S. 394

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

FEBRUARY 16, 2005

Mr. CORNYN (for himself and Mr. LEAHY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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 2005”
6 or the “OPEN Government Act of 2005”.
7 SEC. 2. FINDINGS.
8 Congress finds that—
(1) the Freedom of Information Act was signed into law on July 4, 1966, because the American people believe that—

(A) our constitutional democracy, our system of self-government, and our commitment to popular sovereignty depends upon the consent of the governed;

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

(C) as Justice Black noted in his concurring opinion in Barr v. Matteo (360 U.S. 564 (1959)), “The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees.”;

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

(3) the Freedom of Information Act establishes a “strong presumption in favor of disclosure” as noted by the United States Supreme Court in United States Department of State v. Ray (502 U.S.)
1 164 (1991)), a presumption that applies to all agen-
2 cies governed by that Act;
3 
4 (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 
9 (5) in practice, the Freedom of Information Act
10 has not always lived up to the ideals of that Act; and
11 
12 (6) Congress should regularly review section
13 552 of title 5, United States Code (commonly re-
14 ferred to as the Freedom of Information Act), in
15 order to determine whether further changes and im-
16 provements are necessary to ensure that the Govern-
17 ment remains open and accessible to the American
18 people and is always based not upon the “need to
19 know” but upon the fundamental “right to know”.

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

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

“In making a determination of a representative of the
news media under subclause (II), an agency may not deny
that status solely on the basis of the absence of institu-
tional associations of the requester, but shall consider the
prior publication history of the requester. Prior publica-
tion history shall include books, magazine and newspaper
articles, newsletters, television and radio broadcasts, and
Internet publications. If the requestor has no prior publica-
tion history or current affiliation, the agency shall con-
sider the requestor’s stated intent at the time the request
is made to distribute information to a reasonably broad
audience.”.

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

Section 552(a)(4)(E) of title 5, United States Code,
is amended by adding at the end the following: “For pur-
poses of this section, a complainant has ‘substantially pre-
vailed’ if the complainant has obtained a substantial part
of its requested relief through a judicial or administrative
order or an enforceable written agreement, or if the com-
plainant’s pursuit of a nonfrivolous claim or defense has
been a catalyst for a voluntary or unilateral change in po-

tition by the opposing party that provides a substantial
part of the requested relief.”.

SEC. 5. DISCIPLINARY ACTIONS FOR ARBITRARY AND CAPRICEOUS REJECTIONS OF REQUESTS.

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

(1) by inserting “(i)” after “(F)”;

(2) by adding at the end the following:

“(ii) The Attorney General shall—
“(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and
“(II) annually submit a report to Congress on the number of such civil actions in the preceding year.
“(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).”.

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

(a) Time Limits.—

(1) In General.—Section 552(a)(6)(A)(i) of title 5, United States Code, is amended by inserting “, and the 20-day period shall commence on the date on which the request is first received by the agency, and shall not be tolled without the consent of the party filing the request” after “adverse determination”.

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

(b) Availability of Agency Exemptions.—

(1) In General.—Section 552(a)(6) of title 5, United States Code, is amended by adding at the end the following:
“(G)(i) If an agency fails to comply with the applicable time limit provisions of this paragraph with respect to a request, the agency may not assert any exemption under subsection (b) to that request, unless disclosure—

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

“(II) would disclose personal private information protected by section 552a or proprietary information; or

“(III) is otherwise prohibited by law.

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

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

SEC. 7. INDIVIDUALIZED TRACKING NUMBERS FOR REQUESTS AND STATUS INFORMATION.

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

“(A) establish a system to assign an individualized tracking number for each request for information under this section;

“(B) not later than 10 days after receiving a request, provide each person making a request with the tracking number assigned to the request; and

“(C) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including—

“(i) the date on which the agency originally received the request; and

“(ii) an estimated date on which the agency will complete action on the request.”.

(b) Effective Date and Application.—The amendment made by this section shall take effect 1 year after the date of enactment of this Act and apply to requests for information under section 552 of title 5, United States Code, filed on or after that effective date.

SEC. 8. SPECIFIC CITATIONS IN EXEMPTIONS.

Section 552(b) of title 5, United States Code, is amended by striking paragraph (3) and inserting the following:
“(3) specifically exempted from disclosure by statute (other than section 552b of this title), pro-
vided that such statute—

“(A) if enacted after the date of enactment of the Openness Promotes Effectiveness in our National Government Act of 2005, specifically cites to this section; and

“(B)(i) requires that the matters be with-
held from the public in such a manner as to leave no discretion on the issue; or

“(ii) establishes particular criteria for withholding or refers to particular types of mat-
ters to be withheld;”.

SEC. 9. REPORTING REQUIREMENTS.

Section 552(e)(1) of title 5, United States Code, is amended—

(1) in subparagraph (F), by striking “and” after the semicolon;

(2) in subparagraph (G), by striking the period and inserting a semicolon; and

(3) by adding at the end the following:

“(H) data on the 10 active requests with the earliest filing dates pending at each agency, includ-
ing the amount of time that has elapsed since each request was originally filed;
“(I) the average number of days for the agency to respond to a request beginning the date on which the request was originally filed, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests; and

“(J) the number of fee status requests that are granted and denied, and the average number of days for adjudicating fee status determinations.

When reporting the total number of requests filed, agencies shall distinguish between first person requests for personal records and other kinds of requests, and shall provide a total number for each category of requests.”.

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

Section 552(f) of title 5, United States Code, is amended by striking paragraph (2) and inserting the following:

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

“(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and
“(B) any information described under sub-
paragraph (A) that is maintained for an agency
by an entity under a contract between the agen-
cy and the entity.”.

SEC. 11. OFFICE OF GOVERNMENT INFORMATION SERV-
ICES.

(a) In general.—Chapter 5 of title 5, United
States Code, is amended—

(1) by redesignating section 596 as section 597;

and

(2) by inserting after section 595 the following:

§ 596. Office of Government Information Services

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

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

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

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

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

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

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

597. Authorization of appropriations.”.

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

SEC. 12. ACCESSIBILITY OF CRITICAL INFRASTRUCTURE
INFORMATION.

(a) IN GENERAL.—Not later than January 1 of each
of the 3 years following the date of the enactment of this
Act, the Comptroller General of the United States shall
submit to Congress a report on the implementation and
use of section 214 of the Homeland Security Act of 2002
(6 U.S.C. 133), including—
(1) the number of persons in the private sector, and the number of State and local agencies, that voluntarily furnished records to the Department under this section;

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

(3) such recommendations as the Comptroller General considers appropriate regarding improvements in the collection and analysis of sensitive information held by persons in the private sector, or by State and local agencies, relating to vulnerabilities of and threats to critical infrastructure, including the response to such vulnerabilities and threats; and

(4) an examination of whether the nondisclosure of such information has led to the increased protection of critical infrastructure.

(b) FORM.—The report shall be submitted in unclassified form, but may include a classified annex.

SEC. 13. REPORT ON PERSONNEL POLICIES RELATED TO FOIA.

Not later than 1 year after the date of enactment of this Act, the Office of Personnel Management shall submit to Congress a report that examines—
(1) whether changes to executive branch personnel policies could be made that would—

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

(B) enhance the stature of officials administering that section within the executive branch;

(2) whether performance of compliance with section 552 of title 5, United States Code, should be included as a factor in personnel performance evaluations for any or all categories of Federal employees and officers;

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

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

(5) whether other changes to personnel policies can be made to ensure that there is a clear career advancement track for individuals interested in devoting themselves to a career in compliance with such sections; and
(6) whether the executive branch should require any or all categories of Federal employees to undertake awareness training of such sections.