[ORAL ARGUMENT NOT SCHEDULED]

No. 15-5183

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AMERICAN CIVIL LIBERTIES UNION and
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs-Appellants,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The plaintiffs-appellants are the American Civil Liberties Union and the American Civil Liberties Union Foundation. Senator John D. Rockefeller has filed a brief as *amicus curiae* in support of appellants. The defendants-appellees are the Central Intelligence Agency, the Department of Defense, the Department of State, and the Department of Justice.

B. Rulings Under Review

The rulings under review are the portions of the memorandum opinion and order filed on May 20, 2015, by Judge James E. Boasberg. The memorandum opinion has not yet been published, but it is available on Westlaw at 2015 WL 2406825. There is no official citation for the order.

C. Related Cases

This case has not previously been before this Court or any other court other than the district court. Counsel for the government are unaware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

s/ Thomas Pulham
Thomas Pulham

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GLOSSARY

CIA	Central Intelligence Agency
Executive Summary	A stand-alone summary of the Full Report, along with the report's findings and conclusions
FOIA	Freedom of Information Act
Full Report	6,963-page report authored by the Senate Select Committee on Intelligence
Senate Committee, or SSCI	Senate Select Committee on Intelligence
Study	*Committee Study of the CIA's Detention and Interrogation Program*, authored by the Senate Select Committee on Intelligence and consisting of the Full Report, Executive Summary, and various other components. The Study was filed with the Senate as Senate Report No. 113-288 (2014).

INTRODUCTION

Plaintiffs-appellants American Civil Liberties Union and American Civil Liberties Union Foundation (together, ACLU) seek access to a sensitive, highly classified report authored by the Senate Select Committee on Intelligence (SSCI or the Senate Committee) concerning a Central Intelligence Agency defunct detention and interrogation program. The ACLU cannot obtain this document directly from the Senate Committee because Congress has exempted its records from the Freedom of Information Act (FOIA). And while the Committee has publicly released a stand-alone Executive Summary of the report, it has not voted to seek declassification and public release of the full 6,963-page report (Full Report). Nevertheless, through this FOIA suit, the ACLU is attempting an end-run around Congress by pressing several Executive Branch agencies, which possess copies of the Full Report subject to access restrictions imposed by the Senate Committee, to release the document to them in defiance of those restrictions.

The district court correctly dismissed the ACLU's suit because the FOIA applies to congressional documents in the possession of an Executive Branch agency only when "the agency to whom the FOIA request is directed . . . ha[s] exclusive control of the disputed documents." *Paisley v. CIA*, 712 F.2d 686, 693 (D.C. Cir. 1983) (*vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984)). Here, however, the Senate Committee imposed its continued control over

the Full Report; the Committee has not ceded to the Executive Branch whatever authority would be needed to make the FOIA apply. The ACLU tries to leapfrog this barrier by pointing to the actions of a former chairman of the Senate Committee, who provided the Full Report to several Executive Branch agencies. But those actions were consistent with a congressional intent to maintain control over the Full Report and, in any event, were shortly thereafter countermanded by the current Committee chairman. These contradictory moves by lone Senators in no way provide what would be necessary to override the controls otherwise imposed by the full Senate Committee, and those controls continue to govern until the Committee says otherwise.

STATEMENT OF JURISDICTION

The ACLU attempted to invoke the district court's jurisdiction under 5 U.S.C. § 552(a)(4)(B), 28 U.S.C. § 1331, and 5 U.S.C. §§ 701-706. JA 26.[1] On May 20, 2015, the district court dismissed the ACLU's claim seeking to compel disclosure of the Full Report under the FOIA for lack of jurisdiction. JA 140. The ACLU filed a timely notice of appeal on June 26, 2015. JA 167. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

[1] Citations to "JA" refer to the parties' Joint Appendix; citations to "Br." refer to the Brief for Plaintiffs-Appellants; and citations to "Amicus Br." refer to the Brief of *Amicus Curiae* Senator John D. Rockefeller IV.

STATEMENT OF THE ISSUE

Even though the records of Congress are not subject to the FOIA, the ACLU seeks to compel the release of copies of the Senate Committee's Full Report that are in the possession of several Executive Branch agencies. The question presented on appeal is whether the district court correctly held that the Full Report remains a congressional document not subject to the FOIA, or has instead become a record of those agencies because it has been transmitted to them even though it remains under the control of the Committee.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. The Investigation and the Ground Rules Agreed upon by the Senate Committee and the CIA.

As part of its oversight of the intelligence community, the Senate Committee decided in March 2009, to comprehensively review the Central Intelligence Agency's (CIA) former detention and interrogation program. *See* S. Rep. No. 113-288, at 457 (2014). This review would require access by Senate personnel "to millions of pages of unredacted CIA documents" containing highly sensitive and compartmented classified information. JA 142. The CIA and the Senate Committee therefore "reached an inter-branch accommodation that respected both

the President's constitutional authorities over classified information and the Congress's constitutional authority to conduct oversight of the Executive Branch." JA 58, 142.

The terms of this agreement were memorialized in a June 2, 2009, letter from the Senate Committee (signed by both the chairman and the vice chairman) to the Director of the CIA. *See* JA 92-96, 142. The parties agreed that the CIA would provide Senate Committee members and staff with access to unredacted responsive documents in a secure electronic reading room at a CIA facility. JA 58, 92-93. The reading room would contain a computer system with a network drive, segregated from CIA networks, that the Senate Committee personnel could use to confidentially prepare and store their work product in a secure environment. JA 58, 93.

"One key provision of the 2009 letter, and 'a condition upon which SSCI insisted,' concerned the status of such work product." JA 143 (quoting JA 59 (Declaration of Neal Higgins, Director of the CIA Office of Congressional Affairs)). The letter expressly provided that "[a]ny documents generated on the network drive [described above], as well as any other notes, documents, draft and final recommendations, reports or other materials generated by Committee staff or Members, are the property of the Committee" and "remain congressional records in their entirety." JA 93.

Significantly, the Senate Committee letter stated broadly and unequivocally that, with regard to records generated by the Committee's investigation, "disposition and control over these records, even after the completion of the Committee's review, lies exclusively with the Committee." JA 93. As such, the letter instructed, "these records are not CIA records under the Freedom of Information Act or any other law," and "[t]he CIA may not integrate these records into its records filing systems, and may not disseminate or copy them, or use them for any purpose without the prior written authorization of the Committee." JA 93-94. In the event that the CIA received a FOIA request for any such records, that agency "will respond to the request or demand based upon the understanding that these are congressional, not CIA, records." JA 94.

In accordance with the letter's terms, Senate Committee personnel drafted the initial versions of their report on their segregated network drive. JA 60. As the work progressed, those Senate staffers worked with CIA information technology and security specialists to transfer portions of the report from the segregated shared drive to the Senate Committee's secure facilities in the U.S. Capitol complex so that the Committee could complete the drafting process in its own workspace. *Id.*

B. The Approval and Transmission of the Full Report.

On December 13, 2012, the Senate Committee voted in closed session to approve a draft of the *Committee Study of the CIA's Detention and Interrogation*

Program (Study), which included a lengthy investigative report (the Full Report) and a stand-alone Executive Summary (Executive Summary). JA 143; *see also* S. Rep. No. 113-288, at 8 (2014).[2] An email from the Senate Committee Staff Director to the CIA and other federal agencies explained that, in addition to approving the Study, the Committee also decided that "a limited number of hard copies" would be sent to the Executive Branch "for review," but only to "specific individuals who are identified in advance to the Chairman." JA 98. The CIA gave the Senate Committee a list of names, and the Committee approved access for those individuals for the limited purpose of providing Executive Branch comments to the Senate Committee about the Study. JA 62; *see also* S. Rep. No. 113-288, at 8-9 ("The Committee requested that specific executive branch agencies review and provide comment on the Committee Study . . . ."); JA 127 (letter from the Senate Committee chairman soliciting "suggested edits or comments").

C. The Decision To Seek Declassification and Public Release of the Executive Summary.

On April 3, 2014, after revising the Study in response to CIA comments, the Senate Committee met (again in closed session) to determine its disposition. JA

[2] The Study also included twenty findings and conclusions. Although broken out into their own section, the findings and conclusions were generally subject to the same treatment by the Committee as the Executive Summary. For the reader's convenience, this brief will refer to these two sections together as the Executive Summary.

143. The Committee decided to approve the updated version of the Study (including both the Executive Summary and Full Report), but it voted to send only the "updated Executive Summary" to the President for declassification review and public release. S. Rep. No. 113-288, at 9; *see also* JA 143-44; JA 62-63. A press release issued by the Committee chairman stated that "[t]he full 6,200-page full report has been updated and will be held for declassification at a later time." JA 100.

In a letter to the President, the Senate Committee Chairman Dianne Feinstein reported that the Committee "has voted to send for declassification the Findings and Conclusions and Executive Summary . . . ." JA 130. The letter further stated that the chairman would "transmit separately copies of the full, updated classified report to you and appropriate Executive Branch agencies," and explained that "[t]his full report should be considered as the final and official report from the Committee." *Id.* Chairman Feinstein "encourage[d] and approve[d] the dissemination" of the report to relevant agencies, adding "I believe it should be viewed within the U.S. Government as the authoritative report on the CIA's actions." JA 130-31.[3]

[3] The CIA received the Full Report at this time, but the Department of State, the Department of Defense, and the Department Justice did not receive it until later. *See* JA 64, 104, 107, 110-11.

Over the next several months, as the Senate Committee and the Executive Branch engaged in discussions regarding the processing of the Executive Summary, the Committee continued to edit both that document and the Full Report. JA 144; *see* JA 64; *see also* S. Rep. No. 113-288, at 525 n.1 (explanation in the minority views that "substantive modifications" were made to the Executive Summary after June 20, 2014). Once these negotiations were completed, the Director of National Intelligence declassified a partially redacted version of the Executive Summary. JA 144.

On December 9, 2014, the Senate Committee publicly released the redacted Executive Summary, along with minority views and the additional views of various Committee members. U.S. Senate Select Committee on Intelligence, *Committee Releases Study of the CIA's Detention and Interrogation Program*, http://www.intelligence.senate.gov/press/committee-releases-study-cias-detention-and-interrogation-program (Dec. 9, 2014); *see also* JA 144; JA 64. The chairman's foreword declared that the Study "as updated is now final and represents the official views of the Committee." S. Rep. No. 113-288, at viii. "In keeping with the Committee's earlier decision, however, the Final Full Report was neither sent for declassification nor publicly released." JA 144. Rather, Chairman Feinstein filed the classified Full Report with the Senate, *see* S. Rep. No. 113-288, at i, and explained that she "chose not to seek declassification of the full Committee Study

at this time," *id.* at vi; *see also id.* ("Decisions will be made later on the declassification and release of the full 6,700 page Study."). That was "the last official action of the full Committee in connection with its study of the CIA's detention and interrogation program." JA 64.

D. The ACLU's FOIA Request and Lawsuit.

On February 13, 2013—after the approval of the draft of the Full Report but before the declassification of the Executive Summary—the ACLU submitted FOIA requests to the CIA, the Department of Defense, the Department of State, and the Department of Justice. Pointing to the Senate Committee's December 2012 vote, the ACLU requested the "disclosure of the recently adopted report of the Senate Select Committee on Intelligence relating to the CIA's post-9/11 program of rendition, detention, and interrogation." JA 69. The CIA promptly responded, in accordance with the terms of Senate Committee's 2009 letter, that the ACLU had "requested a Congressionally generated and controlled document that is not subject to the FOIA's access provisions." JA 79. The ACLU filed suit against the CIA, asking the court to compel disclosure. JA 3 (docket entry No. 1).

Several months later, the ACLU submitted new FOIA requests to the same agencies. This time, the ACLU sought "the updated version of the Senate Select Committee on Intelligence's report" as it existed when the Committee voted to send the Executive Summary to the President for declassification review. JA 82.

The ACLU then filed a second amended complaint based on the new request, and added the other agency recipients as defendants. JA 23-35.[4] The government has interpreted the second amended complaint to refer to the most recent version of the Full Report—the 6,963-page classified version transmitted by Chairman Feinstein to the Executive Branch after the Executive Summary was publicly released, *see infra* pp. 10-11—and the parties (and district court) agreed that no further FOIA request or amendment to the complaint was necessary. Br. 10; JA 43.

E. Subsequent Competing Actions of Individual Committee Chairmen Concerning the Full Report.

In addition to the limited transmissions approved by the full Senate Committee—of the entire Study in December 2012 for comment, and the Executive Summary in April 2014 for declassification review—individual Senators who chaired the Committee took different (and inconsistent) actions with respect to the Full Report.

First, in December 2014, Chairman Feinstein transmitted the Full Report to the President and the heads of several Executive Branch agencies, expressing her desire that the report "be made available within the CIA and other components of the Executive Branch for use as broadly as appropriate to help make sure that this

[4] The second amended complaint also sought to enforce separate FOIA requests for CIA documents related to the Senate Committee Study. Neither of those other claims is at issue in this appeal. *See* Br. 10 n.6.

experience is never repeated." JA 133. Her letter continued: "To help achieve that result, I hope you will encourage use of the full report in the future development of CIA training programs, as well as future guidelines and procedures for all Executive Branch employees, as you see fit." *Id.*

When the current Congress opened on January 3, 2015, the chairmanship of the Senate Committee passed from Senator Feinstein to Senator Richard Burr. Shortly thereafter, Chairman Burr sent a letter to the President on January 14, 2015, reporting that he had been unaware of then-Chairman Feinstein's efforts to distribute the Full Report within the Executive Branch in December 2014. JA 136. Chairman Burr advised the President that he considered the Full Report to be "a highly classified and committee sensitive document," and he requested that "all copies of the full and final report in the possession of the Executive Branch be returned immediately to the Committee." *Id.* Chairman Burr offered that the Committee would attempt to "arrive at a satisfactory accommodation" "[i]f an Executive Branch agency would like to review the full and final report." *Id.*

Senator Feinstein, now vice chairman of Senate Committee, responded. In a letter to the President, she declared that she "d[id] not support" Chairman Burr's request that all copies be returned to the Committee. JA 138. Senator Feinstein disputed Chairman Burr's assertion that the report qualified as "Committee Sensitive" under the Senate Committee's Rules of Procedure. And she "ask[ed]

that [the President] retain the full 6,963-page classified report within appropriate Executive branch systems of record, with access to appropriately cleared individuals with a need to know." JA 139.

F. The District Court's Decision Dismissing this Action.

The government moved to dismiss the ACLU's claim seeking the Full Report. The government argued that the district court lacked jurisdiction to compel disclosure of the Full Report because it is a congressional record not subject to the FOIA.

The district court granted the government's motion to dismiss. As the court recognized, all parties agreed that "at the time the SSCI drafted the Full Report, it constituted a congressional document exempt from the FOIA. The bone of contention, instead, is whether the Report, once transmitted to Defendants, *became* an 'agency record' subject to FOIA." JA 152. That question turned on an assessment of the Senate Committee's intent with respect to its work product: "do there exist 'sufficient indicia of congressional intent to control' the Full SSCI Report?" JA 154 (quoting *Paisley v. CIA*, 712 F.2d 686, 693 (D.C. Cir. 1983)). To answer that question, the district court "focus[ed] on three pieces of evidence, [1] SSCI's June 2009 letter to the CIA, [2] Senator Feinstein's December 2014 letter transmitting the Final Report, and [3] SSCI's treatment of the Executive Summary." JA 154.

First, the court observed that "SSCI expressly stated its intent" in the June 2009 letter memorializing the agreement reached between the Senate Committee and the Executive Branch: "the documents it generated during its investigation 'remain congressional records in their entirety,'" and "'control over these records, even after the completion of the Committee's review,' would 'lie[] exclusively with the Committee.'" JA 154 (quoting JA 93).

The court rejected the ACLU's argument that this letter "applied only to documents residing on the SSCI's network drive at the CIA's secure facility," pointing out that "[b]y its express terms, . . . the SSCI-CIA agreement . . . applies both to 'documents generated on the network drive' *and* to 'any other notes, documents, draft and final recommendations, reports or other materials generated by Committee staff or members.'" JA 155-56 (quoting JA 93). The district court also rejected the ACLU's argument that the 2009 letter was irrelevant to evaluation of congressional intent as an "attempt to unduly narrow the universe of relevant evidence." JA 157. Not only did the Senate Committee's 2009 letter merit consideration in its own right, the court recognized, but that letter also "sets the appropriate backdrop against which Senator Feinstein's 2014 letter can be properly understood." JA 158.

Turning to the contents of the Feinstein 2014 letter, the district court explained that "the dissemination authorized by the letter is limited to the

Executive Branch" and it "plainly does not purport to authorize the agencies to dispose of the Report as they wish—*e.g.*, to the public at large." JA 158. The routine sharing of documents by Congress "with the understanding that relevant agencies should make appropriate *internal* use of the information" is not understood to result in the "wholesale abdication of control" over congressional oversight material. *Id.* And "[e]specially here, where SSCI's 2009 letter affirmatively manifests its intent to retain control of its work product," the district court "decline[d] to assume the contrary 'absent a more convincing showing of self-abnegating congressional intent.'" JA 159 (quoting *Goland v. CIA*, 607 F.2d 339, 346 (D.C. Cir. 1978)).

Finally, the court found its conclusion "further reinforced by SSCI's divergent treatment of the Executive Summary." JA 159. Specifically, "SSCI's deliberate decision not to publicly release the Full Report, combined with its assertion that it would consider that course of action in the future, serve to further undermine [the ACLU's] theory that Congress intended to relinquish control over the document." *Id.* The court found it unnecessary to address the government's alternative arguments in support of its motion to dismiss, finding that even without them, the government "has made the requisite showing of congressional intent to retain control." JA 160. Because the district court dismissed the ACLU's claim on the ground that the Full Report was not an agency record, and therefore not subject

to the FOIA, it did not have occasion to consider whether the Full Report would fall within any of the specific provisions exempting categories of agency records from public disclosure. *See, e.g.*, 5 U.S.C. § 552(b)(1) ("This section does not apply to matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order . . . .").

SUMMARY OF ARGUMENT

Jurisdiction for a suit seeking to compel disclosure of documents under the FOIA is limited to claims that an agency has improperly withheld "agency records." 5 U.S.C. § 552(a)(4)(B). When the documents sought through the FOIA are congressional records in the possession of an Executive Branch agency at the time the request is made, special considerations prompted by separation of powers concerns require deference to Congress's affirmatively expressed intent to control its own documents. Thus, this Court has held that whether a congressionally created document is subject to the FOIA turns on whether Congress has manifested a clear intent to control the document. *See United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 597 (D.C. Cir. 2004). Congressional intent is determined by considering the circumstances surrounding the document's creation and the conditions under

which it was provided to the agency. *Paisley v. CIA*, 712 F.2d 686, 692 (D.C. Cir. 1983).

In this case, because the Senate Committee has manifested its clear intent to control the Full Report, the document is not subject to the FOIA. In its 2009 letter to the CIA summarizing the terms of their inter-branch agreement, the Senate Committee stated plainly that "[a]ny documents generated on the network drive . . . , *as well as any other notes, documents, draft and final recommendations, reports or other materials generated by Committee staff or Members*, are the property of the Committee" and "remain congressional records in their entirety." JA 93 (emphasis added). This declaration and the restrictions imposed by the Senate Committee on the CIA's use and dissemination of any such records demonstrate the indicia of congressional control required to establish that the FOIA's disclosure provisions are inapplicable here. The ACLU's argument that the 2009 letter asserted congressional control of only material on the Senate Committee's network drive or in the CIA reading room is foreclosed by the letter's plain text, as the district court found.

The circumstances surrounding the transmission of the Full Report to certain Executive Branch agencies likewise demonstrate the Senate Committee's intent to continue its control of the document. When the Committee voted to approve the draft of the Full Report in 2012, it also decided to send a limited number of copies

to specified individuals in the Executive Branch, identified in advance, for the limited purpose of soliciting their comments and suggested edits. These limitations manifest an intent to continue congressional control of the Full Report. Indeed, the Senate Committee exercised its continuing control over the Full Report when it voted to send only the Executive Summary, and not the Full Report, to the President for declassification review and public release. As the district court recognized, the contrasting treatment of these two documents provides further evidence of intent to control.

The ACLU contends that the Senate Committee's instructions were overridden by Chairman Feinstein's later actions, even though the current Committee chairman rescinded those actions. The ACLU's argument is without merit on several grounds.

First, the actions and statements of individual Senators cannot override the actions of the Senate Committee. Second, the ACLU misinterprets Chairman Feinstein's December 2014 transmittal letter. When read against the backdrop of the Senate Committee's prior actions, her letter and statements are appropriately understood as expressing continued congressional control. Thus, while Senator Feinstein encouraged dissemination and use of the Full Report within the Executive Branch, nothing in her letter suggested that the agencies that received copies were free to dispose of the Full Report as they wished, including by public

disclosure. This absence is critical because, if an agency in possession of a congressional document "is not free to dispose of the [document] as it wills," then the document is not an agency record subject to the FOIA. *Goland v. CIA*, 607 F.2d 339, 347 (D.C. Cir. 1978). The differences between Chairman Feinstein's letter in 2014 and Chairman Burr's letter in 2015 (which sought the return to the Senate Committee of all copies of the Full Report) underscore the need to look to the intent of the Committee, as reflected by its official actions, rather than the intent or actions of individual Senators (even if the individual Senator is also the Committee chairman).

Taken together, the facts surrounding the creation and transmission of the Full Report demonstrate a clear intent by the Senate to retain congressional control of the Full Report and not to subject that document to the FOIA.

STANDARD OF REVIEW

When a district court grants a motion to dismiss for lack of subject matter jurisdiction based on undisputed facts evidenced in the record, this Court's review is de novo. *Herbert v. National Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992).

ARGUMENT

THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE FULL REPORT IS NOT SUBJECT TO THE FOIA

A. Whether the Senate Committee's Full Report Is an Agency Record Depends on Congressional Intent.

The Freedom of Information Act requires federal agencies to make their records available to any person upon reasonable request. 5 U.S.C. § 552(a)(3)(A). The statute does not define "agency records," *see Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 215 (D.C. Cir. 2013), but it does exempt Congress from the definition of "agency." *See* 5 U.S.C. § 551(1)(A) ("agency . . . does not include . . . the Congress"). And "[b]ecause Congress is not an agency, congressional documents are not subject to FOIA's disclosure requirement." *United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 597 (D.C. Cir. 2004).

"[W]here Congress has intentionally excluded a governmental entity" from the FOIA, this Court has been "unwilling to conclude that documents or information of that entity can be obtained indirectly, by filing a FOIA request with an entity that *is* covered under that statute." *Judicial Watch*, 726 F.3d at 225; *see also id.* at 225-26 ("[T]he cases in which we have barred such end runs have involved 'special considerations' attendant to requiring the disclosure of documents or information generated by Congress itself . . . ."); *Goland v CIA*, 607 F.2d 339, 346 (D.C. Cir. 1978) ("It may be assumed that plaintiffs could not easily

win release of the Hearing Transcript from the House of Representatives; we will not permit them to do indirectly what they cannot do directly because of the fortuity of the Transcript's location.").

The FOIA confers jurisdiction on federal courts to "enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). Under this provision, "federal jurisdiction is dependent upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records.'" *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980). Thus, unless the Full Report sought by the ACLU was at some point transformed from a Senate document into an "agency record," the district court lacked jurisdiction over the ACLU's claim. *See Bureau of Nat'l Affairs, Inc. v. U.S. Dep't of Justice*, 742 F.2d 1484, 1488 (D.C. Cir. 1984) ("The requirement that materials sought by a private party be 'agency records' is jurisdictional—only when an agency withholds an agency record does the district court have authority to compel disclosure.").

In *United States Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989), the Supreme Court explained that two requirements must be satisfied for materials requested under the FOIA to qualify as "agency records." First, the agency must have either created or obtained the requested materials. *Id.* at 144. And second, "the agency must be in control of the requested materials at the time the FOIA

request is made." *Id.* at 145. The first requirement is satisfied here (the CIA "obtained" the Full Report), but the second (agency control of the records) is not.

"In the usual case," this Court considers four factors to determine whether an agency has sufficient control over requested documents to make them agency records for purposes of the FOIA. *Judicial Watch*, 726 F.3d at 218. But documents that originate with Congress do not present the usual case. *See Judicial Watch*, 726 F.3d at 221 (explaining that "the standard, four-factor control test does not apply to documents that an agency has . . . obtained from . . . a governmental entity not covered by FOIA: the United States Congress"). Rather, "the connection between Congress and the requested records implicates considerations not at issue" in other FOIA cases. *United We Stand Am.*, 359 F.3d at 599.

Chief among the "'special considerations' attendant to requiring the disclosure of documents or information generated by Congress itself" are the "separation-of-powers concerns that would arise" if a court construed the FOIA to cover such documents or information. *Judicial Watch*, 726 F.3d at 225-26. As this Court has repeatedly recognized, "Congress has undoubted authority to keep its records secret, authority rooted in the Constitution, longstanding practice, and current congressional rules." *Goland*, 607 F.2d at 346.

Yet "Congress exercises oversight authority over the various federal agencies, and thus has an undoubted interest in exchanging documents with those

agencies," including sensitive documents Congress might wish to withhold from the public, "to facilitate [the agencies'] proper functioning in accordance with Congress' originating intent." *Goland*, 607 F.2d at 346. Subjecting such documents to the FOIA "would force Congress 'either to surrender its constitutional prerogative of maintaining secrecy, or to suffer an impairment of its oversight role.'" *Judicial Watch*, 726 F.3d at 221 (quoting *Goland*, 607 F.2d at 346). These special considerations "counsel in favor of according due deference to Congress' affirmatively expressed intent to control its own documents." *Id.* (quoting *Paisley*, 712 F.2d at 693, n.30); *see also Paisley*, 712 F.2d at 693 n.30 ("By first directing our inquiry into Congress' intentions as to the status and disposition of the disputed documents, we thereby safeguard Congress' long-recognized prerogative to maintain the confidentiality of its own records as well as its vital function as overseer of the Executive Branch.").

This Court has held, therefore, that whether a congressionally generated document is subject to the FOIA "turns on whether Congress manifested a clear intent to control the document." *Judicial Watch*, 726 F.3d at 221. And "[t]wo factors are considered dispositive of Congress' continuing intent to control a document: (1) the circumstances attending the document's creation, and (2) the conditions under which it was transferred to the agency." *Paisley*, 712 F.2d at 692. If analysis of these two factors reveals that "Congress has manifested its own intent

to retain control, then the agency—by definition—cannot lawfully 'control' the documents . . . , and hence they are not 'agency records'" under the FOIA. *Paisley*, 712 F.2d at 693; *see also Judicial Watch*, 726 F.3d at 222.

Comparing the inquiry in cases of congressional documents to the standard four-factor test for control under the FOIA, this Court has suggested that the focus on congressional intent renders the first two factors—"the intent of the document's creator to retain or relinquish control over the records" and "the ability of the agency to use and dispose of the record as it sees fit"—"effectively dispositive." *Judicial Watch*, 726 F.3d at 218, 221. In practice, however, the second factor collapses into the first, making congressional intent alone dispositive. *See id.* at 223 ("[A]s in *United We Stand*, the non-covered entity . . . has manifested a clear intent to control the documents. And that means the agency is not free to use and dispose of the documents as it sees fit." (internal quotation marks and citations omitted)); *see also* JA 153-54 ("In truth, the first two factors represent two sides of the same coin . . . .").

B. The Senate Committee Manifested a Clear Intent To Control the Full Report.

1. The circumstances surrounding the creation of the Full Report show that the Senate Committee intended to retain control over this document.

As described above, in its June 2009 letter to the CIA, the Senate Committee expressly provided that "any . . . notes, documents, draft and final

recommendations, reports or other materials generated by Committee staff or Members, are the property of the Committee" and "remain congressional records in their entirety." JA 93. Speaking directly to the subject of this Court's inquiry, the Senate Committee declared that "*disposition and control* over these records, even after the completion of the Committee's review, *lies exclusively with the Committee*." *Id.* (emphasis added). "As such," the Senate Committee declared in the letter, "these records are not CIA records under the Freedom of Information Act." *Id.* The CIA was forbidden to disseminate, copy, or use any such records without the prior written authorization of the Committee, and it was directed not to integrate them into its records filing system. JA 93-94. In the event that the CIA received a FOIA request seeking disclosure of any of this material, the Senate Committee letter required it to "respond to the request . . . based upon the understanding that these are congressional, not CIA, records." JA 94.

This Court's case law confirms that the restrictions laid out in the Senate Committee's letter establish the congressional control necessary to make a record exempt from the FOIA. For example, in *United We Stand America*, the Court considered the effect of a letter by the Joint Committee on Taxation requesting documents from the Internal Revenue Service. That Committee's letter stated that it was "a Congressional record and is entrusted to the Internal Revenue Service for your use only. This document may not be disclosed without the prior approval of

the Joint Committee." *United We Stand Am.*, 359 F.3d at 600-01. This Court found that the Joint Committee's letter manifested congressional intent to control not only the request for documents itself, but also "those portions of the IRS response that would reveal that request." *Id.* at 600. It follows *a fortiori* that the more restrictive Senate Committee letter at issue here (which did not permit agency use of Committee materials) provides sufficient indicia of intent to control *congressionally created* documents falling within its scope.

The Senate Committee's specific and detailed letter in this case stands in stark contrast to the agreement rejected in *Paisley* as "too general and sweeping" to evidence congressional intent with respect to particular documents. 712 F.2d at 695. In that case, the FOIA requester sought the release of all records relating to the death of her husband, a former CIA agent. The Senate Committee had investigated the death and shared some documents with the FBI and the CIA. The Court considered a series of letters written by the Senate Committee indicating the "Committee's desire to prevent release without its approval of any documents generated by the Committee or by an intelligence agency in response to a Committee inquiry." 712 F.2d at 695. But the letters in that case neither referred to the particular investigation at issue nor provided "any particular criteria by which to evaluate and limit the breadth of this interdiction." *Id.* The Court therefore found that the letters did not provide "the requisite express indication of a

congressional intent to maintain exclusive control over these particular records." *Id.* In contrast, the Senate Committee's 2009 letter to the CIA was specifically dedicated to the "procedures and understandings" that would govern the Committee's "study of CIA's detention and interrogation program." JA 92; *see Judicial Watch*, 726 F.3d at 223 ("The expression of that intent is not merely 'general.' Rather, it explicitly extends to each of the 'particular records' at issue." (quoting *United We Stand Am.*, 359 F.3d at 602)).

The ACLU and its *amicus* do not dispute that the 2009 Senate Committee letter reflects the Committee's intent to control the early stages of its work. Instead, they argue that the letter is "simply not relevant to the question whether Congress intended the Final Report to remain a congressional record" once it had been removed from the CIA facility. Br. 27. According to the ACLU and its *amicus*, the provision in the letter asserting congressional control applies only to two categories of documents: those that were "(i) stored on the network drive or (ii) otherwise kept at the Reading Room." Br. 26 (internal quotation marks omitted); *see also* Amicus Br. 8 ("That provision only covered materials that were kept at the SSCI's reading room . . . ."). As the district court recognized, however, "the SSCI-CIA agreement is not so limited." JA 155.[5]

[5] The ACLU asserts (Br. 26-27) that the government "conceded" that the 2009 Senate Committee letter applied to documents on the segregated shared drive

Continued on next page.

By its terms, the Senate Committee's letter covers more than the two limited categories identified by the ACLU and its *amicus*. The relevant provision states that

> [a]ny documents generated on the network drive referenced in paragraph 5, *as well as* any other notes, documents, *draft and final recommendations, reports or other materials generated by Committee staff or Members*, are the property of the Committee and will be kept at the Reading Room solely for secure safekeeping and ease of reference.

JA 93 (emphasis added). The use of the phrase "as well as" plainly shows that the 2009 Senate Committee letter went beyond documents generated on the network drive, and the remaining language governing all final recommendation and reports easily covers the Full Report. *See* JA 155-56.

Nor does the language of the 2009 letter support the argument made by the ACLU and its *amicus* that the Committee intended to assert control only of documents physically located in the CIA Reading Room. Far from limiting the scope of the assertion of control, the relevant provision merely states that the Senate Committee document "will be kept at the Reading Room solely for secure safekeeping and ease of reference," JA 93, a phrase plainly intended to signal that the Senate Committee's placement of material at the CIA facility was for limited

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and also "conceded" that the Final Report was not on that drive (although earlier drafts were). But those supposed concessions are irrelevant, given that the letter makes clear that it covers final reports of the Committee.

purposes, and did not surrender control over any of the Committee's material. The Committee made clear that all of "these documents"—including final reports—"remain congressional records in their entirety and disposition and control over these records, *even after the completion of the Committee's review*, lies exclusively with the committee." *Id.* (emphasis added).

Thus, the district court correctly held that "[w]hile the ACLU is undoubtedly correct that SSCI had FOIA-related concerns arising from its usage of the CIA's network drive, the Committee was presumably also concerned about maintaining control over any public disclosure of its work product—regardless of which computer systems ultimately housed them." JA 156. Indeed, that may be one reason why the Senate Committee limited access to the Executive Summary when it solicited comments in 2012, even though it ultimately intended to release that document publicly. *See* JA 98. The "literal construction" of the Senate Committee's 2009 letter is therefore "the more sensible one" as well. JA 156.

The Senate Committee's insistence that it control any reports resulting from its investigation is the most compelling evidence of the Committee's intent, and on its own demonstrates that the Committee intended to retain control of its work. But that evidence is also buttressed by the Committee's careful procedures to preserve confidentiality when discussing, voting on, and handling the report. All of the Senate Committee's deliberations and votes regarding the Full Report were held in

closed session,[6] and all versions of the report were marked TOP SECRET, with additional access restriction notes based on the sensitive compartmented information contained in them. JA 64.

In *Goland*, this Court found that "[t]he facts that the Committee met in executive session and that the Transcript was denominated 'Secret' plainly evidence a Congressional intent to maintain Congressional control over the document's confidentiality." 607 F.2d at 347. So, too, here. That the classification markings "refer explicitly to the executive branch's own classification scheme," Br. 33, does not change anything. What matters here, as what mattered in *Goland*, is that the Senate Committee's actions obviously "bea[r] clear indicia of a congressional purpose to ensure secrecy." 607 F.2d 348 n.48.

2. The conditions of transfer reaffirm the Senate Committee's intent to control.

The instructions from the Senate Committee when it provided copies of the Full Report to several Executive Branch agencies provide strong evidence of the Committee's continuing intent to retain control over its distribution, dissemination, and ultimate disposition. In December 2012, when the Senate Committee voted (in closed session) to approve the initial version of the Full Report, it also decided that

[6] *See* 160 Cong. Rec. D360 (daily ed. Apr. 2, 2014) (Senate Committee "to hold closed hearings to examine certain intelligence matters" on April 3, 2014); 158 Cong. Rec. D1029 (daily ed. Dec. 12, 2012) (same announcement for Dec. 13, 2012).

a "limited number" of copies would be sent to specific Executive Branch agencies for the sole purpose of soliciting comments. *See* JA 98; S. Rep. No. 113-288, at 8-9 ("The Committee requested that specific executive branch agencies review and provide comment on the Committee Study . . . ."). The Senate Committee also asserted control over who was allowed to view the Full Report within those agencies. The Committee Staff Director informed the agencies that, "as specified in the motion" approved by the Senate Committee, the Committee would only provide copies of the document to "specific individuals who are identified in advance." JA 98. These contemporaneous instructions from the Committee to the agencies limiting both the use and disclosure of its material demonstrated an intent to retain congressional control over the Full Report. *See Paisley*, 712 F.2d at 694; *see also Holy Spirit Ass'n for the Unification of World Christianity v. CIA*, 636 F.2d 838, 842 (D.C. Cir. 1981) (pointing to a memorandum indicating ongoing jurisdiction over the documents and limiting access to individuals authorized by congressional personnel as suggestive of intent to control).

Significantly, when it transmitted the Full Report to the agencies for comment, the Senate Committee reserved the power to decide whether to accept the Executive Branch agencies' suggested changes, as well as the power to decide the ultimate disposition of the Full Report. *See* JA 127 ("After consideration of these views, I intend to present this report with any accepted changes again to the

Committee to consider how to handle any public release of the report, in full or otherwise.”). The Committee thus made clear that, while it wanted the Executive Branch’s input, it was not relinquishing control over the Full Report.

The Senate Committee again exercised its ongoing control when it voted to seek declassification and public release of only the Executive Summary, rather than the Full Report. On April 3, the Committee met (again, in closed session) to determine the disposition of the Full Report. The Committee decided to approve the revisions made to both the Executive Summary and the Full Report in response to CIA comments, but it voted to send only the Executive Summary to the President for declassification. On December 9, when the Full Report and Executive Summary were filed with the Senate, the Senate Committee publicly released only the Executive Summary. The Committee did not vote to seek declassification review or public disclosure of the Full Report (either in whole or in part) at either time; rather, it reserved the power to make these decisions at a future date. JA 100; S. Rep. No. 113-288, at vi (statement in Chairman Feinstein’s foreword that “[d]ecisions will be made later on the declassification and release of the full 6,700 page Study”).

As the district court recognized, this “divergent treatment” of the Executive Summary and the Full Report is significant. JA 159. This Court has recognized in previous cases that decisions to treat similar documents differently can provide

strong evidence of intent to retain control. *See, e.g.*, *Holy Spirit Ass'n*, 636 F.2d at 842 (finding a "[c]omparison of the circumstances surrounding the transfer of [other documents] is instructive"); *Paisley*, 712 F.2d at 694 (lack of "external indicia of control or confidentiality" was evidence of lack of intent to maintain control where such steps were taken with other documents). In this case, "SSCI's deliberate decision not to publicly release the Full Report, combined with its assertion that it would consider that course of action in the future, serve to further undermine [the ACLU's] theory that Congress intended to relinquish control over the document only days later." JA 159.

The ACLU argues that the district court has wrongly conflated classification with congressional control. Br. 34. But the district court did not hold that the classified status of the Full Report, without more, established congressional control. Quite the contrary, the district court suggested that such an argument "would not likely gain much traction." JA 160. The court focused instead on the way that the Senate Committee treated the Executive Summary and the Full Report differently by making affirmative decisions (and taking action) to seek declassification and public release of the former while simultaneously reserving authority to decide the disposition of the latter. Nor does the district court's logic "lead to absurd results." Br. 35. It simply means that, when considering "all of the circumstances surrounding the . . . creation and possession of the documents"

sought in a FOIA request, *United We Stand Am.*, 359 F.3d at 600, a court should account for the possibility that Congress may not want to release publicly a sensitive congressional document, whether or not it contains classified information.

3. The actions of two Senate Committee chairmen, one transmitting the Full Report to the agencies and the other requesting that it be returned, do not undermine the clear expression of congressional intent to control the document.

As just shown, the actions of the Senate Committee made clear that the Final Report would remain a congressional document, and that its disposition was subject to the control of the Committee. The ACLU tries to minimize the previous expression of Committee control by citing the subsequent actions of then-Chairman Feinstein, who in December 2014 transmitted a copy of the filed version of the Full Report to the President and the heads of the defendant agencies. At the same time, the ACLU asks this Court to disregard the actions of the current Committee chairman, who in January 2015 asserted congressional control over the Report and demanded its immediate return. JA 136. The ACLU's request to have the Court wade into the dispute between two members of the Committee should be rejected for two reasons.

First, the actions and statements of individual Senators cannot substitute for the actions of the Senate Committee. In considering the intent of the legislature, "[t]he remarks of a single legislator, even the sponsor, are not controlling," but

must be considered with other indicia such as "the Reports of both Houses and the statements of other Congressmen . . . ." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979); *see also SW General, Inc. v. NLRB*, 796 F.3d 67, 77 (D.C. Cir. 2015). Here, the full Committee voted to seek declassification of and publicly release the Executive Summary, but not the Full Report. The subsequent action of an individual Senator (even the Committee chairman) cannot short-circuit the full Committee—especially where, as here, those actions are directly contradicted less than a month later by the new Committee chairman.[7]

Second, analysis of the letters themselves shows that they support the assertion of continued Senate Committee control. Chairman Feinstein's December 2014 cover letter expressed a desire that the Full Report be "made available within the CIA and other components of the Executive Branch for use as broadly as appropriate to help make sure that this experience is never repeated." JA 133. And "[t]o help achieve that result," she "encourage[d] use of the full report in the future development of CIA training programs, as well as future guidelines . . . for

[7] For similar reasons, the statements by ACLU's *amicus* concerning his understanding of the Committee's intent, *see, e.g.*, Amicus Br. 8-10, do not overcome the objective indicia in the letters themselves, especially given the contradictory interpretation by Chairman Burr.

all Executive Branch employees, as you see fit." *Id.*[8] Senator Feinstein made similar statements in her foreword to the publicly released Executive Summary. *See* S. Rep. No. 113-288, at viii.

Viewed against the "backdrop" of Senate Committee's prior actions, JA 158, including the 2009 letter and the 2012 transmission of the Full Report, Chairman Feinstein's statements are appropriately viewed as expressing continued congressional control by suggesting limited, internal uses for the Full Report, and reserving authority to prevent any other uses. Specifically, Senator Feinstein indicated that the Full Report should be used within the Executive Branch as a guide for agencies to help keep their future conduct in line with congressional expectations. In this way, the Full Report differs little from the transcript at issue in *Goland*, which this Court held was a congressional document even though "[t]he CIA retain[ed] a copy . . . for internal reference purposes only, to be used in conjunction with legislation concerning the Agency and its operations." 607 F.2d at 347.

As the district court here correctly observed, the Feinstein letter "plainly does not purport to authorize the agencies to dispose of the Report as they wish—*e.g.*, to the public at large." JA 158. This limitation is critical—if an agency in

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[8] Chairman Feinstein apparently intended to transmit the Full Report earlier in 2014, JA 130, but only the CIA received it at that time. *See* JA 64, 104, 107, 110-11.

possession of the Full Report "is not free to dispose of the [document] as it wills," then the Full Report is not an agency record subject to the FOIA. *Goland*, 607 F.2d at 347; *see also Judicial Watch*, 726 F.3d at 223 n.19 ("[G]iven the limitations imposed on the Secret Service's use of the documents, it is plain that the Service does not have 'exclusive control of the disputed documents.'").

The ACLU's argument that the district court relieved the government of proving a "clear assertion of congressional control" and "improperly shifted the burden to the ACLU to show that Congress clearly expressed its intent to *abdicate* control" misreads the district court's opinion. Br. 21-22 (internal quotation marks omitted). As the ACLU concedes in a footnote, Br. 23 n.10, the district court found that the government had "made the requisite showing of congressional intent to retain control." JA 160.

The ACLU appears to object to the district court's recognition that "SSCI's 2009 letter sets the appropriate backdrop against which Senator Feinstein's 2014 letter can be properly understood." JA 158. The ACLU tries instead to limit the inquiry into congressional intent to consideration of the Feinstein letter. As the Supreme Court has observed, however, "the world is not made brand new every morning, and [parties cannot] simply as[k] us to ignore perfectly probative evidence." *McCreary Cty. v. American Civil Liberties Union of Ky*., 545 U.S. 844,

866 (2005); *see also* JA 157 (rejecting "the ACLU's attempt to unduly narrow the universe of relevant evidence").

As this Court held in *Judicial Watch*, an entity not covered by the FOIA (the White House in that case) can "manifes[t] its intent to control the entirety of" a set of records through an agreement with a covered agency executed "before the creation and transfer of the documents at issue." 726 F.3d at 223 & n.20. Because the Senate Committee did that in 2009, the district court's conclusion that Chairman Feinstein's letter "should not be readily interpreted to suggest more wholesale abdication of control" comports with both common sense and precedent. JA 158.

The ACLU suggests that "Senator Feinstein's transmittal of the Final Report" could constitute "a release of control over the document" because a Senate Committee rule permits "Committee members and staff . . . to disclose classified or committee sensitive information to persons in the Executive Branch." Br. 38 n.17. That rule permits disclosure to the Executive Branch when the Committee member or staff person making the disclosure is "engaged in the routine performance of Committee legislative or oversight." Senate Select Committee on Intelligence Rule of Procedure 9.7, *available at* http://www.intelligence.senate.gov/about/rules-procedure (last visited Dec. 15, 2015). But this Court's cases have made clear that the act of sharing information as part of congressional oversight does not equate to

an intent to render congressional documents subject to the FOIA. *See supra* pp. 21-23.[9]

Moreover, as already described, Senator Feinstein's letter is not the only relevant letter from a Senate Committee chairman on this subject. In January 2015, Chairman Burr sent his own letter to the President in which he suggested that he had not been aware of the December 2014 transmittal and unambiguously expressed an intention to retain congressional control over the Full Report. JA 136. Senator Burr requested that the report not be entered into any Executive Branch system of records and that all copies of the report be returned to the Senate Committee.

The ACLU argues that Senator Burr's letter is "irrelevant," Br. 37, but it offers no persuasive reason why this letter should be treated so differently from Senator Feinstein's letter. Neither can be tied to any action taken with respect to the Full Report by the Senate Committee, whose last official action was to publicly release the Executive Summary (but *not* the Full Report). Both were written after the Committee's final official action and the ACLU's submission of its FOIA request, and therefore both are vulnerable to criticism as "post-hoc" attempts to

[9] Under the ACLU's interpretation, the actions of a single staff member sharing information with an Executive Branch agency would be sufficient to relinquish control over a sensitive document on behalf of the entire Congress as long as the sharing was permitted by a committee rule. It is unlikely that the Senate Committee intended Rule 9.7 to have such a result.

influence judicial determinations of congressional intent. Besides, this Court need not accept Senator Burr's letter as affirmative evidence of congressional intent to see its true relevance: to underscore the need to look to the intent of the Senate Committee, as reflected by its official actions. If nothing else, Chairman Burr's letter provides a counterpoint to the ACLU's argument that Chairman Feinstein's December 2014 transmittal was approved by the Committee.

* * *

"Ultimately we are dealing with a question of statutory interpretation and congressional intent." *Cause of Action v. National Archives & Records Admin.*, 753 F.3d 210, 216 (D.C. Cir. 2014). Congress has deliberately excluded its records from the FOIA, and the Senate Committee responsible for the Full Report has clearly stated that the report (and all other Committee documents related to its investigation) remain congressional documents subject to its control. Moreover, that same Committee has voted to seek declassification and public release of an Executive Summary of the report while reserving authority to decide whether to make a similar request for the Full Report. Under these circumstances, we can be confident that Congress did not intend to transform this sensitive Legislative Branch material into an agency record subject to the FOIA simply because the material was shared with the Executive Branch in the course of congressional oversight. *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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DECEMBER 2015

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Civil Procedure 32(a). This brief contains 9,177 words.

s/ Thomas Pulham
Thomas Pulham

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Thomas Pulham
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ADDENDUM

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AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

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EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–409 effective 180 days after Sept. 13, 1976, see section 6 of Pub. L. 94–409, set out as an Effective Date note under section 552b of this title.

STUDY AND REPORTS ON ADMINISTRATIVE SUBPOENAS

Pub. L. 106–544, § 7, Dec. 19, 2000, 114 Stat. 2719, provided that:

''(a) STUDY ON USE OF ADMINISTRATIVE SUBPOENAS.—Not later than December 31, 2001, the Attorney General, in consultation with the Secretary of the Treasury, shall complete a study on the use of administrative subpoena power by executive branch agencies or entities and shall report the findings to the Committees on the Judiciary of the Senate and the House of Representatives. Such report shall include—

''(1) a description of the sources of administrative subpoena power and the scope of such subpoena power within executive branch agencies;

''(2) a description of applicable subpoena enforcement mechanisms;

''(3) a description of any notification provisions and any other provisions relating to safeguarding privacy interests;

''(4) a description of the standards governing the issuance of administrative subpoenas; and

''(5) recommendations from the Attorney General regarding necessary steps to ensure that administrative subpoena power is used and enforced consistently and fairly by executive branch agencies.

''(b) REPORT ON FREQUENCY OF USE OF ADMINISTRATIVE SUBPOENAS.—

''(1) IN GENERAL.—The Attorney General and the Secretary of the Treasury shall report in January of each year to the Committees on the Judiciary of the Senate and the House of Representatives on the number of administrative subpoenas issued by them under this section and the identity of the agency or component of the Department of Justice or the Department of the Treasury issuing the subpoena and imposing the charges.

''(2) EXPIRATION.—The reporting requirement of this subsection shall terminate in 3 years after the date of the enactment of this section [Dec. 19, 2000].''

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to

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exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term ''search'' means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)))[1] shall not make any record available under this paragraph to—

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term ''a representative of the news media'' means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ''news'') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii) (II) or (III) of this subparagraph for the first

[1] See References in Text note below.

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two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[(D) Repealed. Pub. L. 98–620, title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357.]

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall—

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except—

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(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, ''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.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term ''exceptional circumstances'' does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure—

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under

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this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term ''compelling need'' means—

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall—

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including—

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) 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;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) 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; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

(A) the investigation or proceeding involves a possible violation of criminal law; and

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(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include—

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency—

(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;

(N) the total amount of fees collected by the agency for processing requests; and

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each

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principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term—

(1) ''agency'' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) ''record'' and any other term used in this section in reference to information includes—

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including—

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(h)(1) There is established the Office of Government Information Services within the National Archives and Records Administration.

(2) The Office of Government Information Services shall—

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) recommend policy changes to Congress and the President to improve the administration of this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(k) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency—

(1) have agency-wide responsibility for efficient and appropriate compliance with this section;

(2) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

(3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(4) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; and

(6) designate one or more FOIA Public Liaisons.

(*l*) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as su-

pervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 383; Pub. L. 90–23, § 1, June 5, 1967, 81 Stat. 54; Pub. L. 93–502, §§ 1–3, Nov. 21, 1974, 88 Stat. 1561–1564; Pub. L. 94–409, § 5(b), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 95–454, title IX, § 906(a)(10), Oct. 13, 1978, 92 Stat. 1225; Pub. L. 98–620, title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357; Pub. L. 99–570, title I, §§ 1802, 1803, Oct. 27, 1986, 100 Stat. 3207–48, 3207–49; Pub. L. 104–231, §§ 3–11, Oct. 2, 1996, 110 Stat. 3049–3054; Pub. L. 107–306, title III, § 312, Nov. 27, 2002, 116 Stat. 2390; Pub. L. 110–175, §§ 3, 4(a), 5, 6(a)(1), (b)(1), 7(a), 8–10(a), 12, Dec. 31, 2007, 121 Stat. 2525–2530; Pub. L. 111–83, title V, § 564(b), Oct. 28, 2009, 123 Stat. 2184.)

HISTORICAL AND REVISION NOTES

1966 ACT

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
....	5 U.S.C. 1002.	June 11, 1946, ch. 324, § 3, 60 Stat. 238.

In subsection (b)(3), the words "formulated and" are omitted as surplusage. In the last sentence of subsection (b), the words "in any manner" are omitted as surplusage since the prohibition is all inclusive.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

1967 ACT

Section 1 [of Pub. L. 90–23] amends section 552 of title 5, United States Code, to reflect Public Law 89–487.

In subsection (a)(1)(A), the words "employees (and in the case of a uniformed service, the member)" are substituted for "officer" to retain the coverage of Public Law 89–487 and to conform to the definitions in 5 U.S.C. 2101, 2104, and 2105.

In the last sentence of subsection (a)(2), the words "A final order * * * may be relied on * * * only if" are substituted for "No final order * * * may be relied upon * * * unless"; and the words "a party other than an agency" and "the party" are substituted for "a private party" and "the private party", respectively, on authority of the definition of "private party" in 5 App. U.S.C. 1002(g).

In subsection (a)(3), the words "the responsible employee, and in the case of a uniformed service, the responsible member" are substituted for "the responsible officers" to retain the coverage of Public Law 89–487 and to conform to the definitions in 5 U.S.C. 2101, 2104, and 2105.

In subsection (a)(4), the words "shall maintain and make available for public inspection a record" are substituted for "shall keep a record * * * and that record shall be available for public inspection".

In subsection (b)(5) and (7), the words "a party other than an agency" are substituted for "a private party" on authority of the definition of "private party" in 5 App. U.S.C. 1002(g).

In subsection (c), the words "This section does not authorize" and "This section is not authority" are substituted for "Nothing in this section authorizes" and "nor shall this section be authority", respectively.

5 App. U.S.C. 1002(g), defining "private party" to mean a party other than an agency, is omitted since the words "party other than an agency" are substituted for the words "private party" wherever they appear in revised 5 U.S.C. 552.

5 App. U.S.C. 1002(h), prescribing the effective date, is omitted as unnecessary. That effective date is prescribed by section 4 of this bill.

REFERENCES IN TEXT

The National Security Act of 1947, referred to in subsec. (a)(3)(E), is act July 26, 1947, ch. 343, 61 Stat. 495, which was formerly classified principally to chapter 15 (§ 401 et seq.) of Title 50, War and National Defense, prior to editorial reclassification in chapter 44 (§ 3001 et seq.) of Title 50. Section 3 of the Act is now classified to section 3003 of Title 50. For complete classification of this Act to the Code, see Tables.

The date of enactment of the OPEN FOIA Act of 2009, referred to in subsec. (b)(3)(B), is the date of enactment of Pub. L. 111–83, which was approved Oct. 28, 2009.

CODIFICATION

Section 552 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2243 of Title 7, Agriculture.

AMENDMENTS

2009—Subsec. (b)(3). Pub. L. 111–83 added par. (3) and struck out former par. (3), which read as follows: "specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;".

2007—Subsec. (a)(4)(A)(ii). Pub. L. 110–175, § 3, inserted concluding provisions.

Subsec. (a)(4)(A)(viii). Pub. L. 110–175, § 6(b)(1)(A), added cl. (viii).

Subsec. (a)(4)(E). Pub. L. 110–175, § 4(a), designated existing provisions as cl. (i) and added cl. (ii).

Subsec. (a)(4)(F). Pub. L. 110–175, § 5, designated existing provisions as cl. (i) and added cls. (ii) and (iii).

Subsec. (a)(6)(A). Pub. L. 110–175, § 6(a)(1), inserted concluding provisions.

Subsec. (a)(6)(B)(ii). Pub. L. 110–175, § 6(b)(1)(B), inserted after the first sentence "To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency."

Subsec. (a)(7). Pub. L. 110–175, § 7(a), added par. (7).

Subsec. (b). Pub. L. 110–175, § 12, in concluding provisions, inserted ", and the exemption under which the deletion is made," after "The amount of information deleted" in second sentence and after "the amount of the information deleted" in third sentence.

Subsec. (e)(1)(B)(ii). Pub. L. 110–175, § 8(a)(1), inserted "the number of occasions on which each statute was relied upon," after "subsection (b)(3),".

Subsec. (e)(1)(C). Pub. L. 110–175, § 8(a)(2), inserted "and average" after "median".

Subsec. (e)(1)(E). Pub. L. 110–175, § 8(a)(3), inserted before semicolon ", based on the date on which the requests were received by the agency".

Subsec. (e)(1)(F) to (O). Pub. L. 110–175, § 8(a)(4), (5), added subpars. (F) to (M) and redesignated former subpars. (F) and (G) as (N) and (O), respectively.

Subsec. (e)(2). Pub. L. 110–175, § 8(b)(2), added par. (2). Former par. (2) redesignated (3).

Subsec. (e)(3). Pub. L. 110–175, § 8(b)(1), (c), redesignated par. (2) as (3) and inserted at end "In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request." Former par. (3) redesignated (4).

Subsec. (e)(4) to (6). Pub. L. 110–175, § 8(b)(1), redesignated pars. (3) to (5) as (4) to (6), respectively.

Subsec. (f)(2). Pub. L. 110–175, § 9, added par. (2) and struck out former par. (2) which read as follows: "'record' and any other term used in this section in