IT MORE DIFFICULT TO HOLD EMPLOYEES ACCOUNTABLE FOR THINGS LIKE FAILING TO PROPERLY ADMINISTER THE FOIA.

LET ME SAY AT THIS POINT THAT BEFORE BECOMING A JOURNALIST I SERVED IN THE LEGISLATIVE AND EXECUTIVE BRANCHES OF GOVERNMENT. I WAS THE FOURTH GENERATION OF MY FAMILY TO SERVE IN GOVERNMENT, I HAVE THE UTMOST RESPECT AND ADMIRATION FOR CAREER FEDERAL WORKERS. EVEN SO, THEY ARE NOT EXEMPT FROM HUMAN NATURE, WHICH TOO OFTEN SEEKS THE PATH OF LEAST RESISTANCE. IN FOIA MATTERS, THAT PATH TOO FREQUENTLY INVOLVES AN ABUSE OR MISAPPLICATION OF THE LAW.

I BELIEVE THIS PROCESS OF BUREAUCRATIC STULTIFICATION ACCOUNTS FOR MOST OF THE PROBLEMS WITH THE CURRENT FOIA SYSTEM AND HELPS EXPLAIN WHY A 2003 SURVEY BY THE NATIONAL SECURITY ARCHIVE FOUND AN FOIA SYSTEM "IN EXTREME DISARRAY." THAT SURVEY COVERED 35 FEDERAL AGENCIES THAT ACCOUNTED FOR 97% OF ALL FOIAS THE PREVIOUS YEAR.

AMONG OTHER THINGS, THE NATIONAL SECURITY ARCHIVE SAID IT FOUND THAT "AGENCY CONTACT INFORMATION ON THE WEB WAS OFTEN INACCURATE; RESPONSE TIMES LARGELY FAILED TO MEET THE STATUTORY STANDARD; ONLY A FEW AGENCIES PERFORMED THOROUGH SEARCHES, INCLUDING E-MAIL AND MEETING NOTES; AND THE LACK OF CENTRAL ACCOUNTABILITY AT THE AGENCIES RESULTED IN LOST REQUESTS AND INABILITY TO TRACK PROGRESS."

IN A SECOND PHASE OF THE SAME 2003 SURVEY, THE NATIONAL SECURITY ARCHIVE ASKED THE SAME AGENCIES FOR LISTS OF THE 10 OLDEST OUTSTANDING FOIA REQUESTS IN THEIR SYSTEMS. HERE IS HOW THE ARCHIVE DESCRIBED THE RESULT:

"IN JANUARY 2003, THE ARCHIVE FILED FOIA REQUESTS ASKING FOR COPIES OF THE '10 OLDEST OPEN OR PENDING' FOIA REQUESTS AT EACH OF THE 35 FEDERAL AGENCIES THAT TOGETHER HANDLE MORE THAN 97% OF ALL FOIA REQUESTS. SIX AGENCIES STILL HAVE NOT RESPONDED IN FULL, MORE THAN TEN MONTHS LATER AND DESPITE REPEATED PHONE CONTACTS ...THE FREEDOM OF INFORMATION ACT ITSELF, AS AMENDED IN 1996, GIVES AGENCIES 20 WORKING DAYS TO RESPOND TO FOIA REQUESTS." HAVING SPENT NEARLY TWO DECADES AS A JOURNALIST HERE IN WASHINGTON, D.C. AND HAVING FILED MORE FOIA REQUESTS THAN I CARE TO REMEMBER, THERE WERE NO SURPRISES FOR ME IN THE NATIONAL SECURITY ARCHIVE SURVEY. NOR WAS I SURPRISED IN 2002 WHEN MY OWN CENTER FOR MEDIA AND PUBLIC POLICY FOUND IN A SURVEY OF FOUR AGENCIES THAT JOURNALISTS RANKED ONLY FOURTH AMONG THE MOST ACTIVE FOIA REQUESTORS. ASK THEM WHY AND THE REPLIES INVARIABLY ARE VARIATIONS ON THIS THEME: IT WASTES TOO MUCH TIME AND THEY PROBABLY WON'T DISCLOSE WHAT I NEED WITHOUT A BIG LEGAL FIGHT, WHICH MY PAPER CAN'T AFFORD, SO WHY BOTHER?

TWO OF THE MOST SERIOUS PROBLEMS OF THE CURRENT FOIA SYSTEM ARE, ONE, THE ABSENCE OF ANY GENUINELY SERIOUS CONSEQUENCES EITHER FOR AN INDIVIDUAL FEDERAL EMPLOYEE RESPONDING TO AN FOIA REQUEST OR FOR HIS OR HER AGENCY, AND, TWO, THE ABSENCE OF A NEUTRAL ARBITER WITH AUTHORITY TO MEDIATE DISPUTES BETWEEN AGENCIES AND REQUESTORS AND TO OVERSEE ADMINISTRATION OF THE FOIA. THE OPEN GOVERNMENT ACT OF 2005 ADDRESSES BOTH OF THESE PROBLEMS EFFECTIVELY AND REALISTICALLY IN MY JUDGMENT.

TO ADDRESS THE FIRST PROBLEM, THE ACT INCLUDES PROVISIONS PROVIDING THAT WHEN AN AGENCY MISSES A STATUTORY FOIA DEADLINE IT IS PRESUMED TO HAVE WAIVED THE RIGHT TO ASSERT VARIOUS EXEMPTIONS, EXCEPT IN CASES INVOLVING NATIONAL SECURITY, PERSONAL PRIVACY, PROPRIETARY COMMERCIAL INFORMATION OR OTHER REASONABLE EXCEPTIONS. THE AGENCY CAN ONLY OVERCOME THIS WAIVER BY PRESENTING CLEAR AND CONVINCING EVIDENCE THAT IT MISSED THE DEADLINE FOR GOOD CAUSE.

THE ACT ALSO PROVIDES ENHANCED AUTHORITY FOR THE OFFICE OF SPECIAL COUNSEL TO TAKE DISCIPLINARY ACTION AGAINST GOVERNMENT OFFICIALS FOUND BY A COURT TO HAVE ARBITRARILY AND CAPRICIOUSLY DENIED A REQUESTOR SEEKING INFORMATION THAT SHOULD BE DISCLOSED. THE ACT FURTHER REQUIRES THE ATTORNEY GENERAL TO INFORM THE OFFICE OF SPECIAL COUNSEL OF SUCH COURT FINDINGS AND TO REPORT TO CONGRESS ON THOSE FINDINGS. THE OFFICE OF SPECIAL COUNSEL IS ALSO REQUIRED TO ISSUE AN ANNUAL REPORT TO CONGRESS ON ITS RESPONSE TO SUCH COURT FINDINGS.

TO ADDRESS THE SECOND PROBLEM, THE ACT ESTABLISHES THE OFFICE OF GOVERNMENT INFORMATION SERVICES WITHIN THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, WHICH IS AN INDEPENDENT AGENCY AND ADVISORY BODY ESTABLISHED IN 1964 TO RECOMMEND IMPROVEMENTS TO CONGRESS AND EXECUTIVE BRANCH AGENCIES. MOST OF THE CONFERENCE'S MORE THAN 200 RECOMMENDED CHANGES HAVE BEEN ADOPTED, AT LEAST IN PART.

THIS OFFICE OF GOVERNMENT INFORMATION SERVICES WOULD FUNCTION AS AN FOIA OMBUDSMAN WITH AUTHORITY TO REVIEW AGENCY POLICIES AND PRACTICES IN ADMINISTERING THE FOIA, RECOMMEND POLICY CHANGES AND MEDIATE FOIA DISPUTES BETWEEN AGENCIES AND REQUESTORS.

WHILE I AM PARTICULARLY ENCOURAGED BY THESE TWO PROVISIONS OF THE ACT, I BELIEVE IT CONTAINS MANY ADDITIONAL MUCH-NEEDED REFORMS IN OTHER AREAS OF THE FOIA, INCLUDING CLOSURE OF THE OUTSOURCED DOCUMENTS LOOPHOLE, REQUIRING OPEN GOVERNMENT IMPACT STATEMENTS OF PROPOSED LEGISLATION, CHANGING THE WAY AGENCIES MEASURE AND REPORT THEIR FOIA RESPONSE TIMES, AND MUCH ELSE. IN SHORT, I BELIEVE THIS ACT AND ITS COMPANION PROPOSAL TO CREATE A 16-MEMBER OPEN GOVERNMENT COMMISSION TO STUDY FOIA RESPONSE DELAYS AND RECOMMEND NEEDED ACTIONS ARE AMONG THE MOST IMPORTANT PIECES OF LEGISLATION TO BE CONSIDERED BY THE 109TH CONGRESS.

IT IS MY HOPE THAT THOSE MEMBERS OF CONGRESS WHO CONSIDER THEMSELVES OF A CONSERVATIVE PERSUASION WILL PAY PARTICULAR ATTENTION TO THE OPEN GOVERNMENT ACT OF 2005 BECAUSE IT CAN BE AN EFFECTIVE RESOURCE FOR RESTORING OUR GOVERNMENT TO ITS APPROPRIATE SIZE AND FUNCTIONS. SUNSHINE IS THE BEST DISINFECTANT NOT ONLY IN THE PHYSICAL WORLD, BUT PERHAPS EVEN MORE SO IN FIGHTING WASTE, FRAUD AND CORRUPTION IN GOVERNMENT AND IN PROTECTING PUBLIC SAFETY:

THIS IS WELL-ILLUSTRATED BY THESE RECENT EXAMPLES OF REPORTING MADE POSSIBLE BY THE FOIA:

? MIAMI'S 47 MPH "HURRICANE:" HURRICANE FRANCES MADE LANDFALL MORE THAN 100 MILES NORTH OF MIAMI-DADE COUNTY LAST YEAR, BUT THAT DIDN'T STOP THOUSANDS OF RESIDENTS IN FLORIDA'S MOST POPULOUS COUNTY FROM RECEIVING NEARLY \$28 MILLION IN FEDERAL DISASTER AID, ACCORDING TO THE FORT LAUDERDALE SUN-SENTINEL. USING THAT STATE'S FOIA, A TEAM OF SUN-SENTINEL REPORTERS FOUND THAT RESIDENTS USED THEIR RELIEF CHECKS TO PAY FOR THINGS LIKE 5,000 TELEVISIONS ALLEGEDLY DESTROYED BY FRANCES, AS WELL AS 1,440 AIR CONDITIONERS, 1,360 TWIN BEDS, 1,311 WASHERS AND DRYERS AND 831 DINING ROOM SETS. ALL THIS DESPITE THE FACT FRANCES' TOP WINDS REACHED ONLY 47 MPH IN THE MIAMI-DADE AREA.

? ILLEGAL ALIENS CONVICTED OF HORRIBLE CRIMES: LOTS OF PEOPLE KNOW THAT FEDERAL LAW REQUIRES ILLEGAL ALIENS CONVICTED OF HEINOUS CRIMES LIKE RAPE, MURDER, CHILD MOLESTATION HERE IN AMERICA TO BE DEPORTED ONCE THEY'VE SERVED THEIR JAIL TERMS. UNFORTUNATELY, IT APPEARS THAT THOUSANDS SUCH ALIENS MAY NOW BE WANDERING A STREET NEAR YOUR HOME OR YOUR CHILD'S SCHOOL BECAUSE FEDERAL IMMIGRATION OFFICIALS FAILED TO SHOW UP WHEN THESE CRIMINALS WERE RELEASED FROM JAIL. EVEN WORSE, ACCORDING TO COX NEWSPAPERS WASHINGTON BUREAU REPORTERS ELIOT JASPIN AND JULIA MALONE, THE JUSTICE DEPARTMENT WON'T RELEASE A GOVERNMENT DATABASE THAT COULD HELP JOURNALISTS AND PRIVATE CITIZENS HELP OFFICIALS FIND THESE ALIENS.

WE ARE INDEED FIGHTING A GLOBAL WAR ON TERRORISM THAT PUTS UNUSUAL DEMANDS ON THE FOIA SYSTEM. CONSERVATIVES AND LIBERALS ALIKE SHOULD ALWAYS REMEMBER THAT AN EVER

EXPANSIVE, EVER-MORE INTRUSIVE GOVERNMENT IS ULTIMATELY ANTITHETICAL TO THE PRESERVATION OF INDIVIDUAL LIBERTY AND DEMOCRATIC ACCOUNTABILITY IN PUBLIC AFFAIRS.

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