

110TH CONGRESS
1ST SESSION

H. R. 1326

To promote 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 HOUSE OF REPRESENTATIVES

MARCH 5, 2007

Mr. SMITH of Texas introduced the following bill; which was referred to the Committee on Oversight and Government Reform

A BILL

To promote 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.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Openness Promotes Effectiveness in our National Gov-
6 ernment Act of 2007” or the “OPEN Government Act of
7 2007”.

1 (b) TABLE OF CONTENTS.—The table of contents for
 2 this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Findings.
- Sec. 3. Protection of fee status for news media.
- Sec. 4. Recovery of attorney fees and litigation costs.
- Sec. 5. Disciplinary actions for arbitrary and capricious rejections of requests.
- Sec. 6. Time limits for agencies to act on requests.
- Sec. 7. Individualized tracking numbers for requests and status information.
- Sec. 8. Specific citations in exemptions.
- Sec. 9. Reporting requirements.
- Sec. 10. Openness of agency records maintained by a private entity.
- Sec. 11. Office of Government Information Services.
- Sec. 12. Accessibility of critical infrastructure information.
- Sec. 13. Report on personnel policies related to FOIA.

3 **SEC. 2. FINDINGS.**

4 Congress finds that—

5 (1) the Freedom of Information Act was signed
 6 into law on July 4, 1966, because the American peo-
 7 ple believe that—

8 (A) our constitutional democracy, our sys-
 9 tem of self-government, and our commitment to
 10 popular sovereignty depends upon the consent
 11 of the governed;

12 (B) such consent is not meaningful unless
 13 it is informed consent; and

14 (C) as Justice Black noted in his concur-
 15 ring opinion in *Barr v. Matteo* (360 U.S. 564
 16 (1959)), “The effective functioning of a free
 17 government like ours depends largely on the
 18 force of an informed public opinion. This calls
 19 for the widest possible understanding of the

1 quality of government service rendered by all
2 elective or appointed public officials or employ-
3 ees.”;

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

7 (3) the Freedom of Information Act establishes
8 a “strong presumption in favor of disclosure” as
9 noted by the United States Supreme Court in
10 United States Department of State v. Ray (502 U.S.
11 164 (1991)), a presumption that applies to all agen-
12 cies governed by that Act;

13 (4) “disclosure, not secrecy, is the dominant ob-
14 jective of the Act,” as noted by the United States
15 Supreme Court in Department of Air Force v. Rose
16 (425 U.S. 352 (1976));

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

19 (6) Congress should regularly review section
20 552 of title 5, United States Code (commonly re-
21 ferred to as the Freedom of Information Act), in
22 order to determine whether further changes and im-
23 provements are necessary to ensure that the Govern-
24 ment remains open and accessible to the American

1 people and is always based not upon the “need to
2 know” but upon the fundamental “right to know”.

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

4 Section 552(a)(4)(A)(ii) of title 5, United States
5 Code, is amended by adding at the end the following:

6 “In making a determination of a representative of the
7 news media under subclause (II), an agency may not deny
8 that status solely on the basis of the absence of institu-
9 tional associations of the requester, but shall consider the
10 prior publication history of the requester. Prior publica-
11 tion history shall include books, magazine and newspaper
12 articles, newsletters, television and radio broadcasts, and
13 Internet publications. If the requestor has no prior publi-
14 cation history or current affiliation, the agency shall con-
15 sider the requestor’s stated intent at the time the request
16 is made to distribute information to a reasonably broad
17 audience.”.

18 **SEC. 4. RECOVERY OF ATTORNEY FEES AND LITIGATION**

19 **COSTS.**

20 Section 552(a)(4)(E) of title 5, United State Code,
21 is amended by adding at the end the following: “For pur-
22 poses of this section only, a complainant has substantially
23 prevailed if the complainant has obtained relief through
24 either—

1 “(i) a judicial order, administrative action,
2 or an enforceable written agreement or consent
3 decree; or

4 “(ii) a voluntary or unilateral change in
5 position by the opposing party, in a case in
6 which the complainant’s claim or defense was
7 not frivolous.”.

8 **SEC. 5. DISCIPLINARY ACTIONS FOR ARBITRARY AND CA-**
9 **PRICIOUS REJECTIONS OF REQUESTS.**

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

12 (1) by inserting “(i)” after “(F)”; and

13 (2) by adding at the end the following:

14 “(ii) The Attorney General shall—

15 “(I) notify the Special Counsel of each civil ac-
16 tion described under the first sentence of clause (i);
17 and

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

21 “(iii) The Special Counsel shall annually submit a re-
22 port to Congress on the actions taken by the Special Coun-
23 sel under clause (i).”.

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

25 (a) TIME LIMITS.—

1 (1) IN GENERAL.—Section 552(a)(6)(A)(i) of
2 title 5, United States Code, is amended by striking
3 “determine within 20 days (excepting Saturdays,
4 Sundays, and legal public holidays) after the receipt
5 of any such request” and inserting “within the 20-
6 day period commencing on the date on which the re-
7 quest is first received by the agency (excepting Sat-
8 urdays, Sundays, and legal public holidays), which
9 shall not be tolled without the consent of the party
10 filing the request, determine”.

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

14 (b) APPLICABILITY OF AGENCY FEES.—

15 (1) LIMITATION.—Section 552(a)(4)(A) of title
16 5, United States Code, is amended by adding at the
17 end the following:

18 “(vii) An agency may not charge any
19 fees under this subparagraph if the agency
20 fails to comply with any time limit that ap-
21 plies under paragraph (6).”.

22 (2) EFFECTIVE DATE AND APPLICATION.—The
23 amendment made by this subsection shall take effect
24 1 year after the date of enactment of this Act and
25 shall apply to requests for information under section

1 552 of title 5, United States Code, filed on or after
2 that effective date.

3 **SEC. 7. INDIVIDUALIZED TRACKING NUMBERS FOR RE-**
4 **QUESTS AND STATUS INFORMATION.**

5 (a) IN GENERAL.—Section 552(a) of title 5, United
6 States Code, is amended by adding at the end the fol-
7 lowing:

8 “(7) Each agency shall—

9 “(A) establish a system to assign an individual-
10 ized tracking number for each request for informa-
11 tion under this section;

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

15 “(C) establish a telephone line or Internet serv-
16 ice that provides information about the status of a
17 request to the person making the request using the
18 assigned tracking number, including—

19 “(i) the date on which the agency origi-
20 nally received the request; and

21 “(ii) an estimated date on which the agen-
22 cy will complete action on the request.”.

23 (b) EFFECTIVE DATE AND APPLICATION.—The
24 amendment made by this section shall take effect 1 year
25 after the date of enactment of this Act and apply to re-

1 quests for information under section 552 of title 5, United
2 States Code, filed on or after that effective date.

3 **SEC. 8. SPECIFIC CITATIONS IN EXEMPTIONS.**

4 Section 552(b) of title 5, United States Code, is
5 amended by striking paragraph (3) and inserting the fol-
6 lowing:

7 “(3) specifically exempted from disclosure by
8 statute (other than section 552b of this title), pro-
9 vided that such statute—

10 “(A) if enacted after the date of enactment
11 of the Openness Promotes Effectiveness in our
12 National Government Act of 2007, specifically
13 cites to this section; and

14 “(B)(i) requires that the matters be with-
15 held from the public in such a manner as to
16 leave no discretion on the issue; or

17 “(ii) establishes particular criteria for
18 withholding or refers to particular types of mat-
19 ters to be withheld;”.

20 **SEC. 9. REPORTING REQUIREMENTS.**

21 (a) ANNUAL REPORT REQUIREMENTS.—Section
22 552(e)(1) of title 5, United States Code, is amended—

23 (1) in the matter preceding subparagraph (A)
24 by striking “fiscal year and which” and inserting
25 “fiscal year. Information in the report shall be ex-

1 pressed in terms of each principal component of the
2 agency and for the agency overall, and”;

3 (2) in subparagraph (B)(ii), by inserting after
4 the first comma the following, “the number of occa-
5 sions on which each statute was relied upon,”;

6 (3) in subparagraph (C), by inserting after
7 “median” the following: “and average”;

8 (4) in subparagraph (E), by inserting before the
9 semicolon the following: “, based on the date on
10 which each request was initially received by the
11 agency”; and

12 (5) by redesignating subparagraphs (F) and
13 (G) as subparagraphs (N) and (O), respectively, and
14 inserting after subparagraph (E) the following new
15 subparagraphs:

16 “(F) the average number of days for the
17 agency to respond to requests beginning on the
18 date on which each request was initially re-
19 ceived by the agency, the median number of
20 days for the agency to respond to such re-
21 quests, and the range in number of days for the
22 agency to respond to such requests;

23 “(G) based on the number of business days
24 that have elapsed since each request was ini-
25 tially received by the agency—

1 “(i) the number of requests for
2 records to which the agency has responded
3 with a determination within a period great-
4 er than 1 day and less than 201 days, stat-
5 ed in 20-day increments;

6 “(ii) the number of requests for
7 records to which the agency has responded
8 with a determination within a period great-
9 er than 200 days and less than 301 days;

10 “(iii) the number of requests for
11 records to which the agency has responded
12 with a determination within a period great-
13 er than 300 days and less than 401 days;
14 and

15 “(iv) the number of requests for
16 records to which the agency has responded
17 with a determination within a period great-
18 er than 400 days;

19 “(H) the average number of days for the
20 agency to provide the granted information be-
21 ginning on the date on which each request was
22 initially received by the agency, the median
23 number of days for the agency to provide the
24 granted information, and the range in number

1 of days for the agency to provide the granted
2 information;

3 “(I) the median and average number of
4 days for the agency to respond with a deter-
5 mination to administrative appeals based on the
6 date on which each appeal was initially received
7 by the agency; the highest number of business
8 days taken by the agency to respond to an ad-
9 ministrative appeal; and the lowest number of
10 business days taken by the agency to respond
11 to an administrative appeal;

12 “(J) data on the 10 active requests with
13 the earliest filing dates pending at the agency,
14 including the amount of time that has elapsed
15 since each request was initially received by the
16 agency;

17 “(K) data on the 10 active administrative
18 appeals with the earliest filing dates pending at
19 the agency as of September 30 of the preceding
20 year, including the number of business days
21 that have elapsed since each request was ini-
22 tially received by the agency;

23 “(L) the number of expedited review re-
24 quests received by the agency, the number that
25 were granted and the number that were denied,

1 the average and median number of days for ad-
2 judicating expedited review requests, and the
3 number of requests that adjudicated within the
4 required 10 days;

5 “(M) the number of fee waiver requests
6 that were granted and the number that were
7 denied, and the average and median number of
8 days for adjudicating fee waiver determina-
9 tions;”.

10 (b) AVAILABILITY OF RAW STATISTICAL DATA.—
11 Section 552(e)(2) of title 5, United States Code, is amend-
12 ed by adding after the period the following: “In addition,
13 each agency shall make the raw statistical data used in
14 its reports available electronically to the public upon re-
15 quest.”.

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

18 Section 552(f) of title 5, United States Code, is
19 amended by striking paragraph (2) and inserting the fol-
20 lowing:

21 “(2) ‘record’ and any other term used in this
22 section in reference to information includes—

23 “(A) any information that would be an
24 agency record subject to the requirements of

1 this section when maintained by an agency in
2 any format, including an electronic format; and

3 “(B) any information described under sub-
4 paragraph (A) that is maintained for an agency
5 by an entity under a contract between the agen-
6 cy and the entity.”.

7 **SEC. 11. OFFICE OF GOVERNMENT INFORMATION SERV-**
8 **ICES.**

9 (a) IN GENERAL.—Chapter 21 of title 5, United
10 States Code, is amended by inserting after section 2119
11 the following new section:

12 **“§ 2120. Office of Government Information Services**

13 “(a) IN GENERAL.—There is established in the Na-
14 tional Archives an office to be known as the ‘Office of Gov-
15 ernment Information Services’.

16 “(b) NATIONAL INFORMATION ADVOCATE.—

17 “(1) IN GENERAL.—The Office of Government
18 Information Services shall be under the supervision
19 and direction of an official to be known as the ‘Na-
20 tional Information Advocate’ who shall report di-
21 rectly to the Archivist of the United States.

22 “(2) FUNCTIONS OF OFFICE.—

23 “(A) GUIDANCE FOR REQUESTERS.—

24 “(i) IN GENERAL.—The Office of Gov-
25 ernment Information Services shall pro-

1 vide, as a non-exclusive alternative to liti-
2 gation, guidance to FOIA requesters.

3 “(ii) TYPES OF GUIDANCE.—In pro-
4 viding such guidance, the Office shall pro-
5 vide informal guidance to requesters and
6 may provide fact-finding reviews and opin-
7 ions to requesters. All reviews and opinions
8 shall be non-binding and shall be initiated
9 only on the request of FOIA requesters.

10 “(iii) AVAILABILITY.—Any written
11 opinion issued pursuant to this section
12 shall be available on the Internet in an in-
13 dexed, readily accessible format.

14 “(iv) FOIA REQUESTERS.—In this
15 paragraph, the term ‘FOIA requester’ or
16 ‘requester’ means a person who has made
17 a request under section 552 of this title
18 and who has been denied records or has
19 not received a timely response to the re-
20 quest or to an administrative appeal.

21 “(B) ANALYSES OF AGENCY OPER-
22 ATIONS.—The Office of Government Informa-
23 tion Services shall—

24 “(i) review policies and procedures of
25 administrative agencies under section 552

1 of this title and compliance with that sec-
2 tion by administrative agencies; and

3 “(ii) recommend policy changes to
4 Congress and the President to improve the
5 administration of section 552 of this title,
6 including whether agencies are receiving
7 and expending adequate funds to ensure
8 compliance with that section.

9 “(3) **IMPACT ON REQUESTER ACCESS TO LITI-**
10 **GATION.**—Nothing in this section shall affect the
11 right of requesters to seek judicial review as de-
12 scribed in section 552 of this title.”.

13 (b) **TECHNICAL AND CONFORMING AMENDMENT.**—
14 The table of sections for chapter 21 of title 5, United
15 States Code, is amended by inserting after the item relat-
16 ing to section 2119 the following:

“2120. Office of Government Information Services.”.

17 **SEC. 12. ACCESSIBILITY OF CRITICAL INFRASTRUCTURE**
18 **INFORMATION.**

19 (a) **IN GENERAL.**—Not later than January 1 of each
20 of the 3 years following the date of the enactment of this
21 Act, the Comptroller General of the United States shall
22 submit to Congress a report on the implementation and
23 use of section 214 of the Homeland Security Act of 2002
24 (6 U.S.C. 133), including—

1 (1) the number of persons in the private sector,
2 and the number of State and local agencies, that vol-
3 untarily furnished records to the Department under
4 this section;

5 (2) the number of requests for access to records
6 granted or denied under this section;

7 (3) such recommendations as the Comptroller
8 General considers appropriate regarding improve-
9 ments in the collection and analysis of sensitive in-
10 formation held by persons in the private sector, or
11 by State and local agencies, relating to
12 vulnerabilities of and threats to critical infrastruc-
13 ture, including the response to such vulnerabilities
14 and threats; and

15 (4) an examination of whether the nondislo-
16 sure of such information has led to the increased
17 protection of critical infrastructure.

18 (b) FORM.—The report shall be submitted in unclas-
19 sified form, but may include a classified annex.

20 **SEC. 13. REPORT ON PERSONNEL POLICIES RELATED TO**
21 **FOIA.**

22 Not later than 1 year after the date of enactment
23 of this Act, the Office of Personnel Management shall sub-
24 mit to Congress a report that examines—

1 (1) whether changes to executive branch per-
2 sonnel policies could be made that would—

3 (A) provide greater encouragement to all
4 Federal employees to fulfill their duties under
5 section 552 of title 5, United States Code; and

6 (B) enhance the stature of officials admin-
7 istering that section within the executive
8 branch;

9 (2) whether performance of compliance with
10 section 552 of title 5, United States Code, should be
11 included as a factor in personnel performance eval-
12 uations for any or all categories of Federal employ-
13 ees and officers;

14 (3) whether an employment classification series
15 specific to compliance with sections 552 and 552a of
16 title 5, United States Code, should be established;

17 (4) whether the highest level officials in par-
18 ticular agencies administering such sections should
19 be paid at a rate of pay equal to or greater than a
20 particular minimum rate;

21 (5) whether other changes to personnel policies
22 can be made to ensure that there is a clear career
23 advancement track for individuals interested in de-
24 voting themselves to a career in compliance with
25 such sections; and

1 (6) whether the executive branch should require
2 any or all categories of Federal employees to under-
3 take awareness training of such sections.

○