

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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Hearing on "Expanding Openness in Government and Freedom of Information" Subcommittee on Terrorism,
Technology and Homeland Security
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I am glad that whatever the weather, the Senate Judiciary Committee is participating in Sunshine Week by means of this hearing and our efforts to strengthen the Freedom of Information Act. This past weekend, in addition to the NCAA ski championships held in Vermont and a number of NCAA basketball conference tournaments around the country, most Americans saw in the Parade Magazine in their Sunday newspapers a reminder that sunshine is a great disinfectant to abuses of power and wrongdoing. The weekly magazine reminded us of a story it ran in January 2004 about a Massachusetts couple who relied on state FOIA laws to expose their town's plans to reopen a dormant and potentially polluted landfill. The story spotlights the power of and the need for government sunshine laws.

I am delighted to join the Senator from Texas in our efforts to strengthen and improve our open government laws. This is the first Judiciary Committee hearing on the Freedom of Information Act, which we call "FOIA," since 1992. There has not been significant legislation regarding FOIA since 1996, when I was the principal author of the Electronic Freedom of Information Act Amendments, a set of modifications that updated FOIA for the Internet Age. In recent years, I have fought against the rolling back of citizens' rights in this regard, and expressed concerns in 2002 over a bipartisan agreement in the Homeland Security legislation that was contrary to those efforts. Until this year, I have been unable to convince a single Republican to join my effort. Senator Cornyn and I have now cosponsored two FOIA bills together; we are building a great bipartisan partnership. You can be sure that I will keep working on him to join me on this third bill, the Restore FOIA Act, which I plan to reintroduce today.

The enactment of FOIA was a watershed moment for democracy. This bulwark of open government is under assault. Liberals and conservatives both recognize a dangerous trend toward over-classification, at enormous cost to the taxpayers and risk to our citizens. On March 3, 2005, J. William Leonard, the Director of Information Security Oversight, testified before a House committee that the number of classification decisions has increased from nine million in 2001 to 16 million in 2004. In 2003 alone, the cost of classifying documents was \$7 billion.

Preserving our right to open government is not only significant in the area of national security. Some of the most important revelations discovered through FOIA requests directly impact our cities and neighborhoods. When the public is shut out, bad things happen. That was the subject of the Parade Magazine story I mentioned a few moments ago, about Linda and Mike Raymond, who live in Woburn, Massachusetts. Their town is a blue-collar suburb of Boston best known as the setting for the book and film, A Civil Action. In the 1980s, after rates of leukemia spiked upward, local industries were sued for polluting the area's water. Four years ago the Raymonds discovered that the city's landfill, dormant for 15 years, was bustling with truck traffic. Linda Raymond contacted Woburn officials, but they stonewalled her. The Raymonds relied on the state FOIA law to get answers. They educated the community and held public officials accountable. The Raymonds' triumph spotlights the power of and the need for government sunshine laws.

This is a success story from the states, but there is much work to be done to ensure that our Federal FOIA law is properly enforced. A month ago, Senator Cornyn and I introduced S.394, the OPEN Government Act of 2005. It is a collection of commonsense modifications designed to update FOIA and improve the timely processing of FOIA requests by Federal agencies. It was drafted after a long and thoughtful process of consultation with individuals and organizations that rely on FOIA to obtain information and share it with the public, including the news media, librarians, and public interest organizations representing all facets of the political spectrum.

Chief among the problems with FOIA implementation is agency delay. In 2003, a non-governmental organization, the National Security Archive, looked into just how long some FOIA requests are left unfulfilled. The group, which is represented on our panel today, found that the oldest requests dated back to the late 1980s, before the collapse of the Soviet Union. The oldest of these was a request to the FBI for information on the Bureau's activities at the University of California. First filed in November 1987, this request was partially fulfilled in 1996 after extensive litigation. According to the National Security Archive, the documents that were released revealed "unlawful FBI intelligence activities and the efforts to cover up such conduct." After a 2002 article in the San Francisco Chronicle, and inquiries from Senator Feinstein, the Bureau acknowledged that there were at least 17,000 pages of records that still had not been produced. Since then, some data has been released, but the requestor recently told me that he believes more than 15,000 pages remain outstanding.

This is an example of a more extreme case, but delays are too commonplace in the system. Last week, Senator Cornyn and I introduced a second bill, S.589, the Faster FOIA Act, which would create a commission to study agency delay. The commission would be charged with reviewing, among other facets, the system of processing fees and fee waivers, which are often cited as causes of delay and are sometimes the subject of litigation. Over the past two years, at my request, the Government Accountability Office (GAO) has reviewed the available data on fee issues. I am grateful for their efforts and look forward to the results of their study later this year.

One of the problems faced by GAO, and anyone else who has looked into agency delay, is the lack of comprehensive reporting data. We address this problem in the Open Government Act, by calling for more detailed reporting from agencies on FOIA processing. The commission created by the Faster FOIA Act will serve to ensure all voices are heard as we craft future modifications to strengthen the law.

Earlier, I mentioned a third piece of legislation that deserves serious consideration in this Congress. After 9/11, we saw the single greatest rollback of FOIA in history tucked into the charter for the Department of Homeland Security. This provision created an opportunity for big polluters or other offenders to hide mistakes from public view just by stamping 'critical infrastructure information' at the top of the page when they submit information to the Department. I am fighting to repeal this law and replace it with a reasonable compromise called the Restore FOIA Act, which would protect both sensitive information and the public's right to know. The OPEN Government Act, the bill Senator Cornyn and I introduced together in February, takes one step forward by requiring reports on the law's use, but Restore FOIA is a more comprehensive approach and I will continue to push for its enactment.

The Constitution reflects the Founders' confidence in a government that welcomes rather than fears dissenting or offensive views. The public's right to know, backed up by FOIA, is a cornerstone of our democracy, guaranteeing a free flow of information that delivers America's promise of government by, of, and for the people.

No generation can afford to take these protections for granted, because they can quickly and easily be taken away - once gone, they are difficult to get back. The recent damage done to FOIA will take great effort to undo. But I hope it can always be said that each generation of Americans did all that it could to preserve the public's right to know for the next generation of Americans.