

The Freedom of Information Act: Holding Government Accountable

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1 Introduction

A democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.

— *President Lyndon B. Johnson, signing FOIA into law.*

Concerned citizens have long hailed FOIA as a cornerstone of government transparency; however, the reality is that FOIA’s implementation doesn’t live up to this promise. First, legal loopholes mean that government agencies are not responsible for responding to FOIA requests on time, so requesters experience interminable delays in trying to access government records. Secondly, if the records are politically sensitive or reveal administrative wrong-doing, government agencies will seldom give them up without a fight; ironically, this is where FOIA

could be most valuable and where FOIA fails most. The problem is that the law fails to hold government agencies accountable for their compliance with FOIA.

For FOIA to fulfill its promise, it must hold government agencies accountable. The proposed Cornyn-Leahy OPEN Government Act of 2005 would impose consequences on agencies for tardiness and create a FOIA ombudsman to audit, review, and mediate FOIA requests. Although the effectiveness of the ombudsman is uncertain, the act's consequences for tardiness would create real accountability for FOIA deadlines and thereby strengthen FOIA considerably.

2 The Fiction of FOIA Accountability

In an idealized world, a requester would obtain a government record under FOIA in the following fashion. He submits his request. The agency searches for relevant records and then reviews the records to determine what to redact and what to disclose. Within 20 working days, the agency makes a determination about whether to comply with the request. Within a reasonable time thereafter, the agency delivers the documents to the requester.¹

If the requester is dissatisfied with the completeness or the timeliness of the response, he files an administrative appeal with the head of the agency. The agency must respond to the appeal within 20 working days.

If the requester is dissatisfied with the administrative appeal, he files a lawsuit to compel disclosure. If the court finds that the requester “substantially prevails,” then it “may assess

¹FOIA actually does not specify any timeframe, but “within a reasonable time” is the judicial interpretation.

against the United States reasonable attorney fees and other litigation costs reasonably incurred.”

3 The Problem: Legal basis and empirical evidence

This is a beautiful picture. Unfortunately, this is not how FOIA works in practice. First, agencies delay responding because they are not responsible for the deadlines under the *Open America* decision. Secondly, the difficulty of filing suit means that agencies rarely worry about this possibility in deciding to withhold or redact records. Thus, if the records are politically sensitive or reveal government wrong-doing, government agencies are strongly disinclined to disclose them in response to FOIA requests. I will address each problem in turn.

3.1 Delay

We first witness this lack of accountability in agencies’ habitually late responses to FOIA requests. FOIA imposes a deadline of 20 working days, but an influential 1976 D.C. circuit decision eliminated all respect for that deadline in *Open American v. Watergate Special Prosecution Task Force*, 547 F.2d 605. Open America sought access to FBI files on the role of the Acting FBI Director, L. Grey Peterson, in the Watergate affair. After the FBI missed the statutory deadlines for the request and the subsequent appeal, Open America filed suit to compel disclosure, arguing that the plain meaning of the statute required that the FBI observe the statutory time limits. In 1974, these limits gave the FBI 10 working days to

respond (with a 10-working-day extension under one of three “unusual circumstances”) and 20 working days to make a determination on administrative appeal. Even with the (dubiously applicable) “unusual circumstances” extension, the FBI had missed all the deadlines.

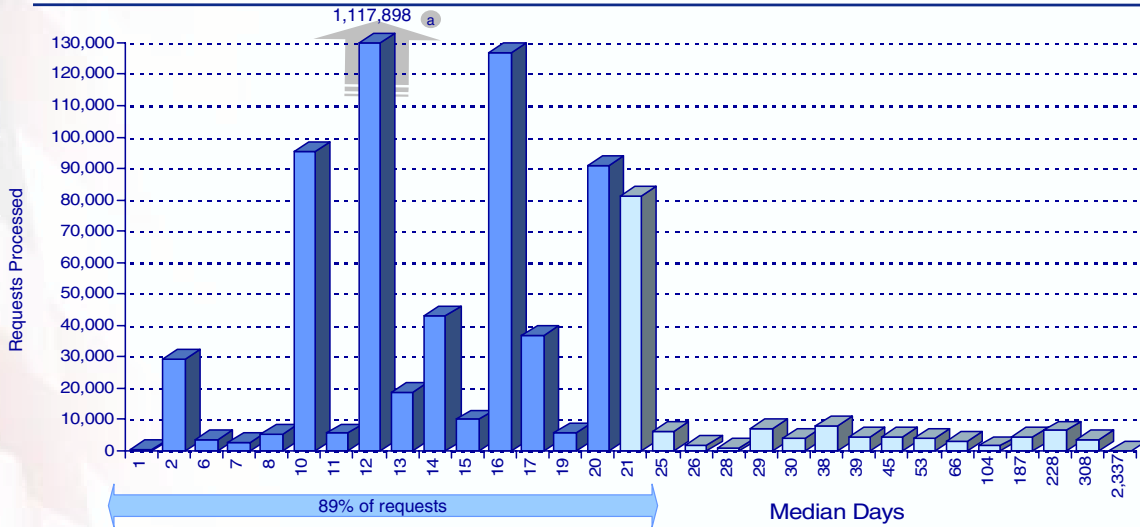
Instead, the court found relief for the FBI under the “exceptional circumstances” provision of 5 USC §552(a)(6)(C):

If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.

The court ruled that the unanticipatedly large FOIA backlogs constituted “exceptional circumstances.” Consequently, so long as the agency was exercising “due diligence” in responding to the request, the court could grant additional time to disclose the records. In this case, 191 FBI employees were processing FOIA requests in the order they were received, and this constituted due diligence. Thus, habitual agency delay in responding to requests found legal validation in *Open America*; the court effectively nullified the 20-day statutory limit.

We see this delay empirically. In 2001, the GAO analyzed the 1999 FOIA annual reports of 25 agencies that processed 1.9 million requests.[10] These 25 agencies handled 97% of the federal governments’ FOIA requests; they are the 24 agencies identified in the Chief Financial Officers Act, plus the CIA. These annual reports give the number of requests handled and the median processing time in working days, so we cannot identify the median processing time across the entire government. Nevertheless, we do see that the agencies with median processing times of 20 days or less handled 1.6 million, or 84%, of the requests. (See Figure 3.1.) Observe that this doesn’t mean that 84% of the requests took 20 days or less, since

20-Day Determination Period Distribution of Requests Processed by Median Days



Note: Except for the end points (1 and 2,337), only medians with over 1,000 requests are included in the graph; data from 23 agencies
^a Actual value; bar scaled down to better illustrate the lower values

Source: FOIA annual reports for fiscal year 1999 (self-reported data).

Figure 1: 2001 GAO analysis of 1999 FOIA response times

this is just the median; we know that at least half of these requests (42%) took less than 20 days, but we can't say anything about the other half.

This sounds faintly reasonable, but the picture starts looking gloomy when we realize that this data is weighted heavily by the Department of Veterans Affairs, which fields disproportionately many requests for veterans' medical records. This department handled 1.1 million requests with a median response time of 12 days. If we discount this department, then the departments with median response time of 20 days or less handled merely 500,000

out of the remaining 800,000 requests, a fairly demoralizing 60%.

Individual agencies also show some disconcertingly long processing times. The Immigration and Naturalization Service handled 81,000 “complex” requests with median processing time of 21 days.² The Department of Defense handled 79,000 “simple” requests with a median processing time of 20 days and 17,000 “complex” requests with a median processing time of 66 days. About 20,000 requests were handled by agencies with median processing times of 104 working days (EOUSA), 187 working days (CIA), 228 working days (FBI) , and 308 working days (State). Somewhat egregiously, the FBI finished 30 *expedited* requests in 1999 with a median processing time of 2,337 days.

It is even more sobering that in 1996, the Electronic FOIA Amendments increased the statutory time limit from 10 days to 20 days, in order to reduce the apparent violations of FOIA. Agencies should have been aiming at 10 days, not 20. With no legal accountability, agencies just worked diligently through their backlog of requests with little regard for how long that would take. This is the legacy of *Open America*.

3.2 Improperly withheld and redacted records

The FOIA grants administrators broad discretion to withhold and redact records. In practice, administrators extend this discretion past the bounds of the law; they can effectively withhold and redact however they see fit, with little or no accountability. These abuses are possible because FOIA provides no effective mechanisms for holding administrators accountable for those decisions. Thus, if the records are politically sensitive or reveal government wrong-

²Along with 78,000 “simple” requests with a median processing time of 10 days.

doing, government agencies are strongly disinclined to disclose them in response to FOIA requests.

Within the limits of the law, the Freedom of Information Act already grants administrators broad leeway in withholding and redacting records, with scant accountability for these decisions. First, administrators have broad leeway in deciding whether a record is exempt from disclosure; then, since the exemptions are discretionary, they also have complete freedom to decide whether to withhold the record. As early as 1978, the Government Accounting Office recognized how much discretion administrators have in withholding records and hence, how important agency attitudes are in making FOIA work:

Interviews with several analysts and agents revealed different attitudes on how the exemptions were to be applied. . . . Attitudes can make the difference as to how many pages, paragraphs, lines, or even words are excised. This is because the excising process consists of a line-by-line review, and officials must constantly make subjective decisions as to whether a certain paragraph or line would disclose the identity of an informant or constitute an unwarranted invasion of privacy.[15]

Since administrators have so much discretion in applying FOIA exemptions, agency attitudes essentially determine the completeness of records that requesters receive.

Even beyond the limits of the law, the lack of accountability for FOIA leaves administrators free to protect their own interests. When records are improperly withheld or redacted, the only remedies available to the requester are an administrative appeal and a lawsuit. Only the rare requester with time, money, and knowledge can avail themselves of these remedies, so these remedies are generally ineffective for holding agencies accountable. First of all, it is often impossible for requesters to tell when records have been improperly withheld or redacted. Requesters face an overwhelming imbalance of information; only the agency knows

precisely what records are relevant and what text has been redacted. Second, even when the requester knows that the agency erred, the process for compelling disclosure is time-consuming and expensive. After a generally ineffectual administrative appeal, the requester must file a lawsuit to compel disclosure. The only consolation is that if the court finds that the requester “substantially prevailed,” then it can award the requester attorneys’ fees.

Thus, FOIA enforcement depends heavily on private lawsuits, and only organizations and the rare individual have the resources to pursue these lawsuits. As a consequence, agencies hardly worry about the remote possibility of a lawsuit when they decide to withhold or redact records. Indeed, a 1980 Senate report discovered that agencies had learned to distinguish between requests that could be credibly backed by a lawsuit; they found that companies and wealthy non-profits often received preferential FOIA treatment over individual citizens, since individual citizens were unlikely to file suit.^[7] Each year, out of millions of FOIA requests and tens of thousands of appeals, we see only hundreds of FOIA lawsuits, and agencies realize this.

The average requester is left with very little idea of whether records have been improperly withheld or redacted and very little recourse even if he knows. Administrators realize this and freely withhold records as they see fit. Thus, FOIA fails to live up to its promise of enabling ordinary citizens to access any government record, however embarrassing or condemning the record may be.

3.3 Administrative Accountability

Besides private mechanisms for enforcement, the FOIA provides three administrative mechanisms to hold agencies accountable for their FOIA actions. Unfortunately, none of these have had much effect, and their existence is poor consolation to the denied FOIA requester.

First, each agency publishes an annual report with statistics on FOIA requests, appeals, backlogs, fees, staffing, and timeliness. Unfortunately, yearly variations in agency reporting make it difficult to analyze trends over time, and variations in data from agency to agency make it difficult to compare agency practices. For example, many agencies report the median processing times of each of their divisions, and the divisions change over time. Some agencies measure processing time from the day when requests are “perfected,” while others measure from the day they are received. Some agencies include Privacy Act requests, while some agencies do not. The GAO struggles valiantly every year to assemble a coherent analysis of these inconsistent reports. In any case, these reports receive negligible political attention, so agencies have little incentive to improve their statistics.

Next, the Department of Justice has the authority to withhold counsel from agencies sued under FOIA. Since agencies lack the authority to retain outside counsel, Justice can use this authority to coerce FOIA compliance. In practice, Justice very rarely threatens to withhold counsel.^[26] Especially in recent years, Justice has simply used its authority implicitly to provide FOIA guidance and training, rather than explicitly to coerce compliance. A component of Justice — the Office of Information and Privacy — issues a biweekly newsletter called *FOIA Post*, and it provides additional educational materials for employees.

The most explicit use of Justice’s authority is the memo that incoming Attorneys General issue outlining new Presidents’ FOIA policy; however, even these broad statements of policy (backed by explicit threats of withholding counsel) cause little change in agency practice. For example, under the Clinton administration, Janet Reno promulgated a very permissive FOIA policy with a “presumption of disclosure” and a promise to defend the withholding of records only if disclosure could cause “foreseeable harm:”

The Department will no longer defend an agency’s withholding of information merely because there is a “substantial legal basis” for doing so. Rather, in determining whether or not to defend a nondisclosure decision, we will apply a presumption of disclosure. . . . In short, it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption.[4]

In sharp contrast, under the following Bush administration, John Ashcroft promulgated a much more restrictive FOIA policy; his memo replaced the presumption of disclosure with a new policy of careful consideration of all the possible interests that could be implicated by disclosure. Ashcroft’s memo promised to defend the withholding of records in essentially any legally defensible situation:

Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information. . . . When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.[5]

These two memos seem to reflect diametrically opposite philosophies about government

transparency, and they threaten to place the full force of the Justice Department behind those philosophies. However, in reality, these memos had little effect on agency practices outside the defense establishment. The National Security Archive found in a 2003 study that most federal agencies “indicated little change in regulations, guidance, or training materials reflecting” Ashcroft’s FOIA memo.[3] If such a drastic change in stated Justice policy produced such minor change in agency practice, we can only conclude that the Department of Justice exercises little power in enforcing FOIA. Thus, the Department of Justice essentially provides only FOIA guidance and training. Though this may promote FOIA compliance overall, it again gives little consolation to the frustrated requester.

FOIA’s final mechanism for public accountability is a promise to discipline arbitrary and capricious employees (§552(4)(F)), but not a single employee has ever been disciplined under this paragraph. Here is how the process should work: if the court rules that “agency personnel acted arbitrarily or capriciously with respect to the withholding” of records under FOIA, then the US Office of Special Counsel should initiate a proceeding against the officer or employee primarily responsible for the withholding to determine whether disciplinary action is warranted. The Special Counsel should submit his findings and recommendations to the agency’s administrative authority, which should take the recommended corrective action.

In practice, no agency personnel have ever been disciplined under FOIA. Only twice has a court ever referred findings to the Special Counsel.[26] In the first case, the request and all subsequent appeals were completely ignored by the agency; nevertheless, the Special Counsel found no fault with agency personnel in a mind-bogglingly technical reading of its imperative

under FOIA “to determine whether disciplinary action is warranted against the officer or employee who was *primarily responsible* for the withholding:”

All of these officials had management responsibilities in connection with the FOIA and, to some degree, the extensive delays involved in furnishing records to Mr. Holly as promised can be laid to mismanagement. However, the Act limits our authority to proceed against those who are “*primarily responsible*” for a failure to produce. On the basis of the evidence before me, I cannot find that any of the persons mentioned fall into that category. (Accordingly), it is the conclusion of this office that disciplinary action is not warranted.³

That is, since many officials were jointly responsible for the withholding, they could not identify any single employee who was *primarily responsible* for the withholding. The second case referred to the Special Counsel was closed without any public findings.⁴ Clearly, this system was not working. In 1978, frustrated with this state of affairs, Congress authorized the Special Counsel of the new Merit Systems Protection Board to initiate investigations of FOIA violations even without judicial referral, but this Special Counsel has never issued findings under this authority.⁵

Thus, none of FOIA’s three mechanisms for administrative accountability are effective. Nobody cares about FOIA statistics, the Department of Justice only provides guidance and training, and no agency personnel have ever been disciplined under FOIA. We must look beyond these administrative remedies to find better ways to enforce FOIA.

³*Holly v. Acree*, 72 F.R.D. 115 (D.D.C. 1976). Quoted in 1980 Senate Report.[7]

⁴*Long v. Internal Revenue Service*, Order No. C7-640V (D.C. Wash. 1981).

⁵At least not until 1989, when the Special Counsel became an independent executive branch. This conclusion is based on a review of all 23 Merit Systems Protection Board decisions containing the term “FOIA,” retrieved from its website at <http://www.mspb.gov/mspbdecisionspage.html> on December 5, 2005.

3.4 Government Motivations

We've seen the legal loopholes in FOIA that lead to a lack of accountability; we've seen the empirical evidence of the results. Without accountability, we can only ask administrators to apply their best, impartial judgment and trust that they do their job well. This actually works well in many other circumstances; we trust that government employees will do their job correctly when they, say, renew our drivers' licenses or audit our tax returns. However, unlike most government functions, FOIA reveals how employees do their jobs, so FOIA administrators cannot be impartial in the same way as the person renewing our drivers' licenses or auditing our tax returns. Especially considering the unusual amount of discretion in complying with FOIA, we cannot expect employees to impartially comply with FOIA out of sheer good will. The motivations provided by the law and government simply fail to align employees with the goals of FOIA.

For example, the law imposes *personal* liability on administrators for improperly disclosing information; since we have seen that FOIA utterly fails to discipline employees for improperly withholding information, legal self-interest predisposes administrators towards withholding. Naturally, disclosing classified information can result in up to 10 years in prison (18 U.S.C. §798), but liability for disclosure extends far beyond just classified information. For example, if a government employee discloses trade secrets or confidential financial information, 18 U.S.C. §1905 can send him to jail for up to a year. Harrison Wellford illustrates the conflict with an ironic anecdote:

The OEO suspended Rudy Frank, one of its employees, for allegedly releasing confidential information on the salaries of teachers at a day-care center operated

by a private corporation under contract to the OEO. Frank then sued the OEO under the Freedom of Information Act to force the OEO to make the day-care salaries public. Faced with the lawsuit, the OEO gave the “secret” data to Frank but refused to lift his suspension.[28]

This certainly shows the double standards of liability for withholding and release. With the risk of job loss, civil liability, and even criminal penalties, it is small wonder that administrators tend to err on the side of withholding rather than disclosure.

In other circumstances, government employees have records that impugn their own behavior, contradict agency policy, or reveal inconvenient political connections. Without accountability, administrators are naturally predisposed to withhold these records.

I spoke with a staffmember in a governor’s office who handled FOIA requests to understand exactly how this mixture of misaligned motivations and lack of accountability results in poor treatment of FOIA requests. She reported that it was regular practice to suppress documents when politically expedient. An agency head would come around one day, saying, “So, do you have that document? Let me know before you release it.” The next day, he would intimate, “Remember that document? Why don’t we forget about it for now?” After all, the requester will not notice that the document is missing, and even if he does, he will not sue.

As for response time, the staffmember reported that the requests are treated with little urgency, and the office pays little attention to the statutory time limit; if the office is busy or if the person responsible for the records is traveling or sick, then the request will simply sit on a desk somewhere, regardless of the statutory deadline. For politically sensitive requests, it is also common practice to delay responding, to provide more time to spin the disclosure and

limit its newsworthiness. Unfortunately, FOIA thus fails where it would be most valuable — in guaranteeing the right of access to politically sensitive information.

The staffer gave the motivations starkly. The odds of any repercussions for withholding records and delaying are so slim that they are barely considered. The FOIA requester would have to file a lawsuit and prove wrongdoing in court, and few requesters have the resources for a lawsuit. So, why not sit on a request, wait for a while, and figure out how to spin it to minimize its political impact?

Harrison Wellers also extensively analyzes the motivations of the government employee under FOIA in *None of your Business: Government Secrecy in America*. He concludes that politically-appointed agency heads fear that they will be embarrassed or “second-guessed” if information is made public, and agency staff fear for their job security and advancement if information they release leads to embarrassment. For example, the FDA made major strides in FOIA compliance under the leadership of Peter Hutt from 1971 to 1975, but Hutt explains that agency heads initially feared that public disclosure would enable endless debate and second-guessing of their decisions:

Rather than risk the expenditure of substantial resources in public debate of this nature, with possible attendant increase in public confusion and loss of Food and Drug Administration prestige, it was easier to maintain the confidentiality of the underlying information and simply avoid the debate.

Indeed, this fear is somewhat well-founded; with great reluctance, the FDA released food safety data on sodium nitrite in 1972 to a Stanford graduate student, who came back with a 78-page analysis detailing the FDA’s errors. Similarly, lower-echelon agency staff worry that disclosing information will endanger their careers if that information contradicts agency

policy or embarrasses supervisors. We see this attitude all the time when agency staff refuse to be interviewed alone or when agency staff insist on anonymity, even for the most trivial of matters. Finally, agency employees are not immune to the natural feeling that the files in their desks should be their own, private files. Unlike any other setting, FOIA forces employees to open potentially every file in their desk to public scrutiny, and we should not be surprised to find resistance to this scrutiny.

Thus, we see that the lack of FOIA accountability permits agencies to delay and withhold records however they wish. We cannot count on government good will to deliver complete and timely records, particularly since FOIA would be most valuable when administrators want to hide. FOIA needs accountability to reach its fullest potential.

4 The Solution: Imposing consequences and accountability

Lack of accountability is the basic flaw in today's FOIA. We need to hold agencies accountable for both the timeliness and the completeness of FOIA responses. With this understanding, we will evaluate Senator Cornyn and Senator Leahy's proposal to reform FOIA: the Cornyn-Leahy OPEN Government Act of 2005 (S.394), and we will propose some changes of our own. The OPEN Government Act would effectively solve the agency timeliness problem by creating real consequences for tardiness. These consequences would so strongly incentivize agencies to respond on time that FOIA requesters would have a reasonable assurance of

a timely response. This single provision would be the OPEN Government Act's greatest success, since it imposes simple and enforceable consequences.

Holding agencies accountable for the completeness of their responses is a more difficult problem. The OPEN Government Act tries to address this problem by creating a FOIA ombudsman. The ombudsman would audit and review agency FOIA performance and mediate between requesters and agencies. Unfortunately, only experience will tell how well this works, and comparing this proposal with the Canadian ombudsman system already raises some doubts. The OPEN Government Act declines to fix FOIA's disciplinary mechanisms; instead, it merely demands some reports about these disciplinary mechanisms from various responsible government agencies.

Finally, a uniform FOIA request submission and tracking system across the entire federal government would foster communication between requesters and agencies and thereby improve the perception of accountability under FOIA. It would also enforce a uniformity of accounting across the government, so the GAO could dependably identify trends in FOIA. The OPEN Government Act hints at this sort of system, but it doesn't realize the possibilities that this could offer.

4.1 Delay

The Cornyn-Leahy OPEN Government Act of 2005 would establish consequences for agency tardiness; the resulting improvements in agency timeliness would change the entire character of FOIA in this country.

The central provision of this act disqualifies an agency from exempting a record from disclosure if it misses the 20-day statutory limit for responding to the request:

- (G) (i) If an agency fails to comply with the applicable time limit provisions of this paragraph with respect to a request, the agency may not assert any exemption under subsection (b) to that request, unless disclosure—
 - (I) would endanger the national security of the United States;
 - (II) would disclose personal private information protected by section 552a or proprietary information; or
 - (III) is otherwise prohibited by law.
- (ii) A court may waive the application of clause (i) if the agency demonstrates by clear and convincing evidence that there was good cause for the failure to comply with the applicable time limit provisions.’.

This presents a strong incentive for agencies to comply with the time limit. If the agency wants to withhold records under any FOIA exemption, it will need to respond in a timely fashion to the request. Experience in Texas suggests that this is highly effective.[20]

Admittedly, this provision is, of course, enforceable only by lawsuit; however, if the agency missed the deadline but still withheld records, the requester would have a clear (and presumably inexpensive) case. The court would also award the requester attorney’s fees for “substantially prevailing.” The OPEN Government Act further strengthens this remedy by granting the requester attorney’s fees if the pursuit of the suit was the “catalyst” for the release of records. That is, if the agency refused to release records but released them upon filing of the lawsuit to render the case moot, the requester would still be entitled to attorney’s fees. (This tactic of stalling and then releasing records to render the case moot continues to be a common agency practice.)

This provision would strongly encourage agencies to respond within 20 days. Filing a

FOIA request with this sort of likelihood is unprecedented in the history of FOIA. This would revitalize FOIA and substantially improve the transparency of our government.

4.2 Tracking and computerization

We could make major improvements in FOIA administration by mandating the use of a single government-wide FOIA computer system like FOIAXpress.⁶ This system accepts requests, tracks progress, and delivers responses over the Internet. It provides computerized systems for record redaction and fee payment. It automatically collects FOIA statistics and generates the appropriate reports. Twenty-five different agencies are already using FOIAXpress internally to track and service FOIA requests, though none of them appear to be using the Public module to accept requests and deliver responses over the Internet.⁷

Such a system would provide a uniform way for citizens to access government records. Moreover, one unified system would yield consistency in data reporting between agencies and across years, allowing the GAO to perform truly meaningful analysis of trends in FOIA satisfaction. The computerized redaction would also permit a level of audit and analysis that was never possible on paper. The GAO could analyze, for example, the number of lines redacted under each exemption or the variation between agencies or even between individual administrators. This would be a truly promising path to explore.

Unfortunately, it would require at least several tens of millions of dollars; although this is a truly trivial sum of money, the need to appropriate money makes this unlikely to make it into

⁶<http://www.foiexpress.com/>. I mean to use this as an example. I don't mean to endorse it, though I admit I am not aware of any comparable software.

⁷<http://www.foiexpress.com/Clients.html>.

the OPEN Government Act. Instead, the OPEN Government Act simply requires agencies to issue a tracking number and estimated completion date for each request. Requesters would be able to track requests online and by phone. The estimated completion date and the tracking system would improve requesters' experience with FOIA, but they won't substantially change FOIA.

4.3 Improperly withheld and redacted records

We would also like to hold agencies accountable for the completeness of FOIA responses. Unfortunately, this problem is more difficult than the timeliness problem, and the OPEN Government Act does not present a clear solution.

The OPEN Government Act barely even attempts to discipline employees who arbitrarily and capriciously withhold records. It would have the Attorney General notify the Special Counsel of any court finding that employees deserved disciplinary action, but this is a fairly useless change. As discussed above, courts have found only twice that employees deserved disciplinary action, and in neither case did the Special Counsel take any disciplinary action. Instead of actually solving the problem, the OPEN Government Act asks for annual reports from the Special Counsel and the Attorney General, and it asks the Office of Personnel Management to assemble some recommendations about motivating employees to comply with FOIA. It ought to be a simple matter to impose civil liability or disciplinary action on employees who illegally withhold records, but the OPEN Government Act basically punts on this problem.

The other major provision of the OPEN Government Act creates a FOIA ombudsman “to review agency policies and procedures, audit agency performance, recommend policy changes, and mediate disputes between FOIA requesters and agencies.”⁸ This ombudsman would oversee the entire FOIA process. It is important to note that requesters could file suit with or without seeking the ombudsman’s mediation, and they could even file suit and seek mediation simultaneously. The ombudsman thus would not impose any further delays on enforcement. The ombudsman may well improve the average citizen’s access to government records. For the average citizen without the time and money to sue, the ombudsman provides a mechanism for him to seek redress without the expense and time of a lawsuit. Even though the ombudsman has no formal powers to force compliance, it may solve conflicts as a privileged mediator that individual citizens cannot.

Canada also enforces its Access to Information Act with an ombudsman, in the form of the Information Commissioner. Unlike the OPEN Government Act’s proposed ombudsman, the Canadian requester can only file suit in court after the Information Commissioner has reviewed the case. Like the OPEN Government Act’s proposed ombudsman, the Information Commissioner has no formal powers to enforce compliance. Alasdair Roberts has made a career of studying the Canadian system, and he finds the Canadian ombudsman system far superior to the American internal review/judicial review system. “Ordinary folks” cannot afford the time and expense of a lawsuit, so an ombudsman/commissioner is much easier to handle.[2] On the other hand, he does note some flaws with the Canadian system. Specifically, the ombudsman’s lack of any formal authority makes it difficult for the ombudsman to engage

⁸http://cornyn.senate.gov/FOIA/files/OPEN_Gov_Act_sect_by_sect.pdf.

constructively with reticent government agencies. Without the power to monitor or order compliance, the Canadian ombudsman can only fall back on subpoenas and public advocacy, which create hostile and ineffective relationships between the ombudsman and government agencies.[23]

Undoubtedly, the success of the ombudsman would depend heavily on good implementation by the administration. Though it is not entirely clear how successful the ombudsman would be, this would definitely represent a significant positive step in making the government records accessible. The success of the ombudsman really depends on its administration and its relationship to the other agencies. Only experience will reveal how effective it will be.

5 Conclusion

Government transparency is an integral part of a democratic society. Citizens should be able to peer into their governments' darkest corners and look for things that are wrong. For only when citizens *know* their government can they participate effectively in its operation. FOIA has served us well over the last decades, but lawsuits followed by more lawsuits have been necessary to keep the dark corners lit. These dark corners are just where FOIA is most valuable, and it is just where FOIA stumbles — in the delays, in the withholdings, and in the redactions — because agencies are most wary of exposing the darkest corners of their administration. Without accountability, we cannot ensure that FOIA keeps these dark corners lit.

The Cornyn-Leahy OPEN Government Act takes one big step in making agencies ac-

countable for their tardiness in responding to FOIA requests; it takes an uncertain forward step in creating a FOIA ombudsman. It takes small steps in many other directions, but we need to look farther ahead and find ways to hold agencies accountable for the completeness of their FOIA responses. An enforceable FOIA would go a long way towards making government accountable to the people.

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