

Testimony of

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STATEMENT OF
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ON THE "OPEN GOVERNMENT ACT OF 2005" (S. 394)
BEFORE THE SUBCOMMITTEE ON TERRORISM, TECHNOLOGY AND
HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
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Senator Cornyn, Senator Leahy, and members of the Subcommittee, I am pleased and honored to appear today to add my strong support for the "Openness Promotes Effectiveness in our National Government Act of 2005" (the "OPEN Government Act," S. 394). This is a balanced and modest, but extremely valuable, measure that would strengthen the Freedom of Information Act in many important respects. A long-standing commitment by both sponsors of this bill to open government has been evident, and I applaud your taking your time today to focus congressional attention on the Freedom of Information Act - for the first time in this century.

I sat in this hearing room over 30 years ago - on the other side of the dais, behind the Administrative Practice and Procedure Subcommittee's Chairman, Ted Kennedy - and heard witnesses complain bitterly about how the Freedom of Information Act (FOIA) was toothless and ineffective. The legislation later enacted - amending two exemptions, setting time limits, limiting fees, directing disclosure of segregable parts of records, and more - overhauled the FOIA in major ways. I even had the pleasure to sit in this seat in the early '90s during Senator Leahy's hearings on what became the E-FOIA, a bill that helped move agency administration of the FOIA into the electronic era.

In my 24 years of private practice I have used the FOIA in a variety of ways for a variety of clients. Since the Subcommittee is hearing from representatives of the media, a think tank, an advocacy group, and a library this morning, I would like initially to advance a perspective of the business community and then end on a more personal note.

Business Use of the FOIA

Businesses use the FOIA both offensively and defensively. A few examples from my own experience include:

- To obtain agency information relating to, and in anticipation of, a significant rulemaking that can affect entire industries or products. Examples include requests to

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EPA a number of years ago for all their records on dioxin, and more recently for their records on MTBE.

- To find out what an agency has done regarding other companies or other industries when it knocks on a client's door with an enforcement issue. I have used the FOIA for this purpose the FTC, Justice Department, and SEC.
- To learn more about agency contracting and purchasing decisions, and to assist clients in competing more effectively for agency contracts.
- To assist clients in litigation - either with a government agency or a regulated company. FOIA provides an alternative avenue for discovery that is not tied to a judicially imposed schedule. In one case, over a hundred FOIA requests were filed with a number of agencies to obtain information supporting a newspaper's contention that its story's assertions of U.S. government backing to libel case plaintiff were well-founded.

- To learn about FDA meetings and decisions concerning review of products - of both clients and competing companies.
- To uncover the terms of an agreement privatizing publication of a journal previously published by the National Cancer Institute.

On a much broader plane, Nobel Prize winner Joseph Stiglitz has addressed, in "The Role of Transparency in Public Life," how the marketplace generally functions more efficiently through enhanced access to information, including government information. Clearly businesses benefit both directly and indirectly from open government information.

Importance of Access to Information

Although the United States was not the first nation with open government legislation, in the quarter century following enactment of the FOIA our system has been a model for the states and for other countries - from former Soviet Block nations to provinces and municipalities in China, from Mexico to South Africa. FOIA has proved indispensable to establishing and maintaining democratic societies and open markets. The U.S. has, however, fallen behind other places in the world in using technology to advance access to and dissemination of government information. We need not only to maintain our commitment to open government, but also to ensure that resources are provided to sustain open government initiatives. The Senate Judiciary Committee has long been a promoter and protector of open government and continues that great tradition today.

S. 394 addresses some of the most important issues frustrating FOIA administration today, but it does so carefully. It recognizes that FOIA administration is not a game of "us versus them," that some issues defy simple solution, and that Congress shares the responsibility for ensuring that the law works. In the end, this legislation is sensitive to the needs of both "us and them" - the user community and government agencies.

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Key Elements of S. 394

My testimony will first focus on three of the most important provisions (or elements) in S. 394. I will then provide comments on a section-by-section basis.

1. Office of Government Information Services

Section 11, establishing an Office of Government Information Services (OGIS), is the most important provision in the bill. The OGIS will assist the public in resolving disputes with agencies as an alternative to litigation, review and audit agency compliance activities, and make recommendations and reports on FOIA administration. Many states have offices that assist in FOIA administration: as we have heard this morning, the Attorney General in Texas performs this kind of function, and there are other very effective models like the New York Committee on Open Government and the Connecticut Freedom of Information Commission. Likewise, a number of foreign countries and the European Union have FOI Ombuds offices. I am confident that the OGIS will more than pay for its costs each year by diverting cases from the courts. Appropriations for the Administrative Conference of the U.S. must be restored for this provision to work. ACUS is the right place for the OGIS, since it historically has been a nonpartisan agency dedicated to improving administrative procedures and assisting agencies to do their jobs more efficiently and effectively. (If Congress does not make the very modest investment to restore ACUS, then the OGIS should nonetheless be established and placed elsewhere, like within the National Archives and Records Administration.)

2. Recovery of Attorneys Fees in Litigation

It is imperative that Congress reverse the application of the *Buckhannon* decision in FOIA cases. While this may seem self-serving, since I have been involved in litigating a number of FOIA cases over the past 2 decades, it is especially important that a plaintiff be able to recover fees and costs in FOIA cases, even where the court does not finally adjudicate the issue of disclosure:

First, it has been clear from time to time that the government has withheld requested information to keep it out of the public domain for as long as possible, knowing full well that the law would not ultimately support withholding. There is no recourse in such situations for requesters other than to file suit, and these cases

unfortunately do not move rapidly on the courts' dockets. So when the government sees the end of the road near, it need only hand over the information to the requester and the case is moot, with no consequences to the government. Second, the government (which, of course, knows what is in the records that have been requested) has the capacity to drag out and complicate litigation, thereby raising the costs to requesters once the lawsuit has begun. I was involved in one

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case - on behalf of the National Security Archive, in fact - where the government asserted that it could not confirm or deny the existence of certain CIA records that it had actually disclosed in an academic conference during our litigation. The prospect for fee and cost liability at the end of this battle is the only potential inhibition for this kind of government conduct.

Finally, there has been a great deal of discussion this morning about delay in agency handling of FOIA cases. Sometimes we are talking about not days or weeks, but years. The filing of a complaint in court may be the only way to get the agency's attention on a request, yet this tool is virtually out of reach if fees and costs cannot be recovered once the agency wakes up, completes processing of the request, and hands over the information.

The Buckhannon decision may have made sense in the context where courts had little discretion over attorneys' fees and where lawsuits may have been filed unnecessarily. But in the FOIA context, this rewards agency recalcitrance and delay. For, if an agency can hand over requested documents with impunity any time before judgment is entered, the end result will be to chill the potential for judicial review as a means of policing the system.

Let me add that most lawyers working with the media, public advocacy groups, libraries, and businesses view litigation is a last resort. Our clients would rather have timely responses from the agency. They would rather have an Office of Government Information Services to help resolve disputes. They would rather negotiate than litigate differences with agencies. But when a FOIA lawsuit is filed, the plaintiff is assuming same role as law-enforcer played by the Texas Attorney General under that state's scheme. Where a lawsuit is responsible for disclosure, a public service has been performed and recovery of fees and costs is appropriate.

3. Enhanced Congressional Oversight

Finally, a number of the provisions of S. 394 reflect a commitment by Congress to improve its ability to oversee and strengthen administration of the FOIA and related laws.

- Clause (6) of Section 2 of the bill calls for regular congressional review of the FOIA.

- Section 5 requires public reporting on sanctions.

- Section 9 clarifies and expands certain reporting requirements, making it easier to compare and assess agency performance in handling FOIA requests.

- Section 12 directs the Comptroller General to assess and make recommendations on protection and disclosure of information under section 214 of the Homeland Security Act.

- Section 13 requires an OPM report on personnel policies that affect FOIA administration.

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- And the study of delay mandated by the Commission established by the "Faster FOIA Act of 2005," introduced last week, will be groundbreaking in exploring new ways to speed dissemination of information under the FOIA. Although these provisions, alone, will do little to alter FOIA compliance, they nevertheless have symbolic as well as real significance in signaling that Congress intends the FOIA to work effectively and smoothly and will continue aggressively to oversee agencies to make sure that is the case.

Congress is indispensable to ensuring effective FOIA administration, so it is unfortunate that Congress has often been AWOL when it comes to the FOIA. Senator Cornyn, you decried that it has been over a decade since the Senate has convened a hearing to examine FOIA compliance. Senator Leahy, you have often called for congressional

vigilance in maintaining the public's access to government information. These hearings and S. 394 mark the beginning of renewed congressional interest in the FOIA; they should not mark the end.

Section-by-Section Discussion of S. 394

Section 2. Findings. Congressional findings are ordinarily used to express useful sentiments, and they do so here. While clauses 1-5 are self-evident, they state principles that are absolutely correct and bear repeating. Clause 6 may also be self-evident, but it is a necessary expression of the role of Congress in maintaining an effective FOIA.

Section 3. News Media and Fees. This section recognizes that the public get information from sources wider than newspapers and magazines, and it will surely reduce litigation and time-consuming administrative disputes. The last sentence may appear open-ended or unenforceable, but since making a false statement to the government is a federal crime under 18 U.S.C. § 1001, I think the likelihood of misuse by requesters will be minimal.

Section 4. Recovery of Fees and Costs. I earlier expressed support for reversing the effects of the *Buckhannon* decision as to FOIA cases. I do think it needs to be clear that when the Section refers to "a substantial part of its requested relief," this does not impose a standard that requires a requester to obtain, for example, a high percentage of the pages of requested documents. This kind of result would allow the government to oppose recovery wherever the complainant does not get everything requested. Clarification of the legislative language would probably be useful on this point; the objective should be simply to return recovery of fees and costs in FOIA litigation to the pre-*Buckhannon* law.

Section 5. Sanctions. The additional reporting language here is modest and useful. When the original sanctions provision was drafted in 1974, Congress anticipated that it would be rarely used, but did not expect the use to be "zero times" in 30 years. At least having automatic public notification of the Special Counsel and better documentation through public reporting can help with congressional oversight and public understanding.

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Section 6. Time Limits. One of the most intractable problems with FOIA administration since the statute's enactment almost 40 years ago has been agency delay. At least once each decade since the FOIA became law, Congress has revisited this issue and made changes or adjustments. Nonetheless, delay continues to vex FOIA users across government. However, clauses (G)(i)(I) and (II) should mirror more closely - or actually refer to - exemptions 1 and 4, so there will be no gap, for example, between "proprietary information" (I) and "trade secrets and other commercial information" under FOIA's § 552(b)(4).

There may also be additional third-party interests that are not covered, but should be better protected, like those under investigation by law enforcement agencies.

Unfortunately, this section may potentially have unforeseeable consequences. The Committee should consider replacing Section 6 with the provisions of the "Faster FOIA Act of 2005," so that these issues, including changing the burden to sustain withholding in the case of delay, could be considered by the proposed Commission.

Section 7. Tracking System. Agencies should long ago have established the technology and procedures mandated under Section 7, but unfortunately these directives are anything but superfluous. Most practitioners advise requesters to follow submission of requests with a phone call to obtain a tracking number; you would be surprised at how many FOIA requests simply get lost or fall through agency cracks during processing. This new system, which is already in place in many other countries, is a step forward.

Section 8. "(b)(3) Statutes." The new clause to be added to FOIA § 552(b)(3) has a number of purposes, all worthwhile. For one, it will in the future eliminate doubt about whether Congress intended, in any enactment, to establish a new (b)(3) statutory exemption to the FOIA. For another, it prevents a FOIA exemption from sneaking into the statute books without adequate congressional scrutiny. And, as a corollary, it will allow appropriate Judiciary Committee oversight of backdoor FOIA exemptions. (There is no inherent objection, as a matter of principle, to specific statutory protection for particular types of information under new (b)(3) statutes. The problem is enactment of these provisions without adequate debate and discussion of consequences.)

Section 9. Reporting Requirements. Reporting has always been an important element of

FOIA accountability since the 1974 Amendments, and the adjustments called for by this Section will help clarify what agencies are doing and facilitate more informed oversight. While it may be perfectly appropriate for agencies to include first-party requests in their FOIA statistics, such often-routine requests tend to skew the totals. The Department of Justice should have done more over the years to direct agencies so that their annual reports would be more useful; now it is time for Congress to step in.

Section 10. Private Entities. This Section addresses a narrow problem of contracted record maintenance. It appears narrow enough to avoid sweeping other contract data under the FOIA unintentionally. It does not affect the vitality of the Forsham case, holding that research data generated by agency grantees were not subject to the FOIA if

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not in the government's possession, and allows the Shelby Amendment to continue to govern public access to these data.

Section 11. OGIS. This is the most important section of S. 394. The new mediation and ombuds-type functions for FOIA administration will be lodged in a new Office in the Administrative Conference of the U.S. ACUS, before Congress allowed its funding to lapse a decade ago, had contributed mightily to the improvement of agency practices and procedures, and it can do the same for FOIA under this new provision.

Section 12. CII Report. The study called for in this Section is much-needed. Few information issues have suffered from as much misinformation as has Critical Infrastructure Information and protection of other homeland security-related information. To the extent that clause (4) might be interpreted as suggesting a predetermined conclusion that somehow there should be an ascertainable short-term cause-and-effect relationship between protecting these data and stopping terrorism, it should be rewritten more neutrally. I would not want to have to justify protection of law enforcement information by showing a drop in crime - or, conversely, to justify FOIA disclosure by showing more informed public voting.

Section 13. Personnel Report. Finally, this Section directs what may be the first organized and comprehensive look at personnel policies relating to FOIA. The basic challenges in FOIA administration are faced every day by dedicated government employees who administer the law. The more we know about this area, the more we can hold agencies accountable for the way FOIA requests are, or are not, handled quickly and appropriately.

Personal Perspective on FOIA

I cannot discuss the Freedom of Information Act and its uses without relating a story that illustrates the power of this magnificent law in a very personal arena. Almost 25 years ago I sent a FOIA request to the Department of Justice for any records relating to my father, who had been a trial lawyer in Justice in the 1920s. Since my father died when I was very young, I knew nothing about his early years as a lawyer, how he came to DOJ, what he did there, or why he relocated to Houston. All this information, and more, was contained in photocopies of the faded personnel and litigation records that I obtained through my FOIA request. Our family's understanding of our own heritage has been enriched by having this information.

Beyond any individual story, the FOIA remains a powerful tool that contributes meaningfully to our democracy. But it is still imperfect. S.394 does an excellent job of addressing some of its remaining weaknesses.

Thank you for the opportunity to testify. I look forward to working with the Committee with a view to seeing this legislation enacted during the 109th Congress.