

FOIA OVERSIGHT AND IMPLEMENTATION ACT OF 2013

JULY 16, 2013.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

[To accompany H.R. 1211]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 1211) 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 amendments and recommend that the bill as amended do pass.

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The amendments (stated in terms of the page and line numbers of the introduced bill) are as follows:

Page 2, line 5, insert “each place it appears” before the semicolon.

Page 2, line 13, strike “proceeding” and insert “following”.

Page 3, line 5, insert “and” at the end.

Page 3, strike line 6 and all that follows through line 8.

Page 3, line 9, strike “(4)” and insert “(3)”.

Page 7, line 14, insert “of” after the opening quotation marks.

Page 7, line 18, strike “new subclauses:” and insert “: ‘of—’”.

Page 10, line 14, strike “and”.

Page 10, line 17, strike the period, closing quotation marks, and the semicolon and insert “; and”.

Page 10, insert after line 17 the following:

“(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).”;

Page 13, after line 15, insert the following new subsection (and redesignate subsequent subsections accordingly):

(g) 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.”.

Page 13, line 22, strike “the implementation” and insert “compliance with and implementation of the requirements”.

Page 13, line 23, strike “; and” and insert a semicolon.

Page 14, strike lines 1 through 3, and insert the following:

“(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.”.

At the end of the bill, add the following:

SEC. 4. 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.

COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

The purpose of H.R. 1211, the FOIA Oversight and Implementation Act of 2013, is to strengthen the Freedom of Information Act (FOIA) to increase transparency and accountability in government. It amends FOIA to provide for more proactive disclosure of records, encourages enhanced agency compliance, and improves the FOIA process for both agencies and requesters.

H.R. 1211 increases the amount of agency information made available through proactive disclosure. Records requested under FOIA more than three times will be posted online for public inspection and copying. Each agency shall also 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 will increase the amount of information the public can access without even filing a FOIA request.

H.R. 1211 establishes 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. 1211 establishes a presumption of openness for agencies processing FOIA requests. Attorney General Eric Holder’s March 2009 Memorandum to agencies directed them to disclose information whenever possible, and to not withhold information simply because it can be legally withheld under a FOIA exemption. H.R. 1211 would codify the presumption of openness, making it a permanent requirement for agencies.

H.R. 1211 strengthens the role of the Office of Government Information Services (OGIS), an entity created by the OPEN Government Act of 2007. OGIS acts as a FOIA ombudsman for agencies and requesters, and is also tasked with alternate dispute resolution to resolve FOIA cases. H.R. 1211 provides OGIS with direct reporting to Congress, without the need for interagency review. OGIS would also be tasked with increased review of compliance with FOIA, including the timely processing of requests, fees and fee waivers, and the use of exemptions. OGIS will submit an annual

report to Congress on its review. It will also hold at least one public meeting per year to allow interested persons to appear and present oral or written statements.

H.R. 1211 clarifies the right of any individual to appeal an agency's determination regarding a FOIA request filed by that individual. The agency must 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. 1211 increases the amount of information reported by agencies in annual FOIA reports. The bill requires 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 will be made available online in a fully useable, bulk-downloadable and machine-readable format.

The bill requires the Government Accountability Office (GAO) to conduct audits of agency compliance with FOIA. It will also catalog the number of exemptions under subsection (b)(3) of FOIA. GAO will 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.

H.R. 1211 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 establishes a Chief FOIA Officers Council, which shall be chaired by the Director of the Office of Information Policy at the Department of Justice, and the Director of OGIS. The Council is 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 shall meet regularly, and will hold annual meetings that are open to the public at which interested persons are allowed to present oral and written statements. All Council records, except any records relating to national security, shall be made publicly available.

Agencies must update their FOIA regulations no later than 180 days after H.R. 1211 is enacted. Regulations must include procedures for engaging in dispute resolution and procedures for engaging with OGIS. The regulations shall be reviewed by OGIS to ensure they are compliant and consistent with current FOIA law. Any agency that fails to comply will have to submit a report to Congress to explain its noncompliance. Agencies that do not comply will also be reviewed by their Office of Inspector General to evaluate agency compliance with FOIA law.

H.R. 1211 creates a pilot program to evaluate the use of a centralized FOIA portal to receive, process, and publicly disseminate

records in response to FOIA requests. The portal must allow people to submit FOIA requests to any participating agency in one location, and to track the processing of their requests. All records produced in response to requests are to be placed automatically online and be made available to the requester and the general public. The pilot requires three new agencies to participate in the FOIA portal, and to use it to track and process requests and post responsive records online. The pilot will last for three years. At the end of the pilot, the Office of Management and Budget will review the benefits of the FOIA portal, including cost and resource savings; increased efficiency, transparency, and accountability; and ability to complete annual FOIA reports. It will also assess any change in the amount of FOIA requests received. Each agency shall report to Congress on its experience using the FOIA portal and any related recommendations the agency considers appropriate.

BACKGROUND AND NEED FOR LEGISLATION

FOIA was enacted in 1966, after eleven years of legislative development in the House of Representatives and almost six years of consideration in the Senate.¹ At the time of enactment, FOIA was the third freedom of information law in the world, and by far the most comprehensive.² It established an important precedent by giving the public a formal method to request and receive information from the government.

FOIA establishes a presumption that records in the possession of Executive Branch agencies and departments of the U.S. Federal Government are accessible to the people. This presumption was not always the approach to federal information access policy. Before FOIA, those seeking information were required to show a need for information. FOIA replaced the “need to know” standard with a “right to know.” As a result, FOIA is often referred to as the embodiment of “the people’s right to know” about the activities and operations of government.

Under FOIA, anyone may file a request for a copy of any existing record at any federal agency for any reason. Information requested under FOIA is required to be released unless it falls under any of nine narrow exemptions to protect certain information from disclosure. Dispute over requests for information under FOIA may be appealed administratively, resolved through mediation, or litigated in court.³

Since its enactment, FOIA has been amended multiple times in efforts to increase agency compliance with the requirements of the act and improve the process. FOIA was amended in 1974, 1976, 1986, 1996, 2007, and 2010. Despite these amendments, significant problems persist. H.R. 1211 helps to address many of these issues.

One issue is the use of the nine statutory FOIA exemptions, which allow for the withholding of records to protect sensitive information from disclosure. There is concern that agencies are over-using exemptions to protect records that should be releasable under

¹ Congressional Research Service, “FOIA: Background and Policy Options for the 113th Congress,” March 8, 2013.

² U.S. House of Representatives Committee on Oversight and Government Reform, “A Citizen’s Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records,” September 2012.

³ Congressional Research Service, “FOIA: Background and Policy Options for the 113th Congress.”

law. In March 2009, Attorney General Eric Holder issued guidance stating that “an agency should not withhold information simply because it may do so legally,” and established a presumption of disclosure.⁴ Many agencies have failed to adopt this practice fully, and withhold information that could be released.

Fees and fee waivers are another problem that requires further legislation. FOIA does not allow agencies to assess 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. Agencies have not fully complied with the statute. Some agencies charge excessive fees, or engage in fee assessment practices designed to dissuade requesters.⁵

The backlog of FOIA requests has increased in recent years, and has led to significant delays in the processing of requests. The number of FOIA requests rose from 597,415 in Fiscal Year 2010 to 644,165 in Fiscal Year 2011, a 7.8 percent increase.⁶ During that same time frame, backlogs increased 20.8 percent. From FY 2010 to FY 2011, the total backlog of FOIA requests increased from 69,526 to 83,490.⁷ Agencies have made efforts to reduce FOIA backlogs, but they continue to be a consistent 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.⁸ 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.

FOIA law 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.”⁹ The Office of Government Information Services was also created to offer mediation services and work to resolve disputes. Despite these actions, the number of FOIA lawsuits continues to rise.¹⁰

LEGISLATIVE HISTORY

H.R. 1211 was introduced on March 15, 2013, by Chairman Issa, with Ranking Member Cummings as an original cosponsor.

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

⁴ See Note 2, *Supra*.

⁵ 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.

⁶ House Committee on Oversight and Government Reform, Testimony of Melanie Ann Pustay, Hearing on FOIA in the 21st Century: Using Technology to Improve Transparency in Government, March 21, 2012 (H. Rept. 112-140).

⁷ Department of Justice, “Summary of Annual FOIA Reports for Fiscal Year 2011,” accessed May 5, 2013.

⁸ Department of Justice, Office of Information Policy (previously Office of Information and Privacy), FOIA Post, “FOIA Counselor Q&A: ‘Frequently Requested’ Records,” accessed January 22, 2013.

⁹ P.L. 110-175.

¹⁰ The FOIA Project, “FOIA Lawsuits Increase During Obama Administration,” December 20, 2012.

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.

On March 20, 2013, the Committee considered H.R. 1211. Amendments offered by Reps. Duckworth, Turner, and Mica were agreed to by voice vote. H.R. 1211, as amended, was then adopted by voice vote and ordered reported favorably to the House.

SECTION-BY-SECTION

Section 1. Short title

This section is the short title of the bill, “FOIA Oversight and Implementation Act of 2013,” or the “FOIA Act.”

Section 2. Freedom of Information Act Amendments

This section amends FOIA by—

(1) Increasing electronic accessibility by requiring agencies to post more information online in publicly accessible formats. Agencies will 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 will also be publicly accessible without request, and there will be a single website for the public to submit FOIA requests and receive information about the status of requests.

(2) Putting into statute President Obama’s and Attorney General Holder’s memorandums requiring agencies to adopt a presumption of openness when responding to requests. Under the Act, agencies may only withhold information if the disclosure of such records could cause foreseeable harm. It places the burden on agencies to demonstrate why information may be withheld, instead of on the public to justify release. The FOIA Act also puts into statute the President’s recommendation to utilize technology to increase transparency and evaluate records to determine whether they should be publicly available.

(3) Strengthening the Office of Government Information Services (OGIS) by giving it increased independence. OGIS shall report directly to Congress without interagency review. It will review agency compliance with all aspects of FOIA, and report recommendations. OGIS will also hold public meetings at least once a year.

(4) Requiring agencies to report more information in 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 available. Annual reports would be completed by March 1 of each year instead of April 1.

(5) 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.

(6) Increasing responsibilities for OGIS, DOJ, and Chief FOIA Officers to review FOIA compliance and make recommendations. DOJ will have to report more information about FOIA lawsuits.

OGIS and Chief FOIA Officers will both review FOIA compliance and make recommendations to improve the process.

(7) Creating a Chief FOIA Officers Council, based on the CIO 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 will meet regularly to review FOIA compliance and discuss improvements. Records of the meetings shall be publicly available, and all meetings shall be noticed in the Federal Register beforehand. No less than once a year, the Council shall have a public meeting where interested persons may submit statements in writing or in person.

(8) Requiring each agency to update its FOIA regulations within 180 days of enactment. The regulations shall include procedures on dispute resolution and working with OGIS. OGIS will review whether agencies comply with this, and if agencies fail to update their regulations they will have to report to Congress on their failure to do so and will be subject to a review of their FOIA compliance by their Office of Inspector General.

Section 3. Pilot program

The section establishes a pilot program to review FOIAonline, the public portal that allows requesters to submit and review requests for multiple agencies at a single location. The pilot program will last for three years and will require three additional agencies to use FOIAonline to process FOIA requests and make records available online. At the end of the pilot, agencies are to report to Congress on the results of the program and make recommendations as to whether it will continue to use FOIAonline.

Section 4. Inspector General review; Adverse actions

This section requires the Inspector General of each agency to periodically review agency compliance with the requirements of FOIA, including timely processing of requests, assessments of fees and fee waivers, and the use of exemptions, and to make any necessary recommendations to the agency head to improve the process. Recommendations may include disciplinary action. Additionally, the amendment would make the withholding of information in a manner inconsistent with FOIA a basis for disciplinary action.

EXPLANATION OF AMENDMENTS

Amendment offered by Ms. Duckworth

Ms. Duckworth's amendment requires agencies to report the number of times they assessed a search or duplication fee for a FOIA request when the agency failed to comply with FOIA request response deadlines. This information would be included in agencies' annual FOIA reports. The amendment would also require agencies to notify a requester if the requester was assessed search or duplication fees after the agency failed to comply with time limits under FOIA, and inform the requester of the circumstances that would justify the fees. If an agency fails to inform the requester, it may not collect fees.

Amendment offered by Mr. Mica

Mr. Mica's amendment added a section to the end of the bill that tasks the Inspector General of each agency with periodically reviewing agency compliance with the requirements of FOIA and making any necessary recommendations to the agency head to improve the process—recommendations may include disciplinary action. Additionally, the amendment would make the withholding of information in a manner inconsistent with FOIA a basis for disciplinary action.

Amendment offered by Mr. Turner

Mr. Turner's amendment requires the Government Accountability Office to report on agencies' processing of FOIA requests seeking information about entities that are owned or have been owned by the government. Specifically, the report would review requests for information on entities that have received assistance under title I of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5211 et seq.) during any period the Government owned more than 50 percent of the stock of the entity. This would cover Government sponsored enterprises and would shed light on FOIA policy pertaining to these entities.

COMMITTEE CONSIDERATION

On March 20, 2013, the Committee met in open session and ordered reported favorably the bill, H.R. 1211, as amended, by voice vote, a quorum being present.

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.

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.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 1211 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Fed-

eral 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 Mandates 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

H.R. 1211 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)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 1211. However, clause 3(d)(3)(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.

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 H.R. 1211 from the Director of Congressional Budget Office:

MAY 21, 2013.

Hon. DARRELL ISSA,
Chairman, Committee on Oversight and Government Reform,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1211, the FOIA Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact for this estimate is Matthew Pickford.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 1211—FOIA Act

Summary: H.R. 1211 would amend the Freedom of Information Act (FOIA). FOIA generally allows any person to obtain federal agency records. Specifically, the legislation would require the Office of Management and Budget (OMB) to establish a single FOIA website for making requests and checking on the status of those requests; establish a Chief FOIA Officers Council to review compliance with the act and to recommend improvements; and require additional reports from the National Archives and Records Administration (NARA) and other agencies.

CBO estimates that implementing H.R. 1211 would cost \$20 million over the 2014–2018 period, assuming appropriation of the necessary amounts. The legislation also could affect direct spending by agencies not funded through annual appropriations (such as the Tennessee Valley Authority). Therefore, pay-as-you-go procedures apply. CBO estimates, however, that any net increase in spending by those agencies would not be significant. Enacting the bill would not affect revenues.

H.R. 1211 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 impact of H.R. 1211 is shown in the following table. The costs of this legislation fall within all budget functions that contain salaries and expenses.

	By fiscal year, in millions of dollars—					
	2014	2015	2016	2017	2018	2014–2018
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Estimated Authorization Level	5	5	4	4	4	22
Estimated Outlays	4	4	4	4	4	20

Basis of the estimate: For this estimate, CBO assumes that the bill will be enacted by the end of fiscal year 2013, 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. OMB issues guidelines to agencies on fees to charge for providing re-

requested information, while DOJ oversees agency compliance with FOIA. In 2012, federal agencies (excluding the Social Security Administration) received more than 650,000 FOIA requests. In addition, DOJ reports that in fiscal year 2012, agencies employed about 4,400 full-time staff to fulfill FOIA requests and spent around \$485 million on FOIA-related activities.

CBO expects that OMB would expand the use of existing websites that are currently used to fulfill FOIA requests. A governmentwide website (FOIA.gov) is operated by the Department of Justice, and FOIAonline.gov is a Web application operated by the Environmental Protection Agency that allows the public to track and search some FOIA requests. Nonetheless, CBO anticipates that the workloads of most agencies would increase to carry out the bill's new reporting requirements. We also estimate that NARA would face additional costs to arrange for a new annual meeting and to establish a Chief FOIA Officers Council to review and improve the FOIA process. Based on the costs of similar electronic filing systems and websites and a review of the annual reports by 15 major agencies over the last five years, CBO estimates that implementing H.R. 1211 would add about 1 percent—around \$5 million annually—to the governmentwide costs of administering FOIA.

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. 1211 could affect net direct spending for agencies not funded through the appropriations process, but CBO estimates that such effects would not be significant in any year.

Intergovernmental and private-sector impact: H.R. 1211 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal costs: Matthew Pickford; Impact on state, local, and tribal governments: Elizabeth Cove Delisle; Impact on private sector: Paige Piper/Bach.

Estimate approved by: Theresa Gullo, Deputy 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, 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) * * *

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

(A) * * *

* * * * *

[(E) a general index of the records referred to under subparagraph (D);]

(E) copies of all records, regardless of form or format, that have been released 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) * * *

* * * * *

(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.

* * * * *

(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.*

* * * * *

(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 appeal 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, not later 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[.] *and the right of such person to seek dispute resolution services from the agency FOIA Public Liaison or the Office of Government Information Services.* 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.

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) * * *

* * * * *
(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) * * *

* * * * *
(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 would cause foreseeable harm and that are—*

(1) * * *

* * * * *
(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 Di-*

rector of the Office of Government Information Services a report which shall cover the preceding fiscal year and which shall include—

(A) * * *

* * * * *

(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).

* * * * *

[(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 undertaken 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.

* * * * *

(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) * * *

* * * * *

[(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; and*

(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, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

(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) 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 REPORT.*—Any report submitted under paragraph (A) 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.

(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 pe-

riod 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; and

(F) 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 mat-*

ters discussed and conclusions reached, and copies of all reports received, issued, or approved by the Council.

* * * * *

(m) FOIA WEB SITE REQUIRED.—Not later than one year after the date of enactment of this subsection, the Office of Management and Budget shall ensure the existence and operation of a single Web site, accessible by the public at no cost to access, that allows the public to—

- (1) submit requests for records under subsection (a)(3); and*
- (2) receive automated information about the status of a request under subsection (a)(7).*

* * * * *

