

110TH CONGRESS
1ST SESSION

S. 849

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,*

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 “The term ‘a representative of the news media’
22 means any person or entity that gathers information of
23 potential interest to a segment of the public, uses its edi-
24 torial skills to turn the raw materials into a distinct work,
25 and distributes that work to an audience. The term ‘news’

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

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

22 **COSTS.**

23 Section 552(a)(4)(E) of title 5, United States Code,
24 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 section, a
3 complainant has substantially prevailed if
4 the complainant has obtained relief
5 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, provided that the com-
10 plainant’s claim is not insubstantial.”.

11 **SEC. 5. DISCIPLINARY ACTIONS FOR ARBITRARY AND CA-**
12 **PRICIOUS REJECTIONS OF REQUESTS.**

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

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

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

17 “(ii) The Attorney General shall—

18 “(I) notify the Special Counsel of each civil ac-
19 tion described under the first sentence of clause (i);
20 and

21 “(II) annually submit a report to Congress on
22 the number of such civil actions in the preceding
23 year.

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

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

5 (a) TIME LIMITS.—

6 (1) IN GENERAL.—Section 552(a)(6)(A)(i) of
7 title 5, United States Code, is amended by striking
8 “determination;” and inserting “determination. The
9 20-day period shall commence on the date on which
10 the request is first received by the appropriate com-
11 ponent of the agency, but in any event no later than
12 ten days after the request is first received by any
13 component of the agency that is designated in the
14 agency’s FOIA regulations to receive FOIA requests.
15 The 20-day period shall not be tolled by the agency
16 except—

17 “(I) that the agency may make one request to
18 the requester for information and toll the 20-day pe-
19 riod while it is awaiting such information that it has
20 reasonably requested from the FOIA requester; or

21 “(II) if necessary to clarify with the requester
22 issues regarding fee assessment. In either case, the
23 agency’s receipt of the requester’s response to the
24 agency’s request for information or clarification ends
25 the tolling period;”.

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

4 “(b) COMPLIANCE WITH TIME LIMITS.—

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

8 “(viii) an agency shall not assess
9 search fees under this subparagraph if the
10 agency fails to comply with any time limit
11 under paragraph (6), provided that no un-
12 usual or exceptional circumstances (as
13 those terms are defined for purposes of
14 paragraphs (6)(B) and (C), respectively)
15 apply to the processing of the request.”.

16 (B) Section 552(a)(6)(B)(ii) of title 5, United
17 States Code, is amended by inserting between the
18 first and second sentences the following: “To aid the
19 requester, each agency shall make available its
20 FOIA Public Liaison, who shall assist in the resolu-
21 tion of any disputes between the requester and the
22 agency.”.

23 (2) EFFECTIVE DATE AND APPLICATION.—The
24 amendment made by this subsection shall take effect
25 1 year after the date of enactment of this Act and

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

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

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

9 “(7) Each agency shall—

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

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

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

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

23 (b) EFFECTIVE DATE AND APPLICATION.—The
24 amendment made by this section shall take effect 1 year
25 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. SPECIFIC CITATIONS IN EXEMPTIONS.**

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

7 “(3) specifically exempted from disclosure by
8 statute (other than section 552b of this title), pro-
9 vided that such statute—

10 “(A) if enacted prior to the date of enact-
11 ment of the OPEN Government Act of 2007,
12 requires that the matters be withheld from the
13 public in such a manner as to leave no discre-
14 tion on the issue, or establishes particular cri-
15 teria for withholding or refers to particular
16 types of matters to be withheld; or

17 “(B) if enacted after the date of enactment
18 of the OPEN Government Act of 2007, specifi-
19 cally cites to the Freedom of Information Act.”.

20 **SEC. 9. REPORTING REQUIREMENTS.**

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

23 (1) in subparagraph (B)(ii), by inserting after
24 the first comma “the number of occasions on which
25 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 after the period “In addition, each agency shall make the
 16 raw statistical data used in its reports available electroni-
 17 cally to the public upon request.”.

18 **SEC. 10. OPENNESS OF AGENCY RECORDS MAINTAINED BY**
 19 **A 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. 11. 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) There is established the Office of Government
15 Information Services within the National Archives and
16 Records Administration. The Office of Government Infor-
17 mation Services shall review policies and procedures of ad-
18 ministrative agencies under section 552, shall review com-
19 pliance with section 552 by administrative agencies, and
20 shall recommend policy changes to Congress and the
21 President to improve the administration of section 552.
22 The Office of Government Information Services shall offer
23 mediation services to resolve disputes between persons
24 making requests under section 552 and administrative
25 agencies as a non-exclusive alternative to litigation and,

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

3 “(i) The Government Accountability Office shall con-
4 duct audits of administrative agencies on the implementa-
5 tion of section 552 and issue reports detailing the results
6 of such audits.

7 “(j) Each agency shall—

8 “(1) Designate a Chief FOIA Officer who shall
9 be a senior official of such agency (at the Assistant
10 Secretary or equivalent level).

11 “(a) GENERAL DUTIES.—The Chief FOIA Officer of
12 each agency shall, subject to the authority of the head of
13 the agency—

14 “(A) have agency-wide responsibility for ef-
15 ficient and appropriate compliance with the
16 FOIA;

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

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

1 personnel, and funding as may be necessary to
2 improve its implementation of the FOIA;

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

8 “(E) facilitate public understanding of the
9 purposes of the FOIA’s statutory exemptions by
10 including concise descriptions of the exemptions
11 in both the agency’s FOIA handbook issued
12 under section 552(g) of title 5, United States
13 Code, and the agency’s annual FOIA report,
14 and by providing an overview, where appro-
15 priate, of certain general categories of agency
16 records to which those exemptions apply.

17 “(2) Designate one or more FOIA Public Liai-
18 sons who shall be appointed by the Chief FOIA Offi-
19 cer.

20 “(b) GENERAL DUTIES.—FOIA Public Liaisons shall
21 report to the agency Chief FOIA Officer and shall serve
22 as supervisory officials to whom a FOIA requester can
23 raise concerns about the service the FOIA requester has
24 received from the FOIA Requester Center, following an
25 initial response from the FOIA Requester Center Staff.

1 FOIA Public Liaisons shall be responsible for assisting in
2 reducing delays, increasing transparency and under-
3 standing of the status of requests, and assisting in the
4 resolution of disputes.

5 “(c) EFFECTIVE DATE.—The amendments made by
6 this section shall take effect on the date of enactment of
7 this Act.”.

8 **SEC. 12. REPORT ON PERSONNEL POLICIES RELATED TO**
9 **FOIA.**

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

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

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

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

21 (2) whether performance of compliance with
22 section 552 of title 5, United States Code, should be
23 included as a factor in personnel performance eval-
24 uations for any or all categories of Federal employ-
25 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.

Passed the Senate August 3, 2007.

Attest:

Secretary.

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