

Testimony of

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Representing

Sunshine in Government Initiative

Freedom of Information Act

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Chairman Clay, Ranking Member Turner and Members of the Subcommittee on Information Policy, Census and National Archives, I'm honored to appear before you today to speak in support of efforts to strengthen the Federal Freedom of Information Act.

I am testifying on behalf of the Sunshine in Government Initiative, a coalition of ten media groups committed to promoting policies that ensure the government is accessible, accountable and open. *

I must say I feel strange sitting at this table. I spent many of my 40-plus years as a journalist *covering* Congressional hearings, not taking part in them. But I've stepped out of my longtime role as a reporter, editor and news executive who doesn't take part in government deliberations because I believe the Freedom of Information Act is one of the most important tools available to journalists and citizens alike to monitor the performance of our government. I appreciate this opportunity to celebrate its success and to point up some flaws in the act that I hope this Congress, in its wisdom, will address.

I come before you today as someone who has spent virtually his entire adult life as a journalist. I came to Washington as a correspondent for The Miami Herald in 1970. I

* SGI member organizations include the American Society of Newspaper Editors, Associated Press, Association of Alternative Newsweeklies, Coalition of Journalists for Open Government, National Association of Broadcasters, National Newspaper Association, Newspaper Association of America, Radio-Television News Directors Association, Reporters Committee for Freedom of the Press, and Society of Professional Journalists.

was later a national correspondent for the Herald's parent company, Knight Ridder Newspapers, which was then the nation's second largest newspaper publisher, Washington Bureau Chief and, subsequently, Vice President/News. In 1999, I returned here as Washington Editor, with responsibility for the Washington Bureau, Knight Ridder's 10 international bureaus and the editorial operations of Knight Ridder/Tribune Information Services. I served in that capacity until June of last year, when Knight Ridder was sold to the McClatchy Company.

Throughout my newspaper career, I've known the value of – and fought for -- public access to the public's records.

As a young reporter at the Ledger in Lakeland, Florida, in 1967, I investigated substandard housing. Using county property and court records, I discovered that much of Lakeland's worst housing was tied up in the estate of a man who had died years before and left his rental properties to a church-affiliated orphanage. But a lax probate court never closed out the estate, and the man's brother, a leading retailer in Lakeland, had taken over the properties and collected the rents. The resulting stories, which would not have been possible without public records, put a spotlight on the scandalous conditions in which many Lakeland residents lived. Though their shacks were literally in danger of falling down on them, they were most in fear of the weekly visit from the rent collector, who would remove their front doors if they didn't pay up.

Florida has long had a history of valuing access to public records and public meetings. The records I sought and examined in the Polk County Courthouse were first declared

public in 1909, with passage of the Public Records Law. In 1967, Florida passed a greatly expanded Public Records Law and a landmark Government-in-the-Sunshine law opening government meetings. Today, in Florida, the citizen's right of access to government information and meetings is enshrined in the state constitution.

The federal government, I must say, came rather late and reluctantly to the party. The Freedom of Information Act was passed in 1966 without the support of the Johnson administration. But FOIA has become an essential tool for journalists attempting to find out for the public what the vast and complex federal government is up to – how it is spending tax dollars, enforcing or failing to enforce regulations or how it is deciding who gets veterans' benefits -- and who doesn't.

Because of FOIA, readers of USA Today learned earlier this month the locations of 122 levees around the country that are so poorly maintained that they could fail in a major flood. The levees protect big population centers such as Sacramento, California; Springfield, Massachusetts and Albuquerque, New Mexico, and smaller towns, such as Lincoln, New Hampshire, Redmond, Utah and Sweetwater, Idaho. The Army Corps of Engineers, which built many of the levees, refused to name the affected communities until USA Today and the Associated Press pressed a FOIA request.

Because of FOIA, the Marine Corps Times was able to reveal in 2005 that nearly 10,000 Marines were issued body armor that flunked government safety tests and had potentially life-threatening flaws. Faced with imminent publication of the story, the Marine Corps recalled more than 5,000 of the armored vests, which failed in tests to stop 9 mm pistol rounds.

Because of FOIA, McClatchy Newspapers were able to report this past weekend that the Department of Veterans Affairs is ill equipped to handle the wave of returning Iraq war veterans suffering from post-traumatic stress syndrome. My former colleague, Chris Adams, a superb investigative reporter in the McClatchy Washington Bureau, analyzed 200 million – yes, 200 million – computerized VA records, including every medical appointment in the system in 2005.

He found that veterans with psychiatric problems are receiving less care than they did in the past, the amount of mental health care provided by the VA varies dramatically from state to state, and nearly 100 VA clinics offer little or no mental health care at all.

I'd like to tell you about a series of stories in 2005 on the VA by Chris and a colleague, Alison Young. I think you'll see that the reporters' experiences while gathering public records for these stories provide strong evidence that FOIA needs to be strengthened.

Early in 2004, Chris and Alison undertook a comprehensive inquiry into how the VA determines who gets disability benefits and who doesn't.

In February, Chris asked the VA what kinds of relevant databases the department maintained. The VA stonewalled, refusing to give him what was known as the "record layout" for different databases. In March, a public affairs officer told Chris that the department didn't want to tell him how it maintained its records because officials feared it was "leading to a big FOIA."

Although FOIA explicitly says that individuals requesting public documents don't have to say why they want them, the VA was clearly trying to figure out what the reporters

planned to write. In an e-mail to Chris, the public affairs officer said that officials at the Veterans Benefits Administration “certainly would like to know why the information is needed in terms of the possible news story lead you envision, what is motivating this as a topic worthy of inquiry at this level of detail. People ask me, ‘Why? What are they looking for?’”

In March, Chris filed our first FOIA request, asking in effect for the records that would tell us what records the VBA maintained. There was no response. We appealed. Still no response.

At one point, Chris was invited to go over to the VA and look at a version of the record layout. He was allowed to take limited notes. Then, as he was leaving, VA officials demanded his notes. They said the notes had to be cleared by other department officials. I believe the demand was an outrage not supported in any way by law, but Chris complied. The notes were faxed to him the next day.

Eventually Chris learned on his own what records he needed for the project, and on April 15 he filed a FOIA request for those databases.

Here, from Chris’ notes is what happened next. Please keep in mind the 20-working-day statutory deadline for an agency response to a FOIA request.

- May 6, a VBA FOIA officer told Chris the request was “being worked.”
- May 12, Chris filed a request for additional files.
- June 4, a VA official said the requests “were still being worked.”

- June 16, a FOIA officer said the requests “were still being worked.”
- July 19, “still being worked.”
- August 6, “still being worked.”
- August 8, “They are still working on them ... It is being worked ... not like it’s sitting there.”
- September 1, “A general estimate is probably a couple months.”
- September 3, a VA official admits, “They did not get to it four months ago ... Part of it was the queue, part of it was the whole general counsel, and part of it was miscommunication ... I told them this has taken too long.”
- September 14, asked when one of the requested files might be available, a FOIA officer said, “Hopefully, I will have that answer by tomorrow at the latest. That’s my hope.”

Alison was also filing FOIA requests for her part of the VA project, and she was getting similar results. At one point, the VA demanded \$41,000 to copy the records of 11,000 service officers who help veterans file their claims. We had asked for two files.

Finally, after numerous unanswered FOIA requests and six administrative appeals, we filed suit in November in Federal District Court in the District of Columbia. In December, the long-sought records began flowing to Chris and Alison. By February of 2005, they had most of what they’d requested. In March, their stories ran.

When you hear what the stories said, I think you’ll understand why the VA dragged its feet and fought so hard to prevent clearly public records from becoming public.

The stories documented how veterans nationwide are being shortchanged by a benefits system prone to long delays, wrongful denials and inconsistent rulings. Over the prior decade, 13,700 veterans died waiting for disability claims to be resolved. Chris and Alison found that two million poor veterans and widows were missing out on a VA pension to which they were entitled. Recent Iraq war veterans couldn't get education benefits. If a veteran asked the agency for advice, he or she was more likely to get a wrong answer than the right answer. The VA made 103,000 errors in 2004 alone in deciding veterans' benefits cases.

Ironically, after fighting us so fiercely, the VA circulated Chris and Alison's stories to its regional offices with instructions to "read the articles, digest the underlying message and then take action to ensure you and your people learn from these writings."

The VA stories won seven journalism awards. But I think the biggest satisfaction came when we learned that Frank Fong, a World War II fighter pilot who was partially blinded in a plane crash, finally got his disability claim approved -- 50 years after it was filed. Chris and Alison had highlighted Fong's case as an example of the Dickensian nature of the VA appeals process. Fong was awarded \$67,000 in back payments.

As for Knight Ridder, in addition to the awards and the satisfaction of knowing we did our duty by persevering in the quest to examine the performance of a federal agency that affects millions of Americans, we got legal bills that totaled more than \$100,000.

Because the VA surrendered the databases and other records before our suit went to trial, we were prevented from recovering legal fees because of the way the appellate court that governs Washington, DC, interprets the Supreme Court's decision in

Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources. The high court ruled in *Buckhannon* that parties didn't have to pay their opponents' legal fees if the defendants gave the plaintiffs essentially everything they were seeking prior to a court judgment.

Buckhannon encourages delaying tactics by agencies that are trying to evade the requirements of FOIA. I believe, though I cannot prove it, that VA officials knew they had a losing case but decided to fight us as long as possible to test our resolve and the depth of our pockets. They knew that in doing so, the VA faced no potential liability.

How do I believe FOIA should be strengthened? You will hear from experts far more versed in the details of the law. But based on our experience with the VA, let me suggest four broad changes:

First, create a FOIA ombudsman within the federal government, a champion for FOIA training and compliance, a place where individuals seeking to exercise their rights under FOIA can go for help short of filing a lawsuit. Had there been such an independent FOIA advocate for Chris and Alison to work with, I believe they could have obtained the records they needed from the VA faster and without the lawsuit that proved costly to us, and that had to be costly to taxpayers.

Second, I urge Congress to eliminate what Sen. John Cornyn (R-TX) has correctly called "the *Buckhannon* tax." Make it clear that plaintiffs forced to sue to get public records are entitled to legal fees, even though the defendant agency throws in the towel before a court decision.

Third, make FOIA's deadlines meaningful. If the law says a request must have a response within 20 working days, put some teeth in it, with real sanctions for agencies that don't comply.

Fourth, as Chris' futile efforts to determine the status of his FOIA requests suggest, the law would work better if every FOIA request was assigned a tracking number. Any individual should be able to check at any time on the status of a request and get an accurate account of its progress. Combined with more meaningful reporting of each agency's overall FOIA performance, this would help achieve greater accountability.

Mr. Chairman, I'm well aware that we're living in a highly polarized political climate. But I think it's important to conclude by pointing out that the free flow of government information isn't a partisan issue. It isn't a liberal vs. conservative issue. Regardless of party or political philosophy, I believe everyone can agree that the government's information is the people's information and that – with certain exceptions for national security or privacy reasons – it should be available to the people.

Thank you for allowing me to appear before you today.

