

110TH CONGRESS  
1ST SESSION

# 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.

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## 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

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## 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.

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.**

4       This Act may be cited as the “Openness Promotes  
5       Effectiveness in our National Government Act of 2007”  
6       or the “OPEN Government Act of 2007”.

7       **SEC. 2. FINDINGS.**

8       Congress finds that—

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

4                   (A) our constitutional democracy, our sys-  
5                   tem of self-government, and our commitment to  
6                   popular sovereignty depends upon the consent  
7                   of the governed;

8                   (B) such consent is not meaningful unless  
9                   it is informed consent; and

10                   (C) as Justice Black noted in his concur-  
11                   ring opinion in *Barr v. Matteo* (360 U.S. 564  
12                   (1959)), “The effective functioning of a free  
13                   government like ours depends largely on the  
14                   force of an informed public opinion. This calls  
15                   for the widest possible understanding of the  
16                   quality of government service rendered by all  
17                   elective or appointed public officials or employ-  
18                   ees.”;

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

22           (3) the Freedom of Information Act establishes  
23           a “strong presumption in favor of disclosure” as  
24           noted by the United States Supreme Court in  
25           *United States Department of State v. Ray* (502 U.S.

1       164 (1991)), a presumption that applies to all agen-  
 2       cies governed by that Act;

3           (4) “disclosure, not secrecy, is the dominant ob-  
 4       jective of the Act,” as noted by the United States  
 5       Supreme Court in *Department of Air Force v. Rose*  
 6       (425 U.S. 352 (1976));

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

9           (6) Congress should regularly review section  
 10      552 of title 5, United States Code (commonly re-  
 11      ferred to as the Freedom of Information Act), in  
 12      order to determine whether further changes and im-  
 13      provements are necessary to ensure that the Govern-  
 14      ment remains open and accessible to the American  
 15      people and is always based not upon the “need to  
 16      know” but upon the fundamental “right to know”.

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

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

20      “‘In making a determination of a representative of the  
 21      news media under subclause (II), an agency may not deny  
 22      that status solely on the basis of the absence of institu-  
 23      tional associations of the requester, but shall consider the  
 24      prior publication history of the requester. Prior publica-  
 25      tion history shall include books, magazine and newspaper

1 articles, newsletters, television and radio broadcasts, and  
 2 Internet publications. If the requestor has no prior publi-  
 3 cation history or current affiliation, the agency shall con-  
 4 sider the requestor’s stated intent at the time the request  
 5 is made to distribute information to a reasonably broad  
 6 audience.”.

7 **SEC. 4. RECOVERY OF ATTORNEY FEES AND LITIGATION**  
 8 **COSTS.**

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

11 (1) by inserting “(i)” after “(E)”; and

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

13 “(ii) For purposes of this section, a  
 14 complainant has substantially prevailed if  
 15 the complainant has obtained relief  
 16 through either—

17 “(I) a judicial order, an adminis-  
 18 trative action, or an enforceable writ-  
 19 ten agreement or consent decree; or

20 “(II) a voluntary or unilateral  
 21 change in position by the opposing  
 22 party, where the complaintant’s claim  
 23 or defense was not frivolous.”.

1 **SEC. 5. DISCIPLINARY ACTIONS FOR ARBITRARY AND CA-**  
 2 **PRICIOUS REJECTIONS OF REQUESTS.**

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

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

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

7 “(ii) The Attorney General shall—

8 “(I) notify the Special Counsel of each civil ac-  
 9 tion described under the first sentence of clause (i);  
 10 and

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

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

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

18 (a) TIME LIMITS.—

19 (1) IN GENERAL.—Section 552(a)(6)(A)(i) of  
 20 title 5, United States Code, is amended by inserting  
 21 “, and the 20-day period shall commence on the date  
 22 on which the request is first received by the agency,  
 23 and shall not be tolled without the consent of the  
 24 party filing the request” after “adverse determina-  
 25 tion”.

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

4           (b) AVAILABILITY OF AGENCY EXEMPTIONS.—

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

8           “(G)(i) If an agency fails to comply with the applica-  
9           ble time limit provisions of this paragraph with respect  
10          to a request, the agency may not assert any exemption  
11          under subsection (b) to that request, unless disclosure—

12           “(I) would endanger the national security of the  
13          United States;

14           “(II) would disclose personal private informa-  
15          tion protected by section 552a or proprietary infor-  
16          mation; or

17           “(III) is otherwise prohibited by law.

18          “(ii) A court may waive the application of clause (i)  
19          if the agency demonstrates by clear and convincing evi-  
20          dence that there was good cause for the failure to comply  
21          with the applicable time limit provisions.”.

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          apply to requests for information under section 552

1 of title 5, United States Code, filed on or after that  
 2 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 2005, 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) IN GENERAL.—Section 552(e)(1) of title 5,  
 22   United States Code, is amended—

23           (1) in subparagraph (B)(ii), by inserting after  
 24       the first comma “the number of occasions on which  
 25       each statute was relied upon,”;



1           (2) in subparagraph (C), by inserting “and av-  
2       erage” after “median”;

3           (3) in subparagraph (E), by inserting before the  
4       semicolon “, based on the date on which the requests  
5       were received by the agency”;

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

8           (5) by inserting after subparagraph (E) the fol-  
9       lowing:

10           “(F) the average number of days for the  
11       agency to respond to a request beginning on the  
12       date on which the request was received by the  
13       agency, the median number of days for the  
14       agency to respond to such requests, and the  
15       range in number of days for the agency to re-  
16       spond to such requests;

17           “(G) based on the number of business days  
18       that have elapsed since each request was origi-  
19       nally received by the agency—

20           “(i) the number of requests for  
21       records to which the agency has responded  
22       with a determination within a period up to  
23       and including 20 days, and in 20-day in-  
24       crements up to and including 200 days;

1           “(ii) the number of requests for  
2 records to which the agency has responded  
3 with a determination within a period great-  
4 er than 200 days and less than 301 days;

5           “(iii) the number of requests for  
6 records to which the agency has responded  
7 with a determination within a period great-  
8 er than 300 days and less than 401 days;  
9 and

10          “(iv) the number of requests for  
11 records to which the agency has responded  
12 with a determination within a period great-  
13 er than 400 days;

14          “(H) the average number of days for the  
15 agency to provide the granted information be-  
16 ginning on the date on which the request was  
17 originally filed, the median number of days for  
18 the agency to provide the granted information,  
19 and the range in number of days for the agency  
20 to provide the granted information;

21          “(I) the median and average number of  
22 days for the agency to respond to administra-  
23 tive appeals based on the date on which the ap-  
24 peals originally were received by the agency, the  
25 highest number of business days taken by the

1 agency to respond to an administrative appeal,  
2 and the lowest number of business days taken  
3 by the agency to respond to an administrative  
4 appeal;

5 “(J) data on the 10 active requests with  
6 the earliest filing dates pending at each agency,  
7 including the amount of time that has elapsed  
8 since each request was originally received by the  
9 agency;

10 “(K) data on the 10 active administrative  
11 appeals with the earliest filing dates pending  
12 before the agency as of September 30 of the  
13 preceding year, including the number of busi-  
14 ness days that have elapsed since the requests  
15 were originally received by the agency;

16 “(L) the number of expedited review re-  
17 quests that are granted and denied, the average  
18 and median number of days for adjudicating ex-  
19 pedited review requests, and the number adju-  
20 dicated within the required 10 days;

21 “(M) the number of fee waiver requests  
22 that are granted and denied, and the average  
23 and median number of days for adjudicating fee  
24 waiver determinations;”.

1 (b) APPLICABILITY TO AGENCY AND EACH PRIN-  
 2 CIPAL COMPONENT OF THE AGENCY.—Section 552(e) of  
 3 title 5, United States Code, is amended—

4 (1) by redesignating paragraphs (2) through  
 5 (5) as paragraphs (3) through (6), respectively; and  
 6 (2) by inserting after paragraph (1) the fol-  
 7 lowing:

8 “(2) Information in each report submitted  
 9 under paragraph (1) shall be expressed in terms of  
 10 each principal component of the agency and for the  
 11 agency overall.”.

12 (c) PUBLIC AVAILABILITY OF DATA.—Section  
 13 552(e)(3) of title 5, United States Code, (as redesignated  
 14 by subsection (b) of this section) is amended by adding  
 15 after the period “In addition, each agency shall make the  
 16 raw statistical data used in its reports available electroni-  
 17 cally to the public upon request.”.

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

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

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

1           “(A) any information that would be an  
2           agency record subject to the requirements of  
3           this section when maintained by an agency in  
4           any format, including an electronic format; and

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

9   **SEC. 11. OFFICE OF GOVERNMENT INFORMATION SERV-**  
10                   **ICES.**

11       (a) IN GENERAL.—Chapter 5 of title 5, United  
12 States Code, is amended—

13           (1) by redesignating section 596 as section 597;

14       and

15           (2) by inserting after section 595 the following:

16   **“§ 596. Office of Government Information Services**

17       “(a) There is established the Office of Government  
18 Information Services within the Administrative Con-  
19 ference of the United States.

20       “(b) The Office of Government Information Services  
21 shall—

22           “(1) review policies and procedures of adminis-  
23 trative agencies under section 552 and compliance  
24 with that section by administrative agencies;

1           “(2) conduct audits of administrative agencies  
2           on such policies and compliance and issue reports  
3           detailing the results of such audits;

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

9           “(4) offer mediation services between persons  
10          making requests under section 552 and administra-  
11          tive agencies as a non-exclusive alternative to litiga-  
12          tion and, at the discretion of the Office, issue advi-  
13          sory opinions if mediation has not resolved the dis-  
14          pute.”.

15          (b) TECHNICAL AND CONFORMING AMENDMENT.—  
16          The table of sections for chapter 5 of title 5, United States  
17          Code, is amended by striking the item relating to section  
18          596 and inserting the following:

“596. Office of Government Information Services.

“597. Authorization of appropriations.”.

19          (c) EFFECTIVE DATE.—The amendments made by  
20          this section shall take effect 1 year after the date of enact-  
21          ment of this Act.

1 **SEC. 12. ACCESSIBILITY OF CRITICAL INFRASTRUCTURE**  
2 **INFORMATION.**

3 (a) IN GENERAL.—Not later than January 1 of each  
4 of the 3 years following the date of the enactment of this  
5 Act, the Comptroller General of the United States shall  
6 submit to Congress a report on the implementation and  
7 use of section 214 of the Homeland Security Act of 2002  
8 (6 U.S.C. 133), including—

9 (1) the number of persons in the private sector,  
10 and the number of State and local agencies, that vol-  
11 untarily furnished records to the Department under  
12 this section;

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

15 (3) such recommendations as the Comptroller  
16 General considers appropriate regarding improve-  
17 ments in the collection and analysis of sensitive in-  
18 formation held by persons in the private sector, or  
19 by State and local agencies, relating to vulnerabili-  
20 ties of and threats to critical infrastructure, includ-  
21 ing the response to such vulnerabilities and threats;  
22 and

23 (4) an examination of whether the nondisclo-  
24 sure of such information has led to the increased  
25 protection of critical infrastructure.

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

3 **SEC. 13. REPORT ON PERSONNEL POLICIES RELATED TO**  
 4 **FOIA.**

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

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

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

13 (B) enhance the stature of officials admin-  
 14 istering that section within the executive  
 15 branch;

16 (2) whether performance of compliance with  
 17 section 552 of title 5, United States Code, should be  
 18 included as a factor in personnel performance eval-  
 19 uations for any or all categories of Federal employ-  
 20 ees and officers;

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

24 (4) whether the highest level officials in par-  
 25 ticular agencies administering such sections should



1 be paid at a rate of pay equal to or greater than a  
2 particular minimum rate; and

3 (5) whether other changes to personnel policies  
4 can be made to ensure that there is a clear career  
5 advancement track for individuals interested in de-  
6 voting themselves to a career in compliance with  
7 such sections; and

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

○