

Congress cloaks more information in secrecy

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WASHINGTON — Few would argue with the need for a national livestock identification system to help the federal government handle a disease outbreak such as mad cow.

But pending legislation calling for the nation's first electronic livestock tracking system would prohibit the public from finding out anything about animals in the system, including the history of a cow sick with bovine spongiform encephalopathy.

The only way the public can find out such details is if the secretary of agriculture makes the information public.

That's because the legislation, sponsored by Rep. Collin C. Peterson, D-Minn., includes a provision that exempts information about the system from being released under the Freedom of Information Act.

Formally called the "third exemption," it is one of nine exemptions the government can use to deny the release of information requested under the FOI Act.

Open government advocates say it is the most troubling of the nine exemptions because it allows Congress to cloak vital information in secrecy through legislation, often without a public hearing or debate. They say Congress frequently invokes the exemption to appease private sector businesses, which argue it is necessary to protect proprietary information.

"It is an easy way to slap a secrecy stamp on the information," said Rick Blum, director of openthegovernment.org, a coalition of more than 30 groups concerned about government secrecy.

The legislative intent of Congress is far more difficult to challenge than a federal agency's denial for the release of information, said Kevin M. Goldberg, general counsel to the American Society of Newspaper Editors.

"This secrecy is often perpetuated in secret as most of the (third exemption) provisions consist of one or two paragraphs tucked into a much larger bill with no notice that the Freedom of Information Act will be affected at all," Goldberg said.

There are at least 140 cases where congressional lawmakers have inserted such exemptions, according to a 2003 Justice Department report.

The report notes that Congress has been "increasingly active in enacting such statutory provisions."

The exemptions have become so popular that finding them in proposed legislation is "like playing a game of Wackamole," one staffer to Sen. Patrick Leahy, D-Vt., joked. "As soon as you handle one, another one pops up."

Congress used the exemption in its massive Homeland Security Act three years ago, granting businesses protection from information disclosure if they agreed to share information about the vulnerabilities of their facilities.

And in another twist on the exemption, Congress inserted a provision into the Consolidated Appropriations Act of 2004 that states that "no funds appropriated under this or any other act may be used to disclose" records about firearms tracking to the public.

Government agencies have also sought protection from information disclosure.

For example, Congress passed an amendment to the National Security Act in 1984 that exempted the CIA from having to comply with the search and review requirements of the FOI Act for its "operational files."

Most of the information in those files, which included records about foreign and counter-intelligence operations, was already protected from disclosure under the other exemptions in the FOI Act.

But before Congress granted the exemption, the agency had to search and review each document to justify withholding the information, which cost time and money.

Open government advocates say many of the exemptions inserted into legislation are not justified.

"This is back door secrecy," said Thomas Blanton, executive director of the National Security Archive at George Washington University, a nonprofit research institute based in Washington.

When an industry wants to keep information secret, it seeks the so-called third exemption, he said.

"It all takes place behind the sausage grinder," Blanton said. "You don't know what gristle is going through the spout, you just have to eat it."

But Daniel J. Metcalfe, co-director off the Justice Department's Office of Information and Privacy, said the exemption is crucial to the FOI Act's structure.

In the case of the animal identification bill, the exemption is critical to winning support from the cattle industry and on Capitol Hill.

"If we are going to develop an animal ID system that's effective and meaningful, we have to respect participants' private information," said Peterson, the Minnesota lawmaker who proposed the identification system. "The goal of a national animal I.D. system is to protect livestock owners as well as the public."

As the livestock industry sees it, it is providing information that will help protect the public health. In exchange for proprietary information about their herds, they believe they should receive confidence that their business records will not be shared with the public.

"The producers would be reluctant to support the bill without the protection," said Bryan Dierlam, executive director of government affairs at the National Cattleman's Beef Association.

The animal identification bill provides the government with the information it needs to protect the public in the event of a disease outbreak, Dierlam said. "But it would protect the producers from John Q. Public trying to willy-nilly access their information."

Food safety experts agree there is a clear need for an animal identification system to protect the public, but they are not certain that the exemption to the FOI Act is necessary.

"It's sad that Congress feels they have to give away something to the cattle industry to achieve it," said Caroline Smith DeWaal, director of the food safety program at the Center for Science in the Public Interest, a nonprofit organization based in Washington.

Slipping the exemption into legislation without notice is another problem cited by open government advocates.

It has become such a problem that the Senate's strongest FOI Act supporters, Sen. John Cornyn, R-Texas, and Sen. Patrick Leahy, D-Vt., proposed that lawmakers be required to uniformly identify the exemption in all future bills.

"If Congress wants to create new exemptions, it must do so in the light of day," Cornyn said. "And it must do so in a way that provides an opportunity to argue for or against the new exemption — rather than have new exemptions creep into the law unnoticed."

Leahy agreed, saying that Congress must be diligent in reviewing new exemptions to prevent possible abuses.

"In Washington, loopholes tend to beget more loopholes, and it's the same with FOI Act exemptions," Leahy said. "Focusing more sunshine on this process is an antidote to exemption creep."

On the Web:

Justice Department's FOIA report: www.doj.gov

Animal Identification Act (HR1254): <http://thomas.loc.gov>

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