

108TH CONGRESS  
2D SESSION

# H. R. 5073

To restore and strengthen the laws that provide for an open and transparent  
Federal Government.

---

## IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 14, 2004

Mr. WAXMAN (for himself, Mr. SANDERS, Mrs. MALONEY, Mr. CUMMINGS,  
Mr. KUCINICH, Mr. CLAY, Mr. VAN HOLLEN, Ms. NORTON, Ms. MCCOL-  
LUM, and Mr. McDERMOTT) introduced the following bill; which was re-  
ferred to the Committee on Government Reform

---

## A BILL

To restore and strengthen the laws that provide for an  
open and transparent Federal Government.

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Restore Open Govern-  
5 ment Act of 2004”.

6 **SEC. 2. TABLE OF CONTENTS.**

7 The table of contents for this Act is as follows:

Sec. 1. Short title.

Sec. 2. Table of Contents.

- Sec. 101. Revocation of the Ashcroft Memo and the Card Memo.  
 Sec. 102. Findings and policy relating to disclosure of information under the  
 Freedom of Information Act.  
 Sec. 103. Protection of voluntarily furnished confidential information.

TITLE II—PRESIDENTIAL RECORDS

- Sec. 201. Revocation of Executive Order of November 1, 2001.

TITLE III—ADVISORY COMMITTEES

- Sec. 301. Presidential inter-agency advisory committees.

TITLE IV—CLASSIFICATION OF INFORMATION

- Sec. 401. Reducing excessive classification of information.

TITLE V—OTHER PROVISIONS

- Sec. 501. Citizen actions.

1                   **TITLE I—FREEDOM OF**  
 2                   **INFORMATION**

3   **SEC. 101. REVOCATION OF THE ASHCROFT MEMO AND THE**  
 4                   **CARD MEMO.**

5           The “Memorandum for Heads of all Federal Depart-  
 6   ments and Agencies” on “The Freedom of Information  
 7   Act” issued by Attorney General John Ashcroft on Octo-  
 8   ber 12, 2001, and the “Memorandum for the Heads of  
 9   Executive Department and Agencies” on “Action to Safe-  
 10   guard Information Regarding Weapons of Mass Destruc-  
 11   tion and Other Sensitive Documents Related to Homeland  
 12   Security” issued by Andrew H. Card, Jr., Assistant to the  
 13   President and Chief of Staff on March 19, 2002, shall  
 14   have no force or effect.

1 **SEC. 102. FINDINGS AND POLICY RELATING TO DISCLO-**  
2 **SURE OF INFORMATION UNDER THE FREE-**  
3 **DOM OF INFORMATION ACT.**

4 (a) FINDINGS.—Congress finds the following:

5 (1) Public access to information held by the  
6 Federal Government is vitally important to the func-  
7 tioning of a democratic society.

8 (2) The Freedom of Information Act was en-  
9 acted to ensure such public access to information.

10 (3) The Freedom of Information Act specifies  
11 limited exemptions to the general requirement for  
12 disclosure, where disclosure could potentially threat-  
13 en other important public policy goals.

14 (4) In establishing the categories of exempt in-  
15 formation under the Freedom of Information Act,  
16 Congress allowed agencies to withhold information in  
17 those categories, but did not in any way mandate or  
18 encourage such withholding.

19 (b) POLICY.—The policy of the Federal Government  
20 is to release information to the public in response to a  
21 request under the Freedom of Information Act—

22 (1) if such release is required by law; or

23 (2) if such release is allowed by law and the  
24 agency concerned does not reasonably foresee that  
25 disclosure would be harmful to an interest protected  
26 by an applicable exemption.

1 (c) GUIDANCE.—All guidance provided to Federal  
2 Government employees responsible for carrying out the  
3 Freedom of Information Act shall be consistent with the  
4 policy set forth in subsection (b).

5 **SEC. 103. PROTECTION OF VOLUNTARILY FURNISHED CON-**  
6 **FIDENTIAL INFORMATION.**

7 (a) IN GENERAL.—Title II of the Homeland Security  
8 Act of 2002 (Public Law 107–296) is amended by striking  
9 subtitle B and inserting the following:

10 **“Subtitle B—Protection of Volun-**  
11 **tarily Furnished Confidential**  
12 **Information**

13 **“SEC. 211. PROTECTION OF VOLUNTARILY FURNISHED**  
14 **CONFIDENTIAL INFORMATION.**

15 “(a) DEFINITIONS.—In this section:

16 “(1) CRITICAL INFRASTRUCTURE.—The term  
17 ‘critical infrastructure’ has the meaning given that  
18 term in section 1016(e) of the USA PATRIOT ACT  
19 of 2001 (42 U.S.C. 5195c(e)).

20 “(2) FURNISHED VOLUNTARILY.—

21 “(A) DEFINITION.—The term ‘furnished  
22 voluntarily’ means a submission of a record  
23 that—

1                   “(i) is made to the Department in the  
2                   absence of authority of the Department re-  
3                   quiring that record to be submitted; and

4                   “(ii) is not submitted or used to sat-  
5                   isfy any legal requirement or obligation or  
6                   to obtain any grant, permit, benefit (such  
7                   as agency forbearance, loans, or reduction  
8                   or modifications of agency penalties or rul-  
9                   ings), or other approval from the Govern-  
10                  ment.

11                  “(B) BENEFIT.—In this paragraph, the  
12                  term ‘benefit’ does not include any warning,  
13                  alert, or other risk analysis by the Department.

14                  “(b) IN GENERAL.—Notwithstanding any other pro-  
15                  vision of law, a record pertaining to the vulnerability of  
16                  and threats to critical infrastructure (such as attacks, re-  
17                  sponse, and recovery efforts) that is furnished voluntarily  
18                  to the Department shall not be made available under sec-  
19                  tion 552 of title 5, United States Code, if—

20                  “(1) the provider would not customarily make  
21                  the record available to the public; and

22                  “(2) the record is designated and certified by  
23                  the provider, in a manner specified by the Depart-  
24                  ment, as confidential and not customarily made  
25                  available to the public.

1 “(c) RECORDS SHARED WITH OTHER AGENCIES.—

2 “(1) IN GENERAL.—

3 “(A) RESPONSE TO REQUEST.—An agency  
4 in receipt of a record that was furnished volun-  
5 tarily to the Department and subsequently  
6 shared with the agency shall, upon receipt of a  
7 request under section 552 of title 5, United  
8 States Code, for the record—

9 “(i) not make the record available;

10 and

11 “(ii) refer the request to the Depart-  
12 ment for processing and response in ac-  
13 cordance with this section.

14 “(B) SEGREGABLE PORTION OF  
15 RECORD.—Any reasonably segregable portion of  
16 a record shall be provided to the person re-  
17 questing the record after deletion of any portion  
18 which is exempt under this section.

19 “(2) DISCLOSURE OF INDEPENDENTLY FUR-  
20 NISHED RECORDS.—Notwithstanding paragraph (1),  
21 nothing in this section shall prohibit an agency from  
22 making available under section 552 of title 5, United  
23 States Code, any record that the agency receives  
24 independently of the Department, regardless of

1       whether or not the Department has a similar or  
2       identical record.

3       “(d) WITHDRAWAL OF CONFIDENTIAL DESIGNA-  
4       TION.—The provider of a record that is furnished volun-  
5       tarily to the Department under subsection (b) may at any  
6       time withdraw, in a manner specified by the Department,  
7       the confidential designation.

8       “(e) PROCEDURES.—The Secretary shall prescribe  
9       procedures for—

10           “(1) the acknowledgement of receipt of records  
11           furnished voluntarily;

12           “(2) the designation, certification, and marking  
13           of records furnished voluntarily as confidential and  
14           not customarily made available to the public;

15           “(3) the care and storage of records furnished  
16           voluntarily;

17           “(4) the protection and maintenance of the con-  
18           fidentiality of records furnished voluntarily; and

19           “(5) the withdrawal of the confidential designa-  
20           tion of records under subsection (d).

21       “(f) EFFECT ON STATE AND LOCAL LAW.—Nothing  
22       in this section shall be construed as preempting or other-  
23       wise modifying State or local law concerning the disclosure  
24       of any information that a State or local government re-  
25       ceives independently of the Department.

1 “(g) REPORT.—

2 “(1) REQUIREMENT.—Not later than 18  
3 months after the date of the enactment of the Re-  
4 store Open Government Act of 2004, the Comp-  
5 troller General of the United States shall submit to  
6 the committees of Congress specified in paragraph  
7 (2) a report on the implementation and use of this  
8 section, including—

9 “(A) the number of persons in the private  
10 sector, and the number of State and local agen-  
11 cies, that furnished voluntarily records to the  
12 Department under this section;

13 “(B) the number of requests for access to  
14 records granted or denied under this section;  
15 and

16 “(C) such recommendations as the Comp-  
17 troller General considers appropriate regarding  
18 improvements in the collection and analysis of  
19 sensitive information held by persons in the pri-  
20 vate sector, or by State and local agencies, re-  
21 lating to vulnerabilities of and threats to critical  
22 infrastructure, including the response to such  
23 vulnerabilities and threats.

1           “(2) COMMITTEES OF CONGRESS.—The com-  
2           mittees of Congress specified in this paragraph  
3           are—

4                   “(A) the Committees on the Judiciary and  
5                   Governmental Affairs of the Senate; and

6                   “(B) the Committees on the Judiciary and  
7                   Government Reform and Oversight of the  
8                   House of Representatives.

9           “(3) FORM.—The report shall be submitted in  
10           unclassified form, but may include a classified  
11           annex.”.

12           (b) TECHNICAL AND CONFORMING AMENDMENT.—  
13           The table of contents for the Homeland Security Act of  
14           2002 (Public Law 107–296) is amended by striking the  
15           items relating to subtitle B of title II and sections 211  
16           through 215 and inserting the following:

                  “Subtitle B—Protection of Voluntarily Furnished Confidential Information  
                  “Sec. 211. Protection of voluntarily furnished confidential information.”.

17                   **TITLE II—PRESIDENTIAL**  
18                   **RECORDS**

19           **SEC. 201. REVOCATION OF EXECUTIVE ORDER OF NOVEM-**  
20                   **BER 1, 2001.**

21           Executive Order number 13233, dated November 1,  
22           2001 (66 Fed. Reg. 56025), shall have no force or effect,  
23           and Executive Order number 12667, dated January 18,  
24           1989 (54 Fed. Reg. 3403), shall apply by its terms.

1                   **TITLE III—ADVISORY**  
2                   **COMMITTEES**

3 **SEC. 301. PRESIDENTIAL INTER-AGENCY ADVISORY COM-**  
4                   **MITTEES.**

5           (a) DEFINITION.—The term “Presidential inter-  
6 agency advisory committee” is any committee or task force  
7 that—

8               (1) is composed wholly of full-time, or perma-  
9               nent part-time, officers or employees of the Federal  
10              Government;

11              (2) includes officers or employees of at least  
12              two separate Federal agencies;

13              (3) is established or utilized to provide advice,  
14              ideas, or recommendations to the President or Vice  
15              President on a specified topic or topics; and

16              (4) has at least one officer or employee as-  
17              signed full-time as a staff member of the committee  
18              to support the functions of the committee.

19           (b) REQUIREMENTS.—

20               (1) The President shall ensure that the names  
21               of the members of the committee are published in  
22               the Federal Register.

23               (2) The committee must make public each sub-  
24               stantive contact between the advisory committee, or  
25               individual members of the advisory committee acting

1 on the committee's behalf, and any person who is  
2 not a full-time or permanent part-time officer or em-  
3 ployee of the Federal Government, including—

4 (A) the date of the contact;

5 (B) the form of the contact (in person, by  
6 telephone, by e-mail, or in writing);

7 (C) the names and affiliations of the par-  
8 ties involved; and

9 (D) the substance of the communication  
10 and the communication itself, if in electronic or  
11 written form.

12 (3) For purposes of this subsection, a contact  
13 shall be considered substantive if the information  
14 conveyed influenced or was reflected in any way in  
15 the committee's advice, recommendations, or report  
16 to the President or Vice President.

## 17 **TITLE IV—CLASSIFICATION OF** 18 **INFORMATION**

### 19 **SEC. 401. REDUCING EXCESSIVE CLASSIFICATION OF IN-** 20 **FORMATION.**

21 As soon as possible, but in no event later than 180  
22 days after the date of the enactment of this Act, the Presi-  
23 dent shall require Federal departments and agencies to  
24 promote a culture of information sharing by reducing dis-  
25 incentives to information sharing, including overclassifica-

1 tion of information and unnecessary requirements for  
2 originator approval.

### 3 **TITLE V—OTHER PROVISIONS**

#### 4 **SEC. 501. CITIZEN ACTIONS.**

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

7 (1) by inserting “, or in any case seeking infor-  
8 mation from a Federal agency or official under any  
9 other Federal law,” after “case under this section”;  
10 and

11 (2) by adding at the end the following: “For  
12 purposes of this section, a complainant has ‘substan-  
13 tially prevailed’ if the complainant has obtained  
14 some of its requested relief through a judicial or ad-  
15 ministrative order or an enforceable written agree-  
16 ment, or if the complainant’s pursuit of a nonfrivo-  
17 lous claim or defense has been a catalyst for a vol-  
18 untary or unilateral change in position by the oppos-  
19 ing party that provides any significant part of the  
20 relief sought.”.

○