

# The National Security Archive

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October 19, 2006

## Via Facsimile

Senator Arlen Specter  
Chairman, Committee on the Judiciary  
United States Senate  
711 Hart Senate Office Building  
Washington, DC 20510

Senator Patrick Leahy  
Ranking Member, Committee on the Judiciary  
433 Russell Senate Office Building  
Washington, DC 20510

Senator John Cornyn  
Committee on the Judiciary  
517 Hart Senate Office Building  
Washington, DC 20510

Dear Sirs:

In light of your longstanding attention to government information disclosure and secrecy issues, I am writing to raise concerns about Attorney General Alberto Gonzales' October 16, 2006 "Report to the President Pursuant to Executive Order 13392 Entitled 'Improving Agency Disclosure of Information.'" ("AG Report") As the AG Report recognizes, the Executive Order on the Freedom of Information Act (FOIA) is unprecedented. It represents the first time an official directive has been issued from the White House that is designed to focus attention on how FOIA programs are run. As a leading user of the FOIA to inform the public about American foreign policy matters, the National Security Archive applauds the attention that information disclosure is now receiving.

However, attention and action are two different things. Unfortunately, the AG Report's rosy outlook ignores critical challenges facing the federal FOIA system. While the AG Report is optimistic about the agencies' newfound "embrace" of technology/automation, FOIA request status tracking, and backlog reduction, it fails to provide an honest assessment of where agencies' FOIA programs stand today and what it will take to bring their FOIA programs into compliance with the law. Critically, the AG Report does not acknowledge the scale of the problems faced by agencies and avoids making mention of two components that are necessary to improve agency disclosure of information: staffing/financial resources and cross-agency leadership.

A review of the individual FOIA improvement plans indicates that many agencies are far behind where they should be in 2006. Many agencies have failed to implement necessary changes to their FOIA programs in order to comply with the 1996 E-FOIA amendments. For example, the Department of

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Veterans Affairs' (VA) regulations pre-date the E-FOIA amendments and thus do not include congressionally mandated innovations in processing tracks or use of technology to better provide information to the public. Notably the VA – despite purporting to process 1.9 million FOIA requests in FY 2005 and generally serving a population deserving of significant consideration – indicates in its individual report that receiving FOIA requests by e-mail is not viable for the agency and that a uniform tracking system across the agency would be impracticable. The National Security Archive's own experience with the VA is that their FOIA program is plagued by obstruction, delay and inefficiency.

Additionally, many agencies are only now beginning to consider how to update their websites to comply with the 1996 E-FOIA amendments, and the individual reports indicate that FOIA staffs have not been provided access to technology advancements at the same pace as their colleagues doing other types of work. Thus, the technological improvements that the individual reports now “embrace” include very basic issues such as Internet access, copy machines, scanners, and simple databases to log and track requests.<sup>1</sup> While the goals of the Executive Order are certainly admirable, it is unclear how the Executive Order will overcome a lack of agency commitment to FOIA when a statute enacted by Congress ten years ago has been unable to achieve such a result.

In addition, some agencies seek far more complex technological changes that will cost money to develop and will require intra-departmental approval to implement. In some cases, the improvement plans indicate that plans to purchase new tracking software or equipment to improve processing are contingent on availability of resources.<sup>2</sup> The individual plans make clear that in the past FOIA programs have not had a high profile within agencies and have lacked support or attention from upper management. While the Executive Order may have helped raise the profile of FOIA within agencies, how these FOIA programs can now advance without stronger incentives and greater resources remains a mystery.

Particularly notable is the AG Report's focus on backlog reduction without any acknowledgement of the true scope of the problem or the resources necessary to deal with it. While we appreciate the reference in the AG Report to the National Security Archive's March 2006 report on the “Ten Oldest” FOIA requests pending in the federal government, those ten represent only a small fraction of many very old FOIA requests languishing unprocessed. We are pleased, of course, that those 15- to 17-year-old requests are now nearly completed, but the more important issue highlighted by our report is that the agencies' processing statistics reported to Congress each year do not accurately reflect the scope of the agencies' backlog problems. Further, the AG Report fails to mention that financial and staff resources are necessary to facilitate backlog reduction. If the Department of the Interior, Agency for International Development and Small Business Administration are to eliminate their backlog by 2008, as the AG Report indicates, then – aside from simply denying requests or finding reasons to reject requests – how can that be accomplished without more personnel processing FOIA requests? A FOIA system that simply pushes papers and does not release information of significance costs money without providing the desired benefit of improved government accountability.

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<sup>1</sup> For example, in 2002, the Department of the Interior (DOI) implemented a centralized web-based FOIA tracking system that would allow all bureaus and offices to track and manage their FOIA requests. However, according to the DOI improvement plan, two key FOIA offices, the Bureau of Indian Affairs and the Office of the Solicitor, still do not have internet access and, therefore cannot access the system. Similarly, the Office of the Secretary of Agriculture FOIA office includes as one of its goals investigating if any modern photocopiers are available in Department of Agriculture (USDA) for its use.

<sup>2</sup> For example, USDA, Department of Commerce, DOJ-CRT, DOJ-DEA, DOJ-EOUST, Department of Labor, Department of Health and Human Services and National Science Foundation all mention budgetary constraints in their individual reports. DOJ-OPA indicated they discussed a FOIA tracking system, but due to budget constraints this option is no longer under consideration.

Lastly, the AG Report fails to address the problems caused by the absence of any cross-agency authority responsible for FOIA. The only standardization that the AG Report recommends is the use of postcards rather than letters to speed processing time. There is no recommendation on the standardization of request tracking even within agencies, despite the fact that effective tracking is a critical element of workflow management. Despite the general acknowledgment in many individual plans that interagency referrals and consultations on FOIA requests are a significant source of delay, there is nothing in the AG's FOIA report that hints at a solution to that delay. The absence of more systemic recommendations in the AG Report demonstrates the dearth of broad, cross-agency policy leadership. Although the Department of Justice's Office of Information and Privacy has been making valuable recommendations to agencies for years about managing their FOIA programs, the individual reports give the impression that many of those recommendations were ignored, only to now be considered years later.

The Executive Branch FOIA system needs leadership, support and appropriate incentives in order for the President's Executive Order to have a significant impact on the improvement of FOIA administration. Accordingly, the National Security Archive calls on your Committee to hold oversight hearings after the agencies complete their next set of reports under the Executive Order, which are due February 1, 2007, and again after the Department of Justice submits its next report to the President on June 1, 2007. We and other users of the FOIA would be happy to review the results of agency efforts under the Executive Order and report on agency progress.

Thank you for your continuing efforts to improve government accountability.

Sincerely,

Meredith Fuchs, General Counsel  
Kristin Adair, FOIA Associate  
Catherine Nielsen, FOIA Coordinator