



March 14, 2007

H.R. 1309 – Freedom of Information Act Amendments of 2007

Floor Situation

H.R. 1309 is being considered on the floor under suspension of the rules and will require a two-thirds majority vote for passage. This legislation was introduced by Representative Carolyn McCarthy (D-NY) on March 5, 2007. The bill was ordered to be reported, as amended, from the Committee on Oversight and Government Reform, by voice vote, on March 8, 2007.

H.Res. 1309 is expected to be considered on the floor on March 14, 2007.

Summary

H.R. 1309 amends the Freedom of Information Act, which was signed into law in 1966.

The amendments to the bill include:

Protection of Fee Status for News Media

The bill prohibits the denial of fee waivers if a requestor lacks institutional associations or is an independent journalist (bloggers). Agencies are required to consider prior publication history, if lacking that, the stated intent of the requester, when determining whether someone is a member of the news media.

**Note: Under current law, “fees shall be limited to reasonable standard charges,” for news media.*

Recovery of Attorney Fees and Litigation Costs

This section expands the ability to recover attorney’s fees. Specifically, it stipulates that if a complainant has “substantially prevailed,” and is eligible to receive attorney’s fees from the United States. The bill defines “substantially prevailed” as receiving relief through a judicial order, administrative action, or an enforceable written agreement or consent decree, or a voluntary or unilateral change in position by the opposing party, in a case in which the complainant’s claim or defense was not frivolous.

The bill states the attorney’s fees must be awarded from a fund created by the House Committee on Appropriations and no funds may come out of the Claims and Judgment Fund of the United States Treasury.

**Note: Current law enables a court to impose attorney's fees and litigation costs against the United States when a complainant has "prevailed."*

Disciplinary Actions for Arbitrary and Capricious Rejections of Requests

H.R. 1309 requires that the Attorney General to notify the Special Counsel of each civil action taken against the United States for wrongfully withholding requested material under FOIA.

Time Limits for Agencies to Act on Requests

Agencies cannot charge a fee for requested documents if they do not comply with the 20 day deadline to determine whether to comply with a request for information.

Individualized Tracking Numbers for Requests and Status Information

The bill calls for agencies to create a tracking system to carefully track and expedite requests.

Reporting Requirements

H.R. 1309 calls for additional reporting on FIOA activities. Specifically, the bill requires reports on:

- The average number of days agencies took to respond to request;
- The number of requests agencies handled within 201 days;
- The number of requests agencies handled within 200 to 301 days;
- The number of requests agencies handled within 300 to 401 days;
- The number of requests agencies handled within a period greater than 400 days; and,
- The number of fee waiver requests that were granted and the number that were denied.

Openness of Agency Records Maintained by a Private Entity

The bill clarifies the availability of government records possessed by non-government third parties be subject to FOIA policies.

Office of Government Information Services

The bill creates an Office of Government Information Services as part of the National Archives and Records Administration. The objective of the office of Government Information Services is to provide informal guidance to requesters under FOIA and may provide fact-finding reviews and opinions to requestors.

Accessibility of Critical Infrastructure Information

H.R. 1309 requires the Comptroller General of the United States to report to Congress on the implementation and use of the Critical Infrastructure Information Act of 2002.

Report on Personnel Policies Related to FOIA

The legislation requires the Office of Personnel Management to report to Congress on how FOIA can better be implemented at the agency level.

Promotion of Public Disclosure

The bill affirms that it is the policy of the Federal Government to release information to the public in response to a request under FOIA if it is required by Law.

Background

The Freedom of Information Act (FOIA) was signed into law by President Lyndon B. Johnson, in 1966. FOIA allows any person, individual or corporate (regardless of citizenship), to request certain records held by the Executive branch, including agencies. Requests can be made without explanation or justification, and can regard any topic. The design of FOIA was to open the government to the press and the public to provide access to records that were previously unavailable.

However, there are 9 specific exemptions and 3 exclusions contained in the statute which allow the Executive branch to withhold requested information. These exemptions pertain to sensitive materials, trade secrets, and other national security matters.

Pursuant to FOIA, agencies may charge a fee for certain actions relating to a FOIA request. In the event that a request is granted, depending on the size and scope of the request, an agency may provide the requestor with a few sheets of paper or a file that contains hundreds of thousands of sheets of paper. Following up on a request causes the agency to do a records search, duplicate the information requested, staff time, and review the information; this is a costly endeavor. Conversely, an agency can provide a requester with the necessary information at a reduced cost, or no cost at all, "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."

FOIA has been amended four times since 1966. In the 109th Congress, Lamar Smith (R-TX) introduced the OPEN Government Act of 2005 (H.R. 867). H.R. 867 was very similar to H.R. 1309 and called for many of the same amendments to FOIA. The bill was referred to the Committee on Government Reform and the Subcommittee on Government Management, Finance, and Accountability held a mark-up on September 27, 2006. The bill was forwarded to the full committee by voice vote but no further action was taken.

The Freedom of Information Act does not apply to Congress. Article I, Section 5 requires the Congress to keep a journal of its actions, except those parts that are required to be kept secret. This has been interpreted to allow Congress to keep certain records secret and

inaccessible to the public. Also, Article I, Section 6, the “Speech or Debate clause,” is interpreted to concern floor, committee, subcommittee, or legislative activity related to the activities of a congressional office.

CBO Estimate

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

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

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

NOTE: * = less than \$500,000.

Staff Contact

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