

# Sunshine in Government Initiative

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## Response to the Social Security Administration's Concerns about the Open Government Act

June 27, 2007 -- The Social Security Administration's (SSA) concern about the impact of the Open Government Act is misdirected, based on stretched logic, and in whole provides a red herring to sow unfounded doubt about FOIA reform legislation. SSA identifies issues that SSA can resolve itself by continuing existing practices or the Justice Department can easily resolve administratively. Instead, SSA attempts to tar sound, common sense legislation with problems the agency's idiosyncratic practices have created.

### **SSA Concern: The Open Government Act would burden the agency with tracking millions of simple Privacy Act inquiries and delay responses**

SSA argues that "at present the Agency controls about 40,000 requests but to comply with this legislation, the Agency would need to control and to track all 18 million FOIA requests, and then to provide the tracking number in an acknowledgement letter to the requester within 10 days." This change "would negatively impact the timeliness of service delivery."

### **SGI Response: SSA's current practice of handling Privacy Act requests separately from FOIA complies with the OPEN Government Act.**

- SSA's own memorandum notes that more than 18 million requests are Privacy Act requests and handled within one day. The legislation does not change the definition of a request under FOIA. Under the Open Government Act, SSA could continue its current practice, as it describes on its website, of handling requesters' inquiries for information about themselves under the Privacy Act, not FOIA.<sup>1</sup> Justice's guidance that agencies should handle Privacy Act requests as FOIA requests is for reporting purposes only.
- Based on SSA's own analysis, SSA would only have to continue to track the roughly 40,000 complex requests it receives and controls through Headquarters, not a burdensome task. (See related CJOG analysis estimating SSA's financial impact to be roughly \$6,000.)
- Justice should rescind its requirement that all agencies lump Privacy Act requests into agency counts of FOIA requests. Disaggregating Privacy Act requests from FOIA requests in agency annual reporting would provide a more accurate picture of FOIA

<sup>1</sup> "If you are requesting your own record(s), we will process your request under the Privacy Act instead of under the FOIA." *Guide to FOIA Requests*, Social Security Administration, [http://www.ssa.gov/foia/html/foia\\_guide.htm](http://www.ssa.gov/foia/html/foia_guide.htm), accessed June 27, 2007.

processing trends as well. The Sunshine in Government Initiative would support this administrative change in Justice Department guidance.

- Even if Justice does not change its guidance, the OPEN Government Act would not absurdly require any agency to delay responding in full within 20 days just so the agency can assign a tracking number to the request. The purpose of the legislation is to improve the processing of FOIA requests so documents that should be released to the public are done so in a more timely and requester-friendly manner. If any agency has a full and complete response within twenty days, it should release the records without a tracking number to the requester. (However, if any document or portion is redacted or denied, entry of that request into a tracking system would, presumably, ease the administrative appeals process and should be done.) A plain reading of the OPEN Government Act clearly establishes the letter and spirit of disclosure to allow these issues to be addressed administratively.

**SSA Concern: S. 849 "would extend 'media' status to virtually everyone who claims to be a representative of the news media, even if that claim is unsupported by evidence."**

**SGI Response: S. 849 changes, not eliminates, criteria for news media status.**

- S. 849 broadens the criteria by which requesters are given fee waivers. Agencies would have to consider factors beyond the institutional affiliation of the requester to include the intent to disseminate the requested information broadly.

**SSA Concern: The bill would negatively affect federal government coffers.**

**SGI Response: Financial impacts on SSA are likely to be very small.**

- SSA does not estimate the amount that would be lost from the broader definition of news media, however the Congressional Budget Office estimates that lost fees from *all* federal agencies would total only around \$1 million and increase the government's legal costs by only 2 percent, a small price for the entire executive branch to create incentives for agencies to improve FOIA processing. In addition, by law agencies cannot collect fees for requests under the Privacy Act, so the argument does not apply to the vast majority of the 18 million requests that SSA says it receives under FOIA.

**SSA Concern: Penalties provisions in the House and Senate differ.**

**SGI Response: This is outdated information.**

- On May 21, 2007, Sen. Patrick Leahy and Sen. John Cornyn, the bill's chief sponsors, introduced a manager's amendment that would drop the provision waiving certain exemptions for failing to process requests within the 20-day deadline. The amendment would replace that provision with the House bill's approach, which allows exemptions and drops fees for delayed requests.

## **Conclusion**

The Social Security Administration identifies problems unique to SSA that the agency itself can remedy by *continuing* current practices (in full compliance with the OPEN Government Act) or that should be clarified in other administrative ways.

It may be true that "SSA's current FOIA processes are not sufficient to meet the requirements of either the House or the Senate version of this bill." The FOIA has become a less reliable, less timely, and less useful tool for the public to obtain documents from its government. If the legislation becomes law, many agencies will be strengthening their FOIA processes and likely adjusting resources to meet new statutory requirements.

The OPEN Government Act does not affect the exemptions, alter definitions of what constitutes a request under FOIA, or create promises to altogether eliminate delays or backlogs. It creates conservative, process-oriented changes to FOIA. It encourages agencies to better process FOIA requests and use resources effectively.