

**Hearing on
Open Government: Reinvigorating the Freedom of Information Act**

**United States Senate
Committee on the Judiciary**

Statement of Meredith Fuchs, General Counsel, National Security Archive

March 14, 2007

Chairman Leahy, Ranking Member Specter and Members of the Senate Committee on the Judiciary, I am pleased to appear before you to support efforts to improve the Freedom Information Act (FOIA).

I am General Counsel to the National Security Archive (the “Archive”), a non-profit research institute and leading user of the FOIA. We publish a wide range of document sets, books, articles, and electronic briefing books, all of which are based on records obtained under the FOIA. In 1999, we won the prestigious George Polk journalism award for “piercing self-serving veils of government secrecy” and, in 2005, an Emmy award for outstanding news research.

In my five years at the Archive, I have overseen five audits of federal agency FOIA processing, including one released this week that examined agency noncompliance with the E-FOIA Amendments of 1996 (which I am attaching to my testimony), two that identified the ten-oldest pending FOIA requests in the federal government, and one that examined the proliferation of sensitive but unclassified information labeling policies. Through those audits, my colleagues’ FOIA requests, litigation, and training federal agency FOIA officers, I am very familiar with how the Act functions.

There are many ways to measure the role the Freedom of Information Act plays in our nation. One way is to look at the work of the news organization headed by Mr. Curley, who sits on this witness panel. All the remarkable news stories based on records released under FOIA and reported by the AP to the public would not have been possible if the AP were not willing to litigate in court to enforce its right to information. This illustrates a significant problem – while the FOIA has been a powerful tool to advance honesty, integrity and accountability in government, there is still a culture of resistance to the law in many federal agencies. Instead of viewing the public as the customer or as part of the team, the handling of FOIA programs at some agencies suggests that the public is considered the enemy and any effort to obstruct or interfere with the meddlesome public will be tolerated. For requesters with the resources, litigation is sometimes a solution. The rest of the public is simply shut out of the process.

I recently spoke at the Western Regional Training Conference for the American Society of Access Professionals (ASAP), a private professional association comprised mainly of federal government FOIA personnel. A FOIA specialist came up to me after one of my talks and told me that at her agency, whenever a FOIA request touches on anything controversial, the staff begins listing ways to slow it down or derail it. She said

they start with fee disputes, then they add on questions about how clearly the request is described, and then they let it languish, apparently hoping all of those tactics will lead to the requester abandoning the request.

My response to her was one of dismay. This is a country where we are strong enough to acknowledge our mistakes, air our dirty laundry, and then fix the problems. If anything is a testament to the strength of our democracy, it is the fact that American citizens are not afraid to ask the government hard questions, but this is something we take for granted in the United States.

I would like to address why reforms are necessary now to revitalize the FOIA. The FOIA is a unique law. There is no federal, state or local agency that enforces it. Rather, it depends on the public to make it work with the tools provided by Congress and an independent judiciary that is willing to remind agencies of their obligations. Based on their own reporting, we know agencies will not make FOIA a tool for timely education about government activities. Each agency is required to submit an annual report that provides FOIA processing statistics as well as information on agencies' progress in achieving goals they set in FOIA improvement plans mandated by Executive Order 13392. Reports for FY 2006 were due by February 1, 2007. As of this past Monday (five weeks after the due date), the reports from only 8 out of 15 federal departments and only 51 out of 75 federal agencies were available.¹

The Department of Justice has taken the lead on guiding agencies through the Executive Order process. The Department of Justice's annual report, however, acknowledges that DOJ components have failed to meet 30 different goals set out in its FOIA improvement plan.² Most striking to me is the report from the Federal Bureau of Investigation (FBI), which indicates that 8 of the FBI's FOIA improvement goals were not met. For some goals the FBI simply pushed back its deadlines by one year. For example, in the FBI FOIA improvement plan, the FBI reported 60 vacancies in its FOIA staff and set a goal to fill those vacancies by September 30, 2006. They did not do the hiring and instead the goal has now been moved to September 30, **2007**. They set a goal to review and update their Web site by December 31, 2006. They failed to do it and instead moved the deadline to December 31, **2007**.

As you know, the FOIA requires agencies to respond to FOIA requests within 20 business days. Attached to my testimony is a compilation of the date ranges of pending FOIA requests at federal agencies. The list was compiled from the agency annual reports referenced above. As you can see from the chart, at least **7 departments have FOIA requests still pending that are more than 10 years old**. Another **7 have requests more than 5 years old**. Twenty-eight (28) more have requests that are between 1 and 5 years old. The second chart shows what happens when requests are sent to another agency for consultation – additional delays result. And, those are just the agencies whose reports are available. The Criminal Division of the Department of Justice reports the oldest FOIA request so far – it is eighteen years old and dates from 1989.

¹ Available at <http://www.usdoj.gov/oip/fy06.html>.

² Available at http://www.usdoj.gov/oip/annual_report/2006/06foiapg12.htm.

At a hearing held in the House of Representatives on February 14, 2007, Melanie Pustay from the Department of Justice testified that agencies have made great progress handling their backlogs.³ While it is true that some agencies are gradually reducing their backlogs, I would like to give you an example of how they are doing so.

The story begins in 2001 when the Treasury apparently was trying to close out old requests. It sent the Archive letters concerning 31 requests that had been submitted in the mid-1990s and asked whether we remained interested in the requests. We said we were still interested in the records. Then, in December 2005, President Bush issued Executive Order 13392, which directed agencies to set goals designed to reduce or eliminate the agencies' FOIA request backlog. Here is what happened next:

- June 14, 2006: The Department of the Treasury set a goal in its FOIA improvement plan of reducing its FOIA backlog by 10% by January 1, 2007.⁴
- August 24, 2006-Present: The Archive receives letters from the Department of Treasury asking whether we are still interested in pursuing access to records under our pending individual FOIA requests, many of which were submitted 10 or more years ago. The letters – which usually took more than seven days to reach our office – warned “if we do not receive a reply from you within 14 business days from the date of this letter, we will conclude that you no longer are interested in the requests and will close our files regarding this matter.” **We received these letters for the same 31 requests that the Department of the Treasury checked on in 2001.**
- January 9, 2007: I sent a letter to Treasury in which I wrote: “In many instances, we have received two or three letters [threatening to close] a particular FOIA request despite the fact that we already advised the Department of our continued interest in that request. In some cases, we have received these letters for requests that are pending on administrative appeal (including appeals filed as recently as August 2006) where the very fact that we appealed should signal our continued interest.” I concluded, “I request that you do not close any Archive FOIA request or appeal without processing it.”
- February 23, 2007: Treasury sent a letter asking whether we continue to be interested in several other old FOIA requests, filed in 1997, in which it states: “We received a letter from Meredith Fuchs of the National Security Archive ... [but] we are in the process of reducing [Treasury’s] significant backlog by communicating with requesters as to which of those requests have gone stale.”

The punch line is that several of the letters received in the past year also indicate that the original requests (which had been submitted from 1994-1997) have been

³ <http://www.usdoj.gov/oip/foiapost/2007foiapost1.htm>.

⁴ Available at <http://www.ustreas.gov/foia/reading-room/foia-improvement-plan.pdf>.

destroyed and ask if we can send new copies of the original FOIA requests. What has the Department of the Treasury FOIA program done for the last six years after it asked whether we would abandon our requests? I wonder if I come back here in another six years whether I will be able to tell you that they asked us yet again whether we are willing to give up.

There are many things wrong with Treasury's practices. They have requests as old as 10-13 years that they clearly have made no effort to process in all those years. In some cases they destroyed the requests without making any substantive response to the FOIA requester. In addition, despite taking years to respond, and failing to meet their 20 business day response time, they only give the FOIA requester 14 business days before closing the request. What if the requester has moved in the intervening 13 years? What if they do not get the letter until more than a week has passed and simply are not able to respond in time? While this may be one way to eliminate backlogs, it is certainly not what Congress intended from FOIA programs.

There are several provisions of the OPEN Government Act of 2007, introduced just yesterday by Senators Leahy and Cornyn, that I think are critical for improving the functioning of FOIA. The attorneys' fees provision will improve the situation because it will make it possible for the public to enforce a law that now has no one ensuring compliance. It will end agency litigation gamesmanship, such as the common practice of agencies taking no action until after a lawsuit has been filed and summary judgment has been briefed. I, and colleagues at other organizations, all can offer examples of these wasteful litigation tactics. Restoration of the catalyst theory for attorneys' fees awards will push agencies to take a responsible legal position from the outset and will end practices that waste the resources of FOIA requesters, the Department of Justice lawyers who have to defend agencies, and the judicial system. The attorneys' fees reform, along with the imposition of real consequences for delay and enhanced authority of the Office of Special Counsel, will provide incentives for agencies to process requests correctly and expeditiously.

Better reporting is an essential part of the package. FOIA annual reports do not permit Congress to conduct quality oversight, agency managers to identify problems and improve processing, and the public to press for responses. I urge you to mandate better, more reliable reporting, including requiring data on: average processing times, range of processing times, oldest pending requests and appeals, the number of requests abandoned by requesters due to delay, the number of requests rejected because the records are operational files, the number of expedited requests received, the number denied, and the processing times for expedited requests. In addition, the Committee should require more standardized reporting, including measuring response time from receipt of the FOIA request and disaggregating data for first person Privacy Act requests and FOIA requests. I assure, judging by the results of our audits and the success of FOIA, such transparency will have an impact on agency processing of FOIA requests.

The tracking requirements also will help. Although it seems obvious that agencies should have some reliable record of public information requests, many do not.

As a result, many requests get lost in the system. It is very hard for a FOIA requester to advocate for processing when neither the requester nor the agency knows who is handling the request.

Finally, the OPEN Government Act of 2007 includes many additional provisions that will help improve FOIA programs. The personnel review could lead to improvements in the professionalism of FOIA programs. The requirement that withholding statutes include specific reference to FOIA would curb the slow erosion of the presumption of open government by making sure careful consideration is given to any new withholding statute. The annual reporting requirement on the use of the Department of Homeland Security disclosure exemption for critical infrastructure information would provide greater accountability concerning the use of the exemption. The provision clarifying that all legitimate journalists are entitled to preferred status would eliminate a common delay tactic employed by agencies against FOIA requesters.

I am hopeful that my testimony today has offered a glimpse into the public's experience with FOIA. I am grateful for your interest in these issues and am happy to respond to any questions.

Meredith Fuchs serves as the General Counsel to the non-governmental National Security Archive at George Washington University. At the Archive, she oversees Freedom of Information Act and anti-secrecy litigation, advocates for open government, and frequently lectures on access to government information. She has supervised five government-wide audits of federal agency FOIA performance including one released this week entitled: "File Not Found: Ten Years After E-FOIA, Most Agencies are Delinquent." She is the Secretary of the Board of Directors of the American Society of Access Professionals (ASAP), a private professional association of FOIA personnel who serve throughout the federal government. She is the author of "Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy," 58 Admin. L. Rev. 131 (2006); and "Greasing the Wheels of Justice: Independent Experts in National Security Cases," 28 Nat'l Sec. L. Rep. 1 (2006).

Previously she was a Partner at the Washington, D.C. law firm Wiley Rein & Fielding LLP, where she was a member of the Litigation, Insurance, Privacy and E-Commerce practice groups. Ms. Fuchs served as a law clerk to the Honorable Patricia M. Wald, U.S. Court of Appeals for the District of Columbia Circuit, and to the Honorable Paul L. Friedman, U. S. District Court for the District of Columbia. She received her J.D. from the New York University School of Law.

Range of Pending FOIA Requests

Data from FY 2006 FOIA Annual Reports

Agency	Oldest Pending Request	Most Recent Pending Request
CNS	N/A	N/A
FTC	N/A	N/A
NIGC	N/A	N/A
USTR	N/A ⁵	N/A
DOJ-Criminal	7/10/89	1/8/07
DOD	3/10/91	9/30/06
CIA	2/1/92	1/23/07
NARA	9/21/92	1/31/07
DOJ-FBI	12/18/92	1/9/07
DOE	3/10/93	1/30/07
EPA	5/23/95	1/30/07
DOS	11/28/97	1/24/07
NTSB	1/7/99	1/23/07
DOJ-Antitrust	6/3/99	1/8/07
DOJ-EOUSA	12/30/99	1/9/07
DOT	8/29/00	1/29/07
DOJ-CRT	1/10/02	1/9/06
DOJ-OIP	2/5/02	1/8/07
DOC-NOAA	8/2/02	1/31/07
SEC	10/4/02	1/31/07
EDU	12/11/03	1/31/07
NEH	2/27/04	1/31/07
DOJ-EOIR	6/20/04	1/17/07
CPSC	7/26/04	1/22/07
Peace Corps	8/2/04	1/22/07
NASA	11/5/04	1/29/07
RRB	2/2/05	9/27/05
DOJ-JMD	3/7/05	12/16/06
DOL	4/5/05	1/24/07
DOJ-USMS	4/20/05	1/9/07
DOC-NIST	4/28/05	1/31/07
DOJ-BOP	4/29/05	1/9/07
DOJ-OLC	5/20/05	12/21/05
SSA	8/10/05	12/31/07
DOJ-ENRD	8/11/05	12/19/06
Committee	9/30/05	1/22/07
EEOC	10/13/05	1/23/07
DOJ-DEA	11/5/05	12/31/06
DOJ-OIG	12/28/05	12/21/06
NSF	1/13/06	11/9/06

⁵ N/A—Agency did not provide information in FY 2006 Annual Report

Agency	Oldest Pending Request	Most Recent Pending Request
ODNI	1/23/06	1/3/07
DOJ-OJP	1/26/06	1/11/07
DOJ-USPC	2/7/06	2/7/06
DOJ-OIPR	2/21/06	1/3/07
Amtrak	3/1/06	1/26/07
DOC-OIG	3/10/06	1/31/07
EXIM	4/10/06	1/30/07
USPS	4/25/06	1/25/07
USTDA	4/28/06	1/25/07
FCC	5/2/06	1/30/07
DOJ-EOUST	5/8/06	12/14/06
CFTC	5/24/06	1/31/07
DOJ-ATF	6/12/06	1/8/07
DOC-PTO	6/16/06	1/31/07
TVA	6/29/06	10/24/06
DOC-BTS	7/13/06	12/19/06
DOC-ITA	7/21/06	1/31/06
FEC	8/8/06	1/29/07
PBGC	8/21/06	1/31/07
FERC	8/30/06	1/9/07
FCA	9/8/06	9/22/06
DOC-Census	9/11/06	10/26/06
DOC-OS	9/12/06	1/31/07
DOC-EDA	9/14/06	11/15/06
DOC-NTIA	9/20/06	1/29/07
FRB	9/28/06	1/29/07
DOJ-OSG	10/6/06	1/9/07
FMC	10/11/06	1/31/07
GSA	10/11/06	1/31/07
NLRB	10/11/06	1/24/07
DOJ-Civil Division	10/24/06	12/15/06
MSPB	11/9/06	1/30/07
FDIC	11/14/06	12/7/06
OMB	11/15/06	2/1/07
DOJ-OVW	11/16/06	12/18/06
DOJ-OPR	12/7/06	12/20/06
DOJ-NDIC	12/15/06	1/11/07
NCUA	12/26/06	1/30/07
OFHEO	12/27/06	1/19/07
OGE	1/17/07	1/17/07

Range of Consultations Pending with Other Agencies

By date of initial interagency communication

Data from FY 2006 FOIA Annual Reports

Agency	Oldest Pending Request	Most Recent Pending Request
CNS	N/A	N/A
FTC	N/A	N/A
NIGC	N/A	N/A
USTR	N/A ⁶	N/A
DOS	4/13/89	1/24/07
DOD	5/3/93	9/30/06
NARA	9/4/93	1/31/07
DOE	5/17/95	11/21/06
CIA	6/2001	1/29/07
DOJ-Criminal	8/2/01	1/9/07
DOJ-FBI	1/8/02	1/9/07
DOJ-DEA	1/3/03	12/29/06
DOJ-OIP	1/3/03	12/29/06
DOJ-USMS	8/4/03	9/11/06
DOC-NIST	8/4/05	1/31/07
DOJ-OIPR	3/24/06	1/5/07
DOJ-OIG	6/15/06	9/11/06
DOJ-Civil Division	8/7/06	8/7/06
DOJ-OSG	11/27/06	12/18/06
DOC-OS	12/5/06	1/31/07
EPA	12/13/06	1/23/07
DOJ-OJP	12/15/06	12/15/06
DOC-NTIA	12/19/06	1/29/07
DOC-OIG	1/2/07	1/31/07

⁶ N/A—Agency did not provide information in FY 2006 Annual Report