



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 26, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department on S. 849, the "Openness Promotes Effectiveness in our National Government Act of 2007" or the "OPEN Government Act of 2007," which amends the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The FOIA is a vital and continuously developing government disclosure mechanism that has been refined over time to accommodate both technological advancements and society's maturing interests in a transparent and fully responsible government. The Department is firmly committed to full compliance with the FOIA as a means of maintaining an open and accountable system of government, while also recognizing the importance of safeguarding national security, enhancing law enforcement effectiveness, respecting business confidentiality, and preserving personal privacy.

As a sign of the Department's continued commitment to the FOIA, it serves as the lead agency in the implementation of Executive Order 13,392, "Improving Agency Disclosure of Information," issued on December 14, 2005. This Order has immediately brought high visibility and focused attention on the FOIA by mandating the designation of a Chief FOIA Officer, FOIA Requester Service Centers, and FOIA Public Liaisons, in each agency. The Order has also focused on the improvement of FOIA processing by ensuring that agency FOIA operations are both "citizen-centered" and "results-oriented." The benefits of instituting these policies are already felt Government-wide, as agencies have developed comprehensive FOIA improvement plans and have issued their first reports mandated by this Order.

The Department opposes several sections of S. 849, as currently drafted, including, most importantly, section 6, which prevents the Government from relying on a number of FOIA exemptions, including exemptions for highly sensitive law enforcement information and privileged material, if the Government does not meet the statutory deadline for responding to requests. The Department also has concerns with section 3, which expands the definition of "representative of the news media" for purposes of assessing FOIA fees; and section 4, which

reinstates the so-called “catalyst theory” for reimbursement of attorneys fees in FOIA litigation. More generally, the Department is very concerned about the substantial administrative and financial burdens that this legislation would impose upon the Executive branch, without authorizing the resources necessary to implement its statutory scheme.

Section 6 – Time Limits for Agencies to Act on Requests

Of grave concern to the Department is section 6(b) of the legislation, which prevents an agency from relying on a number of statutorily provided exemptions from FOIA unless it meets the twenty-day accelerated deadline established in section 6, or unless the agency can make a “clear and convincing” showing to a court that there was “good cause” for its failure to meet the applicable deadline. Although this provision preserves exemptions for national security information, Privacy Act-protected information, “proprietary information,” and information otherwise protected by law, section 6(b) eviscerates several critical exemptions in FOIA including exemptions for inter- or intra-agency memoranda and highly sensitive categories of law enforcement records, unless an agency persuades a court that it has good cause for failing to meet the deadline.

Section 6 of S. 849 is a misguided attempt to remedy one perceived problem – compliance with the statutory response deadlines – with a measure that would eviscerate a central principle of FOIA -- protection of sensitive information. While the basic purpose of FOIA is to ensure an informed citizenry, it balances society’s strong interest in open government with other compelling public interests, such as protecting national security, enhancing the effectiveness of law enforcement, protecting sensitive business information, protecting internal agency deliberations and common law privileges and, not least, preserving personal privacy.

This provision, which would establish that failure to meet an applicable deadline would lead to the automatic release of all information with only a few narrow exceptions, is a draconian remedy with enormous consequences. For example, the automatic waiver of privileges, including privileges for attorney-client and attorney work-product information that are incorporated in FOIA through Exemption 5 and well-established by common law for centuries, is unprecedented. This would frustrate the policy behind these privileges and, among other things, would doubtless create a chilling effect on policy discussions, create public confusion that could result from disclosure of reasons and rationales that were not the grounds for agency action, and cause the premature disclosure of proposed policies before they have been sufficiently considered. It would also greatly interfere with government attorneys’ work in preparing for litigation, exposing their legal strategies, approaches, and views to their opposing counsel, thereby greatly undermining their ability to represent their client. It would also chill the exchange of information to government attorneys from their clients, reducing their ability to properly represent them.

Of greatest concern to the Department is the automatic waiver of the existing exemption for law enforcement information. The wholesale release of law enforcement-related documents

would have devastating consequences for ongoing criminal investigations. Sensitive law enforcement techniques could be exposed, and the lives of witnesses, confidential informants, and law enforcement officials would, without a doubt, be placed in imminent danger. Indeed, the very system of confidentiality inherent in the federal government's law enforcement activities would be shattered by the lack of predictability that this provision would yield. This is also troubling since there is greater convergence between law enforcement activities and homeland security activities.

Further, under section 6(b), any person or organization with criminal intent (including terrorist organizations) could possibly gain access to internal military force protection information (i.e., information concerning the protection of the Pentagon reservation, munitions sites, and any other military installation) if an agency possessing such information were forced to automatically waive any applicable exemption. Disclosures of such highly sensitive information could have dire consequences for our military.

Among the limited exceptions that section 6 would allow the government to invoke after the twenty-day deadline, the exception stated for "personal private information" would be inadequate in any event. Because this exception is limited to "personal private information protected by section 552a" it would apply only to information protected by the Privacy Act. This lack of protection for information not protected by the Privacy Act could result in the public disclosure of personal information, such as third parties' social security numbers. Such a disclosure could have severe consequences for unsuspecting third parties, especially if the social security numbers were used for criminal purposes, such as identity theft. Under current law, personnel, medical, and similar files are exempt from FOIA if disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); *see also id.* § 552(b)(7)(C). This category of information is far broader than the information covered by the Privacy Act. The existing exemption has been interpreted by the courts to mean that a government decision-maker must balance the severity of the threat to an individual's privacy against the public interest in disclosure. *See Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976). By narrowing this important exemption to protect only information covered by the Privacy Act, S. 849 repudiates the policy of balancing any individual's privacy interest against the public interests in disclosure. Thus, S. 849 will significantly limit personal privacy safeguards.

Section 6(b) does contain a purported safety valve that would permit a court to waive the harsh application of the section if an agency "demonstrates by clear and convincing evidence that there was good cause for the failure to comply with the applicable time limit provisions." However, by focusing on the agency's reason for failing to meet the twenty-day deadline, rather than upon the potential harm that reasonably could be expected to be caused by the radical disclosures that would occur, this provision ignores the substantial public interest in avoiding the disclosure of highly sensitive records.

Although section 6(b) would not eliminate the availability of the President's constitutional privilege to protect the interests covered by the statutory exemptions, section 6(b)

would nonetheless raise substantial constitutional concerns that could make it unconstitutional as applied in particular circumstances. The uncertainty created by a system that depends on a court finding “good cause” for delay or upon the invocation of constitutional privilege would likely chill the candor of the constitutionally-protected deliberations of the Executive branch or otherwise harm the interests protected by the statutory exemptions in a way that could compromise the Executive’s discharge of its constitutional functions. Rather than fostering responsible disclosure, this provision actually could well force agencies to deny requests by the twenty-day deadline in order to avoid waiving any exemptions, and thus needlessly increase appeals and litigation. In addition, this provision fails to take into account the complexity of many requests, the need to consult with other agencies, or the need to search for records in multiple locations, including at Federal records centers, all of which necessarily and reasonably add to the time it takes to respond to a request.¹

The Department is also opposed to section 6(a) of S. 849, which would amend 5 U.S.C. § 552(a)(6)(A)(i) by changing the twenty-day time limit so that it commences on the date that the request “is first received by the agency.” This represents a very significant change from current practice in which the twenty-day clock begins once the appropriate element of an agency has received the request in accordance with the agency’s FOIA regulations. Beginning the twenty-day time limit as soon as a request “is first received by the agency” does not allow for the practical necessity of forwarding a request to an appropriate field office, division, or component, which could take several or more days.² This provision is thus at odds with the longstanding practice at all Federal agencies, under regulations that have been duly promulgated and followed in accordance with the explicit direction of the Act itself. *See* 5 U.S.C. § 552(a)(3)(A). For example, Department of Justice FOIA regulations provide that “[a] request will be considered [as] received as of the date it is received by the proper component’s FOIA office.” 28 C.F.R. § 16.3 (2006). Additionally, given that agencies make addresses readily available on their Web sites and in their FOIA Reference Guides, it is not imposing any undue burden on a requester to direct his/her request to the appropriate office. Further, when a requester neglects to address

¹ If enacted, the penalties imposed by section 6(b) would have an equally adverse effect on NARA's ability to protect under the FOIA records that are also subject to the Presidential Record Act (PRA). When processing requests for Presidential records, the PRA requires NARA to inform the former President of its intent to publicly disclose the requested records. In conjunction with this statutory requirement, Executive Order 13,233, "Further Implementation of the Presidential Records Act," affords the former President (and the incumbent President) ninety days to conduct a records review. As a result of the drastic penalties contained in section 6(b) of S. 849, NARA would, after only twenty-days, forfeit its ability to protect certain records under the FOIA, even if such records contain sensitive private information not protected by the Privacy Act, including FBI background files and other law enforcement or investigatory information. Additionally, it would be an added burden for NARA to attempt to compel a court to waive this provision in an effort to protect information for which it already has a sound legal basis to withhold.

² Importantly, additional mail processing time is required in the post-9/11 world because the Department, as well as other agencies, now must x-ray or irradiate incoming mail, including FOIA requests. Five days might pass while the request is being irradiated and before any program office of an agency receives the x-rayed mail.

his/her request properly, agencies routinely route the request to the proper office, so the requester is not penalized in any way for a failure to properly address a request. Conversely, this proposed change in the way the time periods are calculated penalizes the agency for something completely out of its control. Requesters will have no incentive to properly address their requests. More significantly, they will actually have an incentive to use the most obscure address possible in the hope that the time expended in properly routing it will render the agency unable to meet the response deadline.

The Department is opposed to the second clause of section 6(a) which states that the twenty-day time period to respond to a request "shall not be tolled without the consent of the party filing the request." In the course of processing a FOIA request there are numerous occasions when an agency must stop its processing in order to get information from the requester, and the agency should not be penalized for the time it takes the requester to provide needed information to the agency. For example, after a request is first received by an agency the personnel responsible for processing it might determine that the request fails to reasonably describe the records that are being sought. In such situations agency personnel routinely go back to the requester for clarification of the request. Similarly, during the course of processing a request, the agency may determine that the search for responsive records will take longer than anticipated and so will cost more than the requester has agreed to pay. Again, in such situations the agency routinely goes back to the requester to see if the requester would like to narrow its request to reduce the fees owed, or to see if the requester will agree to pay the fees that are anticipated. In these situations, when the processing of the request is necessarily "on hold" while the agency awaits a decision by the requester, the time period for responding has traditionally been tolled. The language in section 6(a) would not allow that to happen without the consent of the requester. That means that absent consent – which is not likely to be given – the agency will be penalized for the failure of requesters to provide necessary information in order for their requests to be processed. Rather than having an incentive to respond quickly to the agency in order to get their request back on track, this provision will actually give requesters an incentive to delay responding to the agency's request for clarification, or for a commitment to pay fees, etc. because by doing so, they know that the twenty-day time period is ticking.

We believe that the draconian penalties in section 6 not only are unwise, but are also unnecessary since Executive Order 13,392 has improved FOIA operations by requiring agencies to review their administration of the FOIA and their compliance with the statutory deadlines. The Executive Order also requires agencies to implement improvement plans specifically focused on eliminating or reducing any backlog of FOIA requests. The Department's preliminary review of reports in this regard indicates that agencies overall are devoting increased resources to processing FOIA requests more efficiently and quickly, and indeed some agencies have already realized meaningful backlog reduction.

Section 3 – Protection of Fee Status for News Media:

Section 3 of the legislation, titled “Protection of Fee Status for News Media,” expands the definition of “representative of the news media,” and thereby exempts a larger class of requesters from the obligation to pay what can sometimes be quite significant fees assessed for searching for responsive documents. The current law represents a carefully-struck balance that establishes differing fee levels for different categories of requesters. For example, an agency is permitted to charge a requester for document search time, duplication, and review costs if the request is made for a “commercial use.” 5 U.S.C. § 552(a)(4)(A)(ii)(I). An agency may charge a requester only for document duplication if the request is made by an educational or non-commercial scientific institution, whose purpose is scholarly or scientific, or by a representative of the “news media.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). Section 3 of the legislation amends subclause (II) so that an agency “may not deny [to a representative of the news media] status solely on the basis of the absence of institutional associations of the requester, but shall consider the prior publication history of the requester” including Internet publications. Most significantly, it would further require an agency, in the absence of such prior publication history, to “consider the requestor’s stated intent at the time the request is made to distribute information to a reasonably broad audience.” Because it can be assumed that virtually all requesters claiming to be representatives of the news media will readily state that it is their “intent” to distribute the records to a broad audience, this expansion of the definition of “representative of the news media” would render the concept of “representative of the news media” virtually meaningless.

Such an expansion of the definition of “representative of the news media” would have severe fiscal and other practical consequences for the Executive branch, and is ill-advised without empirical evidence that the current definition of “representative of the news media” is insufficient to carry out FOIA’s purposes. The increased taxpayer burden that would result from the changed definition should be undertaken only after careful review by Congress in light of limitations being imposed across the board on domestic discretionary spending. Indeed, the limitation in section 3 on the Government’s ability to collect fees for FOIA processing seems inconsistent with the stated desire of many Members of Congress to improve FOIA timeliness. With no requirement that requesters pay search fees, they have no incentive to tailor their requests and so they are likely to make overly broad requests. This, in turn, will stretch agency resources and will increase the time it takes to process all requests. The Executive branch cannot process FOIA requests expeditiously without adequate manpower and resources, which is dependent on adequate funds, including FOIA processing fees deposited in the Treasury Department’s general fund.

Section 4 – Attorneys’ Fees.

Section 4 of the legislation would reinstate the so-called “catalyst theory” for the reimbursement of FOIA litigation fees. Current law permits a court to assess reasonable attorneys’ fees and litigation costs incurred when the complainant in a lawsuit challenging an

agency's response (or lack thereof) to a FOIA request has "substantially prevailed." Section 4 of S. 849 would amend 5 U.S.C. § 552(a)(4)(E) by altering and expanding the definition of "substantially prevailed" to include situations in which a "complainant has obtained relief through either (I) a judicial order, an administrative action, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the opposing party, where the complainant's claim or defense was not frivolous." We understand this provision's intent to be the overruling of the Supreme Court's decision in *Buckhannon Board & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598 (2001), and of a number of recent court of appeals decisions that have applied *Buckhannon* to reject the catalyst theory as a basis for FOIA attorneys' fee awards. See *OCAW v. Dep't of Energy*, 288 F.3d 452 (D.C. Cir. 2002); *Union of Needletrades v. INS*, 336 F.3d 200 (2d Cir. 2003).

The Department does not support the reinstatement of the catalyst theory, for many of the same reasons enunciated in Chief Justice Rehnquist's *Buckhannon* opinion. Proponents of the catalyst theory have argued that it is needed for two reasons. First, they argue that it would encourage plaintiffs with meritorious but expensive cases to bring suit. Second, they argue that it would prevent defendants from unilaterally mooting an action before judgment to avoid an award of attorneys' fees. As Chief Justice Rehnquist noted in his opinion in *Buckhannon*, however, "these assertions . . . are entirely speculative and unsupported by any empirical evidence." *Buckhannon*, 532 U.S. at 608.

More importantly, the Department is especially concerned that the catalyst theory, if reinstated, will serve as a disincentive to a Government agency's decision to voluntarily change decisions and procedures with respect to FOIA requests, because doing so could make the agency liable for a complainant's legal fees. Such a result would be inconsistent with FOIA's underlying purpose of promoting, rather than inhibiting, disclosure.

Furthermore, it is unclear what is meant by the inclusion of an "administrative action" as a possible means by which a requester can obtain "relief" that would justify attorneys' fees. If it is deemed to apply to a requester who receives documents through the administrative FOIA appeals process, that would be a major departure from long-standing administrative law practice and would severely undercut the traditional function of the administrative appeal process, which is designed to provide the requester with an avenue of further review at the agency, as well as provide the agency with a second opportunity to evaluate its response, thereby reducing the likelihood of a lawsuit. If this provision covers relief provided at the administrative appeal stage, this could increase the FOIA program costs dramatically, and would serve as a disincentive to release records at the administrative appeal stage.

Section 7 – Tracking Numbers:

Section 7 would require agencies to establish systems to assign an individualized tracking number to each request and to notify requesters of this number within ten days. In addition, the legislation mandates the establishment of a telephone line or Internet service to provide

information about the status of the request, including receipt date and estimated completion date. The need for this provision has been mitigated by the issuance of the FOIA Executive Order which required that agencies establish FOIA Requester Service Centers to provide requesters with information concerning the status of their FOIA requests. In addition, supervisory personnel have been appointed as FOIA Public Liaisons to ensure that FOIA requesters receive appropriate assistance from the service centers. Moreover, many agencies which receive higher volumes of requests already notify requesters of assigned tracking numbers when they first acknowledge receipt of requests.

Section 8 – Specific Citations in Exemptions:

Section 8 of S. 849 would amend FOIA's Exemption 3, which protects information otherwise statutorily exempted from disclosure, by requiring that newly enacted statutes that purport to limit public disclosure of information specifically cite to this section of S. 849. We believe this amendment is unnecessary. The current version of Exemption 3 was enacted in 1976 (*see* Pub. L. No. 94-409) to limit Exemption 3's availability to specific categories of statutes: those that require agencies to withhold documents with no agency discretion, or, alternatively, that establish particular criteria for withholding or refer to particular types of matters to be withheld. The 1976 amendment to Exemption 3 has worked well now for over thirty years. Courts have recognized that the congressional intent to maintain the confidentiality of particular information is the central consideration in determining whether a statute falls within Exemption 3. In focusing on congressional intent, courts have avoided imposing additional requirements that Congress use any particular "magic words" to establish a statute as an Exemption 3 statute. Thus, the Census Act, the Internal Revenue Code, the National Security Act of 1947, and the grand jury secrecy rule, Fed. R. Crim. P. 6(e), to take several well-known examples, have been determined by the courts to qualify as Exemption 3 statutes even though those statutes do not specifically refer to Exemption 3.

Moreover, subsection (e)(1)(B)(ii) of FOIA now requires agencies to include in their annual FOIA reports a complete list of all statutes that the agency relies upon to authorize withholding under Exemption 3, together with other pertinent information concerning such withholding. Thus, Congress has a ready mechanism under current law, created in the 1996 e-FOIA amendments (Pub. L. No. 104-231), to determine how Exemption 3 is being administered.

Additionally, section 8 could unduly hamper Congress in the future or even constitute a hidden trap. For example, Congress has recently enacted appropriations laws to bar the Bureau of Alcohol, Tobacco, Firearms, and Explosives from releasing certain sensitive law enforcement data to the public. Because congressional intent to maintain the confidentiality of such data is apparent from these appropriations laws, there is no reason to require, in addition, a specific reference to Exemption 3 in every subsequent annual appropriations law. Most significantly, Congress over the years has acted to revitalize certain export laws that periodically expire while Congress deliberates over policy matters. These statutes protect confidential business information submitted to the Government in connection with export applications, and the courts

have upheld Exemption 3 protection for such matters, based upon the clear import of the overall statutory scheme. *See Times Publ'g. Co. v. Dep't of Commerce*, 236 F.3d 1286 (11th Cir. 2001). Under S. 849, such confidential business information would necessarily be subject to disclosure if Congress failed to meet the additional requirement imposed by S. 849. Additionally, if this provision is enacted, it is possible that there would be recurring disagreement as to whether subsequent nondisclosure statutes that do not clearly reference Exemption 3 have impliedly repealed or amended section 8. This sort of uncertainty would eviscerate what appears to be the central purpose of this provision.

Section 9 – Reporting Requirements

Pursuant to the 1996 e-FOIA amendments (Pub. L. No. 104-231), the Department of Justice has responsibility for collecting information from other Executive branch agencies concerning FOIA compliance, including the number of determinations not to comply with requests for records, the number of appeals, the number of pending requests, and the median time to process such requests. *See* 5 U.S.C. § 552(e)(1). Section 9 expands the existing requirements in five principal areas: (1) Agencies' detailed response data based upon the date on which the request was originally received including the average number of days, the median number of days, and the range of dates to respond; (2) data concerning the 10 active requests with the earliest filing dates; (3) data concerning the 10 active administrative appeals with the earliest filing dates; (4) data concerning requests for expedited review; and (5) data on fee waiver requests.

The Department believes that these new reporting requirements would be a largely unnecessary burden upon agencies that, as described above, cuts against the timeliness objectives pursued elsewhere in the bill. In addition, as described above, using the date a request is "originally received by the agency" as the starting point for determining time periods will result in a great distortion of the annual report statistics. If requesters misdirect requests, then the time spent correcting that error (i.e., the time spent forwarding the request to the proper office) would be counted against the agency's processing time. This will result in statistics that do not actually reflect processing time. Further, it is not clear that providing the additional data will provide any new or useful information regarding agency response times. Importantly, as part of their new Executive Order reporting requirements, agencies now report on the range of dates for both pending requests and consults. Moreover, there has been a great deal of focus on the ten oldest requests by agencies.

Section 10 – Agency Records Maintained by a Private Entity:

Current law defines an agency record as information that is "maintained by an agency in any format, including an electronic format." 5 U.S.C. § 552(f)(2). The Supreme Court elaborated on this standard by holding that an "agency record" is a document ". . . either created or obtained by an agency and under agency control at the time of the request." *Dep't of Justice v. Tax Analysts*, 492 U.S. 136 (1989). The Supreme Court has also held that Federal

participation in, or funding of, the generation of information by a privately controlled organization does not render that information an “agency record” under the terms of FOIA. *See Forsham v. Harris*, 445 U.S. 169 (1980).

Section 10 of S. 849 amends the existing statutory definition in 5 U.S.C. § 552(f)(2) to include information “that is maintained for an agency by an entity under a contract between the agency and the entity.” The Department does not object to section 10 if its intention is solely to clarify that agency-generated records held by a Government contractor for records-management purposes are subject to FOIA. On the other hand, the Department would have very serious concerns if section 10 of S. 849 were intended to disturb over twenty-five years of settled law by overruling the *Forsham* and *Tax Analysts* decisions. At the very least, section 10 is ambiguous as currently drafted and should be clarified.

Section 11 – Office of Government Information Services:

The Department has significant questions and concerns about section 11, which would create an “Office of Government Information Services” within the Administrative Conference of the United States. This new office would be charged with responsibility for reviewing policies and procedures of agencies, conducting audits of those agencies, issuing reports, recommending policy changes to the President and Congress to improve the administration of the FOIA, and offering mediation services between requesters and administrative agencies.

The Department is concerned about any intent that the proposed Office of Government Information Services would be given any sort of policymaking and adjudicative role with respect to FOIA compliance. Such a role is foreign to the traditional mission of the Administrative Conference of the United States, which was tasked with promoting improvements in the efficiency, adequacy, and fairness of procedures of the government’s regulatory programs by conducting research and issuing reports. *See* 5 U.S.C. § 594 (2000). Importantly, the aforementioned policymaking role remains appropriately placed with the Department of Justice, which has long held responsibility for ensuring compliance with the FOIA throughout the Executive branch. This role is all the more important, now that the Department serves as the lead agency in implementing Executive Order 13,392.

Of additional concern is that the Office of Government Information Services would be authorized by S. 849 to provide mediation services between agencies and FOIA requesters. It should be noted that many FOIA disputes are not particularly well-suited to mediation because, inter alia, the two matters generally at issue in FOIA litigation – the adequacy of the search and the assertion of exemptions – are questions of law. Moreover, the authority given this Office under the bill may constitute the kind of significant authority that can only be exercised by officers duly appointed under the Appointments Clause, U.S. Const. art. II, sec. 2, cl. 2, and if that is the case, the provision would raise constitutional concerns.

Further, the establishment of such an office would be unwarranted and redundant. Agencies routinely review their FOIA policies and procedures to ensure that they are adequately funded for the administration of the program. In fact, with the recent issuance of Executive Order 13,392, agencies are now required to scrutinize their processing of FOIA requests and report to the Department of Justice on their improvements made in that regard. Agencies then report any deficiencies in the implementation of their improvement plans to the Attorney General and the President's Management Council. Also, the Executive Order required agencies to appoint Chief FOIA Officers, who "have agency-wide responsibility for efficient and appropriate compliance with the FOIA." This requirement ensures high-level visibility and accountability by an agency's "senior official." Further, the Department of Justice and the Government Accountability Office (GAO) already perform the function of holding agencies accountable, working quite well together. Indeed, there have been several GAO reports analyzing Government-wide administration of FOIA during just the past four years.

Additionally, the creation of a separate, independent office to provide Ombudsmen-type services to requesters is unnecessary in light of all agencies' meeting the Executive Order's requirement to designate FOIA Public Liaisons and establish FOIA Requester Service Centers. The Public Liaisons and Requester Service Centers are there to provide information to the public about the status of their requests, to ensure that agencies use a "service-oriented" approach in responding to FOIA-related inquiries, and to resolve disputes.

Finally, both sections 11 and 13 of the bill appear to require the submission of legislative recommendations to Congress by Executive branch agencies, requirements which conflict with the President's authority to submit only such legislative proposals as he deems "necessary and expedient." *See* U.S. Const. art. II, sec. 3. Any such provisions in the bill should be precatory rather than mandatory.

Conclusion:

Since its enactment in 1966, FOIA has firmly established an effective statutory right of public access to Executive branch information in the Federal government. But the goal of achieving an informed citizenry is often counterpoised against other vital societal aims, such as the public's interest in effective and efficient operations of government; the prudent use of limited fiscal resources; and the preservation of the confidentiality and security of sensitive personal, commercial, and governmental information.

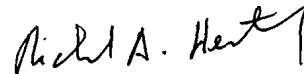
Though tensions among these competing interests are characteristic of a democratic society, their resolution lies in providing a workable scheme that encompasses, balances, and appropriately protects all interests, while placing primary emphasis on the most responsible disclosure possible.

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Regrettably, S. 849, however well intentioned, does not provide a workable regime for effective, efficient compliance with the FOIA, nor does it provide a reasonable balance for the competing and equally compelling governmental aims involved here.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in black ink that reads "Richard A. Hertling". The signature is written in a cursive style with a prominent, sweeping flourish at the end.

Richard A. Hertling
Acting Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member