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READY . . . AIM . . . FOIA! A SURVEY OF THE FREEDOM OF INFORMATION ACT IN THE POST-9/11 UNITED STATES

“I signed this measure with a deep sense of pride that the United States is an open society in which the people’s right to know is cherished and guarded.”¹

—President Lyndon B. Johnson, on signing the Freedom of Information Act into law, July 4, 1966.

In the United States, we take the public and open nature of our government for granted. C-SPAN televises House and Senate debates. The Congressional Record and the Federal Register compile and publicize a plethora of information regarding the Congress and governmental agencies. Among our Constitutional rights is the right to seek redress for our grievances, i.e., the right to complain to our government if we are unhappy.² We also have extensive legislation, commonly known as the Freedom of Information Act (“FOIA”),³ which allows us to request and receive a wide variety of information from government agencies. Common assumptions about the Federal Government lead to the conclusion that governmental secrecy is not a threat to Americans’ privacy rights.

Unfortunately, that assumption is incorrect. In the wake of the attacks of September 11, both the executive and legislative branches instituted policies to protect the nation from further attacks. First, President Bush quickly issued Executive Order 13228, establishing the Office of Homeland Security (“OHS”).⁴ Less than one month after President Bush established the OHS, the Congress enacted the USA Patriot Act, an overarching policy of cooperation between governmental agencies to combat terrorism.⁵ Finally, in November 2002, the Congress passed the Homeland Security Act, codifying the President’s plan to create the Department of Homeland Security (“DHS”), a new, cabinet-level department to deal with terrorism and national security.⁶ The stated purpose of the

¹ H.R. Rep. No. 92-1419 (1972) *reprinted in* FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (P.L. 93-502) SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS AND OTHER DOCUMENTS, 8 (U.S. Government Printing Office 1975)[hereinafter SOURCE BOOK].

² U.S. CONST. amend. I.

³ 5 U.S.C. § 552 (2002).

⁴ Exec. Order No. 13228, 66 Fed.Reg. 51812 (October 8, 2001).

⁵ *See id.*

⁶ Homeland Security Act of 2002, Pub. L. No. 107-296 (Nov. 25, 2002).

OHS, the Patriot Act, and the DHS (in the Homeland Security Act) is to protect the United States from further attacks. Protection from future terrorism is naturally a high priority for the vast majority of Americans. The problem is that the powers of the OHS and DHS are virtually unchecked. In theory, these new entities should be subject to FOIA regulations. The OHS and DHS will undoubtedly create and collect a great deal of information that falls under FOIA's exemptions, since its release could cause a danger to national security. However, the OHS and DHS ought not get a blanket exception for everything they produce. Even the FBI, which also handles sensitive materials, cannot refuse to disclose all information to the public.⁷ Yet, the OHS has thus far refused to cooperate with FOIA requests, making all of its operations completely secret.⁸

Additionally, recent actions by the Department of Justice ("DOJ"), including the interpretation of powers under the Patriot Act, suggest that the Department intends to operate without public oversight.⁹ Given the broad powers of the DHS and its connections to the DOJ and the Patriot Act, allowing the DHS a complete exception to FOIA seriously imperils basic civil liberties. By claiming a complete exception to FOIA, the OHS undermines the governmental openness that Americans take for granted.¹⁰

This Note first gives a brief overview of the Freedom of Information Act, then discusses current governmental policies in the DOJ, including increased powers under the Patriot Act, that exemplify the need for increased governmental openness. This Note also discusses the recent trend in the DOJ to avoid public and congressional oversight. It then applies FOIA to the Office of Homeland Security. Part III also looks at how FOIA applies to the FBI as a case study for FOIA's application to the OHS. This Note then goes on to examine a FOIA exception in the legislation creating the Department of Homeland Security, while also discussing the CIA's use of seemingly minor exemptions to withhold large categories of information, and what effect that practice might have on the DHS's ability to deny FOIA requests. Finally, this Note concludes by arguing that in light of increased governmental powers under post-September 11th legislation, FOIA must remain a vital and important part of United States government regulation, in order to protect citizens from governmental overreaching and excessive secrecy.

⁷ HERBERT N. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT 107 (1999) (stating that "since the passage of the FOIA. . . [the] Congress has repeatedly rejected legislative proposals to exempt intelligence agencies from the FOIA disclosure provisions"). For further discussion of the FBI and FOIA, see discussion *infra*.

⁸ See *Electronic Privacy Information Center v. Office of Homeland Security*, No. 02-620 (D.D.C., filed April, 2002). For more information on the OHS's specific claims as to why a blanket exemption to FOIA should apply, see discussion, *infra*.

⁹ See discussion, *infra*.

¹⁰ 149 Cong. Rec. S3637 (2003) (statement of Sen. Levin) ("The principles of open government and the public's right to know are cornerstones of our democracy. We cannot sacrifice those principles in the name of protecting them").

A BRIEF HISTORY OF FOIA

The Congress enacted FOIA in 1966 to allow the public to gain information about governmental agency operations and to prevent the government from operating under a veil of secrecy.¹¹ Then Attorney General Ramsey Clark, a champion of FOIA, stated, "If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy."¹² FOIA was a sweeping piece of legislation that allowed for the first time the general public "clear access to identifiable agency records without having to state a reason for wanting the information," and placing the burden of proving a reason for withholding such records on the government agency.¹³ FOIA emphasizes broad disclosure¹⁴ with nine exceptions.¹⁵

¹¹ H.R. REP. No. 92-1419 (1972).

¹² *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, pp. iii (U.S. Dep't. of Justice, June 1967), available at <http://www.usdoj.gov/04FOIA/67agmemo.htm>.

¹³ H.R. REP. No. 92-1419 (1972); see also HOWARD ZINN, *TERRORISM AND WAR 74* (Anthony Armove ed., Seven Stories Press 2002) ("The Freedom of Information Act was one of the remarkable gains that came out of the 1960s. It has been tremendously useful for scholars and for citizens who want to find out more about what our government and what our presidents have done.").

¹⁴ *E.P.A. v. Mink*, 410 U.S. 73, 80 (1973) (noting that "without question, the Act is broadly conceived").

¹⁵ 5 U.S.C. § 552 (b) (2002) ("This section does not apply to matters that are- (1)(A) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order; (2) related solely to the internal personnel rules and practices of an agency; (3) specifically exempted from disclosure by statute. . .;(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement information (A) could be reasonably expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local or foreign agency or authority or any private institution which furnished the information on a confidential basis, and in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual; (8) contained in or related to examination, operating, or

Despite the emphasis on disclosure with only narrow exceptions, the 1966 version of FOIA contained several loopholes that allowed government agencies to circumvent compliance with information requests. FOIA contained no time limit for responding to requests, and as a result, many agencies took long periods of time to furnish requested information.¹⁶ Additionally, FOIA failed to prevent agencies from charging fees for items requested through the Act.¹⁷ As a means of restricting information, some agencies charged high costs, effectively limiting FOIA's directive of wide access.¹⁸ In 1973, the Supreme Court held that information marked as classified pursuant to executive order created an automatic FOIA exception, regardless of whether or not the information actually had a national defense or foreign policy purpose.¹⁹ The 1974 FOIA no longer allowed agencies to hide behind time delays, high production costs and blanket classifications of Top Secret. The purpose of the revised FOIA was "to reach the goal of a more efficient, prompt, and full disclosure of information by effecting changes in major areas. . .[including]: Indexes, identifiable records, time limits, attorney fees, court costs, court review, reports to the Congress, and the definition of 'agency'."²⁰ The revised Act thus specifically took into account problems and concerns identified in the 1966 Act. Upon realizing that FOIA's purpose was thwarted, the Congress amended the statute to ensure more government openness.²¹ The Congress's approach in amending and strengthening FOIA evidences a larger Congressional intent to favor open government. The 93rd Congress that revised FOIA viewed the Act as a vital tool in ensuring Federal agencies' accountability to the public. The history and intent behind FOIA are important, because they bolster the argument that free information is an integral part of democracy in the United States. And, given recent comments by current members of Congress, the legislature remains committed to governmental openness.²²

condition reports prepared by, on behalf of, or for the use of, or for the use of an agency responsible for the regulation or supervision or financial institutions; or (9) geological and geophysical information and data, including maps, concerning wells").

¹⁶ H.R. Rep. No. 92-1419 (1972).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *E.P.A. v. Mink*, 410 U.S. at 83-84 (stating that "petitioners have met their burden of demonstrating that the documents were entitled to protection under Exemption 1," simply by showing items were classified as "Top Secret and Secret").

²⁰ H.R. REP. 93-876 (1974), reprinted in SOURCE BOOK, *supra* note 1, at 125.

²¹ 120 CONG. REC. S19806-S19823 (daily ed. Nov. 21, 1974) (Senate Action and Vote on Presidential Veto, statement of Sen. Hart) (noting that "we should remember that these amendments were necessary because the agencies have not made a good faith effort to comply with the act").

²² See *supra* text accompanying notes 16 - 22.

FREE INFORMATION? GOVERNMENTAL POLICY POST-9/11

Although this note focuses specifically on the effects of post-September 11 legislation on the Freedom of Information Act, it is important to examine the overall direction of governmental policies since the 9/11 attacks. Recent legislation and policies, although they may not directly affect FOIA, support arguments for a more open government. And a more open government inevitably includes a strong FOIA.²³

A. *The USA Patriot Act*

The USA Patriot Act, enacted as an immediate response to the September 11 attacks, directly applies to the Justice Department. The Act provides additional powers to the DOJ to conduct investigations of suspected terrorists.²⁴ Part of the overall mandate of the Patriot Act is the same increased information sharing among governmental agencies that colors the Executive Order establishing the Office of Homeland Security,²⁵ decreed less than twenty days prior to the enactment of the Patriot Act.²⁶ Additionally, the Office for Domestic Preparedness, the Domestic Emergency Support Teams, and part of the Immigration and Naturalization Service, all formerly Justice Department agencies, are now incorporated into the Department of Homeland Security by the Patriot Act.²⁷ The President also noted, when signing the Homeland Security Act, that the analysis of information collected by the FBI, which falls under the umbrella of the Department of Justice, would be an integral role of the DHS.²⁸ Finally, any discussion of FOIA is necessarily related

²³ SEE ZINN, *supra* note 13 at 76 (“[President] Bush does not want the American people to know how their government works. . . [If] Bush has his way, we’re not going to learn how governments really function.”).

²⁴ USA Patriot Act, Pub.L. 107-56, § 101, 115 Stat. 276 (2001). The Act’s purposes, as evinced by some of its subheadings include: “Title I-Enhancing Domestic Security Against Terrorism”; “Title II-Enhanced Surveillance Procedures”; “Title V-Removing Obstacles to Investigating Terrorism”; “Title VII-Increased Information Sharing For Critical Infrastructure Protection”; and “Title VIII-Strengthening the Criminal Laws Against Terrorism.”

²⁵ See Exec. Order No. 13228, 66 Fed.Reg. 51812 Sec 3(a): “The Office shall work with executive departments and agencies, State and local governments, and private entities to ensure the adequacy of the national strategy for detecting, preparing for, preventing, protecting against, responding to, and recovering from terrorist threats or attacks within the United States and shall periodically review and coordinate revisions to that strategy as necessary.”

²⁶ Exec. Order No. 13228 was enacted on October 8, 2001, and the USA Patriot Act was enacted on October 26, 2001.

²⁷ DEPARTMENT OF HOMELAND SECURITY, DHS Organization: *DHS Agencies, Who Will Be Part of the New Department?*, available at http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0133.xml, (last visited Jan. 25, 2003).

²⁸ Remarks by the President at the Signing of H.R. 5005 the Homeland Security Act of

to the DOJ, because the Attorney General oversees the FBI's FOIA requests by making a yearly report compiling the number of FOIA requests, appeals of agency determinations, statutes relied upon for agency withholding, the average amount of time requests take, the amount of fees collected and other procedural matters relating to the requests.²⁹

B. *Current FOIA Policy at the Department of Justice*

In the early 1990s, President Clinton and his Attorney General, Janet Reno, announced an "openness initiative" for the Federal Government.³⁰ The initiative stressed the vitality and necessity of FOIA for ensuring the informed citizenry that is "essential to the democratic process."³¹ DOJ policy under Attorney General Reno also created a "presumption of disclosure," encouraging "maximum responsible disclosure."³² However, since President Bush took office, and especially since September 11, 2001, some of the DOJ's conduct has allowed for little public accountability.³³ For example, in October 2001, Attorney General John Ashcroft sent a memorandum to all Federal agencies instructing officials to deny FOIA requests if there is "any sound legal basis" for the denial.³⁴ This directive changed

2002, available at <http://www.whitehouse.gov/news/releases/2002/11/20021125-6.html>, (last visited Jan. 25, 2003) [hereinafter *Remarks*] (stating that "[f]irst, this new department will analyze intelligence information on terror threats collected by the CIA, the FBI, the National Security Agency and others").

²⁹ 5 U.S.C. § 552 (e).

³⁰ FOERSTEL, *supra* note 7 at 165, citing "Administration of Freedom of Information Act," Memo from President Bill Clinton to Heads of Departments and Agencies, Oct. 4, 1993, in WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 29 (Oct. 11, 1993).

³¹ *Id.*

³² GENERAL ACCOUNTING OFFICE, FREEDOM OF INFORMATION ACT: AGENCY VIEWS ON CHANGES RESULTING FROM NEW ADMINISTRATION POLICY, GAO-03-981, Sept. 2003 [hereinafter GAO REPORT]

³³ Daniel Franklin, *Official Secrets*, MOTHER JONES, Jan./Feb. 2003, at 17, quoting statement of Rep. Dan Burton, chairman of the House Committee on Government Reform that "An iron veil is descending over the executive branch"; see also INTERIM REPORT ON FBI OVERSIGHT IN THE 107TH CONGRESS BY THE SENATE JUDICIARY COMMITTEE: FISA IMPLEMENTATION FAILURES, Senators Patrick Leahy, Charles Grassley and Arlen Specter (Feb. 2003), available at http://www.fas.org/irp/congress/2003_rpt/fisa.html (last visited Mar. 28, 2003) [hereinafter INTERIM REPORT] (stating that, "Public scrutiny and debate regarding the actions of governmental agencies as powerful as the DOJ and the FBI are critical to explaining actions to the citizens to whom these agencies are ultimately accountable. In this way, congressional oversight plays a critical role in our democracy").

³⁴ GAO REPORT, *supra* note 32 at 4; Jeffrey Brenner, *What Price Safety?: Closing the Books*, REASON, Vol. 34, Issue 5 (Oct. 1, 2002), available at 2002 WL 5725316, at 1; see also *Freedom of Information Act Training Video is Not Released to Public*, Associated Press (Feb. 13, 2003), available at <http://www.cnn.com/2003/LAW/02/13/secret.video.ap/index.html> (last visited Feb. 13, 2003) [hereinafter *Training Video*] (stating that "A month after the Sept. 11, 2001, terror

the DOJ's policy, in effect since 1993, of only withholding information if its release could cause "foreseeable harm."³⁵ A September, 2003, government study of the policy change surveyed 205 FOIA officers at 25 Federal agencies.³⁶ 31% of the officers said they were less likely to use their discretion to disclose information as a result of the new policies.³⁷

The DOJ's changing attitude toward political protesters is even more disquieting than the change in FOIA policy. Attorney General Ashcroft has proposed FBI domestic surveillance of political organizations, a proposal that some FBI officials criticize as a return to policies discredited in the 1960s, which tarnished the FBI's reputation for many years.³⁸ In late 2003, the national media reported that the FBI had recently been collecting information on antiwar protesters and organizers.³⁹ Although the FBI claims that the information is being used to curb anarchy and extremism, many people, from civil libertarians to members of Congress, have questioned the FBI's motives.⁴⁰

In addition to its FOIA policies, the DOJ has refused to allow congressional oversight of some of its anti-terrorism programs.⁴¹ The Congress intended to condition the DOJ's increased powers under the Patriot Act on enhanced oversight.⁴² Members of the Senate Judiciary Committee specifically noted a desire to avoid a

attacks, Attorney General John Ashcroft directed Federal agencies to "carefully consider" how the release of information under [FOIA] might affect national security and law enforcement.").

³⁵ Brenner, *supra* note 34 at 1-2 (noting that "The impact of the new standard is hard to measure, but watchdog groups worry it has turned foot dragging and noncooperation on FOIA requests into official policy"); *see also Training Video, supra* note 34 (stating that "Experts say responses to freedom of information requests have slowed since then, and more are being denied").

³⁶ GAO REPORT, *supra* note 32, at 10.

³⁷ *Id.*

³⁸ David Corn, *The Fundamental John Ashcroft*, MOTHER JONES, Mar./Apr. 2002, at 39, 42-43 (stating that "Even in the law enforcement community, some argued that Ashcroft was going too far. When he considered a plan to relax restrictions on FBI spying on U.S. religious and political organizations, top Justice and FBI officials criticized the move. The rules, they pointed out, had been imposed after the J. Edgar Hoover era to prevent the kind of domestic surveillance that had given the bureau a bad name"); *see* Part III-D, *infra* for more information on the FBI under J. Edgar Hoover.

³⁹ Eric Lichtblau, *F.B.I. Scrutinizes Antiwar Rallies*, N.Y. TIMES, Nov. 23, 2003, at A1, available at <http://www.nytimes.com> (last visited Nov. 23, 2003); Curt Anderson, *FBI Monitoring of Antiwar Protests Questioned: ACLU, Kennedy Say Efforts Could Imperil Right to Free Speech*, BOSTON GLOBE, Nov. 24, 2003, at A18.

⁴⁰ *Id.*

⁴¹ Adam Clymer, *Justice Dept. Balks at Effort To Study Antiterror Powers*, N.Y. TIMES, Aug. 15, 2002..

⁴² INTERIM REPORT, *supra* note 33 ("We worked together to craft the USA Patriot Act to provide such powers. With those enhanced powers comes an increased potential for abuse and the necessity of enhanced congressional oversight.").

return to past abuses at the FBI as one reason for oversight of new powers.⁴³ Another rationale for congressional oversight is to monitor the DOJ's use of the Patriot Act, to ensure that only suspected terrorists, and not any and all criminals, are investigated and prosecuted under the Act.⁴⁴ Additionally, the Congress included a sunset provision into the Patriot Act: it will expire in 2005 unless the Congress chooses to renew it.⁴⁵ The sunset provision demonstrates a balance between DOJ requests for increased powers, and recognition by the Congress that these powers may not actually be needed in the long run.⁴⁶ Congressional oversight is particularly important in determining whether the Patriot Act will be renewed or abandoned.⁴⁷ However, the DOJ has not complied congressional requests for even basic information.⁴⁸

The House Judiciary Committee, which has the authority to review the DOJ's programs under the Patriot Act, requested information from the DOJ about issues ranging from "roving" surveillance to subpoenas under the Foreign Intelligence Surveillance Act ("FISA").⁴⁹ The DOJ's lack of cooperation with the House Committee was described by one Representative as "yet another shot in this administration's ongoing war against open and accountable government."⁵⁰ The DOJ also ignored a request from the Senate Judiciary Committee for information

⁴³ *Id.* (stating that "Past oversight efforts. . . have exposed abuses by law enforcement agencies such as the FBI. It is no coincidence that these abuses have come after extended periods when the public and the Congress did not diligently monitor the FBI's activities. . . if left unchecked, the immense power wielded by such government agencies can lead them astray").

⁴⁴ Eric Lichtblau, *U.S. Uses Terror Law to Pursue Crimes From Drugs to Swindling*, N.Y. TIMES, Sept. 27, 2003, at A1, available at <http://www.nytimes.com> (last visited Sept. 28, 2003) (stating that "The government is using its expanded authority under the [USA Patriot Act] to investigate suspected drug traffickers, white-collar criminals, blackmailers, child pornographers, money launderers, spies and even corrupt foreign leaders, federal officials said").

⁴⁵ INTERIM REPORT, *supra* note 33 (noting that "In [the USA Patriot Act the] Congress responded to the DOJ's and FBI's demands for increased powers but granted many of those powers only on a temporary basis, making them subject to termination at the end of 2005"); see also Eric Lichtblau, *Republicans Want Terror Law Made Permanent*, N.Y. TIMES, Apr. 9, 2003, at B1, available at <http://www.nytimes.com> (last visited Apr. 9, 2003).

⁴⁶ INTERIM REPORT, *supra* note 33 (stating that, "The 'sunset' . . . reflected the promise that the Congress would conduct vigilant oversight to evaluate the FBI's performance both before and after 9/11. Only in that way could [the] Congress and the public be assured that the DOJ and FBI needed the increased powers in the first place, and were effectively and properly using these new powers to warrant extension of the sunset").

⁴⁷ *Id.*

⁴⁸ *Id.* ("Unfortunately. . . the DOJ and FBI have either delayed answering or refused to answer fully legitimate oversight questions. Such reticence only further underscores the need for continued aggressive congressional oversight").

⁴⁹ Clymer, *supra* note 41.

⁵⁰ *Id.* (quoting Rep. John Conyers).

relating to “topics including the Patriot Act, civil rights and corporate fraud.”⁵¹

The DOJ’s non-compliance caused Senate Judiciary Chairman Patrick Leahy to state, “Since I’ve been here, I have never known an administration that is more difficult to get information from than the oversight committees are entitled to.”⁵² Senator Leahy also noted that Patriot Act requests routinely face a DOJ response of “we will tell you what we want you to know, and we won’t tell you anything else.”⁵³ Another member of the Senate Judiciary Committee, Arlen Specter, even asked the Attorney General directly, “How do we communicate with you and are you really too busy to respond?”⁵⁴ According to Attorney General Ashcroft’s testimony, DOJ’s post-September 11 activities include the creation of a national task force at the FBI “to centralize control and information sharing.”⁵⁵ Ashcroft also spoke of increased powers under the Patriot Act to “begin enhanced information sharing [with] the law-enforcement and intelligence communities” and execute “nationwide search warrants for e-mail.”⁵⁶

C. Recent foia Litigation at the DOJ: The ACLU Case

In August, 2002, several organizations,⁵⁷ including the American Civil Liberties Union (“ACLU”), filed FOIA requests with the DOJ relating to “the government’s implementation of the USA PATRIOT Act.”⁵⁸ The DOJ acknowledged the ACLU’s request, but failed to respond in a timely manner.⁵⁹ In October, 2002, the ACLU filed suit in Federal court requesting an immediate response to its FOIA requests.⁶⁰

⁵¹ *Id.* (noting that “The Senate Judiciary Committee has sent 27 unanswered letters to the department seeking information”).

⁵² *Id.* (quoting Sen. Patrick Leahy); *see also*, INTERIM REPORT, *supra* note 33 (stating that “often legitimate requests went unanswered or the DOJ answers were delayed for so long or were so incomplete that they were of minimal use in the oversight efforts of this Committee”).

⁵³ *Id.* (quoting Sen. Patrick Leahy).

⁵⁴ INTERIM REPORT, *supra* note 33, quoting Sen. Arlen Specter, *citing* HEARING OF THE SENATE JUDICIARY COMMITTEE: OVERSIGHT OF THE DEPARTMENT OF JUSTICE (July 25, 2002).

⁵⁵ Attorney General John Ashcroft, Testimony to Senate Committee on the Judiciary (Dec. 6, 2001), *available at* <http://www.usdoj.gov/ag/testimony/2001/1206transcriptsenatejudiciarycommittee.htm> (last visited Nov. 26, 2002).

⁵⁶ *Id.*

⁵⁷ The complete list of plaintiffs is the ACLU, the Electronic Privacy Information Center, the American Booksellers Foundation for Free Expression, and the Freedom to Read Foundation.

⁵⁸ ACLU v. Dept. of Justice, No. 02-CV-2077(ESH) (D.D.C., filed Oct. 24, 2002) (Complaint for Injunctive Relief), *available at* http://www.epic.org/privacy/terrorism/patriot_foia_complaint.pdf (last visited Apr. 12, 2003).

⁵⁹ *Id.*

⁶⁰ *Id.*; *see discussion, infra* for a discussion of the mechanics of lawsuits under FOIA.

In its complaint, the ACLU makes clear that its request does not cover any information related to specific cases or warrants sought by the FBI.⁶¹ Rather, the ACLU “sought aggregate, statistical data and other policy-level information.”⁶² The DOJ eventually released some records, but claimed that others were exempt from disclosure.⁶³ The ACLU relented on some documents,⁶⁴ but continues to “challenge the withholding only of those records that are critical to the public’s ability to understand the import of new surveillance authorities.”⁶⁵ The case is a further example of the DOJ’s current policy of noncompliance with FOIA. Like the Congress’s requests, the ACLU’s requests involve information that should legitimately be made available to the public.⁶⁶

D. *The Foreign Intelligence Surveillance Court*

The DOJ’s recent policies of noncompliance with FOIA requests and congressional oversight are particularly problematic in light of the Department’s increased surveillance powers under the USA Patriot Act. In November, 2002, a special appellate panel of the Foreign Intelligence Surveillance Court (“FISC”), which reviews DOJ requests for wiretaps, interpreted the Patriot Act to give the Department significantly broader surveillance powers.⁶⁷

⁶¹ Memorandum in Support of Plaintiffs’ Cross-Motion for Summary Judgment and Opposition to Defendant’s Motion for Summary Judgment at 6, *ACLU v. Dept. of Justice*, No. 02-2077 (ESH) (D.D.C. May 19, 2003) (available at <http://www.dcd.uscourts.gov/02-2077.pdf>), available at <http://www.epic.org/privacy/terrorism/usapatriot/FOIA/sj-memo.pdf> (last visited Apr. 12, 2003) (also stating that, “The request did *not* seek the release of records pertaining to particular terrorism or criminal investigations. Nor did it seek the release of other information that could plausibly jeopardize national security or any other government interest”).

⁶² *Id.*

⁶³ *Id.* at 2, 7 (stating that “Defendant. . . did not complete the processing of Plaintiffs’ request until March 3 [2003]”).

⁶⁴ *Id.* at 8 (stating that “Plaintiffs have made every reasonable effort to narrow the scope of this litigation. . . they have completely removed from dispute all materials withheld under [FOIA] Exemptions 2, 6 and 7. . . [and] substantial portions of the material withheld under Exemptions 1 and 5”); see FOIA’s nine exemptions, note 63, *infra*.

⁶⁵ *Id.* at 8, 3. In support of their request, the ACLU also cites to the Senate Judiciary Committee INTERIM REPORT. The ACLU also voices concerns similar to those voiced in the Interim Report, namely that “the Patriot Act’s surveillance provisions effect a dramatic expansion of the government’s ability clandestinely to monitor people living in the United States, including citizens who are not suspected of contravening any law or acting on behalf of a foreign power.” Like the authors of the INTERIM REPORT, the ACLU argues that this type of increased power necessitates meaningful public and Congressional oversight.

⁶⁶ *Id.* at 16. (stating that withheld items include “documents [that] provide information *in the most general possible terms* indicating the extent to which the FBI relied on particular surveillance tools *in the past*. It is implausible that the public disclosure of the withheld documents could jeopardize national security”).

⁶⁷ In re Sealed Case No. 02-001, slip op. (Foreign Intelligence Surveillance Court of

Prior to the Patriot Act, the Department had to keep its criminal investigations and foreign intelligence operations separate.⁶⁸ The Foreign Intelligence Surveillance Act (“FISA”) governed foreign intelligence surveillance, while a different statute governed wiretaps in ordinary criminal cases.⁶⁹ FISA allowed government surveillance only if “the purpose” was the gathering of foreign intelligence, while domestic criminal wiretaps were subject to the probable cause and warrant requirements of the Fourth Amendment.⁷⁰ The Patriot Act amended the language of FISA to allow surveillance if “a significant purpose” is the gathering of foreign intelligence.⁷¹ The DOJ has argued that the alteration, coupled with the Patriot Act’s overarching policy of governmental coordination and information sharing, now means that FISA surveillance also applies to criminal investigations.⁷²

Initially, the FISC ruled against the DOJ’s interpretation, holding that FISA only applies to foreign surveillance, and that wiretaps for the purpose of criminal investigation must still be separate from foreign intelligence gathering. An appellate panel of three judges specially appointed by United States Chief Justice Rehnquist, held, after a secret, *ex parte* hearing, that the DOJ’s interpretation was the correct one.⁷³ Thus, the government is now able to conduct wiretaps for the purpose of criminal investigation or foreign surveillance without meeting the Fourth Amendment’s probable cause standard.⁷⁴

Notwithstanding arguments to the contrary,⁷⁵ even if the FISC ruling is correct, it

Review, Nov. 18, 2002), available at <http://www.cadc.uscourts.gov/common/newsroom/02-001.pdf> (last visited Apr. 12, 2003).

⁶⁸ Need cite for this

⁶⁹ Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 *et seq.*

⁷⁰ Omnibus Crime Control and Safe Streets Act of 1968, Title III, 18 U.S.C. § 2510 *et seq.*; U.S. CONST. amend. IV (stating that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized”).

⁷¹ USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001).

⁷² *In re Sealed Case No. 02-001*, slip op.

⁷³ *Id.* at 47 (holding that “FISA’s general programmatic purpose, to protect the nation against terrorists and espionage threats directed by foreign powers, has from its outset been distinguishable from “ordinary crime control.” After the events of September 11, 2001, though, it is hard to imagine greater emergencies facing Americans than those experienced on that date”).

⁷⁴ *Id.* at 47-48 (concluding that although the constitutional question presented “has no definitive jurisprudential answer, . . . we think the procedures and government showings required under FISA, if they do not meet the minimum Fourth Amendment warrant standards, certainly come close. We, therefore, believe . . . that FISA as amended is constitutional because the surveillances it authorizes are reasonable.”).

⁷⁵ See Brief of *amici curiae* American Civil Liberties Union *et al.* at 37, Foreign Intelligence Surveillance Court of Review, No. 02-001 (Sept. 19, 2002), available at <http://news.findlaw.com/hdocs/docs/terrorism/fisaapp091902amicus.pdf> (last visited Nov. 19, 2002) (stating that “[t]he notion that a search or surveillance may be justified simply because the government invokes the rubric of ‘national security’ flies in the face of the most basic principles of American constitutional democracy”).

has serious implications for the privacy of Americans and for open government.⁷⁶ The FISC conceded that the DOJ had not met the requirements of the Fourth Amendment, but had “come close.”⁷⁷ If the Patriot Act is going to be interpreted in such a way as to allow the DOJ to conduct possibly unconstitutional searches under the guise of national security, it should at least be prevented from operating under a veil of secrecy.⁷⁸ For this reason, the visibility and strength of FOIA are imperative.

THE OFFICE OF HOMELAND SECURITY AND FOIA

Less than one month after the attacks of September 11, 2001, President Bush issued Executive Order 13228.⁷⁹ The Order establishes the Office of Homeland Security, the function of which is to “coordinate the executive branch’s efforts to detect, prepare for, prevent, protect against, respond to, and recover from terrorist attacks within the United States.”⁸⁰ Under the Order, the OHS has broad responsibilities, including the collection of intelligence, detection of future terrorism in America and abroad, and coordination of any response to terrorism attacks among Federal, state, and local government authorities.⁸¹ Executive Order 13228 also establishes a “Homeland Security Council” (“Council”) comprised of the President, Vice President, and various cabinet-level officials.⁸² The Council “shall serve as the mechanism for . . . effective development and implementation of homeland security policies,” in addition to advising and assisting the President.⁸³ Finally, the President stated in the executive order, “I hereby delegate the authority to classify information originally as Top Secret. . . to the Assistant to the President for Homeland Security.”⁸⁴

⁷⁶ INTERIM REPORT, *supra* note 33 (stating that “As the recent litigation before the FISA Court of Review demonstrated, oversight also bears directly on the protection of important civil liberties”).

⁷⁷ *In re Sealed Case* No. 02-001, slip opinion at 48.

⁷⁸ See INTERIM REPORT, *supra* n. 33 (“The Congress and the American people deserve to know what their government is doing. Certainly, the [DOJ] should not expect [the] Congress to be a “rubber stamp” on its requests for new or expanded powers if requests for information about how the Department has handled its existing powers have been either ignored or summarily paid lip service”).

⁷⁹ Exec. Order No. 13228, 66 Fed.Reg. 51812 (Oct. 8, 2001).

⁸⁰ *Id.* at § 3.

⁸¹ *Id.*

⁸² *Id.* at § 5(b). The Council is comprised of “the President, the Vice President, the Secretary of the Treasury, the Secretary of Defense, the Attorney General, the Secretary of Health and Human Services, the Secretary of Transportation, the Director of the Federal Emergency Management Agency, the Director of the Federal Bureau of Investigation, the Director of Central Intelligence, the Assistant to the President for Homeland Security,” and other members who the President may designate. Other cabinet-level officials “shall be invited to attend Council meetings pertaining to their responsibilities.”

⁸³ *Id.* at § 5(a).

⁸⁴ Exec. Order No. 13228, 66 Fed.Reg. 51812 at § 6.

A. *Top Secret Classifications*

President Eisenhower created the label “Top Secret” in 1953.⁸⁵ The purpose of the “Top Secret” classification, according to Eisenhower’s Executive Order 10502, is to prevent disclosure of information “which could result in exceptionally grave damage to the Nation”.⁸⁶ The label is only appropriate for “defense information or material which requires the highest degree of protection.”⁸⁷ The preamble of Eisenhower’s order emphasizes a balance between an informed citizenry and the reality that some information needs protection from disclosure.⁸⁸ Thus, even the architect of the “Top Secret” classification conceived of some restraint on the government’s ability to maintain secrecy, and recognized the importance of public openness. In terms of FOIA, the Congress re-visited the issue of “Top Secret” classification when it amended the Act in 1974, singling out blatant governmental over-classification as one reason for strengthening FOIA.⁸⁹

The OHS, as an entity that will undoubtedly deal with sensitive information relating to national security, is the type of agency that is likely to use the “Top Secret” classification frequently. However, given past abuses of the “Top Secret” label, and especially in light of Congressional concern with the classification when amending FOIA, the OHS’s authority to use the label must be carefully scrutinized. One of the most effective ways to allow public and legislative oversight of an agency like the OHS is through FOIA. Therefore, the authority to classify documents as “Top Secret” pursuant to executive order is a significant reason why rigorous application of the FOIA to the OHS is imperative.

B. *Requests for Information and Suits Under FOIA*

FOIA mandates that agencies publish in the Federal Register the procedure for filing a FOIA request.⁹⁰ The types of information available “for public inspection and copying” are numerous and include final opinions made by an agency, statements of policy, administrative staff manuals that affect the public, and any documents made available to others pursuant to the Act which the agency

⁸⁵ Exec. Order No. 10501, 18 Fed.Reg. 7049 (Nov. 5, 1953).

⁸⁶ *Id.* at § 1(a).

⁸⁷ *Id.*

⁸⁸ *Id.* at preamble (stating that “WHEREAS it is essential that the citizens of the United States be informed concerning the activities of their government; and. . .WHEREAS it is essential that certain official information affecting the national defense be protected uniformly against unauthorized disclosure”).

⁸⁹ 120 CONG. REC. 36, 874 (Senate Action and Vote on Presidential Veto, statement of Sen. Baker)(stating that “I reviewed literally hundreds of Watergate-related documents that had been classified ‘secret’ or ‘top secret’. . .It is my opinion that at least 95 percent of these documents should not have been classified in the first place . . . In short, recent experience indicates that the Federal Government exhibits a proclivity for overclassification of information”).

⁹⁰ 5 U.S.C. § 552(a)(1).

“determines have become or are likely to become the subject of subsequent requests for substantially the same records.”⁹¹ Fees for obtaining information are “limited to reasonable standard charges” for search, duplication and review if the information request is for commercial purposes; the cost of search and duplication if the request is non-commercial, non-educational and non-journalistic; or the cost of duplication only, if the request is for educational or journalistic purposes.⁹² Additionally, agencies must respond to requests within twenty business days.⁹³ Finally, FOIA creates a private right of action against any covered agency that refuses or otherwise fails to comply with requests for information.⁹⁴ The right of action provision is extremely important to the enforcement of FOIA, because it gives anyone who requests information the right to hold governmental agencies accountable under the Act.⁹⁵

In suits under FOIA, a noncompliant agency has the burden of proving an exemption to the disclosure requirement.⁹⁶ The revised Act also makes clear that reviewing courts must review decisions *de novo*, and may examine allegedly exempt materials *in camera* to determine whether partial or total non-disclosure is justified.⁹⁷

President Ford vetoed the 1974 amendments to FOIA, in part out of a concern that they would require too much disclosure of sensitive materials. Specifically, Ford was afraid that the revisions, which called for *in camera* review of classified information, would expose national security and intelligence information.⁹⁸ The Congress considered and debated the national security and foreign policy exemptions at length prior to revising FOIA, and again after the President’s veto. The Congress concluded that the point of allowing *in camera* review was to curb some of the past problems with the Act, namely the tendency of governmental

⁹¹ *Id.* § 552(a)(2).

⁹² *Id.* § 552 (a)(4)(A)(ii).

⁹³ *Id.* § 552 (a)(6)(A)(i).

⁹⁴ *Id.* § 552 (a)(4)(B).

⁹⁵ See *Renegotiation Bd. v. Bannerkraft Clothing Co., Inc.*, 415 U.S. 1, 30 (1974)(Douglas, J., dissenting) (noting that the “Congress was concerned not only with the press and the general public when it lifted the veil of secrecy surrounding federal agencies but also with litigants”).

⁹⁶ *John Doe Agency v. John Doe Corporation*, 493 U.S. 146, 160 (1989), quoting 5 U.S.C. § 552(a)(4)(B) (Stevens, J., dissenting) (stating that “The Court has repeatedly emphasized, what is explicit in the terms of FOIA, that “the burden is on the agency to sustain its action”); see also, *supra* note 15, describing the nine FOIA exemptions.

⁹⁷ *Id.* § 552 (a)(4)(B).

⁹⁸ 120 CONG. REC. S17828-S17830, S17971-S17972, (daily ed. Oct. 1, 1974) (Section Action on Conference Report, Exhibit 1 Letter from President Gerald Ford to Senator Edward Kennedy and Representative William Moorhead) (stating that “I simply cannot accept a provision that would risk exposure of our military or intelligence secrets and diplomatic relations because of a judicially perceived failure to satisfy a burden of proof. . . I can support [the Act] so long as the means selected do not jeopardize our national security interests”).

agencies to over-classify documents. Statements of congressional architects of the FOIA revisions clearly note that part of the reason for the amendments was to rectify egregious abuses of national security classifications during the Nixon Administration.⁹⁹ Additionally, the Congress expressly intended to overrule *E.P.A. v. Mink* so far as it disallowed *in camera* review of documents.¹⁰⁰ Keeping with the spirit of congressional intent, reviewing courts interpret FOIA broadly.¹⁰¹

C. *The EPIC Suit*

Despite FOIA's history of openness and broadly interpreted disclosure provisions, the OHS refuses to release information through the Act. The Electronic Privacy Information Center ("EPIC"), a non-profit, public interest research organization, recently filed a FOIA lawsuit against the OHS.¹⁰² The suit challenges the OHS's failure to respond to EPIC's FOIA request, which asked for "all records relating to efforts to standardize driver's licenses across the country" and "all records associated with. . . proposals being considered by the Office that rely on biometric technology to identify citizens and visitors to America."¹⁰³ The executive order that created the OHS mentions "efforts to ensure that all executive departments and

⁹⁹ 120 CONG. REC. S19806-S19823 (daily ed. Nov. 21, 1974) (Senate Action and Vote on Presidential Veto, statement of Sen. Kennedy) (noting that "This national security argument should be placed in its proper perspective. John Erlichman gave us a clue to how the executive branch views national security when he told President Nixon. . . 'I would put the national security tent over this whole operation.' . . . The White House taped conversation of April 17, 1973 has the President summing up the Watergate cover-up thusly: 'It is a national security-national security area-and that is a national security problem.'"); *see also* (statement of Sen. Muskie) (noting that the revision of FOIA "[W]as a response as well to mounting evidence, more recently confirmed in the tapes of Presidential conversations, that national security reasons were deliberately used to block investigations of White House involvement in Watergate").

¹⁰⁰ H.R. CONF. REP. NO. 93-1380 (1974) (noting that ". . . this clarifies Congressional intent to override the Supreme Court's holding in the case of *EPA v. Mink*. . . with respect to *in camera* review of classified documents"). *See also* 120 CONG. REC. H10864-10875 (daily ed. November 20, 1974) (House Action and Vote on Presidential Veto, statement of Rep. Moorhead) (stating that, "I find it totally unrealistic to assume. . . that the Federal judiciary system is somehow not to be trusted to act in the public interest to safeguard truly legitimate national defense or foreign policy secrets of our Government").

¹⁰¹ *Dept. of the Air Force v. Rose*, 425 U.S. 352, 360-361 (1976) (noting that the "Congress therefore structured a revision whose basic purpose reflected 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language'", and additionally, "these limited exceptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act"); *Renegotiation Bd.*, 415 U.S. at 19 (stating that FOIA contains "broad language. . . with [an] obvious emphasis on disclosure and with its exemptions carefully delineated as exemptions").

¹⁰² *Electronic Privacy Information Center v. Office of Homeland Security*, No. 02-620 (D.D.C., filed April, 2002).

¹⁰³ *Id.*

agencies. . . have sufficient technological capabilities and resources to collect intelligence and data relating to terrorist activities,"¹⁰⁴ and news reports relating to the OHS have mentioned the possibility of implementing national standards for driver's licenses.¹⁰⁵

The OHS has not presented any convincing arguments as to why it should be completely exempt from FOIA. In its motion to dismiss EPIC's suit, the OHS claimed that it is not an agency for the purposes of FOIA, making it exempt from FOIA requests.¹⁰⁶ The crux of the OHS's argument is that its role is simply to advise the President.¹⁰⁷ However, this contention is not in line with FOIA's definition of "agency." Since the 1974 FOIA revisions, the definition of "agency" is "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," excluding the Congress, Federal courts, governments of U.S. territories and possessions and the government of the District of Columbia.¹⁰⁸ The Supreme Court interprets "agency" broadly, and holds that information subject to disclosure "covers virtually all information not specifically exempted by § 552(b)."¹⁰⁹ Under both the plain language of the statute, and the Supreme Court's interpretation of "agency," the OHS's claim that FOIA does not apply to it is untenable.

In a memorandum opinion, the District Court for the District of Columbia denied OHS's motion to dismiss and alternative motion for summary judgment, and granted EPIC's motion requesting discovery.¹¹⁰ In affirming EPIC's contention that discovery is necessary to establish whether the OHS is an agency, the court enumerated a three-part test for "determining whether those who both advise the President and supervise others in the Executive Branch exercise 'substantial independent authority' and hence should be deemed an agency subject to the FOIA."¹¹¹ Reviewing courts should look at (1) "how close operationally the group is to the President," (2) whether the group has "a self-contained structure," and (3)

¹⁰⁴ Exec. Order No. 13228, 66 F.R. 51812 (October 8, 2001).

¹⁰⁵ See Elizabeth Becker, *Traces of Terror: Security and Liberty; Yeas and Nays for Bush's Security Wish List*, N.Y. TIMES, July 17, 2002, available at <http://www.nytimes.com> (last visited Nov. 11, 2002) (stating that "Conservative and civil rights groups took issue with the proposal to create national standards for driver's licenses, saying this was a backhanded effort to impose national identification cards").

¹⁰⁶ *Electronic Privacy Information Center v. Office of Homeland Security*, No. 02-620 (Memorandum Opinion).

¹⁰⁷ *Id.*

¹⁰⁸ 5 U.S.C. § 551(1) (2002).

¹⁰⁹ See *Renegotiation Bd.*, 415 U.S. at 12.

¹¹⁰ *Id.* at 12 (concluding that "Defendant's citation to Executive Order 13228 and the Homeland Security Presidential Directives clearly suggest that OHS operates only to assist and advise the President; it does not, however, provide definitive proof that OHS is not an agency. Furthermore, Plaintiff has shown that its request for discovery is necessary and relevant").

¹¹¹ *Id.* at 7, quoting *Armstrong v. Executive Office of the President*, 90 F.3d 553, 558 (D.C. Cir. 1996).

“the nature of [the group’s] delegated authority.”¹¹² Ultimately, the test comes down to the generality of the group’s goal: “the more general the goal the greater the likelihood that the responsible entity is vested with some element of discretion and is not just advising or assisting the President.”¹¹³ Given the generality of OHS’s mission and its ability to do what is “necessary” to carry out its mission, the OHS should meet the court’s test for being an agency subject to FOIA.¹¹⁴

The district court reviewing the EPIC case did not actually apply the three-factor generality test to the OHS. Instead, the court noted that OHS failed to provide evidence that it is not an agency subject to FOIA. In any FOIA action, the agency (or entity) in question may submit an affidavit in support of its position, which the reviewing court weighs heavily.¹¹⁵ Given the weight placed on agency affidavits, “an affidavit addressing the scope of OHS’s independent authority would be strong evidence in favor of the Defendant’s position.”¹¹⁶ The OHS failed to submit an affidavit, instead choosing to rely on public documents, including Executive Order 13228, which allegedly demonstrates that OHS’s sole purpose is to advise the President. Yet the court noted that “none of these documents foreclose the possibility that OHS has acted with independent authority in other, undocumented instances.”¹¹⁷ In light of the fact that any evidence proving OHS’s status as an agency under FOIA is in OHS’s possession, the court held that EPIC must have the opportunity to request and receive discovery.¹¹⁸

D. FOIA’s Application to the FBI

Part of the reason that the OHS refuses to process FOIA requests lies in the type of information that OHS produces. Given the “Top Secret” classification authority in Executive Order 13228, the OHS clearly sees itself as dealing, at least in part, with national security. However, the argument that production of national security information somehow creates a blanket exception to FOIA for OHS is untenable. The fact that FOIA has routinely been applied to the FBI belies this argument.

The FBI has a long history of trying to circumvent FOIA. In the 1960s, FBI

¹¹² *Id.*, citing *Meyer v. Bush*, 981 F.2d 1288, 1293 (D.C. Cir. 1993).

¹¹³ *Id.* at 8, quoting *Armstrong*, 90 F.3d at 565.

¹¹⁴ See Exec. Order No. 13228, §2., 66 Fed.Reg. 51812 (Oct. 8, 2001) (stating that “The mission of the Office shall be to develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks. The Office shall perform the functions necessary to carry out this mission. . .”).

¹¹⁵ *Safecard Services, Inc. v. Securities and Exchange Commission*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)(stating that, “Agency affidavits are accorded a presumption of good faith”)

¹¹⁶ *Electronic Privacy Information Center v. Office of Homeland Security*, No. 02-620, at 10 (Memorandum Opinion).

¹¹⁷ *Id.* at 10 (noting that “OHS’s charter document provides the Office, at least on paper, with the authority to do whatever is ‘necessary’ to meet its mission. The fact that Defendants can point to instances where OHS has acted ‘solely to advise and assist the President’ does not mean that OHS acts only in that capacity”).

¹¹⁸ *Id.* at 10-11.

officials, under Director J. Edgar Hoover, urged the Congress to write the national security and law enforcement exemptions into FOIA. Following enactment, the FBI continued to urge the Justice Department "to rule that all FBI records remained exempt from disclosure."¹¹⁹ Thus, "until 1974 research pertaining to the FBI was effectively foreclosed."¹²⁰

In light of the various problems and obstacles to free information under the original 1966 FOIA, the Congress significantly amended and enlarged FOIA in 1974. The amendments, in part, came out of the Watergate scandal and the subsequent public pressure to deal with governmental secrecy.¹²¹ However, the discovery, following the death of J. Edgar Hoover in 1971, that the FBI had been employing a wide variety of illegal and unscrupulous practices for many years, largely motivated the amendments and exposed the need for greater public scrutiny and congressional oversight of the Bureau.¹²²

Since the 1974 amendments to FOIA, government agencies have not been permitted completely to circumvent the public request and receipt of information. Following the amendments, even the FBI could no longer refuse to disclose all information. After the exposure and discrediting of FBI practices under Hoover, the general sentiment among both the public and the Congress was that unchecked and unlimited secrecy facilitated the government's infringement on citizens' rights.¹²³ Currently, FOIA subjects the FBI to the same rules as other government agencies,

¹¹⁹ Athan G. Theoharis, *The Freedom of Information Act Versus the FBI*, in A CULTURE OF SECRECY THE GOVERNMENT VERSUS THE PEOPLE'S RIGHT TO KNOW 16, 23 (Athan G. Theoharis ed., 1998) (citing various declassified memoranda between FBI officials, and from FBI officials to the Attorney General).

¹²⁰ *Id.* at 16.

¹²¹ GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 9 (Robert F. Bouchard & Justin D. Franklin, eds., 1980).

¹²² Theoharis, *supra* note 119, at 16-17. "Released FBI records confirm that the FBI monitored prominent Americans (as well as radical activists), collected derogatory personal and political information (and misinformation) about them, promoted or attempted to subvert their careers and personal interests, or recruited them as informers. The subjects ranged from social reformers (Eleanor Roosevelt, Margaret Sanger), presidential candidates (Adlai Stevenson, Thomas Dewey), businessmen (John D. Rockefeller III, Joseph Kennedy), Supreme Court justices (Potter Stewart, Earl Warren, Abe Fortas), reporters and columnists (Harrison Salisbury, Joseph Alsop, Drew Pearson, Don Whitehead, Courtney Ryley Cooper), actors and produces (Walt Disney, Frank Capra, Ronald Reagan, Orson Welles, Frank Sinatra, Rock Hudson), composers (Leonard Bernstein, Aaron Copland), and university officials and professors (James Conant, David Owens, Franz Boaz, Henry Kissinger, Harry Fisher)."; See also 120 CONG. REC. S19806-S19823 (daily ed. Nov. 21, 1974) (Senate Action and Vote on Presidential Veto, statement of Sen. Hart)(stating that in an ACLU study of FBI responses to requests for historical information, "The ACLU concludes that the FBI's historical records policy has been a dismal failure. In case after case, significant historical research has been curtailed by administrative restrictions which often seem arbitrary and unnecessary.").

¹²³ See Corn, *supra* note 32.

including the burden of proving non-disclosure when challenged in court, with one exception:

[If a request is made for FBI records] pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.¹²⁴

Thus, FOIA attempts to strike a balance between the public's right to know, which is a check on governmental power, and the government's interest in protecting national security.¹²⁵ FOIA does not give the FBI the right to exempt all materials, only those that are classified and pertain to the limited bounds of foreign intelligence/counterintelligence and international terrorism.¹²⁶ However, other information generated by the FBI is subject to FOIA's disclosure requirements, and by the Bureau's own estimate, the FBI has handled "over 300,000" FOIA requests in the past twenty years.¹²⁷

The OHS and DHS will undoubtedly handle sensitive materials. As Executive Order 13228 states, the entire purpose of the OHS is to coordinate the executive branch's response to terrorism, which includes the collection and handling of secret information.¹²⁸ These sentiments are echoed in the statute setting up the DHS. However, like the FBI, not everything the OHS or DHS does is sensitive. No government agency only generates materials that need shelter from public scrutiny. Yet that is exactly what Executive Order 13228's authority to classify information will do. There is nothing suspect about presidential authority to classify information as "Top Secret" pursuant to Executive Order. However, OHS's refusal to release any information through FOIA threatens governmental openness and accountability.

THE DEPARTMENT OF HOMELAND SECURITY AND FOIA

The OHS was merely the preliminary piece of a larger plan to form a new, cabinet-level department dedicated to securing the United States from terrorist

¹²⁴ 5 U.S.C. § 552 (c)(B)(3).

¹²⁵ John Doe Agency, 493 U.S. at 157 (stating that "[t]his Court consistently has taken a practical approach when it has been confronted with an issue of interpretation of the Act. It has endeavored to apply a workable balance between the interests of the public in greater access to information and the needs of the Government to protect certain kinds of information from disclosure").

¹²⁶ 5 U.S.C. § 552.

¹²⁷ FEDERAL BUREAU OF INVESTIGATION, Freedom of Information Act, *available at* <http://www.FOIA.fbi.gov/> (last visited Nov. 15, 2002) (stating that "[i]n the last twenty plus years, the FBI has handled over 300,000 requests and over six million pages of FBI documents have been released to the public in paper format").

¹²⁸ Exec. Order No. 13228, 66 Fed.Reg. 51812 (October 8, 2001).

attacks.¹²⁹ After more than a year of debate, the Congress passed the Homeland Security Act of 2002.¹³⁰ That Act created the Department of Homeland Security, which would continue the objectives of the OHS, albeit on a much larger scale.¹³¹ With the creation of the DHS, the OHS is relegated to a less central position in the administration, although it continues to exist within the Executive Office of the President.¹³²

The DHS involves a sweeping overhaul of the Federal Government.¹³³ At its center, the DHS coordinates and combines “22 previously disparate domestic agencies.”¹³⁴ The Department takes Federal agencies formerly administered by other Cabinet-level departments, such as Treasury, Justice, Energy, Defense and Transportation, and places them under a single umbrella.¹³⁵ The underlying purpose of the restructuring is to streamline the fight against terrorism.¹³⁶ After September 11th, allegations surfaced that poor coordination and a lack of information sharing among governmental agencies were partially responsible for the attacks.¹³⁷ The rationale behind creating the DHS is that combining agencies responsible for border control and immigration, emergency preparedness and intelligence analysis will result in better protection against possible future attacks.¹³⁸

A. *Critical Infrastructure Information: A New FOIA Exemption*

In order to carry out the goals of the DHS, information sharing is a major piece of the Homeland Security Act. The Act lays out guidelines for information sharing

¹²⁹ *See id.*

¹³⁰ Homeland Security Act of 2002, Pub. L. No. 107-296 (November 25, 2002).

¹³¹ *Id.*

¹³² *See* <http://www.whitehouse.gov/homeland> (last visited Apr. 12, 2003).

¹³³ *Id.*

¹³⁴ DEPARTMENT OF HOMELAND SECURITY, *DHS Organization: Building a Secure Homeland*, available at http://www.dhs.gov/dhspublic/theme_homel.jsp, (last visited Jan. 25, 2003).

¹³⁵ DEPARTMENT OF HOMELAND SECURITY, *DHS Organization: DHS Agencies, Who Will Be Part of the New Department?*, *supra* note 27.

¹³⁶ *See* Remarks, *supra* note 28.

¹³⁷ Neil A. Lewis, *Traces of Terror: The Overview; F.B.I. Chief Admits 9/11 Might Have Been Detectable*, N.Y. TIMES, (May 30, 2002), available at <http://www.nytimes.com> (last visited Mar. 7, 2003) (stating that “The director of the F.B.I., Robert S. Mueller III, acknowledged today for the first time that the attacks of Sept. 11 might have been preventable if officials in his agency had responded differently to all the pieces of information that were available”).

¹³⁸ Remarks, *supra* note 28 (stating that “Dozens of agencies charged with homeland security will now be located within one Cabinet department with the mandate and legal authority to protect our people. America will be better able to respond to any future attacks, to reduce our vulnerability and, most important, prevent the terrorists from taking innocent American lives”).

among agencies, and for the protection of submitted information. In a section entitled “Protection of Voluntarily Shared Critical Infrastructure Information,” the Act states:

Notwithstanding any other provision of law, critical infrastructure information . . . that is voluntarily submitted to a covered Federal agency for use by that agency regarding the security of critical infrastructure and protected systems, analysis, warning, interdependency study, recovery, reconstitution or other informational purpose, when accompanied by an express statement specified in paragraph (2) . . . shall be exempt from disclosure under section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act).¹³⁹

This section of the Homeland Security Act does not purport to create a blanket exception to FOIA. Rather, under the Act, any ‘critical infrastructure information’ submitted to the DHS marked with the words “This information is voluntarily submitted to the Federal Government in expectation of protection from disclosure as provided by the Critical Infrastructure Information Act of 2002” is automatically exempt from FOIA.¹⁴⁰

The critical infrastructure information exception to FOIA sounds narrow and the exemption is permissive, dependent upon a written label of exemption. However, because the exception is not clearly defined, it can be misused by companies and the government to withhold large amounts of information.¹⁴¹ Additionally, the type of information the critical infrastructure exemption purports to exclude is already covered by FOIA’s national security, confidential commercial information, and law enforcement exemptions.¹⁴² Because the sweep of the new exemption is so broad, it “effectively allows companies to hide information about public health and safety from American Citizens [sic] simply by submitting it to the DHS.”¹⁴³ Given the effectiveness of the exemptions already written into FOIA, there is no need to add such an amorphous and potentially crippling new exception.

¹³⁹ Homeland Security Act of 2002, Pub. L. No. 107-296, Title II §214(a)(1)(A), 116 Stat. 2135, 2152 (emphasis added).

¹⁴⁰ *Id.* §214 (a)(2).

¹⁴¹ *Testimony on the President’s Proposal for a Homeland Security Department, “The Homeland Security Act of 2002” Before the Senate Comm. on the Judiciary, 107th Cong. (2002)* (statement of Timothy H. Edgar, Legislative Counsel, American Civil Liberties Union), available at <http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=10473&c=111> (testified June 25-28, 2002) (stating that the critical infrastructure exemption “hobbles FOIA” and that because “terms are not defined by the proposed legislation,” they could “potentially cover a host of information”).

¹⁴² 5 U.S.C. § 552 (b)(1), (4), (7).

¹⁴³ 149 CONG.REC. S3632 (2003) (statement of Sen. Leahy); see also *Fix This Loophole*, WASH. POST, Feb. 10, 2003, at A20 (“But the law defines ‘information’ so broadly that it will cover, and thus keep secret, virtually anything a company decides to fork over. A company might preempt environmental regulators by ‘voluntarily’ divulging incriminating material, thereby making it unavailable to anyone else”).

The case of the CIA's response to FOIA demonstrates that simple exceptions like the critical infrastructure exemption can turn into broad categories of non-disclosure if the agency involved is particularly resistant to public openness. The Congress clearly intended that FOIA apply to the CIA.¹⁴⁴ Yet, since the CIA convinced the Congress to pass the CIA Information Act, the agency has escaped virtually all FOIA requests.¹⁴⁵ The Act expressly exempts CIA files labeled "operational."¹⁴⁶ The Congress meant the restriction of operational files from FOIA disclosure to be a small exception, which CIA officials argued would actually facilitate the processing of more FOIA requests by freeing up the time of the Agency's FOIA staff members.¹⁴⁷ However, since the passage of the CIA Information Act, the agency has used the small exception to place large amounts of material outside of FOIA's reach.¹⁴⁸

Also aiding the CIA's non-disclosure policies is the reluctance of the Federal courts to question the Agency's claimed exemptions to FOIA.¹⁴⁹ Since the early 1980s, the CIA has taken advantage of the "*Glomar* response,"¹⁵⁰ or a refusal to confirm or deny the existence of records requested under FOIA. Federal courts almost always accept the *Glomar* response, and the CIA exploits it so often that the Ninth Circuit noted it has become "a near-blanket FOIA exemption."¹⁵¹

The CIA's success at circumventing FOIA through an allegedly narrow exemption illuminates the ease with which an agency dealing with national security can avoid disclosing any information. The DHS is not the CIA, but the missions of the two are similar.¹⁵² Both have national security concerns, and both deal with intelligence

¹⁴⁴ FOERSTEL, *supra* note 7, at 107 (stating that "since the passage of the FOIA . . . [the] Congress has repeatedly rejected legislative proposals to exempt intelligence agencies from the FOIA disclosure provisions").

¹⁴⁵ The CIA Information Act, 50 U.S.C. § 431 (2002).

¹⁴⁶ *Id.*

¹⁴⁷ FOERSTEL, *supra* note 7, at 107-108 (stating that "CIA officials assured [the] Congress that such a restriction was modest. . . but it is now clear that the CIA Information Act has had broader and more disturbing consequences").

¹⁴⁸ *Id.* at 108-109.

¹⁴⁹ *Id.* at 108 (noting that "the federal judiciary has been reluctant from the outset to enforce the FOIA against the CIA").

¹⁵⁰ *Id.* at 108 (describing a CIA policy first articulated in response to FOIA requests concerning the *Glomar Explorer*, "a secret underwater vessel").

¹⁵¹ *Hunt v. Central Intelligence Agency*, 981 F.2d 1116, 1120 (9th Cir. 1992) (noting that "we are now only a short step [from] exempting all CIA records from FOIA" and stating that "if [the] Congress did not intend to give the CIA a near-blanket FOIA exemption, it can take notice of the courts' incremental creation of one"); see also FOERSTEL, *supra* note 7, at 108 (stating that "Today courts routinely accept a *Glomar* response from the CIA, and subsequent rulings have extended this exemption far beyond its original scope").

¹⁵² See CENTRAL INTELLIGENCE AGENCY, *About the CIA, CIA Vision, Mission, and Values*, at <http://www.cia.gov/cia/information/mission.html> (last modified Apr. 12, 2002) (stating that the mission of the CIA is to "support the President, the National Security Council, and all who make and execute US national security policy by: Providing accurate,

gathering and analysis.¹⁵³ If DHS agencies attempt to take advantage of the Critical Infrastructure Information provision as a way to circumvent FOIA, the CIA's use of the operational exemption may set a striking precedent. Although it is too early to tell whether DHS agencies will follow this course, given the OHS's resistance to FOIA, advocates of free information may have a very tough time with the DHS. In light of Federal court expansion of the originally narrow CIA exceptions, the Critical Infrastructure Information provision may prove to be a substantial hurdle in using FOIA to obtain information from Department of Homeland Security agencies.

B. Restoring FOIA

With an eye toward curbing possible abuse of the critical infrastructure information exemption, a bill to amend the Homeland Security Act is currently pending in both the House and Senate.¹⁵⁴ The "Restoration of Freedom of Information Act of 2003" ("Restore FOIA") modifies the critical infrastructure exemption by only allowing agencies to withhold such information under FOIA if "the provider would not customarily make the record available to the public" and "the record is designated and certified by the provider . . . as confidential and not customarily made available to the public."¹⁵⁵ By limiting any FOIA exemption to records and adding the "customarily made available to the public" requirement, Restore FOIA attempts to narrow the current exemption.¹⁵⁶ Also, unlike the Homeland Security Act, Restore FOIA does not preempt state law, and would allow states with broader 'sunshine provisions' to disclose information.¹⁵⁷ In the words of one of Restore FOIA's sponsors, the bill "protects Americans' 'right to know' while simultaneously providing security to those in the private sector who voluntarily submit critical infrastructure records to the newly created Department of Homeland Security."¹⁵⁸

evidence-based, comprehensive, and timely foreign intelligence related to national security; and Conducting counterintelligence activities, special activities, and other functions related to foreign intelligence and national security as directed by the President"); *see also* DEPARTMENT OF HOMELAND SECURITY, *DHS Organization: Building a Secure Homeland*, *supra* note 27 (stating that "The new department's first priority is to protect the nation against further terrorist attacks. Component agencies will analyze threats and intelligence. . .").

¹⁵³ *See supra* note 152.

¹⁵⁴ The Restoration of Freedom of Information Act of 2003, S. 609, H.R. 2526 108th Cong. (2003).

¹⁵⁵ *Id.* § 2 (b) (1), (2).

¹⁵⁶ 149 CONG. REC. S3633 (2003) (statement of Sen. Leahy).

¹⁵⁷ *Id.*

¹⁵⁸ 149 CONG. REC. S3631 (2003) (statement of Sen. Leahy).

CONCLUSION

As citizens, we can allow our government greater latitude in order to fight terrorism. At the very least, however, we should demand openness and accountability in return. America can be both secure and open.¹⁵⁹ The historical lessons of the Vietnam and Watergate eras — the very lessons that prompted the Congress to strengthen FOIA in 1974 - teach us that broad non-disclosure under the umbrella of national security can lead to egregious abuses of power and can imperil basic civil liberties. In the end, Vietnam and Watergate led to public distrust, and eventually apathy, with our government and our political system. Following the tragedy of September 11, distrust and apathy are the last things America needs. In order truly to “defend our freedom and our security,”¹⁶⁰ we must be vigilant about participating in the democratic process. The Freedom of Information Act was designed to assist our informed participation in government, and it must apply to the post-September 11th legislation, in order to ensure that our government truly has our interests and freedoms at heart.

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¹⁵⁹ See 149 CONG. REC. S3632 (2003) (statement of Sen. Leahy) (“I do not understand why some have insisted that FOIA and our national security are inconsistent”).

¹⁶⁰ Remarks, *supra* note 28 (“From the morning of September 11th, 2001, to this hour, America has been engaged in an unprecedented effort to defend our freedom and our security.”).