

110TH CONGRESS
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S. 2427

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

IN THE SENATE OF THE UNITED STATES

DECEMBER 6, 2007

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

A BILL

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

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Openness Promotes
5 Effectiveness in our National Government Act of 2007”
6 or the “OPEN Government Act of 2007”.

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

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

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

22 (a) IN GENERAL.—Section 552(a)(4)(E) of title 5,
 23 United States Code, is amended—

24 (1) by inserting “(i)” after “(E)”; and

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

1 “(ii) For purposes of this section, a
 2 complainant has substantially prevailed if
 3 the complainant has obtained relief
 4 through either—

5 “(I) a judicial order, or an enforceable
 6 written agreement or consent decree; or

7 “(II) a voluntary or unilateral change in
 8 position by the agency, provided that the com-
 9 plainant’s claim is not insubstantial.”.

10 (b) LIMITATION.—Notwithstanding section 1304 of
 11 title 31, United States Code, no amounts may be obligated
 12 or expended from the Claims and Judgment Fund of the
 13 United States Treasury to pay the costs resulting from
 14 fees assessed under section 552(a)(4)(E) of title 5, United
 15 States Code. Any such amounts shall be paid only from
 16 funds annually appropriated for the Federal agency
 17 against which a claim or judgment has been rendered.

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

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

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

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

24 “(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 striking
14 “determination;” and inserting “determination. The
15 20-day period shall commence on the date on which
16 the request is first received by the appropriate com-
17 ponent of the agency, but in any event no later than
18 ten days after the request is first received by any
19 component of the agency that is designated in the
20 agency’s FOIA regulations to receive FOIA requests.
21 The 20-day period shall not be tolled by the agency
22 except—

23 “(I) that the agency may make one request to
24 the requester for information and toll the 20-day pe-

1 riod while it is awaiting such information that it has
 2 reasonably requested from the FOIA requester; or

3 “(II) if necessary to clarify with the requester
 4 issues regarding fee assessment. In either case, the
 5 agency’s receipt of the requester’s response to the
 6 agency’s request for information or clarification ends
 7 the tolling period;”.

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

11 (b) COMPLIANCE WITH TIME LIMITS.—

12 (1) IN GENERAL.—

13 (A) SEARCH FEES.—Section 552(a)(4)(A)
 14 of title 5, United States Code, is amended by
 15 adding at the end the following:

16 “(viii) an agency shall refund search
 17 fees under this subparagraph if the agency
 18 fails to comply with any time limit under
 19 paragraph (6), provided that—

20 “(I) no unusual or exceptional
 21 circumstances (as those terms are de-
 22 fined for purposes of paragraphs
 23 (6)(B) and (C), respectively) apply to
 24 the processing of the request; and

1 “(II) such refunds shall be paid
 2 from annual appropriations provided
 3 to that agency.”.

4 (B) PUBLIC LIAISON.—Section
 5 552(a)(6)(B)(ii) of title 5, United States Code,
 6 is amended by inserting between the first and
 7 second sentences the following: “To aid the re-
 8 quester, each agency shall make available its
 9 FOIA Public Liaison, who shall assist in the
 10 resolution of any disputes between the requester
 11 and the agency.”.

12 (2) EFFECTIVE DATE AND APPLICATION.—The
 13 amendment made by this subsection shall take effect
 14 1 year after the date of enactment of this Act and
 15 apply to requests for information under section 552
 16 of title 5, United States Code, filed on or after that
 17 effective date.

18 **SEC. 7. INDIVIDUALIZED TRACKING NUMBERS FOR RE-**
 19 **QUESTS AND STATUS INFORMATION.**

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

23 “(7) Each agency shall—

24 “(A) establish a system to assign an individual-
 25 ized tracking number for each request received that

1 will take longer than ten days to process and provide
2 to each person making a request the tracking num-
3 ber assigned to the request; and

4 “(B) establish a telephone line or Internet serv-
5 ice that provides information about the status of a
6 request to the person making the request using the
7 assigned tracking number, including—

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

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

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

17 **SEC. 8. REPORTING REQUIREMENTS.**

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

20 (1) in subparagraph (B)(ii), by inserting after
21 the first comma “the number of occasions on which
22 each statute was relied upon,”;

23 (2) in subparagraph (C), by inserting “and av-
24 erage” after “median”;

1 (3) in subparagraph (E), by inserting before the
2 semicolon “, based on the date on which the requests
3 were received by the agency”;

4 (4) by redesignating subparagraphs (F) and
5 (G) as subparagraphs (N) and (O), respectively; and

6 (5) by inserting after subparagraph (E) the fol-
7 lowing:

8 “(F) the average number of days for the
9 agency to respond to a request beginning on the
10 date on which the request was received by the
11 agency, the median number of days for the
12 agency to respond to such requests, and the
13 range in number of days for the agency to re-
14 spond to such requests;

15 “(G) based on the number of business days
16 that have elapsed since each request was origi-
17 nally received by the agency—

18 “(i) the number of requests for
19 records to which the agency has responded
20 with a determination within a period up to
21 and including 20 days, and in 20-day in-
22 crements up to and including 200 days;

23 “(ii) the number of requests for
24 records to which the agency has responded

1 with a determination within a period great-
2 er than 200 days and less than 301 days;

3 “(iii) the number of requests for
4 records to which the agency has responded
5 with a determination within a period great-
6 er than 300 days and less than 401 days;
7 and

8 “(iv) the number of requests for
9 records to which the agency has responded
10 with a determination within a period great-
11 er than 400 days;

12 “(H) the average number of days for the
13 agency to provide the granted information be-
14 ginning on the date on which the request was
15 originally filed, the median number of days for
16 the agency to provide the granted information,
17 and the range in number of days for the agency
18 to provide the granted information;

19 “(I) the median and average number of
20 days for the agency to respond to administra-
21 tive appeals based on the date on which the ap-
22 peals originally were received by the agency, the
23 highest number of business days taken by the
24 agency to respond to an administrative appeal,
25 and the lowest number of business days taken

1 by the agency to respond to an administrative
2 appeal;

3 “(J) data on the 10 active requests with
4 the earliest filing dates pending at each agency,
5 including the amount of time that has elapsed
6 since each request was originally received by the
7 agency;

8 “(K) data on the 10 active administrative
9 appeals with the earliest filing dates pending
10 before the agency as of September 30 of the
11 preceding year, including the number of busi-
12 ness days that have elapsed since the requests
13 were originally received by the agency;

14 “(L) the number of expedited review re-
15 quests that are granted and denied, the average
16 and median number of days for adjudicating ex-
17 pedited review requests, and the number adju-
18 dicated within the required 10 days;

19 “(M) the number of fee waiver requests
20 that are granted and denied, and the average
21 and median number of days for adjudicating fee
22 waiver determinations;”.

23 (b) APPLICABILITY TO AGENCY AND EACH PRIN-
24 CIPAL COMPONENT OF THE AGENCY.—Section 552(e) of
25 title 5, United States Code, is amended—

1 (1) by redesignating paragraphs (2) through
 2 (5) as paragraphs (3) through (6), respectively; and
 3 (2) by inserting after paragraph (1) the fol-
 4 lowing:

5 “(2) Information in each report submitted
 6 under paragraph (1) shall be expressed in terms of
 7 each principal component of the agency and for the
 8 agency overall.”.

9 (c) PUBLIC AVAILABILITY OF DATA.—Section
 10 552(e)(3) of title 5, United States Code, (as redesignated
 11 by subsection (b) of this section) is amended by adding
 12 after the period “In addition, each agency shall make the
 13 raw statistical data used in its reports available electroni-
 14 cally to the public upon request.”.

15 **SEC. 9. OPENNESS OF AGENCY RECORDS MAINTAINED BY A**
 16 **PRIVATE ENTITY.**

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

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

22 “(A) any information that would be an
 23 agency record subject to the requirements of
 24 this section when maintained by an agency in
 25 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 Government contract, for
4 the purposes of records management.”.

5 **SEC. 10. OFFICE OF GOVERNMENT INFORMATION SERV-**
6 **ICES.**

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

10 “(h) There is established the Office of Government
11 Information Services within the National Archives and
12 Records Administration. The Office of Government Infor-
13 mation Services shall review policies and procedures of ad-
14 ministrative agencies under section 552, shall review com-
15 pliance with section 552 by administrative agencies, and
16 shall recommend policy changes to Congress and the
17 President to improve the administration of section 552.
18 The Office of Government Information Services shall offer
19 mediation services to resolve disputes between persons
20 making requests under section 552 and administrative
21 agencies as a non-exclusive alternative to litigation and,
22 at the discretion of the Office, may issue advisory opinions
23 if mediation has not resolved the dispute.

24 “(i) The Government Accountability Office shall con-
25 duct audits of administrative agencies on the implementa-

1 tion of section 552 and issue reports detailing the results
2 of such audits.

3 “(j) Each agency shall—

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

7 “(a) GENERAL DUTIES.—The Chief FOIA Officer of
8 each agency shall, subject to the authority of the head of
9 the agency—

10 “(A) have agency-wide responsibility for effi-
11 cient and appropriate compliance with the FOIA;

12 “(B) monitor FOIA implementation
13 throughout the agency and keep the head of the
14 agency, the chief legal officer of the agency, and
15 the Attorney General appropriately informed of
16 the agency’s performance in implementing the
17 FOIA;

18 “(C) recommend to the head of the agency
19 such adjustments to agency practices, policies,
20 personnel, and funding as may be necessary to
21 improve its implementation of the FOIA;

22 “(D) review and report to the Attorney
23 General, through the head of the agency, at
24 such times and in such formats as the Attorney

1 General may direct, on the agency's perform-
2 ance in implementing the FOIA; and

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

12 “(2) Designate one or more FOIA Public Liai-
13 sons who shall be appointed by the Chief FOIA Offi-
14 cer.

15 “(b) GENERAL DUTIES.—FOIA Public Liaisons shall
16 report to the agency Chief FOIA Officer and shall serve
17 as supervisory officials to whom a FOIA requester can
18 raise concerns about the service the FOIA requester has
19 received from the FOIA Requester Center, following an
20 initial response from the FOIA Requester Center Staff.
21 FOIA Public Liaisons shall be responsible for assisting in
22 reducing delays, increasing transparency and under-
23 standing of the status of requests, and assisting in the
24 resolution of disputes.

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

4 **SEC. 11. REPORT ON PERSONNEL POLICIES RELATED TO**
5 **FOIA.**

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

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

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

14 (B) enhance the stature of officials admin-
15 istering that section within the executive
16 branch;

17 (2) whether performance of compliance with
18 section 552 of title 5, United States Code, should be
19 included as a factor in personnel performance eval-
20 uations for any or all categories of Federal employ-
21 ees and officers;

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

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

5 (5) whether other changes to personnel policies
6 can be made to ensure that there is a clear career
7 advancement track for individuals interested in de-
8 voting themselves to a career in compliance with
9 such sections; and

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

○