The Privacy Office
Department of Homeland Security
Privacy Office Workshop Series
Transparency and Accountability:
The Use of Personal Information Within the Government
April 5, 2006

OFFICIAL WORKSHOP TRANSCRIPT

Horizon Ballroom
Ronald Reagan Building and International Trade Center
1300 Pennsylvania Avenue
Washington, D.C. 20004

PANEL II
ACCESS TO PERSONAL INFORMATION: BALANCING THE PUBLIC INTEREST AND PRIVACY

Moderator:

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Panelists:

Richard Huff
Fred Sadler
Tony Kendrick
David Sobel
Harry Hammitt
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MS. WITHNELL: We're going to shift to focus a little bit now. This morning we listened to an over- view of privacy notices from the public and the private sector, what they should contain and how they should be written.

Now we're going to talk about what happens to personal information when it

comes into the government and somebody ask for it, and the balance between privacy and public disclosure.

Arrayed before you is a panel of experts that will do great justice to this topic. I have to say that in sort of considering this panel and looking around the phrase "a rose among the thorns" immediately sprung to mind. But I decided it was presumptuous on my part to compare myself to a rose, and certainly these are not thorns.

Before you are the best and the brightest from the FOIA and privacy worlds. They're experts in their field from the public sector, the public interest sector, and the private sector, and I'm sure we're going to have a spirited discussion this morning and we will leave ample time for questions at the end.

I'm going to ask my former colleague boss and good friend Dick Huff to start us off with a framework about the FOIA.

MR. HUFF: Thank you, Liz. As you saw during the presentation before the Privacy Act certainly does permit a number of notice requirements, or does require a number of notice requirements, about collection and how we use information. It also does in fact have an aspect that prohibits the disclosure of information. It works in context with all the notice and ties into routine uses.

But there is an overall prohibition on disclosure of information that is covered by the Privacy Act, with the exception of information that is required to be disclosed under the Freedom of Information Act.

So one of the things that we're going to look at and that we're going to be chatting here is what information is required to be disclosed under the Freedom of Information Act, particularly what information about individuals.

And with that as a backdrop on the Privacy Act I want to just leap into the Freedom of Information Act. That's our federal access statute that says anybody, whether it's Dr. Dix, somebody from a foreign country, or whether it is a citizen of our own country, anybody can make a Freedom of Information Act request under our laws and the statute requires the agency to respond to those requests and to provide the information that's requested. There are nine statutory exemptions, or nine statutory reasons as to why the agency can withhold the information, and we're going to work particularly with two of those, both dealing with privacy.

One of them is unique to law enforcement records, exemption 7C, and that

provides a bit more protection when information is in law enforcement records.

The other exemption applies to any other federal record that contains information about an individual.

So both of these protest information about individuals, but they do it only where there is either -- depending on which of the exemptions -- where there would be an unwarranted invasion, or a clearly unwarranted invasion of personal privacy.

And this word "unwarranted" is the key word that works into the privacy exemptions. An unwarranted -- well, what makes a disclosure of personal information an unwarranted invasion of privacy, and that's something that our courts have struggled with. We started off first by seeing what the privacy interest is, and the Supreme Court told us in 1982 that it's essentially any information about a living person.

We'll start with that. And that's going to be -- there is some privacy interest there. Now there are a few exceptions to that, there our Office of Personnel Management has set out a regulation that says for federal employees certain information must be disclosed.

Fred, who is a federal employee of the Food and Drug Administration, I'm curious about him so I can make a request to his agency, they'll tell me what his title of his position is, they'll tell me what his salary is, they'll probably give me a mailing address for him. And I might ask some other information, has he ever worked for another federal agency, is that in his biography. And they would give me information of that sort, along with a few other things that the regulation sets out. And that regulation essentially says federal employees -- there's a little bit of an exception, federal employees that are cops, federal employees some who are military people and such -- they don't count on this, we're not going to give out detailed information about cops and undercover people and things such as that.

But for the overwhelming share of federal employees we will disclose individual identifiable information. And the courts have pretty well accepted that. The agency in charge of personnel records just simply says there is no privacy interest in that information.

So that's one of the exceptions on something like that. But other than that, and I do mean that as a very small exception, most information about an individual is going to be considered to be -- that individual would have a privacy interest in it, assuming he or she is still alive. It only works on living people, and then there can be a little bit of an exception even to that. But that's the normal rule is once you pass away you lose any

privacy interest that you would have had in the information.

Now what do we balance this against? The unwarranted invasion of privacy, and we looked at a privacy interest here, is balanced against the public interest. And this follows up the legislative history to the Privacy Act, and it follows up the Supreme Court and the other court decisions saying that that's what we have to do.

And the issue then comes up is really what is this public interest that we're talking about. And my job for 25 years or so was to work on administrative appeals, and I'd get about 3000 of them a year. Scott would make recommendations to me for awhile while he was in our office, saying we should disclose this or we should withhold that when we have an administrative appeal. And one of the things that up until 1989 I had a very difficult problem with figuring out what is this public interest. I mean I read the legislative history and the public interest kind of fits over here, and you measure it against privacy interest.

Well of course it told us what a privacy interest is, information about an individual; but then we weigh it against the weight of that privacy interest and sometimes it's very heavy, you know, all sorts of detailed personal medical records about somebody, information that shows they were investigated for a law enforcement matter, a crime where they were never officially confirmed to be investigated, the government never indicted them in other words. That's a very high personal privacy sort of an interest.

But what do I measure that against on the other side? And I'd read the cases that were coming down from the courts, the courts of appeals, and I was really getting not much help because they would say well, the public interest one says, anything that promotes unionism is in the public interest, and you should disclose names because there's a heavy balance in favor of unionism. Oh, okay. But there was no explanation of why that was so.

And then there was another one that came out a little bit after that that said information that will make voters better understanding of who donates money to campaigns, even though it is beyond what the statute on electioneering, election law, requires to be made public, we should even make more information public, because making better election law decision making, or better election decision making, by voters is in the public interest.

And I'm still trying to think about how is this going to work when I'm working in our law enforcement files, and what's this general principle.

Well thank goodness in 1989 the Supreme Court really answered that for me and for all federal agencies, for all of us who work with the Freedom of Information Act, in a case called Department of Justice vs. Reporters Committee for freedom of the press. And in there what had been sought was the rap sheet, the criminal history information, you know, arrests and convictions and so on, not just federal but state of three Medico brothers. And the three Medico brothers had been alleged to have been all mobbed up, the Pennsylvania Crime Commission had written a story and said that all three of them are all tied up with mobs and they've done all sorts of bad things in their past. And the Reporters Committee and several of the newspapers, CBS, and such made requests to say I'd like to see the rap sheet of the three rap sheets of the Medico brothers, the three Medico brothers.

This case illustrative of another problem with the Freedom of Information Act drug on for almost 16 years through the administrative appeals, a very slow district court process, a very slow court of appeals process, and then finally to the Supreme Count. And during that 16 year period two of the Medico brothers died, just passed away of old age I do believe. I mean they were old to start. And so we in fact, the Department of Justice, released the rap sheet on each one of those two, they said there is no privacy interest.

Bless his heart, Sam Medico hung on, at least through the Supreme Court's decision, and so we did have a live case in controversy before the Supreme Court, and the Supreme Court looked at that and said, okay, there certainly is privacy information about this individual. The Department of Justice had even said with these three individuals we even refused to confirm or deny whether or not there was a rap sheet, because if we even admitted there was such a record that in and of itself would show that they had been arrested at a minimum sometime in their past.

So we even refused to confirm or deny that there was such a record. The Supreme Court affirmed the position of the Department of Justice in there and said that was the right answer.

And what they did is several things. One -- just before we get into the public interest one little footnote on the privacy interest, they said the Reporter's Committee argued that this is all public information, we're talking about stuff people have been arrested, it's all been on, you know, the booking sheets, there had been a conviction, there would be a case somewhere, so it's all public information, you shouldn't be able to protect that.

And the Supreme Court says now wait a minute, there's such a thing as practical

obscurity. And for instance right now, is Dick Huff married? Well if you didn't happen to see the ring I was wearing you could look that up. If you happen to know that you should go to Charlottesville, Virginia, Albemarle County and look for -- Judas priest -- August 15th, I think it is -- it's 1970 and it's in August and I can check it if I have to.

This part is true. When you get older you forget more stuff, all right.

The only thing that was a saving grace is about five years ago, four years ago, on a Wednesday evening our daughter, who's married and off on her own right now, called and said, you know, chatted us up for a little while, and then said do you know what day it is, and thank God she was talking to my wife instead of me, and my wife said, why, it's Wednesday. And she said do you know it is your anniversary? And she had forgotten, and that made two of us.

So if you think you're forgetting stuff now I want to tell you it gets worse, and you can only hope you have a terribly understanding spouse or one whose memory decays at the same rate as yours.

All of that goes into -- please forgive the digression -- and this is going to be one more point on my wife's list of things where he had no reason to say that about me, and the list is getting longer as time passes.

But what we've got is the Supreme Court said this is practically obscure. If this is public information why don't you go get it reporters. And then they answered the question, because even if you just wanted to look in Pennsylvania, it was a Pennsylvania Crime Commission that had said they had been all mobbed up, you are going to have to go whatever the heck the is, 133 counties in Pennsylvania, and you're going to have to go into the county courthouse, and you're going to have to try to look back at the records for the last 50 years. That is going to be practically obscure information.

So just as a note, and that's not limited to law enforcement cases, it could be please give me information on Richard Huff's cases to whether or not he's married, or something of that sort. That would be practically obscure, even though it was once public it surely is no longer public at all.

So we've got that. Now let's finish on about the public interest side, and this is the one that helped me in my job and many FOIA officers I think, so much because what it told us is don't worry about unionism, don't worry about election laws, look to see whether or not the disclosure of the information shows the operations cast light on the operations and activities of the federal agency. And that's what you look to on the other

side.

Sometimes you can't help but disclose information about the individual in order to give that out. And the typical, and I don't want to say it's the only by any means, but a typical example of that is where we have a government employee, a federal employee that has committed a wrongdoing. When I was a honcho with the Department of Justice if I would have gone out and cheated on my travel voucher and, you know, got some money here and doubled it up from somebody else, and I had been caught by our crack Inspector General –

Is the transcript going to say crack Inspector General -- okay, it's not going to have the stuff in there about my wife either.

In terms of that the IG catches me and because I've such long and loyal service they don't end up prosecuting me, they just give me 30 days beach time, leave without pay.

And lo and behold Scott saw me way too often running around, he makes the request, a FOIA request that says what has happened to Huff, I understood there was some sort of a problem. There is a definite privacy interest in the fact that I have committed wrongdoing and I have been caught. It hasn't ever been made public, the government decided it wasn't worthy of a criminal prosecution, but is there a public interest in disclosure?

And this would show, the disclosure, what happened to me shed light on the operations and activities of the government. And that's exactly the sort of thing we would disclose, and we would say yes, it does, here is a honcho, you've got substantial wrongdoing over here, intentional willful wrongdoing, and it is in the public interest, one, to see that leaders, senior players, in an agency have committed wrongdoing, and then two, we should disclose that sort of information not only to show that they committed wrongdoing but what the heck did the agency do in response, how was I punished. Was I fired? No, they only gave me 30 days beach time, so that's something that the public could then use to evaluate whether that would be a fair thing that the agency has done.

But this is one example of where we will see that kind of thing.

Let just finish up with one of my favorite examples of that, and that's General Cochran, a Major General, down at Fort Steward in Georgia near Savannah, and the river runs right through the post. He had a beautiful -- they've got some Army ships, or boats, I guess the Army has boats, and they had those on the river. The advantage with being a general who was the Commander at Fort Steward is you can bring your own private boat

there and put it on the river and then you can make civilian employees do work to tune up your boat, and to fix it and clean it.

No, you can't. But that was what General Cochran did, and he did some other things as well, he got some free flights for himself and his wife up to West Point to see his son graduate. I mean pilots need, you know, their 20 hours or however many of hours flight time per month, why not use it to take me and the little woman up to West Point to watch our son graduate.

Well, in any event General Cochran was found to have committed these wrongdoings because he was like Huff with his travel fraud, long and loyal service, they decided not to court martial him, they offered him non-judicial punishment. This is punishment where they could court martial him but they say we're going to let you -- you have the right to choose to have it handled administratively if you want instead of a court martial. He did choose that, and what then happened is General Cochran was fined about $2000. Lo and behold the newspapers sought that information, it was disclosed to them -- now they withheld from his piece of paper that showed what he had done wrong, and his penalty, they withheld his social security number and things of that sort. But they gave out the guts of what it was he had done and how the Army had punished him.

He sued, and he sued back -- remember at the very beginning the Privacy Act says if you're a citizen generally you're going to get certain kinds of protection here, he said they violated the Privacy Act. And that was one the government successfully defended saying no, we were required to disclose that under the Freedom of Information Act. There was a privacy interest, much greater public interest, disclosure was required. The disclosure was not unwarranted and therefore that information was properly disclosed, and therefore it was not a violation of the Privacy Act.

So that's what -- Liz, is that enough talking for me now?

MS. WITHNELL: That's great, Dick. Thank you once again for educating us at the same time that you're entertaining us.

Dick may have forgotten a lot, but whatever he's forgotten I've not known half as much in terms of FOIA and privacy, so we're delighted to have you join us here.

Our next speaker is Tony Kendrick who is the Director for Departmental Disclosure at Department of Homeland Security. Tony came in and took a fledgling and somewhat amorphous FOIA program and turned it into a model for the Department, and he's going to talk to us a little bit this morning about that program, particularly as it

pertains to privacy.

MR. KENDRICK: Good morning. Kathleen is guarding the door because none of you are getting out of here without knowing a little bit more about FOIA.

One of the things about the FOIA that is so great is its flexibility, but there's also a lot that is stable about it. It grows and it evolves over time, particularly through court cases like Dick has described.

One of the things that I want to -- a point I want to make is that FOIA makes releases. How we make them and what gets released is one issue, but who we release it to is only one group, one population group, and that is we only release it to a FOIA requester. We don't release it to other government agencies, we don't release it to other folks for other purposes because there are other under the Privacy Act, or systems of records notice, or other information sharing policies, regulations and procedures for those agencies to get that information. They don't come to the FOIA office, we don't collect it for them and then send it out as a FOIA.

So the only people who are getting documents from under the FOIA are other FOIA requesters, and that is the world-wide community. All of you, businesses, organizations, other entities can also make FOIA requests but unless you ask for it those documents aren't going to be collected, and aren't going to be made publicly available unless that was their intention when they were created.

If we get a lot of FOIA requests then we can put them up on the web or make them more publicly available to where people then can have access to them without having to make a FOIA request because we've used our discretion to put them up there.

But once we make one release we can make the release for all. Now there are caveats and differences in everything, so let's just agree at this point that everything I'm saying is true probably 98 percent of the time because there's always those exceptions. Because if you ask for your information and we release it to you that does not mean we're going to release it to somebody else.

But who controls the information about you that we release? You do. Under one of the nine exemptions is exemption six as Dick described, and unwarranted invasion of your personal privacy. If your neighbor or anybody on this panel, or in this audience, or anywhere in the world wants to have information about you that the government may have, or may not have -- if we don't have it, we don't have it -- but if we might have it and your neighbor asks for it we don't have any obligation to go to you and ask is it okay if we

give it to them? Your neighbor has to go to you and get something with your permission that allows us to release it.

So under the FOIA 98 percent of the time you control what we can release. And if a requester comes in and says I want my neighbor's information and I know you have it in your data bank, we can't give it to them unless you have granted them permission to do that. And I think that's an important point.

Let's see -- I'm checking over my notes to make sure I get everything.

As Dick said the public interest does balance against the privacy interest. I've been associated with FOIA for over 34 years and any B-6 decision that I've been involved in has never been overturned. And I don't think really since the mid '90s has there been a lot of cases where there has been the public interest overriding the privacy interest.

In DHS of the nine exemptions 18 percent of our requests, and we processed 126,000 requests last year, 18 percent of those we applied exemption six. One way to look at that is saying you, or the individual, did not give a FOIA requester permission to receive your information. And so that's 18 percent of the time.

Again, we don't go to you to ask can we release your information, the requester has to go to you to ask that.

And I guess, because as Dick was talking I was checking off some of my talking points, that's really what I have to say about the FOIA. You control the release of your information, we don't. We don't have the discretion in the government to waive your privacy interest. Under B-6 our hands are tied, we don't release that information.

MS. WITHNELL: Thanks Tony, I appreciate that.

Our next speaker is Fred Sadler. On the screen up here you'll see it says ASAP. He is the President of the American Society of Access Professionals. Many of you in the audience I'm sure are members, and if you're not –

MR. SADLER: You should be.

MS. WITHNELL: Right. He's one of the FOIA superstars. At this point in the program we're going to start talking a little bit more pointedly about privacy and FOIA and with the interaction.

So Fred.

MR. SADLER: Thank you very much, Liz.

When Liz originally contacted me she said your area of focus is talk about the interaction between FOIA and the privacy and how the protections apply, how FOIA is used to protect personal information, cover all the landmark litigation, and do it in under 10 minutes.

So we're going to zip through quite a bit of material and I'm trusting my good long-term friend Dick here to reign me in if I get a little bit over. I'm also suffering from hay fever, those of you who are new to the area welcome to pollen central.

But I do have the pleasure of serving you as the President of the American Society of Access Professionals for the year 2006, the acronym is ASAP.

ASAP is a relatively small group of about 400 members. The overwhelming majority, nearly 95 percent, are professional Freedom of Information and Privacy Act officers. The remainder are public interest type groups, some attorneys in the media, and the membership is certainly concerned with this level of interaction. And to the extent that it is a routine component of our training conferences, twice a year ASAP sponsors east coast and west coast training and the interaction of FOIA and privacy is always a standard component of training, as is the Privacy Act.

We have, as a matter of fact, Washington, D.C. training coming up the first week in May at the Cafritz Center at George Washington University, loved to see you all there. We feature certainly Doris Lama one of our star speakers from the Navy, and Dick Huff –

MR. HUFF: Is this a commercial?

MR. SADLER: No, I wouldn't do that.

MR. HUFF: You charge for that don't you?

MR. SADLER: Absolutely.

MR. HUFF: It sure sounds like a commercial to me. I have to pick up Liz's bar tab for that -- don't put that in the minutes either.

MR. SADLER: But privacy certainly is going to be one of the components that we

direct. And I've been with the federal government for nearly 32 years and I've worked as the FOIA officer for 27. So my comments are heavily weighted in that context. But I'm speaking on behalf of ASAP.

But my career has been spent in a regulatory agency whose primary function is to assist in the protection of public health, and as you might expect we are loaded with personal privacy information.

We have primarily two functions. One is to review applications to bring new medical products on the market, and the other is to monitor the market place after these products are introduced to ensure that they are functioning in the intended manner, and that they are indeed safe and effective.

Now the way to demonstrate safely and effectiveness is to submit detailed clinical data and certainly that has to be given to my agency in a summary form. It's got to be tabulated and it's got to be by a statistical compilation.

But more frequently the back up data is raw data and it may be into the dozens of volumes. If the data comes in encoded, patient one, patient two, and that kind of thing it is not possible to trace a record to a specific individual. But as frequently as not the records come in with patient identifiers attached.

So it is entirely possible for an individual to come in under the Freedom of Information Act and ask for us to locate records for Dick Huff, or Tony Kendrick and Liz Withnell. And so we have extensive -- I would say even voluminous records that if released with undoubtedly constitute an unwarranted invasion of the individual's personal privacy.

And the information goes beyond just how that individual may have been treated in a clinical study, it would go into medical history, family history, genetic make up, siblings, parents, personal habits that would impact on the public health.

Now in terms of monitoring after the fact we collect information on the adverse events. Frequently these are submitted by the patients themselves, more often they are submitted by medical personnel who are involved in intervention of some nature. But by definition we're dealing with adverse events because nobody comes to the government because they had a good medical outcome.

They're loaded again with this kind of information that is of particular interest to

third parties, specifically we're dealing routinely, daily, with attorneys who are looking for data to use in product liability and medical malpractice litigation. These records have to be addressed under the Freedom of Information Act, apply the balancing test under the B-6 exemption, and generally speaking -- I would say 99.9 percent of the cases -- the information would be withheld because release constitutes an unwarranted invasion of personal privacy.

Now getting back to Dick's other point about exemption six, that is one of our most frequently used exemptions, although more frequently I deal with exemption four which prohibits the release of trade secrets and confidential commercial data.

And we also deal extensively with exemption seven. My understanding is that a significant percentage of you are not familiar with the FOIA, and I don't want to presume knowledge but I also don't want to get involved in some of the more technical aspects because that would take us an hour and a half, but exemption seven has six sub parts which are lettered, and exemption 7C permits an agency to withhold records relating to an open investigation when release could reasonably be expected to interfere with enforcement proceedings. And "C" in particular permits the withholding of information if release would constitute an unwarranted invasion of privacy for an individual who is identified in an investigatory record.

And it's a recognition of the inherent sensitivity of law enforcement records. We consider follow up to complaints and adverse events to be an investigation, so by definition again it's a tremendous amount of personal privacy information in the complaint follow up.

Now when it comes to release under the FOIA we don't get that many requests from third parties for personal information, but I did have one rather notorious case in my agency. Lately we had an attorney in Boston come in and ask for all of the records relating to adverse events for individuals who were on hemodialysis who had been dialyzed on a filter that had already been recalled.

So we went through the FOIA review and the redactions were made, and then he called me up and accused me of deliberately impacting adversely on his economic well being because we had taken out all of the information relating to personal privacy, and he said I personally had made it impossible for him to telephone the patients and ask them if they would like to participate in his class action lawsuit.

And I thought, well then we should be congratulated on having appropriately enforced the FOIA.

But if it's not possible to redact and release a record traceable to a particular individual then we have to withhold the entire record. Frequently we'll get requests from insurance companies asking for information about the Dick Huff who may already be in litigation say with the insurance company's policyholder. And they'll identify the specific complaint that they want and say I need Dick Huff's data. And in that case it's simply impossible to release any information because redacting his name or the personal privacy is the same as acknowledging that indeed it was Dick who was exposed to a particular product or suffered a particular adverse outcome, and then contacted the federal government.

So it's one thing to release composite data, you know, in a de-identified or summary format, it's an entirely different issue to identify a particular individual under either six or 7C.

Now if it's a first party request it's generally not problematic. Certainly in the United States and in, I would say the overwhelming majority countries represented here, if an individual wants records about themselves that's a pro forma kind of release. That isn't what happens more often under the FOIA in my experience, it is that it's a third party asking for unredacted records about a particular individual.

Now if we're dealing with pediatric patients in my case, and the requester is the patient's parent, or a designated guardian, not a problem. But in most cases my experience has been that it is a designated authorized representative. And the important part there from a FOIA perspective is to ensure that appropriate steps are taken to release unredacted data only to the authorized individual. And so we require submission of an authentication or notarization from the individual who's involved, or if I'm dealing with a death report certainly from next of kin. Justice has a form posted on the internet website which can be used in these cases. Most state governments also have an equivalent form which we will accept. We will not accept however a copy of a signature either fax or photocopy, it needs to be an original.

So the same level of protection is frequently an issue not only in my agency but in other ASAP member agencies if we're looking for a release of documents from a whistle blower or confidential informant, particularly in law enforcement agency.

And again the -- I think the important point there is to make sure that we've gone through the appropriate confirmation prior to release of unredacted records.

Now having said all of that I have to note that this is not my experience in dealing

with state government, and there is a wide diversity of experience and I'm constantly astonished at how much personal information a state will release. And we frequently will overlap dealing with public health.

I recently had an individual complaint that had come in from an individual accompanied by a copy of what he gave to the State of Florida, and I phoned the Attorney General's office in Tallahassee and was told that they release the name of the complainant, the home address and phone number, the nature of the medical issue that resulted in the submission of the complaint.

MR. HUFF: And the underwear size too.

MR. SADLER: Yeah.

MR. HUFF: And this is Florida. We had -- Janet Reno, if I could interrupt, Janet Reno came to the Department of Justice for eight years and she came from the sunshine state and it is sunshine that way, and she was absolutely shocked at what we didn't release under the FOIA and what we were prohibited from releasing under the Privacy Act. And that was a source of tension with her, and amazement with us, both back and forth for her eight years.

MR. SADLER: Absolutely. And back to the litigation. I mean frequently we'll get requests for tabulated death data, and again I recently had an individual come in, it was a public interest group, and they wanted the death reports for all individuals associated with a particular pharmaceutical product and that was product, and that was provided, they came back and asked for the underlying records. And in reviewing these I find that I got the coroner's report from a county in California, same situation, I called and spoke with the coroner and indeed they released everything, blood type, medical history, medications, next of kin, home address, this is all the kind of information that we would not have released under the Freedom of Information Act.

Now partly because of situations like this even if I'm dealing with encoded data, and we've got patients identified solely by number, I will not release even a number. I had one rather notorious case that hit the front page of The Washington Post and the New York Times in '99 and there were only 18 patients in the study, patient 18 died, there was an attempt to release records using only that number. But the difficulty is all 18 patients are in the same room at the same time. So it may not be that the New York Times could figure out who the identity of the patient is, but it's entirely possible that other study participants or other complainants would be able to identify who the individual was.

So in wrapping up here because I'm getting the elbow, they asked me to talk about any landmark litigation. My agency thankfully has not been sued in years and years and years over issues relating to an unwarranted invasion of personal privacy.

But the rule of thumb up until about two years ago was dead men have no privacy, which goes back to the point that Dick was making. So I was gratified to see that there was a landmark case here in the United States approximately two years ago that went to the United States Supreme Court, and it's a very complicated case, but just to a thumbnail sketch of it, in June or July of 1993 Vince Foster who was an attorney working directly for President Clinton when he was in his first term in the White House was found shot to death in a park very close to here in northern Virginia. There were three subsequent and independent government investigations of the circumstances and all three concluded that unfortunately the late Mr. Foster had indeed suffered from depression and had taken his own life.

There was one attorney in particular who was from California by the name of Alan Favish who questioned the findings of all three government investigations and suggested that these were part of a government cover up of indeed Mr. Foster's murder.

Now under the FOIA Mr. Favish requested access to approximately 150 photographs that were taken in the park including close ups of the death scene and the remains, and of the autopsy. That, through negotiation, was reduced to only 129 photographs. And initially the National Archives denied access to all the photos, but eventually through negotiation and protracted discussions relinquished and released 118 of these photographs.

But it withheld the rest arguing that the privacy interest was not Mr. Foster's, but to piggyback on the next level of what Dick was saying, that is was the inherent privacy interest of Mr. Foster's family members which trumped the public interest that would have been served by releasing these particular photos. So the government's position then was that the photos were graphic and releasing these would greatly upset the family.

Mr. Favish argued that the family did not have a relevant privacy interest and that the right to privacy is solely within one's own control, and that that interest is basically lost on an individual's death, so that Mr. Foster could not have exercised his right to privacy.

The initial suit was brought in Washington, D.C. and the government prevailed, the documents were withheld, Mr. Favish filed an appeal in California, as DOJ has frequently called it "behind the avocado curtain," and they saw things a little bit

differently and came out with a split decision ordering the release of some documents -- or some photos, and withholding of others. And at that point then the National Archives joined with the family and requested the entire withholding.

So the basic question was does the family member have a privacy right that justifies withholding under the FOIA, and in a unanimous decision the Supreme Court determined that yes, they did indeed, and that the family interest outweighed the public interest.

Now that would, under the conditions of the decision, only prevail if evidence had not been presented that the government acted in an improper manner and Mr. Favish failed to demonstrate that there was any impropriety.

So the court basically acknowledged if citizens seek access to documents under the FOIA do not normally need to explain why they seek information or what indeed they will do with it, but in this case that would not have held that it exempts from disclosure records that present an unwarranted invasion of privacy for the next of kin. So personally I was gratified to see that.

And I guess in closing I would say my experience in the past nearly three decades has always been very effective in protecting the individual privacy of government records.

MS. WITHNELL: Thank you, Fred, we appreciate that.

I think we've heard so far about how the FOIA works to protect privacy. I'd like to turn now to David Sobel to hear from the requester's point of view. David masquerades as Superman, works for truth, justice and the American way, and he will give us the requester's point.

MR. SOBEL: Thank you.

Well, so far this all sounds great, federal agencies don't release personal information of any of you to third parties. But this is the Department of Homeland Security, that is not the concern that most citizens have about what the Department of Homeland Security might be doing in the privacy area. You're not concerned about your next door neighbor filing a FOIA request with DHS and getting personal information.

I want to talk about what I think the real concerns are and the real world problems that have arisen over the last few years, and basically it requires a recognition of the fact

that privacy is really a little broader than what we've been talking about.

It's not only a matter of maintaining confidentiality of your information, it's also the concept that you as an individual have some control over information about you and the way it's being used, and whether or not it's accurate. And that specifically is what the Privacy Act seeks to address.

So I want to put this in a little bit of a historical context. And I think this discussion really goes back to the Watergate period. And if you remember what Watergate was about it was largely about government misuse of personal information in many ways. Government agencies were maintaining lists of people based upon their political activities. Agencies were conducting electronic surveillance without authorization of the courts. I know it's hard to believe that these things could go on –

(Laughter)

MR. SOBEL: -- but that was what was going on back then in the late '60s and early '70s, resulting in what came to be known as the Watergate scandal. There were congressional investigations and at the end of that process Congress came up with some remedies, or what Congress believed were going to be remedies. And they were for purposes of this discussion two principle things that Congress did.

First of all it strengthened the Freedom of Information Act in the 1974 amendments creating the FOIA that we really know of today.

It also passed the Privacy Act in 1974, and I think these two statutes really have to be seen as two ends of a larger concept, which is that on the one hand the Privacy Act was intended to restrict the ability of federal agencies to collect personal information and to put some control of that process in the hands of citizens.

And the FOIA on the other hand gave citizens the right to collect information about the government and what the government was doing.

So if you see them together I think you can see that there was an attempt on the part of Congress to rearrange the flow of information and have more information flowing out of the government to citizens, and less information flowing from citizens into government agencies.

Now part of what the Privacy Act did was not only protect disclosures to third parties as we're talking about but it also created access rights, and correction rights on the

part of the citizen him or herself, which is to say that the Privacy Act creates a right of access that I can go the Department of Homeland Security and ask for records that the Department maintains about me.

Once I receive that information I have the opportunity to review it, and if there's something that's incorrect I have the ability under the Privacy Act to seek the correction or expungement of that information. And generally speaking those rights of access and correction are judicially enforceable. If the Department of Homeland Security disagrees with my request for access, or my request for correction, I can go to federal court and have an independent review of either my right to access or my right to correction.

So that's what Congress thought it was doing in 1974 in the wake of Watergate.

So we fast forward to the present time. I think it's fair to say, because I want to focus on one specific example because time obviously is short, I think it's fair to say that the average citizen's interaction with the Department of Homeland Security is most prominent and most frequent, and most obvious, in the context of the airport. Getting on a flight, dealing with TSA and having themselves subjected to what's called the passenger pre-screening process. I'm sure a lot of you know a lot about that process, I'm not going to go into the details other than to say that there have been a series of proposals within TSA over the last few years to create this pre-screening process.

First there was what was called CAPS 2, more recently the program is known as Secure Flight. But basically the concept that runs throughout this process is that there's a process of verifying the identity of the passenger and then checking that name against some kind of list. In the past TSA had maintained the list, there was what was called the selectee list, and a no-fly list. Now it appears that the checking is done against a master terrorist watch list that is maintained by the FBI as the terrorist screening database.

But the point is that this is the interaction that most citizens experience with the Department of Homeland Security. In effect the Department through TSA is conducting background checks on every citizen and foreign visitor before boarding an aircraft in the United States.

Well we've now had experience of four years under this system and many citizens have encountered problems at the airport on a regular basis. It is now clear to hundreds if not thousands of citizens that every time they go to the airport they're going to have a hassle because either their name is similar to someone else on the list, or their name actually is on the list. So they have attempted to correct the problems, and the universal experience that these people have had is that it's virtually impossible to really get at the

bottom of the problem.

The reason is that the Department of Homeland Security and TSA have exempted this system from most of the Privacy Act requirements, particularly the right of a judicially enforceable right of access to information, and the right to correct information. So if you are a passenger who persistently has a problem boarding a plane, and you file a Privacy Act request with TSA for information that the agency maintains that is leading to your being pulled out of line every time you try to get on a flight the agency is going to withhold that information because it classifies that as what's called a sensitive security information, and you have no ability to go to court to challenge that determination.

Even if you were given access to the information and you found it to be incorrect, and you discovered the reason why you have a problem every time you go to the airport, they've mis-identified you or they have information about the fact that you had traveled to Afghanistan five years ago, but you can demonstrate that that's not true, you again have no judicially enforceable right to seek the correction of that inaccurate information, because in its Privacy Act notices, and there was discussion earlier about Privacy Act notices, TSA has exempted this entire screening system from those provisions of the Privacy Act that would otherwise give you that right.

So I think it's important to recognize that while all of these concepts that are being talked about are wonderful in theory, that in the one specific real world application that affects tens of millions of citizens in its interaction with the Department of Homeland Security the Department has failed to create a meaningful and effective redress system, and there is no Privacy Act right of the kind that we typically think of when citizens find themselves in these dilemmas.

So I think it's an important case study because it's the most visible, it's the one situation where a citizen is in effect put on notice that there's some data out there that's creating a problem.

We don't know about other situations, we don't know if our names are on other lists, and whether it could be impacting our employment opportunities or other aspects of our lives, so I think it's a very serious problem that needs to be addressed in a serious way. And unfortunately from my perspective thus far it hasn't been adequately addressed, and we have a situation where there are growing databases and growing watch lists that contain an untold number of names -- I've seen estimates of 70,000 names, 100,000 names, with no real accountability or transparency. And given the fact that the title of this workshop is Transparency and Accountability I think this is a situation where the Department and the government as a whole has really failed up until now.

So let me stop at that point and hopefully we'll have some time for questions.

Thank you.

MS. WITHNELL: Thank you, David. You can't fault us for not being balanced on this panel.

I will say just in response that while these systems may be exempt from the Privacy Act the FOIA does allow anyone to ask for access to information, and even if we can't give you specifically what it is that we have because of other operational reasons there is a process in place -- and we can debate whether or not it works -- but there is a process in place at TSA, and it will be expanded, to provide some kind of redress.

I'd like to turn in the interest of time, and we can talk about this afterwards, to Harry Hammitt who has probably single handedly been responsible for keeping us all up to date on what's happening in the FOIA world. He is the editor of Access Reports and he's going to talk to us today a little bit today about the changing concept of privacy.

MR. HAMMITT: Thank you. I did want to kind of talk of one of the things that has struck me about the privacy concept as it applies to FOIA is how it has changed over the years, and I don't want to go through the entire -- FOIA is 40 years old this year and I don't want to go through the entire history, but I wanted to start out with the -- Congress passed FOIA in 1966 and the general privacy exemption essentially says that files that are medical, personnel and similar files can be protected, information in those can be protected, if disclosure would be a clearly unwarranted invasion of personal privacy.

And so the wording clearly -- unwarranted has always struck me, number one, that Congress essentially struck the balance at the beginning towards the idea of access as opposed to disclosure; and number two, that because there is the need to show that it's clearly unwarranted an agency has to, number one, establish that there is a legitimate privacy interest and then it is up to the requester to show the balance -- that there is balance as far as a public interest is concerned.

But the first thing that an agency is supposedly required to do is decide whether there actually is a legitimate privacy interest in the information that's being requested in the first place.

When I first started writing Access Reports, which was in 1985, the case law was going in the direction where essentially, I mean at this point in time it seems almost

amazing that this state of case law could have existed at one time. But it was the mid 1980s the district courts here at least in Washington had come to the conclusion that your name and address was not personal information that was protected under the Freedom of Information Act. And there were lots of cases involving mailing lists in which the courts began to fairly uniformly say there's not a privacy interest in disclosing your name and your address to these people who want to create mailing lists, normally for commercial purposes.

Several years after that in what I look at now as kind of the first intersection of terrorism and informational privacy the Defense Department, which was the recipient of many of these mailing list requests, came up with a policy that they would not disclose information having to do with readily deployable forces. And that meant basically meant people either who were stationed overseas, or were stationed in the United States in places where they could readily be deployed overseas. And because those people stood a greater chance of being harassed or intimidated or retaliated against by -- I don't even know if the word terrorism per se is in this policy, but I mean certainly that was implicit in the policy -- that that sort of information they would not disclose names and addresses of those sorts of people.

That policy was upheld in the courts in the early 1990s. But the case I wanted to talk about a little bit, and Dick has really talked about it more sufficiently as far as the facts are concerned, but the Reporter's Committee case, which was cited in 1989 by the Supreme Court, really changed the whole concept of how agencies deal with personal information. And basically I think what the court did was decide two things. The first of that, that personal information typically speaking was to be considered private unless there was a good reason to consider it otherwise, and that it was the requester's burden to show that there was this public interest in disclosure, which they analyzed as being that the disclosure would shed light on government activities or operations, which basically meant that rather than the burden falling on the agency to show that the information was exempt under the exemption the burden basically fell upon the requester to show why he or she was able to get the information in the first place. In other words they had to show that disclosure would be in the public interest.

So basically what has happened in my mind is that the agencies with the approval of the courts have essentially decided that the idea of a clearly unwarranted invasion of privacy doesn't really mean anything, and that if I have information that is personal in nature I start out with the presumption that is protected by the privacy exemption, then I go back to the requester and say show me your legitimate public interest for asking me to disclose this. And the public interest to shed light on government activities and operations, whereas it sounds like a perfectly legitimate public idea for a public interest

concept, it's an extremely hard argument to make that a list of names or identifying information about individuals somehow specifically sheds light on what the government itself has done.

And typically it has not been very successful. I think courts generally today do this sort of analysis where, as I said, they start out with a presumption that the information is private and then if they don't like the public interest argument that the requester has put forth, and typically a lot of requesters don't put forth particularly good public interest arguments, then the requester loses and the information is protected.

In the late 1990s during the Clinton administration I think that privacy was really moving into its ascendancy and access was really being eclipsed as far as privacy issues were concerned. But after September 11th I also see something of a kind of a mixed bag, and I kind of wanted to end on these two areas.

One is that after 9/11 the government has for a number of years fairly aggressively used the privacy exemptions as one of the reasons to withhold information that really has to do more with what it's doing to wage the war on terrorism than it has to do specifically with the privacy of individuals. And to me this idea that people that the government picks up on suspicion of being, you know, being involved with terrorism and keeps incarcerated for, you know, an infinite amount of time as far as the government is concerned, to think that somehow there's a over riding privacy interest on the part of those individuals not to be identified to the public is really an incredible idea.

But I think on the other hand as far as privacy is concerned, I mean there has been a downside of 9/11 to privacy, and I think privacy actually has gone down since 9/11 overall as a topic. And I think that is the kind of rebirth of the if you're not guilty then why would you object to the government having your information, or disclosing your information. This kind of idea that somehow people who want to keep their information private have something to hide, and in a world that is as, you know, potentially dangerous as we found since 9/11, that's not a good policy reason and a good answer.

So I mean I think privacy has kind of very much taken a backseat as far as that's concerned.

And so I mean I'm going to end my remarks there, but I mean essentially what I'm trying to say is I think that at one time at the beginning of this Freedom of Information Act the idea of access to personal information was typically that most information was going to be disclosed.

Now I believe that essentially the pendulum has swung in virtually the opposite direction, and it's generally that virtually no personal information is disclosed at this time.

MS. WITHNELL: Thanks, Harry.

I'd like to end with a discussion from Scott Hodes, a former colleague and now an attorney in private practice who has been on both sides of the FOIA and can give us the reaction from where he sits.

MR. HODES: I'm going to speak about really the practical aspects of some of these policies.

Basically the policies of protecting names and information about third parties in FOIA requests sounds great; however many times when somebody is just making a FOIA request, somebody is processing a FOIA request, they don't think much farther than what they know the policy to be and we get some really crazy results.

For instance, Terry Anderson if you recall was kept captive in Lebanon for a number of years. After his release he made a FOIA request for the information about his captors to a number of agencies. And these agencies following the government policy said well we can't confirm or deny that we have these results of these individuals. If we did have these records we'd protect them under exemptions 6 and 7C of the FOIA.

The individuals weren't American citizens so they weren't covered by the Privacy Act, but the government policy was to protect them under exemptions 6 and 7C of the FOIA not matter who they were and what they did.

Mr. Anderson had to sue, and as part of that -- I don't think it ever made it on the merits because the Department of Justice got involved at higher levels and released the information.

But these practical aspects such as in this situation continue today. I believe last year or the year before someone made a FOIA request for information on Osama bin Laden, and the government being protecting of privacy of Mr. bin Laden withheld it under exemption 7C and B6. My theory was we could always find him by releasing this information because then he'd have to come to America to establish jurisdiction and file a Privacy Act suit. Of course the court would say you don't have any Privacy Act rights, but maybe we could arrest him then.

And I think these results continue -- Jill Carroll, who was released, the Christian

Science Monitor woman who was kept hostage in Iraq until earlier this week, if she decides she wants to write a book and makes FOIA requests about her captors and some of the investigations that the government made to try to find her, under this policy the government may very likely withhold this information about her kidnappers under the privacy exemptions.

So there are some problems with the policy. Some of the other things to keep in mind is that in 1989 when the Reporter's Committee came out there was no internet and practical obscurity, which is a great concept, was made before anyone realized that with the touch of a few buttons you could probably get some of those results from those courthouses in various places rather than have to drive around and get them.

Many courthouses are now online and you can get the results by paying a small fee. Some of the courthouses and licenses for various things, marriage licenses, a lot of this stuff is free just as long as you can find the site.

So while I'm not saying that that Reporter's Committee is an improper decision I think some of the reasoning behind it has evolved over time because of the internet and the access to information. You can, you know, if you go on Google now and put in your home address your name will show up. So whether or not the government is protecting information about you other people are releasing that information and it's almost a tilting at windmills where the government is trying to protect your privacy in the FOIA process because that privacy is so diminished from other things that I don't know exactly where this is going to lead to, but I think it's still an evolving process due to technology.

And the other thing about the Favish decision about protecting the rights of survivors. Favish wanted records on Vince Foster. That was a matter that was -- it was in the newspapers every day, it was very high profile and if he would have gotten those records, again it would have been high profile.

Many times information that survivors may want to be kept private would never rise to that level. There would be no remembering of your loved ones tragedy or your loved one because the media wouldn't be interested in it, and even if the requester got it there's not much he or she could do with it except maybe put it on his own website, which may or may not get any attention with the number of websites there are.

So Favish, while giving the government an avenue to withhold information to assist survivors, is not a black letter rule that information needs to be protected because of the survivors. It needs to be looked at in a situation by situation.

I know my private -- when I was with the government, you know, the law is the same no matter what side of the street I'm on. And I'm always counseling clients, and most of my clients are reasonably sane where I will tell them not even to request something, or if denied we won't even appeal it, knowing that they can't get it under exemption 6 or 7C.

Most requesters I believe don't try to push it if they don't get it. Some will, but it's not a big avenue as far as I can see, this is not an area where FOIA requesters are really trying to push it and get more information about third parties as long as the agencies are reasonable in making their withholdings.

You know, some areas that agencies are withholding information they shouldn't is in the titles of employees, non-law enforcement agencies aren't releasing the names of especially high level employees, I believe that's a problem and some are doing that.

But, you know, the policy -- you have to take the policy on one hand, and then you have to weigh it the way the agencies actually invoke the policy, and take a close look at it when you're a requester, and even when you're in a FOIA office make sure you're following those policies so you're releasing the proper information and withholding the proper information.

MS. WITHNELL: Thank you, Scott. We've heard quite a few comments this morning that I hope have raised some questions in your minds so please feel free to line up. I know that Armies move on their stomachs and so do workshops, and we don't want to cut too much into your lunch time, but we would like to hear from you.

MS. CHIMMERS: I'm Betty Chimmers, I'm with the National Academies. I'd like to ask a question particularly to Mr. Sobel and Mr. Hammitt, but other people can join in. And that is something that got mentioned in passing by Mr. Huff, but it was kind of humorous, and that was the brothers who died while waiting for some resolution of their Freedom of Information request and I'd like to ask about the timeliness issue which people really haven't raised, and whether this becomes a real factor in the complying with these regulations.

I raise that for two reasons, one because of a recent Washington Post article which did detail the length of time that it is now taking, and the pending Freedom of Information cases that has really been greatly extended. And also just my own personal experience as a former government employee when in the early '90s there was such an emphasis on complying with these as quickly as possible, and I'm talking about on the staff level, it was part of our performance review. But in the -- from about '95 on much

less emphasis on that, and in fact these things seem to be just kind of winding their way.

So my question is, is this an issue that is very relevant to the discussion here and what have you kind of observed about the timeliness?

MR. SOBEL: Well I think it's a terrible problem. I mean any serious requester needs to take into consideration the fact that with many of the agencies that we deal with unless we can invoke our right to expedited processing, which I'll talk a little about in a minute, it's really not even worth pursuing requests often if you're seeking something that is time sensitive.

I actually have the distinction of having, according to the FBI, one of their ten oldest pending requests and I believe it goes back 12 years and it is still being processed.

I mean that gives you some sense how serious the problem can be.

As a result at EPIC because what we tend to pursue is of a fairly timely nature, I mean we ask for information so that it can contribute to a policy debate that's current, we have increasingly raised our claims for expedited processing which was a right that Congress first created 10 years ago in the '96 FOIA amendments, and that actually has been an issue that has involved most of the litigation we've been involved in in the last couple of years, whether or not we are entitled to expedited processing, and even if an agency says that we are what that might mean.

I mean there are agencies that will grant us expedite processing and then say it's still going to take eight months. I mean this is under a statute that on its face says 20 days.

So it's a very serious problem, Congress is aware of it. Senator Kornan has introduced legislation that would attempt to address the problem, but I don't think anyone who's looked at this over on the long term can be very optimistic about getting to a system that approaches anything near the 20 days that the statute requires.

MR. HUFF: Could I add one point on that? Certainly David is absolutely right, that some of the requests take a tremendous long period of time and it's for a variety of different reasons, some of which is insufficient staffing and some of which is a heavy volume of requests that come in, and some is a volume of pages for a particular request. But one thing that the President has done is he promulgated an Executive Order last December which imposed all sorts of appointing review, planning and reporting processes on the agencies that are designed to focus particularly on those agencies that have more than -- that take more than the statutory time period, and trying to push them

much more toward a timely requirement.

We're going to have to wait to see ultimately the effect of that and how it's going to work out, but I think that this is certainly one step that this President has taken that is toward that problem.

MR. HAMMITT: Yeah, I just wanted to -- this has been an area that's been a problem forever and I think most of us always come to the same conclusion generally speaking that it's a matter of greater funding in terms of increase in staffs and resources.

But I just want to say that another aspect that I have not heard spoken about very much that I think perhaps agencies should pay more attention to if they could is that it's really ultimately also a record keeping problem, in the sense record managements problem, and in the sense that oftentimes one reason that makes it difficult to retrieve information is because people just don't know where it is. And I think if record keeping was improved, and I don't mean to be critical of government record keeping because I don't know that much about it personally, but I think that certainly that would be one way in which you could conceivably speed up the process in information.

MR. HODES: On the records keeping it's not just not knowing where it is but the way FOIA offices are set up. The FOIA office has to go to the program office to actually get the records. Agencies where the FOIA office has direct access to the records that knocks out one of the hurdles and helps get information.

I have a request for a client -- I have a few requests for a client at an agency where the FOIA person has been great, she's like I'm ready to do this, I can't get the stuff to put on a spreadsheet and get it to me. But because she can't just go and type a few things into the computer and has to wait for somebody it's made a 20-day process a six-month process.

MS. WITHNELL: Thank you. I think we need to move to the next question.

MS. WORMLEY: I'm Beverly Wormley, I'm with DHS, and my question is more of a personal issue than having to do with my agency.

Now if my notes are correct the Privacy Act creates the right of access and correction except when we're dealing with TSA.

Now recently there were at least two new segments about small children traveling with their parents, and these children appeared on the no-fly list. Now that means that

the parent cannot go to TSA and say why is my six-year old, or why is my three-year old on your list.

MR. SOBEL: Well they can go and ask the question but –

MS. WORMLEY: And not get an answer.

MR. SOBEL: -- it's really within TSA's discretion whether or not they will comply with the request, and if the parents get a no, that's the end of the line, they can't go to court as they otherwise might be able to.

MS. WORMLEY: So it's a discretionary decision and there are no exceptions other than if they feel like it that day they may respond?

MR. SOBEL: Well I'll let Mr. Kendrick respond to, you know, what goes into that exercise of discretion, but I'll just say yes, it is solely within their discretion, and as I say there is no judicially enforceable right involved.

MR. KENDRICK: I defer to Liz.

(Laughter)

MS. WITHNELL: It's not so black and white. Okay, first of all, you know, we're not so stupid as to think that there's a three-year old and a six-year old should be on a no fly list, so steps were taken to correct that.

Secondly, even if you don't have a Privacy Act right of access there is a right of access under the FOIA, which I mentioned before. All requests for personal information are considered under both statutes in order to give the requester the most amount of information that we can.

So there is a way for those parents through the FOIA process to seek some sort of redress.

In addition the Transportation Security Administration does have a redress program and I feel confident that if the parents went to TSA through the redress process and provided some information to them, you know, we have and we would take care of those kinds of problems.

MS. WORMLEY: Okay, just one last comment. On both of the new segments that I

viewed about this issue the reporters specifically stated there is no redress, there is nothing that these parents can do to correct this problem.

So what –

MS. WITHNELL: They're wrong.

MS. WORMLEY: Well obviously according to you, but –

MS. WITHNELL: With all due respect to media it's sort of like writing privacy notices, you know, you sort of write these broad statements and then you don't put in the qualifiers because that's not part of the deal.

There is a process in place for these parents.

MS. WORMLEY: Okay.

MR. SOBEL: But there is a real question as to the effectiveness. I mean, you know, a three-year old and a five-year old is a pretty easy case. You also would have thought that Senator Ted Kennedy was an easy case, but you know, that took five requests and a direct intervention of Secretary Ridge to deal with that problem.

So, you know, yes, there's a redress process but whether or not it's effective we could debate.

MS. WITHNELL: Well, the only thing I will say is that, you know, we also learn from our mistakes and we are improving every day.

MR. WEITSTER: I love my children to death but sometimes I wouldn't mind having them on a no fly list.

(Laughter)

MS. WITHNELL: Thank you for that note of levity.

MR. WEITSTER: My name is Danny Weitster with MIT and the World Wide Web consortium.

I just wanted to come back to the practical obscurity question that was raised at the beginning, and that Mr. Hodes kind of put a point on, I think really raising the question

what's going to be next -- what's going to be the next Reporter's Committee type case and how is it going to be handled.

I was struck by Mr. Sadler's description of handling the case, I can't remember the details involved, but where you determined that information on California death certificates would be relevant and would increase the practical exposure and thereby obviously limit obscurity.

I'm wondering, and when you talked about an example I found myself wondering how far do you look in cases like this, do you for example Google the results that you're about to give and see whether you get the people's names or do you go and do "X," "Y," or "Z" choice point requests, or any number of other things that people could do with data that you disclose.

And I'm just wondering about -- and I don't mean to pin it on you, but I'm curious about your thoughts about government's current response to this very clear dramatic shift in obscurity, or lack thereof, and long-term thoughts about where we ought to head in thinking about this question.

Because it seems to swamp most of the rest of the discussions that are going on here in many respects.

MR. SADLER: Well let me clarify one point because if I misstated then I need to correct this lady right there, you know, in the record.

When I was dealing with the two examples of the consumer complaint in Florida and the coroner's report from California under our application of these 6 and 7C those records would not have been releasable, and my point that I wanted to raise is that this is not a universally held standard, and that the states would have taken an alternative approach.

To be honest with you what I would really love to have done in those cases is to tell the requester you need to go to the state government and talk to them, but once the record has been admitted to the agency it becomes a permanent part of our records and that becomes a FOIA determination.

And in consulting with counsel we decided that the record -- you know, there's a big difference between a federal acknowledgement and confirmation of something and speculation in the media or some other alternative, perhaps less credible source, giving out information.

So in both of those cases I withheld the data. And I think in terms of the practical obscurity concept I have to be honest with you, if I cannot readily locate information then I would determine it to be practically obscure. Most of my stuff tends to be very, very current, and therefore it's readily found in the media, particularly when I'm dealing with death reports.

MR. WEITSTER: I guess I'm just wondering whether there's -- did you do that based on your kind of good judgment and thoroughness, or based on some procedures? Are those procedures common across different agencies or –

MR. SADLER: I think it's common in most agencies that if you encounter records that come from another agency you need to take another step and go beyond that, you know, because the FOIA is binding on all federal agencies if I come against records from Homeland Security I can refer that request and copies of those documents to another federal agency. And I've done that repeatedly with Veterans Administration when we're dealing with patient medical records. And I know that that agency has an obligation to respond then to the FOIA.

I don't have that option with state records. So it's going to have to be a case by case kind of a decision in that situation, and I frankly am inclined to err on the side of conservancy, and I would far rather have a decision of non disclosure challenged than to go too far and jeopardize that individual's right to privacy.

MR. HUFF: The case law in the District of Columbia circuit, at least involving FBI records where they were records that were 30 or 40 years old and contained investigation material that identified certain people that had been looked at as part of an overall investigation, the FBI was required to look at its own records to determine whether it was aware that any of those people had passed away, and if they had then the FBI did not claim privacy interest for them, but they were not required to do additional research beyond their own records. Now when their own record showed a social security number for the individual the FBI in some cases did check a death index to see whether or not they were deceased, but they were not required to do internet searches or do anything beyond that.

And so the FBI, essentially the court said it had to be familiar with its own records with regard to that one aspect of what would be public information, and in those cases they then did release the names of those people who had been investigated in the McCarthy era and subsequent years that had passed away.

MR. WEITSTER: Thank you.

MR. DRISCOLL: My name is Bob Driscoll. I'm the Privacy Officer for the Administration for Children and Families so we can take some of the emphasis off DHS on this one.

And the last gentleman has perfectly set up my question. It goes to Fred's point earlier and what he had raised, the whole issue of re-disclosure.

I'm not really involved so much in FOIA but whether information is released under a routine use or whether released it's under FOIA if it's released to a non-federal party what wage and what consideration and who makes those determinations as to what consideration is given to what that party then does with the information?

My question arises some from something that we do a lot of, we do computer matching agreements and a lot of our computer matching agreements are done with states, for example. They're legitimately done, they're published in the Federal Register and so on, but someone has raised the question with me and I think it's a good one, you disclose this information to a non-federal partner legally and legitimately and what if that partner then just publishes it in the newspaper, or to go back to the point that Fred made earlier, the state laws are maybe not as stringent or not as set as the federal laws are?

And I'd like to hear maybe from one of the attorneys, and from one of the federal people on this issue.

MR. SOBEL: Well, I mean I can just say I don't know what the practice is, other people on the panel can discuss it better. But the Privacy Act does and can apply to contractors, and it's an issue, you know -- I'm getting back again to the aviation screening area. I mean the other side of the coin, I mean I've been talking about how little access the affected citizen can have, well the routine uses on the other hand are very broad and the information can be shared with a very wide range of outside third parties.

So the question we've always had about that specific situation is what if any contractual language is there between the agency and these outside third parties that would subject them to Privacy Act requirements. And, you know, I just raised the question and see if anyone else can respond to that.

MR. HAMMITT: I was going to say that as far as I remember the Computer Matching Act, which is part of the Privacy Act now, that basically computer matches involved fairly specific agreements between the parties that would limit the other parties

ability to disclose that information or use that information beyond the parameters of the matching program.

So I mean I would look at that as an authorized disclosure certainly, and there would not be any sort of a waiver of potential protection under the Privacy Act or the Freedom of Information Act for the agency.

MR. HUFF: I think my experience dealing with the Computer Matching Act at the Department of Justice was somewhat different than that, is that we would give information to a state for certain reasons and that was very similar to giving out information under one of the Privacy Act routine uses or something like that, to a third party, and with the exception of David touching on contractors which under some circumstances certainly are subject to the same sorts of Privacy Act requirements, as state governments generally aren't. And if we -- one of the most frequent areas that the Department of Justice does share information, other than with other federal agencies, is with state governments. They then follow their own laws if somebody were to make a state FOIA request for that information and it may or may not be given out.

MR. KENDRICK: If I could add, under the FOIA for making that kind of release the purpose that that information may be used for may go into considerations for public interest and determining other factors. But how that information, that document, may be used or disseminated later does not bear on whether it's releasable or not. We don't consider that in determining whether it's releasable.

MS. JONES: My name is Almeda Jones, I'm a Records Officer from the Department of Health and Human Services Program Support Center, and I wanted to comment on Mr. Hode's comment about records management playing a part in the whole privacy FOIA arena.

He is correct, I agree with him on that. Twenty to thirty years ago records were not arranged and filed in the orders that they are now, and in an attempt to retrieve records 20 and 30 and sometimes 40 years, I mean it's a headache. I've worked with records over 34 years and people just don't -- I mean they don't arrange them and transfer them in any kind of order, they didn't before. They have rules and regulations but a lot of people do what they want and records management plays a very large part on retrieving the information from FOIA and the privacy.

And so I just wanted to make that comment and agree with Mr. Hodes that if we have a better record management system in the variety of agencies that I think you could retrieve your records a little better and get them back a little quicker.

MS. WITHNELL: Thank you very much.

I'd like to summarize today's discussion just by leaving you with a couple of questions and a couple of comments.

I think when considering privacy and the FOIA and the interface between them it's important to recognize that legally and in other ways there's a distinction between first-party requests and third-party requests, so that if I'm asking for information about you a different set of rules applies than if I'm asking for information about myself.

And going forward something to think about it seems to me is if we're going to fashion bright line rules for folks who are processing FOIAs and for the public who need to appreciate what we're doing shouldn't the government be the last bastion of privacy, at least as far as third-party requests are concerned so that we can say we are truly protecting the information that we're given.

I'd like to thank all the panelists. I think we've had an interesting discussion and thank you so much.

(Applause)