

Lawmakers Respond to Increasing Government Secrecy with Amendments to Strengthen FOIA

On March 31, 2005, the U.S. Information Security Oversight Office (ISOO) released its annual report on the status of federal security classification programs. Among its findings, ISOO reported that 15.6 million documents were classified last year, almost twice as many as in 2001. Meanwhile only 28 million pages of records were declassified, a significant decrease from the declassification of 204 million pages in 1997, the most since the ISOO began monitoring the programs, according to *The New York Times*. The ISOO report also found that the increased secrecy came at a price of \$7.2 billion last year. The 2004 ISOO report is available online at http://www.archives.gov/isoo/reports/2004_annual_report.pdf.

Thomas H. Kean, the chairman of the 9/11 Commission, told *The Times* that the lack of information-sharing between agencies and increased withholding of information from the public were both related to the government's failure to prevent the Sept. 11, 2001 terrorist attacks. "You'd just be amazed at the kind of information that's classified — everyday information, things we all know from the newspaper," Kean said. "We're better off with openness. The best ally we have in protecting ourselves against terrorism is an informed public."

The increasing government secrecy has also caught the attention of some members of Congress. Sen. John Cornyn (R-Tex.) has made it his goal to make government more transparent by providing greater access to government records. As a former state attorney general for Texas, Cornyn helped reshape the Texas open records laws, Texas Gov't Code Ann. §§ 551 and 552, by reducing turnaround times on information requests for government records and by establishing a state-wide, toll-free hotline for such requests. The hotline handled more than 11,000 calls in 2000 alone. In fact, Cornyn even sued state agencies on a few occasions to force them to comply with lawful requests for information under Texas' open records law.

Now Cornyn is seeking to improve the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, to achieve similar ends. (See "Freedom of Information Act News: Federal Lawmakers Call for Expanded Access to Court Records" in the Fall 2004 issue of the *Silha Bulletin*.) In the first several months of the 109th Congress, Cornyn has already introduced three bills with Sen. Patrick Leahy (D-Vt.) that would make it harder for Congress to hide exemptions to FOIA in legislation,

increase oversight of FOIA, and make it easier for the public to request and obtain government records. On July 6, Cornyn told *The Washington Post*, “A number of the reforms included in these bills are pretty basic in a lot of places, including my home state of Texas.”

The latest bill, S. 1181, was passed on June 24, 2005, by unanimous consent in the Senate. That bill requires that any legislation exempting government records from disclosure under FOIA must be “stated explicitly within the text of the bill.” According to a Cox News Service story from early June, a 2003 Department of Justice (DoJ) report showed that at least 140 laws had exemptions to FOIA inserted in unrelated legislation. The bill now awaits consideration in the House.

In a press release the day the Senate passed S. 1181, Cornyn said, “If Congress is to establish a new exemption to FOIA, it should do so in the open and in the light of day . . . The default position of our government must be one of openness. If records can be open, they should be open. If good reason exists to keep something closed, it is the government that should bear the burden — not the other way around.”

President Lyndon Johnson signed FOIA in 1966, enacting one of the first laws anywhere in the world to presume that government records should be available to the public. *The Post* reported that FOIA has enabled many people to obtain government information about themselves while also providing a way for the media to get access to government records. A May 2005 Government Accountability Office (GAO) analysis of FOIA implementation and use showed that 91 percent of FOIA requests were granted in full and another three percent were granted in part. However, the report also found that some agencies were much less likely to grant requests than others. The GAO found that the State Department, the Central Intelligence Agency, and the National Science Foundation each granted fewer than 20 percent of FOIA requests in full. Additionally, since 2002, backlogs of FOIA requests have increased 14 percent, often resulting in delays that last years. The concerns with some of these problems seem to have bolstered Cornyn’s campaign to improve FOIA.

The bill passed by the Senate on June 24 was only one part of that campaign. The language of S. 1181 was actually taken from a section of a larger piece of legislation proposed by Cornyn and Leahy earlier this year. On February 16, 2005, the senators introduced the Openness Promotes Effectiveness in Our National Government Act of 2005 (OPEN Government Act), S. 394. An identical companion bill in the House, H.R. 867, was also introduced by Rep. Lamar Smith

(R-Tex.) on that same day. The OPEN Government Act's major provisions would remake FOIA in the model of the Texas open records laws.

Among its major provisions, the OPEN Government Act would allow independent journalists, such as freelancers and bloggers, to qualify for fee waivers even if they are not affiliated with any media institution and do not publish regularly. FOIA currently only names "representatives of the news media" as being able to request a fee waiver. Journalists and others in the media not associated with a major organization or publisher can have problems showing they qualify for a waiver of fees, typically costs of the records search and reproduction costs. The proposed language would expand and clarify who qualifies for a fee waiver by allowing the agency to take into consideration the requestor's previous publications and the stated intent of the requestor.

Second, the OPEN Government Act would require the Attorney General to notify the Office of Special Counsel whenever a court, after hearing a lawsuit brought by a requestor who has been denied access to records, rules that an agency has improperly withheld documents under FOIA. The Special Counsel would also be required to make an annual report to Congress detailing the number of such court rulings and the subsequent actions undertaken by the Office in response to the court decisions.

Third, if an agency went beyond the 20 working-day time limit for responding to an FOIA request, the exemptions available to that agency would be restricted. FOIA contains nine specific areas under which records may be withheld from the public. Instead of the usual nine possible exemptions, an agency taking longer than the time limit could only withhold the documents for three reasons: if the release would harm national security, if it would disclose information protected under the Privacy Act, 5 U.S.C. § 552a, or if its disclosure is otherwise prohibited by law.

Fourth, the OPEN Government Act would require each agency to establish a tracking system for FOIA requests. Under that system, each FOIA request must be assigned a tracking number. Within 10 days, the agency would also be required to provide to the requestor the tracking number and an estimated date when the request will be processed. Each agency would also need to establish a telephone hotline or Internet Web site to allow requestors to monitor the progress of their request through the use of the agency-provided tracking number.

Finally, the act would create an Office of Government Information Services to oversee compliance with FOIA and conduct audits of agencies receiving FOIA requests.

The third bill, the Faster FOIA Act of 2005, S. 589, was introduced by Cornyn and Leahy in March. If it becomes law, the Faster FOIA Act will create a 16-member committee to examine FOIA request delays and make recommendations on how best to avoid future delays. The chair and ranking members of the Senate Committee on the Judiciary and the House Government Reform Committee would each appoint three members of the committee while the Attorney General, director of the Office of Management and Budget, the Archivist of the United States, and the Comptroller General would each appoint one member. Reps. Brad Sherman (D-Calif.) and Smith introduced an identical bill, H.R. 1620, in April.

Other lawmakers have also taken an interest in expanding government secrecy. In March 2005, Rep. Henry Waxman (D-Calif.) wrote a letter to Christopher Shays (R-Conn.), chairman of the House Subcommittee on National Security, Emerging Threats and International Relations, expressing his concerns that government records were increasingly being exempted from public release on uncertain grounds.

Waxman wrote, "Unfortunately there is growing evidence that the executive branch has increased the amount of information withheld from the American public and misused rapidly proliferating designations such as 'sensitive but unclassified,' 'for official use only,' 'sensitive homeland security information,' and 'sensitive security information' to block the release of important government records." He continued by noting that his staff had found that those designations were often "absurd overreactions to vague security concerns" that were used, in some cases, "to cover up potentially embarrassing facts, rather than to protect legitimate security interests."

As part of his response to these perceived problems, Waxman has proposed a bill that would modify several government access laws, including FOIA. The Restore Open Government Act of 2005, H.R. 2331, was originally introduced in the House by Waxman in the final days of the 108th Congress, although it was not considered for passage before Congress adjourned. (See "Freedom of Information Act News: Federal Lawmakers Call for Expanded Access to Court Records" in the Fall 2004 issue of the *Silha Bulletin*.)

One of the Restore Open Government Act's key provisions would revoke a memo written by Attorney General John Ashcroft on Oct. 12, 2001. That memo said that the DoJ would defend any agency claiming an FOIA exemption to prevent release of documents unless the claim "lacked a sound legal basis." The Ashcroft memo has been viewed by many as a reversal of a memo previously

written by Attorney General Janet Reno that had stated that FOIA's presumption of access meant the DOJ would not defend a claimed FOIA exemption unless "the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption."

Other provisions of the Restore Open Government Act would reverse an Executive Order issued by President George Bush in November 2001 that made it easier for outgoing presidents to keep presidential papers and records from public release, and require greater transparency in inter-agency committee meetings by amending the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2. The FACA provision in the Restore Open Government Act was inspired by the withholding of documents and information relating to Vice President Dick Cheney's National Energy Policy Development Group.

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