



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

March 14, 2007
(House)

STATEMENT OF ADMINISTRATION POLICY

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

(Rep. Clay (D) Missouri and two cosponsors)

The Administration shares the goals of H.R. 1309 of increasing the timeliness of Freedom of Information Act (FOIA) responses and ensuring a customer-oriented approach to FOIA processing. The Administration has been pursuing these goals, and will be continuing to pursue them, through the strong management review and reforms that the President directed 15 months ago in the first-ever Executive Order on FOIA -- Executive Order 13392, "Improving Agency Disclosure of Information" -- which he signed on December 14, 2005.

However, the Administration cannot support H.R. 1309. The Administration believes it would be premature and counterproductive to the goals of increasing timeliness and improving customer service to amend FOIA before agencies have had sufficient time to implement the FOIA improvements that the President directed them to develop, put into place, monitor, and report on during FYs 2006 and 2007. For example, as explained below, several of the bill's provisions would impose substantial administrative and financial burdens on the Executive Branch. These provisions could result in slower, not faster, agency processing of FOIA requests, and the personnel and funds needed to implement them would have to come from existing agency resources. Moreover, the agency reports that were issued last summer, and the improvement plans that are being implemented, illustrate that the challenges that agencies face in responding to FOIA requests are often unique to each agency and, therefore, require agency-tailored reforms, not a government-wide, one-size-fits-all legislative approach.

The Administration's specific concerns with the bill include the following.

The Administration strongly opposes expanding the definition of "representative of the news media." The bill would exempt a larger class of requesters from the obligation to pay fees assessed for searching for responsive documents. Expanding the definition would have serious fiscal consequences for the Executive Branch. Moreover, with no requirement that requesters pay search fees, they have no incentive to tailor their requests and will likely make overly broad requests, which, in turn, will stretch agency resources and increase the time it takes to process all requests. Further, under current law, agencies have authority to waive or reduce fees upon a determination that disclosure of information will contribute significantly to public understanding.

The Administration also strongly opposes reinstating the so-called "catalyst theory" for the reimbursement of FOIA litigation fees. The Administration is concerned that its reinstatement would serve as a disincentive to an agency's voluntarily revisiting decisions and improving procedures with respect to FOIA requests, because doing so could make the agency liable for a

complainant's legal fees. Furthermore, the bill could be interpreted to include an "administrative action" through the FOIA appeals process as a possible means by which a requester can obtain "relief" that would justify attorneys fees. Such an interpretation 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, 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.

The Administration strongly opposes commencing the twenty-day time limit for processing FOIA requests on the date that the request "is first received by the agency," and preventing the collection of search fees if the timeline is not met. This provision 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. The provision fails to take into account the complexity of many requests, the need to consult with other Executive Branch entities, or the need to search for records in multiple locations, including at Federal records centers. As noted above, the Executive Order requires agencies to implement improvement plans specifically focused on eliminating or reducing any backlog of FOIA requests, and the Justice Department's preliminary review of the agencies' annual reports indicates that some agencies have already realized meaningful backlog reductions.

The Administration is opposed to the creation of an "Office of Government Information Services" within the National Archives and any intent that the proposed Office would be given any sort of policymaking role with respect to FOIA compliance. The FOIA compliance function remains appropriately placed with the Department of Justice, the lead agency in implementing Executive Order 13392.

Finally, the Administration strongly opposes the provision in the bill that appears to be an attempt to repeal Attorney General Ashcroft's FOIA Memorandum and return to Attorney General Reno's pre-9/11 FOIA guidance. The Administration believes that the structure of the FOIA reflects the appropriate balance between the public's right to know how the government is operating and the equally important need to safeguard certain information, such as that pertaining to personal privacy or homeland security.

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