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REPORT
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FOIA IMPROVEMENT ACT OF 2015

FEBRUARY 23, 2015.—Ordered to be printed

Mr. GRASSLEY, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany S. 337]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 337), the FOIA Improvement Act of 2015, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

CONTENTS

I. BACKGROUND AND PURPOSE OF THE FOIA IMPROVEMENT ACT OF 2015

A. BACKGROUND AND THE NEED FOR LEGISLATION

In 1966, the Federal Government established a policy of openness toward information within the control of the Executive Branch, and a presumption that such records should be accessible

to the American public with the enactment of the Freedom of Information Act (FOIA). Under FOIA, any member of the public may request access to Government information, and FOIA requesters do not have to show a need or reason for seeking information. The Freedom of Information Act is used by researchers, historians, journalists, educators, and the public at large to gain access to Government-held information affecting public policy, consumer safety, the environment, and public health, among other things. It has become an indispensable tool for ensuring our Government remains transparent and accountable to the people. The Supreme Court aptly observed that the "[p]urpose of the FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption." [1]

The public's statutory right to access information held by the Executive Branch, however, is not absolute. The Freedom of Information Act defines which agency records are subject to disclosure and outlines mandatory disclosure procedures. The Freedom of Information Act also includes, however, nine exemptions to disclosure and three law enforcement record exclusions that protect some records from disclosure to the public.[2]

Since its enactment, FOIA has been amended multiple times in an effort to improve both transparency and efficiency. Notably, under the OPEN Government Act of 2007, Congress created the Office of Government Information Services (OGIS). OGIS was designed to serve as the FOIA ombudsman—a resource for information and assistance for FOIA requesters—and it was tasked with helping to resolve disputes between Federal agencies and FOIA requesters. OGIS was also charged with reviewing FOIA policies and procedures, monitoring agency compliance, and providing findings and recommendations to Congress with respect to improving the administration of FOIA.

Notwithstanding the many improvements to the original legislation, more needs to be done to ensure that FOIA remains the nation's premier transparency law. In Fiscal Year 2013, the Federal Government received over 700,000 FOIA requests, an 8% increase from the previous fiscal year.[3] As the number of requests grows, so does the backlog of agency responses. A response to a FOIA request is considered to be backlogged if it has been pending with a Federal agency longer than the statutorily prescribed deadline to respond. At the end of Fiscal Year 2013, more than 95,000 responses to FOIA requests were backlogged with a Federal agency—a 33% increase from Fiscal Year 2012.[4]

In addition to the growing backlog, there are concerns that some agencies are overusing FOIA exemptions that allow, but do not require, information to be withheld from disclosure. Pursuant to FOIA, Federal agencies may only withhold documents, or portions of documents, sought if they fall within one or more of nine categories of exemptions established by the statute. While some FOIA exemptions leave no discretion to an agency in determining wheth-

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[1] *NLRB* v. *Robbins Tire & Rubber Co.,* 437 U.S. 214, 242 (1978).

[2] 5 U.S.C. § 552 (2006), *amended by* OPEN Government Act of 2007, Pub. L. No. 110–175, 121 Stat. 2524.

[3] U.S. Department of Justice, *Office of Information Policy, Summary of Annual FOIA Reports for Fiscal Year 2013* at 2, July 23, 2014, *available at http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fy2013-annual-report-summary.pdf.*

[4] *Id.* at 8.

er or not the information may be disclosed, other exemptions allow for discretionary disclosures permitting agencies to release the requested information even if it meets the technical requirements of the exemption.[5] There is a growing and troubling trend towards relying on these discretionary exemptions to withhold large swaths of Government information, even though no harm would result from disclosure. For example, according to the *OpenTheGovernment.org 2013 Secrecy Report*, Federal agencies used Exemption 5, which permits nondisclosure of information covered by litigation privileges such as the attorney-client privilege, the attorney work product doctrine, and the deliberative process privilege, more than 79,000 times in 2012—a 41% increase from the previous year.

During the Clinton Administration, Attorney General Janet Reno instructed agencies to make discretionary disclosures to FOIA requesters, and to withhold records only if a reasonably foreseeable harm existed from that release.[6] In 2001, the George W. Bush Administration reversed this policy with a memorandum from Attorney General John Ashcroft that encouraged agencies to limit discretionary disclosures of information, and stated that the Department of Justice (DOJ) would defend decisions to withhold information from requesters unless those decisions "lack[ed] a sound legal basis."[7] When President Obama took office in 2009, agencies again were instructed to take a more open approach to FOIA, and to deny a FOIA request only if the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions.[8] This ever-changing guidance is undoubtedly confusing to FOIA processors and requesters alike, and agencies need clearer guidance regarding when to withhold information covered by a discretionary FOIA exemption. Codification of this policy also makes clear that FOIA, under any administration, should be approached with a presumption of openness.

Finally, while OGIS has been largely successful in carrying out its mission and serving as a bridge between Federal agencies and FOIA requesters, it is hampered in one of its most fundamental duties. Under the OPEN Government Act of 2007, OGIS is charged with reviewing agency compliance with FOIA, reviewing policies and procedures of administrative agencies under the FOIA, and recommending policy changes to Congress and the President to improve the administration of FOIA. Since its inception, however, DOJ has required OGIS to submit its findings and recommendations to several executive agencies for final approval before receiving permission to deliver its findings to Congress. This process runs contrary to Congress's intent in creating OGIS, and raises questions about its independence, as well as with the timeliness with which Congress and the President can expect to receive its findings and recommendations.

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[5] U.S. Department of Justice, *Guide to the Freedom of Information Act, 2009 Edition,* at 686–692 (2009).

[6] Attorney General Janet Reno, Attorney General, *Memorandum for Heads of Departments and Agencies, Subject: The Freedom of Information Act* (Oct. 4, 1993).

[7] Attorney General John Ashcroft, Attorney General, *Memorandum for Heads of All Federal Departments and Agencies, Subject: The Freedom of Information Act* (Oct. 12, 2001).

[8] Attorney General Eric Holder, *Memorandum for Heads of Executive Departments and Agencies, Subject: Freedom of Information Act* (March 19, 2009).

B. THE FOIA IMPROVEMENT ACT OF 2015

The FOIA Improvement Act of 2015 ("the FOIA Improvement Act") takes a bipartisan approach to building upon the successes of previous FOIA reforms and aims to further modernize the law. Most importantly, this measure codifies the policy established in January 2009 by President Obama for releasing Government information under FOIA. The bill mandates that an agency may withhold information only if it reasonably foresees a specific identifiable harm to an interest protected by an exemption, or if disclosure is prohibited by law. This is commonly referred to as the "presumption of openness." As President Obama noted when he issued his guidance, information may not be withheld "merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."[9]

Further, the bill adds a sunset provision to limit the applicability to Exemption 5 to documents created less than 25 years ago. This provision is consistent with the fundamental goals of FOIA: encouraging both transparency and accountability. Nevertheless, FOIA has long sought to strike the proper balance between achieving its goals and avoiding unintended consequences that might chill internal decision-making between government employees. The sunset provision continues to strike the proper balance between these two concerns. The provision ensures government records be made available to the public for their educational and historic value, while providing sufficient time for agencies to protect against the disclosure of their deliberative processes. The world can change significantly over the span of 25 years, and the public benefits derived from access to historical records should continue to be given special consideration when weighted against the government's interest in withholding information.

The FOIA Improvement Act also strengthens the role of the Office of Government Information Services. First, it restores Congress's original intent, contained in the OPEN Government Act of 2007, that OGIS not be required to obtain the prior approval or comment of any agency before submitting its findings and recommendations to Congress and the President. Second, the measure requires agencies to notify requesters of the right to seek dispute resolution services from OGIS or the agency's FOIA public liaison. This is designed to encourage alternative dispute resolution in lieu of expensive and time-consuming litigation. Third, it provides OGIS with the authority to issue advisory opinions at its own discretion following the completion of mediation services, which will provide guidance for similar disputes going forward.

The FOIA Improvement Act also enhances the public's ability to access information by requiring that certain records and reports be made available in an electronic format, as well as requiring the public posting of documents that have been released under FOIA on three or more occasions. It additionally mandates that agencies make proactive disclosure of documents of general interest or use to the public an ongoing component of their records management program. The legislation clarifies FOIA's fee structure by prohib-

[9] President Barack Obama, *Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act* (Jan. 21, 2009).

iting agencies from charging search or duplication fees when the agency fails to meet the notice requirements and time limits set by existing law, unless a request is considered voluminous.

The FOIA Improvement Act mandates the creation of a Chief FOIA Officers Council to develop recommendations for increasing agency FOIA compliance and efficiency, disseminate information about agency best practices, and coordinate initiatives to increase transparency and open government. The Council is modeled after the currently existing Chief Information Officers Council.

The FOIA Improvement Act requires the Director of the Office of Management and Budget (OMB) to consult with the Attorney General to ensure the operation of a consolidated online request portal. This portal will allow the public to submit a FOIA request to any agency from a single website. Currently, most federal agencies will accept an electronic FOIA request via the web. However, requesters must either visit a particular agency's website to determine how to submit a request or access *www.foia.gov* and search for a specific agency's details when submitting an online request. A consolidated online request portal will remove this burden and confusion. Moreover, the legislation provides that the new consolidated online request portal does not prohibit any agency from creating or maintaining an independent online portal for receiving requests. Finally, the legislation ensures that agencies retain the flexibility needed to process requests once received from the consolidated online request portal. Specifically, the Director of OMB is required to establish standards for interoperability between the consolidated online request portal and the software agencies currently use to process requests. This requirement recognizes the different needs and resources of agencies in processing and responding to requests.

Finally, the FOIA Improvement Act enhances agency reporting requirements under FOIA to ensure that Federal agencies provide data needed to understand the frequency of the use of exemptions. Under the legislation, Federal agencies must include in their reports to Congress the number of instances that an exemption was used to withhold documents, the number of instances the agency made voluntary disclosures, and the number of times the agency engaged in dispute resolution with the OGIS or with the FOIA public liaison.

The FOIA Improvement Act is supported by more than 50 organizations ranging from librarians to public interest organizations, including the American Association of Law Libraries, the American Civil Liberties Union, the American Library Association, the American Society of News Editors, the Association of Research Libraries, the Center for Effective Government, Government Accountability Project, the National Freedom of Information Coalition, the National Security Archive, the National Security Counselors, OpenTheGovernment.org, People for the American Way, Project On Government Oversight, Reporters Committee for Freedom of the Press, Society of Professional Journalists, the Sunlight Foundation, and the Sunshine in Government Initiative.

II. History of the Bill and Committee Consideration

A. HEARING

In the 113th Congress, Chairman Leahy convened on March 11, 2014, an oversight hearing entitled "Open Government and Freedom of Information: Reinvigorating the Freedom of Information Act for the Digital Age." During the hearing, witnesses from the FOIA and open government community testified about the numerous challenges facing the Government in fulfilling its promises of transparency under FOIA. Witnesses in attendance included Miriam Nesbit, Director, Office of Government Information Services, National Archives and Records Administration; Melanie Pustay, Director, the Office of Information Policy, Department of Justice; Amy Bennett, Assistant Director, OpenTheGovernment.org; Dr. David Cuillier, Director, Associate Professor, University of Arizona School of Journalism and President of the Society of Professional Journalists; and Daniel J. Metcalfe, Adjunct Professor of Law and Executive Director, Collaboration on Government Secrecy, American University Washington College of Law.

The hearing examined legislative proposals that would reform FOIA and address impediments to the public's ability to obtain Government information under that law. Several witnesses raised concerns regarding the growing use of FOIA exemptions by Federal agencies to withhold information from the public, and that some Federal agencies had failed to promulgate FOIA regulations—even though the Attorney General issued guidelines instructing them to do so in 2009. The hearing also explored the question of making OGIS more independent and allowing it to make recommendations on improving the FOIA process directly to Congress rather than having to submit the findings to a review process through OMB and DOJ.

B. INTRODUCTION OF THE BILL

After numerous stakeholder meetings and obtaining feedback from Government agencies, then-Chairman Leahy (D–VT) and Senator John Cornyn (R–TX) introduced the FOIA Improvement Act of 2014, S. 2520, on June 24, 2014, in the 113th Congress. The bill was referred to the Committee on the Judiciary. Senators Grassley (R–IA), Hirono (D–HI), Johanns (R–NE), Coons (D–DE), Markey (D–MA), Ayotte (R–NH) and Tester (D–MT) later joined as cosponsors of the legislation.

The Committee reported S. 2520, as amended by a substitute amendment, favorably to the Senate by voice vote on November 20, 2014. The substitute amendment, offered by then-Chairman Leahy and Senator Cornyn, eliminated the balancing test to Exemption 5 originally proposed in the bill as introduced; clarified that the "presumption of openness" applies only to the discretionary exemptions of FOIA; and provided that Federal agencies may not charge fees if they miss the statutory deadline for responding to a FOIA request, unless the request requires a response of more than 50,000 pages. The substitute amendment was accepted by unanimous consent.

S. 2520 then passed the Senate by unanimous consent without amendment on December 8, 2014.

The FOIA Improvement Act of 2015, S. 337, is a continuation of the efforts in the 113th Congress. It was introduced on February 2, 2015, by Senator Cornyn (R–TX), Chairman Grassley (R–IA), and Ranking Member Leahy (D–VT). Senators Fischer (R–NE) and Coons (D–DE) were later added as cosponsors. S. 337 is nearly identical to S. 2520. One technical correction was made to Section 2(1)(A)(ii), which changed "not less than 3 times" to "3 or more times" for additional clarity. The language was otherwise unchanged from S. 2520.

C. COMMITTEE CONSIDERATION

The Committee considered the FOIA Improvement Act of 2015 on February 5, 2015, and voted to report the bill favorably to the Senate by voice vote. S. 337 was then reported to the full Senate on February 9, 2015.

III. SECTION-BY-SECTION ANALYSIS OF THE BILL

Section 1. Short title

This section provides that the legislation may be cited as the "FOIA Improvement Act of 2015."

Section 2. Amendments to FOIA

This section details the changes made by the FOIA Improvement Act to 5 U.S.C. § 552, the Freedom of Information Act (FOIA).

Electronic Accessibility—The FOIA Improvement Act amends the existing requirements that certain records and reports be made available for public inspection to mandate that records available for public inspection be made available in an electronic format in order to ease public access.

Frequently Requested Records—The current law requires that Federal agencies post "frequently requested" records sought under FOIA online. The FOIA Improvement Act clarifies that "frequently requested" documents include any document that has been released under FOIA and has been requested three or more times.

Fees Clarification—The FOIA Improvement Act clarifies that agencies may not charge search or duplications fees when the agency fails to meet the notice requirements and time limits set by existing law, unless a request is considered voluminous. Agencies have been prohibited from charging fees in cases where the agency failed to meet the notice requirement and time limits since the passage of the OPEN Government Act of 2007. However, ambiguity in the language allowed agencies to continue to charge fees in cases where they have not in fact met the notice requirements and time limits for responding to a FOIA request.

The changes in this section remove that ambiguity and make clear that agencies may not charge search and duplication fees unless more than 50,000 pages are necessary to respond to a single request.

Presumption of Openness—The FOIA Improvement Act codifies the policy established for releasing Government information under FOIA by President Obama when he took office in January 2009 and confirmed by Attorney General Holder in a March 19, 2009, Memorandum to all Executive Departments and Agencies. The standard mandates that an agency may withhold information only

if it *reasonably foresees a specific identifiable harm to an interest protected by an exemption, or if disclosure is prohibited by law*. This standard is commonly referred to as the "Foreseeable Harm" standard, or the "Presumption of Openness." President Obama's guidance on this standard states:

> The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve.[10]

Under this standard, the content of a particular record should be reviewed and a determination made as to whether the agency reasonably foresees that disclosing that particular document, given its age, content, and character, would harm an interest protected by the applicable exemption. Agencies should note that mere "speculative or abstract fears," or fear of embarrassment, are an insufficient basis for withholding information.

It is the intent of Congress that agency decisions to withhold information relating to current law enforcement actions under the foreseeable harm standard be subject to judicial review for abuse of discretion.

The foreseeable harm standard applies only to those FOIA exemptions under which discretionary disclosures can be made. Several FOIA exemptions by their own existing terms cover information that is prohibited from disclosure or exempt from disclosure under a law outside the four corners of FOIA.[11] Such information is not subject to discretionary disclosure and is therefore not subject to the foreseeable harm standard.

For example, classified information is protected from disclosure by Exemption 1, *see* 5 U.S.C. § 552(b)(1), and Federal criminal statutes make it unlawful to disclose classified information, *see e.g.*, 18 U.S.C. § 798. Moreover, Exemption 6 was "intended to cover detailed Government records on an individual which can be identified as applying to that individual."[12] Such information is protected if disclosure "would constitute a clearly unwarranted invasion of personal privacy."[13] And Exemption 7(C)—"the law enforcement counterpart to Exemption 6"[14]—protects information compiled for law

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[10] President Barack Obama, *Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act* (Jan. 21, 2009).

[11] *See* U.S. Department of Justice, *Guide to the Freedom of Information Act, 2009 Edition*, at 687–689 (2009) (explaining that classified information, information protected from disclosure by the Trade Secrets Act, information protected by the Privacy Act, and information protected from disclosure under an Exemption 3 statute are not appropriate subjects of discretionary disclosure). Exemption 3 exempts from disclosure information that is "specifically exempted from disclosure by statute (other than section 552b of this title), if that statute" contains a non-discretionary disclosure prohibition or "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(A). In addition, a statute enacted after the date of enactment of the OPEN FOIA Act of 2009 can only serve as an Exemption 3 statute if it "specifically cites" to the Exemption 3 statute. *Id*. § 552(b)(3)(B).

[12] *See* H.R. Rep. No. 89–1497, at 11, *quoted in Dep't of State* v. *Wash. Post. Co.*, 456 U.S. 595, 602 (1982).

[13] 5 U.S.C. § 552(b)(6).

[14] U.S. Department of Justice, *Guide to the Freedom of Information Act, 2009 Edition*, at 561 (2009).

enforcement purposes the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[15] Much of the information covered by these privacy exemptions is subject to a disclosure prohibition in the Privacy Act.[16]

Other narrowly-drawn exemptions for information compiled for law enforcement purposes within Exemption 7 already incorporate a reasonable foreseeability of harm standard within the text of the exemption. This legislation is not meant to displace these exemptions.[17] Among other things, these exemptions protect against infringement of a defendant's right to a fair trial, circumvention of the law, and risks to confidential sources.[18] As with the privacy exemptions, some such information may be subject to a disclosure prohibition or other exemption. These prohibitions or exemptions by their express terms apply a standard equal to, or greater than, reasonable foreseeability with respect to the harms they are meant to protect against.[19]

Extreme care should be taken with respect to disclosure under Exemption 8 which protects matters that are "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."[20] Currently, financial regulators rely on Exemption 8, and other relevant exemptions in Section 552(b), to protect sensitive information received from regulated entities, or prepared in connection with the regulation of such entities, in fulfilling their goals of ensuring safety and soundness of the financial system, compliance with federal consumer financial law, and promoting fair, orderly, and efficient financial markets.

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[15] 5 U.S.C. § 552(b)(7)(C).

[16] As the Supreme Court explained in *Department of Defense* v. *Federal Labor Relations Auth.*, 510 U.S. 487, 494–95 (1994), information protected by the Privacy Act's disclosure prohibition (5 U.S.C. § 552a(b)) cannot be disclosed unless an exemption under the Privacy Act applies. One of those exemptions is for disclosure that is "required under Section 552," referring to disclosure required by FOIA. 5 U.S.C. § 552a(b)(2). Thus, unless another Privacy Act exemption applies, the Privacy Act itself prohibits disclosure of information that is both (a) protected by the Privacy Act, and (b) exempt from FOIA disclosure, such as under Exemptions 6 or 7(C). *FLRA*, 510 U.S. at 494 ("[U]nless FOIA would require release of the addresses, their disclosure is 'prohibited by law,' and the agencies may not reveal them."); *see also Dep't of Defense* v. *Federal Labor Relations Auth.*, 964 F.2d 26, 30–31 n.6 (D.C. Cir. 1992) ("[I]n responding to a FOIA request for personal information about its employees, a federal agency can only disclose information that it would be required to disclose under the FOIA. For an agency to do otherwise would violate the prohibition on disclosure in the Privacy Act."). In addition, as with other subparts of Exemption 7, the texts of Exemption 7(C) and 6 incorporate a reasonable harm standard that this legislation is not meant to displace.

[17] 5 U.S.C. § 552(b)(7). Such exemptions are contained in subparagraphs of Exemption 7 other than subparagraph 7(C).

[18] Exemption 7(D) is critically important for all levels of law enforcement. It is "is meant to (1) protect confidential sources from retaliation that may result from the disclosure of their participation in law enforcement activities, and (2) "encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential." *See Ortiz* v. *Dep't of Health and Human Servs.*, 70 F.3d 729, 732 (2d Cir. 1995) (citing *Brant Construction Co.* v. *United States EPA*, 778 F.2d 1258, 1262 (7th Cir. 1985), and *United Technologies Corp.* v. *NLRB*, 777 F.2d 90, 94 (2d Cir. 1985)).

[19] Reasonable-foreseeability tests are imposed by Exemption 7(A) ("could *reasonably be expected* to interfere with enforcement proceedings"), 5 U.S.C. § 552(b)(7)(A); Exemption 7(D) ("could *reasonably be expected* to disclose the identity of a confidential source . . . or information furnished by a confidential source"), *id.* § 552(b)(7)(D); Exemption 7(E) ("if such disclosure could *reasonably be expected* to risk circumvention of the law"), *id.* § 552(b)(7)(E); and Exemption 7(F) ("could *reasonably be expected* to endanger the life or physical safety of any individual"), *id.* § 552(b)(7)(F). A higher threshold than reasonable-foreseeability is already imposed by Exemption (7)(B), which protects information the disclosure of which "*would deprive* a person of a right to a fair trial or an impartial adjudication." *Id.* § 552(b)(7)(B). As the Supreme Court explained prior to the 1986 amendments, "[t]he enumeration of these categories of undesirable consequences indicates Congress believed the harm of disclosing this type of information would outweigh its benefits." *FBI* v. *Abramson*, 456 U.S. 615, 627–28 (1982).

[20] 5 U.S.C. § 552(b)(8).

Exemption 8 was intended by Congress, and has been interpreted by the courts, to be very broadly construed to ensure the security of financial institutions and to safeguard the relationship between the banks and their supervising agencies.[21] The D.C. Circuit has gone so far as to state that in Exemption 8 Congress has provided "absolute protection regardless of the circumstances underlying the regulatory agency's receipt or preparation of examination, operating or condition reports."[22] Nothing in this legislation shall be interpreted to compromise the stability of any financial institution or the financial system, disrupt the operation of financial markets or undermine consumer protection efforts due to the release of confidential information about individuals or information that a financial institution may have, or encourage the release of confidential information about individuals. This legislation is not intended to lessen the protection under Exemption 8 created by Congress and traditionally afforded by the courts.

Exemption 5—The FOIA Improvement Act amends Exemption 5 to include a sunset provision, which would limit the application of Exemption 5 to documents created less than 25 years ago. Exemption 5 permits agencies to withhold from disclosure inter- and intra-agency documents that would be exempt from discovery in civil or criminal litigation. This includes but is not limited to the attorney-client privilege, the attorney work product doctrine, and deliberative process documents.

The amendment to Exemption 5 is consistent with the unique relationship that government employees have with executive branch agencies, as well as the duty imposed on government employees to act in the public interest. The actions of government lawyers, for example, are subject to a degree of public scrutiny and review that is unknown within the context of a private attorney and her private citizen—or even corporate entity—client.[23]

Office of Government Information Services Independence—The FOIA Improvement Act provides additional independence for the Office of Government Information Services, created by the Open Government Act of 2007. It gives OGIS the ability to report directly to the Congress and the President without prior approval from any other agency, including the DOJ or the OMB. The bill also provides OGIS with the authority to issue advisory opinions at its discretion at the completion of mediation between a FOIA requester and an agency. The Committee expects OGIS to use its full authority to issue advisory opinions, particularly in instances where OGIS notices a particular pattern of non-compliance with the law.

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[21] *See, e.g., Consumers Union* v. *Heimann*, 589 F.2d 531, 534 (D.C. Cir. 1978) (identifying the primary reason for Exemption 8 was to "ensure the security of financial institutions" against the possibility that "disclosure of examination, operation, and condition reports containing frank evaluations of the investigated banks might undermine public confidence and cause unwarranted runs on banks," and the secondary purpose was to "safeguard the relationship between the banks and their supervising agencies," because banks would be less likely to cooperate with federal authorities if "examinations were made freely available to the public and to banking competitors.").

[22] *Gregory* v. *Federal Deposit Insurance Corporation*, 631 F.2d 896, 898 (D.C. Cir. 1980).

[23] See, for example, *In re Witness Before Special Grand Jury 2000–2*, 288 F.3d 289, 293 (7th Cir. 2002) ("First, government lawyers have responsibilities and obligations different from those facing members of the private bar. While the latter are appropriately concerned first and foremost with protecting their clients—even those engaged in wrongdoing—from criminal charges and public exposure, government lawyers have a higher, competing duty to act in the public interest.").

Dispute Resolution Services—The FOIA Improvement Act requires agencies to notify FOIA requesters of the right to seek dispute resolution services from OGIS or the agency's FOIA public liaison.

Government Accountability Office—The FOIA Improvement Act requires the GAO, in addition to its current responsibility of auditing agency compliance with the FOIA, to catalog and report on the statutory exemptions to FOIA that exist outside of 5 U.S.C. § 552 (as incorporated into FOIA through Exemption 3),[24] including the frequency with which the exemptions are invoked. Furthermore, the bill requires the GAO to examine and report on the use of Exemption 5 and examine the manner in which those exemptions have been used by agencies.

Chief FOIA Officers Council—The FOIA Improvement Act mandates creation of a council to develop recommendations for increasing agency FOIA compliance and efficiency by Federal agencies, disseminate information about agency best practices, and coordinate initiatives to increase transparency and open government. The Council is modeled after the currently existing Chief Information Officers Council. The Committee believes meetings of the Council and all materials generated in preparation for or as a result of the Council's work should be as open to the public as possible.

FOIA Reports—The FOIA Improvement Act requires agencies to include in their annual FOIA reports (a) the number of times documents have been exempted from disclosure as part of an ongoing criminal investigation under 5 U.S.C. § 552(c); (b) the number of times the agency has engaged in dispute resolution with OGIS or the FOIA public liaison; and (c) the number of records the agency proactively discloses as required by 5 U.S.C. § 552(a)(2).

Consolidated Online Request Portal—The FOIA Improvement Act requires the Director of OMB, in consultation with the Attorney General, to ensure the operation of a consolidated online request portal that allows the public to submit a FOIA request to any agency from a single website. The legislation provides that this requirement shall not be construed to alter any other agency's power to create or maintain an independent online portal for the submission of a FOIA request. Further, the Director of OMB is instructed to establish standards for interoperability between the new consolidated online request portal and other request processing software used by agencies subject to this section.

Section 3. Revision and issuance of regulations

This section requires agencies to review and issue regulations on the procedures for disclosure of records under section 552 of title 5, including procedures for dispute resolution and engaging with the Office of Government Information Services.

Section 4. Proactive disclosure through records management

This section amends section 3102 of title 44 of the United States Code to make proactive disclosure an ongoing part of agency record management by requiring the heads of agencies to include in an agency's records management system procedures for identifying records of general interest or use to the public that are appropriate

[24] 5 U.S.C. § 552(b)(3).

for public disclosure, and for making such records publicly available in an electronic format.

Section 5. No additional funds authorized

No additional funds are authorized to carry out the requirements of this Act and the amendments made by this Act. Such requirements shall be carried out using amounts otherwise authorized or appropriated.

IV. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Committee sets forth, with respect to the bill, S. 337, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

FEBRUARY 17, 2015.

Hon. CHUCK GRASSLEY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 337, the FOIA Improvement Act of 2015.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact for this estimate is Matthew Pickford.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

S. 337—FOIA Improvement Act of 2015

Summary: S. 337 would amend the Freedom of Information Act (FOIA) and aims to provide easier access to government documents. FOIA generally allows any person to obtain records from federal agencies. Specifically, the legislation would: establish a single website for making FOIA requests; direct agencies to make records available in an electronic format; reduce the number of exemptions agencies can use to withhold information from the public; clarify procedures for handling frequently requested documents and charging fees; establish the Chief FOIA Officers Council; and require agencies to prepare additional reports for the Congress on FOIA matters.

CBO estimates that implementing S. 337 would cost $20 million over the 2015–2020 period, assuming appropriation of the necessary amounts. Enacting S. 337 could affect direct spending by agencies not funded through annual appropriations (such as the Tennessee Valley Authority). Therefore, pay-as-you-go procedures apply. CBO estimates, however, that any net changes direct spending by those agencies would not be significant. Enacting the bill would not affect revenues.

S. 337 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 337 is shown in the following table. The costs

of this legislation fall within all budget functions that contain salaries and expenses.

	By fiscal year, in millions of dollars—						
	2015	2016	2017	2018	2019	2020	2015–2020
CHANGES IN SPENDING SUBJECT TO APPROPRIATION							
Estimated Authorization Level	2	4	4	5	5	5	25
Estimated Outlays	1	3	4	4	4	4	20

Basis of the estimate: For this estimate, CBO assumes that the bill will be enacted in fiscal year 2015, that the necessary amounts will be appropriated for each year, and that spending will follow historical patterns for FOIA activities.

Enacted in 1966, FOIA was designed to enable anyone to request, without explanation or justification, copies of existing, identifiable, and unpublished records from the executive branch. The Office of Management and Budget (OMB) issues guidelines to agencies on what fees to charge for providing information, while the Department of Justice (DOJ) oversees agency compliance with FOIA. In 2013, federal agencies (excluding the Social Security Administration) received more than 704,000 FOIA requests. In addition, DOJ reports that in fiscal year 2013, agencies employed about 4,200 full-time staff to fulfill requests and spent $446 million on related activities.

Some of the provisions of the bill would codify and expand current practices related to FOIA. Presidential memoranda and DOJ guidelines have directed agencies to provide more FOIA information to the public on a timely basis. Under the bill, CBO expects that OMB would expand the use of existing websites that are currently used to fulfill FOIA requests.

CBO anticipates that the workloads of most agencies would increase slightly to carry out the bill's new reporting requirements. We also expect that agencies would incur additional costs to organize and hold an annual FOIA meeting and to establish a Chief FOIA Officers Council to review and improve the FOIA process. Based on the costs of developing and maintaining similar electronic filing systems and websites and a review of the annual reports on FOIA activities submitted by 15 major agencies over the past five years, which provide information on FOIA-related costs, CBO estimates that implementing S. 337 would eventually cost $5 million annually—a 1 percent increase in the governmentwide cost of administering FOIA. We expect that most federal agencies would face additional costs of significantly less than $0.5 million per year.

Pay-As-You-Go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. Enacting S. 337 could affect net direct spending for agencies not funded through the appropriations process, but CBO estimates that such effects would not be significant in any year.

Intergovernmental and private-sctor impact: S. 337 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal costs: Matthew Pickford; Impact on state, local, and tribal governments: Jon Sperl; Impact on private sector: John Rodier.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

V. Regulatory Impact Evaluation

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 337.

VI. Conclusion

Passage of the FOIA Improvement Act will ensure FOIA remains our nation's premier transparency law. Codification of the presumption of openness is long overdue, and will reaffirm our commitment to promoting transparency and an open government. Improvements to OGIS will help ensure that it serves as a much-needed bridge between Federal agencies and FOIA requesters, as well as a resource to Congress and the President as we continue to evaluate and improve FOIA administration. The passage and enactment of this important legislation furthers the notions that government accountability, best achieved through a strong commitment to transparency laws, is in the interests of both the Government and its citizenry alike.

VII. ADDITIONAL VIEWS

ADDITIONAL VIEWS FROM SENATOR SESSIONS

Since the Freedom of Information Act was first passed in 1966, it has been an invaluable tool for promoting government accountability and transparency—"ensur[ing] an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[1] The Committee is now recommending a bill to the Senate that seeks to build on these worthy goals. However, I am concerned that a provision in this legislation could cause a decline in the effectiveness of decisionmaking by government officials by chilling lawyers from presenting in writing various options and concerns. The historic strength, even sanctity, of the attorney-client relationship has been a valued part of the American legal tradition since the nation's founding. To allow a breach of that private communication without specific cause and merely upon the passage of time through FOIA is an enormous alteration of this long-established principle.

Specifically, the bill would change the law so that government documents that are currently covered by FOIA Exemption 5 could potentially be disclosed after 25 years. FOIA Exemption 5 provides that executive agencies do not have to make public any "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."[2] Interpreting this language, the Supreme Court has "construe[d] Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context."[3] As such, Exemption 5 is broad in its scope, "encompassing both statutory privileges and those commonly recognized by case law,"[4] including both the attorney-client and attorney work-product privileges.

By subjecting such documents to potential disclosure, this legislation could chill government lawyers from offering candid advice and invite criminal defendants and their attorneys to re-open and re-litigate long-resolved cases. As the Supreme Court stated in *Upjohn Co.* v. *United States:*

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients, and there-

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[1] *NLRB* v. *Robbins Tire & Rubber Co.,* 437 U.S. 214, 242 (1978).
[2] 5 U.S.C. 552(b)(5).
[3] *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 149 (1975).
[4] Office of Information Policy, "Guide to the Freedom of Information Act," pg. 357, Dep't of Justice, Jul. 23, 2014, *available at: http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption5—1.pdf.*

> by promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.[5]

These same goals and needs exist in the executive agency context to the same extent that they exist in any other legal context, which is why the Supreme Court has also recognized "that an agency can be a 'client' and agency lawyers can function as 'attorneys' within the relationship contemplated by the [attorney-client] privilege . . ."[6] Agency lawyers rely on "full and frank communication" with their executive branch clients in order to provide "sound legal advice or advocacy." I am concerned that "full and frank communication" may be chilled by the knowledge that all such communications could become a matter of public record within a relatively short time period. As the Supreme Court stated in *United States* v. *Nixon*, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process."[7] Attorneys who have prepared legal opinions in the past have felt free to discuss credibility issues, unproven facts, character judgments, and the like on the assumption that they would be considered in the process but never suspecting they would be made public on the mere showing of passage of time. This concern is magnified by the fact that many government lawyers' careers span well over 25 years. It would be unfortunate if a young lawyer withheld sound legal advice, sanitizing or reducing the content of his writings, for fear that he might be criticized for such advice later on, or if an agency official withheld information from lawyers out of similar concern.

In addition, litigation can often last well beyond 25 years. At the very least, this legislation raises the question of whether documents related to ongoing litigation could be disclosed to the public. There would be little certainty, as the question of disclosure in such scenarios would presumably be decided by a judge.

Finally, I am informed by both the Department of Justice and the National Association of Assistant United States Attorneys that the 25-year sunset provision on Exemption 5 could invite defendants and their lawyers to use FOIA as an alternative discovery tool in attempts to re-open closed cases. FOIA was designed by Congress as a public accountability measure and not as an instrument of litigation. Preliminary opinions, early research, and comments made before facts are fully known when considered years later can create unfounded issues resulting in prolonged re-litigation of cases concluded on clear evidence.

While I support the overall purpose of the legislation, I believe that these issues should be studied more closely. I look forward to working with the sponsors and discussing these matters to ensure potential unintended consequences do not frustrate the bill's purpose. I applaud the Committee for its continued efforts to ensure

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[5] *Upjohn Co.* v. *United States,* 449 U.S. 383, 389 (1981) (internal citations omitted).
[6] *Coastal States Gas Corp.* v. *Department of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980).
[7] *United States* v. *Nixon*, 418 U.S. 683, 705 (1974).

the transparent and accountable governance that is so critical to the health of any democracy.

JEFF SESSIONS.

VIII. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds that it is necessary to dispense with the requirement of paragraph 12 to expedite the business of the Senate.

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