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Responses to Social Security Administration Opposition to H.R. 1309 and S. 849

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The Social Security Administration (SSA) has released a memorandum expressing objections to two pending bills designed to reform the Freedom of Information Act (FOIA). Each of the concerns expressed by the SSA is easily addressed.

- **Objection to requirement for a tracking numbers for FOIA requests.** SSA claims that because “the Department of Justice [DOJ] requires that all agencies treat an individual’s request for access under either law as a FOIA request” and SSA handles more than 18 million FOIA and Privacy Act requests annually, SSA would be unable to comply with the provision mandating the assignment of tracking numbers for all requests (Sec. 7).
- **Response:**
 - The vast majority of the requests processed by the SSA are Privacy Act requests for an individual’s own information. These are simple to process because there are no privacy concerns and the records are easy to locate by a person’s name or social security number. SSA’s Annual FOIA Report for FY 2006 indicates that 18.6 million of these simple requests are handled by non-FOIA staff.¹
 - Although DOJ has recommended that agencies treat Privacy Act requests as FOIA requests in order to ensure maximum disclosure and in their Annual FOIA reports to Congress², the Privacy Act and the FOIA are separate laws. The Privacy Act requests are not covered by the requirements of the OPEN Government Act of 2007, which amends only the Freedom of Information Act.
 - SSA’s own description of its current process suggests that the agency is already in compliance, or nearly so, with the OPEN Government Act mandates: “SSA controls and assigns a tracking number only to the more complex requests for information and records.” To the extent that the majority of Privacy Act requests are received in the field, processed quickly, and not assigned tracking numbers, SSA would not have to change this procedure, but only ensure that the minority of requests that are more complex and fall under FOIA are adequately tracked.
 - It seems unlikely that there will be any fiscal consequences to SSA from the tracking requirement.
- **Objection to the 20-day response time for FOIA requests.** SSA opposes the proposed amendments because they will require that agencies begin the clock on the 20-day response time for processing FOIA requests “on the date on which the request is first received by the agency.”

¹ <http://www.ssa.gov/foia/html/2006%20SSA%20Annual%20FOIA%20Report%20-%20Final.doc>.

² FOIA Post (2001), available at <http://www.usdoj.gov/oip/foiapost/2001foiapost13.htm>.

SSA claims that it “needs more than 20 days in many cases simply to locate the information, and SSA’s regulations provide that the time limit starts only when the handling component gets the request.”

- **Response:**

- Many agencies do not start the 20-day time until the appropriate component receives the request, despite the fact that the FOIA clearly states that agencies must “determine within twenty days . . . *after the receipt of any such request* whether to comply” (emphasis added). The proposed amendment does not change the law, but clarifies the standards for a response time so that agencies cannot shuffle a FOIA request around the agency or let it languish before starting the clock for a response. The goal of the clarification is to spur agencies to solve management challenges by developing more effective procedures for handling incoming requests.
- Additionally, consistent standards for measuring agency performance will lead to more reliable annual reports to Congress, which in turn will encourage better agency management and enable better congressional oversight. SSA’s claims to process the vast majority of its requests within the 20-day time limit. SSA reports that:
 - 18.6 million simple requests generally are handled within the first day;
 - 31,000 simple requests for social security number applications or Office of Earnings Operations records are processed within 2 median days;
 - 1402 fast track requests are processed within 9 median days;
 - 362 simple requests are processed within 13 median days; and
 - 1415 complex requests are processed within 30 median days.³

These data suggest that the impact of the clarification regarding response time will not be significant with respect to SSA.

- Further agencies own reports indicate that there are FOIA requests still pending that are as old as 20 years. SSA has acknowledged that it has a FOIA request pending from August 2005 – almost 500 business days. Clearly, the FOIA’s loopholes are too large and in such cases agencies need clearer direction about their obligations to the public.
- **Objection to a provision barring the agency from collecting FOIA processing fees if the request is not processed within the 20 day time limit.** SSA opposes the provision in the House bill (which will be added to the Senate bill under a managers’ amendment, S.A. 1147) that bars agencies from collecting FOIA processing fees if the 20-day time limit is not met. SSA suggests that this provision would “negatively impact the trust funds.”
 - **Response:**
 - Currently, FOIA imposes no penalty on agencies that stall, delay or stonewall on responding to a request for years or even decades. Thus, agencies have long backlogs of unprocessed requests and FOIA requesters have to use litigation to prompt responses. There must be some incentive in FOIA to prompt agency compliance with the law.
 - SSA reports that it includes among in its annual FOIA report statistics millions of requests for verification of social security numbers (SSN) and benefit information for a wide range of banking, credit, and related matters. It notes that the fees collected for earnings records and SSN verification are based on a separate fee provision in the Social Security Act rather than the FOIA fee provision. Thus, they are allowed to recover the full cost of fulfilling such requests and will not lose that under the OPEN Government Act of 2007.
 - Additionally, the **entire** federal government collects just over \$7 million from FOIA search, review and copying fees. As noted above, only a minute portion of SSA’s requests

³ See n. 1.

take more than 20 business days to process. These data suggest that the fiscal impact to SSA of losing the right to charge processing fees for requests pending more than 20 business days will not be significant.

- SSA also expresses opposition to the provision in the Senate bill that would waive certain exemptions for an agency that fails to process a FOIA request within 20 days. The provision to which SSA objects will be removed from the Senate bill in accordance with a managers' amendment, S.A. 1147, by which the primary co-sponsors of S. 849 have agreed to substitute the House version of Sec. 6 for the provision barring use of exemptions.
- **Payment of attorney's fees from appropriated funds.** SSA objects to the provision in the House legislation that would require agencies to pay attorney's fees in FOIA cases from appropriated funds rather than from the Judgment Fund, because this requirement would "negatively impact[] the trust funds."
- **Response:**
 - The Senate bill, S. 849, does not provide for attorneys' fees to be paid from appropriated funds. Under the ordinary course, such fees are paid from the Judgment Fund. The Judgment Fund was created by Congress in 1956 as a permanent appropriation from which money judgments against the United States could be paid, if "not otherwise provided for." 31 U.S.C. § 1304(a)(1). In 1961, the law was amended to also allow payment of settlements out of the Judgment Fund, and some administrative claims are also included in the statute. Any payments from the Fund are not attributed to the agencies responsible for the judgment or settlement paid.
 - The House version of the bill, H.R. 1309, does not permit such fees in FOIA cases be paid from the Judgment Fund (Sec. 4). We agree that this House provision should be struck. The attorneys' fees provision, however, should not be sacrificed because of the need to clarify how such fees will be paid. Currently, agencies waste time and resources of FOIA requester, the Department of Justice, and the judicial system by litigating FOIA cases for the purpose of delaying the release of information. The system of incentives permits this to occur because the agencies can easily moot out the lawsuit on the eve of a judicial decision. Cases such as *Pacific Fisheries v. IRS*, 2006 WL 1635706 (W.D. Wash 2006) (court threatened to award sanctions for agency delay tactics despite the fact it could not award attorneys' fees) demonstrate this problem.
- **Expanded definition of news media.** SSA argues that "[t]he proposed legislation would greatly expand the definition of a news media requester," by extending "'media' status to virtually everyone who claims to be a representative of the news media, even if that claim is unsupported by evidence."
- **Response:**
 - Sec. 3 of the proposed legislation amends 5 U.S.C. 552(a)(4)(A)(ii) to make clear that independent journalists or first time authors are not barred from obtaining fee waivers solely because they lack an institutional affiliation with a recognized news media entity. There is nothing in the proposed amendments that require agencies to grant news media status without evidence, but only that they consider evidence of an intent to publish. In fact, most of the criteria that S. 849 would codify have been in existence for 20 years in FOIA fee guidelines promulgated by the Office of Management and Budget.⁴

⁴ http://www.whitehouse.gov/omb/inforeg/foia_fee_schedule_1987.pdf.

Conclusion

The OPEN Government Act of 2007 (S. 849) and its companion House measure (H.R. 1309) would enact common sense reforms to FOIA and close loopholes that currently permit agencies to flout their responsibilities. The fiscal impacts, if any, would be minimal, particularly given the important of the Freedom of Information Act in ensuring government accountability and integrity. Agencies may not be happy at the attention they have received for their mismanaged FOIA programs, but members of the public have every reason to expect that federal agencies can handle their information requests efficiently and fairly. The 41 years since FOIA was enacted into law have demonstrated that congressional intervention is needed to counteract the bureaucratic resistance to public scrutiny.

If you have any questions, please feel free to contact:

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