

Testimony of  
**Katherine Cary**

General Council  
Texas Attorney General's Office  
March 14, 2007

Testimony United States Senate Committee on the Judiciary Open Government: Reinvigorating the Freedom of Information Act March 14, 2007 Ms. Katherine M. Cary General Counsel, Texas Attorney General's Office

Thank you, Chairman Leahy and Members of the Committee:

My name is Katherine Minter Cary. I am the General Counsel of the Texas Attorney General's Office. Thank you for the high honor of appearing before you today.

First, let me convey for the record Texas Attorney General Greg Abbott's strong support for the bipartisan OPEN Government Act of 2007. Attorney General Abbott has a strong record on open government and believes that, as stewards of the public trust, government officials have a duty of transparency when governing. He often quotes Supreme Court Justice Louis D. Brandeis who said that "sunshine is the best disinfectant."

As the leading open government expert in the Office of the Attorney General, I work daily to apply, educate and enforce one of the most proficient public information laws in the United States. As I have said before, unfettered access to government is a principled - and an achievable - reality.

Texas is a big state. We have more than 2,500 governmental bodies that span 268,801 square miles. From El Paso to the Panhandle and from Texarkana to Brownsville, the Texas Public Information Act ensures that information is placed into the public's hands every day without dispute.

Under the Texas Public Information Act, as under the Freedom of Information Act, requested information is to be "promptly released." Texas law defines this to mean as soon as possible, within a reasonable time, without delay. Any governmental body that wants to withhold records from the public must, within 10 business days, seek a ruling from the Attorney General's Office.

In Texas, a governmental body that fails to take the simple, but required procedural steps to keep information closed has waived any exceptions to disclosure unless another provision of law explicitly makes the information confidential. It is this waiver provision that is critical to providing meaningful consequences that prevent government from benefitting from its own inaction. Under the Public Information Act, if a governmental entity disregards the law and fails to invoke the provisions that specifically protect certain categories of information from disclosure, it has forfeited its right to use those disclosure exceptions. The OPEN Government

Act would institute a similar waiver provision. The Texas experience shows that striking this balance is fair and practical. Simply stated- it works.

In 1999, with Senator Cornyn as Attorney General, governmental bodies in Texas sought roughly 4,000 rulings from the Attorney General. Last year, our office issued approximately 15,000 rulings. This is staggering when you consider that these rulings represent a mere fraction of the requests for information that are promptly fulfilled every day.

What I have found is that education is vital. A noncompliance with open government laws most often results from a misunderstanding of what the law requires rather than malicious intent. For this reason, our office asked the Texas Legislature to require mandatory open government training for public officials in Texas. They agreed, requiring a course of training that must either be done or approved by the Attorney General's Office. We offer the training by free video that is available on the Attorney General's website. To date, our office has issued completed training certificates to almost 40,000 people.

In addition to open government training, our office provides handbooks about the law and an extensive open government website. The Attorney General's Office also has an open government toll-free hotline staffed by attorneys who help clarify the law and make open government information readily available to anyone. This service includes updating callers on where a request for ruling is in the process. The Texas open government hotline answers over 10,000 calls per year. The inclusion of a similar interactive process in the proposed OPEN Government Act would provide citizens with the customer service, attention and access that they deserve from their public servants.

Our office also handles citizen complaints. The Open Records Divisions attorneys attempt, with a 99 percent success rate, to mediate compliance with open records requirements. The OPEN Government Act would create a similar system that Texas has all ready demonstrated successfully. Resolving matters efficiently certainly underscores the usefulness of a dispute resolution function.

We have learned that it only requires a few legal actions by the Attorney General for word to get out that we are serious about enforcing compliance. It appears that the proposed Special Counsel will be in a comparable position to achieve positive results on the federal level.

Finally, Texas has a legal presumption that all information collected, assembled or maintained by or for a governmental body by a third party is open to the public. Records kept by third parties on behalf of Texas governmental bodies remain accessible by request to the governmental body as long as the governmental body enjoys a "right of access" to the information.

Moreover, Texas law does not allow the government to contract away access to public records held by its agents. The OPEN Government Act would appropriately extend the availability of federal governmental records to those records held by non-governmental third parties.

The policy statement that introduces the Texas Public Information Act is on-point:

The people, in delegating authority, do not give their public servants the right to decide what is

good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

The United States Supreme Court has held that the Freedom of Information Act's ideals are analogous:

The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.

NLRB v. Robbins Tire and Rubber Co., 437 U.S. 214, 242 (1978)

Thank you again for the privilege of appearing before you today. I would be happy to answer any questions.