

FREEDOM OF INFORMATION ACT AMENDMENTS OF 2007

MARCH 12, 2007.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. WAXMAN, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 1309]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 1309) 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, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

	Page
Purpose and Summary	2
Background and Need for Legislation	2
Legislative History	4
Section-by-Section	5
Explanation of Amendments	9
Committee Consideration	9
Rollcall Votes	9
Application of Law to the Legislative Branch	9
Statement of Oversight Findings and Recommendations of the Committee	9
Statement of General Performance Goals and Objectives	9
Constitutional Authority Statement	9
Federal Advisory Committee Act	9
Unfunded Mandate Statement	9
Earmark Identification	10

Committee Estimate	10
Budget Authority and Congressional Budget Office Cost Estimate	10
Changes in Existing Law Made by the Bill as Reported	14
Additional Views of Representative Tom Davis	21

The amendment is as follows:

At the end of the bill, add the following new section (and conform the table of contents accordingly):

SEC. 15. REQUIREMENT TO DESCRIBE EXEMPTIONS AUTHORIZING DELETIONS OF MATERIAL PROVIDED UNDER FOIA.

Section 552(b) of title 5, United States Code, is amended in the matter appearing after paragraph (9)—

(1) in the second sentence, by inserting after “amount of information deleted” the following: “, and the exemption under which the deletion is made,”; and

(2) in the third sentence, by inserting after “amount of the information deleted” the following: “, and the exemption under which the deletion is made,”

PURPOSE AND SUMMARY

H.R. 1309, the Freedom of Information Act Amendments of 2007, was introduced on March 5, 2007, by Reps. William Lacy Clay, Todd Russell Platts, and Henry A. Waxman. The legislation promotes and enhances public disclosure of government information pursuant to the Freedom of Information Act (FOIA). This bill will restore the presumption of disclosure, help requesters obtain timely responses from agencies, improve transparency in agency compliance with FOIA, provide an alternative to litigation for FOIA requesters, and provide accountability for agency decisions on whether to release information under FOIA requests.

BACKGROUND AND NEED FOR LEGISLATION

With the enactment of FOIA in 1966, the federal government established a policy of openness toward information within its control. FOIA establishes a presumptive right for the public to obtain identifiable, existing records of federal agencies. Any member of the public may use FOIA to request access to government information. Requesters do not have to show a need or reason for seeking information.

The burden of proof for withholding requested material rests with the department or agency that seeks to deny the request. Agencies may deny access only to records, or portions of records, that fall within nine exemptions. The exemptions include information that relates solely to an agency’s internal personnel rules and practices; internal government deliberative communications about a decision before an announcement; information about an individual that, if disclosed, would cause an unwarranted invasion of personal privacy; and law enforcement records, particularly with regard to ongoing investigations.¹

¹The nine categories of information exempted from the presumption of access are: (1) certain national security or foreign policy information as authorized by an executive order; (2) personnel rules and practices of an agency; (3) information specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information; (5) inter-agency or intra-agency memoranda; (6) personnel and medical files; (7) certain records compiled for law enforcement purposes; (8) certain reports related to the regulation of financial institutions; and (9) geological and geophysical information and data.

Access to information under FOIA has been impacted by memoranda issued by attorneys general. Under the Clinton Administration, the Attorney General instructed agencies to make discretionary disclosures to FOIA requesters, and to withhold records only if a foreseeable harm existed from that release. An October 1993 memorandum from Attorney General Janet Reno stated:

In short, it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be.²

In 2001, the Bush Administration reversed this policy with a memorandum from Attorney General John Ashcroft that encouraged agencies to limit discretionary disclosures of information, calling on them to exercise “full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.” Similarly, the memo stated that the Department of Justice would defend decisions to withhold information from requesters unless those decisions “lack a sound legal basis.”³

FOIA has been used effectively by journalists, public interest organizations, corporations, and individuals to access government information. However, its use has been plagued by delays and backlogs, requesters often have difficulty obtaining information about the status of their requests, and a recent Supreme Court decision has hampered requesters’ ability to litigate their claims. H.R. 1309 would address these and other concerns about the implementation of FOIA.

Executive agencies receive hundreds of thousands of FOIA requests annually. The response to a request may involve a single sheet of paper, thousands of documents, or information in electronic format. An oversight hearing held by the Subcommittee on Government Management, Finance, and Accountability in July 2006 indicated that the timeliness of agency response to FOIA requests is a significant and ongoing problem. Although the law requires that agencies respond to a FOIA request within 20 days, requesters often do not receive the requested information for much longer periods of time. During the July 2006 hearing, the Government Accountability Office (GAO) testified that the number of pending FOIA requests carried over from year to year—also known as the backlog—has been increasing significantly. In Fiscal Year 2005, for example, the backlog increased by approximately 200,000, a 24% increase from the previous year.

H.R. 1309 addresses this backlog by ensuring that the 20-day statutory clock runs immediately upon an agency’s receipt of a request and by imposing consequences on federal agencies for missing the deadline. The bill also requires agencies to provide requesters with individualized tracking numbers for each request and ac-

² Janet Reno, Attorney General, *Memorandum for Heads of Departments and Agencies, Subject: The Freedom of Information Act* (Oct. 4, 1993).

³ John Ashcroft, Attorney General, *Memorandum for Heads of All Federal Departments and Agencies, Subject: The Freedom of Information Act* (Oct. 12, 2001).

cess to a telephone or Internet hotline with information about the status of requests.

Although GAO and other organizations use FOIA annual reports compiled by agencies to analyze compliance with FOIA, these reports do not contain the information needed to understand the extent of delays and compare across agencies. H.R. 1309 would improve transparency in agency compliance with FOIA by strengthening these reporting requirements to identify excessive delays. The bill also requires each agency to make the raw data used to compile its annual reports publicly available. This change will enable analysts to better understand agency performance.

Under FOIA, requesters who do not feel that an agency is being adequately responsive may sue for the information. However, requesters have argued that they would benefit from having access to an ombudsman for FOIA who could provide guidance to requesters before, or as an alternative to, litigation. As journalist Clark Hoyt described it in his testimony before the Information Policy Subcommittee in March 2007, these requesters are looking for “a champion for FOIA training and compliance, a place where individuals seeking to exercise their rights under FOIA can go for help short of filing a lawsuit.” H.R. 1309 creates this ombudsman function within an Office of Government Information Services in the National Archives and Records Administration (NARA).

A new concern has arisen in the last several years for FOIA requesters who litigate their claims. In 2001, the Supreme Court, in *Buckhannon Board and Care Home, Inc. v. West Virginia Dep’t of Health and Human Resources*, 532 U.S. 598 (2001), eliminated the “catalyst theory” of attorney fee recovery under certain federal civil rights laws. The court decided that litigants are only eligible for recovery of attorney fees if they prevail through a court ruling. The application of *Buckhannon* to FOIA prevents requesters from any eligibility for recovery of attorney fees if an agency provides the requested records prior to a court decision. FOIA requesters have raised concerns that this system gives agencies the incentive to delay compliance with a FOIA request until just before a court decision. H.R. 1309 addresses this by clarifying *Buckhannon* does not apply to FOIA cases.

LEGISLATIVE HISTORY

H.R. 1309, the Freedom of Information Act Amendments of 2007, was introduced by Reps. Wm. Lacy Clay, Todd Russell Platts, and Henry A. Waxman on March 5, 2007, and referred to the Committee on Oversight and Government Reform, and was subsequently referred to the Subcommittee on Information Policy, Census and National Archives.

The legislation resembles legislation introduced in the House and Senate in 2005. Specifically, during the 109th Congress, Sens. John Cornyn and Patrick Leahy introduced S. 394, and Rep. Lamar Smith introduced its companion bill, H.R. 867. S. 394 was reported by the Senate Committee on the Judiciary by voice vote without amendment and without an accompanying report.

On September 27, 2006, the Subcommittee on Government Management, Finance, and Accountability reported H.R. 867 to the full Committee on Government Reform, amending the bill to include two provisions offered by Rep. Waxman. The first provision of this

amendment aimed to overturn both the “Ashcroft Memo” (restricting release of information under FOIA) and the “Card Memo” (safeguarding information considered “sensitive but unclassified”). The second provision increased transparency in agency reporting on FOIA implementation. It required agencies to provide more information about the time spent in responding to FOIA requests, their responsiveness to expedited review requests, and the time spent on administrative appeals in their annual reports. The bill was not considered by the full Committee. The substance of the two provisions offered by Rep. Waxman to H.R. 867 is contained in H.R. 1309.

On February 15, 2007, the Subcommittee on Information Policy, Census and National Archives held a hearing on FOIA and analyzed agency efforts to meet FOIA requirements. The witnesses were Linda Koontz, Director, Information Management, Government Accountability Office; Melanie Ann Pustay, Acting Director, Office of Information and Privacy; U.S. Department of Justice; Clarke Hoyt, McClatchy Newspapers, on behalf of the Sunshine in Government Initiative; Anthony Romero, Executive Director, American Civil Liberties Union; and Thomas Blanton, Director, National Security Archive at George Washington University.

The Subcommittee on Information Policy, Census and National Archives held a markup to consider H.R. 1309 on March 6, 2007. The subcommittee approved the bill by voice vote, and reported it favorably to the full Committee.

The Committee held a markup to consider H.R. 1309 on March 8, 2007, and ordered the bill to be reported, as amended, by a voice vote.

SECTION-BY-SECTION

Section 1. Short title

This section provides the short title of H.R. 1309 as the “Freedom of Information Act Amendments of 2007.”

Section 2. Findings

This section lists several findings articulating the sentiment that the effective functioning of a free government depends largely on the force of an informed public with the widest possible understanding regarding the quality of government service rendered by all elective or appointed public officials or employees. In addition, this section notes that the Freedom of Information Act establishes “a strong presumption in favor of disclosure” that applies to all agencies governed by the Act.

Congress finds that in practice, FOIA has not always lived up its ideals of the Act and Congress should therefore regularly review FOIA in order to determine whether further changes and improvements are necessary to ensure that the government remains open and accessible to the American people, based upon a fundamental “right to know.”

Section 3. Protection of fee status for news media

This section clarifies that agencies may not deny fee waivers for legitimate journalists solely on the basis of an absence of institutional associations of the requester. Instead, agencies must con-

sider the prior publication history of the requester, including books, articles, newsletters, television and radio broadcasts, and Internet publications. If the requester has no prior publication history or current affiliation, the agency must consider the requester's stated intent to distribute information to a reasonably broad audience.

This provision is meant to ensure that fee waivers are also available to journalists associated with less traditional media outlets or distribution methods, particularly those that rely on the Internet to reach a broad audience.

Section 4. Recovery of attorney fees and litigation costs

This section clarifies that, for the purpose of the recovery of attorney fees and other litigation costs, requesters have "substantially prevailed" in FOIA litigation when they have obtained relief from the agency through enforceable decisions or orders, as well as through voluntary or unilateral changes in position by the agency.

The section responds to the Supreme Court's ruling in *Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598 (2001), which eliminated the "catalyst theory" of attorney fee recovery under certain federal civil rights laws. This section makes clear that the *Buckhannon* decision does not apply to FOIA cases and ensures that requesters are eligible for attorney fees and other litigation costs if they obtain relief from the agency during the litigation.

Section 5. Disciplinary actions for arbitrary and capricious rejections of requests

This section enhances provisions in current law that authorize disciplinary action against government officials who arbitrarily and capriciously deny records to FOIA requesters. It directs the Attorney General to notify the Special Counsel of civil actions taken for arbitrary and capricious rejections of requests for agency records, and to annually submit reports to Congress on the number of these actions taken. The section further requires the Special Counsel to submit annual reports to Congress on the actions taken by the Special Counsel regarding these civil actions.

Section 6. Time limits for agencies to act on requests

Under FOIA, agencies are required to respond to requesters with a determination within 20 days. Subsection (a) requires that the 20-day statutory clock run immediately upon agency receipt of a FOIA request. The agency must obtain the consent of the requesting party to toll the 20-day period.

Subsection (b) states that an agency may not charge a requester fees for document search, duplication, or review if the agency fails to comply with the 20 day deadline for responding to that request with a determination. This provision would apply only to FOIA requests filed on or after the effective date of this amendment.

Section 7. Individualized tracking numbers for requests and status information

This section requires each agency to establish a system to assign an individualized tracking number for each request for information pursuant to FOIA. Under this provision, each agency would have 10 days after receiving a request to provide the requester with a

tracking number. Each agency also would be required to establish a telephone line or Internet service that provides information about the status of requests, including the date on which the agency received the request and an estimated date on which the agency will complete action on the request.

This provision will take effect one year after the date of enactment and apply only to requests for information filed on or after that effective date.

Section 8. Specific citations in exemptions

This section of the bill provides that Congress may not create new statutory exemptions under FOIA unless it does so explicitly. Accordingly, for any new statutory exemption to have effect, the statute must cite directly to 5 U.S.C. 552(b)(3), thereby conveying congressional intent to create a new (b)(3) exemption.

Section 9. Reporting requirements

This section mandates that agencies provide additional information about their compliance with FOIA in annual reports to the Attorney General detailing compliance information for each principal component of the agency as well as the agency overall.

This section calls on agencies to report on the number of occasions on which a particular statute was relied upon to deny a FOIA request and the average number of days FOIA requests have been pending before that agency, and to provide additional information about the number of days taken by an agency to process different types of requests.

Subsection (a) adds several new requirements for data to be included in agency annual reports. The subsection calls for agencies to provide additional information about the timeframes for responding to requests with a determination, including the number of requests that the agency has responded to within the required 20 days; information about the timeframes for providing granted information to requesters; data regarding agency responsiveness to administrative appeals; data on the 10 active requests and administrative appeals with the earliest filing dates pending at the agency; data regarding agency responsiveness to expedited review requests; and data regarding agency grants of fee waivers.

Subsection (b) requires that each agency make the raw statistical data used in its compliance reports available electronically to the public upon request.

Section 10. Openness of agency records maintained by a private entity

This section clarifies that agency records kept by private contractors licensed by the government to undertake recordkeeping functions remain subject to FOIA just as if those records were maintained by the relevant government agency.

Section 11. Office of government information services

This section creates an Office of Government Information Services within the NARA. This office is to be headed by a National Information Advocate, who will report directly to the Archivist of the United States.

The Office of Government Information Services will provide guidance to FOIA requesters as a non-exclusive alternative to litigation. Specifically, the office may provide nonbinding informal guidance, fact-finding reviews, and opinions to requesters who have been denied records or have not received a timely response to a FOIA request or administrative appeal. In addition, the office will review FOIA policies and procedures by federal agencies and recommend policy changes to Congress and the president designed to improve administration of FOIA.

The Committee expects that the Office of Government Information Services will be responsive to requests for assistance and will, wherever possible, acknowledge these requests in a timely fashion.

Section 12. Accessibility of critical infrastructure information

This Section requires reports on the implementation of the Critical Infrastructure Information Act of 2002. It requires the Comptroller General to report to Congress on the number of private sector, state, and local agency submissions of CII data to the Department of Homeland Security and the number of requests for access to records. The Comptroller General also will be required to report on whether the nondisclosure of CII material has led to increased protection of critical infrastructure.

Section 13. Report on personnel policies related to FOIA

This Section adds a new provision requiring the Office of Personnel Management (OPM) to submit to Congress a report that examines whether certain changes to executive branch personnel policies might enhance agency compliance with FOIA. Specifically, this Section calls on OPM to examine whether FOIA compliance should be included as a factor in personnel performance evaluations; whether an employment classification series specific to compliance with FOIA should be established; whether employees doing FOIA related work should be paid differently; whether there is a clear career advancement track for individuals interested in devoting themselves to FOIA compliance; and whether the executive branch should require all federal employees to undertake awareness training regarding FOIA.

Section 14. Promotion of public disclosure

This Section codifies a “presumption of disclosure” by reaffirming the presumption that records should be released to the public if disclosure is allowable under law and the agency cannot “reasonably foresee” a harm from such a disclosure. Subsection (h)(2) of this Section mandates that all guidance provided to federal employees be consistent with this presumption.

Section 15. Requirement to describe exemptions authorizing deletions of material provided under FOIA

This Section provides that agencies should note the exemption or exemptions used to withhold information on the partial records that are released, unless revealing that information would harm an interest protected by the exemption. It further provides that agencies should, wherever technically feasible, indicate the exemption used at the place in the record where the deletion is made.

EXPLANATION OF AMENDMENTS

The following amendment was adopted in Committee:

Rep. Carolyn Maloney offered an amendment creating a new Section 15, which was accepted by voice vote. The amendment calls on agencies to, whenever possible; indicate the exemption used to delete material at the place in a record where the deletion is made.

COMMITTEE CONSIDERATION

On Thursday, March 8, 2007, the Committee ordered the bill reported to the House by a voice vote.

ROLLCALL VOTES

The Committee held no rollcall votes on this bill.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104-1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill provides enhanced transparency to the operations of the executive branch. As such this bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives are reflected in the descriptive portions of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress to enact the law proposed by H.R. 1309. Article I, Section 8, Clause 18 of the Constitution of the United States grants the Congress the power to enact this law.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, P.L. 104-4) requires a statement whether the provi-

sions of the reported bill include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office that is included herein.

EARMARK IDENTIFICATION

H.R. 1255 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 1309. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under Section 402 of the Congressional Budget Act.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of Rule XIII of the Rules of the House of Representatives and Section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and Section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 985 from the Director of Congressional Budget Office:

MARCH 12, 2007.

Hon. HENRY A. WAXMAN,
*Chairman, Committee on Oversight and Government Reform,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1309, the OPEN Government Act of 2007.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

PETER R. ORSZAG.

Enclosure.

H.R. 1309—OPEN Government Act of 2007

Summary: H.R. 1309 would make several amendments to the Freedom of Information Act (FOIA), which generally allows any person the right to obtain federal agency records protected from disclosure. Specifically, the legislation would:

- Expand FOIA's definition of the news media;
- Require time limits for agencies to act upon FOIA requests and not allow fees to be collected that are for requests not completed within time limits;
- Allow greater recovery of attorney fees and litigation costs by FOIA requestors if information is withheld by the government;

- Require agencies to provide status information for FOIA requests;
- Amend the types of information that are exempt from disclosure under FOIA;
- Require federal agencies to prepare additional reports to the Congress concerning FOIA activities;
- Require new reports concerning agencies' FOIA programs from the Government Accountability Office (GAO), the Department of Justice (DOJ), the Office of the Special Counsel (OSC), and the Office of Personnel Management (OPM); and
- Establish an Office of Government Information Services to provide policy guidance to federal agencies and review FOIA policies and procedures.

CBO estimates that enacting this legislation would increase direct spending by \$6 million in 2008 and \$63 million over the 2008–2017 period to reimburse citizens making FOIA requests for attorneys' fees and litigation cost payments. CBO also estimates that enacting H.R. 1309 would result in a loss of fees, which are recorded in the budget as revenues, of \$10 million over the 2008–2017 period.

In addition, we estimate that implementing the bill would increase costs subject to appropriation by \$9 million in 2008 and \$53 million over the 2008–2012 period to establish the OGIS and implement new agency reporting requirements. H.R. 1309 would codify and expand Executive Order 13392 that requires agencies to improve their FOIA operations, including improving efficiency and customer services.

H.R. 1309 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 1309 is shown in the following table. The costs of this legislation fall within budget function 800 (general government) and all other budget functions that include federal salaries and expenses.

Basis of estimate: For this estimate, CBO assumes that H.R. 1309 will be enacted before the start of 2008, that the necessary funds will be provided for each year, and that spending will follow historical patterns for similar programs.

Enacted in 1966, FOIA was designed to enable any person—individual or corporate, regardless of citizenship status—to request, without explanation or justification, access to existing, identifiable, and unpublished executive branch records on any topic. The Office of Management and Budget issues guidelines to agencies on fees to charge for providing copies of information requested, while DOJ oversees agency compliance with FOIA. Based on information from GAO for fiscal year 2005, federal agencies (excluding the Social Security Administration) received more than 2.5 million FOIA requests. In addition, DOJ reports that in fiscal year 2005, agencies devoted about 5,000 employee-years to processing and litigating FOIA requests at a cost of over \$300 million.

	By fiscal year, in millions of dollars—									
	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
CHANGES IN DIRECT SPENDING										
Attorneys' Fees and Litigation Costs:										
Estimated Budget Authority	6	6	6	6	7	7	7	7	7	7
Estimated Outlays	6	6	6	6	6	6	6	7	7	7
CHANGES IN REVENUES										
FOIA Fees:										
Estimated Revenues	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1
CHANGES IN SPENDING SUBJECT TO APPROPRIATION										
Office of Government Information Services:										
Estimated Authorization Level	4	5	5	5	6	6	6	6	6	6
Estimated Outlays	3	4	5	5	6	6	6	6	6	6
FOIA Reporting Requirements:										
Estimated Authorization Level	4	5	5	5	6	6	6	6	6	7
Estimated Outlays	3	5	5	5	6	6	6	6	6	7
Other Reports:										
Estimated Authorization Level	3	2	1	*	*	*	*	*	*	*
Estimated Outlays	3	2	1	*	*	*	*	*	*	*
Total Changes:										
Estimated Authorization Level	11	12	11	10	12	12	12	12	12	13
Estimated Outlays	9	11	11	10	12	12	12	12	12	13

Note.—* = less than \$500,000.

Direct spending and revenues

Attorneys' Fees and Litigation Costs. Under the legislation, FOIA requestors would be entitled to recover any attorneys' fees and litigation costs incurred to receive requested information through a judicial or administrative order or because of a voluntary change in an agency's FOIA policies. Those payments would be made from the Judgment Fund (a permanent, indefinite appropriation for claims and judgments against the United States). The cost of implementing this section would depend on the number of successful challenges to FOIA requests that are either fully or partially denied and any changes in FOIA disclosure policies.

Under current law, when a FOIA request is denied or partially granted, the requestor can administratively appeal the decision. If the administrative appeal is also denied, a requestor has the right to appeal the decision in federal court. Based on a review of FOIA decisions by federal courts over the 2001–2005 period, CBO estimates that about 350 FOIA cases are presented annually, and about 6 percent of complainants subsequently challenge agency decisions and are reimbursed for attorneys' fees and litigation costs. Those payments by the Judgment Fund cost about \$3 million a year. In addition, based on information from 15 major agencies over the 2001–2005 period, including the Departments of Veterans Affairs, Treasury, Defense, Labor, State, and Justice, CBO estimates that requestors successfully appeal about 1,000 FOIA cases each year.

CBO estimates that the average cost of litigating a FOIA lawsuit or administrative appeal is about \$6,000 per case. Assuming that agencies act on about 1,000 FOIA cases each year, CBO estimates that enacting this legislation would increase direct spending from the Judgment Fund by \$30 million over the 2008–2012 period, and \$63 million over the 2008–2017 period.

FOIA Fees. FOIA requests from researchers associated with academic institutions and the news media are charged fees for the du-

plication of records that are larger than 100 pages. All other requestors are charged fees for research time and duplication costs after the first two hours of research and 100 pages of copying. Those fees are recorded on the budget as revenues and deposited into the general fund of the Treasury. Based on a review of annual FOIA reports from 15 major agencies over the fiscal year 2003–2005 period, CBO estimates that agencies collect about \$4 million in FOIA fees annually.

Section 3 would expand the definition of news media researchers to FOIA requestors who have no affiliation with a media outlet but have a publishing history. Section 6 would set a period of 20 days for agencies to respond to the initial FOIA request. If this deadline is missed, agencies could not charge fees. CBO expects that those changes would reduce the amount of fees currently collected for retrieval of information. Based on information from some of the 15 major agencies, CBO estimates that removing the fees for some requests would reduce the amount of FOIA fees collected by about \$1 million annually.

Spending subject to appropriation

Office of Government Information Services. Section 11 would establish an Office of Government Information Services under the direction of a National Information Advocate within the National Archives and Records Administration (NARA). The office would provide guidance to FOIA requestors, review FOIA policies and practices and make recommendations.

Based on information from NARA and the cost of similar offices, CBO estimates that implementing this provision would cost about \$5 million annually for additional staff to conduct audits of FOIA programs. CBO expects that the new agency would take about two years to reach that level of effort. We estimate that operations for the new office would cost \$23 million over the 2008–2012 period, assuming appropriation of the necessary amounts.

FOIA Reporting Requirements. Section 9 would add a number of additional reporting requirements to the annual FOIA reports submitted by all federal departments and agencies. This would include FOIA information on the time required to process requests, median and average processing time, expedited and appeal processing time, and the oldest pending requests. In addition, H.R. 1309 would require each agency to provide the raw data used to compile their annual FOIA report. Based on the costs of similar reports, a review of annual reports by 15 major agencies over the 2001–2005 period, and information from some of those agencies, CBO estimates that adding additional reporting requirements would cost about \$5 million annually and about \$24 million over the 2008–2012 period, assuming the appropriation of the necessary amounts.

Other Reports. H.R. 1309 would require new reports by a number of government agencies. GAO would be required to report on critical infrastructure information that is collected by the government from the private sector but is exempt from FOIA disclosure. DOJ and OSC would be required to report on legal actions related to the rejection of FOIA requests, and OPM would be required to produce a report on FOIA personnel policies. Based on the costs of similar reports, CBO estimates that implementing those provisions

would cost \$6 million over the 2008–2012 period, assuming the availability of appropriated funds.

Other Provisions. Additional provisions would require providing tracking numbers for FOIA requests and would expand on the provisions of Executive Order 13392 issued on December 14, 2005. That order calls upon all federal agencies to improve their FOIA operations, including customer service and assistance. Specifically, the order requires agencies to develop FOIA improvement plans, designate a Chief FOIA officer, and establish FOIA requestor centers. Based on information from DOJ and a review of annual reports by 15 major agencies over the 2001–2005 period, CBO estimates that those provisions would not significantly increase agencies’ costs to implement FOIA.

Intergovernmental and private-sector impact: H.R. 1309 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal Costs: Matthew Pickford. Impact on State, Local, and Tribal Governments: Lisa Ramirez-Branum. Impact on the Private-Sector: Amy Petz.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, 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):

TITLE 5, UNITED STATES CODE

* * * * *

PART I—THE AGENCIES GENERALLY

* * * * *

CHAPTER 5—ADMINISTRATIVE PROCEDURE

* * * * *

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

* * * * *

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

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

(1) * * *

* * * * *

(4)(A)(i) * * *

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or non-commercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In making a determination of a representative of the news media under subclause (II), an agency may not deny that status solely on the basis of the absence of institutional associations of the requester, but shall consider the prior publication history of the requester. Prior publication history shall include books, magazine and newspaper articles, newsletters, television and radio broadcasts, and Internet publications. If the requestor has no prior publication history or current affiliation, the agency shall consider the requestor's stated intent at the time the request is made to distribute information to a reasonably broad audience.

* * * * *

(viii) An agency may not charge any fees under this subparagraph if the agency fails to comply with any time limit that applies under paragraph (6).

* * * * *

(E) 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. *For purposes of this section only, a complainant has substantially prevailed if the complainant has obtained relief through either—*

(i) a judicial order, administrative action, or an enforceable written agreement or consent decree; or

(ii) a voluntary or unilateral change in position by the opposing party, in a case in which the complainant's claim or defense was not frivolous.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall—

- (I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and*
- (II) annually submit a report to Congress on the number of such civil actions in the preceding year.*
- (iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).*

* * * * *

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

- (i) [determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request] within the 20-day period commencing on the date on which the request is first received by the agency (excepting Saturdays, Sundays, and legal public holidays), which shall not be tolled without the consent of the party filing the request, determine whether to comply with such 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*

* * * * *

(7) Each agency shall—

- (A) establish a system to assign an individualized tracking number for each request for information under this section;*
- (B) not later than 10 days after receiving a request, provide each person making a request with the tracking number assigned to the request; and*
- (C) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including—*
 - (i) the date on which the agency originally received the request; and*
 - (ii) an estimated date on which the agency will complete action on the request.*

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

- (1) * * *

* * * * *

[(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;]

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute—

- (A) if enacted after the date of enactment of the Freedom of Information Act Amendments of 2007, specifically cites to this section; and*
- (B)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue;*
or

(ii) *establishes particular criteria for withholding or refers to particular types of matters to be withheld;*

* * * * *

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

Any reasonably 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. The amount of information deleted, *and the exemption under which the deletion is made*, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, *and the exemption under which the deletion is made*, shall be indicated at the place in the record where such deletion is made.

* * * * *

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding ~~fiscal year and which~~ *fiscal year*. *Information in the report shall be expressed in terms of each principal component of the agency and for the agency overall, and shall include—*

(A) * * *

(B)(i) * * *

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), *the number of occasions on which each statute was relied upon*, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median *and average* number of days that such requests had been pending before the agency as of that date;

* * * * *

(E) the median number of days taken by the agency to process different types of requests, *based on the date on which each request was initially received by the agency;*

(F) *the average number of days for the agency to respond to requests beginning on the date on which each request was initially received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;*

(G) *based on the number of business days that have elapsed since each request was initially received by the agency—*

(i) *the number of requests for records to which the agency has responded with a determination within a period greater than 1 day and less than 201 days, stated in 20-day increments;*

(ii) *the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;*

(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the date on which each request was initially received by the agency, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond with a determination to administrative appeals based on the date on which each appeal was initially received by the agency; the highest number of business days taken by the agency to respond to an administrative appeal; and the lowest number of business days taken by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending at the agency, including the amount of time that has elapsed since each request was initially received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending at the agency as of September 30 of the preceding year, including the number of business days that have elapsed since each request was initially received by the agency;

(L) the number of expedited review requests received by the agency, the number that were granted and the number that were denied, the average and median number of days for adjudicating expedited review requests, and the number of requests that adjudicated within the required 10 days;

(M) the number of fee waiver requests that were granted and the number that were denied, and the average and median number of days for adjudicating fee waiver determinations;

[(F)] (N) the total amount of fees collected by the agency for processing requests; and

[(G)] (O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. *In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.*

* * * * *

(f) For purposes of this section, the term—

(1) * * *

[(2) “record” and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.]

(2) "record" and any other term used in this section in reference to information includes—

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

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under a contract between the agency and the entity.

* * * * *

(h)(1) The policy of the Federal Government is to release information to the public in response to a request under this section—

(A) if such release is required by law; or

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

(2) All guidance provided to Federal Government employees responsible for carrying out this section shall be consistent with the policy set forth in paragraph (1).

* * * * *

CHAPTER 21 OF TITLE 44, UNITED STATES CODE

Sec.
2101. Definitions.

* * * * *

2120. Office of Government Information Services.

* * * * *

§ 2120. Office of Government Information Services

(a) *IN GENERAL.*—There is established in the National Archives an office to be known as the "Office of Government Information Services".

(b) *NATIONAL INFORMATION ADVOCATE.*—

(1) *IN GENERAL.*—The Office of Government Information Services shall be under the supervision and direction of an official to be known as the "National Information Advocate" who shall report directly to the Archivist of the United States.

(2) *FUNCTIONS OF OFFICE.*—

(A) *GUIDANCE FOR REQUESTERS.*—

(i) *IN GENERAL.*—The Office of Government Information Services shall provide, as a non-exclusive alternative to litigation, guidance to FOIA requesters.

(ii) *TYPES OF GUIDANCE.*—In providing such guidance, the Office shall provide informal guidance to requesters and may provide fact-finding reviews and opinions to requesters. All reviews and opinions shall be non-binding and shall be initiated only on the request of FOIA requesters.

(iii) *AVAILABILITY.*—Any written opinion issued pursuant to this section shall be available on the Internet in an indexed, readily accessible format.

(iv) *FOIA REQUESTERS.*—*In this paragraph, the term “FOIA requester” or “requester” means a person who has made a request under section 552 of this title and who has been denied records or has not received a timely response to the request or to an administrative appeal.*

(B) *ANALYSES OF AGENCY OPERATIONS.*—*The Office of Government Information Services shall—*

(i) *review polices and procedures of administrative agencies under section 552 of this title and compliance with that section by administrative agencies; and*

(ii) *recommend policy changes to Congress and the President to improve the administration of section 552 of this title, including whether agencies are receiving and expending adequate funds to ensure compliance with that section.*

(3) *IMPACT ON REQUESTER ACCESS TO LITIGATION.*—*Nothing in this section shall affect the right of requesters to seek judicial review as described in section 552 of this title.*

* * * * *

ADDITIONAL VIEWS OF REPRESENTATIVE TOM DAVIS

Legislation designed to streamline and improve the FOIA process was introduced in the 109th Congress by Rep. Lamar Smith. His bill (H.R. 867) had moved through subcommittee to the full committee. Although not perfect, this was a solid bipartisan bill that Republicans introduced and guided through the legislative process. This year, the Majority took his bipartisan bill and added a few of their own twists. We have additional suggestions as well, and Republicans offered two amendments to H.R. 1309 that were not included in the reported bill.

First, the attorney's fee provision appears to significantly lower the bar for the recovery of fees. The language in this bill differs from that in H.R. 867. We should consider the wisdom of this provision, and its implications for the numerous federal statutes providing for attorney fee awards where the United States or a federal agency or official is a party.

The Supreme Court has ruled on this matter, and now some want to codify old, more lucrative, law. There is a great deal of talk about freedom of information, open government, and the public right to know. But I hope when we scratch the surface, it's not about money. You have to assume that if this provision passes, everyone litigating under any private right of action statute will clamor for the same legislative treatment.

The language in Section 4 of H.R. 1309 would allow plaintiffs to receive awards of attorney's fees in almost any case they file so long as they can show that the defending government agency somehow changed its position once the case had been commenced.

Although it is true that FOIA complainants often face an uphill battle when they face off against an agency, the bar suggested in this statute is simply too low a standard. It may actually undermine the stated "dominant objective" of the act by incentivizing departments to avoid disclosure.

Under Section 4 of this bill, once a lawsuit is commenced any change in position by the agency will be tantamount to an admission of liability for attorney's fees. Why settle? Why release the least controversial documents? Why do anything at all other than try to win the case? Isn't the whole point of FOIA to get the information to the public? We should encourage an agency or department to release all appropriate documents early, thus avoiding a long drawn out court battle. This supports the main purpose of the Act: minimizing secrecy and increasing information provided to the public.

Rep. Bill Sali (R-ID) offered an amendment to strike Section 4 to preserve settled judicial precedent regarding attorney's fees and highlight this issue. I hope my colleagues in the House and Senate will take a close look at this section as this legislation moves forward.

Second, the Majority has taken to heart various groups' concerns about the so-called Ashcroft memo. During the Clinton Administration, Attorney General Janet Reno issued a memorandum establishing a presumption of disclosure if no "foreseeable harm" would result from the release of information.

Shortly after 9/11, and recognizing the challenges of that standard, Attorney General Ashcroft issued a memorandum that encouraged agencies to carefully consider the protection of the values and interests embodied in the statutory exemptions to FOIA (national security, privacy, governmental interests, etc.) when making disclosure determinations. It stated that DOJ would defend agency decisions unless they lack a "sound legal basis." Mr. Ashcroft's memorandum superseded the Reno memorandum.

Section 14, however, would codify Attorney General Reno's position. Keep in mind, these are guidance memos. Agency personnel still must follow the law. This appears to intrude on the discretion given to an Administration to implement the law.

In addition, it requires agency officials to see the future. It is quite a burden to place on agency personnel to ascertain "foreseeable harm" when deciding whether or not to release a document.

The exemptions embodied in FOIA are there for a reason. Attorney General Ashcroft did not establish a policy that government information should not be released if it was likely to threaten national security or invade personal privacy. Congress did. Mr. Ashcroft simply said: follow the law Congress passed and we will support you.

I understand there are serious concerns with this Section. Last year, Rep. Smith was a champion of bipartisan FOIA legislation. I understand that Rep. Smith did not cosponsor this bill, but introduced his own measure, H.R. 1326, in part due to this provision.

I hope we can come to real bipartisan agreement on this provision as we move forward. Clearly, improving the procedural aspects of FOIA is important. I trust we can find a way to balance national security with the vital principles of open government.

TOM DAVIS.

