RCFP testimony on status of EFOIA Act, June 9, 1998

Reporters Committee Executive Director Jane E. Kirtley testified June 9 before the House Subcommittee on Government Management, Information and Technology about the status of implementation of the Electronic FOI Improvements Act of 1996.

She was asked to testify along with a panel of Patrice McDermott of OMB Watch, James Riccio of Public Citizen's Crictical Mass Energy Project and Michael Tankersley of Public Citizen.

The subcommittee also heard from a panel of government FOI officers from the Department of Justice's Office of Information and Privacy, the FBI, the Department of Energy and the National Aeronautics and Space Administration.

The Reporters Committee's written testimony follows:

SUMMARY OF TESTIMONY

BY JANE E. KIRTLEY, EXECUTIVE DIRECTOR
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

BEFORE

THE HOUSE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, INFORMATION AND TECHNOLOGY

June 9, 1998

Mr. Chairman and members of the subcommittee: My name is Jane Kirtley, and I am Executive Director of the Reporters Committee for Freedom of the Press, a voluntary association of news reporters and editors dedicated to helping journalists exercise their F irst Amendment and freedom of information rights to gather and cover the news.

The Reporters Committee and I thank you for the invitation to discuss the Electronic Freedom of Information Act of 1996. We know that we find in this subcommittee a strong ally in the quest for better access to government information. We have not forgot ten how this subcommittee pushed long-anticipated electronic FOI legislation to enactment in late 1996. We are very pleased that, having brought the measure to life, the subcommittee maintains an interest in its continuing good health.

I would like to talk about this statute in terms of what it promises, not what it has delivered. This is important because so far, and for the most part, federal agencies have missed their deadlines for compliance with the Act in the same way they have b een missing FOI deadlines for decades.

Many problems addressed by EFOIA are not yet cured by it

To begin at the most fundamental level, most agencies still do not have implementing regulations for the EFOIA. Proposed rules by the Department of Justice, which assumes the lead in FOI matters, became final only in late May after many months in the cle arance process at the Office of Management and Budget. A majority of agencies have not even issued proposed implementing regulations.

We are told that some agencies still delete E-mail as if it were not a federal record. Some who now realize that electronic mail is significant still print it out in order to respond to FOI requests, rather than provide it in electronic format asked for by many requesters.

Most have not yet established the comprehensive electronic reading rooms the Act anticipated. Existing electronic

reading rooms are often information poor.

Backlogs are the rule rather than the exception. The new 20-day time limit, which was supposed to be "meaningful" unlike its 10-day predecessor (which was honored in the breach), has caused no noticeable improvement in agency response times. The only dif ference is that now a requester receives a phone call or letter saying the agency can't get you the records within 20 days, as opposed to 10 days in the past. It still takes weeks or months or years to finally get the records.

The EFOIA has triggered core reforms in electronic processing

But all is not business as usual. We already have seen some dramatic and core changes to the ways in which FOI requests are handled in the agencies, and we are certain that more will follow -- quickly we hope.

We have watched some experienced agency FOI officers respond enthusiastically to the mandates of the Act, building robust Web pages filled with useful information. They have worked closely with information resource managers to develop electronic informat ion that is easily accessible to users and that will meet their needs. By affirmatively making useful information routinely available, they will reduce the burdens involved in processing formal FOI requests. We hope these creative and innovative people will reap just rewards for their efforts.

Reporters tell us that these sites are set up by agencies, such as the Department of Transportation and the Environmental Protection Agency, that have good track records for disseminating information. These sites are heavily used by journalists. (One rep orter observed that the reverse is also true, that the inadequate Websites of other agencies may reflect the suspicious and non-communicative nature they demonstrate in their day-to-day dealings with the public.)

We have seen some agencies voluntarily set up interactive sites that invite electronic requests and help requesters to write them, prodding for helpful details that will speed up response.

We also have seen core changes in FOI processing. Before passage of the EFOIA, seasoned agency FOI lawyers told us that agency electronic records were supposed to be covered by the FOI Act. Perhaps that should have been the case, but it often was not. If records did not exist on paper, there was a very good chance they would not be released under the FOI Act. Agencies which once excluded electronic records from FOI coverage would not dream of doing so today.

Until passage of the EFOIA, many agencies called an electronic search of their records that retrieved requested data from a database "creating a record." They would routinely assert that the FOI Act did not require them to "create" records. Today they would not make that assertion as grounds to refuse to conduct an electronic search. They would simply conduct the search.

The EFOIA requirement that agencies make reasonable efforts to provide records in the format requested has clearly expanded the usefulness of the Act. Until passage of EFOIA, agencies appropriated the choice of format for providing records. They made t hose choices for their own convenience and not in accordance with the requester's preference. We remember horror stories of reporters who had requested tapes or discs receiving boxes and boxes of unedited, unsorted printed materials that were virtually u seless to them.

Until the Electronic FOI Act made clear that electronic search capabilities available to agencies must also be available to requesters, agencies could simply elect not to perform an electronic search of their databases to locate responsive information.

When Bill Dedman was researching his Pulitzer-Prize winning series The Color of Money for the Atlanta Constitution, a series that changed that city's racially discriminatory banking practices forever, one agency conducted an electronic search of its datab ases to retrieve electronically the information he needed. Another provided him an 80-pound printout instead. It may never again be necessary for requesters to spend the countless hours Dedman did to retrieve information by hand from that mammoth docume nt.

Other reform measures have been less effective

The EFOIA legislation also sought to allay the two other most severe problems faced by requesters trying to use the FOI Act: the failure of agencies to provide responses timely enough to be useful, and a serious misinterpretation of Congress' purpose in enacting the FOI Act that has led to overuse of the privacy exemptions to the Act.

Measures to reduce delay need close monitoring

The new Act attempted to address delays in several ways. It provides for expedited review in compelling circumstances. It provides for multitrack processing which allows shorter, less cumbersome requests to be processed in order of receipt on one track while longer requests are processed on another. And although the Act extends the timeframe for responding to requests, it does so with the caveat that routine backlogs are not "exceptional circumstances" justifying delay.

Provisions in EFOIA for expedited review offer agencies an opportunity to provide information right away when it is obvious that the requester has a compelling need for the information. In our view the legislation is based on sound principles, mandating priority processing when a compelling need exists, particularly when the public needs to be promptly informed about a matter of urgency, such as a rapidly approaching governmental decision.

Unfortunately, we know of few cases in which reporters actually have been granted expedited review to date. This may be because most agencies are behind in adopting implementing regulations.

Additionally, we have not noticed the pace quicken as a result of the multitrack processing provisions, although it appears that requirements for agencies to communicate with requesters to suggest how they can be placed on a "fast track" have been useful to the reporters with whom we deal. Some agencies are choosing not to avail themselves of multitrack processing.

As we stated earlier, we do not believe that agencies are complying with the 20-day time limits or that they have made any effective changes to reduce processing times.

We hope that Congress will keep a close eye on provisions intended to reduce delays, and take whatever action is necessary to ensure that its laudable intentions to reduce or eliminate delays will be realized.

Executive branch, courts have ignored critical "finding"

Finally, we are very disappointed that Congress' finding in this legislation that the FOI Act was intended to serve "any purpose" has been virtually ignored by both the Executive Branch and the courts.

As confirmed by the Amendment's legislative history, the language in the Findings section was meant to rebut the intent attributed to Congress in the Supreme Court's decision in a 1989 case involving the Reporters Committee. The high court rejected a req uest for information on a government contractor's rap sheet, saying "this is not the kind of public interest for which Congress enacted the FOIA." The court said the FOI Act's "central purpose is to ensure that the Government's activities be opened to th e sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed." The high court reached this conclusion on its own; the government had not argued this position. Department of Justice v. Reporters Committee, 489 U.S. 749 (1989)

In that decision and in many which have followed, courts have said that because Congress enacted the FOI Act in order to shed light on government operations and activities, a balancing test weighing privacy and public interests will tip in favor of privac y unless the records directly reveal what the government is up to.

As a practical matter, the high court's interpretation of Congress' intent has locked up information in any government files that happen to contain the names of identifiable individuals. When the public can learn nothing about how government affects or i s affected by individuals, it can learn very little from its FOI requests.

For example, in an excellent series on defaulters on loans of $1 million or more from the Farmers Home Administration, Washington Post reporter Sharon LaFraniere showed that the agency allowed persons to write off loans up to $13 million and that they li ved very, very well on the money they had received from taxpayers' dollars. She was

unable to learn the identities of these government-funded millionaires from the agency because the agency said that would have intruded upon the privacy of the defaulters . She still got her story, using other means to uncover the identities of some of the defaulters, but it should have been easier. How many stories like hers will never be told, concealed under the guise of protecting personal privacy?

In the Electronic FOI Act, Congress unambiguously set the record straight on its intentions in passing a law to require open government records.

It states:

> The Congress finds that (1)the purpose of section 552 of title 5, United States Code, popularly known as the Freedom of Information Act, is to require agencies of the Federal Government to make certain agency information available for public ins pection and copying and to establish and enable enforcement of the right of any person to obtain access to the records of such agencies, subject to statutory exemptions, *for any public or private purpose*;[Emphasis added]

The legislative history makes clear that this language was intended to clarify the misinterpretation of congressional purpose articulated in the Reporters Committee case.

Unfortunately, Congress' intent continues to be summarily ignored. For instance, in a case involving customs forfeiture records, a federal District Court recently held that if Congress had intended to "significantly enlarge the scope of the public intere st served by FOIA," it could have taken "a more clear and direct approach, most likely by amending the exemptions themselves. This they did not do." That lower court held that the plaintiff's public interest could not be considered because it "does not shed light on Customs' performance of its statutory duties," and does not otherwise let citizens know what the agency "is up to." O'Kane v. U.S. Customs Service, No.95-0683-CIV-MORENO (S.D. Fla. Nov. 6, 1997)

Again, the Reporters Committee is grateful for the opportunity to discuss the issues with the subcommittee and is grateful for the subcommittee's continued interest in these matters that are of vital importance to the public.
