

# Freedom of Information Act Legislation in the 114<sup>th</sup> Congress: Issue Summary and Side-by- Side Analysis

-name redacted-

Research Assistant

-name redacted-

Analyst in American National Government

February 26, 2015

Congressional Research Service

7-....

[www.crs.gov](http://www.crs.gov)

R43924

## Summary

Both the House and Senate are currently considering legislation that would make substantive changes to the Freedom of Information Act (FOIA). FOIA was originally enacted in 1966 and has been amended numerous times since—most recently in 2009. FOIA provides the public with a presumptive right to access agency records, limited by nine exemptions that allow agencies to withhold certain types or categories of records.

The legislation under consideration in the 114<sup>th</sup> Congress, S. 337 and H.R. 653, is largely based on bills from the 113<sup>th</sup> Congress, S. 2520 and H.R. 1211. Both of the bills in the current Congress seek to amend a number of provisions of FOIA for the purpose of increasing public access—including improving electronic accessibility of agency records, clarifying the right to request information related to intra- and inter-agency memoranda or letters, standardizing the use of search and duplication fees by agencies, and requiring agencies to notify requestors of dispute resolution processes for requests that have been denied. Both bills would also create a Chief FOIA Officers Council, responsible for informing government-wide FOIA administrators of best practices, and would establish new FOIA-related oversight responsibilities and reporting requirements.

In addition, both the House and Senate legislation would establish a statutory “presumption of openness,” whereby information may only be withheld if it harms an interest protected by a statutory exemption or if disclosure is prohibited by law. This presumption of openness would codify the principles outlined in the current Administration’s guidance on FOIA.

While these bills address a number of similar topics, often in similar ways, there are substantive differences between them. For instance, S. 337 provides a timetable for the assessment of fees if an agency fails to comply with a statutory FOIA request response deadline. Conversely, H.R. 653 would authorize applicable federal inspectors general to review agencies’ FOIA compliance and recommend the agency head take potential adverse actions against improper or negligent execution of the law. In addition, H.R. 653 includes new language seeking to narrow the exemption that provides for agencies’ withholding of intra- or inter-agency records. A summary of provisions in both bills, a side-by-side comparison of these provisions, and analysis of selected provisions is provided in this report.

## **Contents**

Background.....	1
Comparison of Legislation in the 114 <sup>th</sup> Congress.....	2
Analysis of Selected Policy Implications .....	8
Presidential Discretion .....	8
The Use of Exemption 5 and the Privacy Act .....	8
Creation of an Interagency Management Council.....	9
Assessment of Search and Duplication Fees .....	10
Action in the 113 <sup>th</sup> Congress.....	10

## **Tables**

Table 1. Side-by-Side Comparison of Legislation in the 114 <sup>th</sup> Congress .....	3
---	---

## **Contacts**

Author Contact Information.....	11
---------------------------------	----

## Background

The Freedom of Information Act (FOIA), originally enacted in 1966, provides the public presumed access to federal government information (5 U.S.C. §552). This access is available to any person, regardless of citizenship, and does not require justification on the part of the requestor. This presumptive right to access is limited only when the requested information falls within the scope of nine statutory exemptions, which are established by law:

1. Information properly classified for national defense or foreign policy purposes as secret under criteria established by an executive order;
2. Information relating solely to agency internal personnel rules and practices;
3. Data specifically exempted from disclosure by a statute other than FOIA if that statute
  - a. requires that the data be withheld from the public in such a manner as to leave no discretion on the issue;
  - b. establishes particular criteria for withholding information or refers to particular types of matters to be withheld; or
  - c. specifically cites to this exemption (if the statute is enacted after October 28, 2009, the date of enactment of the OPEN FOIA Act of 2009);<sup>1</sup>
4. Trade secrets and commercial or financial information obtained from a person that is privileged or confidential;
5. Inter- or intra-agency memoranda or letters that would not be available by law except to an agency in litigation;
6. Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy;
7. Certain kinds of records compiled for law enforcement purposes;
8. Certain information relating to the regulation of financial institutions; and
9. Geological and geophysical information and data.

These exemptions are intended to prevent the disclosure of certain types of records, with examples including those related to law enforcement proceedings, personally identifiable information, or records pertaining to national security.<sup>2</sup> FOIA has been subsequently amended multiple times, most recently by the OPEN FOIA Act of 2009 (P.L. 111-83).<sup>3</sup>

In March of 2009, Attorney General Eric Holder distributed a memorandum related to FOIA to the heads of all executive departments and agencies. The memorandum built upon a previous

---

<sup>1</sup> P.L. 111-83; 123 Stat. 2142.

<sup>2</sup> More information on the history and current issues surrounding FOIA can be found in CRS Report R41933, *The Freedom of Information Act (FOIA): Background, Legislation, and Policy Issues*, by (name redacted).

<sup>3</sup> In addition to amendments that directly alter the language in 5 U.S.C. §552, numerous additional statutes exempt specific records from disclosure. These statutory exemptions are incorporated into the FOIA framework through 5 U.S.C. §552(b)(3).

memorandum from President Obama, which stated that FOIA “should be administered with a clear presumption: In the face of doubt, openness prevails.”<sup>4</sup> To reinforce this point, the memorandum from the Attorney General instructed agencies to preemptively disclose information prior to a public request, partially disclose information in the event that some aspect of a record must be withheld, and not withhold information simply because it falls within the strict legal parameters of an exemption.<sup>5</sup> Further, the memorandum stated that

The Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) the disclosure is prohibited by law.

The new policy established by this memorandum is often referred to as “the presumption of openness.” This guidance from the Obama Administration departed from the previous Administration’s position on FOIA implementation, in which the Department of Justice stated that it would defend any decision to withhold information under a FOIA exemption if the decision had a “sound legal basis” and did not “present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.”<sup>6</sup>

In recent years, some Members of Congress have expressed interest in further amending FOIA to address both the presumption of openness and other issues, especially the electronic accessibility of agency records. During the 113<sup>th</sup> and 114<sup>th</sup> Congresses, legislation to amend FOIA was considered in both the House and the Senate. In both chambers, the currently proposed FOIA amendments address many of the same issues, often with similar language. The bills, however, also contain substantive differences. This report provides an overview of two FOIA bills in the 114<sup>th</sup> Congress, S. 337 and H.R. 653, and provides analysis of certain FOIA-related provisions within each.

## Comparison of Legislation in the 114<sup>th</sup> Congress

Senator John Cornyn introduced the FOIA Improvement Act of 2015 (S. 337) on February 2, 2015, and the Judiciary Committee reported the bill on February 9, 2015. This legislation was primarily built on nearly identical legislation from the 113<sup>th</sup> Congress (S. 2520), which is discussed in greater detail below. In the House, Representative Darrell E. Issa introduced the FOIA Act (H.R. 653) on February 2, 2015, which was referred to the Committee on Oversight and Government Reform. This bill is based in large part on H.R. 1211, proposed in the 113<sup>th</sup> Congress. Both S. 337 and H.R. 653 address many of the same topics, with important similarities and differences in their approaches. **Table 1** below provides a side-by-side comparison of these two bills. The substantive components of the legislation have been grouped into four categories:

<sup>4</sup> Executive Office of the President, “Memorandum For the Heads of Executive Departments and Agencies,” 74 *Federal Register* 4683, January 26, 2009.

<sup>5</sup> Department of Justice, Office of the Attorney General, *Memorandum For Heads of Executive Departments and Agencies: The Freedom of Information Act (FOIA)*, Washington, DC, March 19, 2009, at <http://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>.

<sup>6</sup> Department of Justice, Office of the Attorney General, *Memorandum For Heads of Federal Departments and Agencies: The Freedom of Information Act*, Washington, DC, October 12, 2001, at <http://www.justice.gov/archive/oip/011012.htm>.

1. **Presumption of Openness:** Provisions related to the overall standards by which agencies make determinations regarding the withholding or disclosure of information.
2. **FOIA Administration and Exemption Use:** Provisions that would alter the process or policy by which agencies administer FOIA, manage appeals, or disclose records.
3. **Oversight and Reporting:** Provisions regarding the role of oversight entities, including Congress and the Government Accountability Office (GAO), and new reporting requirements put in place by the legislation.
4. **New Roles and Responsibilities:** Provisions amending or clarifying the functions of the Office of Government Information Services (OGIS), a component of the National Archives and Records Administration (NARA), or the Chief FOIA Officer designated at each agency.

**Table I. Side-by-Side Comparison of Legislation in the 114<sup>th</sup> Congress**

	<b>S. 337, FOIA Improvement Act of 2015</b>	<b>H.R. 653, The FOIA Act</b>
	<b>Introduced by Senator John Cornyn on Feb. 2, 2015</b>	<b>Introduced by Representative Darrell E. Issa on Feb. 2, 2015</b>
<i>I. Presumption of Openness</i>		
Standard for Disclosure	<ul style="list-style-type: none"> <li>Would establish a standard whereby information is only withheld if the agency foresees that disclosure would harm an interest protected by an exemption or the disclosure is prohibited by law. Would require agencies to consider the partial disclosure of information when possible and explicitly prohibits withholding information simply as a technical matter or because it would embarrass the agency. §2(l)(D)</li> </ul>	<ul style="list-style-type: none"> <li>Would establish a standard whereby information is only withheld if the agency foresees that disclosure would harm an interest protected by an exemption or the disclosure is prohibited by law. §2(b)(2)</li> </ul>
Preemptive Disclosure <sup>a</sup>	<ul style="list-style-type: none"> <li>Would require agencies to make available records that have been requested three or more times. §2(l)(A)(ii)</li> <li>Would require all applicable agencies to establish procedures for identifying records of general interest and making them available. §4</li> </ul>	<ul style="list-style-type: none"> <li>Would require agencies to make available records that have been requested three or more times. §2(a)(1)(A)</li> <li>Would require all applicable agencies to establish procedures for identifying records of general interest and making them available. §2(e)</li> <li>Would require agencies to release records wherein the release is determined to be in the public interest or increase understanding of government operations and activities. For these records, this legislation would also require agencies to redact or segregate information to make these records available even when the whole document cannot be released. §2(e)</li> </ul>

S. 337, FOIA Improvement Act of 2015		H.R. 653, The FOIA Act
<i>II. FOIA Administration and Exemption Use</i>		
Electronic Access to Records	<ul style="list-style-type: none"> <li>• Would require agencies to make records and FOIA guidance available for public inspection in an electronic format. §2(1)(A)(i); §2(1)(A)(iii); §2(4); §4</li> <li>• Would require agencies to make their annual FOIA reports, and any raw statistical data used for those reports, electronically accessible and available in a searchable format. §2(3)(B)</li> <li>• Would require the Attorney General (AG) to make the annual report FOIA submitted to Congress, as well as any raw statistical data used for the report electronically accessible and available in a searchable format. §2(3)(D)</li> <li>• Would direct the Office of Management and Budget (OMB) to establish, in consultation with the AG, a consolidated online request portal for information requests governmentwide. This centralized portal is not intended to limit or replace agency-specific portals, and the Director of OMB would be responsible for establishing interoperability among these platforms. §2(7)</li> </ul>	<ul style="list-style-type: none"> <li>• Would require agencies to make records and FOIA guidance available for public inspection in an electronic format. §2(a)(1)(A); §2(a)(2); §2(e)</li> <li>• Would require agencies to make their annual FOIA reports, and any raw statistical data used for those reports, electronically accessible and available in a searchable format. §2(g)(2)</li> <li>• Would require the Attorney General (AG) to make the annual FOIA report submitted to Congress, as well as any raw statistical data used for the report electronically accessible and available in a searchable format. §2(g)(4)</li> <li>• Would direct the Office of Management and Budget (OMB) to establish, in consultation with the AG, a consolidated online request portal for information requests governmentwide. This centralized portal is not intended to limit or replace agency-specific portals, and the Director of OMB would be responsible for establishing interoperability among these platforms. §2(a)(3)</li> <li>• Would require agencies to assign a tracking number to all requests and establish an automated system that would allow requestors to check the status of their request. Under current law, tracking numbers are only assigned to requests that will take longer than 10 days to process. §2(a)(1)(B)</li> <li>• Would require the Director of the Office of Information Policy (OIP)<sup>b</sup> at DOJ to make the annual report to Congress on categories of information for disclosure available in an electronic, publicly accessible, format. §2(f)</li> </ul>
Fees <sup>c</sup>	<ul style="list-style-type: none"> <li>• Would prohibit agencies from assessing search or duplication fees if they have failed to comply with a statutory deadline and no unusual circumstances apply. If unusual circumstances do apply, and the agency has provided a timely written notice to the requestor, the deadline is excused for an additional 10 days. Beyond that 10-day period, no fees would be permitted to be assessed for unusual circumstances.<sup>d</sup> §2(1)(B)</li> </ul>	<ul style="list-style-type: none"> <li>• Would prohibit agencies from assessing search or duplication fees if they have failed to comply with a statutory deadline for a FOIA response and did not submit a written notice to the requestor justifying the fees assessed. The statutory deadline currently includes a provision for unusual circumstances.<sup>d</sup> §2(h)</li> </ul>
Use of Exemption 5	<ul style="list-style-type: none"> <li>• Would prohibit an agency from applying exemption 5 of FOIA (5 U.S.C.</li> </ul>	<ul style="list-style-type: none"> <li>• Would prohibit an agency from applying exemption 5 of FOIA (5 U.S.C.</li> </ul>

	<b>S. 337, FOIA Improvement Act of 2015</b>	<b>H.R. 653, The FOIA Act</b>
	<p>§552(b)(5)) to any record that is more than 25 years old. This exemption prevents the disclosure of intra- and inter-agency memoranda or letters, and is commonly referred to as the “deliberative process exemption.” §2(2)</p>	<p>§552(b)(5)) to any record that is more than 25 years old. This exemption prevents the disclosure of intra- and inter-agency memoranda or letters, and is commonly referred to as the “deliberative process exemption.” §2(b)(1)(B)</p>
Dispute Resolution	<ul style="list-style-type: none"> <li>Would require agencies to notify requestors of the right to seek assistance from the FOIA Public Liaison for the responding agency and the right of a requestor to seek dispute resolution services from either the liaison of the responding agency or the Office of Government Information Services (OGIS). The deadline for requestors to appeal the FOIA response from an agency would be set by the agency and cannot be fewer than 90 days following the determination. §2(1)(C)</li> </ul>	<ul style="list-style-type: none"> <li>Would prevent the withholding of “records that embody the working law, effective policy, or the final decision of the agency.” §2(b)(1)(A)</li> <li>Would require agencies to notify requestors of the right to seek assistance from the FOIA Public Liaison for the responding agency and the right of a requestor to seek dispute resolution services from either the liaison of the responding agency or the Office of Government Information Services (OGIS). The deadline for requestors to appeal the FOIA response from an agency would be set by the agency and cannot be fewer than 90 days following the determination. §2(d)</li> </ul>
<i>III. Oversight and Reporting</i>		
Oversight Activities	<ul style="list-style-type: none"> <li>Would update committee notification requirements and submission timelines for annual FOIA reports to Congress. §2(3)(C)</li> <li>Would require the Government Accountability Office (GAO) to conduct audits of individual agencies’ FOIA practices, catalog the use of Exemption 3 and Exemption 5, complete a study of efforts to reduce backlogs of FOIA requests, and submit all of these documents to the appropriate committees of jurisdiction for FOIA oversight. §2(6)</li> </ul>	<ul style="list-style-type: none"> <li>Would update committee notification requirements and submission timelines for annual FOIA reports to Congress. §2(g)(3)</li> <li>Would require the Government Accountability Office (GAO) to conduct audits of individual agencies’ FOIA practices, catalog the use of Exemption 3, and review and prepare a report on FOIA requests by agencies pertaining to entities that received assistance under Title I of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. §5211 et seq.). §2(6)</li> <li>Would authorize applicable federal inspectors general to review agency compliance with FOIA, make recommendations to their respective agency heads, and recommend adverse action to the agency head if needed. §3</li> </ul>
Reporting Requirements	<ul style="list-style-type: none"> <li>Would make OGIS a recipient (along with DOJ) of annual agency FOIA reports. Adds new requirements to these reports, including (1) information on the number of times records were withheld related to criminal investigations, and (2) the number of records made publicly available in a searchable format. §2(3)(A)</li> <li>Would require all agencies to review existing regulations related to FOIA and issue new regulations that reflect</li> </ul>	<ul style="list-style-type: none"> <li>Would make OGIS a recipient (along with DOJ) of annual agency FOIA reports. Adds new requirements to these reports, including (1) information on the number of times records were withheld related to criminal investigations, (2) the number of times the agency engaged in dispute resolution with OGIS assistance, (3) the number of records made publicly available in a searchable format, and (4) the number of times the agency assessed a search or duplication fee, while failing to</li> </ul>



S. 337, FOIA Improvement Act of 2015	H.R. 653, The FOIA Act
<p>amendments made to the law. These regulations must include procedures for engaging in dispute resolution and working with OGIS. §3</p>	<p>comply with the time limits. §2(g)(1)</p> <ul style="list-style-type: none"> <li>• Would require all agencies to review existing regulations related to FOIA and issue new regulations that reflect amendments made to the law. These regulations must include procedures for engaging in dispute resolution and working with OGIS. §2(k)</li> <li>• Would require OIP, in consultation with the Director of OGIS, to submit a report to the appropriate committees of jurisdiction for FOIA oversight regarding categories of records that would be appropriate for proactive disclosure. §2(f)</li> </ul>
IV. New Roles and Responsibilities	
<p>Chief FOIA Officers Council<sup>e</sup></p>	<ul style="list-style-type: none"> <li>• Defines the role of the Chief FOIA Officer at each agency to include responsibility for serving as the liaison between the agency, OGIS, and OIP, as well as responsibilities for training agency staff on FOIA roles. The Chief FOIA Officer would also be responsible for completing an annual compliance determination that would review agency regulations, fee assessments, use of exemptions, dispute resolution services with OGIS, and the timeliness of FOIA responses. §2(6)</li> <li>• Would establish a Chief FOIA Officers Council, to be comprised of the Chief FOIA Officers of each agency, as well as senior officials from OMB, DOJ and OGIS. This Council would be co-chaired by the Director of OIP and the Director of OGIS. The roles of this Council would include developing recommendations, disseminating information about agency practices, identifying initiatives to increase transparency, and promoting performance measures to ensure compliance for the administration of FOIA. §2(6)</li> </ul>
<p>Office of Government Information Services</p>	<ul style="list-style-type: none"> <li>• Would establish a Director as the head of OGIS. §2(5)(A)</li> <li>• Would require OGIS to submit an annual report outlining their oversight of agency FOIA practices, legislative policy recommendations, advisory opinions, and usage of dispute resolution services. This report would be submitted to the appropriate committees of jurisdiction for FOIA oversight. Also would require OGIS to hold an open and public meeting on these reports once per year. §2(5)</li> </ul>

S. 337, FOIA Improvement Act of 2015	H.R. 653, The FOIA Act
<ul style="list-style-type: none"> <li>• Would provide OGIS with the authority to submit reports, as well as any other information deemed appropriate, directly to Congress, without review or approval from any other entity, including DOJ and OMB. §2(5)</li> </ul>	<ul style="list-style-type: none"> <li>• Would provide OGIS with the authority to submit reports, as well as any other information deemed appropriate, directly to Congress, without review or approval from any other entity, including DOJ and OMB. §2(c)(2)</li> <li>• Would require the Director of OMB to consult with the Director of OGIS before promulgating rules establishing a uniform schedule of FOIA fees for all agencies. §2(c)(1)</li> </ul>

**Source:** CRS analysis of S. 337 and H.R. 653.

**Notes:** Both S. 337 and H.R. 653 include provisions stating that no additional funds are authorized to carry out the requirements of the legislation.

- a. Guidance from the Department of Justice related to Frequently Requested Records states that the existing statutory standard in 5 U.S.C. §552(a)(2)(D) is “sometimes referred to as establishing a ‘rule’ of three requests- the first one, plus at least two more.” Department of Justice, Office of Information Policy, *FOIA Counselor Q&A: “Frequently Requested Records”*, September 27, 2002, at <http://www.justice.gov/oip/blog/foia-post-2003-foia-counselor-qa-frequently-requested-records>.
- b. According to the website for the Office of Information Policy, the office “is responsible for encouraging agency compliance with the Freedom of Information Act (FOIA) and for ensuring that the President’s FOIA Memorandum and the Attorney General’s FOIA Guidelines are fully implemented across the government.” More information on OIP can be found at <http://www.justice.gov/oip>.
- c. The decision to assess fees under FOIA can include factors such as the intent of the request (commercial or non-commercial), the possible applicability of a fee waiver, or the nature of the requestor (educational scientific institutions or representative of the news media). Additional information about fee assessments can be found in the Department of Justice, *Guide to the Freedom of Information Act: Fees and Fee Waivers*, at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fees-feewaivers.pdf>.
- d. 5 U.S.C. §552 (a)(6)(B)(iii) states that “‘Unusual circumstances’ means, but only to the extent reasonably necessary to the proper processing of the particular requests- (I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request; (II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or (III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.”
- e. Both S. 337 and H.R. 653 include administrative provisions related to the operations of the Chief FOIA Officers Council, including administrative functions and meeting and notice requirements, that are not included in this summary.

While the legislation proposed in both the House and Senate seeks to address many of the same aspects of FOIA—often through very similar language—there are substantive differences between the bills. For example, while H.R. 653 would authorize inspectors general to review agencies’ FOIA compliance and potentially recommend adverse action, the Senate bill does not. Furthermore, the House legislation would limit the scope of Exemption 5, preventing the withholding of “records that embody the working law, effective policy, or the final decision of the agency.” Additionally, the language in S. 337 would place more requirements on agencies that would seek to impose search or duplication fees on a requestor after missing a statutory deadline—including a 10-day extension and a notice requirement. In the House legislation, agencies could apply these fees after a deadline is missed as long as the requestor is notified of an appropriate justification.

In other respects, the two bills seek to address certain FOIA-related issues in very similar ways. Both adopt the same structure to establish Chief FOIA Officers Council, including the assignment of the Director of OIP and the Director of OGIS as co-chairs, for example. Moreover, both include provisions throughout the legislation that would require records, reports, supporting data, and guidance be published in an electronic format that is publicly accessible. Also, both bills would require agencies to provide public notification of dispute resolution services to requestors who have had their requests denied. Finally, both S. 337 and H.R. 653 seek to codify the “presumption of openness” established by the Department of Justice in March of 2009.

## Analysis of Selected Policy Implications

### Presidential Discretion

The amendments to FOIA outlined above present a number of distinct issues or questions for FOIA moving forward. Both S. 337 and H.R. 653 seek to make a number of changes to the role of the Administration in FOIA implementation. Both bills, for example, would codify the current standard for information disclosure set in place by the Obama Administration—or the “presumption of openness.” While this codification should not affect current agency practices, it may limit the discretion available to future Presidents to make changes in the overall level of openness provided under FOIA. For instance, as noted earlier in this report, the previous DOJ standard during the Bush Administration did not include language addressing partial disclosures or recommending discretionary release of information where an exemption could technically be applied.<sup>7</sup>

Additionally, both the House and Senate legislation would provide the OGIS the authority to report directly to Congress and provide legislative recommendations without review, comment, or approval from other executive branch agencies—including the National Archives and Records Administration, the Department of Justice, or the Office of Management and Budget. This direct reporting mechanism, which is included in statute for certain independent agencies, may arguably limit presidential authority over agency recommendations.<sup>8</sup>

### The Use of Exemption 5 and the Privacy Act

The proposed amendments to Exemption 5 would appear to affect active federal records more than inactive federal records.<sup>9</sup> Both of the bills under consideration in the 114<sup>th</sup> Congress would prohibit an agency from applying Exemption 5 of FOIA to any record that is more than 25 years

---

<sup>7</sup> The text of this memorandum can be found at <http://www.justice.gov/archive/oip/011012.htm>.

<sup>8</sup> A list of bypass provisions in place in the executive branch can be found in documents from the Office of Management and Budget collected by Public Citizen. These documents can be found at <http://www.citizen.org/litigation/briefs/FOIAGovtSec/articles.cfm?ID=19293>. For a discussion of the effect of these provisions on agency independence, see CRS Report R43562, *Administrative Law Primer: Statutory Definitions of “Agency” and Characteristics of Agency Independence*, by (name redacted) and (name redacted). As stated in this report, an “exemption from OMB legislative clearance requirements arguably may provide an agency with greater independence from the President by allowing the agency to express its own view on a certain policy or program without the President’s input.” p. 5.

<sup>9</sup> Active federal records are those that are necessary to conduct agency business. See National Archives and Records Administration, “Transferring Records to a Federal Records Center,” at <http://www.archives.gov/frc/records-transfer.html>.

old. Pursuant to NARA's current regulations, after 30 years inactive agency records are to be disposed of or, if they have permanent value, transferred to NARA for permanent preservation. Agency records that are provided to NARA for permanent preservation can no longer be withheld from the public pursuant to FOIA's exemptions. Under current law, therefore, all inactive agency records are to be made available without exemption to the public after 30 years—five years later than either S. 337 or H.R. 653 would require. S. 337 and H.R. 653, however, appear to also apply to active federal records. The volume and substance of active federal records that are currently withheld pursuant to Exemption 5 of FOIA is unclear.

The House bill goes further than the Senate bill, limiting an agency's ability to apply Exemption 5 in cases where records "employ the working law, effective policy, or the final decision of the agency."<sup>10</sup> In these cases, it appears that Exemption 5 could likely no longer be applied to records in cases where a final agency interpretation of law or determination of policy is made. Such action could make many federal records available to the public years prior to when they otherwise might have been released—making executive branch agency decision making and deliberations more transparent and publicly accessible. The provision, however, could also make federal employees involved in these deliberations wary of speaking candidly about concerns or alternative options. If a federal employee understands that deliberative records could be released as soon as a policy determination is made, he or she may be fearful of expressing unpopular opinions or potential outcomes that could prompt public attention or anger.

## **Creation of an Interagency Management Council**

Both pieces of legislation would establish a Chief FOIA Officers Council, comprised entirely of federal employees and headed by the Directors of DOJ's Office of Information Policy and OGIS. This council would be similar to others established by law. For example, the Office of Executive Councils at the General Services Administration lists five interagency management councils:

- the Chief Acquisition Officers Council (CAOC),
- the Chief Financial Officers Council (CFOC),
- the Chief Information Officers Council (CIOOC),
- the Performance Improvement Council (PIC), and
- the President's Management Council (PMC) and President's Management Advisory Board (PMAB).<sup>11</sup>

All of these councils, as well as the potential Chief FOIA Officers Council that would be established by these bills, are restricted solely to federal employees. Currently, however, a FOIA Advisory Committee comprised of both federal and private members is focused on many of the issues that would be under the purview of the Chief FOIA Officers Council established by these bills.<sup>12</sup> These councils could be complementary, or could at times appear duplicative. The

---

<sup>10</sup> H.R. 653 §2(b)(1)(B).

<sup>11</sup> A complete description of each of these councils can be found at the website for the Office of Executive Councils within GSA, at <http://www.gsa.gov/portal/category/101095>.

<sup>12</sup> The FOIA Advisory Committee "is established in accordance with the NAP and the directive in the Freedom of Information Act, 5 U.S.C. §552(h)(1)(C), that the Office of Government Information Services (OGIS) "recommend policy changes ... to improve" the Freedom of Information Act (FOIA) administration." More information on this committee can be found at <https://ogis.archives.gov/foia-advisory-committee.htm>.

Director of OIP and the Director of OGIS would sit on both the committee and the council. These two officials, therefore, could play a role in ensuring a unique role for each entity.

## Assessment of Search and Duplication Fees

Fourth, both S. 337 and H.R. 653 could create barriers to agencies seeking to charge search and duplication fees beyond a certain statutory timeline. Agency administration of fees has been a subject of considerable debate in recent years, receiving attention from the FOIA Advisory Committee, which established a Fees Subcommittee to address the issue. During a meeting on December 3, 2014, this subcommittee reviewed fees assessed by other countries for comparable requests and considered the possibility of eliminating FOIA fees for all but commercial requestors. In addition, this group discussed the impact of such a change on the small number of requestors that account for a large percentage of agency requests, referred to as “vexatious” requestors. While both S. 337 and H.R. 653 address fee assessments for requests in which an agency has missed a deadline, they do not exempt entire classes of requestors from fees or provide any mechanism for managing “vexatious” requestors.<sup>13</sup>

## Action in the 113<sup>th</sup> Congress

The legislation currently being considered by the 114<sup>th</sup> Congress is based in substantial part on bills that were advanced in the 113<sup>th</sup> Congress. In the Senate, the FOIA Improvement Act of 2014 (S. 2520) was introduced by Senator Leahy on June 24, 2014. This legislation was reported by the Judiciary Committee on November 20, 2014, and passed the Senate by Unanimous Consent on December 8, 2014. This legislation was nearly identical to the FOIA Improvement Act of 2015, introduced in the 114<sup>th</sup> Congress.

In the House, the FOIA Act (H.R. 1211) was introduced by Representative Darrell Issa on March 15, 2013. Also in March of 2013, the House Oversight and Government Reform Committee held a hearing entitled, “Addressing Transparency in the Federal Bureaucracy: Moving Toward a More Open Government.” During this hearing, Members expressed their support for the “presumption of openness” established by the President and asked questions of those who provided testimony on many of the issues that were addressed by the FOIA Act, including a single portal for FOIA requests government-wide and a more independent role for OGIS in FOIA implementation.<sup>14</sup> The FOIA Act was reported by the House Oversight and Government Reform Committee on July 16, 2013, and passed the full House unanimously on February 25, 2014, by a vote of 410-0.

This legislation differed from H.R. 653 in two substantive ways. First, H.R. 1211 did not include any provisions altering the use of Exemption 5. Second, Section 3 of H.R. 1211 would have required OMB to establish a three-year pilot program to review the centralized portal for requests.

---

<sup>13</sup> The minutes of the Fees Subcommittee for the meeting held on December 3, 2014, suggest that many other nations define “vexatious” or “extreme” requestors in different ways and have differing approaches for identifying and managing these requestors under their respective access laws. Overall, these types of requestors are those that request records at an unreasonable level. Additional information related to the activities of the Fees Subcommittee can be found at <https://ogis.archives.gov/Assets/foia-fees-committee-status-2015-01-27-revised.pdf>.

<sup>14</sup> U.S. Congress, House Committee on Oversight and Government Reform, *Addressing Transparency in the Federal Bureaucracy: Moving Toward a More Open Government*, 113<sup>th</sup> Cong., 1<sup>st</sup> sess., March 13, 2013, HRG-2013-CGR-0007 (Washington: GPO, 2013).

This review would have required OMB to select agencies with differing levels of FOIA request traffic, assess the benefits of the centralized portal, and provide a report to Congress on the success of the pilot. The legislation currently being considered by the 114<sup>th</sup> Congress includes the creation of a consolidated portal, but no pilot program for review. In regard to both the use of Exemption 5 and the consolidated portal, H.R. 653 is closer to its Senate counterpart than H.R. 1211 was during the 113<sup>th</sup> Congress.

## **Author Contact Information**

(name redacted)  
Research Assistant  
/redacted/@crs.loc.gov, 7-....

(name redacted)  
Analyst in American National Government  
/redacted/@crs.loc.gov, 7-....

## EveryCRSReport.com

The Congressional Research Service (CRS) is a federal legislative branch agency, housed inside the Library of Congress, charged with providing the United States Congress non-partisan advice on issues that may come before Congress.

EveryCRSReport.com republishes CRS reports that are available to all Congressional staff. The reports are not classified, and Members of Congress routinely make individual reports available to the public.

Prior to our republication, we redacted names, phone numbers and email addresses of analysts who produced the reports. We also added this page to the report. We have not intentionally made any other changes to any report published on EveryCRSReport.com.

CRS reports, as a work of the United States government, are not subject to copyright protection in the United States. Any CRS report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS report may include copyrighted images or material from a third party, you may need to obtain permission of the copyright holder if you wish to copy or otherwise use copyrighted material.

Information in a CRS report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to members of Congress in connection with CRS' institutional role.

EveryCRSReport.com is not a government website and is not affiliated with CRS. We do not claim copyright on any CRS report we have republished.