

# APPENDIX A

## The Freedom of Information Act

### Text of the Freedom of Information Act

*The FOIA, originally enacted in 1966 and amended in 1974, 1976, 1986, 1996 and 2002 is codified as Section 552 of Title 5 of the United States Code (5 U.S.C. § 552).*

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

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

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

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

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

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

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

(E) each amendment, revision, or repeal of the foregoing.

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

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

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

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

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

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D); unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available,

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including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of an index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

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

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

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)) shall not make any record available under this paragraph to —

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

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(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(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 noncommercial 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 this clause, the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

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- (II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.
- (v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.
- (vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.
- (vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo, provided that the court's review of the matter shall be limited to the record before the agency.
- (viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.
- (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).
- (C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause is shown.
- (D) Repealed by Pub. L. 98-620, Title IV, 402(2), Nov. 8, 1984, 98 Stat. 3335, 3357.
- (E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
- (ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—
- (I) a judicial order, or an enforceable written agreement or consent decree; or
- (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.
- (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

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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).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

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

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

(i) determine within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request 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

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except—

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person

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making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, “unusual circumstances” means, but only to the extent reasonably necessary to the proper processing of the particular requests—

- (I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
- (II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or
- (III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term “exceptional circumstances” does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing the request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

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- (ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.
  - (iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.
- (E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—
- (I) in cases in which the person requesting the records demonstrates a compelling need; and
  - (II) in other cases determined by the agency.
- (ii) Notwithstanding clause (i), regulations under this subparagraph must ensure—
- (I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and
  - (II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.
- (iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.
- (iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.
- (v) For purposes of this subparagraph, the term “compelling need” means—
- (I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
  - (II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.
- (vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person’s knowledge and belief.
- (F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.
- (7) Each agency shall—
- (A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and
  - (B) 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

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(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)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
- (2) related solely to the internal personnel rules and practices of an agency;
- (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;
- (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;
- (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (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.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

- (A) the investigation or proceeding involves a possible violation of criminal law; and
- (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be

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expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize the withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(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 shall include—

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(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;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was 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 originally received by the agency—(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(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

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- (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 the request was originally filed, 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 to administrative appeals based on the date on which the appeals originally were 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 each agency, including the amount of time that has elapsed since each request was originally received by the agency;
  - (K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;
  - (L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;
  - (M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;
  - (N) the total amount of fees collected by the agency for processing requests; and
  - (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) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.
- (3) 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.
- (4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.
- (5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.
- (6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

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- (f) For purposes of this section, the term—
- (1) “agency” as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and
  - (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 Government contract, for the purposes of records management.
- (g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including—
- (1) an index of all major information systems of the agency;
  - (2) a description of major information and record locator systems maintained by the agency; and
  - (3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.
- (h)(1) There is established the Office of Government Information Services within the National Archives and Records Administration.
- (2) The Office of Government Information Services shall—
- (A) review policies and procedures of administrative agencies under this section;
  - (B) review compliance with this section by administrative agencies; and
  - (C) recommend policy changes to Congress and the President to improve the administration of this section.
- (3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.
- (i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.
- (j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).
- (k) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency—
- (1) have agency-wide responsibility for efficient and appropriate compliance with this section;
  - (2) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;
  - (3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

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(4) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; and

(6) designate one or more FOIA Public Liaisons.

(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

## Legislative History of the FOIA

### 1966 Act

The most significant legislative materials concerning the original FOIA have been reprinted in Subcomm. on Adm. Prac. And Proc. Of the Senate Comm. on the Judiciary, *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*, S. Doc. 93-82, 93d Cong., 2d Sess. (Comm. Print 1974)(commonly “Source Book” or “1966 Source Book”).

1. Hearings:

Senate Committee on the Judiciary, Hearings on S. 1160, May 12, 13, 14, and 21, 1965.

Senate Committee on the Judiciary, Hearings on S. 1663, July 21, 22, and 23, 1964.

House Committee on Government Operations, Hearings on H.R. 5012, March 30 and 31, April 1, 2, and 5, 1956 (and Appendix).

2. Senate Passage—88<sup>th</sup> Congress:

S. Rep. No.1219, 88<sup>th</sup> Cong. 2d Sess. (S. 1666).

Considered and passed Senate, July 28, 1964, 110 Cong. Rec. 17086.

*On motion to reconsider*, July 31, 1964, 110 Cong. Rec. 17666.

3. Reports on S. 1160—89<sup>th</sup> Congress:

S. Rep. No. 813, 89<sup>th</sup> Cong. 1<sup>st</sup> Sess., Committee on the Judiciary, October 4, 1965.

H. Rep. No. 1497, 89<sup>th</sup> Cong. 2d Sess., Committee on Government Operations, May 9, 1966.

4. Floor Consideration of S. 1160—89<sup>th</sup> Congress:

Considered and passed Senate, October 13, 1965, 111 Cong. Rec. 26820.

Considered and passed House, June 20, 1966, 112 Cong. Rec. 13007.

### 1974 Amendments

The most significant legislative materials concerning the 1974 amendments to the FOIA have been reprinted in Subcomm. on Govt. information and Individual Rights of the House Comm. on Govt. Op. et al., *Freedom of Information Act and Amendments of 1974. (PL. 93-502) Source Book: Legislative History, Texts, and other Documents*, 94<sup>th</sup> Cong. 1<sup>st</sup> Sess. (Joint Comm. Print 1975)(commonly “1974 Source Book”).

1. Hearings:

House Committee on Government Operations, May 2, 7, 8, 10, and 16, 1973.

Senate Committee on the Judiciary, April 10, 11, 12, May 8, 9, 10, 16, June 7, 8, 11, and 26, 1972 (and Appendix).

2. House Reports:

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- H. Rep. No. 93-876 accompanying H.R. 12471 (Comm. on Gov't Op.) and No. 93-1380 (Comm. of Conference).
3. Senate Reports:  
  
S. Rep. No. 93-854 accompanying S. 2543 (Comm. on the Judiciary) and No. 93-1200 (Comm. of Conference).
  4. Congressional Record, Vol. 120 (1974):  
  
March 14, considered and passed House.  
May 30, considered and passed Senate, amendment in lieu of S. 2543.  
October 1, Senate agreed to conference report.  
October 7, House agreed to conference report.
  5. Weekly Compilation of Presidential Documents, Vol. 10, No. 42:  
  
October 17, vetoed; Presidential message.
  6. Congressional Record, Vol. 120 (1974):  
  
November 20, House overrode veto.  
November 21, Senate overrode veto.

### 1976 Amendments

- Note: Congress, in passing the "Government in the Sunshine Act," P.L. 94-409, 94<sup>th</sup> Cong, 2d Sess. S.5, Sept. 13, 1976, 90 Stat. 1241, amended section 552(b)(3), the FOIA exemption relating to other statutes. The pages cited in the legislative history are those pages related specifically to the amendment of the third exemption to the FOIA.
1. House Reports:  
  
H. Rep. No. 94-880, Part I (Comm. on Gov't Op.) 9-10, 22-23, 25.  
H. Rep. No. 94-880, Part II (Comm. on the Judiciary) pp. 34, 7, 14, 16, 25.  
H. Rep. No. 94-1441 (Comm. of Conference).
  2. Senate Reports:  
  
S. Rep. No. 94-354, to accompany S. 5 (Comm. on Gov't Op.), and No. 94-1441 (Comm. of Conference).
  3. Congressional Record, daily ed. (1976):  
  
July 28, pp. 7867, 7871-73, 7886, 7897-98: considered and passed House.  
July 29, pp. E4187089: remarks of Rep. McCloskey.

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August 31, pp. H9258-62: House agreed to Conference Report S15043-45: Senate agreed to Conference Report.

4. Weekly Compilation of Presidential Documents, Vol. 12 (1976) No. 42: p. 1334:  
Sept. 13, 1976, signed; Presidential statements.

### 1978 Amendments

Note: Congress, in passing the Civil Service Report Act, P.L. 95-454, 95<sup>th</sup> Cong. 2d Sess., S. 2640, 91 Stat. 1111, amended subsection 552(a)(4)(F) to substitute reference to “Special Counsel” for references to the “Civil Service Commission.”)

1. House Reports:

H. Rep. No. 95-1403 (Post Office and Civil Service Comm.).  
H. Rep. No. 95-1717 (Conference Comm.).

2. Senate Reports:

S. Rep. No. 95-969 (Governmental Affairs Comm.).  
S. Rep. No. 95-1272 (Conference Comm.).  
*See* 1978 U.S. Code Cong. and Adm. News, p. 2723.

### 1984 Amendments

Note: Congress, in passing legislation that included much of a proposed Federal Courts Civil Priorities Act (H.R. 5645) as passed by the House, P.L. 98-620, Title IV, Subtitle A 98<sup>th</sup> Cong., 2d Sess., 98 Stat. 3356, struck out subsection 552(a)(4)(D) which provided for expedited docketing and hearing of FOIA cases in precedence over other cases no considered of greater importance.

1. House Report:

H. Rep. No. 98-985 (Judiciary Comm.)  
*See* 1984 U.S. Code Cong. and Admin. News, p. 5779.

### 1986 Amendments

Note: These FOIA amendments were enacted as provisions of the Anti-Drug Abuse Act of 1986, P.L. 99-570, Title I, Subtitle N, Sec. 1801-1804. Because they were adopted initially as Senate floor amendments, there is no mention of them in the numerous committee reports that are cited as part of the legislative history of the public law. The amendments are explained, however, in several floor statements prepared by their individual co-sponsors.

1. Congressional Consideration:

(All cites are to pages of daily edition of Vol. 132 Congressional Record.)

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S 13648, 13660-61 (Sept. 25, 1986) [Introduction of Senate Bill (S. 2878)].  
S 14033 (Sept. 27, 1986) (Leahy Amendment and Statement).  
S 14038-40 (Sept. 27, 1986) (Hatch Statement).  
S 14252 (Sept. 30, 1986) (Denton Statement).  
S 14295-300 (Sept. 30, 1986) (Leahy Statement).  
S 14277-78 (Sept. 30, 1986) (Senate Technical Amendments).  
H 9462-68 (Oct. 8, 1986) (English/Kindness Statements).  
H 9497-98 (Oct. 8, 1986) (House Approves Amendments).  
E 3596 (Oct. 10, 1986) (Correction to English Statement of Oct. 8, 1986).  
S 15956 (Oct. 10 1986) (Senate Amendment to House Amendment).  
S 16496-97 (Oct. 10, 1986) (Leahy-Kerry Colloquy).  
S 16502 (Oct. 15, 1986) (Senate Approves Amendments/Final Text of the FOIA Changes).  
S 16504-05 (Oct 15, 1986) (Hatch Statement).  
SH 11233-34 (Oct. 17, 1986) (House Amendment to Senate Amendment/Final Text of the FOIA Changes).  
H 10787 (Oct. 17, 1986) (House Approves Amendments).  
S 16921 (Oct. 17, 1986) (Senate Concurs in House Amendments).

### 1996 Amendments

Note: These FOIA amendments were enacted as provisions of the Electronic Freedom of Information Act Amendments of 1996, P.L.104-231, 110 Stat. 3048, based on separate Senate (S.1090) and House (H.R.3802) bills that were informally reconciled by their primary sponsors without the need of a formal House-Senate conference. The “Findings and Purposes” section which that in the Public Law was not codified as part of the statutory text of the amended FOIA.

1. House Report:

No.104-175 accompanying H.R.3802 (Comm. on Government Reform and Oversight).

2. Senate Report:

No.104-272 accompanying S.1090 (Comm. on the Judiciary).

3. Congressional Record, daily ed.

S 10888-10891 (July 28, 1995) (Text and Introductory Remarks: S.1090).

E 1280-1281 (July 12, 1996) (Text and Introductory Remarks: H.R. 3802).

H 10447-10449 (September 17, 1996) (House passage of H.R.3802).

S 10713-10715 (September 17, 1996) (Senate passage of S.1090, as amended by substitution of H.R.3802).

### 2002 Amendment

Congress, in passing P.L. 107-306, Title III, Subtitle B, S 312, Nov. 27, 2002, 116 Stat. 2390, added section 552(a)(3)(E), exempting entities of the intelligence community from FOIA disclosures.

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### 2007 Amendments

Note: These FOIA amendments were enacted as provisions of the OPEN Government Act of 2007, Pub. L. No. 110-175, § 6, 121 Stat. 2524, based on Senate bill S.2488. The “Findings” section that appears in the Public Law was not codified as part of the statutory text of the amended FOIA.

1. Senate Report:

No. 110-59 accompanying S.849 (substantively identical bill) (Comm. on the Judiciary).

2. Congressional Records, daily ed.

S15649-S15650 (December 14, 2007) (Kyl Statement).

S15701-15704 (December 14, 2007) (Text and Remarks: S.2488).

S15701 (December 14, 2007) (Senate passage of S.2488).

H16788-16790 (December 18, 2007) (Text of S.2488).

H16790-16792 (December 18, 2007) (Remarks, Suspension of Rules, and House passage of S.2488).

S15831-S15832 (December 18, 2007) (Leahy Statement).

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**Conference Report on the 1974 Amendments**

93d Congress

2d Session

Senate Report No. 93-1200

**FREEDOM OF INFORMATION ACT AMENDMENTS**

**October 1, 1974 Ordered to be printed**

**MR. KENNEDY, from the committee of conference,  
submitted the following**

**CONFERENCE REPORT**

**[To accompany H.R. 12471]**

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 12471) to amend section 552 of title 5, United States Code, known as the Freedom of Information Act, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

*That (a) the fourth sentence of section 552(a)(2) of title 5, United States Code, is amended to read as follows: "Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication."*

*(b)(1) Section 552(a)(3) of title 5, United States Code is amended to read as follows:*

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

*(2) Section 552(a) of title 5, United States Code, is amended by redesignating paragraph (4), and all references thereto, as paragraph (5) and by inserting immediately after paragraph (3) the following new paragraph:*

*"(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public."*

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*“(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.”*

*“(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made unless the court otherwise directs for good cause shown.”*

*“(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.”*

*“(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.”*

*“(F) 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 Civil Service Commission 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 Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority to 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 Commission recommends.”*

*“(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.”*

*(c) Section 552(a) of title 5, United States Code, is amended by adding at the end thereof the following paragraph:*

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

*“(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore, and of the right of such person to appeal to the head of the agency any adverse determination; and*

*“(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.”*

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*“(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, ‘unusual circumstances’ means, but only to the extent reasonable necessary to the proper processing of the particular request—*

*“(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;*

*“(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or*

*“(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.”*

*“(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.”*

*SEC. 2. (a) Section 552(b)(1) of title 5, United States Code, is amended to read as follows:*

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

*(b) Section 552(b)(7) of title 5, United States Code, is amended to read as follows:*

*“(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;”*

*(c) Section 552(b) of title 5, United States Code, is amended by adding at the end the following: “Any reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”*

*SEC. 3 Section 552 of title 5, United States Code, is amended by adding at the end thereof the following new subsections:*

*“(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include-*

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“(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determinations;

“(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

“(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

“(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

“(5) a copy of every rule made by such agency regarding this section;

“(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

“(7) such other information as indicates efforts to administer fully this section.”

*The Attorney General shall submit an annual report on or before March of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such cases, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.*

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

*SEC. 4. The amendments made by this Act shall take effect on the ninetieth day beginning after the date of enactment of this Act.*

And the House agrees to the same.

EDWARD KENNEDY,  
PHILIP A. HART,  
BIRCH BAYH,  
QUENTIN BURDICK,  
JOHN TUNNEY,  
CHARLES McC. MATHIAS, JR.,

Managers on the Part of the Senate.

CHET HOLIFIELD,  
WILLIAM S. MOORHEAD,  
JOHN E. MOSS,  
BILL ALEXANDER,  
FRANK HORTON,  
JOHN N. ERLNBORN,  
PAUL McCLOSKEY,

Managers on the Part of the House.

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### Joint Explanatory Statement of the Committee of Conference

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two houses on the amendment of the Senate to the bill (H.R.12471) to amend section 552 of title 5, United States Code, known as the Freedom of Information Act, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment struck out all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment which is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

#### Index Publication

The House bill added language to the present Freedom of Information law to require the publication and distribution (by sale or otherwise) of agency indexes identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, which is required by U.S.C. 552(a)(2) to be made available or published. This includes final opinions, orders, agency statements of policy and interpretations not published in the *Federal Register*, and administrative staff manuals and agency staff instructions that affect the public unless they are otherwise published and copies offered for sale to the public. Such published indexes would be required for the July 4, 1967, period to date. Where agency indexes are now published by commercial firms, as they are in some instances, such publication would satisfy the requirements of this amendment so long as they are made readily available for public use by the agency.

The Senate amendment contained similar provisions, indicating that the publication of indexes should be on a quarterly or more frequent basis, but provided that if an agency determined by an order published in the *Federal Register* that its publication of any index would be “unnecessary and impracticable,” it would not actually be required to publish the index. However, it would nonetheless be required to provide copies of such index on request at a cost comparable to that charged had the index been published.

The conference substitute follows the Senate amendment, except that if the agency determines not to publish its index, it shall provide copies on request to any person at a cost not to exceed the direct cost of duplication.

#### Identifiable Records

Present law requires that a request for information from an agency be for “identifiable records.” The House bill provided that the request only “reasonably describe” the records being sought.

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The Senate amendment contained similar language, but added a provision that when agency records furnished a person are demonstrated to be of “general public concern,” the agency shall also make them available for public inspection and purchase, unless the agency can demonstrate that they could subsequently be denied to another individual under exemptions contained in subsection (b) of the Freedom of Information Act.

The conference substitute follows the House bill. With respect to the Senate proviso dealing with agency records of “general public interest,” the conferees wish to make clear such language was eliminated only because they conclude that all agencies are presently obligated under the Freedom of Information Act to pursue such a policy and that all agencies should effect this policy through regulation.

### Search and Copying Fees

The Senate amendment contained a provision, not included in the House bill, directing the Director of the Office of Management and Budget to promulgate regulations establishing a uniform schedule of fees for agency search and copying of records made available to a person upon request under the law. It also provided that an agency could furnish the records requested without charge or at a reduced charge if it determined that such action would be in the public interest. It further provided that no fees should ordinarily be charged if the person requesting the records was an indigent if such fees would amount to less than \$3, if the records were not located by the agency, or if they were determined to be exempt from disclosure under subsection (b) of the law.

The conference substitute follows the Senate amendment, except that each agency would be required to issue its own regulations for the recovery of only the direct costs of search and duplication — not including examination or review of records — instead of having such regulations promulgated by the Office of Management and Budget. In addition, the conference substitute retains the agency’s discretionary public-interest waiver authority but eliminates the specific categories of situations where fees should not be charged.

By eliminating the list of specific categories, the conferees do not intend to imply that agencies should actually charge fees in those categories. Rather, they felt, such matters are properly the subject for individual agency determination in regulations implementing the Freedom of Information law. The conferees intend that fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information.

### Court Review

The House bill clarifies the present Freedom of Information law with respect to *de novo* review requirements by Federal courts under section 552(a)(3) by specifically authorizing the court to examine *in camera* any requested records in dispute to determine whether the records are — as claimed by an agency — exempt from mandatory disclosure under any of the nine categories of section 552(b) of the law.

The Senate amendment contained a similar provision authorizing *in camera* review by Federal courts and added another provision, not contained in the House bill, to authorize Freedom of Information suits to be brought in the Federal courts in the District of Columbia, even in cases where the agency records were located elsewhere.

## **Appendix A**

The conference substitute follows the Senate amendment, providing that in determining *de novo* whether agency records have been properly withheld, the court may examine records *in camera* in making its determination under any of the nine categories of exemptions under section 552(b) of the law. In *Environmental Protection Agency v. Mink, et al.*, 410 U.S. 73 (1973), the Supreme Court ruled that *in camera* inspection of documents withheld under section 552(b)(1) of the law, authorizing the withholding of classified information, would ordinarily be precluded in Freedom of Information cases, unless Congress directed otherwise. H.R. 12471 amends the present law to permit such *in camera* examination at the discretion of the court. While *in camera* examination need not be automatic, in many situations it will plainly be necessary and appropriate. Before the court orders *in camera* inspection, the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure. The burden remains on the Government under this law.

### **Response to Complaints**

The House bill requires that the defendant to a complaint under the Freedom of Information law serve a responsive pleading within 20 days after service, unless the court directed otherwise for good cause shown.

The Senate amendment contained a similar provision, except that it would give the defendant 40 days to file an answer.

The conference substitute would give the defendant 30 days to respond, unless the court directs otherwise for good cause shown.

### **Expedited Appeals**

The Senate amendment included a provision, not contained in the House bill, to give precedence on appeal to cases brought under the Freedom of Information law, except as to cases on the docket which the court considers of greater importance.

The conference substitute follows the Senate amendment.

### **Assessment of Attorney Fees and Costs**

The House bill provided that a Federal court may, in its discretion, assess reasonable attorney fees and other litigation costs reasonably incurred by the complainant in Freedom of Information cases in which the Federal Government had not prevailed.

The Senate amendment also contained a similar provision applying to cases in which the complainant had “substantially prevailed,” but added certain criteria for consideration by the court in making such awards, including the benefit to the public deriving from the case, the commercial benefit to the complainant and the nature of his interest in the Federal records sought, and whether the Government’s withholding of the records sought had “a reasonable basis in law.”

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The conference substitute follows the Senate amendment, except that the statutory criteria for court award of attorney fees and litigation costs were eliminated. By eliminating these criteria, the conferees do not intend to make the award of attorney fees automatic or to preclude the courts, in exercising their discretion as to awarding such fees, to take into consideration such criteria. Instead, the conferees believe that because the existing body of law on the award of attorney fees recognizes such factors, a statement of the criteria may be too delimiting and is unnecessary.

### **Sanction**

The Senate amendment contained a provision, not included in the House bill, authorizing the court in Freedom of Information cases to impose a sanction of up to 60 days suspension from employment against a Federal employee or official who the court found to have been responsible for withholding the requested records without reasonable basis in law.

The conference substitute follows the Senate amendment, except that the court is authorized to make a finding whether the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding. If the court so finds, the Civil Service Commission must promptly initiate a proceeding to determine whether disciplinary action is warranted against the responsible officer or employee. The commission's findings and recommendations are to be submitted to the appropriate administrative authority of the agency concerned and to the responsible official or employee, and the administrative authority shall promptly take the disciplinary action recommended by the commission. This section applies to all persons employed by agencies under this law.

### **Administrative Deadlines**

The House bill required that an agency make a determination whether or not to comply with a request for records within 10 days (excepting Saturdays, Sundays, and legal public holidays) and to notify the person making the request of such determination and the reasons therefor, and the right of such person to appeal any adverse determination to the head of the agency. It also required that agencies make a final determination on any appeal of an adverse determination within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the date of receipt of the appeal by the agency. Further, any person would be deemed to have exhausted his administrative remedies if the agency fails to comply with either of the two time deadlines.

The Senate amendment contained similar provision but authorized certain other administrative actions to extend these deadlines for another 30 working days under specified types of situations, if requested by an agency head and approved by the Attorney General. It also would grant an agency, under specified "unusual circumstances," a 10-working-day extension upon notification to the person requesting the records. In addition, an agency could transfer part of the number of days from one category to another and authorize the court to allow still additional time for the agency to respond to the request. The Senate amendment also provided that any agency's notification of denial of any request for records set forth the names and titles or positions of each person responsible for the denial. It further allowed the court, in a Freedom of Information action, to allow the government additional time if "exceptional circumstances" were present and if the agency was exercising "due diligence in responding to the request."

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The conference substitute generally adopts the 10- and 20-day administrative time deadlines of the Senate amendment for “unusual circumstances” in situations where the agency must search for and collect the requested records from field facilities separate from the office processing the request, where the agency must search for, collect, and examine a voluminous amount of separate and distinct records demanded in a single request, or where the agency has a need to consult with another agency or agency unit having a substantial interest in the determination because of the subject matter. This 10-day extension may be invoked by the agency only once — either during initial review of the request or during appellate review.

The 30-working-day certification provision of the Senate amendment has been eliminated, but the conference substitute retains the Senate language requiring that any agency’s notification to a person of the denial of any request for records set forth the names and titles or positions of each person responsible for the denial. The conferees intend that this listing include those persons responsible for the original, as well as the appellate, determination to deny the information requested. The conferees intend that consultations between an agency unit and the agency’s legal staff, the public information staff, or the Department of Justice should not be considered the basis for an extension under the subsection.

The conference substitute also retains the Senate language giving the court authority to allow the agency additional time to examine requested records in exceptional circumstances where the agency was exercising due diligence in responding to the request and had been since the request was received.

### **National Defense and Foreign Policy Exemption (b)(1)**

The House bill amended subsection (b)(1) of the Freedom of Information law to permit the withholding of information “authorized under the criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy.”

The Senate amendment contained similar language but added “statute” to the exemption provision.

The conference substitute combines language of both House and Senate bills to permit the withholding of information where it is “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy” and is “in fact, properly classified” pursuant to both procedural and substantive criteria contained in such Executive order.

When linked with the authority conferred upon the Federal courts in this conference substitute for *in camera* examination of contested records as part of their *de novo* determination in Freedom of Information cases, this clarifies Congressional intent to override the Supreme Court’s holding in the case of *E.P.A. v. Mink, et al. supra*, with respect to *in camera* review of classified documents.

However, the conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency’s affidavit concerning the details of the classified status of the disputed record.

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Restricted Data (42 U.S.C. 2162), communication information (18 U.S.C. 798), and intelligence sources and methods (50 U.S.C. 403(d)(3) and (g)), for example, may be classified and exempted under section 552(b)(3) of the Freedom of Information Act. When such information is subjected to court review, the court should recognize that if such information is classified pursuant to one of the above statutes, it shall be exempted under this law.

### Investigatory Records

The Senate amendment contained an amendment to subsection (b)(7) of the Freedom of Information law, not included in the House bill, that would clarify Congressional intent disapproving certain court interpretations which have tended to expand the scope of agency authority to withhold certain “investigatory files compiled for law enforcement purposes.” The Senate amendment would permit an agency to withhold investigatory records compiled for law enforcement purposes only to the extent that the production of such records would interfere with enforcement proceedings, deprive a person of a right to a fair trial or an impartial adjudication, constitute a clearly unwarranted invasion of personal privacy, disclose the identity of an informer, or disclose investigative techniques and procedures.

The conference substitute follows the Senate amendment except for the substitution of “confidential source” for “informer,” the addition of language protecting information compiled by a criminal law enforcement authority from a confidential source in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, the deletion of the word “clearly” relating to avoidance of an “unwarranted invasion of personal privacy,” and the addition of a category allowing withholding of information whose disclosure “would endanger the life or physical safety of law enforcement personnel.”

The substitution of the term “confidential source” in section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. Under this category, in every case where the investigatory records sought were compiled for law enforcement purposes — either civil or criminal in nature — the agency can withhold the names, addresses, and other information that would reveal the identity of a confidential source who furnished the information. However, where the records are compiled by a criminal law enforcement authority, *all* of the information furnished only by a confidential source may be withheld if the information was compiled in the course of a criminal investigation. In addition, where the records are compiled by an agency conducting a lawful national security intelligence investigation, all of the information furnished only by a confidential source may also be withheld. The conferees intend the term “criminal law enforcement authority” to be narrowly construed to include the Federal Bureau of Investigation and similar investigative authorities. Likewise, “national security” is to be strictly construed to refer to military security, national defense, or foreign policy. The term “intelligence” in section 552(b)(7)(D) is intended to apply to positive intelligence-gathering activities, counterintelligence activities, and background security investigations by governmental units which have authority to conduct such functions. By “an agency” the conferees intend to include criminal law enforcement authorities as well as other agencies. Personnel, regulatory, and civil enforcement investigations are covered by the first clause authorizing withholding of information what would reveal the identity of a confidential source but are not encompassed by the second clause authorizing withholding of all confidential information under the specified circumstances.

## **Appendix A**

The conferees also wish to make clear that disclosure of information about a person to that person does not constitute an invasion of his privacy. Finally, the conferees express approval of the present Justice Department policy waiving legal exemptions for withholding historic investigatory records over 15 years old, and they encourage its continuation.

### **Segregable Portions of Records**

The Senate amendment contained a provision, not included in the House bill, providing that any reasonably segregable portion of a record shall be provided to any person requesting such record after the deletion of portions which may be exempted under subsection (b) of the Freedom of Information law.

The conference substitute follows the Senate amendment.

### **Annual Reports by Agencies**

The House bill provided that each agency submit an annual report, on or before March 1 of each calendar year, to the Speaker of the House and the President of the Senate, for referral to the appropriate committees of the Congress. Such report shall include statistical information on the number of agency determinations to withhold information requested under the Freedom of Information law; the reasons for such withholding; the number of appeals of such adverse determinations with the result and reasons for each; a copy of every rule made by the agency in connection with this law; a copy of the agency fee schedule with the total amount of fees collected by the agency during the year; and other information indicating efforts to properly administer the Freedom of Information law.

The Senate amendment contained similar provisions and added two requirements not contained in the House bill, (1) that each agency report list those officials responsible for each denial of records and the numbers of cases in which each participated during the year and (2) that the Attorney General also submit a separate annual report on or before March 1 of each calendar year listing the number of cases arising under the Freedom of Information law, the exemption involved in each such case, the disposition of the case, and the costs, fees, and penalties assessed under the law. The Attorney General's report shall also include a description of Justice Department efforts to encourage agency compliance with the law.

The conference substitute incorporates the major provisions of the House bill and two Senate amendments. With respect to the annual reporting by each agency of the names and titles or positions of each person responsible for the denial of records requested under the Freedom of Information law and the number of instances of participation for each, the conferees wish to make clear that such listing include those persons responsible for the original determination to deny the information requested in each case as well as all other agency employees or officials who were responsible for determinations at subsequent stages in the decision.

### **Expansion of Agency Definition**

The House bill extends the applicability of the Freedom of Information law to include any executive department, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch of Government (including the Executive Office of the President), or any independent regulatory agency.

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The Senate amendment provided that for purposes of the Freedom of Information law the term agency included any agency defined in section 551(l) of title 5, United States Code, and in addition included the United States Postal Service, the Postal Rate Commission, and any other authority of the Government of the United States which is a corporation and which receives any appropriated funds.

The conference substitute follows the House bill. The conferees stated that they intend to include within the definition of “agency” those entities encompassed by 5 U.S.C. 551 and other entities including the United States Postal Service, the Postal Rate Commission, and government corporations or government-controlled corporations now in existence or which may be created in the future. They do not intend to include corporations which receive appropriated funds but are neither chartered by the Federal Government nor controlled by it, such as the Corporation for Public Broadcasting. Expansion of the definition of “agency” in this subsection is intended to broaden applicability of the Freedom of Information Act but it is not intended that the term “agency” be applied to subdivisions, offices or units within an agency.

With respect to the meaning of the term “Executive Office of the President” the conferees intend the result reached in *Soucie v. David*, 448 F.2d 1067 (C.A.D.C. 1971). The term is not to be interpreted as including the President’s immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.

### Effective Date

Both the House bill and the Senate amendment provided for an effective date of 90 days after the date of enactment of these amendments to the Freedom of Information law.

The conference substitute adopts the language of the Senate amendment.

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JOHN TUNNEY,  
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### 1996 EFOIA Amendments House Report (Excerpts)

#### IV. EXPLANATION OF THE BILL

##### A. Overview

The highlights of the Electronic Freedom of Information Amendments include:

*Electronic records.*— Records which are subject to the FOIA shall be made available under the FOIA when the records are maintained in electronic format. This clarifies existing practice by making the statute explicit on this point.

*Format Requests.*— Requestors may request records in any form or format in which the agency maintains those records. Agencies must make a “reasonable effort” to comply with requests to furnish records in other formats.

*Redaction.*— Agencies redacting electronic records (deleting part of a record to prevent disclosure of material covered by an exemption) must note the location and the extent of any deletions made on a record. This provision, however, applies only if the agencies have the technology to comply with it.

*Expedited Processing.*— Certain categories of requestors would receive priority treatment of their requests if failure to obtain information in a timely manner would pose a significant harm. The first category of requestors entitled to this special processing includes those who could reasonably expect that delay could pose an imminent threat to the life or physical safety of an individual. The second category includes requests, made by a person primarily engaged in the dissemination of information to the public, and involving compelling urgency to inform the public.

*Multitrack processing.*— Agencies will be able to establish processes for processing requests of various sizes on different tracks. Because of this procedure, larger numbers of requests for smaller amounts of material will be completed more quickly. Requestors will also have an incentive to frame narrower requests.

*Agency Backlogs.*— Agencies can no longer delay responding to FOIA requests because of “exceptional circumstances” simply as a result from a predictable agency request workload. This strengthens the requirement that agencies respond to requests on time.

*Deadlines.*— The deadline for responding to FOIA is extended to 20 workdays from the current 10 workday requirement for initial determinations.

*Reporting requirements.*— The legislation expands certain reporting requirements, and requires agencies to make more information available through electronic means.

##### B. Section by Section

###### *Section 1. Short title*

The Act should be cited as the “Electronic Freedom of Information Act Amendments of 1996.”

*Section 2. Findings and purposes*

The findings make clear that Congress enacted the FOIA to require Federal agencies to make records available to the public through public inspection and at the request of any person for any public or private use. They further acknowledge the increase in the Government's use of computers and encourages agencies to use new technology to enhance public access to Government information.

*Section 3. Application of requirements to electronic format information*

The section explicitly states that a "record" under the FOIA includes electronically stored information. This articulates the existing general policy under the FOIA that all Government records are subject to the Act, regardless of the form in which they are stored by the agency. The Department of Justice agrees that computer database records are agency records subject to the FOIA.<sup>31</sup> The bill defines "record" to "include any information that would be an agency record subject to the requirements of this section if maintained by an agency in any format, including an electronic format."

<sup>31</sup>See "Department of Justice Report on 'Electronic Record' Issues Under the Freedom of Information Act," Senate Hearing 102 1098, 102d Cong., 2d Sess. P. 33, 1992. This section clarifies the meaning of the term "record" and similar terminology used in the FOIA. Several important points are worth making.

*Breadth of Policy.*—First, the FOIA usually uses the term "record," but other terms are also used occasionally, including "information" and "matter." The terms are used interchangeable. The section makes clear a comprehensive policy that records in electronic formats are agency records subject to the Act. The language of the section should leave no doubt about the breadth of the policy. As noted previously, a number of statutes set Federal Government information policy. This bill is not intended to be dispositive of all aspects of those policies. For example, matter not previously subject to FOIA when maintained in a non-electronic format is not made subject to FOIA by this bill.

*Storage Media.*—Second, the section clarifies that a record in electronic format can be requested just like a record on paper or any other format, and within enumerated exceptions, can potentially be fully disclosed under the law. The format in which data is maintained is not relevant under the FOIA. Computer tapes, computer disks, CD ROMs, and all other digital or electronic media are records. Microfiche and microforms are records. When other, yet-to-be invented technologies are developed to store, maintain, produce, or otherwise record information, these will be records as well. When determining whether information is subject to the FOIA, the form or format in which it is maintained is not relevant to the decision.

The requirements for the disclosure of information exist elsewhere in the Act. No matter how it is preserved, information that passes the threshold test of being an agency record, remains a record. This provision should restrain agencies from evading the clear intent of the FOIA by deeming some forms of data as not being agency records and not subject to the law. The primary focus should always be on whether information is subject to disclosure or is exempt, rather than the form or format it is stored in. This provision, however, does not broaden the concept of agency record. The information maintained on a computer is a record, but the computer is not.

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*Rejected Definitions.*—Third, the Committee rejects the definition of record in the substitute to S. 90, as reported by the Senate Committee on the Judiciary on April 25, 1996. The Senate bill had incorporated a definition of record drawn from the Records Disposal Act. \32\

\32\44 U.S.C. \*3301 (1994).

A case in point comes from the decision in *SDC Development Corp. v. Mathews*. \33\ The decision has previously been sharply criticized by this Committee and its holding is inconsistent with the policies expressed in this legislation. \34\ The Court found that an agency-created computer database of research abstracts was not an agency record because it was library material. The court used the library material exclusion in the Records Disposal Act as an excuse to place these records beyond the reach of the FOIA. H.R. 3802 makes clear, contrary to *SDC v. Mathews*, that information an agency has created and is directly or indirectly disseminating remains subject to the FOIA in any of its forms or formats. \35\

\33\542 F.2d 1116 (9th Cir. 1976).

\34\See House Committee on Government Operations, *Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview*, 99th Cong., 2d Sess. 32-36 (1986).

\35\A recent scholarly article examines the background and policy of the Records Disposal Act and the FOIA. It provides a more extensive discussion of the Court's misreading of the FOIA, the Records Disposal Act and the Copyright Act. See Robert Gellman, *Twin Evils: Government Copyright and Copyright-Like Controls Over Government Information*, 45 *Syracuse Law Review* 999, 1036-1046 (1995).

### *Section 4. Information made available in electronic format and indexation of records*

This section of the bill requires that materials, such as agency opinions and policy statements, which an agency must "make available for public inspection and copying," pursuant to Section 552(a)(2), and which are created on or after November 1, 1996, be made available by computer telecommunications, and in hard copy, within one year after the date of enactment. If an agency does not have the means established to make these materials available on-line, then the information should be made available in another electronic form, e.g., CD ROM or disc. The bill would thus treat (a)(2) materials in the same manner as it treats (a)(1) materials, which under the Government Printing Office Electronic Information Access Enhancement Act of 1993 \36\ are required, via the Federal Register, to be made available on-line.

\36\44 U.S.C. 4101 (1993).

This section would also increase the information made available under Section 552(a)(2). Specifically, agencies would be required to make available for public inspection and copying, in the same manner as other materials made available under Section 552(a)(2), copies of records released in response to FOIA requests that the agency determines have been or will likely be the subject of additional requests. In addition, they would be required to make available a general index of these previously-released records. By December 31, 1999, this index should be made available by computer telecommunications. Since not all individuals have access to computer networks or are near agency public reading rooms, requestors would still be able to access previously-released FOIA records through the normal FOIA process.

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As a practical matter, this would mean that copies of previously-released records on a popular topic, such as the assassinations of public figures, would subsequently be treated as (a)(2) materials, made available for public inspection and copying. This would help to reduce the number of multiple FOIA requests for the same records requiring separate agency responses. Likewise, the general index would help requestors in determining which records have been the subject of prior FOIA requests. By diverting some potential FOIA requests for previously-released records with this index, agencies can better use their FOIA resources to fulfill new requests.

This section also makes clear that to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes the index and copies of previously-released records.

Finally, this section would require an agency to indicate the extent of any deletion from the previously-released records. This provision is consistent with the "Computer Redaction" section of the bill. Both provisions similarly temper this requirement by giving agencies the flexibility to show that marking the place on the record where the deletion was made was not technically feasible. Agencies need not reveal information about deletions if such disclosure would harm an interest protected by an exemption.

### *Section 5. Honoring form or format requests*

This section requires agencies to help requestors by providing information in the form requested, including requests for the electronic form of records, if the agency can readily reproduce it in that form. The section would overrule *Dismukes v. Department of the Interior*, which held that an agency "has no obligation under the FOIA to accommodate plaintiff's preference [but] need only provide responsive, nonexempt information in a reasonably accessible form."<sup>37</sup>

<sup>37</sup>603 F. Supp. 760, 763 (D.D.C. 1984)

This section also requires agencies to make reasonable efforts to search for records kept in an electronic format. An unreasonable effort would significantly interfere with the operations of the agency or the agency's use of its computers. Electronic searches should not result in any greater expenditure of agency resources than would have occurred with a conventional paper-based search for documents.

The bill defines "search" as a "review, manually or by automated means," of "agency records for the purpose of locating those records responsive to a request." Under the FOIA, an agency need not create documents that do not exist. Computer records found in a database rather than in a file cabinet may require the application of codes or some form of programming to retrieve the information. Under the definition of "search" in the bill, the review of computerized records would not amount to the creation of records. Otherwise, it would be virtually impossible to get records maintained completely in an electronic format, like computer database information, because some manipulation of the information likely would be necessary to search the records.

Current law provides that most requestors receive the first two hours of search time for free. Ten years ago, computer time was expensive and carefully metered. Today, computer time is generally no longer a scarce resource. Except in unusual cases, the cost of computer time should not be a factor in calculating the two free hours of search time. Often, searching by computer will reduce costs because computer

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searches are generally faster, more thorough and more accurate, than manual searches. In those unusual cases, where the cost of conducting a computerized search significantly detracts from the agencies' ordinary operations, no more than the dollar equivalent of two hours manual search time shall be allowed for two hours free search time. For any searches conducted beyond the first two hours, an agency shall only charge the direct costs of conducting such searches.

### *Section 6. Standard for judicial review*

Section 5 requires a court to accord substantial weight to an agency's determination as to both the technical feasibility of redacting non-releasable material at the place on the record where the deletion was made, under paragraphs (2)(C) and subsection (b), as amended by this Act, and the reproducibility of the requested form or format of records, under paragraph (3)(B), as amended by this Act. This deference is warranted because agencies are the most familiar with the availability of their own technical resources to process, redact, and reproduce records.

This section does not affect the extent of judicial deference that a court may or may not extend to an agency on any other matter. There is no intent with this provision, either expressly or by implication, to affect the deference or weight which a court may extend to an agency determination or an agency affidavit on any other matter. The provision applies narrowly to agency determinations with regard to technical feasibility.

### *Section 7. Ensuring timely response to requests*

The bill addresses the single most frequent complaint about the operation of the FOIA: agency delays in responding to FOIA requests. This section encourages agencies to employ better records management systems and to set priorities for using their FOIA resources.

In underscoring the requirement that agencies respond to requests in a timely manner, the Committee does not intend to weaken any interests protected by the FOIA exemptions. Agencies processing some requests may need additional time to adequately review requested material to protect those exemption interests. For example, processing some requests may require additional time in order to properly screen material against the inadvertent disclosure of material covered by the national security exemption.

*Multitrack First-In First-Out Processing.*—An agency commitment to process requests on a first-in, first-out basis has been held to satisfy the requirement that an agency exercise due diligence in dealing with backlogs of FOIA requests. Processing requests solely on a FIFO basis, however, may result in lengthy delays for simple requests. The prior receipt and processing of complex requests delays other requests, increasing agency backlogs. The bill would permit agencies to promulgate regulations starting multitrack processing systems, and makes clear that agencies should exercise due diligence within each track. Agencies would also be required to give requestors the opportunity to limit the scope of their requests to qualify for processing under a faster track.

*Unusual Circumstances.*—The FOIA currently permits an agency in "unusual circumstances" to extend for a maximum of ten working days the statutory time limit for responding to a FOIA request, upon written notice to the requestor setting forth the reason for such extension. The FOIA enumerates various reasons for such an extension. These reasons include the need to search for and collect requested records

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from multiple offices, the volume of records requested, and the need for consultation with other components within the agency.

An extra ten days may still provide an insufficient time for an agency to respond to unusually burdensome FOIA requests. The bill provides a mechanism to deal with such requests, which an agency would not be able to process even with an extra ten days. For such requests, the bill requires an agency to inform the requestor that the request cannot be processed within the statutory time limits and provide an opportunity for the requestor to limit the scope of the request so that it may be processed within statutory time limits, and/or arrange with the agency a negotiated deadline for processing the request. In the event that the requestor refuses to reasonably limit the request's scope or agree upon a time frame and then seeks judicial review, that refusal shall be considered as a factor in determining whether "exceptional circumstances" exist under subparagraph (6)(C).

The Committee believes that the FOIA works best when requestors and agencies work together to define and fulfill reasonable requests. When a requestor can modify a request to make it easier for the agency to process it, this benefits everyone. Still, there will be circumstances in which a requestor and an agency cannot agree upon a modification that will speed processing. As long as a request meets the legal standards of the FOIA, each requestor has the right to frame his or her own request. If an agency determines by an objective standard that a requestor has unreasonably refused to modify a request, and a court concurs, then the court shall consider that refusal when determining whether exceptional circumstances exist.

However, if an agency determines on its own that a requestor has unreasonably refused to modify a request, the agency may not otherwise discriminate against that request or requestor. The request must be processed as it would have been had no modification been sought. An agency may not maintain a separate queue of "unreasonable" requests, nor may an agency constantly move "unreasonable" requests to the back of the queue. The Committee cautions agencies against using this limited test of "reasonableness" in any way other than the narrow way that the statute provides.

This provision does not relieve an agency of the responsibility of making a diligent, good-faith effort to complete its review of an initial request within the statutory time frame. An agency should seek an extension beyond the additional ten days already provided in "unusual circumstances" only in rare instances. This procedure will achieve one of the bill's important goals of encouraging a dialogue between an agency and a requestor. This enhances the opportunity of a requestor to obtain at least some of the records sought in a timely fashion, and could alleviate some of the agency's burden in responding to a request that could not otherwise be processed within the statutory time limits. In addition, it could provide a requestor with some certainty as to a time frame for processing his or her request.

*Exceptional Circumstances.* —The Freedom of Information Act provides that, in "exceptional circumstances," a court may extend the statutory time limits for an agency to respond to a FOIA request, but does not specify what those circumstances are. The bill would clarify that routine, predictable agency backlogs for FOIA requests do not constitute exceptional circumstances for purposes of the Act. This is consistent with the holding in *Open America v. Watergate Special Prosecution Force*,<sup>38</sup> where the court held that an unforeseen 3,000 percent increase in FOIA requests in one year, which created a massive backlog in an agency with insufficient resources to process those requests in a timely manner, can constitute "exceptional circumstances." Routine backlogs of requests for records under the FOIA should not give agencies an automatic excuse to ignore the time limits, since this provides a

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disincentive for agencies to clear up those backlogs. Nevertheless, the bill makes clear that a court shall consider an agency's efforts to reduce the number of pending requests in determining whether exceptional circumstances exist. Agencies may also make a showing of exceptional circumstances based on the amount of material classified, based on the size and complexity of other requests processed by the agency, based on the resources being devoted to the declassification of classified material of public interest, or based on the number of requests for records by courts or administrative tribunals.

\38\547 F.2d 605 (D.C. Cir. 1976)

*Aggregation of Requests.* —The amendments reported out of Committee had reflected an implicit assumption that agency regulations may permit the aggregation of requests by the same requestor, or requestors that an agency reasonably believes are acting in concert. An amendment clarifying this point is anticipated to be considered on the House floor.

Any aggregation must involve such clearly related material that should be considered as a single request. Multiple requests involving unrelated matters should not be aggregated. Existing agency procedures regarding entitlement for fee waivers already permit agencies to aggregate some multiple requests.

The purpose of this aggregation is to ensure the equitable treatment of similarly situated requestors. Aggregation would depend upon the factual circumstances of the requests, and particularly whether multiple requests were being used primarily to obtain a procedural advantage over other requests or requestors. Multiple or related requests could also be aggregated with requests seeking similar information for the purposes of negotiating the scope of the request and schedule. Where multiple requestors have not acted in concert, such aggregation must be with their consent. Applying the same principles, agencies should not aggregate groups of requests simply to delay responding to requests. For example, the filing of a subsequent request should not affect the processing of an initial request by the same requestor.

### *Section 8. Time period for agency consideration of requests*

The bill contains provisions designed to address the needs of both agencies and requestors for more workable deadlines for processing FOIA requests.

*Expedited Processing.* —The bill would require agencies to promulgate regulations authorizing expedited access to requestors who show a “compelling need” for a speedy response. The agency would be required to decide whether to grant the request for expedited access within ten days and then notify the requestor of the decision. The requestor would bear the burden of showing that expedition is appropriate. This section limits judicial review to the same record before the agency on the determination of whether to grant expedited access. Moreover, the section provides that the Federal courts will not have jurisdiction to review an agency's denial of an expedited access request if the agency has already provided a complete response to the request for records. The latter provision does not limit a court's ability to consider a requestor's application for the award of attorney's fees.

A “compelling need” warranting faster FOIA processing would exist in two categories of circumstances. In the first category, the failure to obtain the records within an expedited deadline poses an imminent threat to an individual's life or physical safety. The second category requires a request by someone “primarily engaged in disseminating information” and “urgency to inform the public

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concerning actual or alleged Federal government activity.” The section also permits agencies to elect to offer expedited processing in other circumstances.

The agencies are directed to establish rules and regulations for processing requests for expedited access. By requiring a “compelling need,” the expedited access procedure is intended to be limited to circumstances in which a delay in obtaining information can reasonably be foreseen to cause a significant adverse consequence to a recognized interest.

Agency officials will be required to make factual and subjective judgments about the circumstances cited by requestors to qualify them for “expedited processing.” To do so the requestors will need to explain in detail their basis for seeking such treatment. Agency discretion should be exercised with fairness and diligence. The credibility of a requestor who makes repeated claims for expedited processing that are determined to lack factual foundation may be taken into account when the same requestor makes additional requests.

The specified categories for compelling need are intended to be narrowly applied. A threat to an individual’s life or physical safety qualifying for expedited access should be imminent. A reasonable person should be able to appreciate that a delay in obtaining the requested information poses such a threat. A person “primarily engaged” in the dissemination of information should not include individuals who are engaged only incidentally in the dissemination of information. The standard of “primarily engaged” requires that information dissemination be the main activity of the requestor, although it need not be their sole occupation. A requestor who only incidentally engages in information dissemination, besides other activities, would not satisfy this requirement.

The standard of “urgency to inform” requires that the information requested should pertain to a matter of a current exigency to the American public and that a reasonable person might conclude that the consequences of delaying a response to a FOIA request would compromise a significant recognized interest. The public’s right to know, although a significant and important value, would not by itself be sufficient to satisfy this standard.

Some agencies, such as the Department of Justice, already employ expedited access procedures that, in some respects, have a broader criteria for expedited access than contained in Section 7. \39\ Agencies are given latitude to expand the criteria for expedited access, “in other cases determined by the agency.” However, the expedited processing procedure should be invoked in the circumstances as enumerated in the bill. Given the finite resources generally available for fulfilling FOIA requests, unduly generous use of the expedited processing procedure would unfairly disadvantage other requestors who do not qualify for its treatment.

\39\The Department of Justice’s procedures for expedited access permits it if a delay would result in the loss of substantial due process rights and the information sought is not otherwise available in a timely manner.

*Expansion of Agency Response Time.* —To help Federal agencies in reducing their backlog of FOIA requests, the bill would double the time limit for an agency to respond to FOIA requests from ten days to twenty days. Attorney General Janet Reno has acknowledged the inability of most Federal agencies to comply with the ten-day rule “as a serious problem” stemming principally from “too few resources in the face of too heavy a workload.” \40\

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\40\Reno, Janet, Attorney General, Memorandum for Heads of Departments and Agencies, October 4, 1993, “The Freedom of Information Act.”

*Estimation of Matter Denied.* —The bill would require agencies when denying a FOIA request to try to estimate the volume of any denied material and provide that estimate to the requestor, unless doing so would harm an interest protected by an exemption.

### *Section 9. Computer redaction*

The ease with which information on the computer may be redacted makes the determination of whether a few words or 30 pages have been withheld by an agency at times impossible. The amendments require agencies to identify the location of deletions in the released portion of the record and, where technologically feasible, to show the deletion at the place on the record where they made the deletion, unless including that indication would harm an interest protected by an exemption.

### *Section 10. Report to the Congress*

This section would add to the information an agency is already required to publish as part of its annual report. Specifically, agencies would be required to publish in their annual reports information regarding denials of requested records, appeals, a complete list of statutes upon which the agency relies to withhold information under Section 552 (b)(3), which exempts information that is specifically exempted from disclosure by other statutes, the number of backlogged FOIA requests, the number of days taken to process requests, the amount of fees collected, and the number of staff devoted to processing FOIA requests. The annual reports would be required to be made available to the public, including by computer telecommunications means. If an agency does not have the means established to make the report available on-line, then the report should be made available in another electronic form. The Attorney General is required to make each report available at a single electronic access point, and advise the Chairmen and ranking members of the Senate Committee on the Judiciary and the House Committee on Government Reform and Oversight that such reports are available.

Congress has undertaken several recent initiatives focused on streamlining government, making government processes more efficient, and improving the availability of government information. The Government Performance and Results Act requires a system of evaluation measures based on performance and results. The Paperwork Reduction Act of 1995 reexamines government information in the light of recent technological developments. Also, the Reports Elimination Act eliminates hundreds of reports to Congress required in a statute. Other pending legislation is likely to eliminate more than 200 statutorily required reports to Congress from the General Accounting Office.

In the spirit of these reforms, the Committee considered the reporting requirements of the Freedom of Information Act. Some new requirements were added to make the reports more useful to the public and to Congress. For the public, the FOIA reports should answer certain common questions, such as: How does one request documents? How does the Government respond to those requests, including an explanation of the reasons for not honoring a request? And, how long does it usually take for a request to be processed? For Congress, these reports should furnish a view of the agency workload and any backlog. The reports should identify the progress the agency is making toward eliminating that backlog. They should report on the resources devoted to answering FOIA requests, allowing for meaningful

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comparisons among agencies about performance. Someone unfamiliar with the FOIA process should be able to understand a report without resorting to reading the statute. Jargon such as “(b)(3) exemptions” should be replaced with more understandable language substituted. Guidance should be given to the agencies so that all reports contain terms with identical meanings.

Besides revising the contents of the reports to make them more useful, the Committee changed the timing and reporting period of the reports. Both changes were done to reduce the burden on the agencies, though it meant a delay in providing information and descriptive language to the public and Congress. FOIA reports have previously reported on a calendar year and have been due on March 1st of the following year. This bill changes the reporting period to a fiscal year to make it easier for agencies to compile the budget and staffing information required. This bill also gives agencies more time to prepare the reports from two to four months. Of course, agencies should strive to make their reports available sooner. In addition, the Committee has provided an additional two months to the Department of Justice to coordinate electronic access to these reports.

This bill also requires the availability of all FOIA reports by electronic means. The Committee anticipates that the Department of Justice will establish a home page for reaching all agency reports through a single site. Until a single site of electronic access is available for all reports, the Committee expects the Attorney General will forward to Congress print copies of all reports not available electronically. Agencies that do not provide electronic access should also make print reports available to the public, including distribution to Depository Libraries.

In drafting this legislation, the Committee rewrote the entire reporting section of the Freedom of Information Act. This was done to make it easier for the public to understand the new reporting requirements, without constant reference to existing law.

Three reporting requirements were added to aid the public and Congress to understand the work flow in each agency. Beginning in 1998, agencies will be required to report:

How many requests have not been resolved to the requestors’ satisfaction at the end of the reporting period? What is the median number of days those appeals have been pending?

What is the number of requests received during the year, and the number of requests processed during the year?

What is the median number of days taken to process requests of different types? What is the volume of requests coming into the agency annually, and the number of requests processed by the agency that year? These requirements will give the public and Congress clear measures of any backlog that exists. This will allow Congress to monitor progress in responding to FOIA requests across time. It will help the public understand how long it takes an agency to respond to a request.

The Committee has requested that agencies provide the median number of days requests have been in the backlog queue, and the median number of days necessary to complete the processing of requests. The Committee elected to use medians as a statistical measure because of their appropriateness when the measure being summarized does not have a normal distribution, or when a few cases of extreme value would skew an average. For example, a few requests for excessively large numbers of documents could artificially inflate the average time taken to fill a request. Of course, if agencies determine that the

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average time is a better measure of their performance, they can include that in the report along with the median. Medians are simple to calculate, simply requiring a distribution of the number of days each request has been pending, and do not increase the reporting burden on agencies. The Committee appreciates that some agencies with decentralized FOIA operations may have trouble in calculating a precise agency-wide median. In such circumstances reasonable estimates may be used. Finally, this bill requires that agencies report the number of staff assigned to processing FOIA requests, and their budget for processing FOIA requests.

Much comment is made of the adequacy of agency resources to comply with the statutory requirements of the FOIA. Effective future congressional oversight of the FOIA requires more detailed information about the level of resources that agencies devote to FOIA, the effectiveness of their utilization and the level of resources that might be required for agencies to fully comply with the FOIA. Agencies should inform Congress of the additional resources needed to fully comply with the FOIA. In the absence of such information on budget requests and management initiatives, the complaint by agencies that Congress has denied the resources necessary to comply with the statutory deadlines is unsupported.

The Committee has rewritten the FOIA reporting requirements to make them more useful to the public and to Congress, and to make the information in them more accessible. With those goals in mind, we expect that the Department of Justice, in consultation with the Office of Management and Budget, will provide guidelines to the agencies so that all reports use common terminology and follow a similar format. The Attorney General and the Director of the Office of Management and Budget are required to develop reporting guidelines for the annual reports by October 1, 1997.

### *Section 11. Reference materials and guides*

This section requires agencies to make publicly available, upon request, reference material or a guide for requesting records or information from an agency. This guide would include an index and description of all major information systems of an agency, and a handbook for obtaining various types and categories of public information from an agency.

The guide is intended to be a short and simple explanation for the public of what the Freedom of Information Act is designed to do, and how a member of the public can use it to access government records. Each agency should explain in clear and simple language, the types of records that can be obtained from the agency through FOIA requests, why some records cannot, by law, be made available, and how the agency makes the determination of whether or not a record can be released.

Each agency guide should explain how to make a FOIA request, and how long a requestor can expect to wait for a reply from the agency. In addition, the guide should explain the requestor's rights under the law to appeal to the courts to rectify agency action. The guide should give a brief history of recent litigation it has been involved in, and the resolution of those cases. If an agency requires that certain requests, such as applications for expedited access, be completed on agency forms, then the forms should be part of the guide.

The guide is intended to supplement other information locator systems, like the Government Information Locator System (GILS) called for in the Paperwork Reduction Act of 1995. \41\ Thus, the guide should reference those systems and explain how a requestor can obtain more information about them. Of course, any agency specific locator systems should be similarly referenced in the guide. \41\ The

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Paperwork Reduction Act consists of (P.L. 96 511, 94 Stat. 2812) as amended by the Paperwork Reduction Act of 1986 (section 101(m) [Title VIII, Part A] of P.L. 99 500 and P.L. 99 591, 100 Stat. 1783) and The Paperwork Reduction Act of 1995 (P.L. 104 13, 109 Stat. 163). The Paperwork Reduction Act is codified at Chapter 35 of Title 44 of the United States Code.

It is expected that OMB will assist the agencies in assuring that all guides follow a common format so that a requestor picking up guides from two or more agencies can easily find the information they are seeking. Similarly, OMB should assure that all agencies use common terminology in describing record systems, how to file a FOIA request, and in describing other locator systems.

All guides should be available through electronic means, and should be linked to the annual reports. A citizen picking up a FOIA guide should learn how to access the annual reports. Similarly, any potential requestor reading an annual report should learn about the guide, and how to access it.

### *Section 12. Effective date*

To provide agencies with time to implement new requirements under the Act, sections 7 and 8 shall become effective one year after the date of enactment. These sections concern multitrack and expedited processing, unusual and exceptional circumstances, the doubling of the statutory time period for responding to FOIA requests, and estimating the amount of material to which access is denied. The remainder of the bill will take effect 180 days after enactment.

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### Statement of Attorney General Ashcroft Regarding Implementation of FOIA

October 12, 2001

Memorandum for Heads of all Federal Departments and Agencies

From: John Ashcroft, Attorney General  
Subject: The Freedom of Information Act

As you know, the Department of Justice and this Administration are committed to full compliance with the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000). It is only through a well-informed citizenry that the leaders of our nation remain accountable to the governed and the American people can be assured that neither fraud nor government waste is concealed.

The Department of Justice and this Administration are equally committed to protecting other fundamental values that are held by our society. Among them are safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy.

Our citizens have a strong interest as well in a government that is fully functional and efficient. Congress and the courts have long recognized that certain legal privileges ensure candid and complete agency deliberations without fear that they will be made public. Other privileges ensure that lawyers' deliberations and communications are kept private. No leader can operate effectively without confidential advice and counsel. Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), incorporates these privileges and the sound policies underlying them.

I encourage your agency to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA. Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.

In making these decisions, you should consult with the Department of Justice's Office of Information and Privacy when significant FOIA issues arise, as well as with our Civil Division on FOIA litigation matters. When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.

This memorandum supersedes the Department of Justice's FOIA Memorandum of October 4, 1993, and it likewise creates no substantive or procedural right enforceable at law.