

FOIA OVERSIGHT AND IMPLEMENTATION ACT OF 2015

JANUARY 7, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CHAFFETZ, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

[To accompany H.R. 653]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 653) to amend section 552 of title 5, United States Code (commonly known as the Freedom of Information Act), to provide for greater public access to information, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “FOIA Oversight and Implementation Act of 2015” or the “FOIA Act”.

SEC. 2. FREEDOM OF INFORMATION ACT AMENDMENTS.

(a) **ELECTRONIC ACCESSIBILITY.**—Section 552 of title 5, United States Code, is amended—

(1) in subsection (a)—

(A) in paragraph (2)—

(i) by striking “for public inspection and copying” each place it appears and inserting “in an electronic, publicly accessible format”;

(ii) by striking “; and” and inserting a semicolon;

(iii) by striking subparagraph (E) and inserting the following new subparagraphs:

“(E) copies of all releasable records, regardless of form or format, that have been requested three or more times under paragraph (3); and

“(F) a general index of the records referred to under subparagraphs (D) and (E);”; and

(iv) in the matter following subparagraph (F) (as added by clause (iii) of this subparagraph)—

(I) by striking “subparagraph (D)” and inserting “subparagraphs (D) and (E)”; and

(II) by striking “subparagraph (E)” and inserting “subparagraph (F)”; and

(B) in paragraph (7)—

(i) in subparagraph (A), by striking “that will take longer than ten days to process”; and

(ii) in subparagraph (B), by inserting “automated” after “provides”;

(2) in subsection (g), by striking “make publicly available upon request” and inserting “make available in an electronic, publicly accessible format”; and

(3) by adding at the end the following new subsection:

“(m) **ELECTRONIC SUBMISSION OF REQUESTS.**—

“(1) **CONSOLIDATED ONLINE REQUEST PORTAL.**—The Director of the Office of Management and Budget, in consultation with the Attorney General, shall ensure the operation of a consolidated online request portal that allows a member of the public to submit a request for records under subsection (a) to any agency from a single website. The portal may include any additional tools the Director of the Office of Management and Budget finds will improve the implementation of this section.

“(2) **RULE OF CONSTRUCTION.**—This subsection shall not be construed to alter the power of any other agency to create or maintain an independent online portal for the submission of a request for records under this section. The Director of the Office of Management and Budget shall establish standards for interoperability between the portal required under paragraph (1) and other request processing software used by agencies subject to this section.

“(3) **EMAIL REQUEST REQUIRED.**—Each agency shall accept requests for records under subsection (a) through an email address and shall publish such email address on the website of the agency.”

(b) **PRESUMPTION OF OPENNESS.**—Section 552(b) of title 5, United States Code, is amended—

(1) in paragraph (5), by inserting after “with the agency” the following: “, excluding—

“(A) opinions that are controlling interpretations of law;

“(B) final reports or memoranda created by an entity other than the agency, including other Governmental entities, at the request of the agency and used to make a final policy decision;

“(C) guidance documents used by the agency to respond to the public; and

“(D) records or information created 25 years or more before the date on which a request is made under subsection (a)(3)”; and

(2) in the matter following paragraph (9), by inserting before “Any reasonably segregable portion” the following: “An agency may not withhold information under this subsection unless such agency reasonably foresees that disclosure would cause specific identifiable harm to an interest protected by an exemption, or if disclosure is prohibited by law.”

(c) **ASSESSMENT OF ATTORNEY FEES AND OTHER LITIGATION COSTS.**—Section 552(a)(4)(E)(i) of title 5, United States Code, is amended by striking “The court may” and inserting “The court shall”.

(d) **THE OFFICE OF GOVERNMENT INFORMATION SERVICES.**—Section 552 of title 5, United States Code, is amended—

(1) in subsection (a)(4)(A)(i), by striking “the Director of the Office of Management and Budget” and inserting “the Director of the Office of Management and Budget, in consultation with the Director of the Office of Government Information Services,”; and

(2) by amending subsection (h) to read as follows:

“(h) THE OFFICE OF GOVERNMENT INFORMATION SERVICES.—

“(1) ESTABLISHMENT.—There is established the Office of Government Information Services within the National Archives and Records Administration. The head of the Office is the Director of the Office of Government Information Services.

“(2) REVIEW OF FOIA POLICY, PROCEDURE, AND COMPLIANCE.—The Office of Government Information Services shall—

“(A) review policies and procedures of agencies under this section;

“(B) review compliance with this section by agencies;

“(C) identify methods that improve compliance under this section that may include—

“(i) the timely processing of requests submitted to agencies under this section;

“(ii) the system for assessing fees and fee waivers under this section; and

“(iii) the use of any exemption under subsection (b); and

“(D) review and provide guidance to agencies on the use of fees and fee waivers.

“(3) MEDIATION SERVICES.—The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and agencies as a non-exclusive alternative to litigation and may issue advisory opinions at the discretion of the Office or upon request of any party to such mediation services.

“(4) SUBMISSION OF REPORT.—

“(A) IN GENERAL.—The Office of Government Information Services shall not less than annually submit to the committees described in subparagraph (C) and the President a report on the findings from the information reviewed and identified under paragraph (2), a summary of the Office’s activities under paragraph (3) (including any advisory opinions issued), and legislative and regulatory recommendations to improve the administration of this section.

“(B) ELECTRONIC AVAILABILITY OF REPORTS.—The Office shall make available any report submitted under paragraph (A) in a publicly accessible format.

“(C) CONGRESSIONAL SUBMISSION OF REPORT.—The committees described in this subparagraph are the following:

“(i) The Committee on Oversight and Government Reform of the House of Representatives.

“(ii) The Committees on Homeland Security and Governmental Affairs and the Judiciary of the Senate.

“(D) DIRECT SUBMISSION OF REPORTS AND TESTIMONY.—Any report submitted under paragraph (A), any testimony, or any other communication to Congress shall be submitted directly to the committees and the President, without any requirement that any officer or employee outside of the Office of Government Information Services, including the Archivist of the United States and the Director of the Office of Management and Budget, review such report, testimony, or other communication.

“(5) SUBMISSION OF ADDITIONAL INFORMATION.—The Director of the Office of Government Information Services may submit additional information to Congress and the President that the Director determines to be appropriate.

“(6) ANNUAL MEETING REQUIRED.—Not less than once a year, the Office of Government Information Services shall hold a meeting that is open to the public on the review and reports by the Office and permit interested persons to appear and present oral or written statements at such meeting.”.

(e) PUBLIC RESOURCES.—Section 552(a)(6)(A) of title 5, United States Code, is amended—

(1) in clause (i), by striking “of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and” and inserting the following: “of—

“(I) such determination and the reasons therefor;

“(II) the right of such person to seek assistance from the agency FOIA Public Liaison; and

“(III) the right of such person to appeal to the head of the agency any adverse determination, within a period determined by the agency that is

not less than 90 days after the receipt of such adverse determination; and”;
and

(2) in clause (ii), by striking the period at the end and inserting the following:
“and the right of such person to seek dispute resolution services from the agency FOIA Public Liaison or the Office of Government Information Services.”

(f) ADDITIONAL DISCLOSURE OF INFORMATION REQUIREMENTS.—Section 552(a) of title 5, United States Code, is amended by adding at the end the following new paragraphs:

“(8) DISCLOSURE OF INFORMATION FOR INCREASED PUBLIC UNDERSTANDING OF THE GOVERNMENT.—Each agency shall—

“(A) review the records of such agency to determine whether the release of the records would be in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government;

“(B) for records determined to be in the public interest under subparagraph (A), reasonably segregate and redact any information exempted from disclosure under subsection (b); and

“(C) make available in an electronic, publicly accessible format, any records identified in subparagraph (A), as modified pursuant to subparagraph (B).

“(9) INCREASED DISCLOSURE OF INFORMATION.—Each agency shall—

“(A) make information public to the greatest extent possible through modern technology to—

“(i) inform the public of the operations and activities of the Government; and

“(ii) ensure timely disclosure of information; and

“(B) establish procedures for identifying categories of records that may be disclosed regularly and additional records of interest to the public that are appropriate for public disclosure, and for posting such records in an electronic, publicly accessible format.”.

(g) REPORT ON CATEGORIES OF INFORMATION FOR DISCLOSURE.—Not later than one year after the date of the enactment of this Act, and every two years thereafter, the Director of the Office of Information Policy of the Department of Justice, after consultation with agencies selected by the Director, shall submit to the Committee on Oversight and Government Reform of the House of Representatives and the Committees on Homeland Security and Governmental Affairs and the Judiciary of the Senate a report that identifies categories of records that would be appropriate for proactive disclosure, and shall make such report available in an electronic, publicly accessible format.

(h) AGENCY FOIA REPORT.—Section 552(e) of title 5, United States Code, is amended—

(1) in paragraph (1)—

(A) by inserting “and to the Director of the Office of Government Information Services” after “the Attorney General of the United States”;

(B) in subparagraph (N), by striking “; and” and inserting a semicolon;

(C) in subparagraph (O), by striking the period and inserting a semicolon;

and

(D) by adding at the end the following new subparagraphs:

“(P) the number of times the agency invoked a law enforcement exclusion under subsection (c);

“(Q) the number of times the agency engaged in dispute resolution with the assistance of the Office of Government Information Services or the FOIA Public Liaison;

“(R) the number of records that were made available in an electronic, publicly accessible format under subsection (a)(2); and

“(S) the number of times the agency assessed a search or duplication fee under subsection (a)(4)(A) and did not comply with a time limit under subsection (a)(6).”.

(2) by amending paragraph (3) to read as follows:

“(3) ELECTRONIC ACCESSIBILITY OF REPORTS.—Each agency shall make each such report available in an electronic, publicly accessible format. In addition, each agency shall make the raw statistical data used in its reports available in a timely manner in an electronic, publicly accessible format. Such data shall be—

“(A) made available without charge, license, or registration requirement;

“(B) capable of being searched and aggregated; and

“(C) permitted to be downloaded and downloaded in bulk.”;

(3) in paragraph (4)—

(A) by striking “Committee on Government Reform and Oversight” and inserting “Committee on Oversight and Government Reform”;

(B) by striking “Governmental Affairs” and inserting “Homeland Security and Governmental Affairs”; and

(C) by striking “April 1” and inserting “March 1”;

(4) in paragraph (5)—

(A) by inserting “and the Director of the Office of Government Information Services” after “the Director of the Office of Management and Budget”; and

(B) by striking “by October 1, 1997”; and

(5) by amending paragraph (6) to read as follows:

“(6) ATTORNEY GENERAL FOIA REPORT.—

“(A) IN GENERAL.—The Attorney General of the United States shall submit to Congress and the President an annual report on or before March 1 of each calendar year which shall include for the prior calendar year—

“(i) a listing of the number of cases arising under this section;

“(ii) each subsection under this section, each paragraph of the subsection, and any exemption, if applicable, involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4); and

“(iii) a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

“(B) ELECTRONIC AVAILABILITY.—The Attorney General of the United States—

“(i) shall make each report described under subparagraph (A) available in an electronic, publicly accessible format; and

“(ii) shall make the raw statistical data used in each report available in an electronic, publicly accessible format, which shall be—

“(I) made available without charge, license, or registration requirement;

“(II) capable of being searched and aggregated; and

“(III) permitted to be downloaded, including downloaded in bulk.”.

(i) SEARCH OR DUPLICATION FEES.—Section 552(a)(4)(A)(viii) of title 5, United States Code, is amended by adding at the end the following new sentence: “Any agency that does assess search or duplication fees after failing to comply with a time limit under paragraph (6) shall provide written notice to the requester of the circumstance that justifies the fees. If an agency fails to provide such notice, the agency may not assess search or duplication fees.”.

(j) GOVERNMENT ACCOUNTABILITY OFFICE.—Subsection (i) of section 552 of title 5, United States Code, is amended to read as follows:

“(i) GOVERNMENT ACCOUNTABILITY OFFICE.—The Government Accountability Office shall—

“(1) conduct audits of administrative agencies on compliance with and implementation of the requirements of this section and issue reports detailing the results of such audits;

“(2) catalog the number of exemptions under subsection (b)(3) and agency use of such exemptions; and

“(3) review and prepare a report on the processing of requests by agencies for information pertaining to an entity that has received assistance under title I of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5211 et seq.) during any period in which the Government owns or owned more than 50 percent of the stock of such entity.”.

(k) CHIEF FOIA OFFICER RESPONSIBILITIES; COUNCIL; REVIEW.—Section 552 of title 5, United States Code, is amended—

(1) by striking subsections (j) and (k); and

(2) by inserting after subsection (i), the following new subsections:

“(j) CHIEF FOIA OFFICER.—

“(1) DESIGNATION.—Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

“(2) DUTIES.—The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency—

“(A) have agency-wide responsibility for efficient and appropriate compliance with this section;

“(B) 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;

“(C) 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;

“(D) 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;

“(E) 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;

“(F) serve as the primary agency liaison with the Office of Government Information Services and the Office of Information Policy; and

“(G) designate one or more FOIA Public Liaisons.

“(3) COMPLIANCE REVIEW REQUIRED.—The Chief FOIA Officer of each agency shall—

“(A) review, not less than annually, all aspects of the agency’s administration of this section to ensure compliance with the requirements of this section, including—

“(i) agency regulations;

“(ii) disclosure of records required under paragraphs (2), (8), and (9) of subsection (a);

“(iii) assessment of fees and determination of eligibility for fee waivers;

“(iv) the timely processing of requests for information under this section;

“(v) the use of exemptions under subsection (b); and

“(vi) dispute resolution services with the assistance of the Office of Government Information Services or the FOIA Public Liaison; and

“(B) make recommendations as necessary to improve agency practices and compliance with this section.

“(k) CHIEF FOIA OFFICERS COUNCIL.—

“(1) ESTABLISHMENT.—There is established in the executive branch the Chief FOIA Officers Council (in this subsection, referred to as the ‘Council’).

“(2) MEMBERS.—The Council shall consist of the following members:

“(A) The Deputy Director for Management of the Office of Management and Budget.

“(B) The Director of the Office of Information Policy at the Department of Justice.

“(C) The Director of the Office of Government Information Services at the National Archives and Records Administration.

“(D) The Chief FOIA Officer of each agency.

“(E) Any other officer or employee of the United States as designated by the Co-Chairs.

“(3) CO-CHAIRS.—The Director of the Office of Information Policy at the Department of Justice and the Director of the Office of Government Information Services at the National Archives and Records Administration shall be the Co-Chairs of the Council.

“(4) SUPPORT SERVICES.—The Administrator of General Services shall provide administrative and other support for the Council.

“(5) CONSULTATION.—In performing its duties, the Council shall consult regularly with members of the public who make requests under this section.

“(6) DUTIES.—The duties of the Council include the following:

“(A) Develop recommendations for increasing compliance and efficiency under this section.

“(B) Disseminate information about agency experiences, ideas, best practices, and innovative approaches related to this section.

“(C) Identify, develop, and coordinate initiatives to increase transparency and compliance with this section.

“(D) Promote the development and use of common performance measures for agency compliance with this section.

“(7) MEETINGS.—

“(A) REGULAR MEETINGS.—The Council shall meet regularly and such meetings shall be open to the public unless the Council determines to close the meeting for reasons of national security or to discuss information exempt under subsection (b).

“(B) ANNUAL MEETINGS.—Not less than once a year, the Council shall hold a meeting that shall be open to the public and permit interested persons to appear and present oral and written statements to the Council.

“(C) NOTICE.—Not later than 10 business days before a meeting of the Council, notice of such meeting shall be published in the Federal Register.

“(D) PUBLIC AVAILABILITY OF COUNCIL RECORDS.—Except as provided in subsection (b), the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents that were made available to or prepared for or by the Council shall be made publicly available.

“(E) MINUTES.—Detailed minutes of each meeting of the Council shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the Council.”.

(I) REGULATIONS.—

(1) REVISION OF REGULATIONS.—Not later than 180 days after the date of the enactment of this Act, the head of each agency shall review the regulations of such agency and shall issue regulations on procedures for the disclosure of records under section 552 of title 5, United States Code, in accordance with the amendments made by this section. The regulations of each agency shall include—

(A) procedures for engaging in dispute resolution; and

(B) procedures for engaging with the Office of Government Information Services.

(2) OFFICE OF GOVERNMENT INFORMATION SERVICES REPORT.—Not later than 270 days after the date of the enactment of this Act, the Office of Government Information Services shall submit to Congress a report on agency compliance with the requirements of this subsection.

(3) REPORT ON NONCOMPLIANCE.—The head of any agency that does not meet the requirements of paragraph (1) shall submit to Congress a report on the reason for noncompliance not later than 270 days after the date of the enactment of this Act.

(4) INSPECTOR GENERAL REVIEW FOR NONCOMPLIANCE.—Any agency that fails to comply with the requirements of this subsection shall be reviewed by the Office of Inspector General of such agency for compliance with section 552 of title 5, United States Code.

(5) AGENCY DEFINED.—In this section, the term “agency” has the meaning given such term in section 552(f) of title 5, United States Code.

SEC. 3. INSPECTOR GENERAL REVIEW; ADVERSE ACTIONS.

(a) INSPECTOR GENERAL REVIEW.—

(1) IN GENERAL.—The Inspector General of each agency shall—

(A) periodically review compliance with the requirements of section 552 of title 5, United States Code, including the timely processing of requests, assessment of fees and fee waivers, and the use of exemptions under subsection (b) of such section; and

(B) make recommendations the Inspector General determines to be necessary to the head of the agency, including recommendations for disciplinary action.

(2) AGENCY DEFINED.—In this subsection, the term “agency” has the meaning given that term under section 552(f) of title 5, United States Code.

(b) ADVERSE ACTIONS.—The withholding of information in a manner inconsistent with the requirements of section 552 of title 5, United States Code (including any rules, regulations, or other implementing guidelines), as determined by the appropriate supervisor, shall be a basis for disciplinary action in accordance with subchapter I, II, or V of chapter 75 of such title, as the case may be.

SEC. 4. NO ADDITIONAL FUNDS AUTHORIZED.

No additional funds are authorized to carry out the requirements of this Act and the amendments made by this Act. Such requirements shall be carried out using amounts otherwise authorized or appropriated.

COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

H.R. 653, the FOIA Oversight and Implementation Act of 2015 (FOIA Act), would strengthen the Freedom of Information Act (FOIA) to increase transparency and accountability in government,

and improve access to government records for citizens. It amends FOIA to provide for more disclosure of records, through both proactive disclosure and limitations on the use of exemptions. H.R. 653 also encourages enhanced agency compliance with statutory requirements and improves the FOIA process for both agencies and requesters.

BACKGROUND AND NEED FOR LEGISLATION

FOIA establishes a presumption that records in the possession of Executive Branch agencies and departments of the federal government are accessible to the people.¹ Under FOIA, anyone may file a request for a copy of any existing record at any federal agency for any reason.² Information requested under FOIA is required to be released unless it falls under any of nine narrow exemptions that protect certain information from disclosure.³

FOIA was a product of the former-Government Operations Committee's Special Subcommittee on Government Information, established in the 84th Congress.⁴ After eleven years of development in the House of Representatives and almost six years of consideration in the Senate, FOIA was enacted in 1966.⁵ The House bill report to the 1966 Freedom of Information Act stated:

It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his government. This bill strikes a balance considering all these interests.⁶

Since FOIA's enactment, Congress has repeatedly revisited the law to better balance the public's right to know. FOIA has been amended multiple times in efforts to increase agency compliance with the requirements of the Act and to improve the process. FOIA was amended in 1974, 1976, 1986, 1996, 2007, and 2010.⁷ Despite these amendments, barriers to the public's right to know persist. H.R. 653 will help to address many of these issues.

FOIA's "Right to Know" Necessitates Increased Disclosure

FOIA is often referred to as the embodiment of "the people's right to know" about the activities and operations of government.⁸ However, backlogs, exemptions, and other barriers to access interfere with this right. In fiscal year 2014, Executive Branch agencies received 714,231 new FOIA requests.⁹ In the same period, the

¹ Congressional Research Service, "The Freedom of Information Act (FOIA): Background, Legislation, and Policy Issues," Aug. 14, 2015.

² *Id.*

³ *Id.*

⁴ Sam Archibald, "The Early Years of the Freedom of Information Act—1955 to 1974," PS: Political Science and Politics, vol. 26, no. 4 (1993), pp. 726–731.

⁵ Congressional Research Service, "The Freedom of Information Act (FOIA): Background, Legislation, and Policy Issues," Aug. 14, 2015.

⁶ H. Rep. No. 1497 (1966).

⁷ Congressional Research Service, "The Freedom of Information Act (FOIA): Background, Legislation, and Policy Issues," Aug. 14, 2015.

⁸ *Id.*

⁹ U.S. Department of Justice, "Summary of Annual FOIA Reports for Fiscal Year 2014."

agencies processed 647,142 new and existing requests, and agencies released records in full 28 percent of the processed requests.¹⁰

The FOIA statute includes nine exemptions, which allow for the withholding of records to protect sensitive information from disclosure.¹¹ Unfortunately, there is concern that agencies are overusing these exemptions to protect records that should be releasable under the law.¹² To help put their use in perspective, in FY2014 agencies invoked exemptions more than 550,000 times.¹³

Effective transparency starts with a presumption of openness

In January 2009, President Obama issued a memorandum which said: “The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. . . . All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.”¹⁴ In March 2009, Attorney General Eric Holder issued guidance which reasserted a presumption of disclosure and established a standard for litigation whereby the Department of Justice would defend FOIA request denials only if “(1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.”¹⁵

Building on the Administration’s efforts, H.R. 653 would codify the presumption of openness, making it a permanent requirement for agencies, with respect to FOIA. Based on the Department of Justice’s standard to defend a decision in litigation, H.R. 653 would prohibit agencies from withholding information unless the agency “reasonably foresees that disclosure would cause a specific, identifiable harm to an interest protected by an exemption, or if disclosure is prohibited by law.” An inquiry into whether an agency has reasonably foreseen a specific, identifiable harm that would be caused by a disclosure would require the ability to articulate both the nature of the harm and the link between the specified harm and specific information contained in the material withheld.

The presumption as codified at 5 U.S.C. 552(b) would be applicable to discretionary exemptions, such as exemption two or exemption five, which cover internal personnel policy and legal privileges, respectively.¹⁶ The presumption would not require the release of in-

¹⁰ *Id.*

¹¹ 5 U.S.C. 552(b).

¹² OpenTheGovernment.org “Scoring the Third National Action Plan—November 17, 2015 Newsletter,” available at: <http://www.openthegovernment.org/node/5051>; AllGov.com “Judge Orders CIA to Stop Abusing Freedom of Information Act Exemption,” (Sept. 25, 2013), available at: <http://www.allgov.com/news/controversies/judge-orders-cia-to-stop-abusing-freedom-of-information-act-exemption-130925?news=851226>; Media Alert, Sunlight Foundation “Editorial Memo: The Freedom Of Information Act Must Be Updated” (Aug. 24, 2014), available at: <http://sunlightfoundation.com/press/releases/2014/08/26/editorial-memo-freedom-information-act-must-be-upd/>; Unredacted, “Analysis of and Prospects for New House and Senate FOIA Bills” (Feb. 4, 2015) available at: <https://nsarchive.wordpress.com/page/13/?archives-list&archives-type=months>.

¹³ U.S. Dept. of Justice, “Data,” available at <http://www.foia.gov/data.html> (last accessed May 28, 2015).

¹⁴ Memorandum from President Barack Obama for the Heads of Exec. Departments & Agencies, *Freedom of Information Act*, (Jan. 21, 2009).

¹⁵ Memorandum from Att’y Gen. Eric Holder for the Heads of Exec. Departments & Agencies, *Freedom of Information Act*, (Mar. 19, 2009), 74 Fed. Reg. 51879 (Oct. 8, 2009).

¹⁶ Dept. of Justice, “Discretionary Disclosure and Waiver,” (May 2004).

formation for which disclosure is legally prohibited. As an example, exemption one protects classified information.¹⁷ Agency officials do not have discretion to release properly classified information.¹⁸ The presumption of openness does not change that prohibition, as the specific, identifiable harm is that the release of the information would be a violation of the law.

Similarly, the presumption does not alter the scope of information that is covered under an exemption. Exemption eight, as an example, has traditionally been interpreted by courts as having a “‘particularly broad, all-inclusive’ scope.”¹⁹ The presumption does not narrow the broad scope of exemption eight. Nor should the presumption be interpreted so as to compromise the stability of any financial institution or financial system, disrupt the operations of financial markets or undermine consumer protection due to the release of private information about individuals.

Some concerns about overuse of exemption five can be addressed by limiting the scope

Exemption five has been singled out as a particularly problematic exemption. Some have taken to calling it the “withhold it because you want to” exemption.²⁰ Exemption five safeguards sensitive information contained in inter-agency or intra-agency memorandums or letters that would be withheld as privileged during litigation.²¹ The purpose of the exemption is so that agencies need not operate in a fishbowl.²²

Federal agencies most commonly invoke exemption five to withhold records protected by attorney client privilege, attorney work product privilege, and the deliberative process privilege.²³ The deliberative process privilege is the most used privilege and the source of the most concern regarding overuse.²⁴ The privilege is a relatively recent innovation by the judicial branch, first appearing in an American judicial decision in 1958.²⁵

The deliberative process privilege has become the legal vehicle by which agencies continue to withhold information about government operations.²⁶ The legislative history of FOIA describes how this was a central problem FOIA was trying to fix, namely abuse of statutory language that was intended to public access to information about the operations of the federal government. The 1966 House bill report found “Improper denials occur again and again.”²⁷ It went on:

¹⁷ 5 U.S.C. 552(b)(1).

¹⁸ E.O. 13526 (2009); 18 U.S.C. 798.

¹⁹ Dept. of Justice “Guide to the Freedom of Information Act,” *Exemption Eight* (updated July 23, 2014).

²⁰ Nate Jones, “The Next FOIA Fight: The B(5) ‘Withhold it because you want to’ Exemption,” National Security Archive blog “Unredacted” (Mar. 27, 2014).

²¹ 5 U.S.C. 552(b)(5).

²² H. Rep. No. 1497 (1966).

²³ Dept. of Justice “Guide to the *Freedom of Information Act*,” Exemption Five, p13 (updated May 7, 2014).

²⁴ Anne Weismann, “New FOIA Legislation—the Good, the Bad, and the Ugly,” Citizens for Responsibility and Ethics in Washington, (Feb. 9, 2015).

²⁵ *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958). Gerald Wetlaufer, “Justifying Secrecy: An Objection to the General Deliberative Privilege,” 65 Ind. L.J. 843 (Fall 1990).

²⁶ Dept. of Justice “Guide to the *Freedom of Information Act*,” Exemption Five (updated May 7, 2014).

²⁷ H. Rep. No. 1497 (1966).

Matters which relate solely to “internal management” and thus can be withheld under the provisions of [current law] range from the important to the insignificant. They range from a proposed spending program, still being worked out in the agency for future presentation to the Congress, to a routine telephone book. . . . The statutory requirement that information about routine administrative actions need be given only to “persons properly and directly concerned” has been relied upon almost daily to withhold Government information from the public. . . . If none of the other restrictive phrases of [current law] applies to the official Government record which an agency wishes to keep confidential, it can be hidden behind the “good cause found” shield. **Historically, Government agencies whose mistakes cannot bear public scrutiny have found ‘good cause’ for secrecy.**²⁸

Congress has not yet identified language that will ensure that the Executive agencies administering FOIA will strike the appropriate balance between privacy that is absolutely necessary for candid conversations in the development of effective public policy and transparency that is necessary and expected in a government by the people and for the people. In an attempt to provide some transparency in this area, H.R. 653 carves out a 25-year time limitation to exemption five.

In addition to the presumption of openness, the FOIA Act would specifically limit exemption five by setting a time limit on use of the exemption. Agencies could only apply exemption five to records and information created within 25 years prior to the date of the request regardless of the underlying privilege relied upon.

Proactive disclosure will further the development of a culture of openness

Proactive disclosure will improve transparency of government operations and allow the public to better understand government activities and decisions. H.R. 653 would increase the amount of agency information made available through proactive disclosure. Records requested under FOIA more than three times would be posted online for public inspection and copying. Each agency would also be required to review its records to determine whether any records ought to be released because they are in the public interest, and establish procedures for identifying categories of records that can be proactively disclosed to the public on a regular basis. These provisions would increase the amount of information the public can access without even filing a FOIA request. As an added benefit, increased disclosure may reduce the drain on resources required to respond to repetitive requests.

H.R. 653 would improve FOIA processes

Ensuring the public’s right to know requires that the processing of FOIA requests is done efficiently and effectively. Transparency in FOIA processes allows requesters to feel confident that agencies are responding to those requests and that the agency takes their inquiry seriously. Increased accessibility ensures that everyone has

²⁸ *Id.* (emphasis added).

the ability to exercise their rights and increased compliance means the agencies are effective in their responsibilities to uphold the public's right.

H.R. 653 would ensure accessibility and transparency in FOIA processes

To improve accessibility and transparency, H.R. 653 would establish a single website, accessible to the public at no cost, which will allow people to submit FOIA requests, file appeals, and receive automated information about the status of their requests in a single location. H.R. 653 also would require agencies to assign a tracking number to a request on day one, so that requesters may track the progress of their request as it moves through an agency's FOIA process. These provisions would improve public access to the FOIA request process and improve efficiency in federal FOIA offices.

H.R. 653 clarifies the right of any individual to appeal an agency's determination regarding a FOIA request filed by that individual. Under the bill, agencies would be required to give requesters at least 90 days to appeal an adverse determination. A time limit for appeals is not currently codified, so this provision will strengthen requester rights to file appeals.

H.R. 653 would ensure compliance with FOIA processes

A 2014 survey found that seven years after enactment of the OPEN Government Act of 2007, more than half of agencies had not updated their FOIA regulations to comply with the law.²⁹ To ensure statutory compliance, H.R. 653 would require agencies to update their FOIA regulations no later than 180 days after H.R. 653 is enacted. The bill would require agency regulations to be reviewed by the Office of Government Information Services (OGIS) to ensure they are compliant and consistent with current FOIA law. Any agency that fails to comply would be required to submit a report to Congress to explain its noncompliance. Agencies that do not comply would also be reviewed by their Office of Inspector General to evaluate agency compliance with FOIA law.

Fees and fee waivers are another problem that requires further legislation. FOIA does not allow agencies to charge search fees if the agency does not comply with specific statutory time limits to respond to requesters. Additionally, many requesters qualify for a waiver of fees. Some agencies have not fully complied with the statute and charge excessive fees, or engage in fee assessment practices designed to dissuade requesters.³⁰ H.R. 653 would clarify the fee requirements to better prevent similar abuses in the future.

While there are no criminal penalties for violating FOIA, courts may assess attorney fees and court costs for violations, and bringing disciplinary action against an agency employee who acted arbitrarily or capriciously with respect to the withholding of information.³¹ H.R. 653 would expand upon the ability to impose disciplinary actions by allowing an agency to impose disciplinary actions

²⁹ National Security Archive, "National Security Archive FOIA Audit highlights delinquent agencies; praises Congressional and White House plans for updated regulations," (Mar. 14, 2014).

³⁰ Washington Examiner, "EPA Inspector General Investigating Claims Agency Used Fees to Block FOIA Requests," May 16, 2013. See also: "Suit: Spy Agency Flouting FOIA," *Politico*, February 22, 2012.

³¹ 5 U.S.C. 552(a)(4).

when the Inspector General determines an employee has inappropriately withheld records that were releasable under FOIA.

An effective OGIS is an independent OGIS

FOIA implementation has been plagued by delays, resistance, and excuses for non-compliance from the beginning.³² Congress has been persistent in conducting oversight, drafting legislative solutions, and encouraging greater openness in the executive branch, with little to no avail. Eight years ago, in yet another attempt to improve FOIA processes, Congress enacted the OPEN Government Act of 2007.³³ Among other things, the OPEN Government Act established OGIS to serve as a FOIA Ombudsman, to help requesters navigate the FOIA process and to remind agencies of statutory obligations.³⁴

OGIS was charged with providing a neutral source of FOIA compliance review, policy recommendations, and dispute resolution services for requesters and agencies as an alternative to litigation.³⁵ OGIS first opened its doors in September 2009.³⁶ One concern facing the agency is that the advice, recommendations, and reports regarding FOIA compliance are first filtered through the Office of Management and Budget, prior to reaching Congress.

In February 2015, Ms. Miriam Nisbet, the first Executive Director of OGIS, testified before the Committee's Subcommittee on Government Operations. Ms. Nisbet served as the Executive Director of OIGS from 2009 through 2014. In no uncertain terms, Ms. Nisbet explained the need for greater independence: "If you want recommendations, reports, and testimony that have not had to be reviewed, changed, and approved by the very agencies that might be affected, then you should change the law. . . . [T]he authority to report directly to Congress, as H.R. 653 provides, would be an important reform for an office that hears complaints, resolves disputes, reviews compliance, and is expected to speak truth to power. I might add that, if I were still the Director, I could not say this."³⁷

H.R. 653 provides OGIS with direct reporting to Congress, without the need for interagency review. This increased independence would allow OGIS to give unfiltered recommendations and assessments. OGIS would also be tasked with increased review of compliance with FOIA, including the timely processing of requests, the proper handling of fees and fee waivers, and the correct use of exemptions. OGIS would be required to submit an annual report to Congress on its review and hold at least one public meeting per year to allow interested persons to appear and present oral or written statements.

H.R. 653 would increase oversight to address persistent backlogs and other inefficiencies

The backlog of FOIA requests has increased in recent years, and has led to significant delays in the processing of requests. The

³² H.R. Rep. No. 92-1419 (1974).

³³ Pub. L. 110-175 (2007).

³⁴ *Id.*

³⁵ *Id.*

³⁶ "OGIS Timeline," available at <https://ogis.archives.gov/news-and-events/ogis-timeline.htm> (last accessed Dec. 13, 2015).

³⁷ H. Comm. on Oversight & Gov't Reform, *Ensuring Government Transparency through FOIA Reform*, 114th Cong. (Feb. 27, 2015) (Statement of Miriam Nisbet, former Exec. Dir., OGIS).

number of FOIA requests rose from 597,415 in FY 2010 to 714,231 in FY2014, a 20 percent increase.³⁸ During that same time frame, the government-wide backlog more than doubled. From FY2010 to FY2014, the total backlog of FOIA requests increased from 69,526 to 159,741.³⁹ Agencies have made efforts to reduce FOIA backlogs, but backlogs are a persistent and growing problem.

Many agencies are failing to comply with FOIA requirements to make frequently requested records publicly available online. The Department of Justice issued guidance instructing agencies to release records that have been requested three or more times.⁴⁰ The proactive disclosure of records in the public interest has been limited though. Proactive disclosure could reduce the number of FOIA requests, requiring less processing time for agencies.

The current FOIA statute encourages the use of alternate dispute resolution to avoid lawsuits whenever possible. Each agency has a FOIA Public Liaison who is tasked with assisting “in the resolution of any disputes between the requester and the agency.”⁴¹ OGIS was also created to offer mediation services and work to resolve disputes. Despite these actions, the number of FOIA lawsuits continues to rise.⁴²

To increase the ability to oversee FOIA processes, H.R. 653 would increase the amount of information reported by agencies in annual FOIA reports. The bill would require each agency to report how often it invoked law enforcement exclusions, how often it engaged in dispute resolution, how often it made information available to the public through proactive disclosure, and how often it assessed a search or duplication fee for a request when the agency did not comply with the statutory time limits for responding to that request. The reports would be sent to OGIS, as well as the Attorney General. Additionally, the raw data used by agencies to complete their annual FOIA reports would be made available online in a fully useable, bulk-downloadable and machine-readable format.

The bill would require the Government Accountability Office (GAO) to conduct audits of agency compliance with FOIA and catalog the number of exemptions that have been created under exemption three of FOIA. GAO would also review and report on agency processing of FOIA requests seeking information about private entities that receive or received assistance under the Emergency Economic Stabilization Act of 2008 during any period in which the government owned or owns more than 50 percent of the stock of such entity. Nothing in H.R. 653 is intended to alter the policy issued pursuant to section 348 of the FY 2010 Intelligence Authorization Act (P.L. 111–259).

H.R. 653 increases the oversight responsibilities of agency Chief FOIA Officers, requiring each agency Chief FOIA Officer to annually review all aspects of FOIA compliance by the agency. The bill also would establish a Chief FOIA Officers Council to be chaired by the Director of the Office of Information Policy at the Department of Justice and the Director of OGIS.

³⁸ Department of Justice, “Summary of Annual FOIA Reports for Fiscal Year 2014.”

³⁹ *Id.*

⁴⁰ Department of Justice, Office of Information Policy (previously Office of Information and Privacy), FOIA Post, “FOIA Counselor Q&A: ‘Frequently Requested’ Records,” (2002).

⁴¹ P.L. 110–175 (2007).

⁴² The FOIA Project, “FOIA Lawsuits,” available at foiaproject.org/lawsuit/ (last accessed Dec. 13, 2015).

The Council would be tasked with: developing recommendations to increase FOIA compliance and efficiency; sharing information on ideas, best practices, and innovative approaches to improve FOIA; identifying ways to better coordinate initiatives to increase transparency; and promoting the development and use of performance measures for agency FOIA compliance. The Council would be required to meet regularly and hold annual meetings, open to the public and at which interested persons would be allowed to present oral and written statements. All Council records, except any records relating to national security, would be required to be made publicly available.

LEGISLATIVE HISTORY

H.R. 653 was introduced by Congressman Darrell Issa (R-CA), with Ranking Member Elijah Cummings (D-MD) as an original cosponsor, on February 2, 2015 and referred to the Committee on Oversight and Government Reform. On March 25, 2015, the Committee on Oversight and Government Reform ordered H.R. 653 favorably reported, with an amendment in the nature of a substitute by Congressman Mark Meadows (R-NC) and two amendments by Chairman Jason Chaffetz (R-UT).

Similar legislation, S. 337 the “FOIA Improvement Act of 2015,” was introduced in the Senate by Senator John Cornyn (R-TX), with Senators Chuck Grassley (R-IA) and Patrick Leahy (D-VT) as original cosponsors, on February 2, 2015 and referred to the Senate Committee on the Judiciary. On February 9, 2015, the Senate Committee on the Judiciary ordered S. 337 favorably reported. No further action has been taken.

On February 27, 2015 the Committee on Oversight and Government Reform Subcommittee on Government Operations held a hearing entitled “Ensuring Government Transparency Through FOIA Reform.” The Subcommittee heard testimony from Ms. Miriam Nisbet, former Director of the Office of Government Information Services, Mr. Frederick Sadler, a former FOIA officer at the Food and Drug Administration, and Mr. Rick Blum, Director of the Sunshine in Government Initiative.

During the 113th Congress, on March 13, 2013, the Committee on Oversight and Government Reform held a hearing on FOIA and related issues entitled, “Addressing Transparency in the Federal Bureaucracy: Moving Toward A More Open Government.” The Committee heard testimony from representatives of transparency watchdog groups, including Ms. Angela Canterbury, Director of Public Policy, Project on Government Oversight; Mr. Jim Harper, Director of Information Policy Studies, Cato Institute; Mr. Daniel Schuman, Policy Counsel, The Sunlight Foundation; and Ms. Celia Wexler, Senior Washington Representative, Center for Science and Democracy, Union of Concerned Scientists.

Following this hearing, then-Chairman Issa and Ranking Member Cummings introduced the FOIA Oversight and Implementation Act of 2013, on March 15, 2013. That bill, H.R. 1211, was ordered favorably reported by the Committee on Oversight and Government Reform on March 20, 2013 and passed the House 410–0 on February 25, 2014. In the Senate, it was referred to the Senate Committee on Judiciary and no further action was taken.

Additionally, on June 24, 2014, Senator Leahy introduced S. 2520 the “FOIA Improvement Act of 2014.” S. 2520 was ordered favorably reported by the Senate Committee on the Judiciary on November 20, 2014 and passed the Senate by unanimous consent on December 9, 2014. The bill was held at the desk in the House. No further action was taken in the three remaining days the House was in session in 2014.

SECTION-BY-SECTION

Section 1. Short title

Designates the short title of the bill, “FOIA Oversight and Implementation Act of 2015,” or the “FOIA Act.”

Section 2. Freedom of Information Act amendments

Amends the Freedom of Information Act (FOIA) by—

(1) Increasing electronic accessibility by requiring agencies to post more information online in publicly accessible formats. Agencies would be required to post information requested three or more times online in a publicly accessible format, as well as other records that would contribute to public interest. Annual reports and the raw data of the reports would also be publicly accessible.

(2) Requiring OMB, in consultation with the Attorney General, to create a consolidated online request portal for the public to submit FOIA requests and receive information about the status of requests.

(3) Requiring agencies to provide an e-mail address at which the agency accepts FOIA requests and to post that e-mail address online.

(4) Prohibiting agencies from collecting fees if they do not respond within 20 days, unless the agency provides a written notice to the requester that justifies the fees.

(5) Requires agencies to pay litigation costs if the plaintiff prevails.

(6) Limiting exemption five to 25 years after the creation of the record and to exclude: (i) opinions that are controlling interpretations of law, (ii) final reports or memoranda solicited and used to make policy, and (iii) guidance documents used to respond to the public.

(7) Requiring agencies to identify a reasonably foreseeable harm that could be caused by disclosure before withholding information under discretionary exemptions, placing the burden on agencies to demonstrate why information may be withheld, instead of on the public to justify release.

(8) Strengthening the Office of Government Information Services (OGIS) by giving it increased independence. OGIS would be required to report directly to Congress without interagency review or review by the Archivist or the Office of Management and Budget. OGIS would be required to review agency compliance with all aspects of FOIA, and report recommendations. OGIS would also be required to hold public meetings at least once a year.

(9) Requiring agencies to report more information in their annual reports. Agencies would for the first time have to report the number of times they invoked law enforcement exclusions, engaged in dispute resolution, and the number of records made publicly avail-

able. Annual reports would need to be completed by March 1 of each year instead of April 1 in order to make information available for Sunshine Week.

(10) Requiring the Government Accountability Office to catalog all uses of (b)(3) exemptions, which are FOIA exemptions created by other statutes. Currently, it is unknown how many (b)(3) exemptions exist.

(11) Increasing responsibilities for OGIS, DOJ, and Chief FOIA Officers to review FOIA compliance and make recommendations. DOJ would be required to report more information about FOIA lawsuits. OGIS and Chief FOIA Officers would both review FOIA compliance and make recommendations to improve the process.

(12) Creating a Chief FOIA Officers Council, based on the Chief Information Officers Council. It shall be run jointly by OGIS and DOJ's Office of Information Policy as co-chairs. All agency Chief FOIA Officers shall be members of the Council. The Council would be required to meet regularly to review FOIA compliance and discuss improvements. Records of the meetings would be mandated to be made publicly available, and all meetings would be required to be noticed in the Federal Register prior to the meeting. No less than once a year, the Council would be required to have a public meeting where interested persons may submit statements in writing or in person.

(13) Requiring each agency to update its FOIA regulations within 180 days of enactment. OGIS would be required to review agency compliance. If agencies fail to update their regulations they would be required to report to Congress on their failure and would be subject to a review of their FOIA compliance by their Office of Inspector General.

Section 3. Inspector General review; adverse actions

Section three would require Inspectors General to review compliance with FOIA and make recommendations, including recommendations for disciplinary action.

Section three would also make the inappropriate withholding of information under FOIA the basis for a disciplinary action.

Section 4. No additional funds authorized

Clarifies that no additional funds are authorized to implement the bill.

EXPLANATION OF AMENDMENTS

Congressman Mark Meadows (R-NC) offered an amendment in the nature of a substitute that clarifies the Office of Government Information Services' authority to issue advisory opinions and requires agencies to accept FOIA requests by email. The Meadows amendment was adopted by voice vote.

Chairman Jason Chaffetz (R-UT) offered two amendments: (1) an amendment to require agencies to pay for litigation fees when they do not substantially prevail in FOIA lawsuits, which will encourage greater compliance with statutory requirements by discouraging agencies from defending legally tenuous position, and (2) an amendment to restrict the use of exemption five by excluding three categories of information.

The exemption five amendment creates greater transparency into agency decision making. The amendment does not, however, prevent an agency from relying upon other exemptions to withhold records, such as exemption one, which prohibits the release of properly classified information. The exemption five amendment limits exemption five for information which is integral to an agency's final policy decision, regardless of whether it was expressly adopted by the agency. The agency would not need to publicly state that the information served as a basis of the decision because the request for information is sufficient evidence to show that the information was considered in some way in the process of reaching the final policy decision. The amendment also limits the use of exemption five with regard to guidance used by agencies to respond to the public, which will allow the public greater insight into how to best interact with agencies.

The exemption five amendment also limits the use of exemption five with regard to legal opinions that are likely the final interpretation of the law. On occasion, the Executive Branch considers legal issues of first impression which are unlikely to be resolved in courts.⁴³ The Department of Justice's Office of Legal Counsel (OLC), as an example, is responsible for providing controlling advice to the Executive Branch.⁴⁴ Without judicial review, OLC's controlling advice is effectively "the final word on the controlling law."⁴⁵ The exemption five amendment prohibits the use of exemption five to withhold from disclosure such final controlling interpretations.

Both Chaffetz amendments were adopted by voice vote.

Representative Carolyn Maloney (D-NY) offered an amendment to clarify that the presumption of openness language is not intended to lessen the protection provided by exemption 8 of FOIA. Representative Maloney withdrew her amendment.

COMMITTEE CONSIDERATION

On March 25, 2015 the Committee met in open session and ordered reported favorably the bill, H.R. 653, as amended by voice vote, a quorum being present.

ROLL CALL VOTES

There were no recorded votes during consideration of H.R. 653.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104-1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill provides for more proactive disclosure of records, encourages enhanced agency compliance, and improves the FOIA process for both agencies and requesters. Legislative branch employees and their families, to the extent that they are otherwise eligible for the benefits provided by this legislation, have equal access to its benefits.

⁴³ Memorandum, Dept. of Justice Office of Legal Counsel, "Best Practices for OLC Legal Advice and Written Opinions," (July 16, 2010).

⁴⁴ *Id.*

⁴⁵ *Id.*

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives are reflected in the descriptive portions of this report. The objective of the bill is FOIA Oversight and implementation of certain reforms.

DUPLICATION OF FEDERAL PROGRAMS

No provision of this bill establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The FOIA Oversight and Implementation Act will require agencies to promulgate new regulations on procedures for processing requests under FOIA. Agencies are already required to have regulations on FOIA, but this Act will ensure these regulations are current. Agencies will specifically have to create new regulations on interactions with the Office of Government Information Services, and procedures used for dispute resolution services.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, P.L. 104-4) requires a statement as to whether the provisions of the reported include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

EARMARK IDENTIFICATION

This bill does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Com-

mittee of the costs that would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of Congressional Budget Office:

H.R. 653—FOIA Act

Summary: H.R. 653 would amend the Freedom of Information Act (FOIA). FOIA generally allows any person to obtain records from federal agencies. Specifically, the legislation would: establish a single website for making FOIA requests; direct agencies to make records available in an electronic format; require courts to pay some attorney fees and other litigation costs related to FOIA disputes; reduce the number of exemptions agencies can use to withhold information from the public; clarify procedures for handling frequently requested documents and charging fees; establish the Chief FOIA Officers Council; and require agencies to prepare additional reports for the Congress.

CEO estimates that implementing H.R. 653 would cost \$22 million over the 2016–2020 period, assuming appropriation of the necessary amounts. The bill would affect direct spending by agencies not funded through annual appropriations; therefore, pay as-you-go procedures apply. CEO estimates, however, that any net increase in spending by those agencies would not be significant. Enacting the bill would not affect revenues.

H.R. 653 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary effect of H.R. 653 is shown in the following table. The costs of this legislation fall within all budget functions that contain spending for salaries and expenses.

	By fiscal year, in millions of dollars—					
	2016	2017	2018	2019	2020	2016–2020
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Administrative Provisions:						
Estimated Authorization Level	2	4	4	5	5	20
Estimated Outlays	1	3	4	5	5	20
Attorney Fees and Other Litigation Costs:						
Estimated Authorization Level	*	*	*	*	*	2
Estimated Outlays	*	*	*	*	*	2

	By fiscal year, in millions of dollars—					
	2016	2017	2018	2019	2020	2016–2020
Total Changes:						
Estimated Authorization Level	2	4	4	5	5	22
Estimated Outlays	2	4	4	5	5	22

Note: * less than \$500,000.

Basis of the estimate: For this estimate, CBO assumes that the bill will be enacted late in fiscal year 2015, that the necessary amounts will be appropriated for each year, and that spending will follow historical patterns for FOIA activities.

Enacted in 1966, FOIA was designed to enable anyone to request, without explanation or justification, copies of existing, identifiable, and unpublished records from the executive branch. The Office of Management and Budget (OMB) issues guidelines to agencies on what fees to charge for providing information, while the Department of Justice (DOJ) oversees agency compliance with FOIA. In 2013, federal agencies received more than 730,000 FOIA requests. In addition, DOJ reports that in fiscal year 2013, agencies employed about 4,200 full-time staff to fulfill FOIA requests and spent \$446 million on related activities.

Administrative provisions

H.R. 653 would establish a Chief FOIA Officers Council to review and improve the FOIA process and to convene an annual FOIA meeting. In addition, the legislation would impose additional reporting and administrative requirements on agencies. Thus, CBO expects that the workload of most agencies would increase under the bill. Based on the costs of similar councils and related administrative requirements as well as a review of cost information in the annual reports submitted by 15 major agencies over the past five years, CBO estimates that implementing H.R. 653 would eventually cost \$5 million annually—a 1 percent increase in the governmentwide cost of administering FOIA. We expect that most federal agencies, however, would face additional costs of significantly less than \$0.5 million per year.

Attorney fees and other litigation costs

H.R. 653 would require courts to award attorney fees and related litigation costs to plaintiffs in all FOIA cases where the plaintiff has “substantially prevailed.” Under current law, the courts have more discretion in awarding attorney fees and related costs.

CBO reviewed FOIA cases over the 2010–2014 period. In those years agencies spent between a few hundred dollars to \$1.5 million per year on awards for plaintiffs’ attorney fees and related costs. In addition, on average there were less than 20 cases annually where attorney fees were not paid by the government when the plaintiff had prevailed on any part of the court’s decision. Based on that information, CBO estimates that under H.R. 653 additional attorney fees and related costs would total about \$300,000 per year, roughly \$2 million over the 2016–2020 period.

Pay-As-You-Go Considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. Enacting H.R. 653 could affect net direct spending by some agencies (such as the

Tennessee Valley Authority) because their operating costs are covered by receipts from the sale of goods, fees, and other collections. Therefore, pay-as-you-go procedures apply. Because most of those agencies can make adjustments to the amounts collected, CBO estimates that any net changes in direct spending by those agencies would not be significant. Enacting the bill would not affect revenues.

Intergovernmental and private-sector impact: H.R. 653 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Previous CBO estimate: On February 17, 2015, CBO transmitted a cost estimate for S. 337, the FOIA Improvement Act of 2015, as ordered reported by the Senate Committee on the Judiciary on February 9, 2015. H.R. 653 would require courts to order agencies to pay attorney and other litigation costs in FOIA disputes when the plaintiff substantially prevails, while the Senate bill would not. That difference is reflected in the cost estimates.

Estimate prepared by: Federal Costs: Matthew Pickford; Impact on State, Local, and Tribal Governments: Jon Sperl; Impact on Private Sector: John Rodier.

Estimate approved by: Theresa Gullo, Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italic*, and existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

* * * * *

PART I—THE AGENCIES GENERALLY

* * * * *

CHAPTER 5—ADMINISTRATIVE PROCEDURE

* * * * *

Subchapter II—ADMINISTRATIVE PROCEDURE

* * * * *

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submissions or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available **【for public inspection and copying】** *in an electronic, publicly accessible format—*

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records**【; and】**;

【(E) a general index of the records referred to under subparagraph (D);】

(E) copies of all releasable records, regardless of form or format, that have been requested three or more times under paragraph (3); and

(F) a general index of the records referred to under subparagraphs (D) and (E);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may

delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in [subparagraph (D)] *subparagraphs (D) and (E)*. However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available [for public inspection and copying] *in an electronic, publicly accessible format* current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in [subparagraph (E)] *subparagraph (F)* available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

- (i) it has been indexed and either made available or published as provided by this paragraph; or
- (ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of

the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to—

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by [the Director of the Office of Management and Budget] *the Director of the Office of Management and Budget, in consultation with the Director of the Office of Government Information Services*, and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or non-commercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

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.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclo-

sure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii) (II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That the court's review of the matter shall be limited to the record before the agency.

(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. *Any agency that does assess search or duplication fees after failing to comply with a time limit under paragraph (6) shall provide written notice to the requester of the circumstance that justifies the fees. If an agency fails to provide such notice, the agency may not assess search or duplication fees.*

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under

paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(E)(i) **【The court may】** *The court shall* assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(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.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(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).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request **【of such determination and the reasons therefor, and of the right of such person to ap-**

peal to the head of the agency any adverse determination; and] of—

(I) *such determination and the reasons therefor;*

(II) *the right of such person to seek assistance from the agency FOIA Public Liaison; and*

(III) *the right of such person to appeal to the head of the agency any adverse determination, within a period determined by the agency that is not less than 90 days after the receipt of such adverse determination; and*

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection[.] *and the right of such person to seek dispute resolution services from the agency FOIA Public Liaison or the Office of Government Information Services.*

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.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C). 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.

(iii) As used in this subparagraph, “unusual circumstances” means, but only to the extent reasonably necessary to the proper processing of the particular requests—

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term “exceptional circumstances” does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack

processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure—

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term “compelling need” means—

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person’s knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(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 *automated* 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.

(8) *DISCLOSURE OF INFORMATION FOR INCREASED PUBLIC UNDERSTANDING OF THE GOVERNMENT.—Each agency shall—*

(A) review the records of such agency to determine whether the release of the records would be in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government;

(B) for records determined to be in the public interest under subparagraph (A), reasonably segregate and redact any information exempted from disclosure under subsection (b); and

(C) make available in an electronic, publicly accessible format, any records identified in subparagraph (A), as modified pursuant to subparagraph (B).

(9) *INCREASED DISCLOSURE OF INFORMATION.—Each agency shall—*

(A) make information public to the greatest extent possible through modern technology to—

- (i) inform the public of the operations and activities of the Government; and*
- (ii) ensure timely disclosure of information; and*

(B) establish procedures for identifying categories of records that may be disclosed regularly and additional records of interest to the public that are appropriate for public disclosure, and for posting such records in an electronic, publicly accessible format.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency, *excluding—*

(A) *opinions that are controlling interpretations of law;*

(B) *final reports or memoranda created by an entity other than the agency, including other Governmental entities, at the request of the agency and used to make a final policy decision;*

(C) *guidance documents used by the agency to respond to the public; and*

(D) *records or information created 25 years or more before the date on which a request is made under subsection (a)(3);*

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

An agency may not withhold information under this subsection unless such agency reasonably foresees that disclosure would cause specific identifiable harm to an interest protected by an exemption, or if disclosure is prohibited by law. Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States *and to the Director of the Office of Government Information Services* a report which shall cover the preceding fiscal year and which shall include—

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(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;

(N) the total amount of fees collected by the agency for processing requests[; and];

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests[.];

(P) the number of times the agency invoked a law enforcement exclusion under subsection (c);

(Q) the number of times the agency engaged in dispute resolution with the assistance of the Office of Government Information Services or the FOIA Public Liaison;

(R) the number of records that were made available in an electronic, publicly accessible format under subsection (a)(2); and

(S) the number of times the agency assessed a search or duplication fee under subsection (a)(4)(A) and did not comply with a time limit under subsection (a)(6).

(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.

[(3) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.]

(3) *ELECTRONIC ACCESSIBILITY OF REPORTS.*—Each agency shall make each such report available in an electronic, publicly accessible format. In addition, each agency shall make the raw statistical data used in its reports available in a timely manner in an electronic, publicly accessible format. Such data shall be—

(A) made available without charge, license, or registration requirement;

(B) capable of being searched and aggregated; and

(C) permitted to be downloaded and downloaded in bulk.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the [Committee on Government Reform and Oversight] *Committee on Oversight and Government Reform* of the House of Representatives and the Chairman and ranking minority member of the Committees on [Governmental Affairs] *Homeland Security and Governmental Affairs* and the Judiciary of the Senate, no later than [April 1] *March 1* of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget *and the Director of the Office of Government Information Services*, shall develop reporting and performance guidelines in connection with reports required by this subsection [by October 1, 1997], and may establish additional requirements for such reports as the Attorney General determines may be useful.

[(6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts under-

taken by the Department of Justice to encourage agency compliance with this section.】

(6) ATTORNEY GENERAL FOIA REPORT.—

(A) *IN GENERAL.*—The Attorney General of the United States shall submit to Congress and the President an annual report on or before March 1 of each calendar year which shall include for the prior calendar year—

(i) a listing of the number of cases arising under this section;

(ii) each subsection under this section, each paragraph of the subsection, and any exemption, if applicable, involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4); and

(iii) a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(B) *ELECTRONIC AVAILABILITY.*—The Attorney General of the United States—

(i) shall make each report described under subparagraph (A) available in an electronic, publicly accessible format; and

(ii) shall make the raw statistical data used in each report available in an electronic, publicly accessible format, which shall be—

(I) made available without charge, license, or registration requirement;

(II) capable of being searched and aggregated; and

(III) permitted to be downloaded, including downloaded in bulk.

(f) For purposes of this section, the term—

(1) “agency” as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(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.

(g) The head of each agency shall prepare and 【make publicly available upon request】 *make available in an electronic, publicly accessible format*, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including—

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

[(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;

[(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;

[(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;

[(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;

[(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

[(6) designate one or more FOIA Public Liaisons.]

(h) *THE OFFICE OF GOVERNMENT INFORMATION SERVICES.—*

(1) *ESTABLISHMENT.—There is established the Office of Government Information Services within the National Archives and Records Administration. The head of the Office is the Director of the Office of Government Information Services.*

(2) *REVIEW OF FOIA POLICY, PROCEDURE, AND COMPLIANCE.—The Office of Government Information Services shall—*

(A) review policies and procedures of agencies under this section;

(B) review compliance with this section by agencies;

(C) identify methods that improve compliance under this section that may include—

(i) the timely processing of requests submitted to agencies under this section;

(ii) the system for assessing fees and fee waivers under this section; and

(iii) the use of any exemption under subsection (b); and

(D) review and provide guidance to agencies on the use of fees and fee waivers.

(3) *MEDIATION SERVICES.*—The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and agencies as a non-exclusive alternative to litigation and may issue advisory opinions at the discretion of the Office or upon request of any party to such mediation services.

(4) *SUBMISSION OF REPORT.*—

(A) *IN GENERAL.*—The Office of Government Information Services shall not less than annually submit to the committees described in subparagraph (C) and the President a report on the findings from the information reviewed and identified under paragraph (2), a summary of the Office's activities under paragraph (3) (including any advisory opinions issued), and legislative and regulatory recommendations to improve the administration of this section.

(B) *ELECTRONIC AVAILABILITY OF REPORTS.*—The Office shall make available any report submitted under paragraph (A) in a publicly accessible format.

(C) *CONGRESSIONAL SUBMISSION OF REPORT.*—The committees described in this subparagraph are the following:

(i) The Committee on Oversight and Government Reform of the House of Representatives.

(ii) The Committees on Homeland Security and Governmental Affairs and the Judiciary of the Senate.

(D) *DIRECT SUBMISSION OF REPORTS AND TESTIMONY.*—Any report submitted under paragraph (A), any testimony, or any other communication to Congress shall be submitted directly to the committees and the President, without any requirement that any officer or employee outside of the Office of Government Information Services, including the Archivist of the United States and the Director of the Office of Management and Budget, review such report, testimony, or other communication.

(5) *SUBMISSION OF ADDITIONAL INFORMATION.*—The Director of the Office of Government Information Services may submit additional information to Congress and the President that the Director determines to be appropriate.

(6) *ANNUAL MEETING REQUIRED.*—Not less than once a year, the Office of Government Information Services shall hold a meeting that is open to the public on the review and reports by

the Office and permit interested persons to appear and present oral or written statements at such meeting.

(i) **GOVERNMENT ACCOUNTABILITY OFFICE.**—*The Government Accountability Office shall—*

(1) conduct audits of administrative agencies on compliance with and implementation of the requirements of this section and issue reports detailing the results of such audits;

(2) catalog the number of exemptions under subsection (b)(3) and agency use of such exemptions; and

(3) review and prepare a report on the processing of requests by agencies for information pertaining to an entity that has received assistance under title I of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5211 et seq.) during any period in which the Government owns or owned more than 50 percent of the stock of such entity.

(j) **CHIEF FOIA OFFICER.**—

(1) DESIGNATION.—*Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).*

(2) DUTIES.—*The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency—*

(A) have agency-wide responsibility for efficient and appropriate compliance with this section;

(B) 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;

(C) 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;

(D) 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;

(E) 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;

(F) serve as the primary agency liaison with the Office of Government Information Services and the Office of Information Policy; and

(G) designate one or more FOIA Public Liaisons.

(3) **COMPLIANCE REVIEW REQUIRED.**—*The Chief FOIA Officer of each agency shall—*

(A) review, not less than annually, all aspects of the agency's administration of this section to ensure compliance with the requirements of this section, including—

(i) agency regulations;

(ii) disclosure of records required under paragraphs (2), (8), and (9) of subsection (a);

- (iii) assessment of fees and determination of eligibility for fee waivers;
- (iv) the timely processing of requests for information under this section;
- (v) the use of exemptions under subsection (b); and
- (vi) dispute resolution services with the assistance of the Office of Government Information Services or the FOIA Public Liaison; and

(B) make recommendations as necessary to improve agency practices and compliance with this section.

(k) **CHIEF FOIA OFFICERS COUNCIL.**—

(1) **ESTABLISHMENT.**—There is established in the executive branch the Chief FOIA Officers Council (in this subsection, referred to as the “Council”).

(2) **MEMBERS.**—The Council shall consist of the following members:

(A) The Deputy Director for Management of the Office of Management and Budget.

(B) The Director of the Office of Information Policy at the Department of Justice.

(C) The Director of the Office of Government Information Services at the National Archives and Records Administration.

(D) The Chief FOIA Officer of each agency.

(E) Any other officer or employee of the United States as designated by the Co-Chairs.

(3) **CO-CHAIRS.**—The Director of the Office of Information Policy at the Department of Justice and the Director of the Office of Government Information Services at the National Archives and Records Administration shall be the Co-Chairs of the Council.

(4) **SUPPORT SERVICES.**—The Administrator of General Services shall provide administrative and other support for the Council.

(5) **CONSULTATION.**—In performing its duties, the Council shall consult regularly with members of the public who make requests under this section.

(6) **DUTIES.**—The duties of the Council include the following:

(A) Develop recommendations for increasing compliance and efficiency under this section.

(B) Disseminate information about agency experiences, ideas, best practices, and innovative approaches related to this section.

(C) Identify, develop, and coordinate initiatives to increase transparency and compliance with this section.

(D) Promote the development and use of common performance measures for agency compliance with this section.

(7) **MEETINGS.**—

(A) **REGULAR MEETINGS.**—The Council shall meet regularly and such meetings shall be open to the public unless the Council determines to close the meeting for reasons of national security or to discuss information exempt under subsection (b).

(B) **ANNUAL MEETINGS.**—Not less than once a year, the Council shall hold a meeting that shall be open to the pub-

lic and permit interested persons to appear and present oral and written statements to the Council.

(C) NOTICE.—Not later than 10 business days before a meeting of the Council, notice of such meeting shall be published in the Federal Register.

(D) PUBLIC AVAILABILITY OF COUNCIL RECORDS.—Except as provided in subsection (b), the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents that were made available to or prepared for or by the Council shall be made publicly available.

(E) MINUTES.—Detailed minutes of each meeting of the Council shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the Council.

(1) 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.

(m) ELECTRONIC SUBMISSION OF REQUESTS.—

(1) CONSOLIDATED ONLINE REQUEST PORTAL.—The Director of the Office of Management and Budget, in consultation with the Attorney General, shall ensure the operation of a consolidated online request portal that allows a member of the public to submit a request for records under subsection (a) to any agency from a single website. The portal may include any additional tools the Director of the Office of Management and Budget finds will improve the implementation of this section.

(2) RULE OF CONSTRUCTION.—This subsection shall not be construed to alter the power of any other agency to create or maintain an independent online portal for the submission of a request for records under this section. The Director of the Office of Management and Budget shall establish standards for interoperability between the portal required under paragraph (1) and other request processing software used by agencies subject to this section.

(3) EMAIL REQUEST REQUIRED.—Each agency shall accept requests for records under subsection (a) through an email address and shall publish such email address on the website of the agency.

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