

H.R. 1211 - FOIA OVERSIGHT AND IMPLEMENTATION ACT OF 2014

GENERAL COMMENTS

- The Administration strongly opposes passage of H.R. 1211. The Administration views H.R. 1211 as an attempt to impose on the Executive Branch multiple administrative requirements concerning its internal management of FOIA administration, which are not appropriate for legislative intervention and would substantially increase costs and cause delays in FOIA processing. In this respect in particular, this bill is vastly different from past amendments to the FOIA, which addressed substantive issues connected with access to government records.
- We are committed to improving FOIA administration across the government, and we believe that the President's FOIA Memorandum and the Attorney General's FOIA Guidelines provide the best framework for those improvements. In the five years since their issuance, agencies have achieved many real successes, processing more requests, improving response time, and making more information available proactively. Furthermore, in the December 2013 National Action Plan for Open Government, the Administration laid out five key initiatives as part of its FOIA modernization effort. Through these five initiatives the Administration has committed to:
 - Exploring the best way to launch a consolidated online FOIA service;
 - Standardizing FOIA practices across agencies;
 - Improving internal agency FOIA processes;
 - Establishing a FOIA Advisory Committee; and
 - Improving FOIA training across the government.

Efforts to implement these initiatives are already ongoing and these commitments can be seen in more detail here:

http://www.whitehouse.gov/sites/default/files/docs/us_national_action_plan_6p.pdf.

Additionally, the Justice Department has undertaken a number of steps to improve the FOIA process as discussed in recent testimony. Pustay, Melanie Ann. "Open Government and Freedom of Information: Reinvigorating the Freedom of Information Act for the Digital Age," testimony, March 11, 2014, before the Senate Judiciary Committee. Text available at:

<http://www.judiciary.senate.gov/imo/media/doc/03-11-14PustayTestimony.pdf>.

- As a result, the Administration believes that the changes proposed in H.R. 1211 are not necessary and, in many respects, will undermine the successes achieved to date by diverting scarce processing resources. While there are some provisions in the bill that we do not object to, such as establishment of a FOIA Advisory Committee, and continued focus on the role of agency Chief FOIA Officers, such matters can be – and are already being – addressed administratively, without legislation.

MAJOR CONCERNS

- "Foreseeable harm"; proposed § 552(b): First, the Administration strongly opposes the bill's addition of a "foreseeable harm" standard into the FOIA exemptions. By inserting a separate

requirement that agencies demonstrate that disclosure “would cause specific identifiable harm,” before any withholding would be permissible, the bill effectively amends each and every one of the existing exemptions in a manner that is fatally vague and subjective. This addition would vastly increase FOIA litigation and would undermine the policy behind each of the existing exemptions. It would require judges to determine, on a document-by-document basis, whether disclosure of a record protected by an exemption would cause “identifiable harm.” By removing agency discretion to determine when a document covered by an exemption should be released, it would create massive uncertainty and would chill intragovernmental communication. The proposed amendment is unacceptably damaging to the proper administration of FOIA and of the government as a whole.

- Review of existing records; proposed § 552(a)(8): Second, the Administration strongly opposes the bill's attempt to impose a requirement for agencies to review all their existing records, determine whether their release would contribute to public understanding of the operations of the agency, and if so, to process them for disclosure. Given the vast quantities of records agencies hold, this requirement is so sweeping in nature that it is completely unworkable. We support proactive disclosure of records and, indeed, that is a key aspect of the President's FOIA Memorandum and the Attorney General's FOIA Guidelines, but the goal of increasing such disclosures can be achieved in a more thoughtful way that does not unnecessarily increase costs or divert resources from conducting agency operations and processing actual FOIA requests.
- Single FOIA website; proposed § 552(m) and §3 of bill: Third, while the Administration believes that it is beneficial to study the feasibility of establishing a single website for the making of FOIA requests, and has already committed to doing so, we also believe that, given the many challenges posed by creation of such a site, it is premature and would be counterproductive to mandate establishment of a pilot program, with required participation by multiple agencies, prior to completion of the feasibility study.
- OGIS; proposed § 552(h) and others: Fourth, the bill also inserts multiple references to the Office of Government Information Services (OGIS) that are often unnecessary and in some instances are counterproductive or inconsistent with the role of an office that is charged with providing mediation services. OGIS has a clearly defined role in the statute that we support, but the bill would give OGIS responsibilities that, in some cases, would unduly burden agencies, create inefficiencies, conflict with the neutrality required of a mediator, and have the potential to needlessly detract from DOJ's authority to guide the Executive Branch with regard to FOIA.

PROBLEMATIC PROVISIONS OF THE BILL

Section 2 - Freedom of Information Act Amendments

- New FOIA Website Requirement. As discussed above, the bill would add a new § 552(m), which would require OMB – “[n]ot later than one year after” enactment – to “ensure the existence and operation of a single website” for the public to (1) submit FOIA requests to agencies; (2) receive automated information about the status of their FOIA requests; and (3) file appeals. The Administration objects to this provision. The Administration believes that further study is needed to assess the feasibility of establishing a single website to make and track requests. Given that

there are 99 agencies subject to the FOIA, with vastly different FOIA needs, the technical and fiscal challenges of attempting to establish a single site for both submission and tracking of requests are great. Agencies' existing capabilities and operational needs, including appropriate handling of classified records and integration with agency record-keeping systems and systems that support FOIA workflow, would all need to be assessed and compared against what could be offered by a uniform system. It will be critical to assess the costs as well as the benefits of deploying a single system before making a decision on how to proceed. Otherwise, the pilot program could cause not only disruption of agency FOIA programs, but the undermining of agencies' ability to comply with existing DOJ reporting and data migration requirements. In addition, the Administration believes that DOJ should retain the role of setting FOIA policy and objects to provisions assigning new FOIA roles and responsibilities to OMB.

- Disclosure of Information. As discussed above, the bill would add a new § 552(a)(8), which would require all agencies to affirmatively review all their records to determine which would be of public interest, and to then affirmatively process all such records, and make them available in an electronic, publicly accessible format. First, the breadth of this provision is staggering, since virtually every agency would have millions of records to review. Second, to affirmatively review all the records an agency possesses to determine which are in the public interest, and redact portions of them that contain sensitive information, like information protected by the Privacy Act or Trade Secrets Act, would impose a crushing burden on agencies. Third, the bill does not take account of agency obligations to ensure that all posted records are accessible to individuals with disabilities, as required by Section 508 of the Rehabilitation Act of 1973, an obligation that is commonly fulfilled by the same people who process FOIA requests. The FOIA already contains a provision that requires agencies to post records that are likely to be frequently requested, and that provision offers a more structured and workable way to promote affirmative disclosures. In addition, the President's and Attorney General's FOIA Memoranda encourage proactive disclosures of records above and beyond the statutory requirements. For these reasons, the Administration strongly objects to the proposed new paragraph.
- Presumption of Openness - Amendments to 5 USC 552(b). As discussed above, the Administration strongly opposes the bill's addition of a narrow version of a "foreseeable harm" standard into the FOIA exemptions. While we would strongly oppose any attempt to codify such language, the bill language is particularly pernicious because, while seemingly analogous to the Attorney General's "foreseeable harm" standard contained in his 2009 FOIA Guidelines, it expands on that standard in a way that significantly changes FOIA's carefully crafted exemption scheme. The bill, like the Attorney General's FOIA Guidelines, recognizes that withholding is appropriate under the FOIA when "disclosure is prohibited by law." In all other situations, however, rather than requiring agencies to "reasonably foresee[] that disclosure would harm an interest protected by one of the statutory exemptions," the bill provides that agencies may not withhold information unless they reasonably foresee "that disclosure would *cause specific identifiable* harm to an interest protected by an exemption." (emphasis added) This is a much higher threshold to meet and would put a vast array of information at risk of disclosure. The risk is most obvious with regard to exemptions that typically do not allow discretionary releases, such as the exemptions that cover classified information and protect personal privacy, but it would have a devastating effect with regard to every exemption. To be clear, we do not believe that this is fixable by amending the language, because any codification of a foreseeable-harm standard would

undermine proper FOIA administration by requiring judges to determine on a document-by-document, subjective basis whether withholding is proper.

- Chief FOIA Officers Council - Amendments to 5 U.S.C. 552(k). While the Administration does not necessarily object to the concept of creation of a Chief FOIA Officers Council, we do not believe it is necessary or appropriate to mandate it, or prescribe its makeup, through legislation. The Administration believes that the authority of any Chief FOIA Officers Council should be subject to existing OMB and DOJ authority in these areas. However, proposed § 552 (k)(6)(C) and (D) could be read as providing the Council with policy and/or oversight authority that more appropriately belongs with OMB and DOJ.
- Regulations - Bill, § 2(k). The amendments proposed by the bill would not, by themselves, require implementing regulations and so it does not make sense for the bill to direct agencies to issue new FOIA regulations within 180 days of enactment “in accordance with the amendments made” by the bill. We question which of the requirements in this bill would require regulatory changes by agencies that already have FOIA regulations in place. Furthermore, to the extent that this paragraph is itself affirmatively directing agencies to include “procedures for engaging in dispute resolution” in their regulations, the Administration objects to the paragraph. While we support notifying requesters of the availability of such services, it would be counterproductive to require formal, regulatory procedures for the actual interaction with dispute resolution providers, given that such procedures are voluntary at their core and are enhanced by the providers’ ability to be fluid and flexible in how they proceed. Given our objection to any need to promulgate regulations as a result of the proposals contained in this bill, we likewise object to the requirement of a report detailing which agencies have amended their regulations.
- Shifting Certain Authorities to Implement FOIA from DOJ to the Office of Government Information Services (OGIS) - Amendments to 5 U.S.C. 552(h). The Administration believes that it is important for DOJ to retain its role as the provider of FOIA guidance to the Executive Branch. While we support the current statutory role of OGIS in reviewing agency FOIA policies, and while it is free to provide input, we feel strongly that actual guidance to agencies should come from DOJ. Thus, the Administration strongly objects to new § 552(h)(2)(D), which would require OGIS to “provide guidance to agencies on the use of fees and fee waivers.” Because this is a subset of the many FOIA issues on which DOJ provides guidance to agencies, requiring OGIS to provide such guidance is inefficient, could lead to confusion and inconsistency, and is contrary to the neutrality required of OGIS given its role in providing mediation services. As a result, this provision would be harmful, rather than beneficial, to the FOIA process. Likewise, we object to the lack of clarity of the proposed language in new § 552(h)(2)(C), which would require OGIS to “identify” methods for improving compliance with FOIA, because it fails to specify what OGIS is to do once it has made such identification.

Constitutional Issues in Section 2

- The bill would add new § 552(h)(4)(A), which would require OGIS to submit a report to certain committees of Congress containing “legislative and regulatory recommendations to improve the administration of [the FOIA].” This provision infringes on the President’s prerogative under the Recommendations Clause to “recommend to [Congress’s] Consideration such Measures as *he*

shall judge necessary and expedient,” U.S. Const. art. II, § 3 (emphasis added), because it requires an official in the executive branch who is subject to the President’s direction to make legislative recommendations that advance particular policies or objectives. To avoid conflict with the Recommendations Clause, we advise that the provision be revised to make clear that it is precatory, such as by insertion of the phrase “if deemed appropriate” after “recommendations.”

- The bill would also require, in new § 552(h)(4)(D), that the report discussed above, as well as testimony and other communications with Congress “be submitted directly to [certain congressional] committees and the President, without any requirement that any officer or employee outside of the Office of Government Information Services, including the Archivist . . . and the Director of [OMB] review such report, testimony, or other communication.” This provision raises separation of powers concerns by interfering with the President’s supervision of the executive branch in the exercise of his constitutionally assigned function “to take Care that the Laws be faithfully executed,” U.S. Const. art. II, § 3. It is analogous to a concurrent reporting requirement—a requirement that an executive branch agent report simultaneously to Congress and to the President (or supervising executive branch officials)—in that it prevents the President from supervising the executive branch in its communications to Congress. (We recognize that § 552(h)(4)(D) would literally allow OGIS to sidestep supervision by “any officer or employee outside of the Office of Government Information Services”, which we would not construe to include the President himself, but it still would severely burden the President in the exercise of his “take care” responsibilities by disabling him from relying on subordinate executive branch officials to supervise OGIS in its communications to Congress.) We have long taken the position that such provisions are presumptively objectionable, for they “clearly weaken the President’s control over the executive branch and by doing so increase[s] congressional leverage on the President and other officials of the executive branch.” *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 175 (1996). We therefore object to this provision.

Section 3 - Pilot Program

- As discussed above, the Administration strongly opposes provisions of the bill that would require OMB to establish a 3-year pilot program to review the benefits of “a centralized portal to process requests and release information,” including the requirement that no less than three agencies that are not currently using such a portal be compelled to do so. This section fails to take into account the resource and contractual implications associated with mandating use of a particular FOIA system, not to mention the significant disruption that would be caused to those agencies’ FOIA programs. We therefore object to Section 3 (Pilot Program) in its entirety. The feasibility and makeup of a consolidated online FOIA portal is currently being evaluated through the existing Administration effort to explore the best way to launch a consolidated FOIA website. Legislation is counterproductive, unnecessary, and premature as any determination on how to establish such an online service should wait until this review concludes.

Section 4 – Inspector General Review

- The Administration objects to Section 4(b) of the bill, which provides that withholding information “in a manner inconsistent with the requirements of” the FOIA or any “rules,

regulations, or other implementing guidelines” shall be a “basis for disciplinary action.” While the reference to disciplining employees may be an attempt to hold agency employees accountable for FOIA decisions, and to encourage greater disclosure, it is problematic in several respects. First, the standard is too vague and difficult to apply and it is unclear who “the appropriate supervisor” is referring to. Second, it would have very negative effect of discouraging agency employees from making FOIA decisions in a timely fashion as their concerns about whether they will be disciplined down the road, and this in turn would significantly bog down and back up an already overwhelmed FOIA system at agencies. Lastly, it has the negative effect of discouraging individuals from coming to work in the FOIA field in the first instance, knowing that they could be subject to disciplinary action if any of their good faith decisions are later deemed to be “inconsistent” with statutory and regulatory standards.

- Currently, every employee is already subject to discipline for poor job performance, in accordance with established standards. In addition, the FOIA already contains a provision addressing discipline of agency personnel for acting “arbitrarily or capriciously with respect to [a] withholding.” 5 U.S.C. 552(a)(4)(F). This existing provision targets malfeasance more clearly than the bill would and there is no reason to believe that any other provision is needed.