

The Amendments to S 849 as approved by the Senate

Definition of Media

Original language in S 849

Section 552(a)(4)(A)(ii) of title 5, United States Code, is amended by adding at the end the following:

“ In making a determination of a representative of the news media under subclause (II), an agency may not deny that status solely on the basis of the absence of institutional associations of the requester, but shall consider the prior publication history of the requester. Prior publication history shall include books, magazine and newspaper articles, newsletters, television and radio broadcasts, and Internet publications. If the requestor has no prior publication history or current affiliation, the agency shall consider the requestor's stated intent at the time the request is made to distribute information to a reasonably broad audience.’.

Language in amended version that passed Senate:

(a) NEWS-MEDIA STATUS.—

“The term “a representative of the news media” means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of “news”) who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a newsmedia entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.”

Analysis:

The new language parallels a definition drafted by Office of Management and Budget back in 1987 but includes language similar to a 1991 court decision that allowed

the National Security Archive to qualify for media status and to allow for the dynamic changes taking place in “media” as a result of the internet. It’s possible the new language will make it more difficult for some bloggers, those who are not actually providing an editing function, to gain a fee waiver. But overall we believe the new language will benefit anyone seeking information for journalistic goals.

Recovery of Attorneys Fees

Original language in S 849

Section 552(a)(4)(E) of title 5, United States Code, is amended--

(1) by inserting `(i)' after `(E)'; and

(2) by adding at the end the following:

(ii) For purposes of this section, a complainant has substantially prevailed if the complainant has obtained relief through either--

(I) a judicial order, an administrative action, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the opposing party, where the complainant's claim or defense was not frivolous.'.

Language in amended version that passed Senate:

(b) ATTORNEYS’ FEES.— At page 5, strike lines 1 through 7 and insert:

“(I) a judicial order, or an enforceable written agreement or consent decree;

or

(II) a voluntary or unilateral change in position by the agency, provided that the complainant’s claim is not insubstantial.”

Analysis:

The intent of the initial bill was to overturn a 2001 court decision that has limited the recovery of attorney’s fees. Before the decision, a requester who sued and then got all or much of the information sought from the agency before a trial was eligible to recover legal fees – under what was termed the “catalyst” theory. The court decision dumped the catalyst theory and required the requester to prevail in court to be eligible.

The Justice Department and Sen. Kyl fought the change in the initial bill but the compromise restores the catalyst approach. There is a modest change in the language establishing the criteria for recovery, from a showing the requesters claim was “not frivolous” to “not insubstantial.” The courts will ultimately decide what that means but the difference to me seems inconsequential.

Penalties and Time Limits

Original language in S 849

(a) Time Limits-

(1) IN GENERAL- Section 552(a)(6)(A)(i) of title 5, United States Code, is amended by inserting ` , and the 20-day period shall commence on the date on which the request is first received by the agency, and shall not be tolled without the consent of the party filing the request' after `adverse determination'.

(2) EFFECTIVE DATE- The amendment made by this subsection shall take effect 1 year after the date of enactment of this Act.

(b) Availability of Agency Exemptions-

(1) IN GENERAL- Section 552(a)(6) of title 5, United States Code, is amended by adding at the end the following:

`(G)(i) If an agency fails to comply with the applicable time limit provisions of this paragraph with respect to a request, the agency may not assert any exemption under subsection (b) to that request, unless disclosure--

`(I) would endanger the national security of the United States;

`(II) would disclose personal private information protected by section 552a or proprietary information; or

`(III) is otherwise prohibited by law.

`(ii) A court may waive the application of clause (i) if the agency demonstrates by clear and convincing evidence that there was good cause for the failure to comply with the applicable time limit provisions.'.

(2) EFFECTIVE DATE AND APPLICATION- The amendment made by this subsection shall take effect 1 year after the date of enactment of this Act and apply to requests for information under section 552 of title 5, United States Code, filed on or after that effective date.

Language in amended version that passed Senate:

“(b) COMPLIANCE WITH TIME LIMITS.—

(1)(A) Section 552(a)(4)(A) of title 5, United States Code, is amended by adding at the end the following:

“(viii) An agency shall not assess search fees under this subparagraph if the agency fails to comply with any time limit under paragraph (6), provided that no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.”

(B) Section 552(a)(6)(B)(ii) of title 5, United States Code, is

amended by inserting between the first and second sentences the following:

“To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the

requester and the agency.”

(e) STATUS OF REQUESTS.— At page 7:

(1) strike lines 17 through 22 and insert:

“(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and”

(2) at line 23, strike “(C)” and insert “(B)”.

(c) COMMENCEMENT OF 20-DAY PERIOD AND TOLLING.— At page 6, lines 1 through 7 and insert:

“(1) IN GENERAL.— Section 552(a)(6)(A)(i) of title 5, United States Code, is amended by striking “determination;” and inserting:

“determination. The 20-day period shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event no later than ten days after the request is first received by any component of the agency that is designated in the agency’s FOIA regulations to receive FOIA requests. The 20-day period shall not be tolled by the agency except (I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the FOIA requester or (II) if necessary to clarify with the requester issues regarding fee assessment. In

3
either case, the agency’s receipt of the requester’s response to the agency’s request for information or clarification ends the tolling period;”

Analysis:

There are three changes here.

First, the penalties imposed if an agency does not respond in 20 working days. The proposed change was quite controversial and some argued would cause serious breaches of confidentiality if an agency waived its ability to withhold information based on an exemption because it failed to meet the deadline. The change conforms with the House version, which provides a financial penalty – the loss of search fees if the 20 day deadline is not met.

The second provides that the 20-day clock does not start running until the request reaches the proper FOIA office within agency, as long as that does not take more than 10 days. Agencies argued that FOIA requests are often misaddressed and go to a main office rather than a field or component office that actually has custody of the record. They don’t want to be penalized for the resulting delay. FOIA advocates noted agencies have sometimes abused the process, extending the transfer of requests to the proper component to avoid starting the clock. The 10 days provides a compromise.

The third provides that the clock can be “tolled”, or stopped, once to allow an agency to ask questions that will clarify the request and get a response, theoretically making the processing more efficient. The amendment as first drafted would have allowed for repeated questions and tolling and permitted agencies to continue a practice

of dragging out the response time indefinitely. The one-time toll provision seems reasonable.

Statutory Exemptions

Original language in S 849

SEC. 8. SPECIFIC CITATIONS IN EXEMPTIONS.

Section 552(b) of title 5, United States Code, is amended by striking paragraph (3) and inserting the following:

- ^ (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute--
 - ^ (A) if enacted after the date of enactment of the Openness Promotes Effectiveness in our National Government Act of 2005, specifically cites to this section; and
 - ^ (B)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
 - ^ (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld;'

Language in amended version that passed Senate:

- (f) CLEAR STATEMENT FOR EXEMPTIONS.— At page 8, strike line 19 and all that follows through the end of the section and insert:
 - “(A) if enacted prior to the date of enactment of the OPEN Government Act of 2007, requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or establishes particular criteria for withholding or refers to particular types of matters to be withheld; or
 - “(B) if enacted after the date of enactment of the OPEN Government Act of 2007, specifically cites to the Freedom of Information Act.”
- (g) PRIVATE RECORDS MANAGEMENT.— At page 13, lines 14 through 15, strike “a contract between the agency and the entity.” and insert “Government contract, for the purposes of records management.”.

Analysis:

The intent of this provision in the original bill was to send up a flag whenever a bill is introduced that includes a new statutory exemption to FOIA. The language of S849 incorporates existing criteria for creating such an exemption.

The revision still provides for the flag – language saying FOIA is being amended – but it also drops the criteria for the new exemption. It’s unclear to me what the impact of this is, and whether existing statutory language establishing the criteria is retained.

Establishing an Ombudsman

Original language in S 849

Sec. 596. Office of Government Information Services

- ^ (a) There is established the Office of Government Information Services within the Administrative Conference of the United States.
- ^ (b) The Office of Government Information Services shall--
 - ^ (1) review policies and procedures of administrative agencies under section 552 and compliance with that section by administrative agencies;
 - ^ (2) conduct audits of administrative agencies on such policies and compliance and issue reports detailing the results of such audits;
 - ^ (3) recommend policy changes to Congress and the President to improve the administration of section 552, including whether agencies are receiving and expending adequate funds to ensure compliance with that section; and
 - ^ (4) offer mediation services between persons making requests under section 552 and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, issue advisory opinions if mediation has not resolved the dispute.'
- (b) Technical and Conforming Amendment- The table of sections for chapter 5 of title 5, United States Code, is amended by striking the item relating to section 596 and inserting the following:
 - ^ 596. Office of Government Information Services.
 - ^ 597. Authorization of appropriations.'
- (c) Effective Date- The amendments made by this section shall take effect 1 year after the date of enactment of this Act.

Language in amended version that passed Senate:

“SEC. 11. OFFICE OF GOVERNMENT INFORMATION SERVICES.

“(a) IN GENERAL— Section 552 of title 5, United States Code, is amended by adding at the end the following:

“(h) There is established the Office of Government Information Services within the National Archives and Records Administration. The Office of Government Information Services shall review policies and procedures of administrative agencies under section 552, shall review compliance with section 552 by administrative agencies, and shall recommend policy changes to Congress and the President to improve the administration of section 552. The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests

under section 552 and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

5

“(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of section 552 and issue reports detailing the results of such audits.

“(j) Each agency shall—

“(1) Designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

General Duties— The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency—

“(A) have agency-wide responsibility for efficient and appropriate compliance with the FOIA;

“(B) monitor FOIA implementation throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency’s performance in implementing the FOIA;

“(C) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of the FOIA;

“(D) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency’s performance in implementing the FOIA; and

“(E) facilitate public understanding of the purposes of the FOIA’s statutory exemptions by including concise descriptions of the exemptions in both the agency’s FOIA handbook issued under section 552(g) of title 5, United States Code, and the agency’s annual FOIA report, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply.”

“(2) Designate one or more FOIA Public Liaisons who shall be appointed by the Chief FOIA Officer.

General Duties— FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a FOIA requester can raise concerns about the service the FOIA requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.”

Analysis:

This makes three changes in the initial bill.

It moves the location of the ombudsman’s office from the Administrative Conference, an unfunded entity that exists on paper only now, to the National Archives. That’s where the new office is located in the House version.

Second, it takes away the audit function and gives it to the General Accountability Office, which now periodically audits FOIA performance.

Third, it establishes in law the positions of Chief FOIA Officer and Public Liaison in each agency. These positions were created under the president's executive order of December 2005 to improve service to requesters.

The first draft of Sen. Kyl's amendment eliminated the mediation function of the ombudsman and in effect provided these new positions as a replacement. In the amendment as passed, the mediation, which is the guts of the ombudsman provision, remains and the two new positions are supplemental.