

Testimony of
Tom Curley

President
Associated Press
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President and CEO of
The Associated Press
Representing the Sunshine in Government Initiative
On "Open Government: Reinvigorating the Freedom of Information Act" Senate Judiciary
Committee
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Chairman Leahy, Ranking Member Specter and Members of the Committee on the Judiciary, thank you on behalf of the Sunshine in Government Initiative. (Members of SGI include: American Society of Newspaper Editors, The Associated Press, Association of Alternative Newsweeklies, Coalition of Journalists for Open Government, National Association of Broadcasters, National Newspaper Association, Newspaper Association of America, Radio-Television News Directors Association, Reporters Committee for Freedom of the Press, and Society of Professional Journalists.) Your efforts to strengthen the Freedom of Information Act show a courageous and timely commitment to the essence of our democratic values.

The enactment of the Freedom of Information Act more than 40 years ago affirmed that even though this government had become the mightiest power on earth, it was still the people's government.

It also was a bold admission that failure to allow public oversight leads quickly to less public service and more self-service. FOIA was a promise to the people that whatever they might want to know about what their government was doing, the law would back them in all but a few kinds of highly sensitive or confidential matters.

The law does back them. But in too many cases the government doesn't back the law. As a result, increasingly we are seeing in the front-page headlines trends toward self-service government instead of public service.

First, let's look at the facts. The Coalition of Journalists for Open Government reported recently that the backlog of third party requests to executive departments rose in 2005 to 31 percent.

An Associated Press analysis last year of Freedom of Information summaries showed that the backlog problem, and the response delays have steadily worsened since agency performance reporting started in 1998.

What statistics like these can't show us is what the poor performance is costing us. News organizations like the one I manage understand that cost very well. We use FOIA and its state law counterparts every day.

When agencies respond as the law says they should, we know that the information they reveal can provoke public response that improves government operations, curbs waste and fraud, and even saves lives. When agencies don't respond, those opportunities are delayed, or lost altogether.

What kinds of opportunities lie hidden in the more than 200,000 FOIA requests that went unanswered in 2005?

I can tell you about one of them. It's not a dramatic story. It's as ordinary as the lunchbox a child carries to school every day.

In 2005, government scientists tested 60 of those little lunchboxes and found that one in five contained levels of lead that some medical experts consider unsafe. Several of them had more than 10 times the maximum acceptable level.

Yet the consumer Product Safety Commission issued a statement that said the tests uncovered "no instances of hazardous levels." AP national writer Martha Mendoza asked to see the tests and learned that the statement wasn't true.

You might have expected to read Martha's report more than a year ago when she filed her expedited FOIA request for the study results. But her story was just published last month. That's because it took an entire year to get the 1,500 pages of lab reports and other documents...a year in which many parents continued to buy those popular soft vinyl lunch carriers and hand them to their children without any reason to wonder if they might not be safe.

Apparently the commission still thinks the boxes are safe. They told Martha that children don't use their lunchboxes in a way that exposes them to the lead found in the tests.

Maybe they're right. But maybe they're not.

Martha talked to researchers who study the effects of exposure to lead. Some of them told her the lead levels were cause for serious concern.

And they weren't the only ones who thought the commission had underplayed the threat. Another federal agency thought so, too.

When the Food and Drug Administration heard about the test results last summer - many months after the consumer commission said there was no problem - FDA officials warned lunchbox manufacturers that they might face penalties if they didn't get the lead out. One major store chained pulled the boxes off its shelves nationwide.

Evidently, reasonable people can disagree over whether it's okay to manufacture a tiny bit of toxic metal into your child's lunchbox.

And that's the point...reasonable people can disagree...but only if they know. And parents can make informed choices about what to put in their kids' hands only if they hear those differing views.

Why did it take a year for the commission to respond to a relatively simple request that FOIA says it was supposed to answer in 20 working days?

The commission offered a reason. Its position was that the test report could not be released until each lunchbox manufacturer had been notified that information about its product was being disclosed.

We'll leave for another day the question of whether a government safety agency should be more sensitive to product manufacturers than to the concerns of parents for their children's health.

What I believe should concern this committee is the choice that agencies like the consumer product commission face when they confront a FOIA request like Martha's: On one hand, ignoring a duty to inform the manufacturers - whether the duty is real or not - could bring political or legal repercussions from powerful business interests and their allies.

On the other hand, ignoring a duty to meet the disclosure deadlines in the Freedom of Information Act could bring ... no consequences at all.

Any agency compliance officer with a healthy survival instinct could figure this one out. Disclosure brings risk. Delay or denial brings no risk.

No risk, that is, unless you count whatever the risk may be to your child of lead in the lunchbox.

I urge you to make changes that give the benefits of full and timely disclosure of government information a fighting chance of overcoming the often self-serving forces arrayed against them.

S. 394, the Open Government Act introduced last Congress by Senators Cornyn (R. Texas) and Leahy (D. Vermont) included real FOIA enforcement provisions. The Sunshine in Government Initiative supported that bill and will help in any way it can toward enactment of similar legislation this year.

By no means is the news from the FOIA front all bad. I could tell you FOIA success stories, too.

Thanks to FOIA, AP last year was able to report for the first time the extent of deaths and injuries among private contract workers in Iraq.

Thanks to FOIA, AP learned that the FDA suspected but failed to follow up in time to stop a transplant organ provider who was using faked health records to ship body parts that were implanted in human recipients.

And FOIA requests were a crucial part of AP's reporting which showed that highly publicized federal fines against companies that break the law are increasingly being quietly written down afterwards - sometimes by more than 90 percent.

It's a tribute to the professionalism and respect for the rule of law of so many agency FOIA officers that they respond correctly to thousands of requests for information each year.

They know - as we do - that our government was designed to be open and works best when its principles are upheld.

But I am not here to reassure you that FOIA is working fine because we all know it's not. FOIA is a law that protects us against real harm and real loss. Such laws cannot be asked to enforce themselves.

If you leave FOIA defenseless, agencies will continue too often to take the risk-free path -- the easy path -- and just say no. And they're all the more likely to do it when something has gone wrong that the public really, really needs to know about.

One of our reporters had an experience a few years ago that shows just how little risk it can take to make "no" seem like the right answer to a FOIA request.

We asked the Defense Department for a copy of a training video they had developed. They said "no." Their reason was that a Freedom of Information Act exemption prevented them from releasing a copy of "Freedom of Information Act: The Public's Right to Know."

We had a good laugh over this. But it was the kind of laughing you do to keep from crying...because this is what life has been like so often in recent years for reporters and other regular FOIA requesters. The very same reflex that prompted the Department of Defense's goofy denial of our request for their video is evident everywhere . . . sometimes with results nearly as absurd.

When we asked the Interior Department for documents showing which employees had asked for waivers from agency ethics rules in 2004, Interior said our request was too broad. They said we had to provide the names of the employees who sought the waivers . . . exactly the information we were requesting from them.

Federal officials who used to provide information for the asking now say you have to file a time-consuming FOIA request. Ground-level FOIA officers may be willing enough to comply with the law, but their bosses look for ways to delay or deny.

Administrative appeals from those denials are often no more than occasion for further broken deadlines and ritual denials. The requester ends up with a choice between giving up or commencing litigation that can easily cost well into six figures.

Even AP has to choose such fights carefully. Another problem is that we can litigate a FOIA denial for years and still not get our legal fees reimbursed if an agency turns over the goods before a court actually orders it to do so.

How many of your small business or private constituents can't afford to sue and just have to give up?

There could easily be a third way. A strong FOIA ombudsman within the federal government could help requesters around some of the most unreasonable obstacles without forcing them to go to court.

Unreasonable obstacles abound in part because many agency executives think obstructing information flow is our national policy. The Ashcroft memorandum advising agencies that the Justice Department stands ready to back any plausible argument for denying a FOIA requests continues to set the tone for the denial of access.

In similar fashion, the mania for classification of government documents and the creation of such categories as sensitive but unclassified continues to be a costly scourge. When in doubt, stamp it secret...even if it's been public for decades.

This reflex undermines our values, erodes public confidence in its government and in the end leaves the public in far greater danger than it would be if it knew more about the threats to its safety.

And the problem is no longer just with federal agencies. An AP survey last year found that state agencies and legislatures have caught the secrecy virus. We identified more than 600 new state laws that restrict access to what had once been public information. The presumption that any plausible reason for locking the files is a good enough reason is doing immeasurable harm.

When government has trained itself to believe that the risks from openness are substantial, while the risks from keeping secrets are negligible, you begin to get the kind of government nobody wants - a government that believes its job is to do all the thinking for us.

You get, for example, a Consumer Product Safety Commission that decides on its own - for all of us - that a little bit of toxic lead in a lunchbox is okay...and that the matter needs no further discussion.

"Further discussion" is the essence of a free society. We need a strong and effective Freedom of Information Act to make sure that discussion flourishes.

Mr. Chairman, Senator Specter, members of the committee, on behalf of the Sunshine in Government Initiative, we are grateful for this opportunity to appear before you today. We urge you to pass Open Government Act legislation this year.