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S. 2488

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 17, 2007

Referred to the Committee on Oversight and Government Reform

AN ACT

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,*

1 **SECTION 1. SHORT TITLE.**

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

5 **SEC. 2. FINDINGS.**

6 Congress finds that—

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

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

14 (B) such consent is not meaningful unless
15 it is informed consent; and

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

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

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

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

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

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

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

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

4 “In this clause, the term ‘a representative of the news
5 media’ means any person or entity that gathers informa-
6 tion of potential interest to a segment of the public, uses
7 its editorial skills to turn the raw materials into a distinct
8 work, and distributes that work to an audience. In this
9 clause, the term ‘news’ means information that is about
10 current events or that would be of current interest to the
11 public. Examples of news-media entities are television or
12 radio stations broadcasting to the public at large and pub-
13 lishers of periodicals (but only if such entities qualify as
14 disseminators of ‘news’) who make their products available
15 for purchase by or subscription by or free distribution to
16 the general public. These examples are not all-inclusive.
17 Moreover, as methods of news delivery evolve (for example,
18 the adoption of the electronic dissemination of newspapers
19 through telecommunications services), such alternative
20 media shall be considered to be news-media entities. A
21 freelance journalist shall be regarded as working for a
22 news-media entity if the journalist can demonstrate a solid
23 basis for expecting publication through that entity, wheth-
24 er or not the journalist is actually employed by the entity.
25 A publication contract would present a solid basis for such
26 an expectation; the Government may also consider the

1 past publication record of the requester in making such
2 a determination.”.

3 **SEC. 4. RECOVERY OF ATTORNEY FEES AND LITIGATION**
4 **COSTS.**

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

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

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

9 “(ii) For purposes of this subpara-
10 graph, a complainant has substantially
11 prevailed if the complainant has obtained
12 relief through either—

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

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

18 (b) LIMITATION.—Notwithstanding section 1304 of
19 title 31, United States Code, no amounts may be obligated
20 or expended from the Claims and Judgment Fund of the
21 United States Treasury to pay the costs resulting from
22 fees assessed under section 552(a)(4)(E) of title 5, United
23 States Code. Any such amounts shall be paid only from
24 funds annually appropriated for any authorized purpose

1 for the Federal agency against which a claim or judgment
2 has been rendered.

3 **SEC. 5. DISCIPLINARY ACTIONS FOR ARBITRARY AND CA-**
4 **PRICIOUS REJECTIONS OF REQUESTS.**

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

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

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

9 “(ii) The Attorney General shall—

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

12 and

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

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

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

20 (a) TIME LIMITS.—

21 (1) IN GENERAL.—Section 552(a)(6)(A) of title
22 5, United States Code, is amended by inserting after
23 clause (ii) the following:

24 “The 20-day period under clause (i) shall com-
25 mence on the date on which the request is first re-

1 ceived by the appropriate component of the agency,
2 but in any event not later than ten days after the
3 request is first received by any component of the
4 agency that is designated in the agency's regulations
5 under this section to receive requests under this sec-
6 tion. The 20-day period shall not be tolled by the
7 agency except—

8 “(I) that the agency may make one
9 request to the requester for information
10 and toll the 20-day period while it is await-
11 ing such information that it has reasonably
12 requested from the requester under this
13 section; or

14 “(II) if necessary to clarify with the
15 requester issues regarding fee assessment.
16 In either case, the agency's receipt of the
17 requester's response to the agency's re-
18 quest for information or clarification ends
19 the tolling period.”.

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

23 (b) COMPLIANCE WITH TIME LIMITS.—

24 (1) IN GENERAL.—

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

4 “(viii) An agency shall not assess
5 search fees (or in the case of a requester
6 described under clause (ii)(II), duplication
7 fees) under this subparagraph if the agen-
8 cy fails to comply with any time limit
9 under paragraph (6), if no unusual or ex-
10 ceptional circumstances (as those terms
11 are defined for purposes of paragraphs
12 (6)(B) and (C), respectively) apply to the
13 processing of the request.”.

14 (B) PUBLIC LIAISON.—Section
15 552(a)(6)(B)(ii) of title 5, United States Code,
16 is amended by inserting after the first sentence
17 the following: “To aid the requester, each agen-
18 cy shall make available its FOIA Public Liai-
19 son, who shall assist in the resolution of any
20 disputes between the requester and the agen-
21 cy.”.

22 (2) EFFECTIVE DATE AND APPLICATION.—The
23 amendment made by this subsection shall take effect
24 1 year after the date of enactment of this Act and
25 apply to requests for information under section 552

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

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

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

8 “(7) Each agency shall—

9 “(A) establish a system to assign an individual-
10 ized tracking number for each request received that
11 will take longer than ten days to process and provide
12 to each person making a request the tracking num-
13 ber assigned to the request; and

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

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

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

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

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

3 **SEC. 8. REPORTING REQUIREMENTS.**

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

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

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

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

14 (4) by redesignating subparagraphs (F) and
15 (G) as subparagraphs (N) and (O), respectively; and

16 (5) by inserting after subparagraph (E) the fol-
17 lowing:

18 “(F) the average number of days for the
19 agency to respond to a request beginning on the
20 date on which the request was received by the
21 agency, the median number of days for the
22 agency to respond to such requests, and the
23 range in number of days for the agency to re-
24 spond to such requests;

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

4 “(i) the number of requests for
5 records to which the agency has responded
6 with a determination within a period up to
7 and including 20 days, and in 20-day in-
8 crements up to and including 200 days;

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

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

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

22 “(H) the average number of days for the
23 agency to provide the granted information be-
24 ginning on the date on which the request was
25 originally filed, the median number of days for

1 the agency to provide the granted information,
2 and the range in number of days for the agency
3 to provide the granted information;

4 “(I) the median and average number of
5 days for the agency to respond to administra-
6 tive appeals based on the date on which the ap-
7 peals originally were received by the agency, the
8 highest number of business days taken by the
9 agency to respond to an administrative appeal,
10 and the lowest number of business days taken
11 by the agency to respond to an administrative
12 appeal;

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

18 “(K) data on the 10 active administrative
19 appeals with the earliest filing dates pending
20 before the agency as of September 30 of the
21 preceding year, including the number of busi-
22 ness days that have elapsed since the requests
23 were originally received by the agency;

24 “(L) the number of expedited review re-
25 quests that are granted and denied, the average

1 and median number of days for adjudicating ex-
2 pedited review requests, and the number adju-
3 dicated within the required 10 days;

4 “(M) the number of fee waiver requests
5 that are granted and denied, and the average
6 and median number of days for adjudicating fee
7 waiver determinations;”.

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

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

13 (2) by inserting after paragraph (1) the fol-
14 lowing:

15 “(2) Information in each report submitted
16 under paragraph (1) shall be expressed in terms of
17 each principal component of the agency and for the
18 agency overall.”.

19 (c) PUBLIC AVAILABILITY OF DATA.—Section
20 552(e)(3) of title 5, United States Code, (as redesignated
21 by subsection (b) of this section) is amended by adding
22 at the end “In addition, each agency shall make the raw
23 statistical data used in its reports available electronically
24 to the public upon request.”.

1 **SEC. 9. OPENNESS OF AGENCY RECORDS MAINTAINED BY A**
2 **PRIVATE ENTITY.**

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

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

8 “(A) any information that would be an
9 agency record subject to the requirements of
10 this section when maintained by an agency in
11 any format, including an electronic format; and

12 “(B) any information described under sub-
13 paragraph (A) that is maintained for an agency
14 by an entity under Government contract, for
15 the purposes of records management.”.

16 **SEC. 10. OFFICE OF GOVERNMENT INFORMATION SERV-**
17 **ICES.**

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

21 “(h)(1) There is established the Office of Government
22 Information Services within the National Archives and
23 Records Administration.

24 “(2) The Office of Government Information Services
25 shall—

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

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

5 “(C) recommend policy changes to Congress
6 and the President to improve the administration of
7 this section.

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

14 “(i) The Government Accountability Office shall con-
15 duct audits of administrative agencies on the implementa-
16 tion of this section and issue reports detailing the results
17 of such audits.

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

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

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

1 “(2) monitor implementation of this section
2 throughout the agency and keep the head of the
3 agency, the chief legal officer of the agency, and the
4 Attorney General appropriately informed of the
5 agency’s performance in implementing this section;

6 “(3) recommend to the head of the agency such
7 adjustments to agency practices, policies, personnel,
8 and funding as may be necessary to improve its im-
9 plementation of this section;

10 “(4) review and report to the Attorney General,
11 through the head of the agency, at such times and
12 in such formats as the Attorney General may direct,
13 on the agency’s performance in implementing this
14 section;

15 “(5) facilitate public understanding of the pur-
16 poses of the statutory exemptions of this section by
17 including concise descriptions of the exemptions in
18 both the agency’s handbook issued under subsection
19 (g), and the agency’s annual report on this section,
20 and by providing an overview, where appropriate, of
21 certain general categories of agency records to which
22 those exemptions apply; and

23 “(6) designate one or more FOIA Public Liai-
24 sons.

1 “(1) FOIA Public Liaisons shall report to the agency
2 Chief FOIA Officer and shall serve as supervisory officials
3 to whom a requester under this section can raise concerns
4 about the service the requester has received from the
5 FOIA Requester Center, following an initial response from
6 the FOIA Requester Center Staff. FOIA Public Liaisons
7 shall be responsible for assisting in reducing delays, in-
8 creasing transparency and understanding of the status of
9 requests, and assisting in the resolution of disputes.”.

10 (b) EFFECTIVE DATE.—The amendments made by
11 this section shall take effect on the date of enactment of
12 this Act.

13 **SEC. 11. REPORT ON PERSONNEL POLICIES RELATED TO**
14 **FOIA.**

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

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

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

23 (B) enhance the stature of officials admin-
24 istering that section within the executive
25 branch;

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

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

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

13 (5) whether other changes to personnel policies
14 can be made to ensure that there is a clear career
15 advancement track for individuals interested in de-
16 voting themselves to a career in compliance with
17 such sections; and

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

21 **SEC. 12. REQUIREMENT TO DESCRIBE EXEMPTIONS AU-**
22 **THORIZING DELETIONS OF MATERIAL PRO-**
23 **VIDED UNDER FOIA.**

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

