

Statement by **Meredith Fuchs**, General Counsel, National Security Archive, George Washington University
March 15, 2005

Hearing on “Openness in Government and Freedom of Information: Examining the OPEN
Government Act of 2005”

Room 226 of the Dirksen Senate Office Building
Senate Committee on the Judiciary Subcommittee on Terrorism,
Technology and Homeland Security
 U.S. Senate 

Mr. Chairman and members of the Committee, thank you for this opportunity to speak with you about the Freedom of Information Act and the necessary reforms that would be enacted by the OPEN Government Act of 2005. I wish to commend the co-sponsors of the OPEN Government Act of 2005, Senators Cornyn and Leahy – each of whom has an established record as a defender of open government – for their efforts to ensure that our federal government is accountable and responsive to its citizens.

I have extensive experience with the Freedom of Information Act. The National Security Archive, of which I am General Counsel, ranks as one of the most active and successful non-profit users of the Freedom of Information Act: Our work has resulted in more than six million pages of released documents that might otherwise be secret today. We have published more than half a million pages on the Web and other formats, along with more than 40 books by our staff and fellows, including the Pulitzer Prize winner in 1996 on Eastern Europe after Communism. We have conducted two recent studies of federal agency administration of the FOIA, including one that focused entirely on the problem of delay and backlog. We won the George Polk Award in April 2000 for "piercing self-serving veils of government secrecy." We have partners in 35 countries around the world doing the same kind of work today, opening the files of secret police, Politburos, military dictatorships, and the Warsaw Pact. We use the United States' model of a transparent democracy to advocate for openness abroad.

1. An Informed Citizenry Builds A Stronger Nation

An informed citizenry is one of our nation's highest ideals. Thus, much of our public policy is predicated on the idea that competition in the marketplace for ideas should be fair and unfettered. To this end, we support a free press, a diverse scholarly community, and an inquiring citizenry – all dedicated to ferreting out and publishing facts. The Freedom of Information Act is a critical component in this effort to permit public access to facts – facts about government. In a world in which war and terrorism are commonplace, an essential component of national security is an informed citizenry that, as a result of its education about issues, believes in and strongly supports its government. This is glaringly apparent at a time when American soldiers are being called on to risk their lives to protect democratic ideals, when the public is held in a balance of terror, and when our resources are committed to establishing and maintaining our defense.

Our freedom of information laws are the best mechanism for empowering the public to participate in governance. An open government is an honest government that will engender the loyalty and support of its citizens. The fact of the matter is, however, that there is a bureaucratic resistance – to some extent justified – to opening government proceedings and filing cabinets to public scrutiny. National security is a very real and important concern that unfortunately leads to a certain level of reflexive secrecy. But, often the secrecy reflex should have given way to the right to know and, indeed, the need to know. Thus, the law must impose pressure to disclose information on government agencies, including a real opportunity for independent disclosure decisions, exposure of recalcitrant or unacceptable handling of information requests, and penalties for disregard of the public's legal right to information about the activities of the government

Just last summer, Congressman Shays of Connecticut gave a striking example of the paradox caused by the secrecy system running up against the public interest in disclosure. He described an incident in 1991 when a Department of Defense inspector general classified a study that found that 40 percent of chemical masks for the military leaked. It was classified, so, according to Congressman Shays, no one was doing anything to solve the problem. Congressman Shays described how he was gagged from speaking about it for six years when it finally was disclosed and his constituents – American soldiers who fought in the Gulf War – were able to begin to understand their Gulf War illnesses. The rest is history, so to speak. Isn't it important for the security of the nation and for the safety of the public for these kinds of problems to be confronted instead of being locked away in secret vaults?

Indeed, this is the lesson of the inquiries concerning the September 11 attacks on the United States. It was most directly addressed by Eleanor Hill, Staff Director, Joint House/Senate Intelligence Committee Investigation into September 11 Attacks. In the "Joint Inquiry Staff Statement" of October 17, 2002, Ms. Hill explained, "the record suggests that, prior to September 11th, the U.S. intelligence and law enforcement communities were fighting a war against terrorism largely without the benefit of what some would call their most potent weapon in that effort: an alert and committed American public. One needs look no further for proof of the latter point than the heroics of the passengers on Flight 93 or the quick action of the flight attendant who identified shoe bomber Richard Reid."

This conclusion is echoed in the Report of the 9/11 Commission, which includes only one finding that the attacks might have been prevented. This occurs on page 247 and is repeated on page 276 with the footnote on page 541, quoting the interrogation of the hijackers' paymaster, Ramzi Binalshibh. Binalshibh commented that if the organizers, particularly Khalid Sheikh Mohammed, had known that the so-called 20th hijacker, Zacarias Moussaoui, had been arrested at his Minnesota flight school on immigration charges, then Bin Ladin and Mohammed would have called off the 9/11 attacks. News of that arrest would have alerted the FBI agent in Phoenix who warned of Islamic militants in flight schools in a July 2001 memo that vanished into the FBI's vaults in Washington. The Commission's wording is important here: only "publicity" could have derailed the attacks.

We see in examples again and again that an informed public is an empowered public that can protect the health, safety and security of their own communities. Documents disclosed under FOIA have repeatedly been used to expose potential conflicts of interest that directly relate to public welfare, such as National Institute of Health researchers who had close ties to the pharmaceutical industry. The result of disclosure: review and reform of NIH's ethical rules. As you can see from the list of news stories published in the last few years that I have appended to my testimony, there are numerous examples of information being released in documents requested under FOIA that has empowered citizens to protect their families and communities from risks like lead in the water, mercury in fish, crime hubs, and the like. I remember when a foreign official visited my office on the eve of his own country implementing a freedom of information law and asked, "What if the records show that the government did something wrong?" My answer to him – and to you – is that is what the FOIA is about and that is what the citizens of this country deserve: a government that can acknowledge its errors, compensate for them, and then do better the next time. That is what the black farmers who were subjected to radiation experiments in this country are entitled to. It is what the soldiers who were unwittingly exposed to chemical and biological agents in tests by the U.S. military are entitled to. And, it is what will ultimately keep our nation strong.

2. Justice Delayed is Justice Denied

A key part of empowering the public, however, is giving them the information they need in sufficient time for them to act. The problem of delay in the processing of FOIA requests has been a persistent problem. When first enacted, the Freedom of Information Act had nothing in it to force agencies to respond within a reasonable timeframe. In 1974, Congress amended FOIA and established administrative deadlines of ten working days for processing FOIA requests and twenty working days for administrative appeals, and a one-time, ten working day extension in "unusual circumstances." Unfortunately most FOIA requests seem to fall into the loophole for "unusual circumstances." Congress tried again in 1996 to address the problem both by increasing the mandatory processing time to take into account the reality of the administrative processing burden and also by narrowing the loophole to cover only "exceptional circumstances" and clarify that routine, predictable agency backlogs for FOIA requests do not constitute exceptional circumstances for purposes of the Act, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

My organization oversaw a 35 agency audit to determine whether agencies had made progress in reducing backlogs. We found that as of November 2003 there still were backlogs as long as 16 years at some agencies. I have appended to my testimony a graph that shows the range of delays that we were able to identify.

You all know the old adage that "justice delayed is justice denied." Well, in the case of FOIA that certainly is true. My own organization has many examples of long delayed requests that resulted in no information being available for reasons that simply

are unacceptable. For example, we made requests to the Air Force in 1987 for records on the visit by former Philippine President Ferdinand Marcos to US Air Bases as he was driven into exile in 1986. When we recently refiled the request we were told that records on the subject would have been destroyed many years ago. We made a request to the Defense Intelligence Agency in 1993 for records concerning the heroin trade in Colombia. A document was located and sent to the Coast Guard for review and release in 1995. Nine years later we were told that the Coast Guard lost the document. Finally, we have many requests that languished for 8, 9, 10 or 11 years when we finally were informed that during the pendency of our request, the records were accessioned to the National Archives and Records Administration. In one case, we had completed and published two document sets on U.S.-Japanese relations while we waited. How much worse must the problem be for journalists who are trying to uncover breaking news or individuals who are trying to protect their families and communities or advocacy groups who are working hard to protect the health and safety of the public? These noble efforts should not be undermined by the failure of the FOIA system to identify and disclose information that the public has a right and a need to know. Something has to be done.

The OPEN Government Act of 2005 will go far to motivate agencies to process FOIA requests and to process in a timely fashion. The Act includes a provision that would limit the ability of agencies to withhold some information in litigation if they cannot justify their belated responses to a FOIA request. This provision, perhaps more than any other, may be the key to solving the delay problem. Some may criticize it out of fear that it will result in a flood of troubling information disclosures. The reality is that despite 3.6 million FOIA requests reported in FY 2004, there were nothing approaching that many FOIA lawsuits filed in federal court during FY 2004 and the provision only comes into play in litigation. That requires the requester to have the resources to bring suit. It also requires a judge to decide that the penalty meets the statutory standard of “clear and convincing” evidence that there was good cause for failure to comply with the time limits. Further, it applies only to the discretionary exemptions, and has no impact on the issues that Congress has identified as most needing protection from disclosure. It would not undermine the national security protection of Exemption 1; it would not endanger personal privacy concerns protected by the Privacy Act of 1974; and, it would not lead to disclosure of information that Congress has mandated should be secret, such as intelligence sources and methods. With all these protections built into the proposal, the bottom line is that it is unlikely to lead to any dire consequences.

On the other hand, there is little in the law as it is written today that puts real pressure on agencies to get their FOIA systems working smoothly. I would liken the expected impact of the proposed penalty for delay provision to the impact that automatic declassification in Executive Order 12958 had on the declassification of historical records. Even though automatic declassification has never been imposed on any agency – the deadline was extended both by President Clinton and by President Bush – the threat of it resulted in a dramatic increase in declassification activity. The fear that agencies could lose control over their declassification decisions focused the agencies on setting up processes for systematic declassification. The penalty provision in the OPEN Government Act of 2005 will have just that impact. It will spur agencies to upgrade their

FOIA processing to meet the requirements of the law. If agencies comply with the law, they will have nothing to fear.

Another provision that will put some needed pressure on agencies, especially those that are obstructive, is the requirement that the Attorney General notify the Office of Special Counsel of any judicial finding that agency personnel have acted arbitrarily or capriciously with respect to withholding documents. The provision does not change the Office of Special Counsel's existing authority to determine whether disciplinary action against the involved personnel is warranted, but it makes clear that the Attorney General of the United States will take action when agency personnel ignore their legal obligations.

Our audit found that the backlogs I have described cannot be detected by Congress in the annual reports each agency is required to publish concerning their FOIA processing. For example, if an agency told you that its median response time for FOIA requests is 169 days, would you be surprised to learn that the same agency had unprocessed requests as old as 3400 days? Well, that was the case with the Air Force when we conducted our audit. What about an agency that reports its median processing time as 55 days. Would it surprise you to know that the agency, the Department of Commerce, had requests still pending as old as 2400 days. How can Congress engage in oversight if the information it is provided is meaningless or misleading? How can a FOIA requester persuade a court that an agency has not demonstrated "exceptional circumstances" justifying delay if the requester has no data to present to the court?

The problem is not necessarily that the statistics are wrong, but simply that the reports do not offer the information needed by Congress and the public. For instance, we found that agencies exclude from their median processing times long periods of delay after their receipt of FOIA requests while the request is "perfected" or fee disputes are resolved. Agencies also frequently close requests by sending the requester a letter inquiring whether there is any "continuing interest" in the records and then closing the request if a response is not received within a short period. In addition, in some cases the medians are actually the median of medians reported by each major agency component. As a result, there is no way to compare FOIA processing across the government or to assess the tremendous disparities between agencies' workloads, backlogs and processing times. In fact, I feel no hesitation in saying that many of the conclusions drawn from the annual reports are faulty. This does a disservice to Congress, the public, and the agencies.

The OPEN Government Act of 2005 would improve reporting by requiring a fixed, standard method for calculating response times – so that reliable comparison can be made across agencies – and statistics on the range of response times, the average and median response times, and the oldest pending FOIA requests. It also requires agencies to set up tracking number and FOIA hotlines that ensure that requests are logged, are not lost, and are monitored. It imposes a discipline on agencies and empowers FOIA requesters to engage in a back and forth with agency FOIA personnel to facilitate processing.

3. Independent Review Will Reduce Litigation And Improve The Quality of Disclosure Decisions

Another aspect of the OPEN Government Act of 2005 that I believe will make the FOIA system work better for the public is the proposal to set up an Office of Government Information Services and a FOIA ombudsman within the Administrative Conference of the United States. So long as the ombudsman program does not impact the ability of requestors to litigate FOIA claims, it may resolve problems and alleviate the need for litigation. These sorts of independent ombudsmen and information commissioners are gaining popularity in other nations with freedom of information laws as well.

There is a good example of how an independent review mechanism aside from litigation in the courts can work in the functioning of the Interagency Security Classification Appeals Panel (ISCAP), which has ruled for openness in some 60% of its cases, although the total number of cases is quite small and involves mostly historical rather than current information. ISCAP works well because it has credibility as a result of its balanced membership and because it has binding authority unless an appeal is made to the President of the United States.

Nonetheless, many good examples exist of ombudsmen and information commissioners who do not have binding authority, but whose opinions carry weight. Key provisions that would help this alternative dispute process work would be the requirement that agencies engage in the process in good faith, authority for the ombudsman to hold hearings or take testimony, and publication of the ombudsman's opinions. A wonderful example of an ombudsman who lacks binding authority, but nonetheless resolves disclosure disputes, is the Committee on Open Government in New York State. The Committee furnishes advisory opinions, which it publishes for public review, and submits an annual report to the Governor and the State Legislature describing the Committee's experience and recommendations for improving the open government laws.

The Administrative Conference historically was the type of institution that merited the respect of other government agencies. Thus, it is an appropriate place in which to house a FOIA ombudsman. It will have no apparent conflict of interest in attempting to mediate and resolve disputes. It requires the funding and support necessary to make the program work, however. I urge Congress, therefore, to provide sufficient funding and, with the passage of the OPEN Government Act of 2005, clearly establish the statutory intent to open the government as much as possible to public scrutiny as is consistent with the needs of national security. With an established track record, independence, congressional support, publicity and an expressed statutory intent to maximize disclosure, the ombudsman proposal may improve FOIA processing for all requestors and minimize litigation for agencies.

4. Recognizing the Goal of Having an Open Government

Finally, I wish to commend the OPEN Government Act of 2005's directive that the Office of Personnel Management examine how FOIA can be better implemented at the agency level, including an assessment of the benefit of performance reviews, job classification and training related to FOIA. The people who process these FOIA requests are serving a significant public interest and are the focal point for the competing pressures of secrecy and disclosure. The system will work better if the incentives are changed to make everyone in the bureaucracy comply with FOIA, so the FOIA personnel are able to fulfill their mission.

I am grateful for your time today. I will be pleased to answer your questions.

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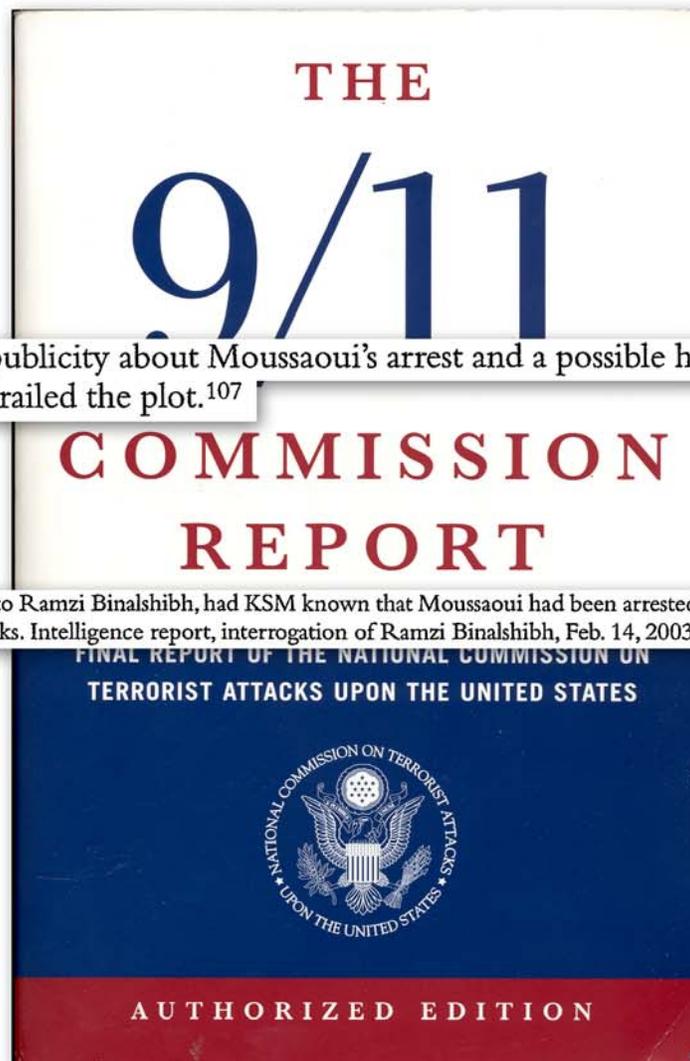
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Openness Equals Security



However, publicity about Moussaoui’s arrest and a possible hijacking threat might have derailed the plot.¹⁰⁷

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107. According to Ramzi Binalshibh, had KSM known that Moussaoui had been arrested, he would have cancelled the 9/11 attacks. Intelligence report, interrogation of Ramzi Binalshibh, Feb. 14, 2003.

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21st Century FOIA Success Stories

"Feds Don't Track Airline Watchlist Mishaps," The Associated Press State & Local Wire, July 24, 2003, at State and Regional, by David Kravets. Exposed problems of delay and "false positives" caused by management of aviation security program.

"Extra IDs a Liability for Hill, 13 Other Bases," Deseret Morning News (Salt Lake City), Aug. 21, 2003, at B1, by Lee Davidson. Disclosed security risk of unaccounted for identification badges and contractors who did not have criminal background checks.

"Mission of Sacrifice Series: Casualties of Peace, Part One of Seven Parts," Dayton Daily News (Ohio), Oct. 26, 2003, at A1, by Russell Carollo and Mei-Ling Hopgood. Exposed never-before-released statistics on the dangers faced by Peace Corps volunteers.

"Documents Say 60 Nuclear Chain Reactions Possible," Las Vegas Review-Journal (Nevada), Nov. 26, 2003, at 5B, by Keith Rogers. Nevada state officials learned of the possibility of an uncontrolled nuclear chain reaction inside the planned Yucca Mountain nuclear waste repository.

"Stealth Merger: Drug Companies and Government Medical Research; Some of the National Institutes of Health's Top Scientists Are Also Collecting Paychecks and Stock Options from Biomedical Firms. Increasingly, Such Deals Are Kept Secret," The Los Angeles Times, Dec. 7, 2003, at A1, by David Willman. Exposed potential conflicts of interest inside national top health research institution.

"Northwest Gave U.S. Data on Passengers; Airline Had Denied Sharing Information for Security Effort," The Washington Post, Jan. 18, 2004, at A1, by Sara Kehaulani Goo. Airlines provided passenger data to government without informing passengers.

"Chemawa Warnings Date to '89," The Oregonian, Feb. 20, 2004, at A1, by Kim Christensen and Kara Briggs. Documents show repeated warnings by Indian Health Service regarding school's "holding cells," lack of supervision and poor medical service.

"D.C. Knew of Lead Problems in 2002; Timing of E-Mails Contradicts Claims," The Washington Post, Mar. 29, 2004, at A1, by Carol D. Leonnig and David Nakamura.

"Group: Industry Exceeds Clean Water Act," Waste News, Apr. 12, 2004, by Bruce Geiselman. EPA documents show more than 60 percent of industrial and municipal facilities nationwide exceeded Clean Water Act permit limits during the eighteen month period.

"Rat-Poison Makers Stall Safety Rules; EPA Had Drafted Regulations to Protect Children, Animals," The Washington Post, Apr. 15, 2004, at A3, by Juliet Eilperin. Documents expose risk of rat poison to children.

"Navy Confirms Weapons Facility Was Temporarily Decertified," The Associated Press State & Local Wire, Apr. 24, 2004, at State and Regional. Confirms an incident at a local Navy submarine facility where a nuclear missile was mishandled.

"Eating well: Second Thoughts on Mercury in Fish," The New York Times, 13 March 2002, p. F5, by Marian Burros. Risk of mercury to pregnant women and children exposed.

"Reagan, Hoover, and the UC Red Scare," San Francisco Chronicle, 9 June 2002, p. A1, by Seth Rosenfeld. FOIA documents obtained after a 17-year legal battle showed the FBI had conducted unlawful intelligence activities at the University of California, the nation's largest public university, in the 1950s and 1960s.

"Sailors exposed to deadly agents," The Deseret News (Salt Lake City, Utah), 24 May 2002, p. A1, by Lee Davidson. 7 years after FOIA documents showed the Army exposed hundreds of sailors to germ and chemical warfare tests in the 1960s, the Pentagon acknowledged using chemical and biological warfare agents in the tests.

"Widespread Water Violations Decried," By Eric Pianin, The Washington Post, 7 August 2002. Nearly one-third of major industrial facilities and government-operated sewage treatment plants have significantly violated pollution discharge regulations during a two year period.

"The Vertical Vision/ Part I: The Widow-Maker," By Alan C. Miller and Kevin Sack, The Los Angeles Times, 15 December 2002. Military documents chronicled the troubled history of the most dangerous airplane flying in the U.S. military -- the Marine Corps' Harrier attack jet.

"Doomed plane's gaming system exposes holes in FAA oversight," By Gary Stoller, USA Today, 17 February 2003. Documents connected the Sept. 2, 1998, crash of Swissair Flight 111 with the flight's entertainment system.

"Study details MTA woes; Buses average breakdown every 976 miles of service; Peer agencies more reliable; Report details problems with maintenance, safety," By Stephen Kiehl, The Baltimore Sun, 21 April 2003. Buses operated by the Maryland Transit Administration are more prone to breakdowns than buses in comparable transit agencies.

"NASA mistakes, optimism cost taxpayers billions," Florida Today, 15 June 2001. Document shows projected \$4.3 billion cost overrun on international space station.

"Hundreds of defects reported along Zephyr's track," Associated Press, 10 June 2001. In 5 years prior to fatal Amtrak derailment March 17, 1500 defects found on Iowa tracks.

"Mishandling of informant hurt cases, DEA concedes; Crime: Because the system missed warnings of operative's misdeeds, many charges have been dismissed or weakened," Los Angeles Times, 5 June 2001. DEA and prosecutors ignored warnings for 12 years, 280 cases.

"Ritalin prescribed unevenly in U.S.," Cleveland Plain Dealer, 6 May 2001. DEA data shows dramatic variations by county in prescription rates for drug.

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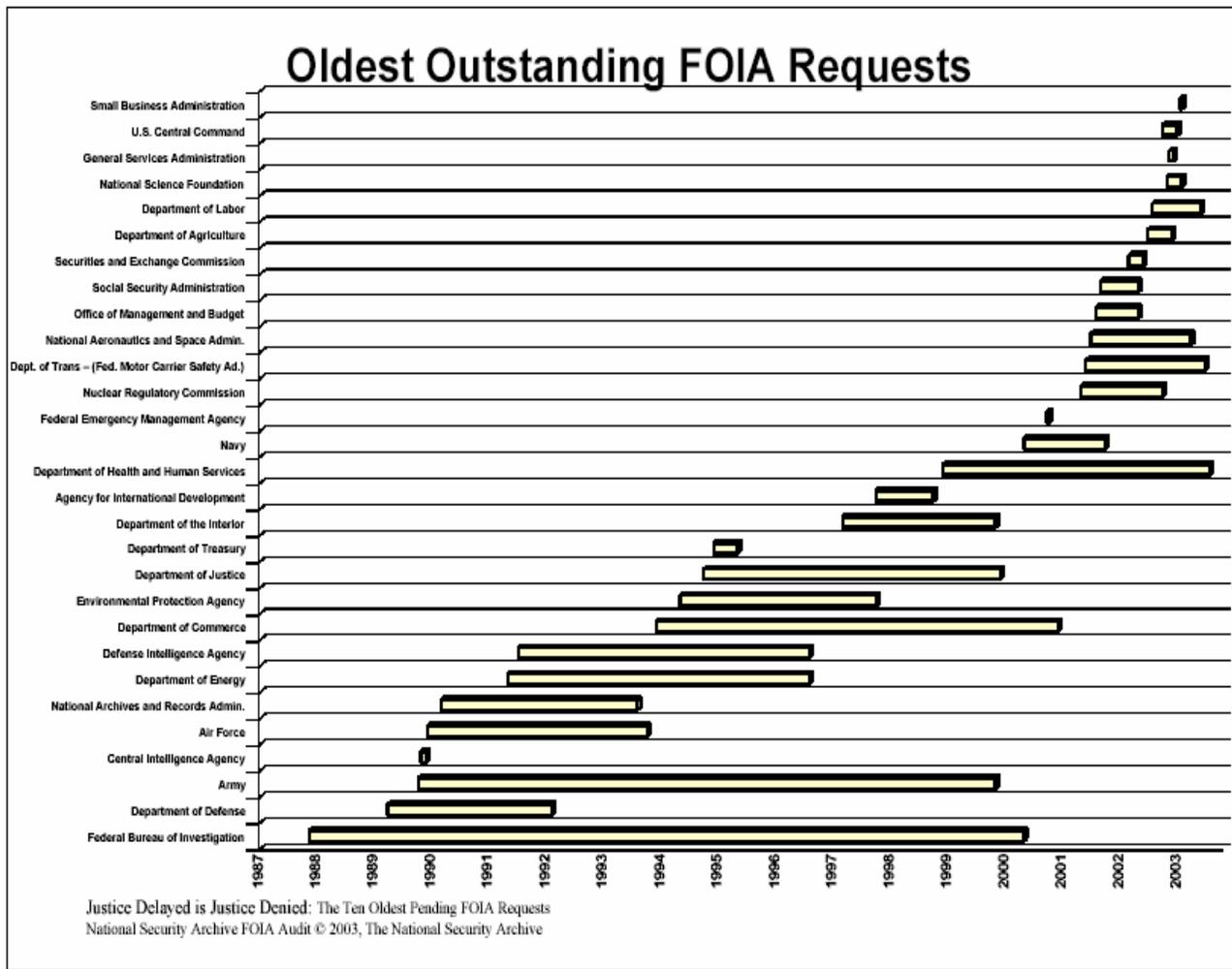


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THE TEN OLDEST FOIA REQUESTS: BACKLOGS STILL EXIST

(As of November 2003)



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Annual Reports Mask the Seriousness of the Backlog: Comparison of Median Processing Times to Age of Ten Oldest Pending FOIA Requests

(As of November 2003)

- **AGENCY FOR INTERNATIONAL DEVELOPMENT** (Ten Oldest FOIA Requests pending as long as 1500 to 1250 business days; Median Days To Process requests pending at end of FY 2002 reported as 356);
- **AIR FORCE** (Ten Oldest FOIA Requests pending approximately 3400 to 2300 business days; Median Days To Process requests pending at end of FY 2002 reported as 169);
- **ARMY** (Ten Oldest FOIA Requests pending as long as 3500 business days; Median Days To Process requests pending at end of FY 2002 reported as 25);
- **CENTRAL INTELLIGENCE AGENCY** (Ten Oldest FOIA Requests pending as long as 4090 to 3400 business days; Median Days To Process requests pending at end of FY 2002 reported as 601);
- **DEFENSE INTELLIGENCE AGENCY** (Ten Oldest FOIA Requests pending approximately 3000 to 1300 business days; Median Days To Process requests pending at end of FY 2002 reported as 890);
- **DEPARTMENT OF COMMERCE** (Ten Oldest FOIA Requests pending approximately 2400 to 650 business days; Median Days To Process request pending at the end of FY 2002 reported as 55);
- **DEPARTMENT OF DEFENSE** (Ten Oldest FOIA Requests pending approximately 4170 to 2700 business days; Median Days To Process requests pending at end of FY 2002 reported as 87);
- **DEPARTMENT OF ENERGY** (Ten Oldest FOIA Requests pending approximately 3100 to 1790 business days; Median Days To Process request pending at the end of FY 2002 reported as 97);
- **DEPARTMENT OF JUSTICE, OFFICE OF INFORMATION AND PRIVACY** (Ten Oldest FOIA Requests pending approximately 2250 to 900 business days; Median Days To Process request pending at the end of FY 2002 reported as 2-295);

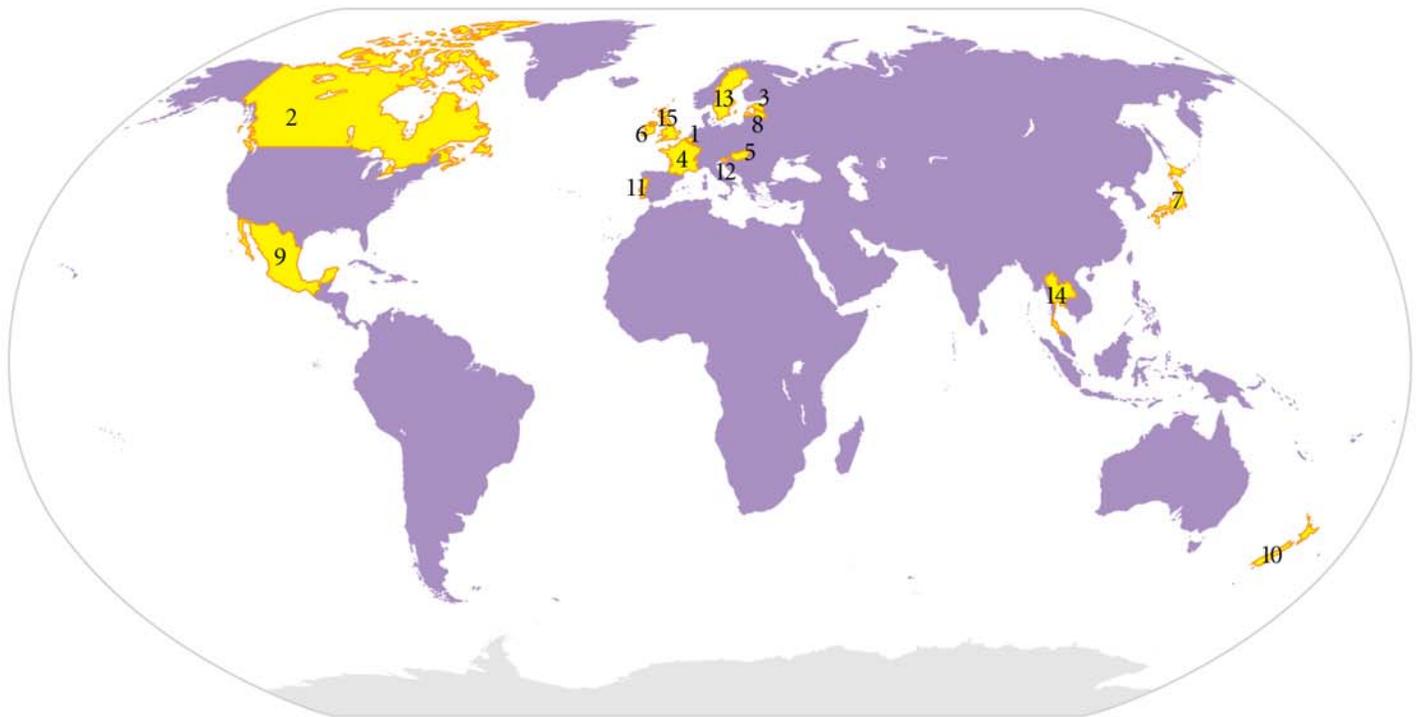
- **DEPARTMENT OF TREASURY** (Ten Oldest FOIA Requests pending approximately 2130-2010 business days; Median Days To Process request pending at the end of FY 2002 reported as 1-545)
- **ENVIRONMENTAL PROTECTION AGENCY** (Ten Oldest FOIA Requests pending approximately 2250 to 1500 business days; Median Days To Process request pending at the end of FY 2002 reported as 11-483);
- **FEDERAL BUREAU OF INVESTIGATION** (Ten Oldest FOIA Requests pending approximately 3970 to 830 business days; Median Days To Process requests pending at end of FY 2002 reported as 90);
- **NATIONAL ARCHIVES AND RECORDS ADMINISTRATION** (Ten Oldest FOIA Requests pending approximately 3390 to 2540 business days; Median Days To Process request pending at the end of FY 2002 reported as 887).

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Countries with Information Commissioners or Ombudsmen



1. Belgium
2. Canada
3. Estonia
4. France
5. Hungary
6. Ireland
7. Japan
8. Latvia

9. Mexico
10. New Zealand
11. Portugal
12. Slovenia
13. Sweden
14. Thailand
15. United Kingdom

