

109TH CONGRESS  
1ST SESSION

# H. R. 867

To promote openness in Government by strengthening section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 16, 2005

Mr. SMITH of Texas introduced the following bill; which was referred to the Committee on Government Reform

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## A BILL

To promote openness in Government by strengthening section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), and for other purposes.

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

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Openness Promotes  
5       Effectiveness in our National Government Act of 2005”  
6       or the “OPEN Government Act of 2005”.

7       **SEC. 2. FINDINGS.**

8       Congress finds that—

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

4                   (A) our constitutional democracy, our sys-  
5                   tem of self-government, and our commitment to  
6                   popular sovereignty depends upon the consent  
7                   of the governed;

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

10                   (C) as Justice Black noted in his concur-  
11                   ring opinion in *Barr v. Matteo* (360 U.S. 564  
12                   (1959)), “The effective functioning of a free  
13                   government like ours depends largely on the  
14                   force of an informed public opinion. This calls  
15                   for the widest possible understanding of the  
16                   quality of government service rendered by all  
17                   elective or appointed public officials or employ-  
18                   ees.”;

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

22           (3) the Freedom of Information Act establishes  
23           a “strong presumption in favor of disclosure” as  
24           noted by the United States Supreme Court in  
25           *United States Department of State v. Ray* (502 U.S.

1       164 (1991)), a presumption that applies to all agen-  
2       cies governed by that Act;

3           (4) “disclosure, not secrecy, is the dominant ob-  
4       jective of the Act,” as noted by the United States  
5       Supreme Court in *Department of Air Force v. Rose*  
6       (425 U.S. 352 (1976));

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

9           (6) Congress should regularly review section  
10      552 of title 5, United States Code (commonly re-  
11      ferred to as the Freedom of Information Act), in  
12      order to determine whether further changes and im-  
13      provements are necessary to ensure that the Govern-  
14      ment remains open and accessible to the American  
15      people and is always based not upon the “need to  
16      know” but upon the fundamental “right to know”.

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

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

20      “In making a determination of a representative of the  
21      news media under subclause (II), an agency may not deny  
22      that status solely on the basis of the absence of institu-  
23      tional associations of the requester, but shall consider the  
24      prior publication history of the requester. Prior publica-  
25      tion history shall include books, magazine and newspaper

1 articles, newsletters, television and radio broadcasts, and  
 2 Internet publications. If the requestor has no prior publi-  
 3 cation history or current affiliation, the agency shall con-  
 4 sider the requestor’s stated intent at the time the request  
 5 is made to distribute information to a reasonably broad  
 6 audience.”.

7 **SEC. 4. RECOVERY OF ATTORNEY FEES AND LITIGATION**  
 8 **COSTS.**

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

19 **SEC. 5. DISCIPLINARY ACTIONS FOR ARBITRARY AND CA-**  
 20 **PRICIOUS REJECTIONS OF REQUESTS.**

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

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

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

25 “(ii) The Attorney General shall—

1 “(I) notify the Special Counsel of each civil ac-  
2 tion described under the first sentence of clause (i);  
3 and

4 “(II) annually submit a report to Congress on  
5 the number of such civil actions in the preceding  
6 year.

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

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

11 (a) TIME LIMITS.—

12 (1) IN GENERAL.—Section 552(a)(6)(A)(i) of  
13 title 5, United States Code, is amended by inserting  
14 “, and the 20-day period shall commence on the date  
15 on which the request is first received by the agency,  
16 and shall not be tolled without the consent of the  
17 party filing the request” after “adverse determina-  
18 tion”.

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

22 (b) AVAILABILITY OF AGENCY EXEMPTIONS.—

23 (1) IN GENERAL.—Section 552(a)(6) of title 5,  
24 United States Code, is amended by adding at the  
25 end the following:

1       “(G)(i) If an agency fails to comply with the applica-  
 2 ble time limit provisions of this paragraph with respect  
 3 to a request, the agency may not assert any exemption  
 4 under subsection (b) to that request, unless disclosure—

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

7               “(II) would disclose personal private informa-  
 8 tion protected by section 552a or proprietary infor-  
 9 mation; or

10              “(III) is otherwise prohibited by law.

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

15              (2) EFFECTIVE DATE AND APPLICATION.—The  
 16 amendment made by this subsection shall take effect  
 17 1 year after the date of enactment of this Act and  
 18 apply to requests for information under section 552  
 19 of title 5, United States Code, filed on or after that  
 20 effective date.

21 **SEC. 7. INDIVIDUALIZED TRACKING NUMBERS FOR RE-**  
 22 **QUESTS AND STATUS INFORMATION.**

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

1 “(7) Each agency shall—

2 “(A) establish a system to assign an individual-  
3 ized tracking number for each request for informa-  
4 tion under this section;

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

8 “(C) establish a telephone line or Internet serv-  
9 ice that provides information about the status of a  
10 request to the person making the request using the  
11 assigned tracking number, including—

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

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

16 (b) EFFECTIVE DATE AND APPLICATION.—The  
17 amendment made by this section shall take effect 1 year  
18 after the date of enactment of this Act and apply to re-  
19 quests for information under section 552 of title 5, United  
20 States Code, filed on or after that effective date.

21 **SEC. 8. SPECIFIC CITATIONS IN EXEMPTIONS.**

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

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

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

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

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

14 **SEC. 9. REPORTING REQUIREMENTS.**

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

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

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

21 (3) by adding at the end the following:

22 “(H) data on the 10 active requests with the  
23 earliest filing dates pending at each agency, includ-  
24 ing the amount of time that has elapsed since each  
25 request was originally filed;



1           “(I) the average number of days for the agency  
2           to respond to a request beginning the date on which  
3           the request was originally filed, the median number  
4           of days for the agency to respond to such requests,  
5           and the range in number of days for the agency to  
6           respond to such requests; and

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

10       When reporting the total number of requests filed, agen-  
11       cies shall distinguish between first person requests for per-  
12       sonal records and other kinds of requests, and shall pro-  
13       vide a total number for each category of requests.”.

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

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

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

21           “(A) any information that would be an  
22           agency record subject to the requirements of  
23           this section when maintained by an agency in  
24           any format, including an electronic format; and

1           “(B) any information described under sub-  
2           paragraph (A) that is maintained for an agency  
3           by an entity under a contract between the agen-  
4           cy and the entity.”.

5 **SEC. 11. OFFICE OF GOVERNMENT INFORMATION SERV-**  
6 **ICES.**

7           (a) IN GENERAL.—Chapter 5 of title 5, United  
8 States Code, is amended—

9           (1) by redesignating section 596 as section 597;  
10          and

11          (2) by inserting after section 595 the following:

12 **“§ 596. Office of Government Information Services**

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

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

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

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

24               “(3) recommend policy changes to Congress  
25 and the President to improve the administration of

1 section 552, including whether agencies are receiving  
2 and expending adequate funds to ensure compliance  
3 with that section; and

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

10 (b) TECHNICAL AND CONFORMING AMENDMENT.—  
11 The table of sections for chapter 5 of title 5, United States  
12 Code, is amended by striking the item relating to section  
13 596 and inserting the following:

“596. Office of Government Information Services.  
“597. Authorization of appropriations.”.

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

17 **SEC. 12. ACCESSIBILITY OF CRITICAL INFRASTRUCTURE**  
18 **INFORMATION.**

19 (a) IN GENERAL.—Not later than January 1 of each  
20 of the 3 years following the date of the enactment of this  
21 Act, the Comptroller General of the United States shall  
22 submit to Congress a report on the implementation and  
23 use of section 214 of the Homeland Security Act of 2002  
24 (6 U.S.C. 133), including—

1           (1) the number of persons in the private sector,  
2           and the number of State and local agencies, that vol-  
3           untarily furnished records to the Department under  
4           this section;

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

7           (3) such recommendations as the Comptroller  
8           General considers appropriate regarding improve-  
9           ments in the collection and analysis of sensitive in-  
10          formation held by persons in the private sector, or  
11          by State and local agencies, relating to  
12          vulnerabilities of and threats to critical infrastruc-  
13          ture, including the response to such vulnerabilities  
14          and threats; and

15          (4) an examination of whether the nondisclo-  
16          sure of such information has led to the increased  
17          protection of critical infrastructure.

18          (b) FORM.—The report shall be submitted in unclas-  
19          sified form, but may include a classified annex.

20   **SEC. 13. REPORT ON PERSONNEL POLICIES RELATED TO**  
21                   **FOIA.**

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

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

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

6                 (B) enhance the stature of officials admin-  
7           istering that section within the executive  
8           branch;

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

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

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

21          (5) whether other changes to personnel policies  
22          can be made to ensure that there is a clear career  
23          advancement track for individuals interested in de-  
24          voting themselves to a career in compliance with  
25          such sections; and

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

○