

**Calendar No. 406**

104TH CONGRESS }  
2d Session }

SENATE

{ REPORT  
104-272

**ELECTRONIC FREEDOM OF INFORMATION IMPROVEMENT  
ACT OF 1995**

MAY 15, 1996.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary,  
submitted the following

**REPORT**

together with

**ADDITIONAL VIEWS**

[To accompany S. 1090]

The Committee on the Judiciary, to which was referred the bill (S. 1090) to amend title 5, United States Code, section 552, commonly called the Freedom of Information Act, to provide for public access to information in an electronic format, and for other purposes, having considered the same, reports favorably thereon and recommends that the bill, as amended, do pass.

**CONTENTS**

	Page
I. Explanation of amendment .....	4
II. Purpose .....	5
III. Legislative history .....	5
IV. Vote of the committee .....	6
V. Discussion .....	6
VI. Detailed discussion of the bill .....	9
VII. Regulatory impact statement .....	20
VIII. Cost estimate .....	20
IX. Additional views of Senator Leahy .....	23
X. Changes in existing law .....	33

The amendment is as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Electronic Freedom of Information Improvement Act of 1996”.

**SEC. 2. FINDINGS AND PURPOSES.**

(a) FINDINGS.—The Congress finds that—

(1) the purpose of the Freedom of Information Act is to require agencies of the Federal Government to make certain agency information available for public inspection and copying and to establish and enable enforcement of the right of any person to obtain access to the records of such agencies (subject to statutory exemptions) for any public or private purpose;

(2) since the enactment of the Freedom of Information Act in 1966, and the amendments enacted in 1974 and 1986, the Freedom of Information Act has been a valuable means through which any person can learn how the Federal Government operates;

(3) the Freedom of Information Act has led to the disclosure of waste, fraud, abuse, and wrongdoing in the Federal Government;

(4) the Freedom of Information Act has led to the identification of unsafe consumer products, harmful drugs, and serious health hazards;

(5) Government agencies increasingly use computers to conduct agency business and to store publicly valuable agency records and information; and

(6) Government agencies should use new technology to enhance public access to agency records and information.

(b) PURPOSES.—The purposes of this Act are to—

(1) foster democracy by ensuring public access to agency records and information;

(2) improve public access to agency records and information;

(3) ensure agency compliance with statutory time limits; and

(4) maximize the usefulness of agency records and information collected, maintained, used, retained, and disseminated by the Federal Government.

**SEC. 3. PUBLIC INFORMATION AVAILABILITY.**

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

(1) in the matter before subparagraph (A) by inserting “including by computer telecommunications, or if computer telecommunications means are not available, by other electronic means,” after “Federal Register”;

(2) by striking out “and” at the end of subparagraph (D);

(3) by redesignating subparagraph (E) as subparagraph (F); and

(4) by inserting after subparagraph (D) the following new subparagraph:

“(E) a complete list of all statutes that the agency head or general counsel relies upon to authorize the agency to withhold information under subsection (b)(3) of this section, together with a specific description of the scope of the information covered; and”.

**SEC. 4. MATERIALS MADE AVAILABLE IN ELECTRONIC FORMAT AND INDEX OF RECORDS MADE AVAILABLE TO THE PUBLIC.**

Section 552(a)(2) of title 5, United States Code, is amended—

(1) in the matter before subparagraph (A) by inserting “, including, within 1 year after the date of the enactment of the Electronic Freedom of Information Improvement Act of 1996, by computer telecommunications, or if computer telecommunications means are not available, by other electronic means,” after “copying”;

(2) in subparagraph (B) by striking out “and” after the semicolon;

(3) by adding after subparagraph (C) the following new subparagraphs:

“(D) an index of all major information systems containing agency records regardless of form or format unless such an index is provided as otherwise required by law;

“(E) a description of any new major information system with a statement of how such system shall enhance agency operations under this section;

“(F) an index of all records which are made available to any person under paragraph (3) of this subsection; and

“(G) copies of all records, regardless of form or format, which because of the nature of their subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records under paragraph (3) of this subsection;”;

(4) in the second sentence by striking out “or staff manual or instruction” and inserting in lieu thereof “staff manual, instruction, or index or copies of records, which are made available under paragraph (3) of this subsection”; and

(5) in the third sentence by inserting “and the extent of such deletion shall be indicated on the portion of the record which is made available or published at the place in the record where such deletion was made” after “explained fully in writing”.

**SEC. 5. HONORING FORMAT REQUESTS.**

Section 552(a)(3) of title 5, United States Code, is amended by—

- (1) inserting “(A)” after “(3)”;
- (2) inserting “(A) through (F)” after “under paragraphs (1) and (2)”;
- (3) striking out “(A) reasonably” and inserting in lieu thereof “(i) reasonably”;
- (4) striking out “(B)” and inserting in lieu thereof “(ii)”; and
- (5) adding at the end thereof the following new subparagraphs:

“(B) An agency shall, as requested by any person, provide records in any form or format in which such records are maintained by that agency.

“(C) An agency shall make reasonable efforts to search for records in electronic form or format and provide records in the form or format requested by any person, including in an electronic form or format, even where such records are not usually maintained but are available in such form or format.”.

**SEC. 6. DELAYS.**

(a) FEES.—Section 552(a)(4)(A) of title 5, United States Code, is amended by adding at the end thereof the following new clause:

“(viii) If at an agency’s request, the Comptroller General determines that the agency annually has either provided responsive documents or denied requests in substantial compliance with the requirements of paragraph (6)(A), one-half of the fees collected under this section shall be credited to the collecting agency and expended to offset the costs of complying with this section through staff development and acquisition of additional request processing resources. The remaining fees collected under this section shall be remitted to the Treasury as general funds or miscellaneous receipts.”.

(b) DEMONSTRATION OF CIRCUMSTANCES FOR DELAY.—Section 552(a)(4)(E) of title 5, United States Code, is amended—

- (1) by inserting “(i)” after “(E)”; and
- (2) by adding at the end thereof the following new clause:

“(ii) Any agency not in compliance with the time limits set forth in this subsection shall demonstrate to a court that the delay is warranted under the circumstances set forth under paragraph (6) (B) or (C) of this subsection.”.

(c) PERIOD FOR AGENCY DECISION TO COMPLY WITH REQUEST.—Section 552(a)(6)(A)(i) is amended by striking out “ten days” and inserting in lieu thereof “twenty days”.

(d) AGENCY BACKLOGS.—Section 552(a)(6)(C) of title 5, United States Code, is amended by inserting after the second sentence the following: “As used in this subparagraph, for requests submitted pursuant to paragraph (3) after the date of the enactment of the Electronic Freedom of Information Improvement Act of 1996, the term ‘exceptional circumstances’ means circumstances that are unforeseen and shall not include delays that result from a predictable workload, including any ongoing agency backlog, in the ordinary course of processing requests for records.”.

(e) NOTIFICATION OF DENIAL.—The last sentence of section 552(a)(6)(C) of title 5, United States Code, is amended to read: “Any notification of any full or partial denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request and the total number of denied records and pages considered by the agency to have been responsive to the request.”.

(f) MULTITRACK FIFO PROCESSING AND EXPEDITED ACCESS.—Section 552(a)(6) of title 5, United States Code, is amended by adding at the end thereof the following new subparagraphs:

“(D)(i) Each agency shall adopt a first-in, first-out (hereafter in this subparagraph referred to as FIFO) processing policy in determining the order in which requests are processed. The agency may establish separate processing tracks for simple and complex requests using FIFO processing within each track.

- “(ii) For purposes of such a multitrack system—
  - “(I) a simple request shall be a request requiring 10 days or less to make a determination on whether to comply with such a request; and
  - “(II) a complex request shall be a request requiring more than 10 days to make a determination on whether to comply with such a request.

“(iii) A multitrack system shall not negate a claim of due diligence under subparagraph (C), if FIFO processing within each track is maintained and the agency can show that it has reasonably allocated resources to handle the processing for each track.

“(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing that upon receipt of a request for expedited access to records and a showing by the person making such request of a compelling need for expedited access to records, the agency determine within 10 days

(excepting Saturdays, Sundays, and legal public holidays) after the receipt of such a request, whether to comply with such request. A request for records to which the agency has granted expedited access shall be processed as soon as practicable. A request for records to which the agency has denied expedited access shall be processed within the time limits under paragraph (6) of this subsection.

“(ii) A person whose request for expedited access has not been decided within 10 days of its receipt by the agency or has been denied shall be required to exhaust administrative remedies. A request for expedited access which has not been decided may be appealed to the head of the agency within 15 days (excepting Saturdays, Sundays, and legal public holidays) after its receipt by the agency. A request for expedited access that has been denied by the agency may be appealed to the head of the agency within 5 days (excepting Saturdays, Sundays, and legal public holidays) after the person making such request receives notice of the agency’s denial. If an agency head has denied, affirmed a denial, or failed to respond to a timely appeal of a request for expedited access, a court which would have jurisdiction of an action under paragraph (4)(B) of this subsection may, upon complaint, require the agency to show cause why the request for expedited access should not be granted, except that such review shall be limited to the record before the agency.

“(iii) The burden of demonstrating a compelling need by a person making a request for expedited access may be met by a showing, which such person certifies under penalty of perjury to be true and correct to the best of such person’s knowledge and belief, that failure to obtain the requested records within the timeframe for expedited access under this paragraph would—

- “(I) threaten an individual’s life or safety;
- “(II) result in the loss of substantial due process rights and the information sought is not otherwise available in a timely fashion; or
- “(III) affect public assessment of the nature and propriety of actual or alleged governmental actions that are the subject of widespread, contemporaneous media coverage.”.

#### **SEC. 7. COMPUTER REDACTION.**

Section 552(b) of title 5, United States Code, is amended by inserting before the period in the sentence following paragraph (9) the following: “, and the extent of such deletion shall be indicated on the released portion of the record at the place in the record where such deletion was made”.

#### **SEC. 8. DEFINITIONS.**

Section 552(f) of title 5, United States Code, is amended to read as follows:

“(f) For purposes of this section—

“(1) the term ‘agency’ as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency;

“(2) the term ‘record’ means all books, papers, maps, photographs, machine-readable materials, or other information or documentary materials, regardless of physical form or characteristics, but does not include—

- “(A) library and museum material acquired or received and preserved solely for reference or exhibition purposes;
- “(B) extra copies of documents preserved solely for convenience of reference;
- “(C) stocks of publications and of processed documents; or
- “(D) computer software which is obtained by an agency under a licensing agreement prohibiting its replication or distribution; and

“(3) the term ‘search’ means a manual or automated review of agency records that is conducted for the purpose of locating those records which are responsive to a request under subsection (a)(3)(A) of this section.”.

### **I. EXPLANATION OF AMENDMENT**

Inasmuch as all of the text of S. 1090 after the enacting clause was stricken and new language was incorporated as a single amendment, the contents of this report constitute an explanation of the amendment made by the Committee on the Judiciary.

## II. PURPOSE

The Freedom of Information Act (FOIA) makes Government information available, with certain exceptions, to anyone who requests it. The statute is consistent with our democratic form of government by furthering the interests of citizens in knowing what their Government is doing.

Over the 30 years of its existence, the FOIA has led to numerous disclosures of waste and fraud in the Government. Today, the FOIA is in the midst of a new challenge. The phenomenon of Federal executive department and agency records being produced and retained in electronic formats has grown at a fast rate during the past several years as Government use of personal computers and digital storage media, such as CD-ROM's (compact disk read-only memory), has become more widespread. Agency records are no longer created exclusively on pieces of paper and placed in filing cabinets. Computers make it easier and more efficient to manage the tremendous amount of information collected, stored, and used by the Government.

The FOIA was created at a time when agency records were predominantly produced on paper. The efficient operation of the FOIA requires that the form or format of an agency record constitutes no impediment to the public accessibility of requested information. Furthermore, the electronic information technology currently being used by executive departments and agencies should be applied in a manner that promotes efficiency in responding to FOIA requests. This objective includes using technology to provide requesters with information in the form most useful to them.

An underlying goal of S. 1090 is to encourage electronic access to Government information available under the FOIA, including requests made pursuant to section 552(a)(3). This shall make it easier for citizens to access Government information on a timely basis, and shall further efficient Government agency compliance with the FOIA.

S. 1090, the Electronic Freedom of Information Improvement Act of 1996, amends the FOIA to address these considerations and other information access issues prompted by the electronic information phenomenon.

## III. LEGISLATIVE HISTORY

A bill to clarify the application of the FOIA to agency records in electronic forms or formats, S. 1940, the Electronic Freedom of Information Improvement Act of 1991, was introduced by Senator Patrick Leahy for himself and Senator Hank Brown on November 7, 1991. It was referred to the Committee on the Judiciary, and a hearing on the bill was held by the Subcommittee on Technology and the Law on April 30, 1992.

Testifying before the Subcommittee was Steven R. Schlesinger, Director, Office of Policy Development, Department of Justice, accompanied by Daniel Metcalfe, Co-director, Office of Information and Privacy, Department of Justice. The Subcommittee also received testimony from a panel of witnesses, which included Peter Prichard, editor, *USA Today*, appearing on behalf of the American Newspaper Publishers Association, American Society of Newspaper

Editors, Society of Professional Journalists/Sigma Delta Chi, National Newspaper Association, National Association of Broadcasters, Radio-Television News Directors Association, and Reporters Committee for Freedom of the Press; Scott Marshall, director, Governmental Relations Department, American Foundation for the Blind; Sybil McShane, director of Library and Information Services, Vermont State Department of Libraries; and Thomas M. Susman, a practicing attorney with Ropes & Gray, appearing on behalf of the American Bar Association.<sup>1</sup> The Subcommittee took no further action on S. 1940 prior to the final adjournment of the 102d Congress.

A related bill, S. 1939, the Freedom of Information Improvement Act of 1991, was also introduced by Senator Leahy on November 7, 1991. This bill contained amendments to the FOIA concerning matters other than agency records in electronic forms or formats. S. 1939 was also referred to the Committee on the Judiciary, but no action was taken on it during the 102d Congress.

A slightly modified version of S. 1940 was introduced by Senator Leahy for himself and Senator Brown on November 22, 1993, as S. 1782, the Electronic Freedom of Information Improvement Act of 1993. It was referred to the Committee on the Judiciary. Senator John Kerry of Massachusetts cosponsored the bill on April 11, 1994. A revised version of S. 1782 was unanimously approved by the Subcommittee on Technology and the Law on June 29, 1994, and by the Committee on the Judiciary on August 11, 1994. The bill then passed the Senate by unanimous consent on August 25, 1995. No further action on the bill was taken in the 103rd Congress.

On July 28, 1995, Senators Leahy, Brown, and Kerry introduced S. 1090, the Electronic Freedom of Information Improvement Act of 1995, which varied slightly from the version passed by the Senate in the 103d Congress. S. 1090 was referred to the Committee on the Judiciary and, on October 6, 1995, to the Subcommittee on Terrorism, Technology and Government Information. The Subcommittee favorably reported the bill on March 14, 1996. Following consultation with the Office of Management and Budget, revisions were made to S.1090 in the form of a substitute amendment.

#### IV. VOTE OF THE COMMITTEE

On April 25, 1996, with a quorum present, by voice vote, the Committee on the Judiciary unanimously ordered the Committee substitute to S. 1090 favorably reported.

#### V. DISCUSSION

The FOIA was initially enacted in 1966 after many years of congressional committee examination of impediments to public access to information from the executive departments and agencies of the Federal Government.<sup>2</sup> The FOIA was first amended in 1974. The

<sup>1</sup>*The Electronic Freedom of Information Improvement Act*: Hearing before the Subcommittee on Technology and the Law of the Committee on the Judiciary, 102d Cong., 2d sess. (1992) (hereafter "1992 Hearing").

<sup>2</sup>House. *Availability of Information From Federal Departments and Agencies*: Hearings before the House Committee on Government Operations, 84th–86th Congresses, U.S. Govt. Print. Off., 1956–1959.

changes made by the amendments included requiring that a requester only “reasonably describe” the records being sought; allowing an agency to furnish documents without charge or at a reduced cost if it determined that such an action would be in the public interest; allowing a court to conduct an *in camera* review of contested materials to determine if they were being properly withheld; establishing specific response times for agency action; allowing a judge to award attorney fees and litigation costs where a private complainant had “substantially prevailed” in seeking records from an agency; prescribing that a court may take notice of “arbitrary and capricious” withholding of agency documents and require that a civil service investigation take place in order to determine if disciplinary action is warranted; expanding and clarifying the definition of agencies covered by the FOIA; and specifying that any record containing segregable portions of withholdable information shall be released with the necessary deletions. In addition, exemptions in the Act pertaining to classified information and law enforcement materials were narrowed and made more specific in terms of their application.

In 1976, when adopting another open government law—the Government in the Sunshine Act—Congress once again amended the FOIA.<sup>3</sup> The change was a limited one, prompted by a 1975 decision of the Supreme Court, which broadly interpreted the types of information falling within the ambit of the third exemption of the FOIA.<sup>4</sup> The FOIA amendment contained in the Sunshine Act modified the third exemption to limit its application to information specifically excepted from disclosure by statutes mandating protection “in such a manner as to leave no discretion on the issue” or establishing particular criteria or referring to particular types of information to be withheld.<sup>5</sup>

Senate attempts to further amend the FOIA were unsuccessful during the 97th and 98th Congresses. In the closing days of the 99th Congress, however, FOIA amendments were attached to an omnibus anti-drug abuse bill during Senate debate on the measure.<sup>6</sup> These amendments strengthened protection for law enforcement records and created new fee and fee waiver arrangements. Three categories of fees were established: for commercial users of the Act, for scholarly or scientific researchers and news media representatives, and for all other users. No fees were to be charged if the costs of routine collection and processing of the fee were likely to equal or exceed the amount of the fee or, in the case of requesters other than commercial users of the Act, for the first 2 hours of search time or for the first 100 pages of document duplication. In addition, records were to be furnished without charge or at a reduced charge if disclosure of the information was in the public interest because it was likely to contribute significantly to public understanding of the operations or activities of the Government and

<sup>3</sup>For the legislative history of the Government in the Sunshine Act and its amendment to the FOI Act, see Senate Committee on Government Operations and House Committee on Government Operations, *Government in the Sunshine Act—S. 5 (Public Law 94-409)*. Source Book: Legislative History, Texts, and Other Documents. Joint committee print, 94th Congress, 2d ses. Washington, U.S. Govt. Print. Off., 1976.

<sup>4</sup>*Administrator, Federal Aviation Administration v. Robertson*, 422 U.S. 255 (1975).

<sup>5</sup>90 Stat. 1241, at 1247.

<sup>6</sup>See Harold C. Relyea, “U.S. Freedom of Information Act Reforms—1986,” 9 *Journal of Media Law and Practice*, 6–12 (March 1988).

otherwise was not primarily in the commercial interest of the requester.

The FOIA has become a popular tool used by various quarters of American society—the press, business, scholars, attorneys, consumers, and others. Recent agency annual reports on the administration of the Act, covering 1992 operations, indicate an annual volume of almost 600,000 requests. The response to a request may involve paper or, increasingly, information in an electronic format.

In 1955, when congressional hearings laying the groundwork for the FOIA were held on the availability of information from Federal departments and agencies, the Federal Government had 45 computers. Ten years later, when the Senate passed its version of the FOIA, the inventory had risen to 1,826 computers. Only 5 years elapsed before the Government's holdings jumped to 5,277 computers, resulting in hundreds of thousands of automated files and many data banks of agency records.<sup>7</sup>

In succeeding years, the phenomenon of agency records being produced and retained in electronic formats grew at a highly expansive rate as Government use of personal computers and digital storage media, such as CD-ROMs (compact disk read-only memory), became more and more widespread.<sup>8</sup> In fiscal year 1994, the Federal Government reportedly counted almost 25,250 small computers (costing \$10,000 to \$100,000 each), 8,500 medium computers (costing \$100,000 to \$1,000,000 each), and 890 large computers (costing more than \$1,000,000 each) in use. Personal computers had proliferated throughout the Federal executive establishment. In 1995, the General Services Administration had more than 19,300 PCS in its inventory, but only 16,700 employees.<sup>9</sup> The Social Security Administration was preparing to upgrade computer systems in 1,300 offices nationwide, installing 2,700 local area networks (LANs) and 90,000 new desktop computers.<sup>10</sup> In a related development, during the past 3 years, more than 800 Federal sites have been set up on the World Wide Web.<sup>11</sup>

The FOIA should stay abreast of these developments to promote uniformity among agencies, minimize uncertainty among FOIA requesters, and avoid potential disagreements between the two. That is the principal purpose of S. 1090, the Electronic Freedom of Information Improvement Act of 1996.

Certainly, innovations are underway to promote greater dissemination of Government information through an electronic information “superhighway.”<sup>12</sup> For example, the 104th Congress created

<sup>7</sup> Alan F. Westin and Michael A. Baker. *Data banks in a Free Society*. New York: Quadrangle Books, 1972, pp. 29–30.

<sup>8</sup> See House Committee on Government Operations. *Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview*, H.R. Rept. No. 99-560, 99th Cong., 2d sess. (1986); U.S. Office of Technology Assessment. *Informing the Nation: Federal Information Dissemination in an Electronic Age*. Washington, DC, October 1988.

<sup>9</sup> Kevin Pwer, “GSA Calls for Halt in Buying New PCS,” 14 *Government Computer News*. 1 (Apr. 3, 1995).

<sup>10</sup> Ted Bunker, “Reinventing Government,” *LAN Magazine*. 158 (October 1995).

<sup>11</sup> Lisa Corbin, “Cyberocracy,” 28 *Government Executive*. 12 (January 1996).

<sup>12</sup> See U. S. Information Infrastructure Task Force. *The National Information Infrastructure: Agenda for Action*. Washington, DC, Sept. 15, 1993; U.S. Information Infrastructure Task Force's Committee on Applications and Technology. *Putting the Information Infrastructure to Work*. Washington, DC, May 1994; U.S. Information Infrastructure Task Force's Committee on Applications and Technology. *The Information Infrastructure: Reaching Society's Goals*. Washington, DC, September 1994; U.S. Advisory Council on the National Infrastructure. *A Nation*

the “Thomas” on-line service, providing access to numerous legislative resources, including the text of legislation and the *Congressional Record*. The U.S. Geological Survey has published data on the World Wide Web about rising rivers and potential flood conditions; the White House provides daily briefings and speeches on-line; and the Security and Exchange Commission’s EDGAR system provides electronic access to corporate and financial data on American companies. Such laudable dissemination occurs on the initiative of Government officials, and the Paperwork Reduction Act of 1995 reflects congressional understanding that wider use of electronic dissemination has become an integral part of Government information activity. The FOIA provides access to Government information sought at the initiative of individuals. Government dissemination of more varieties and greater amounts of its information holdings via a “superhighway” may reduce the volume of FOIA requests, but in no way diminishes the need for the FOIA to embrace agency records regardless of their form or format.

## VI. DETAILED DISCUSSION OF THE BILL

The FOIA requires agencies to make different types of information available to the public through publication in the Federal Register, in public reading rooms, and in response to specific requests. The Electronic Freedom of Information Improvement Act of 1996, S. 1090 as amended, would enhance electronic access to, and expand the information forms or formats used in making each category of information available under the FOIA. The new requirements of these amendments are intended to apply prospectively from the date of enactment.

### 1. FINDINGS

Section 2, setting forth the findings and purposes of the bill, makes clear that the purpose of the FOIA is to require agencies of the Federal Government to make records available to the public through public inspection and upon the request of any person for any public or private use. The findings also cite the role of the FOIA in leading to the disclosure of information about Government operations and consumer health and safety. For example, in 1993, the FOIA was used to uncover human radiation experiments conducted under Government auspices in the decades after World War II. Press reports on these experiments prompted the Department of Energy to conduct a review for purposes of declassifying millions of pages of secret documents on the Government’s past activities in this area.

Finally, the findings acknowledge the increased use of computers by Federal agencies, and exhort agencies to use this technology to enhance public access.

### 2. PURPOSES

The purposes of the bill are to ensure and improve public access to agency records and information, and maximize the usefulness of those records and information to the public.

---

of Opportunity: Realizing the Promise of the Information Superhighway, Washington, DC, January 1996.

The bill is also intended to promote agency compliance with statutory time limits. Chronic delays in receiving responses to FOIA requests are the largest single complaint of persons using the FOIA to obtain Federal agency records and information.

### 3. PUBLIC INFORMATION AVAILABILITY

Section 3 of the bill amends 5 U.S.C. 552(a)(1) to require that the Federal Register be available not only in paper form, but also “by computer telecommunications means,” and, if such means are not available, the Federal Register must be available by alternative “electronic means,” such as CD-ROM or on disk. Agencies should strive to meet their responsibilities under 5 U.S.C. 552(a)(1), and, to the maximum extent practicable, under 5 U.S.C. 552(a)(2) as well, through electronic means.

The Government Printing Office Electronic Information Access Enhancement Act of 1993<sup>13</sup> (hereafter referred to as the “GPO Access Act”) already requires the Superintendent of Documents to provide “on-line access” to the *Congressional Record*, the *Federal Register*, and certain other publications to the public.

The term “computer telecommunications” is meant to be synonymous with on-line access. This term was used by Congress in describing the obligations of the Environmental Protection Agency (EPA) to make its Toxic Release Inventory publicly available pursuant to the Emergency Planning and Community Right-to-Know Act, Title III of the Superfund Amendments Reauthorization Act of 1986.<sup>14</sup> Although neither that Act nor its legislative history defines the term, the Environmental Protection Agency has understood and implemented its duty in terms of providing public on-line access to its database. The Paperwork Reduction Act of 1995 reflects congressional intent generally that wider use of electronic dissemination is an integral part of Government information activity.

The FOIA currently requires that each agency publish in the *Federal Register*, “for the guidance of the public,” such information as descriptions of its organization, from whom, and methods whereby, the public may obtain information, and statements of general policy. The bill would require agencies also to publish in the *Federal Register* a complete list of statutes which require the agency to withhold information under 5 U.S.C. 552(b)(3), along with a specific description of the scope of the information covered.

This section 3 requirement would serve an informational and notice function for the public regarding claimed agency withholding authorities. In addition, this provision would assist congressional oversight to insure that (b)(3) withholding exemptions are not abused. This provision in no way prohibits an agency from relying on a statute, where appropriate, to withhold records or information. Nor would this provision prevent an agency from relying on an unlisted statute to deny information in appropriate cases.

### 4. MATERIALS MADE AVAILABLE IN ELECTRONIC FORMAT

Section 4 of the bill would make it easier to identify and locate agency records and would enhance electronic access to the informa-

<sup>13</sup> Public Law 103-40; 107 Stat. 112.

<sup>14</sup> Public Law 99-499; 100 Stat. 1728.

tion which an agency must “make available for public inspection and copying” under 5 U.S.C. 552(a)(2). Agencies are already encouraged to establish public reading rooms to facilitate the availability of materials to the public. Agencies should strive to make information available through electronic means wherever practicable, and the bill promotes this goal for those records subject to the FOIA. Public access to agency records and information should be enhanced through electronic means.

Under section 4 of the bill, materials required to be publicly available under 552(a)(2) must be made available, within 1 year of enactment, “by computer telecommunications,” as well as in hard copy. If an agency cannot make these materials available by computer telecommunications, then the materials should be made available in some other electronic form, such as CD-ROM or on disk. The bill thus treats materials required to be disclosed pursuant to 5 U.S.C. 552 (a)(2) in the same manner as it treats (a)(1) materials, which are required to be published in the *Federal Register* and, under the GPO Access Act, to be made available to the public electronically.

The implementation of the electronic access requirements for 552(a)(2) material is deferred for 1 year to allow agencies time to arrange compliance. Deferred implementation is not provided in section 3 of the bill for materials required to be disclosed pursuant to 5 U.S.C. 552(a)(1), since agencies already have an obligation to make this information available electronically on-line under the GPO Access Act.

##### 5. INDICES AND DESCRIPTIONS OF MAJOR INFORMATION SYSTEMS

Three categories of materials are currently required to be made available under 5 U.S.C. 552(a)(2): final opinions and orders made in adjudicated cases, agency policies and interpretations which are not published in the Federal Register, and administrative staff manuals and instructions to staff that affect a member of the public.

Section 4 of the bill would expand these categories of materials and require agencies to make available for public inspection and copying, in the same manner as other materials made available under 5 U.S.C. 552(a)(2), an index of all major information systems containing agency records, unless such an index is already made publicly available as otherwise required by law. Such an index shall help the public locate and access information held by particular agencies.

Requiring on-line access to an index of major information systems is fully consistent with the requirement of the Paperwork Reduction Act of 1995 and revised guidelines in OMB Circular A-130, which provide uniform government-wide information management policies. Specifically, 44 U.S.C. S.3506 and section 8a(5)(d)(iv) of the Circular A-130, July 15, 1994, direct agencies to assist the public in finding Government information. Agencies may accomplish this by specifying and disseminating “locator” information about the content, format, uses, limitations, location and means of access associated with particular records.

This requirement would also supplement the Government Information Locator Service (GILS) identifying public information re-

sources throughout the Federal Government, describing the information available in those resources, and providing assistance in obtaining the information.<sup>15</sup> Access to GILS contents would be available through each agency through public and private information services on-line, and by other electronic media.

Section 4 of the bill would also require agencies to make publicly available a description of any new major information system, together with a statement of how the system shall enhance agency operations under the FOIA. The purpose of this provision is to require agencies to use the development of new major information systems as opportunities to enhance FOIA administration. Agencies should make use of electronic information technology in order to administer their responsibilities under the FOIA most efficiently. Indeed, at the time of “major information system” establishment, agencies should consider both the potential FOIA availability of the information involved as well as the affirmative availability of the information apart from the FOIA.

Agencies are subject to a similar requirement under 44 U.S.C. 3506 and section 8a(1) of OMB Circular A-130, which direct agencies to plan from the outset for each step in the information life cycle. Such planning includes providing for public access to records where required or appropriate.

The term “major information system” is familiar to Federal agencies since it is defined in OMB Circular A-130. As defined in OMB Circular A-130, “‘major information system’ means an information system that requires special management attention because of its importance to an agency mission; its high development, operating, or maintenance costs; or its significant role in the administration of agency programs, finances, property, or other resources.” In accordance with OMB Circular A-130, agencies should already be establishing inventories of their “major information systems.”<sup>16</sup> This new requirement under S. 1090 is not overlapping but, instead, is a consistent and coordinated legislative requirement to support administrative efforts already underway.

Certain kinds of records identified in nine exemptions may be excluded from disclosure under the FOIA. These exemptions would therefore apply to the index, which is required to be made publicly available under the bill. Thus, an agency is not required to identify the existence of a particular database or electronic system in the exceptional circumstance in which its existence is itself a sensitive, exempt fact. For example, a new investigatory database, the existence of which necessarily reflects the existence of an ongoing law enforcement investigation protected under Exemption 7(a), would be exempt from disclosure on the index.

#### 6. INDEX OF RECORDS MADE AVAILABLE TO THE PUBLIC

Section 4 of the bill would require that an *index* of any records released as the result of requests for records pursuant to 5 U.S.C. 552(a)(3) must be made available for public inspection and copying under 552(a)(2). This provision shall assist requesters in determining which records have been the subject of prior FOIA requests.

<sup>15</sup> 44 U.S.C. 3511, 109 Stat. 180.

<sup>16</sup> OMB Circular No. A-130, sec. 9a(5), p. 15 (July 15, 1994).

Since requests for records provided in response to prior requests are more readily identified by the agency without the need for new searches, this list may assist agencies in complying with the FOIA time limits. This should also reduce costs to agencies in preparing responses. This does not, however, relieve agencies of their obligations to conduct an adequate search for, or justify withholding of, responsive records as required by the FOIA.

In addition, *copies* of records, which, because of the nature of their subject matter, an agency determines have been or shall likely be the subject of subsequent FOIA requests, must be made available for public inspection and copying in the same manner as the materials required to be made available under paragraph (a)(2).

As a practical matter, this would mean that copies of records released in response to FOIA requests on a subject of popular interest, such as the assassinations of Martin Luther King, Jr., and President Kennedy, or on human radiation experiments conducted by the Government, must subsequently be treated as materials subject to release under 5 U.S.C. 552(a)(2) and made available for public inspection and copying, including by computer telecommunications or other electronic means. This would reduce the number of duplicative FOIA requests for the same records requiring separate agency responses.

The General Accounting Office has found that certain Federal agencies, including the International Trade Administration at the Department of Commerce and the State Department, are already taking steps to make available for public inspection and copying in their reading rooms materials released in response to specific requests under the FOIA. "The State Department, for example, places previously released material in the reading room when it believes the documents shall be of topical or recurrent public interest. Such documents include information relating to the Jonestown massacre, the Grenada invasion, and the Cuban missile crisis."<sup>17</sup>

The purpose of this provision in the bill is to prompt agencies to make information available affirmatively on their own initiative in order to meet anticipated public demand for it. In other words, FOIA processes should not be incumbered by requests for routinely available records or information that can more efficiently be made available to the public through affirmative dissemination means.

We recognize that an agency's practical ability to make records and information affirmatively available to the public apart from the FOIA is far greater as to nonexempt records than to any record or information that is partially exempt and requires redaction. Nevertheless, once released in response to a specific request under the FOIA, complying with the new requirement of making the previously released material, even in a redacted form, available for public inspection and copying should not be a burdensome undertaking.

Requiring, as a standard practice among all Federal agencies, that popular, previously released FOIA records be made available for public inspection and copying, including by computer telecommunications, would take a significant step toward on-line FOIA

---

<sup>17</sup>U.S. General Accounting Office, "Freedom of Information Act: Agency Reading Rooms", GAO/GGD-89-84BR, May 1989, at p. 6.

requests and responses. This shall increase agency efficiency and reduce workload. Of course, not all individuals have access to computers or the computer networks, such as the Internet, or are near public reading rooms. Thus, requesters shall still be able to access previously released FOIA records through the normal FOIA process.

Current law permits an agency to delete identifying details from material made available under 5 U.S.C. 552(a)(2), “[t]o the extent required to prevent a clearly unwarranted invasion of personal privacy.” Section 4 would make clear that agencies retain the same discretion to delete identifying details from the index and copies of records released in response to FOIA requests and made available under this section of the bill, to prevent a clearly unwarranted invasion of personal privacy.

The final part of section 4 would, consistent with the “Computer Redaction” requirement in section 7 of the bill, require that any withholding deletions made in electronic records prior to their public disclosure must be indicated within the disclosed records at the place(s) and to the extent of their occurrence.

Nothing in this section precludes an agency from classifying information previously released under a FOIA request.

#### 7. HONORING FORMAT REQUESTS

Section 5 of the bill directs agencies to provide records to requesters in any form or format in which the agency maintains those records. At the same time, the bill also directs agencies to make reasonable efforts to honor the format requests of requesters.

The amendments to section 552(a)(3) contained in section 5 of the bill, as amended, override the holding in *Dismukes v. Department of the Interior*,<sup>18</sup> that an agency “has no obligation under the FOIA to accommodate plaintiff’s preference [but] need only provide responsive, nonexempt information in a reasonably accessible form.” This precedent, which has been followed in at least one subsequent case, *see Baizer v. U.S. Department of the Air Force*, 887 F. Supp. 225, 229 (N.D. Cal. 1995), presents a reason for Congress to enact legislation to clarify the rights of requesters with respect to the form and format of the released record.

The bill’s requirement to make records available in the form or format requested by any person where such records are not usually maintained in the requested form or format, is subject to a “reasonable efforts” qualification. In some cases, this could relieve the agency of the requirement if it would prove onerous. To clarify the meaning of “reasonable,” the bill makes clear that requests for an electronic version of records should be honored, even for records that are not normally maintained or stored in electronic form, if they are, nevertheless, available in the requested electronic version.

This requirement applies to choices between conventional record forms (e.g., paper, microfiche, or electronic) as well as to choices between existing electronic formats. As a general rule, the decision whether to disclose requested records or information in a new requested form, whether electronic or other form, is a matter of ad-

<sup>18</sup> 603 F. Supp. 760, 763 (D.D.C. 1984).

ministrative discretion. In exercising that discretion, agencies should consider administrative efficiency and the existence of identified public demands for the information. Consistent with current practice, a FOIA requester generally should be entitled to obtain a paper printout of any nonexempt electronic records—or any readily retrievable nonexempt part of such records—if the requester prefers.

The “reasonable efforts” qualification would apply to any situation in which the original form of a record cannot readily be handled without damage to it, such as may be the case with archival records, where an existing copy form is used instead. Likewise, the “reasonable efforts” qualification could relieve agencies of the obligation of releasing the original form of partially exempt records in circumstances where agencies need to handle the records in a certain form for purposes of redaction and, therefore, cannot readily disclose them, as redacted, in a previously existing form.

This section also directs agencies to make “reasonable efforts to search for records in electronic form or format.” What constitutes a “reasonable effort” shall vary with the circumstances under which the records are held. We recognize that both agency computer program development resources and agency computer system operation resources are highly valuable and finite. Both of these categories of agency resources shall be impinged upon by the level of new search activity required under the amendments. Agencies should search for and retrieve data according to new specifications where such retrieval activity does not disrupt agency functions.

The Office of Management and Budget has suggested 2 hours as the amount of time an agency should reasonably spend on computer program development time to accommodate a requester’s request for a particular form or format. In certain circumstances, and for certain agencies, 2 hours of computer development time may be the maximum amount of time that is reasonable. Other agencies may determine that significantly more or less than 2 hours is reasonable under the circumstances.

Agencies may, as permitted by 5 U.S.C. 552 (a)(4)(A), charge appropriate fees to recover copying costs, regardless of what medium is used for duplication. Thus, if an agency is requested to produce duplicate CD-ROM’s and has the capability to do so, it may assess an appropriate fee to recover the reasonable costs for copying the record in that form. “Copying costs” include the costs to agencies when they do not maintain the records in the requested format and must put the records in that format. A requester’s refusal to pay the direct costs of copying in the requested form or format would be a factor in determining whether it is reasonable for the agency to comply with the format request.

#### 8. DELAYS

Section 6 of the bill addresses the single most frequent complaint about the operation of the FOIA, namely, agency delays in responding to FOIA requests. A 1986 House report cited a number of reasons for the delays, including inadequate resources, unnecessary

bureaucratic complexity, poor organization of agency records, and lack of interest by agencies in disclosure.<sup>19</sup>

These delays have persisted. In an October 1993 memorandum to all Heads of Departments and Agencies, Attorney General Janet Reno acknowledged the delay problem and the cause for FOIA backlogs, stating:

Many Federal departments and agencies are often unable to meet the Act's ten-day time limit for processing FOIA requests, and some agencies—especially those dealing with high-volume demands for particularly sensitive records—maintain large FOIA backlogs greatly exceeding the mandated time period. The reasons for this may vary, but principally it appears to be a problem of too few resources in the face of too heavy a workload. This is a serious problem—one of growing concern and frustration to both FOIA requesters and Congress, and to agency FOIA officers as well.

Indeed, out of a total of 75 agencies responding to a Department of Justice request for backlog information in February 1994, only 28 agencies reported no backlog.

The bill contains provisions intended to help agencies comply with statutory time limits by doubling the time allowed for a determination on requests for records, providing financial incentives for compliance, directing agencies to make more information available on-line and to use better record management techniques, such as multi-track processing, publishing prior requests to avoid new searches, and making available in public reading rooms those records likely to be the subject of duplicative FOIA requests.

(a) *Retention of Half the FOIA Fees.*—The bill would permit agencies that comply with statutory time limits to retain one-half of the FOIA fees they collect and direct them to use those fees to enhance the FOIA request processing function. While the purpose of this provision is to give agencies an incentive to comply with the time limits, the Committee recognizes that FOIA fees do not cover the cost of compliance.

(b) *Demonstration of Circumstances for Delay.*—This section would require agencies not in compliance with the statutory time limits to demonstrate that the delay is warranted under the standards for “unusual” or “exceptional” circumstances set forth in 5 U.S.C. § 552(a)(6)(B) and (C) of the FOIA, the only circumstances that excuse compliance with the time limits.

(c) *Doubling of Statutory Time Limit.*—Currently, the FOIA allows agencies 10 working days to make initial determinations on requests for information possessed by the Government. Compliance with the 10-day rule is a practical impossibility for the majority of agencies. The bill, therefore, doubles the allowable time period for making an initial determination to 20 working days, while leaving intact the current 10-working day statutory extension for cases involving “unusual circumstances.”

(d) *Agency Backlogs.*—Under the FOIA, a court may grant an agency additional time to respond to FOIA requests beyond the statutory time limit, if the agency can show that “exceptional circumstances exist and that the agency is exercising due diligence in

<sup>19</sup>House Committee on Government Operations. *Freedom of Information Act Amendment of 1986*. pp.11–12, H.R. 99–832, 99th Cong., 2d sess.

responding to the request.” The FOIA does not limit the additional time permitted. The Committee encourages agencies to reduce backlogs. The bill would clarify that “exceptional circumstances” should be demonstrated by more than the usual backlog of pending requests, but good faith efforts to address and reduce an unusually large backlog may be relevant to a determination of whether “exceptional circumstances” exist.

(e) *Notification of Denial*.—Currently, the FOIA requires agencies to provide requesters with the names and titles or positions of any person responsible for denial of a request for records. The bill would amend this requirement to also require disclosure to requesters of the total number of records and pages that the agency considered responsive to the request, but nevertheless withheld.

(f) *Multi-track FIFO Processing*.—An agency commitment to process requests on a first-come, first-served basis has been held to satisfy the requirement that an agency exercise due diligence in dealing with backlogs of FOIA requests.<sup>20</sup> Some agencies have taken the position that they must process requests on an FIFO basis, even if this procedure may result in lengthy delays for simple requests due to the prior receipt and processing of complex requests. This section encourages agencies to implement multi-track processing systems for FOIA requests to reduce backlog.

Simple requests are those requiring 10 days or less to process. Such requests may include requests for only a few specific documents that are easily accessed or which, by their nature would not normally be exempt from the requester (e.g., request for a copy of one’s own birth certificate or naturalization certificate). Complex requests are those for which it is estimated that the records sought would take more than 10 days to locate, review, and prepare for disclosure. Such requests may include requests from files requiring line-by-line review of numerous pages of personal information, classified information, or investigative files, particularly those that are of current or of recent investigations, that require careful coordination with investigative personnel.

Under a two-track system some simple requests shall be processed ahead of more complex ones which may have been received earlier. Agencies may have more than two tracks, for example, in the event that they receive requests for expedited access, which may be processed on their own track.

(g) *Expedited Access*.—The bill provides for a requester to obtain expedited access to records where the requester demonstrates a compelling need, as defined by the bill. Once such a need is demonstrated, and the request for expedited access is granted, the agency must then proceed to process that request “as soon as practicable.” No specific number of days for compliance is imposed by the bill since, depending upon the complexity of the request, the time needed for compliance may vary. The goal is not to get the request for expedited access processed within a specific time frame, but to give the request priority for processing more quickly than otherwise would occur.

In the event the agency uses a single-track FIFO procedure, the expedited request should be processed first. If more than one expe-

<sup>20</sup> *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976).

dited access request is granted and pending, the agency should have a separate track to process them on a FIFO basis. A FOIA request to which expedited access has been denied should be processed in the order it was received relative to other FOIA requests. S. 1090, as amended, would permit a requester to seek limited judicial review based on the same record before the agency of an agency's denial of an expedited access request, but only when the requester has complied with the strict time limits under paragraph (4)(E)(ii).

This section adds statutory substance to the term "compelling need" for purposes of obtaining expedited access. The first two criteria, in which an individual's life or safety would be threatened, embody bases for expedited access which have been accepted by some courts and acknowledged by the Justice Department at least since 1983. The third basis for expedited access would arise when failure to obtain such access would affect public assessment of the nature and propriety of actual or alleged governmental actions that are the subject of widespread, contemporaneous media coverage. This is a reworking of the new "Discretion to Promote Public Accountability" standard for expedited access which the Department of Justice, Office of Information and Privacy, distributed to all agencies in a February 1, 1994, memorandum. Media coverage is not in itself sufficient for expedition. In order to ensure that this shall not become a routine incantation among requesters, this ground for expedition requires "widespread, contemporaneous media coverage" to be shown in support of a request asserting its applicability. FOIA is not a substitute for a means of civil discovery. FOIA requests related to ongoing civil litigation do not receive expedited access under the criteria established in the bill simply because parties may need information for use in civil litigation.

The requester would be required to declare, under penalty of perjury, the truth and correctness of the requester's statements of compelling need in support of a request for expedited access. This is the same requirement generally used to certify the correctness of information provided to the government on documents ranging from income tax returns to applications for fishing licenses.

#### 9. COMPUTER REDACTION

Section 7 of the bill would require that any withholding deletions made in electronic records prior to their public disclosure must be indicated within the disclosed records at the place(s) and to the extent of their occurrence. This would ensure that the requester receives notice of the amount of material deleted and the location of the deletion when records are provided to a requester in electronic form or as a hard copy print of electronic information.

Agencies are not required to aggregate, compact, or modify electronic data in any way in order to release it to FOIA requesters in nonexempt form. Agencies may do so as a matter of administrative discretion, just as FOIA requesters may modify their requests in order to encompass only nonexempt data.

## 10. DEFINITIONS

The FOIA already defines the term “agency” and section 8 of S 1090, as amended, would add definitions of “record” and “search” to the FOIA.

(a) *Record*.—The FOIA currently does not define “record.” A determination of what constitutes an “agency record” in particular instances shall depend upon a number of factors identified by the Supreme Court in *Department of Justice v. Tax Analysts*.<sup>21</sup> Any item containing information that is in the possession and control of an agency is usually considered to be an agency record under FOIA.

At the outset, it is important to note that the FOIA is not an independent basis for requiring agencies to maintain records or information; other statutes and regulations establish such requirements. For example, the FOIA does not dictate the records an agency must preserve under the Federal Records Act, but only those subject to release. At the same time, agencies should not convert any information into a form not required to be preserved for the purpose of altering its status under the FOIA.

As defined in the bill, “record” refers to all books, papers, maps, photographs, machine-readable materials, or other information or documentary materials, regardless of physical form or characteristics. The term expressly does not include library and museum material acquired or received and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, stocks of publications and of processed documents, or computer software which is obtained by an agency under a licensing agreement prohibiting its replication or distribution.

This definition is a modified version of the definition of “record” in the Federal Records Act (“FRA”).<sup>22</sup> The new definition in the FOIA is not necessarily tied to any definition of “record” that is used for purposes of other statutes, including the Federal Records Act. Similar to that in the FRA, the proposed definition of “record” under the FOIA expressly excludes reference items that have been acquired or received by the Government solely for reference purposes. This is consistent with current law that, for example, library reference materials are not subject to the FOIA.<sup>23</sup>

(b) *Search*.—The bill makes it clear that a search of computerized records that requires application of codes or some form of programming to retrieve information would not amount to the creation of a new record.

As defined in the Act, “‘search’ means a manual or automated review of agency records that is conducted for the purpose of locating those records which are responsive to a request under subsection (a)(3)(A) of this section.” Under FOIA, an agency is not required to create documents that do not exist. Because computer records may be located in a database rather than in a file cabinet, the question is whether a computer search is analogous to a search for paper records. Computerized records may require the application of codes or some form of programming to retrieve the information. Any other interpretation would make it virtually impossible

<sup>21</sup> 492 U.S. 136, 144–45 (1989).

<sup>22</sup> 44 U.S.C.A. 3301.

<sup>23</sup> See *Dept. Of Justice v. Tax Analysts*, 492 U.S. 136 (1988).

to get records that are maintained completely in an electronic form because some manipulation of the information likely would be necessary to search for the record.

This definition further clarifies that a search for records is only made with regard to FOIA requests under 5 U.S.C. 552(a)(3)(A).

#### VII. REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b), Rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that no significant additional regulatory impact or impact on personal privacy would be incurred in carrying out the provisions of this legislation.

#### VIII. COST ESTIMATE

The Committee accepts the cost estimate of the Congressional Budget Office.

The Congressional Budget Office estimate follows:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, May 13, 1996.*

Hon. ORRIN G. HATCH,  
*Chairman, Committee on the Judiciary,  
U.S. Senate, Washington, DC*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1090, the Electronic Freedom of Information Improvement Act of 1996, as ordered reported by the Senate Committee on the Judiciary on April 25, 1996. CBO estimates that enacting this bill would allow agencies to spend between \$4 million and \$5 million over the 1997–2002 period out of fee income expected under current law. Such expenditures would constitute new direct spending; therefore, pay-as-you-go procedures would apply.

Bill purpose. S. 1090 would amend the Freedom of Information Act (FOIA) to:

Require that agencies make available for public inspection and reproduction copies of any records that, because of the nature of their subject matter, are likely to elicit additional requests;

Require that agencies provide information in the form requested (for example, paper or computer disk), if the information is already available in that form;

Authorize agencies to retain and spend one-half of any fees collected under FOIA, provided that they comply with the statutory tie limits for responding to such requests; and

Expand the amount of time an agency has to respond to a FOIA request from 10 days to 20 days.

Federal Budgetary Impact. Many of the bill's provisions are similar to those already required by the Office of Management and Budget (OMB Circular No. A–130), and therefore are not expected to affect agencies' budgets. Some provisions, however, could change the way certain agencies' respond to FOIA requests. For instance, the bill would require that agencies make available for public inspection and reproduction copies of any records that—because of the nature of their subject matter—are likely to elicit additional re-

quests. The bill also would require that agencies provide information in the form requested, if the information is already available in that form. The first provision could reduce agencies' costs, while the second provision might increase agencies' costs, but CBO cannot estimate the extent of these impacts. Any change in spending from either provision would be subject to appropriation actions.

To provide an incentive to reduce delays, S. 1090 would allow eligible agencies to keep half of the fees currently charged for processing FOIA requests and to spend those funds on resources used to comply with FOIA's time limits. In 1992 (the most recent year for which complete tabulations of agencies' annual reports on FOIA activities are available), agencies spent about \$108 million processing FOIA requests, while charging about \$8 million in fees. Under current law, these fees are deposited in the Treasury. Because the bill would expand the amount of time agencies have to respond to requests from 10 days to 20 days, we estimate that about 45 out of the 75 agencies included in the Department of Justice's 1994 report on agency backlogs under FOIA would meet the bill's requirement for "substantial compliance" and would thus be eligible to retain half of any fees they charge. These agencies, however, account for only about 10 percent of the total fees collected. Thus, if this provision had been in effect for 1992, they would have retained only about \$0.4 million. By contrast, four agencies—all with large backlogs—accounted for almost 75 percent of the total fees collected in 1992.

Assuming that costs for processing FOIA requests continue to grow at historical rates and that fees as a proportion of those costs also remain at their historical rates, CBO estimates that agencies would be eligible to retain about \$0.6 million of fees collected during fiscal year 1996. Under the bill, however, spending of these funds would not occur until fiscal year 1997. Estimated outlays would rise gradually to about \$1 million by 2002, and we estimate that direct spending from this provision would total between \$4 million and \$5 million over the 1997–2002 period. The following table summarizes the estimated budgetary impact of the bill.

CHANGES IN DIRECT SPENDING  
[By fiscal year, in millions of dollars]

	1997	1998	1999	2000	2001	2002
Estimated Budget Authority .....	1	1	1	1	1	1
Estimated Outlays .....	1	1	1	1	1	1

This estimate assumes that S. 1090 would be enacted by the end of fiscal year 1996.

Pay-as-you-go statement. Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 sets up pay-as-you-go procedures for legislation affecting direct spending or receipts through 1998. S. 1090 would affect direct spending by authorizing eligible agencies to retain and spend on-half of any fees collected under FOIA. As a result, CBO estimates that outlays would increase by about \$1 million in 1997 and \$1 million in 1998.

Mandates statement. S. 1090 contains no intergovernmental or private sector mandates as defined in Public Law 104-4 and would impose no direct costs on state, local, or tribal governments.

If you wish further details on this estimate, we will be pleased to provide them. The staff contact is John R. Righter.

Sincerely,

JUNE E. O'NEILL, *Director*.

## IX. ADDITIONAL VIEWS OF SENATOR LEAHY

A number of points were not addressed in the Committee's report that would be helpful to provide additional guidance to agencies on implementing the Electronic Freedom of Information Act. As one of the authors of this legislation, I submit these additional views to supplement the report of the Committee.

### I. INTRODUCTION

The emerging National Information Infrastructure (NII) consists of interconnected computer networks and databases that can put vast amounts of information at users' fingertips. Such an information infrastructure can be used to give the public easy access to the immense volumes of information generated and held by the Government. Individual Federal agencies are already contributing to the development of the NII by using technology to make Government information more easily accessible to our citizens. For example, FedWorld, a bulletin board available on the Internet, provides a gateway to more than 60 Federal agencies.

The Electronic Freedom of Information Improvement Act would contribute to that information flow by increasing on-line access to Government information, including agency regulations, opinions, and policy statements, and agency records that have been previously released in response to FOIA requests and that are the subject of repeated requests. This electronic FOIA bill is an important step forward in using technology to make government more accessible and accountable to our citizens.

### II. LEGISLATIVE HISTORY OF THE FOIA

The Committee report notes, without elaboration, that the FOIA was enacted in 1966 after many years of examination of the impediments to providing the public with access to Government records. Prior to 1966, the prevailing public access law, section 3 of the Administrative Procedure Act of 1946, was being interpreted in ways to restrict the availability of information.<sup>1</sup> The so-called "housekeeping" law, dating from the earliest days of the Republic and authorizing a department head to prescribe regulations for the custody, use, and preservation of department records, papers, and property, was also being used to restrict information sought by the public.<sup>2</sup> Indeed, a considerable number of laws, regulations, and rules restraining legal access to public records were identified.

<sup>1</sup>60 Stat. 237, at 238. Francis E. Rourke. *Secrecy and Publicity: Dilemmas of Democracy*. Baltimore: The Johns Hopkins Press, 1961, pp. 57-58.

<sup>2</sup>See 1 Stat. 28, 49, 65; these and similar provisions were consolidated in the *Revised Statutes of the United States* (1878) at section 161, which is presently located in the *United States Code* at 5 U.S.C. 301 (1994). Rourke, *Secrecy and Publicity: Dilemmas of Democracy*, pp. 47-49.

The author of one of the earliest and most thorough studies of this protective bulwark stated the resulting dilemma dramatically and concisely:

Public business is the public's business. The people have the right to know. Freedom of information is their just heritage. Without that the citizens of a democracy have but changed their kings.<sup>3</sup>

An initial effort in support of the people's right to know came to fruition in 1958 when Congress enacted an amendment to the "housekeeping" law stating that it "does not authorize withholding information from the public or limiting the availability of records to the public."<sup>4</sup>

Shortly thereafter, work was begun on drafting legislation to amend section 3 of the Administrative Procedure Act with a general statute requiring the disclosure of unpublished agency records requested by the public. Such a bill was introduced, considered, and approved in the Senate during the 88th Congress, when the movement for what would become the Freedom of Information Act began in earnest.<sup>5</sup> The House, however, took no action on such a measure before *sine die* adjournment. The Senate turned to such legislation again in the 89th Congress, and adopted a revised and refined version of the earlier bill on October 23, 1965. The House subsequently passed this bill on June 20, 1966.

Signing the FOIA into law on July 4, 1966,<sup>6</sup> President Johnson declared:

This legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.<sup>7</sup>

In accordance with the provisions of the Act, the FOIA became operative on July 4, 1967, by which time it had been codified as section 552 of title 5, United States Code.<sup>8</sup>

During House and Senate committee consideration of legislation leading to the FOIA, no executive department or agency representative had testified in support of the proposals. Congressional oversight of the administration and operation of the Act would reveal that this distaste for the legislation had transformed into hostility toward the statute during its initial implementation.

A 1972 report by the House Committee on Government Operations, based upon oversight proceedings conducted by one of its subcommittees earlier in the year, characterized the situation in the following words:

<sup>3</sup>Harold L. Cross. *The People's Right to Know*. Morningside Heights: Columbia University Press, 1953, p. xiii.

<sup>4</sup>72 Stat. 547. Rourke, *Secrecy and Publicity*, pp. 59-60.

<sup>5</sup>For the legislative history of the Freedom of Information Act of 1966, see Senate Committee on the Judiciary, *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*, S. Doc. No. 93-82, 93d Cong., 2d sess. (1974).

<sup>6</sup>80 Stat. 250.

<sup>7</sup>*Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1966*. Book 2. Washington, U.S. Govt. Print. Off., 1967, p. 699.

<sup>8</sup>81 Stat. 54; 5 U.S.C. 552 (1970).

The efficient operation of the Freedom of Information Act has been hindered by 5 years of foot-dragging by the Federal bureaucracy. The widespread reluctance of the bureaucracy to honor the public's legal right to know has been obvious in parts of two administrations. This reluctance has been overcome in a few agencies by continued pressure from appointed officials at the policy making level and in some other agencies through public hearings and other oversight activities by the Congress.<sup>9</sup>

Curiously, it was often argued that the FOIA was not a primary program of the departments and agencies, a contention that sadly ignored the importance of Government information accessibility for the citizens of a democracy. Consequently, FOIA administration suffered from a lack of resources and a lack of immediacy so that requests languished, awaiting a response.

A reform bill to strengthen the FOIA was introduced in the House at the outset of the 93d Congress in early 1973.<sup>10</sup> A companion proposal was offered in the Senate in March, and the House legislation received a committee hearing in May. No department or agency witness expressed any support for the proposed amendments. By the end of 1973, the House bill had been refined, was reported from committee in February 1974, and was adopted by the House in March. Shortly thereafter, in May, a Senate counterpart bill was reported, strengthened during floor debate, and adopted. Conferees were then named to reconcile the differences between the two measures amending the FOIA.

These were tumultuous times in the Federal Government and the Nation. During the 20 months that the FOIA amendments moved through the two Houses of Congress, various congressional committees and a Special Prosecutor were pursuing inquiries into a burglary at the Democratic National Committee headquarters in the Watergate apartment complex in Washington, DC. By the end of 1973, the involvement of current and former high-level officials of the Nixon administration in this and related matters had been revealed.

The following year, articles of impeachment against President Nixon were under development in the House. Accountability and the availability of Government information became issues of mounting importance for Congress and the public. A crux point was reached when the President refused to provide certain Oval Office tape recordings subpoenaed by the Special Prosecutor. The dispute came before the Supreme Court, which, in a unanimous opinion of July 24, 1974, affirmed a district court order requiring the President to provide the subpoenaed tapes.<sup>11</sup> A week later, the House Committee on the Judiciary approved three articles of impeachment of President Nixon. Ten days later, he resigned.

<sup>9</sup>House Committee on Government Operations, Administration of the Freedom of Information Act, H. Rept. 92-1419, 92d Cong., 2d sess. (1972), pp. 8-9.

<sup>10</sup>For the legislative history of the 1974 amendments to the FOIA Act, see House Committee on Government Operations and Senate Committee on the Judiciary. *Freedom of Information Act and Amendments of 1974 (Public Law 93-502)*. Source Book: Legislative History, Texts, and Other Documents. Joint committee print, 94th Cong., 1st sess. Washington, U.S. Govt. Print. Off., 1975.

<sup>11</sup>*United States v. Nixon*, 418 U.S. 683 (1974).

The FOIA amendments of 1974, which are summarized in the Committee's report, were not developed in response to the Watergate incident. However, they gained legislative momentum as congressional investigators probed Watergate and related matters. President Nixon resigned shortly after the conferees on the FOIA amendments began their deliberations in August. The new President, Gerald Ford, sent a letter to the conferees indicating his reservations about some of the amendments. The conferees pressed on, resolved their differences, and placed their report before their respective chambers. The Senate gave approval on October 1; the House voted acceptance on October 7; and the compromise legislation was sent to President Ford the next day.

On October 17, the President returned the bill to the House without his approval and characterized the legislation as "unconstitutional and unworkable."<sup>12</sup> However, he had underestimated congressional support for the amendments. On November 20, the House voted 371-31 to reject the Presidential veto. The next day, the Senate completed action on the legislation, voting 65-27 to override the President's objections. The 1974 amendments then became law, taking effect on February 19, 1975.<sup>13</sup>

These amendments and their manner of adoption, as well as subsequent amendments to the FOIA detailed in the Committee report, provide a clear indication of congressional support for and commitment to the FOIA and its proper administration.

### III. SUPPLEMENTAL DISCUSSION OF THE BILL

#### 1. FINDINGS

The findings set forth in section 2 of the bill makes clear that the FOIA requires Federal agencies to make records available to the public in specified ways, including upon the request of any person for any public or private use. As Justice Ginsburg commented, "the identity and particular purpose of the requester is irrelevant under FOIA. \* \* \* This main rule serves as a check against selection among requesters, by agencies and reviewing courts, according to idiosyncratic estimations of the request's or requester's worthiness."<sup>14</sup>

This finding is intended to address concerns that the reasoning of the Supreme Court in *Department of Justice v. Reporters Committee*<sup>15</sup> and the *U.S. Department of Defense v. Federal Labor Relations Authority*<sup>16</sup> analyzed the purpose of the FOIA too narrowly. The purpose of the FOIA is not limited to making agency records and information available to the public only in cases where such material would shed light on the activities and operations of Government. Effort by the courts to articulate a "core purpose" for which information should be released imposes a limitation on the FOIA which Congress did not intend and which cannot be found in

<sup>12</sup> *Public Papers of the Presidents of the United States: Gerald R. Ford, 1974*. Washington, U.S. Govt. Print. Off., 1975, pp. 374-376.

<sup>13</sup> 88 Stat. 1561.

<sup>14</sup> *U.S. Department of Defense v. Federal Labor Relations Authority*, — U.S. —, 114 S. Ct. 1006, 1019 (1994) (Ginsburg, J., concurring).

<sup>15</sup> 489 U.S. 749 (1989).

<sup>16</sup> 114 S.Ct. 1006, 773-775, 1012-13 (1994).

its language,<sup>17</sup> and distorts the broader import of the Act in effectuating Government openness.

While the intended use of the records by the requester is normally irrelevant in determining whether to grant access to the requested records, it may properly be considered in assessing the potential consequences of disclosure where the public interest in disclosure must be balanced against an asserted privacy interest in denying access to such records.

## 2. RECORDS MADE AVAILABLE TO THE PUBLIC

The Congress has indicated its intent through laws, such as the Paperwork Reduction Act of 1995, that wider use of electronic dissemination is an integral part of Government information activity. Such dissemination occurs on the initiative of Government officials. The FOIA, by contrast, also provides access to Government information sought on the initiative of the people.

The Committee report correctly notes that the Government Information Locator Service (GILS) is a helpful tool for providing access to public information resources in the Federal Government. Significantly, many Federal agencies are also establishing sites on the World Wide Web to educate the public about their mission and facilitate access to information about the agency. Agencies should be encouraged to establish a FOIA requester section on their Web site homepage to facilitate on-line access to 552(a)(1), (a)(2), and (a)(3) materials. For example, by accessing an agency's Web site, requesters in the future may be able to browse through an index of major computer systems maintained by the agency, an index of records made available to the public, and copies of records previously released pursuant to FOIA requests.

In short, these World Wide Web sites could be used to provide on-line access to the materials that agencies are disseminating both electronically and in more conventional form to the public. In fact, the Department of Defense has specified that all homepages must be accompanied by a GILS record that tells the public how to access other DOD material. We urge Federal agencies to continue progress in this area.

## 3. HONORING FORMAT REQUESTS

Section 5 of the bill requires that Federal agencies provide records to requesters in any form or format in which the agency maintains those records, and that Federal agencies make reasonable efforts to search for and honor the format requests of requesters. In many cases, the vast amounts of information held in Government databases would only be usable if disclosed in an electronic form. Such information disclosed in paper form would be unmanageable. Nevertheless, a FOIA requester should be entitled to obtain a paper "printout" of any nonexempt electronic records—or any readily retrievable nonexempt part of such records—if the requester so prefers, consistent with current practice.

The Committee report points out that what constitutes a "reasonable effort" to search for records in electronic form or format will

<sup>17</sup> *U.S. Department of Defense v. FCRA*, supra, 114 S.Ct. at 1018–1019 (Ginsburg, J., concurring).

vary with the circumstances under which the records are held. In responding to FOIA requests seeking only specified portions of databases, agencies should search for and retrieve data in the same manner used in the ordinary course of agency business with their existing retrieval-programming capability for the database involved. When requesters seek to have data retrieved according to specifications other than those ordinarily used by agencies for data retrieval from the database system involved, agencies should comply with such requests where they can reasonably and efficiently do so. We recognize that this requirement, in tandem with the “record” status of agency software, holds some potential for compelled software creation.

Agencies should be required to search for and retrieve data according to new specifications where such retrieval activity does not disrupt agency functions.

Agencies should make use of the capability to redact exempt information through electronic means, including through the acquisition of software packages for those purposes, wherever it is more efficient to do so. Where redactions are made by electronic means, the requirement in section 7 of the bill remains that the requester should be notified of the extent and location of the redactions. This principle should apply to redaction in conventional record form, in which case the extent of redactions ordinarily can be shown on the face of partially disclosed records.

#### 4. DELAYS: AGENCY BACKLOGS

The bill would clarify the meaning of “exceptional circumstances” warranting an extension of the statutory time limit for responding to requests under the FOIA. Specifically, under the bill, the term “exceptional circumstances” would mean “circumstances that are unforeseen and shall not include delays that result from a predictable workload, including any ongoing agency backlog, in the ordinary course of processing requests for records.”

In *Open America v. Watergate Special Prosecution Force*,<sup>18</sup> the court held that exceptional circumstances exist when the agency can show it has inadequate resources to process FOIA requests within statutory time limits and the agency is exercising due diligence by processing requests on a “first-in, first-out” basis. Relying upon overly broad dictum in this case, agencies have employed the exceptional circumstances-due diligence exception to obtain judicial approval for lengthy delays whenever they have a backlog.

Backlogs of requests for records under the FOIA should not give agencies an automatic excuse to ignore the time limits. This is exactly the wrong incentive to clear up such backlogs.

The bill would not overturn *Open America*, but would clarify its holding. In *Open America*, the court granted additional time because the agency had a truly exceptional, 3000-percent increase in FOIA requests in 1 year. The bill would not change the outcome in *Open America*—exceptional, unforeseen workload increases would still warrant additional time to respond to FOIA requests.

Consistent with Judge Leventhal’s concurring opinion in *Open America*, the bill would clarify that “exceptional circumstances”

<sup>18</sup>547 F.2d 605 (D.C. Cir. 1976).

must be demonstrated by more than the mere number or backlog of pending requests. This clarification would apply prospectively to requests for agency records submitted after the date of enactment of this Act.

The agency must show the extraordinary size or complexity of the requested records at issue; affirmative steps the agency is taking to reduce the backlog (such as applying for additional funding, training or reassigning additional personnel, or implementing new processing procedures); efforts to expedite release of the requested records, including by the partial release of records expressly covered by the FOIA and plainly outside the scope of any exemption; and concrete obstacles to locating or otherwise processing the requested records, including cases in which a substantial proportion of the requested records can reasonably be expected to involve information that may be exempt under 5 U.S.C. 552(b) (1), (6), or (7). The mere fact that the requested records are those of an agency with law enforcement or national security missions, such as the Federal Bureau of Investigation or Central Intelligence Agency, should not be sufficient in itself to demonstrate that the records can reasonably be expected to fall within the scope of those exemptions.

#### 5. DEFINITIONS: RECORD

The new definition of “record” in the bill includes “machine-readable materials or other information or documentary materials, regardless of physical form or characteristics.” As a general rule, information maintained in electronic form should be no less subject to the FOIA than information maintained in conventional paper record form. Indeed, among Federal agencies, there is little disagreement that FOIA covers all Government records, regardless of the form in which they are maintained or stored by the agency. The Department of Justice agrees that computer database records are agency records subject to the FOIA.<sup>19</sup>

However, a question may arise as to what, exactly, constitutes a “record” when public records are in an electronic format. For example, most Government agencies maintain large databases comprising millions of pieces of information. A specific “record” may not be created until a query is formed and the software associated with the database manipulates the information, which in turn compiles the record formulated by the query. Because the database itself is a public record, then any record created from information stored in that database is also a public record.

The process of retrieving the information, however, may result in the creation of a new document when the data is printed out on paper or written on computer tape or disk. This may be the only way computerized data is retrievable, even if it means a new document must be created.

Moreover, material in a database that is constantly being updated or modified is dynamic and continuously changing. It should, nonetheless, be subject to the FOIA. Agencies may have to develop special procedures to accommodate FOIA applicability to such data on a “snapshot” basis, while at the same time duly impairing the

<sup>19</sup> 1992 Hearing, at 33.

operation of the electronic system involved. Any such nonexempt data for which there is an anticipated public demand is likely to be made available affirmatively under section 4 of S. 1090, thereby removing any potential FOIA complications for that data.

The proposed definition of “record” in the bill would cover electronic mail, in accordance with current case law and regulations. Recognizing that “the widespread and easy use of e-mail has made it an important tool for the conduct of Government business” and that “nearly all Federal agencies now use e-mail to transact Government business,” the National Archives and Records Administration issued regulations, effective on September 27, 1995, setting forth regulations for the identification and preservation of e-mail messages that constitute Federal records.

Electronic mail has also been held subject to the FOIA by courts that have considered this issue. In *Armstrong v. Executive Office of President*,<sup>20</sup> the court based its definition of “records” on the language contained in 44 U.S.C.A. 3301, and concluded that, if a document qualifies as a record, then the FRA prohibits an agency from discarding it by fiat. Communications stored in electronic communications systems constituted Federal records because the FRA’s definition of “records” includes material “regardless of physical form or characteristics.” The court concluded that substantive communications otherwise meeting the definition of Federal “records” that had been saved on electronic mail came within the FRA’s purview. Thus, the court held the mere existence of paper printouts of electronic communications for Government agencies does not affect the record status of electronic material unless paper versions include all significant material contained in the electronic records. Electronic documents retain their status as Federal records after the creation of paper printouts and all FRA obligations concerning management and preservations of records apply.

Electronic mail is used not just by Federal employees to conduct official business, but also in circumstances where the employees may have an expectation of privacy or confidentiality. This expectation may be compromised if the messages are preserved as records and released to the public under the FOIA. What constitutes an appropriate use of e-mail systems by Federal employees and what legitimate expectations of privacy those employees may have in particular e-mail messages are important questions, but not policy determinations to be made under the FOIA. Indeed, the National Archive and Records Administration has concluded that “E-mail records are no more and no less important than other records. Agency personnel must apply the same decision making process to e-mail that they apply to other documentary materials regardless of the media used to create them.”<sup>21</sup>

Electronic information or material maintained outside of the Government that is accessed electronically by an agency, but merely viewed by agency employees, should not be deemed to come into the agency’s possession and control by virtue of such electronic access. Any such data on a networked computer, however, that is retrieved into an agency database by an agency employee or agent,

<sup>20</sup> 1 F.3d 1274, 1278 (D.C. Cir. 1993).

<sup>21</sup> 60 Fed. Reg. 44634, 44635 (Aug. 28, 1995).

or is printed out in paper form, becomes subject to the Act. Rules governing the circumstances under which agencies may merely view, and not preserve, data distributed over networked computers in the performance of their functions should be established through legal and policy mechanisms other than the FOIA.

As a general rule, computer software should also be treated as a “record” subject to the FOIA. “Computer software” may be regarded as the computer programs, routines, and symbolic languages that control the functioning and direct the operation of computer hardware. Software that is generated totally at Government expense, and in which there exists no private proprietary interest, should be subject to the FOIA and disclosed if not covered by a FOIA exemption (e.g., Exemption 2 which can protect against circumvention of computer-system security).<sup>22</sup> Such software should be made available at direct cost under the FOIA, absent any specific congressional authorization for the charging of a greater fee.

Any software that is generated by an outside party under a Government contract, in which the Government has retained all proprietary interest, should likewise be subject to the FOIA. Any software that is generated by an agency and furnished to an outside party “exclusively” under a cooperative agreement should be treated under the Act in accordance with the provisions of any specific congressional enactment pertaining to such agreement.

Any software that is generated by an outside party under a Government contract, in which the party retains some or all of the proprietary interest, should be subject to disclosure under the FOIA only insofar as is compatible with that proprietary interest, as well as the interests protected by any other applicable FOIA exemption, such as Exemption 2 or 3.

Any computer software that has been acquired by the Government, and from an outside proprietary interest holder under a licensing agreement that prohibits the software’s copying or distribution is excluded by the definition of a “record” under the bill. The most effective handling of an FOIA request for such software would be for the agency simply to identify the software as commercially available.

In circumstances where acquired software is not made commercially available by the outside proprietary interest holder, or the software has been customized and is therefore not commercially available in the exact form in which it is requested, both the circumstances of the acquisition and of the proprietary interest shall have to be examined in order to determine the software’s status under the FOIA. Specifically, a determination shall have to be made whether release is permitted under the licensing agreement under which the agency obtained the software, and whether such release is consistent with the copyright or patent laws.

If the licensing agreement or other legal impediment bars release of the requested computer software, agencies should make efforts to segregate proprietary from nonproprietary information in order to comply with the FOIA.

<sup>22</sup> See *Cleary, Gottlieb, Steen & Hamilton v. Dept. of Health and Human Services*, 844 F. Supp. 770 (D.D.C. 1993) (computer program created by agency employee is an agency “record” under the FOIA but under the circumstances were exempt from disclosure under the deliberative process privilege in Exemption 5).

If an agency maintains an electronic information system in such a way that objectively understandable access to any nonexempt information in it is dependent upon a computer program or software that is unavailable to the public, then the agency must upon request, pursuant to the new requirement in section 5 of the bill, take all reasonable steps to convert the data in order to afford FOIA access to it in a requested electronic form.

Agencies should make efforts to avoid this situation and seek instead to obtain computer programs or software that are available to the public either commercially or by release under the FOIA. Agencies certainly should not use licensing agreements to circumvent public access to electronic information under the FOIA. Efforts to do so would be short-sighted given the additional time, expense, and efforts that must be undertaken by agencies to convert information from an unreleasable electronic form to a releasable electronic form.

#### IV. CONCLUSION

Making Government information readily available electronically can help to revitalize citizens' interest in learning what their Government is doing and better their understanding of the reasons underlying Government actions. The Electronic Freedom of Information Improvement Act of 1996 is an important step forward in using technology to make Government more accessible and accountable to our citizens.

In addition, this bill takes steps to cure the lengthy delays in obtaining responses to requests for agency records under the FOIA. The American taxpayer has paid for the collection and maintenance of these records and should get prompt access to it upon request. That is what the law requires and that is the standard of service Government agencies should meet. *Long delays in access can mean no access at all.*

PATRICK LEAHY.

X. CHANGES IN EXISTING LAW MADE BY THE BILL, AS AMENDED

In compliance with paragraph 12, rule XXVI of the Standing Rules of the Senate, 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):

**UNITED STATES CODE**

\* \* \* \* \*

**TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES**

\* \* \* \* \*

**CHAPTER 5—ADMINISTRATIVE PROCEDURE**

**Subchapter I—General Provisions**

\* \* \* \* \*

**§ 552. Public information; agency rules, opinions, orders, records, and proceedings**

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register *including by computer telecommunications, or if computer telecommunications means are not available, by other electronic means*, for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; **and**

(E) *a complete list of all statutes that the agency head or general counsel relies upon to authorize the agency to withhold information under subsection (b)(3) of this section, together with a specific description of the scope of the information covered; and*

(F) each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying, *including, within 1 year after the date of the enactment of the Electronic Freedom of Information Improvement Act of 1996, by computer telecommunications, or if computer telecommunications means are not available, by other electronic means—*

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; **[and]**

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) *an index of all major information systems containing agency records regardless of form or format unless such an index is provided as otherwise required by law;*

(E) *a description of any new major information system with a statement of how such system shall enhance agency operations under this section;*

(F) *an index of all records which are made available to any person under paragraph (3) of this subsection; and*

(G) *copies of all records, regardless of form or format, which because of the nature of their subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records under paragraph (3) of this subsection;*

unless the materials are promptly published and copies offered for sale. 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, statements of policy, interpretation, **[or staff manual or instruction]** *staff manual, instruction, or index or copies of records, which are made available under paragraph (3) of this subsection.* 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 at the place where such deletion was made.* Each agency shall also maintain and make available for public inspection and copying current indexes provid-

ing 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. A final order, opinion, statements 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) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2)(A) *through (F)* of this subsection, each agency, upon any request for records which [(A) reasonably] (i) reasonably describes such records and [(B)] (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) *An agency shall, as requested by any person, provide records in any form or format in which such records are maintained by that agency.*

(C) *An agency shall make reasonable efforts to search for records in electronic form or format and provide records in the form or format requested by any person, including in an electronic form or format, even where such records are not usually maintained but are available in such form or format.*

(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 and which shall provide for a uniform schedule of fees for all agencies.

\* \* \* \* \*

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter *de novo*: Provided, that the court's review of the matter shall be limited to the record before the agency.

(viii) *If at an agency's request, the Comptroller General determines that the agency annually has either provided responsive documents or denied requests in substantial compliance with the requirements of paragraph (6)(A), one-half of the fees collected under this section shall be credited to the collecting agency and expended to offset the costs of complying with this sec-*

*tion through staff development and acquisition of additional request processing resources. The remaining fees collected under this section shall be remitted to the Treasury as general funds or miscellaneous receipts.*

\* \* \* \* \*

(D) Repealed.

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) *Any agency not in compliance with the time limits set forth in this subsection shall demonstrate to a court that the delay is warranted under the circumstances set forth under paragraph (6) (B) or (C) of this subsection.*

\* \* \* \* \*

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ~~ten days~~ *twenty days* (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such a 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

(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. If on appeal the denial of the request for records is in the 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.

\* \* \* \* \*

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. *As used in this subparagraph, for requests submitted pursuant to paragraph (3) after the date of the enactment of the Electronic Freedom of Information Improvement Act of 1996, the term "exceptional circumstances" means circumstances that are unforeseen and shall not include delays that result from a predictable workload, including any ongoing agency backlog, in the ordinary course of processing requests for records.* Upon any determination by an agency to comply with a request for records,

the records shall be made promptly available to such person making such request. [Any notification of denial of any requests for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.] *Any notification of any full or partial denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request and the total number of denied records and pages considered by the agency to have been responsive to the request.*

*(D)(i) Each agency shall adopt a first-in, first-out (hereafter in this subparagraph referred to as FIFO) processing policy in determining the order in which requests are processed. The agency may establish separate processing tracks for simple and complex requests using FIFO processing within each track.*

*(ii) For purposes of such a multi-track system-*

*(I) a simple request shall be a request requiring 10 days or less to make a determination on whether to comply with such a request; and*

*(II) a complex request shall be a request requiring more than 10 days to make a determination on whether to comply with such a request.*

*(iii) A multitrack system shall not negate a claim of due diligence under subparagraph (C), if FIFO processing within each track is maintained and the agency can show that it has reasonably allocated resources to handle the processing for each track.*

*(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing that upon receipt of a request for expedited access to records and a showing by the person making such request of a compelling need for expedited access to records, the agency determine within 10 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such a request, whether to comply with such request. A request for records to which the agency has granted expedited access shall be processed as soon as practicable. A request for records to which the agency has denied expedited access shall be processed within the time limits under paragraph (6) of this subsection.*

*(ii) A person whose request for expedited access has not been decided within 10 days of its receipt by the agency or has been denied shall be required to exhaust administrative remedies. A request for expedited access which has not been decided may be appealed to the head of the agency within 15 days (excepting Saturdays, Sundays, and legal public holidays) after its receipt by the agency. A request for expedited access that has been denied by the agency may be appealed to the head of the agency within 5 days (excepting Saturdays, Sundays, and legal public holidays) after the person making such request receives notice of the agency's denial. If an agency head has denied, affirmed a denial, or failed to respond to a timely appeal of a request for expedited access, a court which would have jurisdiction of an action under paragraph 4(B) of this subsection may, upon complaint, require the agency to show cause why the request for ex-*

*pedited access should not be granted, except that such review shall be limited to the record before the agency.*

*(iii) The burden of demonstrating a compelling need by a person making a request for expedited access may be met by a showing, which such person certifies under penalty of perjury to be true and correct to the best of such person's knowledge and belief, that failure to obtain the requested records within the timeframe for expedited access under this paragraph would—*

*(I) threaten an individual's life or safety;*

*(II) result in the loss of substantial due process rights and the information sought is not otherwise available in a timely fashion; or*

*(III) affect public assessment of the nature and propriety of actual or alleged governmental actions that are the subject of widespread, contemporaneous media coverage.*

(b) This section does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

\* \* \* \* \*

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection, *and the extent of such deletion shall be indicated on the released portion of the record at the place in the record where such deletion was made.*

\* \* \* \* \*

[(f) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government department, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.]

*(f) For purposes of this section—*

*(1) the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.*

*(2) the term "record" means all books, papers, maps, photographs, machine-readable materials, or other information or documentary materials, regardless of physical form or characteristics, but does not include—*

*(A) library and museum material acquired or received and preserved solely for reference or exhibition purposes;*

*(B) extra copies of documents preserved solely for convenience of reference;*

*(C) stocks of publications and of processed documents; or*

*(D) computer software which is obtained by an agency under a licensing agreement prohibiting its replications or distributions; and*

*(3) the term "search" means a manual or automated review of agency records that is conducted for the purpose of locating those records which are responsive to a request under subsection (a)(3)(A) of this section.*

