

REMARKS OF ATTORNEY GENERAL JANET RENO
ASSOCIATED PRESS MANAGING EDITORS CONVENTION
INDIANAPOLIS, INDIANA
OCTOBER 25, 1995

The story is told about a founder of the American Press Institute who went on the road to sell memberships many years ago. He came to a small-town weekly in New England, where he encountered the editor with the rolltop desk, the green eye-shade, garters on his sleeves. But, the editor just didn't seem to be buying, no matter how eloquently it was explained to him that membership in the Institute might assist the paper to improve and better serve its community.

Finally, the salesman pulled out his A-#1 sales pitch, invoking the names of Alexander Hamilton and James Madison and Benjamin Franklin and John Peter Zenger, and how -- if the American people meant to be their own governors -- the very survival of our Republic depended upon a vigorous and up-to-date press, meeting its obligations to its readers. Concluding his impassioned appeal, he looked to the editor, expecting him to sign up immediately.

"Mister," said the editor, "this town just ain't worth it."

I tell you that story because we think your towns are "worth it." We think it is important that your communities know what their government is doing. The Justice Department and the Clinton Administration have given a lot of time and attention to trying to enlarge the availability of public information because we think it is good government to do so.

We do it every day by taking one problem at a time and trying our level best to make improvements.

Let me give you an example.

After several major news events in Washington, we became aware that it would be months, perhaps years, before press requests for documents in those cases could be met under the Freedom of Information Act. The law does not contain a preference for news organizations. Yet the delays inherent in even routine processing were being misread as an effort to slow down disclosure, and were undermining public confidence in the integrity of the process.

So, we established a new procedure for putting certain requests, those in which widespread and exceptional media interest exists, and which raise questions about government conduct, to the head of the line.

Under this expedited processing policy, we have been able to make documents that are much in demand more quickly available -- frequently, in one or two days. Recent examples include:

- **The complete transcripts of the FBI's negotiations and phone conversations with the Branch Davidians at Waco;**

- **Records dealing with alleged human rights violations in Guatemala;**

- **The Justice Department's command center logs disclosing high level phone traffic during the Ruby Ridge incident;**

- **And closed federal investigative files on incidents that may have involved former Los Angeles police detective Mark Fuhrman.**

Our charter to reexamine information policy and try to improve it came in October 1993 when President Clinton articulated a new openness policy and called for disclosure to be the norm. We rescinded the 1981 guidelines under which decisions to withhold information would be defended if a substantial legal basis could be found for doing so. We turned that around. We instituted a "presumption of disclosure." We said we would not defend agency actions to withhold in the absence of foreseeable harm that reasonably could be expected to occur to the government or to some other interest specifically protected by the law. We said we would not defend withholding where the information only technically or arguably fell within an exemption.

We strongly encouraged all Federal agencies to make discretionary FOIA releases whenever possible. We undertook a review of more than 500 cases to see whether information previously withheld should be made available, and did so in many of them. In one case, 1,550 pages had been withheld. We released all but 24. In another instance, 308 pages had been held back. We concluded that 305 of them could be turned over without foreseeable harm.

We said we would expedite the release of reports on serious professional misconduct by Department of Justice employees. We said we would provide names, instead of anonymous summaries in an annual report, as had been the case previously. We kept our promise.

We said we would reexamine FOIA forms and formats, and we have, making improvements in nearly all of them. In fact, other agencies became aware of the effort and asked for help with their forms, among them: The Department of the Interior, the Labor Department, the Air Force and the Environmental Protection Agency.

We also tried to create a system to respond to reporters who were having a problem, and to try to do something about it:

- **Several components required reporters to submit their finished stories for 30-days advance clearance in exchange for obtaining access to certain files or interviews on sensitive subject matters. That's gone now.**

- One Justice Department component had a blanket policy of not identifying by name employees who were involved in incidents the press inquired about. That's gone now.

- One operating division of the Justice Department automatically demanded of all FOIA requesters that they get the written consent of persons named in files before that information could be made available. The improper use of that rule is gone now, too.

Sometimes, there are First Amendment concerns that have nothing to do with your access to our information, but our access to yours. There, too, we try to be responsive and responsible.

For example, we now require an advance evaluation from the Justice Department's Public Affairs Director every time a federal prosecutor seeks a court order for a news organization's records, or searches of journalists' files, or for outtakes or testimony taken under compulsion. That office represents your interest vigorously, encouraging our prosecutors to use alternative means of acquiring evidence when confidential source material is at issue, or other matters that concern you. Every media subpoena for contested material or testimony originates in the Justice Department's Criminal Division and goes to two places for concurrence before it comes to me -- the Deputy Attorney General and the Director of Public Affairs who was a reporter for 34 years. We have taken these extra steps to ensure that your concerns are reflected

in our deliberative process.

I don't mean to tell you we have reached perfection. Although 24 of the Justice Department's 29 components either eliminated or reduced FOIA backlogs last year, we still ended the year with a backlog of approximately 30,000 FOIA requests. Most of that was at the FBI, where the backlog was about 17,000 requests, and the Immigration and Naturalization Service, where the backlog was more than 10,000 requests. But, it is still a disappointment that the figure was as large as it was, despite the fact that the Justice Department has the equivalent of 617 employees doing FOIA and Privacy Act processing fulltime and spends about \$35 million a year in unreimbursed tax dollars to meet this responsibility.

We scored some successes. The backlog was down 1% last year -- the second year in a row that responses went out faster than new requests came in. For example, INS reduced its backlog of requests that had been pending a year or more by 58%. The U.S. Attorneys' offices made significant cuts in its backlog, as did the Bureau of Prisons. Yet, clearly, the number of requests we get each year -- about 125,000 at the Justice Department -- makes it very difficult just to keep up.

The reality is that frequently, despite our best efforts, the Freedom of Information Act doesn't work well for you. Just as justice delayed is justice denied, information delayed is sometimes the same as a information denied. You are in the daily news business, and you can't wait several years to get a meaningful response.

The dollars are not available to double or triple our FOIA staffs. The original notion that fees could substantially cover the cost is not realistic for agencies like ours. It is not appropriate to ask journalists and historians to pay the millions of dollars it costs the Justice Department and other federal agencies to respond to FOIA requests each year. We are going to have to find some other way to make FOIA work better.

Nearly 30 years after the enactment of FOIA, it may be time to start thinking about new mechanisms to improve the manner in which FOIA meets its core objective -- letting people know how their government works. Let me emphasize that careful study and evaluation needs to be done. We would also want to work closely with Congress. But it may be useful to begin generating thoughts and ideas that might move us from the current dilemma, one that frustrates us just as much as it does you.

The purpose of the Freedom of Information Act was to fulfill the Madisonian goal of making it possible for us to be our own governors. We would be able to do that by having "that power which knowledge brings." Popular information would make popular government possible.

Yet, today, relatively few FOIA requests have to do with finding out what the government is doing. The large bulk of requests comes from individuals seeking information which the government is merely storing -- information from government files that might tell them more about a business competitor, or a celebrity, or someone else they might find interesting. Our experts tell us that 50 to 80 percent of the FOIA workload of some agencies such as NASA, the Securities and Exchange Commission and several Department of Defense agencies results from businesses seeking information about their competitors, contract bidding information or commercial data.

I do not mean to impose a value judgment, or to suggest that anyone be eliminated from using FOIA. But, maybe the time has come to create different tiers, or tracks, to give a priority to requests that have a broad public purpose, rather than a purely private purpose.

That is not a concept which is foreign to the Act. Right now, one of the elements that is weighed in considering fee waivers is whether or not the information is sought for the benefit of the public, as opposed to a purely private interest. Such a standard has to be applied generously, to err on the side of the requester when the purpose is mixed or unclear. But it is something we could think about.

Another aspect to consider is size and complexity. I do not mean to suggest that larger requests in which thousands of pages must be gone through -- what the FBI calls "project" requests -- are less worthy than others. In fact, scholars might argue they are the most valuable. But should thousands of others have to wait in line while one huge request clogs the system? Perhaps we should offer the incentive of more rapid processing for requests of less than a certain breadth or number of documents. A reporter who is aware that a narrow request will go on the express track is much less likely to ask, for example, for all of Congressman X's correspondence with the Justice Department, if his immediate interest is the Congressman's 1993 correspondence concerning an investigation of the XYZ Widget Company.

Again, that is not a foreign concept. The FBI already has an informal, rapid track for simple requests. And our own Public Affairs office handles simple requests for documents under FOIA standards without putting the requests into the formal FOIA queue as one means of servicing media requesters and lightening the load on FOIA officers.

Some news people and writers have already figured that out. We worked with one journalist to narrow his request from 87 boxes of documents to five after he learned it would take more than a year to process the full request. After delivery a few months later, he wrote "It was a thin package, but all I need."

Another writer needed a file totalling 1,300 pages in a hurry. Working with him, we reduced the request to 60 pages, and he got what he needed much faster.

Those "give me all you've got" requests slow down the system for everybody. In one instance, a single FOIA request tied up 60 FBI personnel. Another individual with multiple requests required the services of 13 analysts for more than a year. Requests exceeding 100,000 pages are not uncommon. Groups, believing the government has all sorts of secret files on them, have had hundreds of their members file FOIA requests, each of which must be processed individually and specifically even though it is clear they come from a common source. All these are clogging the system.

Why is it that, while other aspects of our legal system recognize the need to alleviate burdensome and duplicative requests, we remain frozen, unable to do something about FOIA? Why would it be wrong to impose sensible and reasonable limitations?

Much of the Justice Department's current backlog is caused by prisoner requests and individuals involved in immigration proceedings who are using FOIA as an early means to get access to key parts of their files. For example, could aliens be given discovery rights at an earlier point without using FOIA? Should alternatives means be found to provide information meeting the private concerns of prisoners and aliens, or to give access to information the government is merely storing, to free up FOIA to serve its public purpose?

One more thought to chew on: could mechanisms be devised to simplify what the agencies must present to the courts to justify the withholding of information? Note this: At the same time that the FBI is 4.8 million pages behind in its processing, an estimated 29% of the time of its analysts is devoted to drafting extensive Vaughn declarations, as they are called, meeting the requirements the courts have imposed to explain the withholding of material. That is an enormous and some would say disproportionate administrative burden. We should work with courts and interested parties to think of ways of reducing that burden, while still assuring every one that requests are being handled conscientiously and in good faith.

The future holds bright promise. Under the laboratory program of the National Performance Review, the FBI is spending \$3 million developing an electronic document processing system, to do the job better and quicker. An interagency group working group has been discussing electronic formats for creating documents with their releasable portions designated and stored. We have already put thousands of documents into electronically retrievable form through Internet and the World Wide Web. We are now designing comparable systems for each of our U.S. Attorney's offices so that you can access local information. Every document that can be accessed electronically is one less document that is likely to be sought under FOIA, saving time and money for all of us.

The Department of Justice has also become the first Federal agency to write performance standards for responding to information requests into the job description of each employee who might have a role in receiving, transmitting or processing FOIA requests. That includes all Department employees involved in the process, not just our FOIA experts. We have made it clear we expect a high level of performance, and employees will be graded on how well they do.

However, as I have suggested, that won't do the job alone. Sure, I want you to know about all the good things we are doing. But good intentions and good ideas won't fix a problem in which there is no practical way of providing enough resources to make the current system work best for people like you. We need to start thinking about necessary improvements in the system. And we need your help in doing so.

It is appropriate that we consider ways to streamline the Freedom of Information Act as we move into 1996 -- the 30th anniversary of the Act. Expect to hear more from us. As a proponent of openness and government "in the sunshine," I believe I can talk candidly about changes in FOIA. You know me, and you know what I stand for.

I want the system to operate more effectively because, unlike that New England editor, I think this town "is worth it." The cause is right. The law is right. It's time for you in the media to join with us in suggesting ways to make the law work better.