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S. 2488

To promote accessibility, accountability, and openness in Government by strengthening section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), and for other purposes.

IN THE SENATE OF THE UNITED STATES

DECEMBER 14, 2007

Mr. LEAHY (for himself, Mr. CORNYN, Mr. KYL, Mr. SPECTER, Mr. KERRY, Mrs. BOXER, Mr. FEINGOLD, Mr. DURBIN, Ms. LANDRIEU, Mr. SMITH, Mr. ALEXANDER, Mr. COBURN, Mr. ISAKSON, Mr. OBAMA, Mr. CARDIN, Mr. SANDERS, Mr. BROWN, and Mrs. MCCASKILL) introduced the following bill; which was read twice, considered, read the third time, and passed

A BILL

To promote accessibility, accountability, and openness in Government by strengthening section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), and for other purposes.

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

3 **SECTION 1. SHORT TITLE.**

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

1 **SEC. 2. FINDINGS.**

2 Congress finds that—

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

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

10 (B) such consent is not meaningful unless
11 it is informed consent; and

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

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

24 (3) the Freedom of Information Act establishes
25 a “strong presumption in favor of disclosure” as
26 noted by the United States Supreme Court in

1 United States Department of State v. Ray (502 U.S.
2 164 (1991)), a presumption that applies to all agen-
3 cies governed by that Act;

4 (4) “disclosure, not secrecy, is the dominant ob-
5 jective of the Act,” as noted by the United States
6 Supreme Court in Department of Air Force v. Rose
7 (425 U.S. 352 (1976));

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

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

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

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

21 “In this clause, the term ‘a representative of the news
22 media’ means any person or entity that gathers informa-
23 tion of potential interest to a segment of the public, uses
24 its editorial skills to turn the raw materials into a distinct
25 work, and distributes that work to an audience. In this

1 clause, the term ‘news’ means information that is about
2 current events or that would be of current interest to the
3 public. Examples of news-media entities are television or
4 radio stations broadcasting to the public at large and pub-
5 lishers of periodicals (but only if such entities qualify as
6 disseminators of ‘news’) who make their products available
7 for purchase by or subscription by or free distribution to
8 the general public. These examples are not all-inclusive.
9 Moreover, as methods of news delivery evolve (for example,
10 the adoption of the electronic dissemination of newspapers
11 through telecommunications services), such alternative
12 media shall be considered to be news-media entities. A
13 freelance journalist shall be regarded as working for a
14 news-media entity if the journalist can demonstrate a solid
15 basis for expecting publication through that entity, wheth-
16 er or not the journalist is actually employed by the entity.
17 A publication contract would present a solid basis for such
18 an expectation; the Government may also consider the
19 past publication record of the requester in making such
20 a determination.”.

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

22 **COSTS.**

23 (a) IN GENERAL.—Section 552(a)(4)(E) of title 5,
24 United States Code, is amended—

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

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

2 “(ii) For purposes of this subpara-
3 graph, a complainant has substantially
4 prevailed if the complainant has obtained
5 relief through either—

6 “(I) a judicial order, or an enforceable
7 written agreement or consent decree; or

8 “(II) a voluntary or unilateral change in
9 position by the agency, if the complainant’s
10 claim is not insubstantial.”.

11 (b) LIMITATION.—Notwithstanding section 1304 of
12 title 31, United States Code, no amounts may be obligated
13 or expended from the Claims and Judgment Fund of the
14 United States Treasury to pay the costs resulting from
15 fees assessed under section 552(a)(4)(E) of title 5, United
16 States Code. Any such amounts shall be paid only from
17 funds annually appropriated for any authorized purpose
18 for the Federal agency against which a claim or judgment
19 has been rendered.

20 **SEC. 5. DISCIPLINARY ACTIONS FOR ARBITRARY AND CA-**
21 **PRICIOUS REJECTIONS OF REQUESTS.**

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

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

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

1 “(ii) The Attorney General shall—

2 “(I) notify the Special Counsel of each civil ac-
3 tion described under the first sentence of clause (i);
4 and

5 “(II) annually submit a report to Congress on
6 the number of such civil actions in the preceding
7 year.

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

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

12 (a) TIME LIMITS.—

13 (1) IN GENERAL.—Section 552(a)(6)(A) of title
14 5, United States Code, is amended by inserting after
15 clause (ii) the following:

16 “The 20-day period under clause (i) shall com-
17 mence on the date on which the request is first re-
18 ceived by the appropriate component of the agency,
19 but in any event not later than ten days after the
20 request is first received by any component of the
21 agency that is designated in the agency’s regulations
22 under this section to receive requests under this sec-
23 tion. The 20-day period shall not be tolled by the
24 agency except—

1 “(I) that the agency may make one
2 request to the requester for information
3 and toll the 20-day period while it is await-
4 ing such information that it has reasonably
5 requested from the requester under this
6 section; or

7 “(II) if necessary to clarify with the
8 requester issues regarding fee assessment.
9 In either case, the agency’s receipt of the
10 requester’s response to the agency’s re-
11 quest for information or clarification ends
12 the tolling period.”.

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

16 (b) COMPLIANCE WITH TIME LIMITS.—

17 (1) IN GENERAL.—

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

21 “(viii) An agency shall not assess
22 search fees (or in the case of a requester
23 described under clause (ii)(II), duplication
24 fees) under this subparagraph if the agen-
25 cy fails to comply with any time limit

1 under paragraph (6), if no unusual or ex-
 2 ceptional circumstances (as those terms
 3 are defined for purposes of paragraphs
 4 (6)(B) and (C), respectively) apply to the
 5 processing of the request.”.

6 (B) PUBLIC LIAISON.—Section
 7 552(a)(6)(B)(ii) of title 5, United States Code,
 8 is amended by inserting after the first sentence
 9 the following: “To aid the requester, each agen-
 10 cy shall make available its FOIA Public Liai-
 11 son, who shall assist in the resolution of any
 12 disputes between the requester and the agen-
 13 cy.”.

14 (2) EFFECTIVE DATE AND APPLICATION.—The
 15 amendment made by this subsection shall take effect
 16 1 year after the date of enactment of this Act and
 17 apply to requests for information under section 552
 18 of title 5, United States Code, filed on or after that
 19 effective date.

20 **SEC. 7. INDIVIDUALIZED TRACKING NUMBERS FOR RE-**
 21 **QUESTS AND STATUS INFORMATION.**

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

25 “(7) Each agency shall—

1 “(A) establish a system to assign an individual-
2 ized tracking number for each request received that
3 will take longer than ten days to process and provide
4 to each person making a request the tracking num-
5 ber assigned to the request; and

6 “(B) establish a telephone line or Internet serv-
7 ice that provides information about the status of a
8 request to the person making the request using the
9 assigned tracking number, including—

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

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

14 (b) **EFFECTIVE DATE AND APPLICATION.**—The
15 amendment made by this section shall take effect 1 year
16 after the date of enactment of this Act and apply to re-
17 quests for information under section 552 of title 5, United
18 States Code, filed on or after that effective date.

19 **SEC. 8. REPORTING REQUIREMENTS.**

20 (a) **IN GENERAL.**—Section 552(e)(1) of title 5,
21 United States Code, is amended—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 (1) by redesignating paragraphs (2) through
5 (5) as paragraphs (3) through (6), respectively; and

6 (2) by inserting after paragraph (1) the fol-
7 lowing:

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

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

18 **SEC. 9. OPENNESS OF AGENCY RECORDS MAINTAINED BY A**
19 **PRIVATE ENTITY.**

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

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

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

5 “(B) any information described under sub-
6 paragraph (A) that is maintained for an agency
7 by an entity under Government contract, for
8 the purposes of records management.”.

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

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

14 “(h)(1) There is established the Office of Government
15 Information Services within the National Archives and
16 Records Administration.

17 “(2) The Office of Government Information Services
18 shall—

19 “(A) review policies and procedures of adminis-
20 trative agencies under this section;

21 “(B) review compliance with this section by ad-
22 ministrative agencies; and

23 “(C) recommend policy changes to Congress
24 and the President to improve the administration of
25 this section.

1 “(3) The Office of Government Information Services
2 shall offer mediation services to resolve disputes between
3 persons making requests under this section and adminis-
4 trative agencies as a non-exclusive alternative to litigation
5 and, at the discretion of the Office, may issue advisory
6 opinions if mediation has not resolved the dispute.

7 “(i) The Government Accountability Office shall con-
8 duct audits of administrative agencies on the implementa-
9 tion of this section and issue reports detailing the results
10 of such audits.

11 “(j) Each agency shall designate a Chief FOIA Offi-
12 cer who shall be a senior official of such agency (at the
13 Assistant Secretary or equivalent level).

14 “(k) The Chief FOIA Officer of each agency shall,
15 subject to the authority of the head of the agency—

16 “(1) have agency-wide responsibility for effi-
17 cient and appropriate compliance with this section;

18 “(2) monitor implementation of this section
19 throughout the agency and keep the head of the
20 agency, the chief legal officer of the agency, and the
21 Attorney General appropriately informed of the
22 agency’s performance in implementing this section;

23 “(3) recommend to the head of the agency such
24 adjustments to agency practices, policies, personnel,

1 and funding as may be necessary to improve its im-
2 plementation of this section;

3 “(4) review and report to the Attorney General,
4 through the head of the agency, at such times and
5 in such formats as the Attorney General may direct,
6 on the agency’s performance in implementing this
7 section;

8 “(5) facilitate public understanding of the pur-
9 poses of the statutory exemptions of this section by
10 including concise descriptions of the exemptions in
11 both the agency’s handbook issued under subsection
12 (g), and the agency’s annual report on this section,
13 and by providing an overview, where appropriate, of
14 certain general categories of agency records to which
15 those exemptions apply; and

16 “(6) designate one or more FOIA Public Liai-
17 sons.

18 “(l) FOIA Public Liaisons shall report to the agency
19 Chief FOIA Officer and shall serve as supervisory officials
20 to whom a requester under this section can raise concerns
21 about the service the requester has received from the
22 FOIA Requester Center, following an initial response from
23 the FOIA Requester Center Staff. FOIA Public Liaisons
24 shall be responsible for assisting in reducing delays, in-

1 creasing transparency and understanding of the status of
2 requests, and assisting in the resolution of disputes.”.

3 (b) EFFECTIVE DATE.—The amendments made by
4 this section shall take effect on the date of enactment of
5 this Act.

6 **SEC. 11. REPORT ON PERSONNEL POLICIES RELATED TO**
7 **FOIA.**

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

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

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

16 (B) enhance the stature of officials admin-
17 istering that section within the executive
18 branch;

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

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

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

8 (5) whether other changes to personnel policies
9 can be made to ensure that there is a clear career
10 advancement track for individuals interested in de-
11 voting themselves to a career in compliance with
12 such sections; and

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

16 **SEC. 12. REQUIREMENT TO DESCRIBE EXEMPTIONS AU-**
17 **THORIZING DELETIONS OF MATERIAL PRO-**
18 **VIDED UNDER FOIA.**

19 Section 552(b) of title 5, United States Code, is
20 amended in the matter after paragraph (9)—

21 (1) in the second sentence, by inserting after
22 “amount of information deleted” the following: “,
23 and the exemption under which the deletion is
24 made,”; and

1 (2) in the third sentence, by inserting after
2 “amount of the information deleted” the following:
3 “, and the exemption under which the deletion is
4 made,”.

○