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Freedom of Information Act (FOIA) Amendments: 109th Congress

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Freedom of Information Act (FOIA) Amendments: 109th Congress

Summary

Enacted in 1966 after 11 years of investigation, legislative development, and deliberation in the House and half as many years of such consideration in the Senate, the Freedom of Information Act (FOIA) displaced the ineffective public information section of the Administrative Procedure Act. The FOIA was designed to enable any person — individual or corporate, regardless of citizenship — to request, without explanation or justification, presumptive access to existing, identifiable, unpublished, executive branch agency records on any topic. The statute specified nine categories of information that may be permissibly exempted from the rule of disclosure. Disputes over the accessibility of requested records could be ultimately settled in court.

Not supported as legislation or enthusiastically received as law by the executive branch, the FOIA was subsequently refined with direct amendments in 1974, 1976, 1986, and 1996. The statute has become a somewhat popular tool of inquiry and information gathering for various quarters of American society — the press, business, scholars, attorneys, consumers, and environmentalists, among others — as well as some foreign interests. The response to a request may involve a few sheets of paper, several linear feet of records, or perhaps information in an electronic format. Such responses require staff time, search and duplication efforts, and other resource commitments. Agency information management professionals must efficiently and economically service FOIA requests, doing so, of late, in the sensitized homeland security milieu. Requesters must be satisfied through timely supply, brokerage, or explanation. Simultaneously, agency FOIA costs must be kept reasonable. The perception that these conditions are not operative can result in proposed new corrective amendments to the statute. Legislation offered in this regard in the 109th Congress includes S. 394, the OPEN Government Act, introduced by Senator John Cornyn with Senator Patrick Leahy, and H.R. 867, the House companion, introduced by Representative Lamar Smith. Of related interest is S. 589, sponsored by Senator Cornyn with Senator Leahy, which would create a temporary commission to examine, and make recommendations concerning, FOIA request processing delays. The companion bill, H.R. 1620, was offered by Representative Brad Sherman. Another related bill offered by Senator Leahy, S. 622, would amend the Homeland Security Act to modify the limitations on the release of voluntarily furnished critical infrastructure information pursuant to the FOIA. In mid-May, Representative Henry Waxman introduced H.R. 2331, a comprehensive bill addressing several aspects of information access and disclosure. In early June, Senator Cornyn, with Senator Leahy, split off a portion of S. 394 concerning the clarity of legislative exceptions to the access rule of the FOIA and introduced it as S. 1181. This report examines efforts to amend the FOI Act, and will be updated as events warrant.

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Freedom of Information Act (FOIA) Amendments: 109th Congress

Often referred to as the embodiment of “the people’s right to know” about the activities and operations of government, the Freedom of Information Act (FOIA) statutorily established a premise of presumptive public access to information held by the federal departments and agencies. Enacted in 1966 to replace the ineffective public information section of the Administrative Procedure Act (APA), the FOIA allows any person — individual or corporate, regardless of citizenship — to request, without explanation or justification, existing, identifiable, unpublished agency records on any topic.¹ At the time of its enactment, the FOIA was regarded as a somewhat revolutionary development. Only two other nations — Sweden and Finland — had comparable law, and in neither case was it as sweeping as the new American model. The law’s premise reversed the burden of proof that had existed under the public information section of the APA. Under the previous arrangement, requesters had to establish a basis for their plea or a need for the information being sought, whereas under the FOIA, accessibility was presumed, and the agencies had to justify denying a requester access, in whole or in part, to information. The FOIA provided clear exceptions allowing explicit types of information to be protected from disclosure, while the APA section, which was vague, had come to be interpreted so as to give the agencies broad discretion to withhold information sought by the public. Furthermore, the APA section was silent regarding the possibility of the denial of a request for information being pursued in court; the FOIA specified this course of action after the exercise of an administrative appeal.

The FOIA was also revolutionary in another regard. The product of 11 years of investigation, legislative development, and deliberation in the House and half as many years of such consideration in the Senate, the statute was almost exclusively a congressional creation. Indeed, no department or agency head had supported the legislation, and President Lyndon B. Johnson had reluctantly signed the measure unceremoniously at the last possible moment under strong pressure from press organizations.² Because it was not enthusiastically received as law by the executive branch, the FOIA required close attention by congressional overseers during its initial years of administration, and was subsequently refined with direct amendments in 1974, 1976, 1986, and 1996. While agency hostility to the statute diminished with the ensuing years, there is occasional, latent evidence that its requirements are sometimes regarded in some agencies as secondary to their mission programs. Also, there may be some agency dislike of the FOIA because agency careerists consider the statute intrusive, providing a means for outsiders to question, second-guess, or delay administrative actions and policymaking.

¹ See 5 U.S.C. § 552.

² See Samuel J. Archibald, “The Freedom of Information Act Revisited,” *Public Administration Review*, vol. 39, July-August 1979, pp. 311-318.

FOIA Overview

The access procedures of the FOIA apply only to the departments and agencies of the federal executive branch. This scope has been shaped by historical and constitutional factors. During the latter half of the 1950s, when congressional subcommittees began examining government information availability, the practices of the federal departments and agencies were of primary attention. Complaints from the public and the press guided this focus, as did the experience of congressional committees and subcommittees of being rebuffed when seeking information from these entities. The President might have been of interest in this regard, but his exercise of so-called “executive privilege” — the withholding of information based upon his authority as the head of the executive branch — was a matter of some constitutional complexity and uncertainty, and had not resulted in widespread public protest.³ The accessibility of federal court records was not an issue. Congressional information practices might have been scrutinized, but the subcommittees probing the executive branch in this regard lacked jurisdiction for the legislative branch. In his inaugural 1955 hearing, Representative John E. Moss, chairman of the newly created Special Subcommittee on Government Information, delineated the situation, saying: “We are not studying the availability of information from Congress, although many comments have been made by the press in that field, but we are taking a long, hard look at the amount of information available from the executive and independent agencies for both the public and its elected representatives.”⁴

Eleven years after that hearing, the remedying FOIA was made applicable only to the federal departments and agencies. The historical record underlying the FOIA and continuing “executive privilege” considerations contributed to the President being left outside of the scope of the new law. Also, while the historical record underlying the FOIA also contributed to both the legislative and judicial branches being left outside of the scope of the statute, it was thought by some as well that, in the case of Congress, glossings of the secret journal clause or the speech or debate clause of the Constitution⁵ might be impediments to the effective application of the FOIA to Congress.⁶

³ See U.S. Congress, Senate Committee on the Judiciary, *The Power of the President to Withhold Information from Congress*, committee print, 85th Cong., 2nd sess. (Washington: GPO, 1958-1959), 2 parts.

⁴ U.S. Congress, House Committee on Government Operations, *Availability of Information from Federal Departments and Agencies*, hearing, 84th Cong., 1st sess., Nov. 7, 1955 (Washington: GPO, 1956), p. 3.

⁵ Art. I, Sec. 5, which directs each house of Congress to keep a journal of its proceedings and publish the same, except such parts as may be judged to require secrecy, has been interpreted to authorize the House and the Senate to keep other records secret. Art. 1, Sec. 6, which specifies that Members of Congress, “for any Speech or Debate in either House ... shall not be questioned in any other Place,” might be regarded as a bar to requests to Members for records concerning their floor, committee, subcommittee, or legislative activity.

⁶ See U.S. Congress, Senate Committee on Governmental Affairs, *To Eliminate Congressional and Federal Double Standards*, hearing, 96th Cong., 1st sess., Sept. 20, 1979 (continued...)

Although the FOIA specifies nine categories that may be exempted from the statute's rule of disclosure, these exceptions do not require agencies to withhold records, but merely permit access restriction. Allowance is made in the law for the exemption of (1) information properly classified for national defense or foreign policy purposes as secret under criteria established by an executive order; (2) information relating solely to agency internal personnel rules and practices; (3) data specifically excepted from disclosure by a statute which either requires that matters be withheld in a non-discretionary manner or which establishes particular criteria for withholding or refers to particular types of matters to be withheld; (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) inter- or intra-agency memoranda or letters that would not be available by law except to an agency in litigation; (6) personnel, medical, or similar files the disclosure of which would constitute an unwarranted invasion of personal privacy; (7) certain kinds of investigatory records compiled for law enforcement purposes; (8) certain information relating to the regulation of financial institutions; and (9) geological and geophysical information and data, including maps, concerning wells. Some of these exemptions, such as the one concerning trade secrets and commercial or financial information, have undergone considerable judicial interpretation.⁷

A person denied access to requested information, in whole or in part, may make an administrative appeal to the head of the agency for reconsideration. After this step, an appeal for further consideration of access to denied information may be made in federal district court.⁸

Agencies responding to FOIA requests are permitted by the statute to charge fees for certain activities — records search, duplication, and review — depending upon the type of requester, such as a commercial user; an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; a news media representative; or the general public. However, requested records may be furnished by an agency without any charge or at a reduced cost, according to the law, “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or

⁶ (...continued)

(Washington: GPO, 1979); Harold C. Relyea, “Public Access to Congressional Records: Present Policy and Reform Considerations,” *Government Information Quarterly*, vol. 2, 1985, pp. 235-256; CRS Report 92-403A, *The Application of the Freedom of Information Act to Congress: A Legal Analysis*, by Jay R. Shampansky (archived; available on request).

⁷ For sources concerning judicial interpretation of the FOIA, see Harry A. Hammitt, David L. Sobel, and Tiffany A. Stedman, eds., *Litigation Under the Federal Open Government Laws: 2004* (Washington: EPIC Publications and The James Madison Project, 2004); James T. O'Reilly, *Federal Information Disclosure*, third edition (Eagan, MN: West Group, first published in 2000, with supplements).

⁸ See U.S. Congress, House Committee on Government Reform, *A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records*, H.Rept. 109-226, 109th Cong., 1st sess. (Washington: GPO, 2005), available from the committee website at [<http://reform.house.gov/>] under “reports.”

activities of the government and is not primarily in the commercial interest of the requester.”⁹

The statute has become a somewhat popular tool of inquiry and information gathering for various quarters of American society — the press, business, scholars, attorneys, consumers, and environmentalists, among others — as well as some foreign interests. The response to a request may involve a few sheets of paper, several linear feet of records, or perhaps information in an electronic format. Such responses require staff time, search and duplication efforts, and other resource commitments. Agency information management professionals must efficiently and economically service FOIA requests, doing so, of late, in the sensitized homeland security milieu. Requesters must be satisfied through timely supply, brokerage, or explanation. Simultaneously, agency FOIA costs must be kept reasonable. The perception that these conditions are not operative can result in proposed new corrective amendments to the statute.

Legislation

On February 16, 2005, Senator John Cornyn introduced legislation on behalf of himself and Senator Patrick Leahy to “significantly expand the accessibility, accountability, and openness of the Federal Government.” Acknowledged to be “a bipartisan effort to improve and update our public information laws — particularly the Freedom of Information Act,” S. 394, denominated the Openness Promotes Effectiveness in Our National Government Act of 2005 or OPEN Government Act of 2005, was referred to the Committee on the Judiciary. Senator Leahy is the ranking minority member on the committee, and Senator Cornyn chairs the Subcommittee on Terrorism, Technology, and Homeland Security, which held the initial hearings on the measure.¹⁰ Senator Cornyn noted that the bill “is supported by a broad coalition across the ideological spectrum,” and placed in the record “endorsement letters from dozens of watchdog groups.”¹¹ In his introductory remarks, Senator Leahy characterized S. 394 as “a collection of common sense modifications designed to update FOIA and improve the timely processing of FOIA requests by Federal agencies.”¹² That same day, a companion bill, H.R. 867, was introduced in the House by Representative Lamar Smith, and was referred to the Committee on Government Reform.

The following matters are among those addressed in the provisions of the bills, as introduced.

- Clarifying that independent journalists are not barred from obtaining fee waivers solely because they lack an institutional affiliation with a recognized news media organization.

⁹ 5 U.S.C. § 552(a)(4)(A)(iii).

¹⁰ *Congressional Record*, daily edition, vol. 151, Feb. 16, 2005, p. S1520.

¹¹ See *ibid.*, pp. S1520-S1524.

¹² *Ibid.*, p. S1526.

- Clarifying that a complainant has substantially prevailed in an FOIA lawsuit, and is eligible to recover attorney fees, if the complainant has obtained a substantial part of his or her requested relief through a judicial or administrative order or if the pursuit of a claim was the catalyst for the voluntary or unilateral change in position by the opposing party.¹³
- Requiring that the Attorney General, whenever a court finds that agency personnel have acted arbitrarily or capriciously with respect to withholding records sought under the FOIA, notify both the Office of Special Counsel and Congress of such court finding, and requiring the Office of Special Counsel to report annually to Congress on any actions taken by its personnel to investigate such cases.¹⁴
- Clarifying that the 20-day time limit on responding to an FOIA request commences on the date on which the request is initially received by the agency, and providing that, if an agency fails to comply with the time limit requirement, it may not assert any exemption under Section 552(b) to the request unless disclosure would endanger national security or disclose personal information protected by the Privacy Act or proprietary information, or is otherwise prohibited by law.¹⁵
- Requiring agencies to establish tracking systems, with each FOIA request receiving a tracking number, and to notify requesters of their tracking numbers within 10 days of receiving a request, and to establish a telephone or Internet system to allow requesters to obtain information on the status of their individual requests, including an estimated date on which action on the request will be completed by the agency.
- Providing that statutory provisions protecting records relative to the third exemption of the FOIA which are enacted subsequent to the enactment of the bill must do so explicitly and cite directly to the third exemption, thereby conveying congressional intent to create an

¹³ This provision responds to the ruling in *Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Services*, 532 U.S. 598 (2001), in which the Supreme Court eliminated the so-called “catalyst theory” of attorney fee recovery under certain federal civil rights laws, and which prompted concern that the holding could be extended to FOIA cases.

¹⁴ The FOIA requires that, when a court finds that agency personnel have acted arbitrarily or capriciously with respect to withholding records sought under the FOIA, the Office of Special Counsel shall determine whether disciplinary action against such personnel is warranted. 5 U.S.C. § 552(a)(4)(F).

¹⁵ The Privacy Act may be found at 5 U.S.C. § 552a.

information protection within the scope of the exemption.¹⁶ This provision was later offered in separate legislation (see below).

- Expanding agency reporting requirements on FOIA administration to include data on the 10 oldest active requests pending at each agency, including the amount of time that has elapsed since each such request was originally filed; calculated average response times and the range of response times for FOIA requests; and the number of fee status requests that are granted and denied, and the average number of days for adjudicating fee status determinations.
- Clarifying that agency records kept by private contractors licensed by the federal government to undertake recordkeeping functions remain subject to the FOIA.
- Establishing an Office of Government Information Services within the Administrative Conference of the United States to review agency policies and procedures, audit agency performance, recommend policy changes, and mediate disputes between FOIA requesters and agencies with a view to alleviating the need for litigation, but not limiting the ability of requesters to litigate FOIA claims.¹⁷
- Requiring reports to Congress by the Comptroller General of the United States on the implementation and use of the Critical Infrastructure Information Act of 2002, including the number of private sector persons and state and local government agencies that voluntarily furnished critical infrastructure information (CII) records to the Department of Homeland Security, the number of requests for access to CII records granted or denied, and the results of an examination of whether the nondisclosure of CII has led to the increased protection of critical infrastructure.¹⁸
- Requiring the Office of Personnel Management to examine how the FOIA can be better administered at the agency level, including an assessment of whether FOIA performance should be considered as a factor in personnel performance reviews, whether a job classification series specific to the FOIA and the Privacy Act should be considered, and whether FOIA awareness training should be provided to federal employees.

¹⁶ The third exemption to the rule of disclosure exempts matters that are “specifically exempted from disclosure by statute [other than the Privacy Act], provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.” 5 U.S.C. § 552(b)(3).

¹⁷ The authorization for the Administrative Conference lapsed in 1995, but it was recently reauthorized, although it has not been appropriated any funds; see 118 Stat. 2255.

¹⁸ The Critical Infrastructure Information Act is Subtitle B of Title II of the Homeland Security Act of 2002; see 116 Stat. 2150.

Referred to the Committee on the Judiciary, S. 394 was the subject of hearings before the Subcommittee on Terrorism, Technology, and Homeland Security on March 15, 2005. Witnesses included representatives of the Texas Open Records Division, Heritage Foundation Center for Media and Public Policy, American Civil Liberties Union, and National Security Archive.

Of related interest is S. 589, the Faster FOIA Act of 2005, introduced by Senator Cornyn with Senator Leahy on March 10, 2005.¹⁹ This legislation would establish a temporary commission to examine, and make recommendations concerning, FOIA request processing delays. Of the 16 members of the panel, three each would be appointed by chairman and ranking minority member of the Senate Committee on the Judiciary and House Committee on Government Reform, with the four remaining members being appointed by the Attorney General, director of the Office of Management and Budget, Archivist of the United States, and Comptroller General of the United States. At least four members of the commission must be from groups with experience submitting FOIA requests on behalf of nonprofit groups or media organizations. Referred to the Committee on the Judiciary, the bill was reported from committee without amendment or a written report on March 17, 2005, and was placed on the Senate legislative calendar. A companion bill, H.R. 1620, was introduced in the House by Representative Brad Sherman, with Representative Lamar Smith, on April 13, 2005, and it was referred to the Committee on Government Reform.

Senator Leahy also introduced another related bill, S. 622, the Restoration of Freedom of Information Act of 2005, on March 15, 2005, for himself and Senators Carl Levin, Russell Feingold, and Joseph Lieberman. The proposal would amend the Homeland Security Act to prohibit a record pertaining to the vulnerability of, and threats to, critical infrastructure that is furnished voluntarily to the Department of Homeland Security (DHS) from being made available to the public pursuant to the FOIA if (1) the provider would not customarily make the record available to the public, and (2) the record is designated and certified by the provider as confidential and not customarily made available to the public. The measure also prohibits other federal agencies in receipt of such a record furnished to the DHS from making the record publicly available, and allows a provider of such a record to withdraw the confidential designation at any time. When introducing the legislation, Senator Leahy proffered that the bill would “protect Americans’ right to know while simultaneously providing security to those in the private sector who voluntarily submit critical infrastructure records to the Department of Homeland Security.” He called the current protective arrangement “an extraordinarily broad exemption to FOIA in exchange for the cooperation of private companies in sharing information with the government regarding vulnerabilities in the nation’s critical infrastructure.”²⁰ The legislation was referred to the Committee on the Judiciary.

On May 12, 2005, Representative Henry Waxman introduced, on behalf of himself and 19 initial cosponsors, H.R. 2331, the Restore Open Government Act of 2005. The measure contains sections promoting the public disclosure of government

¹⁹ *Congressional Record*, daily edition, vol. 151, Mar. 10, 2005, pp. S2485-S2486.

²⁰ *Ibid.*, Mar. 15, 2005, pp. S2736-S2738.

information, revoking Bush Administration memoranda regarded to encourage the withholding of information, fostering better managed use of information control markings outside of the security classification regime, restoring public access to presidential records, prohibiting the use of secret advisory committees within the executive branch, promoting the timely declassification of information, and improving the operation of the FOIA. The bill was referred to the Committee on Government Reform and the Committee on Homeland Security.

On June 7, Senator Cornyn, with Senator Leahy, introduced S. 1181, which included a provision from S. 394 providing that statutory provisions protecting records relative to the third exemption of the FOIA which are enacted subsequent to the enactment of the bill must do so explicitly and cite directly to the third exemption, thereby conveying congressional intent to create an information protection within the scope of the exemption.²¹ The bill cleared the Committee on the Judiciary on a voice vote on June 9, 2005. The Senate passed the bill by unanimous consent on June 24, and the measure was then sent to the House, where it was referred to the Committee on Government Reform.²²

²¹ *Ibid.*, June 7, 2005, pp. S6159-S6161.

²² *Ibid.*, June 24, 2005, pp. S7383-S7385.