

OPEN Government Act of 2007 (Introduced in Senate)

S 849 IS

110th CONGRESS

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S . 849

To promote accessibility, accountability, and openness in Government by strengthening section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), and for other purposes.

IN THE SENATE OF THE UNITED STATES

March 13, 2007

Mr. LEAHY (for himself and Mr. CORNYN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To promote accessibility, accountability, and openness in Government by strengthening section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Openness Promotes Effectiveness in our National Government Act of 2007' or the `OPEN Government Act of 2007'.

SEC. 2. FINDINGS.

Congress finds that--

- (1) the Freedom of Information Act was signed into law on July 4, 1966, because the American people believe that--
 - (A) our constitutional democracy, our system of self-government, and our commitment to popular sovereignty depends upon the consent of the governed;
 - (B) such consent is not meaningful unless it is informed consent; and
 - (C) as Justice Black noted in his concurring opinion in *Barr v. Matteo* (360 U.S. 564 (1959)), `The effective

functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees.';

(2) the American people firmly believe that our system of government must itself be governed by a presumption of openness;

(3) the Freedom of Information Act establishes a 'strong presumption in favor of disclosure' as noted by the United States Supreme Court in *United States Department of State v. Ray* (502 U.S. 164 (1991)), a presumption that applies to all agencies governed by that Act;

(4) 'disclosure, not secrecy, is the dominant objective of the Act,' as noted by the United States Supreme Court in *Department of Air Force v. Rose* (425 U.S. 352 (1976));

(5) in practice, the Freedom of Information Act has not always lived up to the ideals of that Act; and

(6) Congress should regularly review section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), in order to determine whether further changes and improvements are necessary to ensure that the Government remains open and accessible to the American people and is always based not upon the 'need to know' but upon the fundamental 'right to know'.

SEC. 3. PROTECTION OF FEE STATUS FOR NEWS MEDIA.

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.'.

SEC. 4. RECOVERY OF ATTORNEY FEES AND LITIGATION COSTS.

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:

` (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.

SEC. 7. INDIVIDUALIZED TRACKING NUMBERS FOR REQUESTS AND STATUS INFORMATION.

(a) In General- Section 552(a) of title 5, United States Code, is amended by adding at the end the following:

` (7) Each agency shall--

` (A) establish a system to assign an individualized tracking number for each request for information under this section;

` (B) not later than 10 days after receiving a request, provide each person making a request with the tracking number assigned to the request; and

` (C) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including--

` (i) the date on which the agency originally received the request; and

` (ii) an estimated date on which the agency will complete action on the request.'

(b) Effective Date and Application- The amendment made by this section 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.

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;'.

SEC. 9. REPORTING REQUIREMENTS.

(a) In General- Section 552(e)(1) of title 5, United States Code, is amended--

(1) in subparagraph (B)(ii), by inserting after the first comma ` the number of occasions on which each statute was relied upon,';

(2) in subparagraph (C), by inserting ` and average' after ` median';

(3) in subparagraph (E), by inserting before the semicolon ` , based on the date on which the requests were received by the agency';

(4) by redesignating subparagraphs (F) and (G) as subparagraphs (N) and (O), respectively; and

(5) by inserting after subparagraph (E) the following:

` (F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

` (G) based on the number of business days that have elapsed since each request was originally received by the agency--

` (i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

` (ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

` (iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

` (iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

` (H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

- ` (I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;
- ` (J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;
- ` (K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;
- ` (L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;
- ` (M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;'

(b) Applicability to Agency and Each Principal Component of the Agency- Section 552(e) of title 5, United States Code, is amended--

- (1) by redesignating paragraphs (2) through (5) as paragraphs (3) through (6), respectively; and
- (2) by inserting after paragraph (1) the following:
 - ` (2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.'

(c) Public Availability of Data- Section 552(e)(3) of title 5, United States Code, (as redesignated by subsection (b) of this section) is amended by adding after the period ` In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.'

SEC. 10. OPENNESS OF AGENCY RECORDS MAINTAINED BY A PRIVATE ENTITY.

Section 552(f) of title 5, United States Code, is amended by striking paragraph (2) and inserting the following:

- ` (2) `record' and any other term used in this section in reference to information includes--
 - ` (A) any information that would be an agency record subject to the requirements of this section when

maintained by an agency in any format, including an electronic format; and
` (B) any information described under subparagraph (A) that is maintained for an agency by an entity under a contract between the agency and the entity.'.

SEC. 11. OFFICE OF GOVERNMENT INFORMATION SERVICES.

(a) In General- Chapter 5 of title 5, United States Code, is amended--
(1) by redesignating section 596 as section 597; and
(2) by inserting after section 595 the following:

` 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.

SEC. 12. ACCESSIBILITY OF CRITICAL INFRASTRUCTURE INFORMATION.

(a) In General- Not later than January 1 of each of the 3 years following the date of the enactment of this Act, the Comptroller General of the United States shall submit to Congress a report on the

implementation and use of section 214 of the Homeland Security Act of 2002 (6 U.S.C. 133), including--

- (1) the number of persons in the private sector, and the number of State and local agencies, that voluntarily furnished records to the Department under this section;
- (2) the number of requests for access to records granted or denied under this section;
- (3) such recommendations as the Comptroller General considers appropriate regarding improvements in the collection and analysis of sensitive information held by persons in the private sector, or by State and local agencies, relating to vulnerabilities of and threats to critical infrastructure, including the response to such vulnerabilities and threats; and
- (4) an examination of whether the nondisclosure of such information has led to the increased protection of critical infrastructure.

(b) Form- The report shall be submitted in unclassified form, but may include a classified annex.

SEC. 13. REPORT ON PERSONNEL POLICIES RELATED TO FOIA.

Not later than 1 year after the date of enactment of this Act, the Office of Personnel Management shall submit to Congress a report that examines--

- (1) whether changes to executive branch personnel policies could be made that would--
 - (A) provide greater encouragement to all Federal employees to fulfill their duties under section 552 of title 5, United States Code; and
 - (B) enhance the stature of officials administering that section within the executive branch;
- (2) whether performance of compliance with section 552 of title 5, United States Code, should be included as a factor in personnel performance evaluations for any or all categories of Federal employees and officers;
- (3) whether an employment classification series specific to compliance with sections 552 and 552a of title 5, United States Code, should be established;
- (4) whether the highest level officials in particular agencies administering such sections should be paid at a rate of pay equal to or greater than a particular minimum rate; and
- (5) whether other changes to personnel policies can be made to ensure that there is a clear career advancement track for individuals interested in devoting themselves to a career in compliance with such sections; and

(6) whether the executive branch should require any or all categories of Federal employees to undertake awareness training of such sections.