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### **Abstract**

Since its inception in 1996, the U.S. Freedom of Information Act (FOIA) has been a powerful tool in promoting public access to government information. At the same time, since the law was first enacted persons making FOIA requests have suffered frequent delays waiting for agency responses to even the most straight-forward requests. This article examines the history of delay under the FOIA, reviews the causes of delay, and evaluates the prescriptions for delay contained in legislation introduced early in 2005 by Senator John Cornyn.

Since its inception, the Freedom of Information Act (FOIA) (2002) has proved to be a powerful tool in promoting public access to government information in the United States. Likewise, since the law was first enacted, persons making FOIA requests have very often been disappointed with the long time that it takes many agencies to respond to even the most straight-forward request. This article examines the history of delay under the FOIA, reviews some of the many causes of delay, and evaluates the prescriptions for delay contained in legislation introduced early in 2005 by Senator John Cornyn. Senator Cornyn is a Texas Republican who served as the state's Attorney General and, before that, Supreme Court Justice. Attorney General Cornyn was known for his aggressive pursuit of information disclosure by Texas agencies and governmental units. In both speeches and articles (Cornyn, 2004), he has vowed to bring to Washington a taste of open government, Texas style. Other

provisions in the Cornyn bill, The Open Government Act of 2005 (S. 394),<sup>1</sup> are also briefly assessed.

### **The Chronic Problem of Delay: A Brief History**

When the FOIA was enacted by Congress in 1966, it contributed both fine principles and the prospect of judicial enforcement toward effecting a workable public right to government records. From the first weeks of this new statute's operation, however, federal agencies and requesters have been grappling with a problem that has so far proved intractable: agency delay in processing FOIA requests.

The FOIA initially established no time limit for agency responses to requests; rather, it specified only that each agency must make requested records "promptly available." In its 1972 report on the Administration of the Freedom of Information Act, the House Committee on Government Operations listed "Major Problem Areas," the first of which was "the bureaucratic delay in responding to an individual's request for information" (p.8). The Senate Judiciary Committee's report on legislation that was to become the 1974 FOIA Amendments echoed this finding:

Witnesses from the public sector . . . uniformly decried delays in agency responses to request as being of epidemic proportion, often tending to be tantamount to refusal to provide the information. Media representatives, in particular, identified delay as the major obstacle to use of the FOIA by the press. . . . Almost every public witness at the hearings brought out specific examples of inordinate delays following initial requests for information.

Congress attempted to solve this problem by establishing deadlines for agency initial response – 10 working days – and for agency determinations on appeal – 20 working days. Nonetheless, even with the time limits introduced into FOIA administration by the 1974 Amendments, the problem of delay persisted.

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<sup>1</sup> The bill is cosponsored by Senator Patrick Leahy, a Vermont Democrat, who authored the last amendments to the FOIA in 1996, the Electronic Freedom of Information Act.

In 1996 Congress attempted in its Electronic Freedom of Information Act Amendments (EFOIA) to address the issue of agency delays; it expanded the time for response (from 10 to 20 days), provided that large chronic backlogs and inadequate resources do not constitute "exceptional circumstances" justifying delay, and established "Electronic Reading Rooms" via agency Web sites to speed public access.<sup>2</sup> EFOIA represented important, but nevertheless modest, progress in addressing the problem of delay.

In its 2002 report, "Update on Implementation of the 1996 Electronic Freedom of Information Act Amendment," the General Accounting Office (GAO) concluded that "Governmentwide, . . . agency backlogs of pending requests are substantial and growing, indicating that agencies are falling behind in processing requests" (p.12). Two years later, GAO's "Update on Freedom of Information Act Implementation Status" did find that agencies "reported a decrease in the backlog of pending requests remaining at the end of each year"; however, while seven agencies had a decrease in median processing time for "simple requests" from 2001 and 2002, in 2002 "eight agencies reported median processing times for pending requests that were greater than 1 year (defined as 251 business days) in length" (pp.3, 44). By May 2005 GAO observed that "backlogs have increased"; some simple requests are taking more than 100 days to process (Koontz, GAO, 2005, pp.18, 21).

Requesters experience these delays first hand. A comprehensive resource for FOIA users observes that while many agencies meet time limits, "some, particularly the FBI, CIA, IRS, State Department, National Security Agency, and the former

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<sup>2</sup> Consistent with the history of FOIA administration, agencies were quite slow in implementing EFOIA (OMB Watch, 1999).

Immigration & Naturalization Service, can take several years to respond" (EPIC & James Madison Project, 2004, p.28). The National Security Archive did a 35-agency audit of agency backlogs in 2003 and found backlogs as long as 16 years at some agencies. Every witness at a March 15, 2005 hearing before a Senate Judiciary Subcommittee on Terrorism, Technology and Homeland Security identified delay as a central problem in FOIA administration. In May 2005, Linda D. Koontz, the Director of Information Management Issues of GAO testified before the House Subcommittee on Government Management, Finance, and Accountability that the backlog of FOIA requests has risen fourteen percent since 2002.

Other governments that have implemented similar freedom of information measures have experienced problems with delays. In Canada, the current Information Commissioner has made reducing delays a priority (2004-2005). His 2004-2005 Annual Report cites improvements in the system due to the implementation of "report card" department evaluations, as well as continued complaints regarding failures of the government to meet response deadlines and a backlog due in part to lack of resources. Critics claim that the cited improvements are illusory, as "departments have simply learned how to use the law to create the impression that delays have been eliminated" (Roberts, 2005, p.A5). In the UK, the Department for Constitutional Affairs reported in June 2005 that among non-routine requests received between January 1 and March 2005, 1,344 of 13,427 requests were still being processed while 509 were on hold due to non-payment (p.8). The Campaign for Freedom of Information (2005) has expressed dismay at the "unacceptable delays" in receiving answers to requests, noting that the report fails to detail how long a requester must wait until an answer is actually received.

Senator Cornyn's efforts to strengthen and improve FOIA resulted in a first important step in March 2005 when the Senate Judiciary Committee approved his bill, S. 589, to create a commission to study FOIA response delays. Three months later the Senate approved S. 1181, a bill to require that any future legislation to establish a new exemption to FOIA be stated explicitly within the text of the bill and to specify language for including such a "b-3" exemption to FOIA (named after section 552(b)(3) of title 5, which recognizes that Congress may create exemptions to disclosure outside the four corners of FOIA itself). Senator Cornyn continues to press for more comprehensive FOIA reform through enactment of S. 394.

Senator Cornyn's broader bill is in large part designed to speed FOIA processing and to address related problems plaguing FOIA administration. A review of some of the reasons for delays in the processing of FOIA requests will provide context for assessing the legislative proposals to address what the U.S. Department of Justice has called an "intractable" problem (Nichols, 2005).

### **The Causes of Delay**

Plainly, there continue to be significant delays in the processing of FOIA requests across most agencies of the federal government. Most requesters who frequently use the FOIA do not even expect an agency determination within the time limits provided by statute and would be surprised if one were received; the media have all but abandoned use of the FOIA for routine investigatory purposes (Tapscott, M. & Mears, W., 2005).

The causes of delay are many – some excusable and some not – so devising agency incentives is no simple matter. Some of the basic reasons for delay can be catalogued as follows:

1. First, and probably foremost, is the absence of adequate resources dedicated to processing FOIA requests. FOIA requests received increased by 71 percent in the period between 2002 and 2004 (Koontz, GAO, 2005, p.13). Agencies simply do not view FOIA as a core mission. Protecting the environment, making research grants, enforcing criminal laws, or procuring military material are core missions; disclosing information is not. This view is usually shared by both the authorizing and appropriating committees of Congress. So it is probably safe to suggest that inadequate resources will always be a problem for FOIA administrators.

2. Some, and perhaps many, instances of agency delays in processing FOIA requests relate to the nature of the requests. Processing time will be directly affected by the size and complexity of the request, as well as the potential need for the agency to consult with third-parties. Agency response time for a simple request for a clearly identified document cannot reasonably be compared with the time to compile and review thousands of pages of agency records from multiple locations. And increasing numbers of requests are for entire databases, which seldom can be processed within a short time frame.

3. There is also the need to consult with other agencies, with program staff, and with third parties. For example, agencies cannot effectively process documents from a law enforcement file without consulting with relevant personnel about whether there is an ongoing investigation and whether release might jeopardize that investigation. Nor can agencies make disclosure determinations about documents containing information marked as commercially confidential without consulting with the submitter on the potential that disclosure would cause substantial

competitive harm. These kinds of agency determinations can seldom be completed within the FOIA's time limits.

4. A fourth major reason for delay relates to the issue of incentives: There is little incentive for the agency to respond in a timely fashion to most FOIA requests. At the same time, government officials should not need incentives to adhere to statutory requirements. Any use of financial incentives is likely to be perverse: agencies without backlogs won't need added resources, and agencies experiencing chronic delays should hardly be rewarded by added resources unless it is certain that the delays are caused mainly by inadequate resources. Agency successes in increasing rates of processing requests and reducing backlog vary widely. In the years 2002, 2003, and 2004, while some agencies processed fewer requests than they received, others (CIA, Energy, Labor, SBA, and State) were able to reduce their backlog (Koontz, GAO, 2005, p.19).<sup>3</sup> However, because of the lack of clarity in agency reporting on delay, there are few useful data that can be used to generate accolades for agencies who process requests quickly and opprobrium for agencies who chronically miss deadlines and whose delay is measured in years rather than days or even months.

5. Unfortunately, delay is sometimes used by agency officials to serve political purposes or policy goals, or to mask embarrassment (perhaps until the agency or administration leadership changes, or until a hot news story turns cold). Here, no incentive that fails to sanction the responsible government official is likely to work, since that official already knows that the information will ultimately have to be disclosed. And sanctions against individual government employees, already provided by the FOIA, have not been used.

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<sup>3</sup> Figure 1 page 20 (Koontz, GAO, 2005) provides useful information comparing the processing rates for 25 agencies in 2002, 2003 and 2004.

6. A sixth reason for delay sometimes arises: As stated in the leading treatise on FOIA (O'Reilly, J., 2000, p.186), "Delays in responding to disclosure requests have become an institutional tool to dissuade requests." This, as mentioned earlier, routinely works with media requesters, as every press representative who has ever testified or written on FOIA has emphasized (Subcommittee on Terrorism, Technology and Homeland Security Testimony, 2005).

7. Finally, given the size and complexity of the federal government and the outmoded records-maintenance systems of some agencies, it is not surprising that sometimes agencies simply cannot find the requested records within the time limits. A Court of Appeals panel in a recent Seventh Circuit case involving Department of Veterans Affairs records, *Walsh v. US. Dept. Veterans Affairs*, 400 F.3d 535, 537 (7<sup>th</sup> Cir. 2005) put it succinctly: "The delays he [the requester] unfortunately encountered seem to have been caused by simple confusion about the physical location of the records."

Unfortunately, with so many causes of delay, it is not likely that this problem will succumb to a one-size-fits-all solution. That is why Senator Cornyn introduced a companion bill to S. 394, the "Faster FOIA Act of 2005" (S. 589),<sup>4</sup> to establish a commission to study and make recommendations to reduce FOIA delay. But no legislation can be expected to provide a quick fix to this problem.

S. 394 addresses delay, along with some other issues frustrating FOIA administration, but for the most part it does so moderately – almost gently. While a consistent focus of many provisions of the bill is delay, S. 394 recognizes that FOIA

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<sup>4</sup> Both S. 394 and S. 589 have House counterparts – H.R. 867 and H.R. 1620. This article focuses on Senator Cornyn's legislation because his efforts initiated the development and introduction of both bills during the 109<sup>th</sup> Congress.

administration is not a game of “requester versus agency,” that some issues defy simple solution, and that Congress shares the responsibility for ensuring that the law works.

### **S. 394’s Prescriptions for Delay**

Although almost half of the sections of S. 394 potentially address agency delay, this discussion first focuses on the most important pieces of the bill and then briefly describes and assesses the remaining sections.

#### *Office of Government Information Services*

Section 11, establishing an Office of Government Information Services (OGIS), is potentially the most powerful provision in S. 394. The OGIS is intended to assist the public in resolving disputes with agencies as an alternative to litigation, review and audit agency compliance activities, and make recommendations and reports on FOIA administration. Many states have offices that assist in FOIA administration: the Attorney General in Texas performs this function, and there are other very effective models like the New York Committee on Open Government and the Connecticut Freedom of Information Commission. Likewise, a number of foreign countries and the European Union have FOI Ombuds offices or comparable institutions.

The OGIS would be placed in the Administrative Conference of the U.S. (ACUS). Although ACUS lost its funding in 1993, it would be an ideal place for the OGIS, since it historically had been a nonpartisan agency dedicated to improving administrative procedures and assisting agencies to do their jobs more efficiently and effectively. If Congress does not make the very modest investment to restore ACUS, then the OGIS could be established and placed elsewhere in the federal establishment.

*Recovery of Attorneys Fees in Litigation*

Section 4 proposes to reverse application of the Supreme Court decision, *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Servs.*, 532 U.S. 598 (2001), to FOIA cases that has the effect of prohibiting a requester from recovering fees and costs where the court does not finally adjudicate the issue of disclosure. Although the Department of Justice has expressed its satisfaction with this decision (Nichols, 2005), there are strong reasons supporting adoption of this section of the bill.<sup>5</sup>

First, it has been clear from time to time that the government has withheld requested information to keep it out of the public domain for as long as possible, knowing full well that the law would not ultimately support withholding. There is no recourse in such situations for requesters other than to file suit, and these cases unfortunately do not move rapidly on the courts' dockets. So when the government sees the end of the road near, it need only hand over the information to the requester and the case is moot, with no consequences to the government.

Second, the government (which, of course, knows what is in the requested records ) has the capacity to drag out and complicate litigation, thereby raising the costs to requesters once a lawsuit has begun. The prospect for fee and cost payments by the government at the end of this battle offers the only potential inhibition for this kind of dilatory government conduct.

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<sup>5</sup> For recent examples supporting the need to reverse *Buckhannon*, see Statement of Senator John Cornyn for the House Government Reform Subcommittee, available from: [http://www.cornyn.senate.gov/doc\\_archive/jc\\_foia/House\\_FOIA\\_Statement.pdf](http://www.cornyn.senate.gov/doc_archive/jc_foia/House_FOIA_Statement.pdf).

Finally, this Section provides an important remedy for delay in agency handling of FOIA cases. As discussed earlier, delay often lasts not weeks or even months, but years. The filing of a complaint in court may be the only way to get the agency's attention to a request, yet this tool is virtually out of reach if fees and costs cannot be recovered once the agency wakes up, completes processing of the request, and hands over the information.

The *Buckhannon* decision may have made sense where courts had little discretion over attorneys' fees and where lawsuits may have been filed unnecessarily. But in the FOIA context, it rewards agency recalcitrance and delay. For, if an agency can hand over requested documents with impunity any time before judgment is entered, the end result will be to chill the potential for judicial review as a means of policing the system. When a FOIA lawsuit is filed, the plaintiff is assuming the same role as law-enforcer, played by the Texas Attorney General under that state's scheme. Where a lawsuit is responsible for disclosure, a public service has been performed and recovery of fees and costs is appropriate.

#### *Enhanced Congressional Oversight and Public Accountability*

Congress is indispensable to ensuring effective FOIA administration, so it is unfortunate that Congress has been so inattentive to FOIA oversight. A number of the provisions of S. 394 reflect a commitment by Congress to improve its ability to oversee and strengthen administration of FOIA and related laws. Some require public reporting by agencies to enhance accountability in FOIA administration.

- Clause (6) of Section 2 of the bill calls for regular congressional review of the FOIA.
- Section 5 requires public reporting on sanctions.

- Section 9 clarifies and expands certain reporting requirements, making it easier to compare and assess agency performance in handling FOIA requests.
- Section 12 directs the Comptroller General to assess and make recommendations on protection and disclosure of information under section 214 of the Homeland Security Act.
- Section 13 requires an Office of Personnel Management report on personnel policies that affect FOIA administration.

Although these provisions alone will do little to speed FOIA compliance, they nevertheless can have real significance in signaling that Congress intends the FOIA to work effectively and smoothly and will continue aggressively to oversee agencies to make sure that is the case. If Congress wants agencies to process FOIA requests faster; vigilant oversight can clearly communicate that goal.

#### *Penalizing Agencies for Delay*

Section 6(b) would handicap agencies in court where a response to a specific request has been subject to delay by providing that “if an agency fails to comply with the applicable time limit provisions . . . the agency may not assert any exemption” unless disclosure would endanger national security, invade privacy, disclose proprietary information, or be otherwise prohibited by law. (A court could waive application of this sanction if the agency “demonstrates by clear and convincing evidence that there was good cause” for the noncompliance.)

While this is no doubt the strongest medicine proposed in S. 394,<sup>6</sup> it is premature to adopt this provision in the absence of more reliable data on delay and without distinguishing among reasons for delay and the kinds of information requested, as discussed above. Although the provision is drafted to protect the rights of some third parties, the potential for imposing unintended consequences affecting others – for example, important law enforcement or other governmental interests – seems sufficiently serious to militate toward more thorough exploration of the implications of this proposal before its enactment. While this proposal was derived in part from a provision in the Texas Public Information Act (1973), there appear to be no available data regarding how often this provision has been applied or its consequences. Perhaps analysis by a Faster FOIA Commission (Faster FOIA Act, 2005) might provide greater foundation for evaluating the potential impact of this proposal.

### **Section-by-Section Discussion of S. 394**

Those sections of S. 394 that were not addressed above are briefly reviewed here:

*Section 2. Findings.* Congressional findings are ordinarily used to express useful sentiments, if not occasionally platitudes, and they do so here. While these findings may be self-evident – for example, “the American people firmly believe that our system of government must itself be governed by a presumption of openness” – they set out principles that are absolutely correct and bear repeating.

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<sup>6</sup> Section 6(a) of S. 394 would prohibit agencies from stopping the clock on (“tolling”) the 20-day response period during, for example, resolution of fee disputes. This may be one instance where agency practice may often be justified, such that a more refined approach (for example, prohibiting tolling if the requester agrees to pay fees should she fail to obtain a waiver) seems called for.

*Section 3. News Media and Fees.* This section recognizes that the public gets information from sources wider than traditional media, and it will surely reduce litigation and time-consuming administrative disputes. The last sentence – requiring the agency to “consider the requestor’s stated intent” to distribute the information broadly – may appear open-ended or unenforceable, but since making a false statement to the government is a federal crime, the likelihood of misuse by requesters is likely to be minimal.

*Section 4. Sanctions.* The additional reporting language here is modest and useful. When the original sanctions provision, 5 U.S.C. § 552(a)(4)(F) was drafted in 1974, Congress anticipated that it would be rarely used, but did not expect the use to be “zero times” in 30 years. At least having automatic public notification of court findings to the Special Counsel and better documentation through public reporting can help with congressional oversight and public understanding.

*Section 7. Tracking System.* Agencies should long ago have established the technology and procedures mandated under Section 7 (“a system to assign an individualized tracking number for each request” and to establish an Internet or telephone service to provide status information to the requester), but unfortunately these directives are anything but superfluous. Most practitioners advise requesters to follow submission of requests with a phone call to obtain a tracking number; FOIA requests all too often get lost or fall through agency cracks during processing. This proposed new system, which is mandated by law in many other countries, is a step forward.

*Section 8. “(b)(3) Statutes.”* The new clause to be added to FOIA § 552(b)(3) (exempting from disclosure matters where other statutes specifically authorize or require nondisclosure) has a number of purposes, all worthwhile. For one, it will in the future eliminate doubt about whether Congress intended, in any enactment, to establish a new (b)(3) statutory exemption to the FOIA by requiring Congress, when doing so, specifically to cite this section. For another, it prevents a FOIA exemption from sneaking into the statute books without adequate congressional scrutiny. And, as a corollary, it will allow appropriate congressional committees oversight of backdoor FOIA exemptions.

*Section 9. Reporting Requirements.* Public reporting has always been an important element of FOIA accountability since the 1974 Amendments, 5 U.S.C. § 552(e) (Department of Justice Annual FOIA Reports), and the adjustments and additional information called for by this section will help clarify what agencies are doing and facilitate more informed oversight. While it may be perfectly appropriate for agencies to include first-party requests in their FOIA statistics (requests by individuals for files that pertain only to themselves, such as Veterans’ medical records), these often-routine requests tend to skew the totals. The Department of Justice should have done more over the years to direct agencies so that their annual reports would be more useful; now Congress proposes to do so.

*Section 10. Private Entities.* This section addresses a narrow problem of contracted record maintenance. It appears narrow enough to avoid sweeping other contract data under the FOIA unintentionally and does not affect the vitality of *Forsham v. Harris*, 445 U.S. 169 (1980), which held that research data generated by agency grantees were not subject to the FOIA if not in the government’s possession.

*Section 12. Critical Infrastructure Information (CII) Report.* This section calls for a GAO study on implementation and use of the provisions of the Homeland Security Act of 2002, 6 U.S.C. § 133, that accord special protection to CII. Since few information issues have suffered from as much uncertainty and protection of homeland security-related information, this study could contribute greatly to public understanding of the issue. Clause (4) – directing “an examination of whether the nondisclosure of such [CII] information has led to the increased protection of critical infrastructure” – might suggest a predetermined conclusion that somehow there should be an ascertainable short-term cause-and-effect relationship between protecting these data and stopping terrorism. That is an impossible task, and the assignment should be rewritten more neutrally.

*Section 13. Personnel Report.* Finally, section 11 directs what may be the first organized and comprehensive study of personnel policies relating to the FOIA. The basic challenges in FOIA administration are faced every day by dedicated government employees who administer the law. The more that is known about this area, the more Congress can hold agencies accountable for the way FOIA requests are, or are not, handled quickly and appropriately.

## **Conclusion**

Reducing delay in the processing of FOIA requests is challenging, but need not be impossible. Three special obstacles block the way in the present Congress. The first is the severe and acrimonious political division within the Congress, which remains controlled by the President’s party. The second is a post-September 11 nation in which the government’s interest in enhancing security appears at every turn to trump

the traditional public interest in opening government further for the people and the press. The third is a deficit-driven, wartime-like federal appropriations process that is not likely to add resources for FOIA administration.

While the Cornyn legislation has been generally praised by all public (nongovernmental) witnesses present at two congressional hearings on FOIA so far this year (Subcommittee on Terrorism, Technology and Homeland Security, 2005; Nichols, 2005), the skepticism of Department of Justice witness at the House hearings does not bode well. Since DOJ has not, in over 40 years, supported legislation intended to strengthen the public's ability to gain access to government information, the intensity of DOJ's opposition will be crucial to the future of S. 394.

Vigorous pursuit of government disclosure of information suited Texas Attorney General Cornyn well. It came with the turf as part of the AG's statutory duty, and Texas water districts, towns, and commissions proved no match for the fearsome Attorney General in his pursuit of open government. Cornyn has again taken up the good fight, but the Senate Judiciary Committee is not the Texas Attorney General's office, and Washington is assuredly not Texas. Nonetheless, the original enactment of the FOIA and subsequent strengthening amendments never came easy, so congressional approval of all or any part of the Cornyn bill should not be expected to either. Cornyn and the bills' supporters make a powerful case for enactment.<sup>7</sup> Perhaps they can get the 109<sup>th</sup> Congress to listen.

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<sup>7</sup> The author counts himself among these supporters (Susman, T. 2005).

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