

Statement of Ari Schwartz
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before the
House Government Reform Subcommittee on
Government Management, Finance, and Accountability
on the
Freedom of Information Act

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Chairman Platts, Ranking Member Towns, and members of the Subcommittee, thank you for holding this hearing on the Freedom of Information Act. I am Ari Schwartz, Associate Director for the Center for Democracy & Technology (CDT).

CDT is a non-profit public interest organization founded in 1994 to promote democratic values and individual liberties for the digital age. CDT works for practical, real-world solutions that enhance free expression, privacy, universal access and democratic participation. We are guided by our vision of the Internet as a uniquely open, global, decentralized and user-controlled medium. We believe the Internet has unprecedented potential to promote democracy, by placing powerful information and communications technology in the hands of individuals and communities.

Summary

Citizen access to government information is essential to a functioning democracy. **The Freedom of Information Act (FOIA) remains an essential tool to provide citizens the insight into the workings of government that is necessary to ensure accountability.**

FOIA is by no means perfect and CDT is supportive of the current efforts by Senators John Cornyn (R-TX) and Patrick Leahy (D-VT) and Representative Lamar Smith (R-TX) and Brad Sherman (D-CA) to improve the law.

However, we also think that there is a more fundamental opportunity to improve citizen access to information that should be central to the heart of this Subcommittee's agenda. **Information management within agencies should be improved to provide more of the information created with taxpayer dollars back to the public directly via the Internet without the need for a FOIA request.** Better design of information management infrastructures would force agencies to make disclosure decisions at the time of document creation. Systems built with the proactive goal of dissemination would not only enhance the public's access to information, but would also help agencies fulfill their missions and cut down on many inefficiencies. The E-FOIA amendments of 1996, the E-Government Act of 2002 and OMB Circular A-130 have started us down the path to this goal, but there is still much work to be done.

Background

The importance of an informed citizenry to a functioning democracy has long been understood. James Madison once said, "A popular government without popular information, or the means of acquiring it, is but a prologue to a farce or tragedy or perhaps both." Franklin Delano Roosevelt understood that "The only sure bulwark of continuing liberty is a government strong enough to

protect the interests of the people, and a people strong enough and well enough informed to maintain its sovereign control over the government.” It is important to keep in mind that public oversight of government is a check not just on abuse but also on the accuracy of the data on the basis of which governmental decisions are made. Without access to government information, effective citizen oversight is impossible.

FOIA

Although the importance of “the people’s right to know” has long been understood, it was not statutorily enforced until 1966 with the passage of the Freedom of Information Act (FOIA). Through this Act, every citizen of the United States gained the right to access information held by the government. It was enacted to ensure an informed citizenry, vital to the functioning of a democratic society, as a check against corruption and to hold the governors accountable to the governed. FOIA affirmed the public's right-to-know as a central principle of our democratic government.

FOIA is viewed by journalists, public interest organizations, and citizens as an important tool in opening federal agency policies and practices to public scrutiny. The congressional findings accompanying the 1996 amendments to the Act state that FOIA has led to the disclosure of waste, fraud, abuse and wrongdoing in the Federal Government, and has led to the identification of unsafe consumer products, harmful drugs, and serious health hazards.

Under FOIA, federal entities are required to disclose records upon the written request of a citizen, unless the records fall within one of the nine exemptions to the Act. Records may be withheld from the public if they are:

- Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and are classified as such;
- Related solely to the internal personnel rules and practices of any agency;
- Specifically exempted from disclosure by statute;
- Trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- Inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than a party in litigation with the agency;
- Personnel or medical files;
- Records or information compiled for law enforcement purposes;
- Records contained in or related to examination, operating or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions; or
- Geological and geophysical information and data.

E-FOIA Amendments

In the years following FOIA’s initial passage, some weaknesses in the law became evident. Among the problems encountered were long wait times, uneven implementation, and the inability to receive electronic documents. Another concern was the “requester’s paradox” — “how can I know to request a specific document, when I don’t even know that the document exists?”

In 1996, the “Electronic Freedom of Information Act” (E-FOIA) amended FOIA to address these problems.

The amendments lengthened allowable agency response times (previously almost universally ignored), but limited the types of circumstances in which extensions could be granted. This cut down on the use of boilerplate language to extend almost every FOIA request.

E-FOIA required agencies to provide records “in any form or format requested by the person if the record is readily reproducible by the agency in that form or format” in order to allow requesters to request information in a usable electronic format.

To address the “requester’s paradox,” Congress pushed agencies to make more information directly available to the public. E-FOIA required agencies to index and post online documents that are likely to be the subject of frequent requests,¹ including copies of administration opinions, policy statements, and staff manuals. These indexes are now often referred to as “Electronic Reading Rooms” and appear on agency Web sites. The amendments also required agencies to create indexes and description of all major information systems. This inventory allows requesters to see the types of information that may be available for request.

OMB Circular A-130

In 1980, OMB developed basic principles and guidelines for dissemination of information by federal agencies. Entitled Circular A-130, this document has been updated four times to become the seminal policy statement for the delivery of government information for every President since Ronald Reagan. It establishes the active dissemination of information as a critical goal for agencies. We have included the document’s “Basic Considerations and Assumptions” as an appendix to this testimony because they should continue to provide the underpinnings of any decisions made on government information policy.

To accomplish the goals set forth in A-130, OMB specifically advises agencies that tagging information in advance and creating “an information dissemination management system which can ensure the routine performance of certain functions” are essential.

E-Government Act

As the World Wide Web developed, citizens wanted more government information to be made available online.² In passing the E-Government Act of 2002, Congress actively promoted improved use of the Internet. Congress understood that, at the local level, many direct governmental *services* (such as registering a car and renewing a driver’s license) were available online, whereas at the federal level citizens were specifically interested in finding *information*. Therefore, the E-Government Act wisely focused more on government-wide information policy instead of than on specific government services.

¹ In its 2004 Freedom of Information Act Guide, the Department of Justice advises agencies that they are “required to determine whether [records] have been the subject of multiple FOIA requests (i.e., two or more additional ones) or, in the agency’s best judgment based upon the nature of the records and the types of requests regularly received, are likely to be the subject of multiple requests in the future” (p.25 & 26).

² The Pew Internet & American Life Project has been documenting the public’s use of government Web sites for years and continues to indicate that government information is a frequent draw for Web users. A 2004 report found that 77% of Internet users (97 million Americans) have at some point gone online to search for information from or to communicate with government agencies (http://www.pewinternet.org/pdfs/PIP_E-Gov_Report_0504.pdf).

The E-Government Act also required a committee of relevant government agencies to develop recommendations for open standards to enable the organization and categorization of government information. This will be the first time that the government develops a cross-agency taxonomy of information so that different terms that are used to mean the same thing can be mapped within and across agencies, allowing for better searching and retrieval of information. These recommendations are due from OMB in December 2005.

This taxonomy will help take advantage of the Web's unique decentralized structure that allows information to be sorted in ways beyond traditional hierarchical stovepipes. Some of these changes are already in place, in part thanks to other changes in the E-Government Act encouraging cross-agency partnerships. For example, the US Park Service (part of the Department of Interior) and the US Forest Service (part of the US Department of Agriculture) both administer public lands on which camping is permitted. In the past, to find information about campgrounds in a National Park or National Forest, an individual needed to know which agency administered the land. Today, an individual can use recreation.gov to quickly plan a trip across the country, stopping at parks and forests without needing to know the agency involved.

Recent Negative Changes to FOIA and FOIA policy

Not all of the changes to FOIA over the past several years have been positive. On October 12, 2001, then Attorney General John Ashcroft distributed a memorandum to all federal agencies altering the government's policy on FOIA by suggesting that agencies should not release information if there is uncertainty about whether the information falls under one of the main FOIA exemptions. This memo reversed a policy that had been in place for eight years encouraging agencies to share information if there was uncertainty about whether it should be withheld. The change was a step backwards.

Also of concern is the recent increase in so called "(b)(3) exemptions." This section allows Congress to designate any category of records as exempt from FOIA for any reason. Recently, there have been several such blanket exemptions adopted and others introduced. In most cases, the information seems to be covered by existing exemptions for national security, law enforcement and/or confidential business information, but Congressional exemption under (b)(3) essentially insulates agency decisions from judicial review. We urge Congress to refrain from adopting (b)(3) exemptions except in truly extraordinary cases.

Current Legislation to Improve FOIA

In March of this year, Senators John Cornyn (R-TX) and Patrick Leahy (D-VT) and Representatives Lamar Smith (R-TX) and Brad Sherman (D-CA) introduced the OPEN Government Act of 2005 and the Faster FOIA Act of 2005, legislation that would close many loopholes left open by FOIA.

The OPEN Government Act (HR 867) is an important bill in several respects. CDT is especially encouraged that it would take advantage of the Internet to more efficiently disseminate public information. The Internet is an ideal medium for increasing and streamlining public access to government information. For example, through blogs and audio and video webcasts, the Internet has facilitated the rise of independent media outlets. By requiring Internet publications to be considered when making a determination of a requester's news media status, the OPEN Government Act recognizes the legitimacy of these online outlets and in doing so, removes a financial hurdle for many smaller media entities to use FOIA. In addition, by creating a system that allows FOIA requesters to track requests, the Act takes advantage of the efficiency of the

Internet in providing a layer of accountability to the FOIA request process. Finally, requiring the Comptroller General to report on the implementation of the Critical Infrastructure Information Act of 2002 will bring oversight to the effectiveness of the (b)(3) exemption for information on the nation's critical infrastructure. CDT strongly supports the bill.

The Faster FOIA Act (HR 1620) would create a 16 member Commission on Freedom of Information Act Processing. With at least four members required to have experience submitting FOIA requests on behalf of nonprofit research, educational, or news media organizations, such a Commission could develop innovative solutions to the continuing problems of FOIA delays, balancing the needs of both agencies and requesters. CDT supports the Faster FOIA Act.

Creating Better Information Structures

Access to information inevitably implicates other interests — in particular cost, privacy and security. Too often, these important issues are unnecessarily seen as competing with openness. Most of the discussion around these issues assumes that there must be a trade-off. However, the public does not see it this way, nor does CDT.

In April 2003, a poll conducted by the Council for Excellence in Government showed that access, privacy and security were all equally important values and suggested that citizens expect all to be protected in federal e-government projects.³ These findings should not come as a surprise since, in most cases, getting the right information to the right person at the right time ensures privacy, security and access, and can be more cost effective if done properly. Yet, to get to this point, information must be managed properly.

CDT regularly hears stories from agencies about the internal mismanagement of information. While cases such as the FBI's Virtual Case File have been highlighted in the press, similar inefficiencies and failures exist throughout government. For example, one agency came to CDT to discuss changes in its Privacy Act practices.⁴ These officials had begun their task by cataloging the current Privacy Act Systems of Records at the agency to examine those that could be combined or eliminated. They found about half of these important data systems were missing. Over time the agency had simply lost track of them. Poor information management does not serve the interests of access, privacy, security or cost efficiency.

Yet, as bad information harms all of these areas, good information management can protect them. Information managers have long suggested solving data access and control problems by tagging information within the actual coding of the document. These tags describe the document in part and in whole. This so-called *metadata* would streamline the searching and cataloging of information. It would also allow the creators of public documents to tag privacy sensitive information or classified information, making decisions about release at the time document is created rather than requiring other agency staff to review the document when it is requested. Documents suitable for release could then be posted as a matter of course, without the need for a FOIA request, essentially ending the "requester's paradox."

³ <http://www.excelgov.org/displayContent.asp?Keyword=ppp041403>

⁴ This anecdote is more relevant than it may seem. Agencies treat individual requests for information under the Privacy Act as FOIA requests, because FOIA offers more rights to the individual. This is also the reason that many FOIA officers are also Privacy Act officers and why some Chief Privacy Officers at agencies have requested responsibility for FOIA.

Such approaches also offer opportunities for cost savings. Put simply, it takes less time to digitize and make available all agency documents (with appropriate redactions or withholdings) than it does to file away the documents until a FOIA request is received, then search for the requested documents, and print, review and send the document if found. Past examples show that making electronic records available to the public before a member of the public makes a request saves an agency time and money.

Perhaps the best example of the power of posting information comes not under FOIA, but from a Congressional agency, the Government Accountability Office. GAO began publicly posting all of its reports in October 1994 through GPO Access and in 1996 began providing the reports on its own Web site. By 1998 the total number of copies that GAO was printing had gone down from 1.2 million a year to 800,000 a year. Meanwhile an average of 150,000 to 200,000 copies of each GAO report were being downloaded online. Given the number of reports that GAO issues, this means that tens of millions more GAO reports are being accessed without a significant rise in GAO's budget. While there may have been some initial start-up costs to put the data on a GAO Web site, there is no question that GAO has saved taxpayers money over the long term by putting all reports online.

Conclusion

Congress should be encouraging agencies to think creatively about building better information systems with dissemination as a key goal. Addressing dissemination, privacy and security at the time of the creation of information management systems ensures that all of these interests are protected.

Appendix I

OMB Circular A-130 -- <http://www.whitehouse.gov/omb/circulars/a130/a130trans4.html> Basic Considerations and Assumptions:

- a The Federal Government is the largest single producer, collector, consumer, and disseminator of information in the United States. Because of the extent of the government's information activities, and the dependence of those activities upon public cooperation, the management of Federal information resources is an issue of continuing importance to all Federal agencies, State and local governments, and the public.
- b Government information is a valuable national resource. It provides the public with knowledge of the government, society, and economy -- past, present, and future. It is a means to ensure the accountability of government, to manage the government's operations, to maintain the healthy performance of the economy, and is itself a commodity in the marketplace.
- c The free flow of information between the government and the public is essential to a democratic society. It is also essential that the government minimize the Federal paperwork burden on the public, minimize the cost of its information activities, and maximize the usefulness of government information.
- d In order to minimize the cost and maximize the usefulness of government information, the expected public and private benefits derived from government information should exceed the public and private costs of the information, recognizing that the benefits to be derived from government information may not always be quantifiable.
- e The nation can benefit from government information disseminated both by Federal agencies and by diverse nonfederal parties, including State and local government agencies, educational and other not-for-profit institutions, and for-profit organizations.
- f Because the public disclosure of government information is essential to the operation of a democracy, the management of Federal information resources should protect the public's right of access to government information.
- g The individual's right to privacy must be protected in Federal Government information activities involving personal information.
- h Systematic attention to the management of government records is an essential component of sound public resources management which ensures public accountability. Together with records preservation, it protects the government's historical record and guards the legal and financial rights of the government and the public.
- i Strategic planning improves the operation of government programs. The agency strategic plan will shape the redesign of work processes and guide the development and maintenance of an Enterprise Architecture and a capital planning and investment control process. This management approach promotes the appropriate application of Federal information resources.
- j Because State and local governments are important producers of government information for many areas such as health, social welfare, labor, transportation, and education, the Federal Government must cooperate with these governments in the management of information

resources.

- k The open and efficient exchange of scientific and technical government information, subject to applicable national security controls and the proprietary rights of others, fosters excellence in scientific research and effective use of Federal research and development funds.
- l Information technology is not an end in itself. It is one set of resources that can improve the effectiveness and efficiency of Federal program delivery.
- m Federal Government information resources management policies and activities can affect, and be affected by, the information policies and activities of other nations.
- n Users of Federal information resources must have skills, knowledge, and training to manage information resources, enabling the Federal government to effectively serve the public through automated means.
- o The application of up-to-date information technology presents opportunities to promote fundamental changes in agency structures, work processes, and ways of interacting with the public that improve the effectiveness and efficiency of Federal agencies.
- p The availability of government information in diverse media, including electronic formats, permits agencies and the public greater flexibility in using the information.
- q Federal managers with program delivery responsibilities should recognize the importance of information resources management to mission performance.
- r The Chief Information Officers Council and the Information Technology Resources Board will help in the development and operation of interagency and interoperable shared information resources to support the performance of government missions.