

**Follow-Up Questions from Senator Patrick Leahy
for Meredith Fuchs, National Security Archive
Hearing on “Expanding Openness in Government and Freedom of Information”
Subcommittee on Terrorism, Technology and Homeland Security
Tuesday, March 15, 2005**

1. Most FOIA requestors do not ultimately litigate their claims, but litigation is a fundamental right, and sometimes a critical option, in the FOIA context. The Open Government Act (S.394) preserves what is often referred to as the “catalyst theory” of attorney fee recovery. Why is the recovery of attorneys’ fees so important to requestors?

Without an attorneys’ fees provision, it would be virtually impossible for individual FOIA requestors to ever litigate FOIA cases. Thus, they would be denied the only type of independent review available under FOIA for denials of records requests, failure to process requests or obdurate conduct by a federal agency. The reason for this is that litigation is costly. FOIA practitioners that I have spoken to have told me that they require a retainer in excess of \$15,000 for a FOIA lawsuit in order to cover the basic cost of drafting a complaint and responding to a government motion for summary judgment. This is a significant financial burden for a citizen to bear in order to get the government to comply with its legal, statutory obligation, and is a burden most individuals cannot bear.

As currently interpreted by the courts, attorneys’ fees are generally only available to a FOIA litigant if the lawsuit results in a judicially sanctioned change in the legal relationship between the parties, i.e. a court order requiring some relief requested by the FOIA requester. This is problematic because a government agency that seeks to unreasonably avoid, delay, or interfere with the release of records can wait to see if the FOIA can pull together the resources to bring a lawsuit and then, on the eve of judicial consideration, moot out the entire case by releasing responsive records. This wastes the FOIA requester’s resources and also the government’s resources, as some time likely was put in by Department of Justice Attorneys defending the actions (or inactions) of the client agency. This is bad policy and bad government. Sadly, there is no other avenue for a FOIA requester to seek independent review as the administrative appeals are decided by the same agency that denied the records (or failed to act) in the first place. Some agencies do not even permit administrative appeals for their failure to process FOIA requests.

I recently submitted a letter to Senators Leahy and Cornyn describing a particular incidence of this practice. The letter is attached to this written testimony. In that case, the requester submitted a request and got no response; submitted an administrative appeal and got no response; filed suit and got some records previously released to another requester; then threatened to file for summary judgment and only then (one year after the FOIA request) got additional responsive records.

There are numerous examples of the government playing games in litigation like this. For example, recently I was involved in a case in which the FOIA requester lost a claim for expedited processing in the district court. The requester appealed, and a coalition of organizations including the National Security Archive filed an amicus brief in the D.C. Circuit. One week after the plaintiff's and amici's briefs were filed in the court of appeals, (ten months after the litigation had commenced, after trial court proceedings had been completed, and after appellate briefs had been filed) the government finished its processing of the FOIA request and released the documents. It then argued that the appeal—indeed the entire case – was moot. Most lawyers are not willing to take a case when the government can so easily moot out the claim after substantial time has been invested on litigating and extinguish a right to attorney's fees.

There are unique aspects to FOIA litigation that make the availability of attorney's fees under a catalyst theory essential. FOIA cases are different than other cases in which Congress has seen fit to permit fee shifting. In civil rights cases seeking damages, the defendants cannot easily moot damages claims by capitulating. Plaintiffs may reject settlement offers, increase their demands, or require attorneys' fees as part of a settlement. In the case of equitable relief in civil rights cases, when defendants voluntarily remedy civil rights plaintiffs' injunctive claims, courts generally will not dismiss a plaintiff's action as moot if the defendant might repeat the challenged conduct. Further, because monetary relief may be available, a plaintiff with a strong or meritorious civil rights case often can find an attorney who will pursue the case on the promise that the plaintiff will pay the legal fees if the case is at least partially successful.

FOIA cases are quite different. Plaintiffs never claim monetary damages under FOIA because the law does not provide for them. Nor do plaintiffs typically seek ongoing injunctive relief or declaratory judgments. Nearly all FOIA actions simply demand a one-time release of documents. As a result, except in cases where there is a critical legal dispute at issue, government defendants frequently moot FOIA claims on the eve of judgment and deny compensation to successful plaintiffs' attorneys. Under such an arrangement, only parties capable of risking litigating without compensation are able to enforce FOIA against intransigent government agencies. Furthermore, even in those cases, agencies are able to prolong the litigation without fear of paying costs for their opponents.

2. I have heard FOIA litigators say that even though they may lose their case in court, they win in the process of litigation. Can you explain this and explain how the Open Government Act's fee provision would impact the FOIA requester?

FOIA requesters often find that agency personnel will make categorical denial determinations that result in the wholesale withholding of large swathes of information. A particularly striking example of this involved a Washington Post request under the FOIA for documents from the Department of Defense ("DOD") regarding American efforts to rescue hostages in Iran. When DOD claimed partial or entire exemption for 2000 documents (14,000 pages), a lawsuit was filed. The District Court appointed a

special master skilled in the classification of national security documents to compile a meaningful sample of these documents for the court to review. The Special Master examined the documents and helped the government to disclose new documents and re-examine the originals, resulting in the release of more than two-thirds of the pages of records that had been denied.

Even in a more standard case, however, through litigation, the FOIA request often is given a closer look by a Department of Justice attorney who must respond in court to the FOIA requester's legal arguments. In addition, judges usually set timetables for agencies to review the records and require detailed affidavits or Vaughn indexes that require each record to actually be reviewed. Courts are very permissive in these situations and often allow, indeed encourage, the government to revise and supplement its affidavits throughout the litigation and perfect its case. As a result of each of these processes, agencies often produce records during the course of the litigation that they denied to the FOIA requester. If an agency produces enough records during the litigation and finally justifies its withholdings, it usually will then file a motion for summary judgment and obtain a ruling in its favor. Under current judicial interpretations of FOIA, if the agency has made a sufficient showing and wins the motion for summary judgment, it is likely that the FOIA requester will not be able to obtain attorneys' fees.

The OPEN Government Act's fee provision would change the situation so that when a FOIA requester brings a lawsuit to challenge a government agency's refusal to adequately find and review records, and that lawsuit is a catalyst for the agency releasing records, the FOIA requester will be entitled to attorneys' fees to pay the cost of having to act as a "private attorney general." Thus, it would be an incentive for the government to do its work up front and avoid litigation altogether. As a result it would save resources at the Department of Justice, which might have fewer unreasonable withholding cases to defend. It also would save judicial resources because it might no longer be necessary for courts to monitor cases that can be resolved by the agency putting a little effort into the review up front. It also would save the limited resources of members of the public who are forced to sue to get the agency to review records for release.

3. Do you think that the improved reporting requirements in the OPEN Government Act are enough to solve the backlog problem?

The improved reporting requirements in the OPEN Government Act are vitally important for understanding the trends in FOIA processing and identifying problem centers in the administration of FOIA. As currently specified in FOIA, the reporting requirements provide misleading statistics as to processing time and hide agencies' backlogs. The OPEN Government Act would require more detail as to processing time, including the range of processing times, specific details on backlogged FOIA requests, and other useful information. This would enable agency leadership to know about problems and seek solutions. It would enable the Department of Justice's Office of Information and Privacy to see where the problem agencies are and offer solutions to improve processing. It would make it possible for Congress to understand whether citizens are getting responses to FOIA requests or are being ignored by the very agencies that they pay for. The improved

reporting requirements may put some pressure on agencies to resolve their backlogs, but it probably is not enough of an incentive to completely solve the problem.

4. I have been troubled by the increase in classification of documents in recent years and by the creation of what are often called “pseudo-classification” categories, like “sensitive but unclassified” or “for official use only.” The categories do not have legal protection under FOIA, but many believe they create a chilling effect on disclosure. Are you concerned about these categories?

The National Security Archive's experience with pseudo-classification is not encouraging. Among our many projects, we are pursuing the public release of the actual primary sources cited and quoted by the 9/11 Commission, and we have been on the receiving end of an object lesson in reflexive pseudo-secrecy at the Transportation Security Administration. For example, last year we asked for the five Federal Aviation Administration warnings to airlines on terrorism in the months just prior to 9/11 - warnings that were quoted in the 9/11 Commission report and discussed at length in public testimony by high government officials. The TSA responded by denying the entire substance of the documents under five separate exemptions to the Freedom of Information Act, and even withheld the unclassified document titles and Information Circular numbers as "Sensitive Security Information." When we pointed out that the titles, dates, and numbers were listed in the footnotes to the number one best-selling book in the United States, the 9/11 Commission report, the TSA painstakingly restored those precise digits and letters in its second response to us, but kept the blackout over everything else.

These new secrecy stamps – and we know of at least 8 ("sensitive but unclassified," "controlled unclassified information," "sensitive unclassified information," "sensitive security information," "sensitive homeland security information," "sensitive information," "for official use only," and "law enforcement sensitive) – tell government bureaucrats "don't risk it"; in every case, the new labels signal "find a reason to withhold." In another TSA response to an Archive FOIA request, the agency released a document labeled "Sensitive But Unclassified" across the top, and completely blacked out the full text, including the section labeled "background" - which by definition should have segregable factual information in it. The document briefed Homeland Security Secretary Tom Ridge on an upcoming meeting with the Pakistani Foreign Minister, but evidently officials could not identify any national security harm from release of the briefing, and fell back on the new tools of SBU, together with the much-abused "deliberative process" exemption to the Freedom of Information Act.

5. The Open Government Act creates the position of a FOIA ombudsman to resolve FOIA disputes, and if possible, to help everyone avoid litigation. What role do you think can be best served by an ombudsman? How best can this person mediate disputes?

Currently, a FOIA requester has no option short of litigation for independent review of a government agency's denial (or non-response) to a FOIA request. A mediator could try

to get accurate information as to the status of requests, help focus and clarify requests and responses when there has been a breakdown in communication, provide a reality check to the government agency, and resolve those disputes that are not solely a genuine difference of legal opinion.

Because the proposed ombudsman would not have binding authority, the ombudsman office can only be effective if it has credibility as a result of a balanced perspective and non-political nature, a requirement that agencies engage in the process in good faith – both as expressed by Congress and through policy direction from agency heads and the Attorney General to that effect, authority for the ombudsman to hold hearings or take testimony, and publication of the ombudsman's opinions.

6. In addition to dispute resolution, how else can the ombudsman serve agencies and requestors? What policy issues do you recommend the ombudsman address?

In the experience of the National Security Archive there are three general types of dispute with agencies: (1) a genuine difference of legal opinion as to whether particular records should be released; (2) a difference as to what or how much should be redacted in released records; and (3) a belief that the agency is mishandling the FOIA request. For this third category of disputes, the ombudsman could prepare an annual report on frequently reoccurring problems, along with recommendations for solutions. The ombudsman also could identify best practices for handling based on experiences with the agencies. In the second category, the ombudsman can serve to articulate both requester and agency views, which often are based on different assumptions or bases of knowledge. Here too, the ombudsman can make recommendations that help preserve government's interests while advancing public information.

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May 10, 2005

The Honorable John Cornyn
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
United States Senate
Washington, DC 20510

Dear Senators Cornyn and Leahy:

On April 23, 2004, Professor Ralph Begleiter, a University of Delaware professor and a former CNN correspondent, filed a Freedom of Information Act (FOIA) request seeking two categories of information: (1) copies of 361 photographic images of the honor ceremony at Dover Air Force Base for fallen U.S. military returning home to the United States that already had been released to another FOIA requester; and (2) similar images taken after October 7, 2001 at any U.S. military facility.

The unnecessarily prolonged history of this FOIA request demonstrates how plaintiffs often are forced to take the extreme measure of filing a lawsuit to get the government to release information (which in this case probably was not too hard to find or review). And then how, when faced with the obligation to respond in court to the unreasonable denial of the FOIA request or unnecessary delay in processing, the government sometimes simply releases the records. This litigation strategy imposes significant burdens on the FOIA requester, who must locate counsel and participate in litigation, but denies the requester any recompense for fulfilling the "private attorney general" role envisioned by the FOIA, since the absence of a final court ruling requiring the disclosure often denies the plaintiff statutory attorneys' fees.

On June 30, 2004 – 48 business days after Professor Begleiter's request was filed and more than twice the response time permitted under the FOIA – Mr. Begleiter filed an administrative appeal of his April 23, 2004 FOIA request. The appeal was never acknowledged or responded to by the Air Force.

As of September 2004 – five months after the request was filed – Professor Begleiter had received no substantive response to the FOIA request or administrative appeal. Professor Begleiter then contacted each of the two FOIA personnel at the Department of Air Force who had acknowledged receipt of the FOIA request and was told by one person that there were no records and by another that the request was being processed. It was at that point that Professor Begleiter determined to file suit.

On October 4, 2004, Professor Begleiter filed suit for the records requested on April 23, 2004, and in subsequent FOIA requests for similar images. On November 22, 2004, the Air Force provided Professor Begleiter a CD-ROM with the 361 images that had been released six months earlier to another FOIA requester and denied the remainder of his request claiming that it had no more responsive records. When

An Independent non-governmental research institute and library located at the George Washington University, the Archive collects and publishes declassified documents obtained through the Freedom of Information Act. Publication royalties and tax deductible contributions through The National Security Archive Fund, Inc. underwrite the Archive's Budget.

Professor Begleiter demonstrated to the Air Force in an administrative appeal that its response was incorrect – since he had evidence that numerous other photographic images fitting the description in his FOIA request existed – the Air Force asked for additional time to search a range of components and agencies that had not been searched in the first place. Professor Begleiter, through counsel, agreed to provide the Air Force with additional time and the litigation was stayed at the end of December 2004 pending completion of the search. At the end of February 2005, Professor Begleiter agreed to wait another 30 days for the search to be completed. On March 25, 2005, however, Professor Begleiter informed the court and the Air Force that his counsel was preparing a motion for summary judgment based on the Air Force’s failure to process the FOIA request. In response to that notice, on April 8, 2005, the government advised Professor Begleiter’s counsel that hundreds of additional images would soon be provided. Ninety-two images were provided on April 15, and an additional 268 images were provided on April 25, 2005. Professor Begleiter is in the process of deciding future steps in the lawsuit.

It was not until he filed his lawsuit that Professor Begleiter obtained release of records that previously had been provided to another FOIA requester. It took an entire year, the filing of a lawsuit, and finally the notice that a summary judgment motion was being prepared to obtain any additional substantive response to the FOIA request. In my view, this sort of manipulation of the timing of records releases is a purposeful litigation strategy designed to put off release of information that someone does not want to release until the government knows that it can no longer resist because a court will not agree with the withholding. It is an attempt to evade FOIA’s attorney’s fees provision by denying the FOIA requester a judicial decision ordering the release. It diverts FOIA requesters’ resources unnecessarily into litigation that could be avoided by proper initial handling of FOIA requests.

Please feel free to contact me with any questions you may have or for more information about Professor Begleiter’s lawsuit.

Thank you for your efforts to strengthen the accountability of our government agencies.

Sincerely,

Meredith Fuchs
General Counsel