

S 2488 ES

110th CONGRESS
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S. 2488

AN ACT

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 this clause, 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. In this clause, 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 news-media 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.'.

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

(a) In General- 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 subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either-

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

` (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.'.

(b) Limitation- Notwithstanding section 1304 of title 31, United States Code, no amounts may be obligated or expended from the Claims and Judgment Fund of the United States Treasury to pay the costs resulting from fees assessed under section 552(a)(4)(E) of title 5, United States Code. Any such amounts shall be paid only from funds annually appropriated for any authorized purpose for the Federal agency against which a claim or judgment has been rendered.

SEC. 5. DISCIPLINARY ACTIONS FOR ARBITRARY AND CAPRICIOUS REJECTIONS OF REQUESTS.

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

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

(2) by adding at the end the following:

` (ii) The Attorney General shall--

` (I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

` (II) annually submit a report to Congress on the number of such civil actions in the preceding year.

` (iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).'

SEC. 6. TIME LIMITS FOR AGENCIES TO ACT ON REQUESTS.

(a) Time Limits-

(1) IN GENERAL- Section 552(a)(6)(A) of title 5, United States Code, is amended by inserting after clause (ii) the following:

` The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. 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 requester under this section; or

` (II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.'

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

(b) Compliance With Time Limits-

(1) IN GENERAL-

(A) SEARCH FEES- 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 (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if 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) PUBLIC LIAISON- Section 552(a)(6)(B)(ii) of title 5, United States Code, is amended by inserting after the first sentence 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.'.

(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 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

`(B) 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. 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 at the end ` In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.'.

SEC. 9. 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 Government contract, for the purposes of records management.'

SEC. 10. 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)(1) There is established the Office of Government Information Services within the National Archives and Records Administration.
- ` (2) The Office of Government Information Services shall--
 - ` (A) review policies and procedures of administrative agencies under this section;
 - ` (B) review compliance with this section by administrative agencies; and
 - ` (C) recommend policy changes to Congress and the President to improve the administration of this section.
- ` (3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section 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.
- ` (i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.
- ` (j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).
- ` (k) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency--
 - ` (1) have agency-wide responsibility for efficient and appropriate compliance with this section;

- ˆ (2) monitor implementation of this section 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 this section;
 - ˆ (3) 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 this section;
 - ˆ (4) 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 this section;
 - ˆ (5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; and
 - ˆ (6) designate one or more FOIA Public Liaisons.
- ˆ (I) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the 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.'
- (b) Effective Date- The amendments made by this section shall take effect on the date of enactment of this Act.

SEC. 11. 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.

SEC. 12. REQUIREMENT TO DESCRIBE EXEMPTIONS AUTHORIZING DELETIONS OF MATERIAL PROVIDED UNDER FOIA.

Section 552(b) of title 5, United States Code, is amended in the matter after paragraph (9)--

- (1) in the second sentence, by inserting after ` amount of information deleted' the following: `, and the exemption under which the deletion is made,'; and
- (2) in the third sentence, by inserting after ` amount of the information deleted' the following: `, and the exemption under which the deletion is made,'.

Passed the Senate December 14, 2007.

Attest:

Secretary.