

Oral Testimony of Tom Curley

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On

"Advancing Freedom of Information
in the New Era of Responsibility"

Senate Judiciary Committee

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Chairman Leahy, Ranking Member Sessions and Members of the Committee on the Judiciary, thank you for your invitation to appear before you today as you continue your good work on behalf of open government with this hearing on Freedom of Information.

I would like to make the following four points.

The first is that we in the news media are still finding federal agencies unresponsive to the declarations from the White House that government must become more open. We appreciate the change in policy direction. But the change hasn't yet reached the street, and a stronger FOIA is still the public's best defense against harmful government secrecy.

The second is that we think the Office of Government Information Services can eventually be extremely valuable to

FOIA requesters, as an advisor and sometimes as a mediator of disputes. But OGIS is tackling enormous challenges with very modest resources, and we urge the Committee to continue its close monitoring and support as the new office finds its footing.

The third point is that FOIA's privacy exemption may need the Committee's attention. Courts in some important cases appear to be ignoring the intent of Congress when it passed FOIA that public records containing personal information qualify for the exemption only when that information is highly personal, private and sensitive.

Some judges are satisfied with a mere showing that a person is mentioned by name in a document. Then they compound the error by refusing to recognize any public interest in disclosure of such records at all unless the requester knows in advance that they're likely to contain evidence of government misconduct.

That's not the proper balancing of interests that FOIA is supposed to require. It's wrong, it's causing problems, and we think it may take changes in the language of FOIA sections b(6) and b(7) to fix it.

I'd like to focus in my remaining few minutes on the fourth and final point – that so-called b(3) amendments to legislation are severely undermining FOIA's ability to preserve the public's access to government activities and information.

As you know, b(3)'s are provisions embedded in other laws that put certain very specific kinds of information beyond FOIA's reach. They are often inserted with little or no discussion and no public notice, and they now constitute a very large black hole in our open records law. The Sunshine in Government Initiative found about 250 b(3)'s on the books, and about 140 of these show up in agency denial letters in any given year.

In many cases these special exemptions protect information already covered under one or more of the other exemptions in

FOIA's section B. In other cases they are creating whole new categories of information not subject to disclosure.

But the real problem with these exemptions is that writing them into statute forecloses any chance for an impartial determination that a valid reason applies to all the information that's been effectively roped off. Whether or not one of the general FOIA exemptions should cover a particular information request is subject to court review. But a statutory exemption for very specific information is not.

So, for example, the FAA has a b(3) exemption that lets it withhold information voluntarily submitted to aviation regulators regarding the safety and security of air travel. You may remember this as the exemption the FAA was planning to use as the basis for hiding information the agency collected about airports where birds in the flight paths are crippling or even bringing down airliners.

Also secret are the identities of watermelon growers, the identities of people who handle honey and the ingredients in cigarettes.

B(3) exemptions hide the private sector advice that government trade representatives and congressional committees use to shape trade policy, and also the studies that chemical plants conduct to determine the impact of any worst-case accident on neighboring communities and the environment.

There may be valid arguments for putting a secrecy label on some of this information.

But the real concern is that whatever valid arguments there may be have not been tested or challenged, or even discussed, in any public forum. And the b(3) exemptions mean that a disappointed FOIA requester will find it nearly impossible to challenge them in court.

Nobody knows exactly how many of these exemptions there are, but AP reporters encounter them on a routine basis.

We regarded the OPEN FOIA Act which you, Chairman Leahy, and Senator Cornyn introduced earlier this year as a good and much-needed first step toward reining in this alarming trend.

Your proposed statute would make it possible for anyone who is watching for b(3) exemptions in proposed legislation to spot them easily, since they would have to include a citation to paragraph b(3) of FOIA.

I hope you can keep the OPEN FOIA Act on track toward passage, and I hope Congress will then build on it with some additional steps, such as automatic sunseting of b(3)'s and special scrutiny of b(3) exemptions, including a White House/OMB review process, before these exemptions can be submitted by federal agencies.

Chairman Leahy, Senator Sessions, members of the Committee, thank you very much for allowing me this opportunity to speak

**to you about these important issues today. And thank you again
for your commitment to FOIA and to the liberties it does so
much to protect.**