

COALITION OF
JOURNALISTS FOR
OPEN GOVERNMENT
1101 Wilson Blvd, Suite 1100, Arlington, VA. 22209 703-807-2100

11/3/05

The Honorable Michael B. Enzi
379A Russell Senate Office Building
Washington, DC, 20510-5004

Dear Senator Enzi,

The Coalition of Journalists for Open Government (“CJOG”) is an alliance of journalism-related organizations that came together out of concern over the increasing secrecy at all levels of government. We believe this diminishing access to public records and meetings, which prevents the citizenry from being fully informed, is detrimental to public policy and is a principal factor in the public’s growing distrust of and disengagement from government.

Together with the nine undersigned organizations, we write to ask that you amend the Biodefense and Pandemic Vaccine and Drug Development Act of 2005 (S 1873) to remove that portion of Section III which exempts the duties, activities, working groups and advisory boards of the Biomedical Advanced Research and Development Agency (“BARDA”) from the Federal Advisory Committee Act (“FACA”) and the Freedom of Information Act (“FOIA”). Exempting BARDA from these acts is unprecedented and unwarranted. It is likely to do more harm than good to BARDA’s efforts to protect the United States from bioterrorism, epidemics and pandemics.

S 1873 states that BARDA will not be subject to the requirements of FACA and will only be subject to FOIA to the extent that it is determined that there is no threat to national security. These provisions turn the concepts of “open government” and “democracy” on their heads. To our knowledge, no federal agency has ever received a blanket exemption from compliance with the Freedom of Information Act. Even those agencies which deal with sensitive national security information on a daily basis – including the Central Intelligence Agency, the Department of Homeland Security, and the Department of Defense – must comply with FOIA.

Just as these agencies are treated as any other under FOIA, so is the so-called “national security exemption” found in Section (b)(1) of FOIA. That exemption is to be narrowly construed in the same manner as the other eight. Information is only to be withheld for reasons of national security when specifically authorized under an executive order and properly classified pursuant to such order.

The overbreadth of the cited provisions in S 1873 is further compounded by the bill’s statement that a decision to withhold such information “shall not be subject to judicial review.” Review by

an independent judge is not only a cornerstone of the Freedom of Information Act, but of our entire constitutional democracy.

While S 1873 is intended to protect public health and safety, it puts at serious risk the public safety benefit that flows from citizen participation in government. The key to public health is the public, which cannot avoid transmission of epidemic or pandemic disease unless it has knowledge of the disease, its transmission, and its remedies. Members of the public cannot identify and stop bioterrorists unless they are made aware of the bioterrorists' potential existence. Major epidemics throughout history have shown that government secrecy does more to spread disease than prevent it. One need look no further than the recent SARS epidemic, and the failure of the Chinese government to adequately inform the public of this disease and how to prevent its transmission. That government's secrecy threatened not only domestic health, but world health. The same is true of the most extensive flu epidemic in world history, the Great Influenza of 1918, whose rapid spread was due, in part, to government censorship of news coverage regarding this disease.

In the end, the likeliest result of the S 1873 provisions will be to infect and weaken public confidence in BARDA and federal health policies and security policies. In recent remarks on over-classification, former Congressman Lee Hamilton, Vice Chair of the National Commission on Terrorist Attacks Upon the United States, noted that "[a]n abundance of secrecy leads to cynicism on the part of the American people." His committee concluded that "[t]he American people learned the full unvarnished story of 9/11. Because they achieved a fuller understanding of 9/11, they had an opportunity to learn the lessons of the past and apply them to the future."

BARDA can benefit from the same adherence to maximum transparency. The current Exemption (b)(1) to FOIA and the long judicial precedent implementing that exemption, will ensure that the national security is protected in those cases where it truly is justified; openness will ensure that the public protects the national security at all other times.

Please amend S 1873 to repeal these provisions found in Section III, which would become Section 319L(f) of the Public Service Health Act (42 U.S.C. 241, et. seq.).

Thank you,

Pete Weitzel
For the Coalition of Journalists for Open Government,
and the
American Society of Newspaper Editors
Associated Press Managing Editors
Association of Alternative Newspapers
CapitolBeat
Investigative Reporters and Editors
National Conference of Editorial Writers
Society of Environmental Journalists
Society of Professional Journalists
Washington Coalition for Open Government