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Freedom of Information Act (FOIA) Amendments: 110th Congress

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Freedom of Information Act (FOIA) Amendments: 110th Congress

Summary

Enacted in 1966 after 11 years of investigation, legislative development, and deliberation in the House and half as many years of such consideration in the Senate, the Freedom of Information Act (FOIA) displaced the ineffective public information section of the Administrative Procedure Act. The FOIA was designed to enable any person — individual or corporate, regardless of citizenship — to request, without explanation or justification, presumptive access to existing, identifiable, unpublished, executive branch agency records on any topic. The statute specified nine categories of information that may be permissibly exempted from the rule of disclosure. Disputes over the accessibility of requested records could be ultimately settled in court.

Not supported as legislation or enthusiastically received as law by the executive branch, the FOIA was subsequently refined with direct amendments in 1974, 1976, 1986, and 1996. The statute has become a somewhat popular tool of inquiry and information gathering for various quarters of American society — the press, business, scholars, attorneys, consumers, and environmentalists, among others — as well as some foreign interests. The response to a request may involve a few sheets of paper, several linear feet of records, or perhaps information in an electronic format. Such responses require staff time, search and duplication efforts, and other resource commitments. Agency information management professionals must efficiently and economically service FOIA requests, doing so, of late, in the sensitized homeland security milieu. Requesters must be satisfied through timely supply, brokerage, or explanation. Simultaneously, agency FOIA costs must be kept reasonable. The perception that these conditions are not operative can result in proposed new corrective amendments to the statute.

Several bills were offered in this regard in the 109th Congress, such as the OPEN Government Act, introduced by Senator John Cornyn with Senator Patrick Leahy and offered in the House by Representative Lamar Smith. Of related interest was legislation sponsored by Senator Cornyn with Senator Leahy, which would have created a temporary commission to examine, and make recommendations concerning, FOIA request processing delays. A companion bill was offered by Representative Brad Sherman. Another related bill, offered by Senator Leahy, would have amended the Homeland Security Act to modify the limitations on the release of voluntarily furnished critical infrastructure information pursuant to the FOIA. Representative Henry Waxman introduced a comprehensive bill addressing several aspects of information access and disclosure. While some of these proposals made progress in the legislative process, none were enacted by the 109th Congress. Similar legislation has been introduced in the 110th Congress (H.R. 541, H.R. 1309, H.R. 1326, H.R. 1775, S. 849, S. 2427, S. 2488, S. 2746, S, 3276). This report will be updated as events warrant.

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Often referred to as the embodiment of "the people's right to know" about the activities and operations of government, the Freedom of Information Act (FOIA) statutorily established a premise of presumptive public access to information held by the federal departments and agencies. Enacted in 1966 to replace the ineffective public information section of the Administrative Procedure Act (APA), the FOIA allows any person — individual or corporate, regardless of citizenship — to request, without explanation or justification, existing, identifiable, unpublished agency records on any topic.[1] At the time of its enactment, the FOIA was regarded as a somewhat revolutionary development. Only two other nations — Sweden and Finland — had comparable law, and in neither case was it as sweeping as the new American model. The law's premise reversed the burden of proof that had existed under the public information section of the APA. Under the previous arrangement, requesters had to establish a basis for their plea or a need for the information being sought, whereas under the FOIA, accessibility was presumed, and the agencies had to justify denying a requester access, in whole or in part, to information. The FOIA provided clear exceptions allowing explicit types of information to be protected from disclosure, while the APA section, which was vague, had come to be interpreted so as to give the agencies broad discretion to withhold information sought by the public. Furthermore, the APA section was silent regarding the possibility of the denial of a request for information being pursued in court; the FOIA specified this course of action after the exercise of an administrative appeal.

The FOIA was also revolutionary in another regard. The product of 11 years of investigation, legislative development, and deliberation in the House and half as many years of such consideration in the Senate, the statute was almost exclusively a congressional creation. Indeed, no department or agency head had supported the legislation, and President Lyndon B. Johnson had reluctantly signed the measure unceremoniously at the last possible moment under strong pressure from press organizations.[2] Because it was not enthusiastically received as law by the executive branch, the FOIA required close attention by congressional overseers during its initial years of administration, and was subsequently refined with direct amendments in 1974, 1976, 1986, and 1996. While agency hostility to the statute diminished with the ensuing years, there is occasional, latent evidence that its requirements are sometimes regarded in some agencies as secondary to their mission programs. Also, there may be some agency dislike of the FOIA because agency careerists consider the statute intrusive, providing a means for outsiders to question, second-guess, or delay administrative actions and policymaking.

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[1] See 5 U.S.C. § 552.

[2] See Samuel J. Archibald, "The Freedom of Information Act Revisited," *Public Administration Review*, vol. 39, July-August 1979, pp. 311-318.

FOIA Overview

The access procedures of the FOIA apply only to the departments and agencies of the federal executive branch. This scope has been shaped by historical and constitutional factors. During the latter half of the 1950s, when congressional subcommittees began examining government information availability, the practices of the federal departments and agencies were of primary attention. Complaints from the public and the press guided this focus, as did the experience of congressional committees and subcommittees of being rebuffed when seeking information from these entities. The President might have been of interest in this regard, but his exercise of so-called "executive privilege" — the withholding of information based upon his authority as the head of the executive branch — was a matter of some constitutional complexity and uncertainty, and had not resulted in widespread public protest.[3] The accessibility of federal court records was not an issue. Congressional information practices might have been scrutinized, but the subcommittees probing the executive branch in this regard lacked jurisdiction for the legislative branch. In his inaugural 1955 hearing, Representative John E. Moss, chairman of the newly created Special Subcommittee on Government Information, delineated the situation, saying: "We are not studying the availability of information from Congress, although many comments have been made by the press in that field, but we are taking a long, hard look at the amount of information available from the executive and independent agencies for both the public and its elected representatives."[4]

Eleven years after that hearing, the remedying FOIA was made applicable only to the federal departments and agencies. The historical record underlying the FOIA and continuing "executive privilege" considerations contributed to the President being left outside of the scope of the new law. Also, while the historical record underlying the FOIA also contributed to both the legislative and judicial branches being left outside of the scope of the statute, it was thought by some as well that, in the case of Congress, glossings of the secret journal clause or the speech or debate clause of the Constitution[5] might be impediments to the effective application of the FOIA to Congress.[6]

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[3] See U.S. Congress, Senate Committee on the Judiciary, *The Power of the President to Withhold Information from Congress*, committee print, 85th Cong., 2nd sess. (Washington: GPO, 1958-1959), 2 parts.

[4] U.S. Congress, House Committee on Government Operations, *Availability of Information from Federal Departments and Agencies*, hearing, 84th Cong., 1st sess., November 7, 1955 (Washington: GPO, 1956), p. 3.

[5] Art. I, Sec. 5, which directs each house of Congress to keep a journal of its proceedings and publish the same, except such parts as may be judged to require secrecy, has been interpreted to authorize the House and the Senate to keep other records secret. Art. 1, Sec. 6, which specifies that Members of Congress, "for any Speech or Debate in either House ... shall not be questioned in any other Place," might be regarded as a bar to requests to Members for records concerning their floor, committee, subcommittee, or legislative activity.

[6] See U.S. Congress, Senate Committee on Governmental Affairs, *To Eliminate Congressional and Federal Double Standards*, hearing, 96th Cong., 1st sess., September 20,

(continued...)

Although the FOIA specifies nine categories that may be exempted from the statute's rule of disclosure, these exceptions do not require agencies to withhold records, but merely permit access restriction. Allowance is made in the law for the exemption of (1) information properly classified for national defense or foreign policy purposes as secret under criteria established by an executive order; (2) information relating solely to agency internal personnel rules and practices; (3) data specifically excepted from disclosure by a statute which either requires that matters be withheld in a non-discretionary manner or which establishes particular criteria for withholding or refers to particular types of matters to be withheld; (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) inter- or intra-agency memoranda or letters that would not be available by law except to an agency in litigation; (6) personnel, medical, or similar files the disclosure of which would constitute an unwarranted invasion of personal privacy; (7) certain kinds of investigatory records compiled for law enforcement purposes; (8) certain information relating to the regulation of financial institutions; and (9) geological and geophysical information and data, including maps, concerning wells. Some of these exemptions, such as the one concerning trade secrets and commercial or financial information, have undergone considerable judicial interpretation.[7]

A person denied access to requested information, in whole or in part, may make an administrative appeal to the head of the agency for reconsideration. After this step, an appeal for further consideration of access to denied information may be made in federal district court.[8]

Agencies responding to FOIA requests are permitted by the statute to charge fees for certain activities — records search, duplication, and review — depending upon the type of requester, such as a commercial user; an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; a news media representative; or the general public. However, requested records may be furnished by an agency without any charge or at a reduced cost, according to the law, "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or

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[6] (...continued)
1979 (Washington: GPO, 1979); Harold C. Relyea, "Public Access to Congressional Records: Present Policy and Reform Considerations," *Government Information Quarterly*, vol. 2, 1985, pp. 235-256; CRS Report 92-403A, *The Application of the Freedom of Information Act to Congress: A Legal Analysis*, by Jay R. Shampansky (archived; available on request).

[7] For sources concerning judicial interpretation of the FOIA, see Harry A. Hammitt, David L. Sobel, and Tiffany A. Stedman, eds., *Litigation Under the Federal Open Government Laws: 2004* (Washington: EPIC Publications and The James Madison Project, 2004); James T. O'Reilly, *Federal Information Disclosure*, third edition (Eagan, MN: West Group, first published in 2000, with supplements).

[8] See U.S. Congress, House Committee on Government Reform, *A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records*, H.Rept. 109-226, 109th Cong., 1st sess. (Washington: GPO, 2005).

activities of the government and is not primarily in the commercial interest of the requester."[9]

The statute has become a somewhat popular tool of inquiry and information gathering for various quarters of American society — the press, business, scholars, attorneys, consumers, and environmentalists, among others — as well as some foreign interests. The response to a request may involve a few sheets of paper, several linear feet of records, or perhaps information in an electronic format. Such responses require staff time, search and duplication efforts, and other resource commitments. Agency information management professionals must efficiently and economically service FOIA requests, doing so, of late, in the sensitized homeland security milieu. Requesters must be satisfied through timely supply, brokerage, or explanation. Simultaneously, agency FOIA costs must be kept reasonable. The perception that these conditions are not operative can result in proposed new corrective amendments to the statute.

109th Congress Legislative Reform Efforts

During the 109th Congress, Senator John Cornyn, on February 16, 2005, introduced legislation on behalf of himself and Senator Patrick Leahy to "significantly expand the accessibility, accountability, and openness of the Federal Government." Acknowledged to be "a bipartisan effort to improve and update our public information laws — particularly the Freedom of Information Act," S. 394, denominated the Openness Promotes Effectiveness in Our National Government Act of 2005 or OPEN Government Act of 2005, was referred to the Committee on the Judiciary. Senator Leahy was the ranking minority member on the committee, and Senator Cornyn chaired the Subcommittee on Terrorism, Technology, and Homeland Security, which held the initial hearings on the measure.[10] Senator Cornyn noted that the bill "is supported by a broad coalition across the ideological spectrum," and placed in the record "endorsement letters from dozens of watchdog groups."[11] In his introductory remarks, Senator Leahy characterized S. 394 as "a collection of common sense modifications designed to update FOIA and improve the timely processing of FOIA requests by Federal agencies."[12] That same day, a companion bill, H.R. 867, was introduced in the House by Representative Lamar Smith, and was referred to the Committee on Government Reform.

The following matters were among those addressed in the provisions of the bills, as introduced.

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[9] 5 U.S.C. § 552(a)(4)(A)(iii).

[10] *Congressional Record*, daily edition, vol. 151, 109th Cong., 2nd sess., February 16, 2005, p. S1520.

[11] See ibid., pp. S1520-S1524.

[12] Ibid., p. S1526.

- Clarifying that independent journalists are not barred from obtaining fee waivers solely because they lack an institutional affiliation with a recognized news media organization.

- Clarifying that a complainant has substantially prevailed in an FOIA lawsuit, and is eligible to recover attorney fees, if the complainant has obtained a substantial part of his or her requested relief through a judicial or administrative order or if the pursuit of a claim was the catalyst for the voluntary or unilateral change in position by the opposing party.[13]

- Requiring that the Attorney General, whenever a court finds that agency personnel have acted arbitrarily or capriciously with respect to withholding records sought under the FOIA, notify both the Office of Special Counsel and Congress of such court finding, and requiring the Office of Special Counsel to report annually to Congress on any actions taken by its personnel to investigate such cases.[14]

- Clarifying that the 20-day time limit on responding to a FOIA request commences on the date on which the request is initially received by the agency, and providing that, if an agency fails to comply with the time limit requirement, it may not assert any exemption under Section 552(b) to the request unless disclosure would endanger national security or disclose personal information protected by the Privacy Act or proprietary information, or is otherwise prohibited by law.[15]

- Requiring agencies to establish tracking systems, with each FOIA request receiving a tracking number, and to notify requesters of their tracking numbers within 10 days of receiving a request, and to establish a telephone or Internet system to allow requesters to obtain information on the status of their individual requests, including an estimated date on which action on the request will be completed by the agency.

- Providing that statutory provisions protecting records relative to the third exemption of the FOIA which are enacted subsequent to the

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[13] This provision responded to the ruling in *Buckhannon Board and Care Home, Inc*. v. *West Virginia Dep't of Health and Human Services*, 532 U.S. 598 (2001), in which the Supreme Court eliminated the so-called "catalyst theory" of attorney fee recovery under certain federal civil rights laws, and which prompted concern that the holding could be extended to FOIA cases.

[14] The FOIA requires that, when a court finds that agency personnel have acted arbitrarily or capriciously with respect to withholding records sought under the FOIA, the Office of Special Counsel shall determine whether disciplinary action against such personnel is warranted. 5 U.S.C. § 552(a)(4)(F).

[15] The Privacy Act may be found at 5 U.S.C. § 552a.

enactment of the bill must do so explicitly and cite directly to the third exemption, thereby conveying congressional intent to create an information protection within the scope of the exemption.[16] This provision was later offered in separate legislation (see below).

- Expanding agency reporting requirements on FOIA administration to include data on the 10 oldest active requests pending at each agency, including the amount of time that has elapsed since each such request was originally filed; calculated average response times and the range of response times for FOIA requests; and the number of fee status requests that are granted and denied, and the average number of days for adjudicating fee status determinations.

- Clarifying that agency records kept by private contractors licensed by the federal government to undertake recordkeeping functions remain subject to the FOIA.

- Establishing an Office of Government Information Services within the Administrative Conference of the United States to review agency policies and procedures, audit agency performance, recommend policy changes, and mediate disputes between FOIA requesters and agencies with a view to alleviating the need for litigation, but not limiting the ability of requesters to litigate FOIA claims.[17]

- Requiring reports to Congress by the Comptroller General of the United States on the implementation and use of the Critical Infrastructure Information Act of 2002, including the number of private sector persons and state and local government agencies that voluntarily furnished critical infrastructure information (CII) records to the Department of Homeland Security, the number of requests for access to CII records granted or denied, and the results of an examination of whether the nondisclosure of CII has led to the increased protection of critical infrastructure.[18]

- Requiring the Office of Personnel Management to examine how the FOIA can be better administered at the agency level, including an assessment of whether FOIA performance should be considered as a factor in personnel performance reviews, whether a job classification series specific to the FOIA and the Privacy Act should

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[16] The third exemption to the rule of disclosure exempts matters that are "specifically exempted from disclosure by statute [other than the Privacy Act], provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3).

[17] The authorization for the Administrative Conference lapsed in 1995, but it was recently reauthorized, although it has not been appropriated any funds; see 118 Stat. 2255.

[18] The Critical Infrastructure Information Act is Subtitle B of Title II of the Homeland Security Act of 2002; see 116 Stat. 2150.

be considered, and whether FOIA awareness training should be provided to federal employees.

Referred to the Committee on the Judiciary, S. 394 was the subject of hearings before the Subcommittee on Terrorism, Technology, and Homeland Security on March 15, 2005. Witnesses included representatives of the Texas Open Records Division, Heritage Foundation Center for Media and Public Policy, American Civil Liberties Union, and National Security Archive. On September 21, the bill was reported from committee by voice vote without amendment and without an accompanying report. The companion House bill, H.R. 867, was approved, with an amendment, and forwarded from the Subcommittee on Government Management, Finance, and Accountability to the House Committee on Government Reform on September 27, 2006. The amendment would have revoked two FOIA directives issued by the Bush Administration: an October 12, 2001, memorandum from the Attorney General and a March 19, 2002, memorandum from the White House Chief of Staff, both of which urged closer attention to the protection of information.

Of related interest was S. 589, the Faster FOIA Act of 2005, introduced by Senator Cornyn with Senator Leahy on March 10, 2005.[19] This legislation would have established a temporary commission to examine, and make recommendations concerning, FOIA request processing delays. Of the 16 members of the panel, three each would have been appointed by chairman and ranking minority member of the Senate Committee on the Judiciary and House Committee on Government Reform, with the four remaining members having been appointed by the Attorney General, director of the Office of Management and Budget, Archivist of the United States, and Comptroller General of the United States. At least four members of the commission had to be from groups with experience submitting FOIA requests on behalf of nonprofit groups or media organizations. Referred to the Committee on the Judiciary, the bill was reported from committee without amendment or a written report on March 17, 2005, and was placed on the Senate legislative calendar. A companion bill, H.R. 1620, was introduced in the House by Representative Brad Sherman, with Representative Lamar Smith, on April 13, 2005, and it was referred to the Committee on Government Reform.

Senator Leahy also introduced another related bill, S. 622, the Restoration of Freedom of Information Act of 2005, on March 15, 2005, for himself and Senators Carl Levin, Russell Feingold, and Joseph Lieberman. The proposal would have amended the Homeland Security Act to prohibit a record pertaining to the vulnerability of, and threats to, critical infrastructure that is furnished voluntarily to the Department of Homeland Security (DHS) from being made available to the public pursuant to the FOIA if (1) the provider would not customarily make the record available to the public, and (2) the record was designated and certified by the provider as confidential and not customarily made available to the public. The measure also prohibited other federal agencies in receipt of such a record furnished to the DHS from making the record publicly available, and allowed a provider of such a record to withdraw the confidential designation at any time. When

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[19] *Congressional Record*, daily edition, vol. 151, 109th Cong., 2nd sess., March 10, 2005, pp. S2485-S2486.

introducing the legislation, Senator Leahy proffered that the bill would "protect Americans' right to know while simultaneously providing security to those in the private sector who voluntarily submit critical infrastructure records to the Department of Homeland Security." He called the operative protective arrangement "an extraordinarily broad exemption to FOIA in exchange for the cooperation of private companies in sharing information with the government regarding vulnerabilities in the nation's critical infrastructure."[20] The legislation was referred to the Committee on the Judiciary.

On May 12, 2005, Representative Henry Waxman introduced, on behalf of himself and 19 initial cosponsors, H.R. 2331, the Restore Open Government Act of 2005. The measure contained sections promoting the public disclosure of government information, revoking Bush Administration memoranda regarded to encourage the withholding of information, fostering better managed use of information control markings outside of the security classification regime, restoring public access to presidential records, prohibiting the use of secret advisory committees within the executive branch, promoting the timely declassification of information, and improving the operation of the FOIA. The bill was referred to the Committee on Government Reform and the Committee on Homeland Security.

On June 7, Senator Cornyn, with Senator Leahy, introduced S. 1181, which included a provision from S. 394 providing that statutory provisions protecting records relative to the third exemption of the FOIA which are enacted subsequent to the enactment of the bill must do so explicitly and cite directly to the third exemption, thereby conveying congressional intent to create an information protection within the scope of the exemption.[21] The bill cleared the Committee on the Judiciary on a voice vote on June 9, 2005. The Senate passed the bill by unanimous consent on June 24, and the measure was then sent to the House, where it was referred to the Committee on Government Reform.[22]

110th Congress Legislative Reform Efforts

The early months of the 110th Congress saw the reintroduction of the Faster FOIA Act by Representative Brad Sherman as H.R. 541 on January 17, 2007, and the OPEN Act by Representative Lamar Smith as H.R. 1326 on March 5, 2007 (see above).[23] Both bills were referred to the Committee on Oversight and Government Reform. Senator Patrick Leahy reintroduced the OPEN Act as S. 849 on March 13; a hearing on the bill was held by the Committee on the Judiciary on March 14; and the panel approved the measure on a voice vote on April 12, with a report on the

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[20] Ibid., March 15, 2005, pp. S2736-S2738.

[21] Ibid., June 7, 2005, pp. S6159-S6161.

[22] Ibid., June 24, 2005, pp. S7383-S7385.

[23] See *Congressional Record*, daily edition, 110th Cong., 1st sess., March 5, 2007, p. E460.

measure filed and ordered to be printed on April 30.[24] The bill was held up for floor consideration and a final vote due to concerns arising from Department of Justice objections, which were resolved just before the Senate adjourned for the August recess. The bill came before the Senate by unanimous consent on August 3, was amended, and passed by unanimous consent. The amendments included a new definition of "a representative of the news media"; a modification of the conditions for when a complainant has substantially prevailed relative to the recovery of attorney fees and litigation costs; new language concerning the time limits for agencies to act on requests; elimination of language limiting the availability of agency exemptions if an agency fails to comply with time limit provisions and substituting language disallowing the assessing of search fees when an agency fails to comply with time limits; modification of the requirements for request tracking arrangements; modification of the provision amending the third exemption of the act concerning statutory protections of information; a rechartering of the proposed Office of Government Information Services as an entity within the National Archives and Records Administration; and the elimination of a requirement for a Government Accountability Office report on the implementation and use of the critical infrastructure information section of the Homeland Security Act (6 U.S.C. §133).

A modified version of the OPEN Act was introduced on March 5, 2007, by Representative William Clay as H.R. 1309, the Freedom of Information Act Amendments of 2007. The following matters were among those addressed in the provisions of the bill, as introduced.

- Clarifying that agencies may not deny the status of requester claiming to be a journalist solely on the basis of the absence of institutional associations, but must consider the prior publication history of the requester or otherwise consider the requester's stated intent at the time the request is made to distribute information to a reasonably broad audience.

- Clarifying that a complainant has substantially prevailed in an FOIA lawsuit, and is eligible to recover attorney fees, if the complainant has obtained a substantial part of his or her requested relief through a judicial or administrative order or if the pursuit of a claim was the catalyst for the voluntary or unilateral change in position by the opposing party.[25]

- Requiring the Attorney General to notify the Special Counsel of civil actions in which the court issues a written finding that the

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[24] Ibid., March 13, 2007, p. S3066; U.S. Congress, Senate Committee on the Judiciary, *Open Government Act of 2007*, report to accompany S. 849, 110th Cong., 1st sess., S.Rept. 110-59 (Washington: GPO, 2007).

[25] This provision responded to the ruling in *Buckhannon Board and Care Home, Inc*. v. *West Virginia Dep't of Health and Human Services*, 532 U.S. 598 (2001), in which the Supreme Court eliminated the so-called "catalyst theory" of attorney fee recovery under certain federal civil rights laws, and which prompted concern that the holding could be extended to FOIA cases.

circumstances surrounding the withholding of records sought under the FOIA raise questions whether agency personnel acted arbitrarily or capriciously and to submit a report to Congress on the number of such civil actions in the preceding year, and requiring the Special Counsel to submit annually to Congress a report on the actions taken regarding such cases.

- Clarifying that the 20-day time limit on responding to a FOIA request commences on the date on which the request is initially received by the agency, and providing that, the agency may not toll or extend the time limit without the consent of the party filing the request or charge any fees if the agency fails to comply with specified time limits.

- Requiring agencies to establish tracking systems, with each FOIA request receiving a tracking number, and to notify requesters of their tracking numbers within 10 days of receiving a request, and to establish a telephone or Internet system to allow requesters to obtain information on the status of their individual requests, including an estimated date on which action on the request will be completed by the agency.

- Providing that statutory provisions protecting records relative to the third exemption of the FOIA which are enacted subsequent to the enactment of the bill must do so explicitly and cite directly to the third exemption, thereby conveying congressional intent to create an information protection within the scope of the exemption.[26]

- Expanding agency reporting requirements on FOIA administration to include both principal component and overall agency data on requests and their disposition, including the number of occasions on which cited statutes were relied upon to withhold information, as well as other data regarding time lapses for pending requests; the number of requests experiencing response delays; and data on each agency's 10 oldest active requests, 10 oldest active appeals, and the quantity and disposition of expedited review requests and fee waiver requests.

- Clarifying that agency records kept by private contractors licensed by the federal government to undertake recordkeeping functions remain subject to the FOIA.

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[26] The third exemption to the rule of disclosure exempts matters that are "specifically exempted from disclosure by statute [other than the Privacy Act], provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3).

- Establishing an Office of Government Information Services within the National Archives and Records Administration to review agency policies and procedures, audit agency performance, recommend policy changes, and mediate disputes between FOIA requesters and agencies with a view to alleviating the need for litigation, but not limiting the ability of requesters to litigate FOIA claims.

- Requiring reports to Congress by the Comptroller General of the United States on the implementation and use of the Critical Infrastructure Information Act of 2002, including the number of private sector persons and state and local government agencies that voluntarily furnished critical infrastructure information (CII) records to the Department of Homeland Security, the number of requests for access to CII records granted or denied, and the results of an examination of whether the nondisclosure of CII has led to the increased protection of critical infrastructure.[27]

- Requiring the Office of Personnel Management to examine how the FOIA can be better administered at the agency level, including an assessment of whether FOIA performance should be considered as a factor in personnel performance reviews, whether a job classification series specific to the FOIA and the Privacy Act should be considered, and whether FOIA awareness training should be provided to federal employees.

- Clarifying that the "policy of the Federal Government is to release information to the public in response to a request under" the FOIA "if such release is required by law; or if such release is allowed by law and the agency concerned does not reasonably foresee that disclosure would be harmful to an interest protected by an applicable exemption," and specifying that all guidance provided to federal employees having responsibility for carrying out the FOIA "shall be consistent with the policy set forth."

When H.R. 1309 came under consideration by the Committee on Oversight and Government Reform during a March 8, 2007, markup, an amendment to the bill was approved. The added provision would require agencies to indicate, for each redaction made in a record, which specific FOIA exemption was involved. The amended legislation was then approved for House floor consideration.

Introduced on March 29, 2007, H.R. 1775, the Freedom of Information Improvement Act, would amend the FOIA by adding a new subsection facilitating access to records relating to federal contracts. While the exemptions to the rule of disclosure under the statute would still be applicable, provision is made for the potential release of information relating to contract performance, the use of

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[27] The Critical Infrastructure Information Act is Subtitle B of Title II of the Homeland Security Act of 2002; see 116 Stat. 2150.

substandard materials or work practices in performance, and evidence of past poor performance by a contractor.

Negotiations to resolve differences between H.R. 1309 and S. 849 continued through the fall. One of the more contentious issues concerned the Senate bill's failure to specify the source for the payment of attorney fees to FOIA requesters, who would be entitled to payments if an agency changed its position concerning the release of records after a requester challenged an agency denial in court. While the House bill provided that such payments would come from annually appropriated agency funds, the lack of such specificity in the Senate bill posed the strong possibility that it would trigger "pay-as-you-go" objections in the House. On December 6, Senator Leahy, with Senator Cornyn as a cosponsor, introduced S. 2427, a revised version of S. 849 that contained the language of the House bill concerning the source of attorney fees payments.[28] A slightly revised version of this bill, addressing other House concerns, was introduced by Senator Leahy, with 17 bipartisan cosponsors, on December 14 as S. 2488. That same day, the Senate considered the bill, and approved it without amendment by unanimous consent.[29] As adopted by the Senate, the bill amends the FOIA as follows:

- defines "representative of the news media" and "news" for purposes of request processing fees, and regards a freelance journalist as working for a news media entity if the journalist can demonstrate a solid basis for expecting publication through that entity;

- provides that, for purposes of awarding attorney fees and litigation costs, a FOIA complainant has substantially prevailed in a legal proceeding to compel disclosure if such complainant obtained relief through either (1) a judicial order or an enforceable written agreement or consent decree, or (2) a voluntary or unilateral change in position by the agency if the complainant's claim is not substantial;

- prohibits the Treasury Claims and Judgment Fund from being used to pay reasonable attorney fees in cases where the complainant has substantially prevailed, and requires fees to be paid only from funds annually appropriated for authorized purposes for the federal agency against which a claim or judgment has been rendered;

- directs the Attorney General to (1) notify the Special Counsel of civil actions taken for arbitrary and capricious rejections of requests for agency records, and (2) submit annual reports to Congress on such civil actions, while also directing the Special Counsel to submit an annual report on investigations of agency rejections of FOIA requests;

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[28] *Congressional Record*, daily edition, vol. 153, Dec. 6, 2007, pp. S14853-S14855.

[29] Ibid., Dec. 14, 2007, pp. S15701-S15704.

- requires the 20-day period during which an agency must determine whether to comply with a FOIA request to begin on the date the request is received by the appropriate component of the agency, but no later than 10 days after the request is received by any component that is designated to receive FOIA requests in the agency's FOIA regulations; and prohibits the tolling of the 20-day period by the agency, except (1) that the agency may make one request to the requester for clarifying information and toll the 20-day period while awaiting such information, or (2) if necessary to clarify with the requester issues regarding fee assessment, and ends the tolling period on the agency's receipt of the requester's response.

- prohibits an agency from assessing search or duplication fees if it fails to comply with time limits, provided that no unusual or exceptional circumstances apply to the processing of the request, and requires each agency to make available its FOIA Public Liaison (see below), who shall assist in the resolution of any disputes between the agency and the requester;

- requires agencies to establish (1) a system to assign an individualized tracking number for each FOIA request received that will take longer than 10 days to process, and (2) a telephone line or Internet service that provides information on the status of a request;

- revises annual reporting requirements on agency compliance with the FOIA to require information on (1) FOIA denials based upon particular statutory provisions, (2) response times, and (3) compliance by the agency and by each principal component thereof; and requires agencies to make the raw statistical data used in reports electronically available to the public upon request;

- redefines "record" under the FOIA to include any information maintained by an agency contractor;

- establishes within the National Archives and Records Administration an Office of Government Information Services (OGIS) to (1) review compliance with FOIA policies, (2) recommend policy changes to Congress and the President, and (3) offer mediation services between FOIA requesters and agencies as a non-exclusive alternative to litigation; and authorizes the OGIS to issue advisory opinions if mediation fails to resolve a dispute;

- requires each agency to designate a Chief FOIA Officer, who shall (1) have responsibility for FOIA compliance, (2) monitor FOIA implementation, (3) recommend to the agency head adjustments to agency practices, policies, personnel, and funding to improve implementation of the FOIA, and (4) facilitate public understanding of the purposes of the FOIA's statutory exemptions; and requires agencies to designate at least one FOIA Public Liaison, who shall be appointed by the Chief FOIA Officer to (1) serve as an official to

whom a FOIA requester can raise concerns about service from the FOIA Requester Center, and (2) be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes;

- requires the Office of Personnel Management to report to Congress on personnel policies related to the FOIA; and

- requires the identification of the FOIA exemption(s) relied upon to redact information from records provided in response to a FOIA request.

The Senate-approved bill was received in the House on December 17, and was referred to the Committee on Oversight and Government Reform. The following day, the measure was considered by the House under a suspension of the rules, agreed to by voice vote, and cleared for the President.[30] The legislation was signed into law by President Bush on December 31, 2007.[31]

Less than a month later, Senator Patrick Leahy, the principal Senate proponent of the FOIA reform legislation, pointed out to his colleagues that OMB officials had indicated that all of the funding authorized by the new law for the OGIS within NARA would be placed within the Department of Justice budget for FY2009. This arrangement could give the Department control over the OGIS, perhaps to the point of euthanizing it, or allocating the OGIS funds to its own Office of Information and Privacy, which oversees FOIA compliance by federal agencies. In creating the OGIS, legislators had deliberately located it outside of the Department of Justice, which represents agencies sued by FOIA requesters. Calling the OMB tactic "not only contrary to the express intent of the Congress, but ... also contrary to the very purpose of this legislation," Leahy expressed hope "that the administration will reconsider this unsound decision and enforce this law as the Congress intended."[32] OMB declined to comment on the matter prior to the formal presentation of the President's budget to Congress on February 4.

What the President's budget offered regarding the OGIS was the following section proposed for enactment as part of Title V, General Provisions, of the Commerce, Justice, Science, and Related Agencies Appropriations legislation for FY2009.

> Sec. 519. The Department of Justice shall carry out the responsibilities of the office established in 5 U.S.C. 552(h), from amounts made available in the Department of Justice appropriation for "General Administration Salaries and Expenses." In addition, subsection (h) of section 552 of title 5, United States

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[30] Ibid., Dec. 18, 2007, pp. H16788-H16792.

[31] P.L. 110-175.

[32] *Congressional Record*, daily edition, vol. 154, Jan. 23, 2008, pp. S201-S202; Dan Friedman, "Senators Say White House Plans to Eliminate Special FOIA Office," *CongressDaily*, Jan. 25, 2008, available at [http://www.govexec.com/story_page_pf.cfm?articleid=39120&dcn=e_gvet].

> Code, is hereby repealed, and subsections (i) through (l) are redesignated as (h) through (k).[33]

The office established in 5 U.S.C. §552(h) is the OGIS. The Department of Justice, which would be vested with carrying out the responsibilities of that office, would be authorized to utilize funds from its general administration appropriation to do so. House appropriators subsequently rejected this language. Of the almost $424 million recommended for NARA for FY2009, an increase of almost $32 million over the requested amount, $330 million was proposed for operating expenses, an increase of a little more than $2 million above the President's budget request. Specified allocations from this account included slightly more than half a million dollars to increase archivist staff, $1 million for the OGIS, and over half a million dollars for review and declassification of U.S. government records on the Nazi and Japanese Imperial governments.[34]

On March 12, 2008, Senator Leahy introduced S. 2746, the OPEN FOIA Act of 2008.[35] The bill amends the third or intervening statute exemption of the FOIA to require that, after the enactment of this legislation, all legislative provisions intended to fall within the ambit of exemption 3 specifically cite to the exemption provision.[36] Similar legislation was unanimously approved by the Senate during the 109th Congress, but failed to move in the House. The new bill was referred to the Committee on the Judiciary.

On July 16, 2008, Senator Charles Grassley introduced S. 3276 to make the FOIA, Privacy Act, and Federal Advisory Committee Act applicable to the Smithsonian Institution. Senator Grassley said he was offering the legislation in response to "oversight findings and the many scandals that have raised questions about accountability and mismanagement at the Smithsonian" during recent years.[37] The bill was referred to the Committee on Rules and Administration.

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[33] U.S. Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2009 — Appendix* (Washington: GPO, 2008), p. 239.

[34] U.S. Congress, House Committee on Appropriations, *Financial Services and General Government Appropriations Bill, 2009*, committee print, 110th Cong., 2nd sess. (Washington: GPO, 2008), pp. 80-81.

[35] *Congressional Record*, daily edition, vol. 154, Mar. 12, 2008, pp. S2000-S2001.

[36] The third or intervening statute exemption of the FOIA may be found at 5 U.S.C. §552(b)(3).

[37] *Congressional Record*, daily edition, vol. 154, July 16, 2008, pp. S6873-S6875; also see James V. Grimaldi and Jacqueline Trescott, "Bill Would End FOIA Shield for Smithsonian," *Washington Post*, July 19, 2008, pp. C1, C5.

Current Legislation

H.R. 541 (Sherman)

A bill to establish the Commission on Freedom of Information Act Processing Delays; introduced January 17, 2007, and referred to the Committee on Oversight and Government Reform.

H.R. 1309 (Clay)

Freedom of Information Act Amendments of 2007. Introduced March 5, 2007, and referred to the Committee on Oversight and Government Reform; approved March 6 by the Subcommittee on Information Policy, Census, and National Archives on a voice vote and sent to full committee; amended and approved March 8 by the Committee on Oversight and Government Reform; approved March 14 by the House under a suspension of the rules on a 308-117 vote.

H.R. 1326 (Smith (TX))

Openness Promotes Effectiveness in our National Government Act of 2007 (the OPEN Act). Introduced March 5, 2007, and referred to the Committee on Oversight and Government Reform.

H.R. 1775 (Cardoza)

Freedom of Information Improvement Act. Introduced March 29, 2007, and referred to the Committee on Oversight and Government Reform.

S. 849 (Leahy)

Openness Promotes Effectiveness in our National Government Act of 2007 (the OPEN Act). Introduced March 13, 2007, and referred to the Committee on the Judiciary; hearing held March 14; approved by committee on a voice vote on April 12; report (S.Rept. 110-59) filed and ordered to be printed April 30; brought up by unanimous consent, amended, and approved on August 3, 2007.

S. 2427 (Leahy)

Openness Promotes Effectiveness in our National Government Act of 2007 (the OPEN Act). Introduced December 6, 2007, and referred to the Committee on the Judiciary; superseded by S. 2488.

P.L. 110-175; S. 2488 (Leahy)

Openness Promotes Effectiveness in our National Government Act of 2007 (the OPEN Act). Introduced December 14, 2007, passed without amendment by unanimous consent, and message on Senate action sent to the House; received in the House and referred to the Committee on Oversight and Government Reform on December 17; considered under a suspension of the rules in the House and agreed to by voice vote on December 18; presented to the President on December 21; signed into law on December 31.

S. 2746 (Leahy)

OPEN FOIA Act of 2008. Introduced March 12, 2008, and referred to the Committee on the Judiciary.

S. 3276 (Grassley)

Open and Transparent Smithsonian Act of 2008. Introduced July 16, 2008, and referred to the Committee on Rules and Administration.