



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

March 14, 2007
(House)

STATEMENT OF ADMINISTRATION POLICY

H.R. 1309 - Freedom of Information Act Amendments of 2007

(Rep. Clay (D) Missouri and two cosponsors)

The Administration shares the goals of H.R. 1309 of increasing the timeliness of Freedom of Information Act (FOIA) responses and ensuring a customer-oriented approach to FOIA processing. The Administration has been pursuing these goals, and will be continuing to pursue them, through the strong management review and reforms that the President directed 15 months ago in the first-ever Executive Order on FOIA -- Executive Order 13392, "Improving Agency Disclosure of Information" -- which he signed on December 14, 2005.

However, the Administration cannot support H.R. 1309. The Administration believes it would be premature and counterproductive to the goals of increasing timeliness and improving customer service to amend FOIA before agencies have had sufficient time to implement the FOIA improvements that the President directed them to develop, put into place, monitor, and report on during FYs 2006 and 2007. For example, as explained below, several of the bill's provisions would impose substantial administrative and financial burdens on the Executive Branch. These provisions could result in slower, not faster, agency processing of FOIA requests, and the personnel and funds needed to implement them would have to come from existing agency resources. Moreover, the agency reports that were issued last summer, and the improvement plans that are being implemented, illustrate that the challenges that agencies face in responding to FOIA requests are often unique to each agency and, therefore, require agency-tailored reforms, not a government-wide, one-size-fits-all legislative approach.

The Administration's specific concerns with the bill include the following.

The Administration strongly opposes expanding the definition of "representative of the news media." The bill would exempt a larger class of requesters from the obligation to pay fees assessed for searching for responsive documents. Expanding the definition would have serious fiscal consequences for the Executive Branch. Moreover, with no requirement that requesters pay search fees, they have no incentive to tailor their requests and will likely make overly broad requests, which, in turn, will stretch agency resources and increase the time it takes to process all requests. Further, under current law, agencies have authority to waive or reduce fees upon a determination that disclosure of information will contribute significantly to public understanding.

The Administration also strongly opposes reinstating the so-called "catalyst theory" for the reimbursement of FOIA litigation fees. The Administration is concerned that its reinstatement would serve as a disincentive to an agency's voluntarily revisiting decisions and improving procedures with respect to FOIA requests, because doing so could make the agency liable for a

complainant's legal fees. Furthermore, the bill could be interpreted to include an "administrative action" through the FOIA appeals process as a possible means by which a requester can obtain "relief" that would justify attorneys fees. Such an interpretation would be a major departure from long-standing administrative law practice and would severely undercut the traditional function of the administrative appeal process, which is designed to provide the requester with an avenue of further review at the agency, thereby reducing the likelihood of a lawsuit. If this provision covers relief provided at the administrative appeal stage, this could increase the FOIA program costs dramatically and would serve as a disincentive to release records at the administrative appeal stage.

The Administration strongly opposes commencing the twenty-day time limit for processing FOIA requests on the date that the request "is first received by the agency," and preventing the collection of search fees if the timeline is not met. This provision represents a very significant change from current practice in which the twenty-day clock begins once the appropriate element of an agency has received the request in accordance with the agency's FOIA regulations. The provision fails to take into account the complexity of many requests, the need to consult with other Executive Branch entities, or the need to search for records in multiple locations, including at Federal records centers. As noted above, the Executive Order requires agencies to implement improvement plans specifically focused on eliminating or reducing any backlog of FOIA requests, and the Justice Department's preliminary review of the agencies' annual reports indicates that some agencies have already realized meaningful backlog reductions.

The Administration is opposed to the creation of an "Office of Government Information Services" within the National Archives and any intent that the proposed Office would be given any sort of policymaking role with respect to FOIA compliance. The FOIA compliance function remains appropriately placed with the Department of Justice, the lead agency in implementing Executive Order 13392.

Finally, the Administration strongly opposes the provision in the bill that appears to be an attempt to repeal Attorney General Ashcroft's FOIA Memorandum and return to Attorney General Reno's pre-9/11 FOIA guidance. The Administration believes that the structure of the FOIA reflects the appropriate balance between the public's right to know how the government is operating and the equally important need to safeguard certain information, such as that pertaining to personal privacy or homeland security.

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March 13, 2007
(House)

STATEMENT OF ADMINISTRATION POLICY

H.R. 1255 – Presidential Records Act Amendments of 2007

(Rep. Waxman (D) California and 8 cosponsors)

The Administration understands that Presidential records have unique historic value and supports making such records available to the American people in a manner consistent with procedures established by the President for consideration of constitutionally based privileges. The Administration strongly opposes House passage of H.R. 1255 because it would be counterproductive and invite unnecessary litigation, is misguided, and would improperly impinge on the President's constitutional authority, in violation of settled separation of powers principles. Although the Administration is otherwise willing to work with interested parties to strike a meaningful balance of competing interests, if H.R. 1255 were to be presented to the President, his senior advisors would recommend that he veto the bill.

H.R. 1255 would create unintended incentives for more expansive claims of privilege and invite costly and time-consuming litigation. Currently, there is no set time limitation in which a former and incumbent President must process a request for Presidential records, and claims of privilege thus far have been rare. To date, in excess of 2.5 million pages of material have been approved for release, with only 9 documents totaling 64 pages withheld on a claim of privilege. However, as drafted, H.R. 1255 imposes a rigid time period of up to forty (40) days in which the former and incumbent Presidents must assert a claim of constitutionally based privilege, or automatically waive the right to do so. The requests for release of Presidential records often involve hundreds, if not thousands, of pages of material over which a claim of constitutionally based privilege may potentially be asserted. The bill, then, incentivizes former and incumbent Presidential administrations, out of an abundance of caution, to assert blanket claims of constitutionally based privilege over all material in the requested file, thereby creating further delay in the release of Presidential records. To the extent that such an assertion is unacceptable to a requester or other party, there is a great risk for further delay through costly and time-consuming litigation that can be expected to follow.

Additionally, contrary to assertions by the bill's sponsors, delays in processing and releasing Presidential records are primarily attributable to the ever increasing volume of and demand for such records and the inadequate number of trained archivists available at each Library to shepherd such requests. These factors have resulted in processing backlogs of up to five years prior to submission of those requests to the former and incumbent Presidents for consideration. This bill does nothing to address that backlog and, thus, is misguided.

Finally, the Administration has great concerns about the substantial impingement on separation of powers principles presented by H.R. 1255. Congress must act with great care when addressing the internal operations of a coordinate branch of government, and it may not interfere

with the President's exercise of his authority to establish procedures regarding the assertion of constitutionally based privileges. Executive privilege is not subject to Congressional regulation, but rather arises directly from the Constitution itself. Furthermore, a former President, although no longer a government official, may nonetheless assert constitutionally based privileges over his Presidential records. Inherent in the President's authority to invoke a constitutionally based privilege is the authority to direct the means by which it is invoked. Executive Order 13233, entitled "Further Implementation of the Presidential Records Act" (issued on November 1, 2001), represents the President's legitimate exercise of his authority to establish processes regulating the disclosure of records subject to the Presidential Records Act that may also be subject to constitutionally based privileges. Sections 2 and 3 of the bill encroach upon the President's constitutional authority by purporting to override the mechanisms established by the President for asserting a claim of constitutionally-based privilege against disclosure of Presidential records.

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STATEMENT OF ADMINISTRATION POLICY

H.R. 985 – Whistleblower Protection Enhancement Act of 2007

(Rep. Waxman (D) CA and 24 cosponsors)

The Administration supports accountability and transparency in the implementation of Federal programs. However, the Administration strongly opposes House passage of H.R. 985 because it could compromise national security, is unconstitutional, and is overly burdensome and unnecessary. Rather than promote and protect genuine disclosures of matters of real public concern, it would likely increase the number of frivolous complaints and waste resources. If H.R. 985 were presented to the President, his senior advisors would recommend that he veto the bill.

H.R. 985 would expand, for the first time, whistleblower protections to employees at national security agencies who disclose classified information to Congress. H.R. 985 would permit an employee to make an individualized determination – without further review and perhaps without all relevant information – to disclose classified information. Such an independent, uncoordinated decision to disclose classified information could jeopardize not only national security programs, but also the security of the people involved in such programs. The President now has the necessary authority to control the circumstances under which others receive classified and national security information to ensure such information is not disclosed or used in a way that would jeopardize national security. By vesting subordinate Executive branch officials with a right to disclose classified information outside of the Executive branch without receiving official authorization from the President or his official designee, the bill would impede the President's necessary coordination function. In addition, in any litigation concerning a whistleblower, if the government invokes the state secrets privilege, H.R. 985 would require that the matter at issue be resolved in favor of the plaintiff. This essentially would require the agency to choose between protecting national security information in court or conceding lawsuits. Finally, H.R. 985 would allow administrative and judicial review of Executive branch security clearance determinations, a prerogative that must be within the Executive branch's discretion for the protection of national security programs and personnel.

The expanded definition of protected disclosures in H.R. 985 also would upset the delicate balance between whistleblower protection and the ability of Federal managers to manage the workforce by permitting employees to bring a whistleblower complaint in response to almost every adverse employment action. The existing protections guaranteed by the Whistleblower Protection Act are sufficient to promote and protect genuine disclosures of matters of public concern by offering protection from adverse personnel actions to employees who report government wrongdoing to those in a position to remedy the problem. The proposed expansive definition has the potential to convert any disagreement over an issue or contrary interpretation of a law between employees, no matter how trivial or frivolous, into a whistleblower disclosure.

The proposed expansive definition also would permit employees to impede legitimate investigations (even those by Inspectors General) by arguing that such investigation itself was an adverse action against the whistleblower. Instead of providing further protection to those with legitimate claims, who are covered by the existing law, the proposed definition likely will increase the number of frivolous claims of whistleblower reprisal, compromise legitimate investigations into wrongdoing, and create protections for disgruntled employees whose jobs would not otherwise be secure.

H.R. 985 also would permit employees to engage in judicial forum shopping in having their claims resolved. Whistleblowers already have the right to seek corrective action for an unlawful personnel action from the Merit Systems Protection Board, and are afforded judicial review before the Federal Circuit. H.R. 985 would allow employees to have their claims heard de novo in any federal district court, which could result in two trials (rather than one) for each employee's complaint, and might result in divergent local district court interpretations and split circuit court decisions.

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