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## **Access to Information – 109<sup>th</sup> Congress Acts to Amend FOIA**

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The Bush Administration has shown a marked preference for keeping government documents secret. The number of government documents being classified has risen 60% since 2001. In 2002-2003 alone, the increase was 26%, and an additional 15.6 million documents (+10%) were classified in 2004. Not all of these documents should have been classified. In a recent Congressional hearing on over-classification and pseudo-classification, Thomas S. Blanton, the director of the National Security Archive, testified that only 10-20% of government documents are properly classified and that new categories of pseudo-classified documents such as "sensitive but unclassified" and "Sensitive Homeland Security Information" are preventing access to even more information. At the same time, the demand for government information has never been higher. The Office of Information and Privacy (Department of Justice) recently reported that there was a 36% increase in requests under the Freedom of Information Act (FOIA) in 2003. There were 3.26 million requests, the highest one-year increase in requests to date. Of those government documents that can be requested under the FOIA, policy memos from John Ashcroft, the then-Attorney General and Andrew Card, Chief of Staff, have given federal agencies the executive green light to err on the side of refusing to release information. The October 2001 Ashcroft Memorandum instructed agencies that if they withhold documents under the Freedom of Information Act, agency actions will be defended "unless they lack a sound legal basis." The March 2002 Card Memorandum encouraged agencies to withhold information that was unclassified, but "could be misused to harm the security of our nation," a broad and undefined category. Since FOIA was passed to promote openness in government and easy access to federal agency information, the Bush Administration's policies are against both the letter and the spirit of FOIA. A coalition of senators and representatives from both political parties have responded by introducing legislation to put FOIA back on track. In September 2004, Representative Henry Waxman first introduced the Restore Open Government Act (H.R. 5073, 108th Cong. (2004) and then re-introduced it in the 109th Congress (H.R. 2331, 109th Cong. (2005). The Restore Open Government Act would implement FOIA's statutory presumption that agency documents will be provided by: expressly repudiating the Ashcroft and Card memoranda and implementing a regulatory presumption in favor of disclosure; reinstating the Reagan executive order on the release of presidential records; and reducing excessive classification. Several other bills promoting FOIA reform have been introduced in the 109th Congress. The first is the OPEN Government Act of 2005 (S. 394, 109th Cong. (2005)) introduced by Republican Senator John Cornyn of Texas and Democrat Patrick Leahy of Vermont, and its companion bill in the House, H.R. 876, 109th Cong. (2005).

The OPEN Government Act would:

- Limit the ability to create new exemptions by implication
- Require that FOIA be also applied to outsourced recordkeeping functions.
- Protect access to FOIA fee waivers for legitimate journalists, regardless of institutional association – including bloggers and other Internet-based journalists.

- Improve reporting requirements by requiring agencies to give people seeking documents a tracking number within ten days and to set up telephone or Internet systems allowing them to learn the status and estimated completion date.
- Impose penalties for failure to comply, including the loss of all exemptions (except national security, personal privacy, proprietary information or a ban in another law)
- Determine appropriate funding levels needed to ensure agency FOIA compliance.

The OPEN Government Act was referred to the Committee on the Judiciary's Subcommittee on Terrorism, Technology and Homeland Security, and open hearings were held on March 15, 2005. Section 8 of the OPEN Government Act, requiring express disclosure of FOIA exemptions in legislation, was introduced as a separate, bi-partisan bill (S. 1181, 109th Cong. (2005)), and was passed by the Senate Judiciary Committee on June 9, 2005. Senators Cornyn and Leahy also co-introduced the Faster FOIA Act (S. 589, 109th Cong. (2005)), which would establish a sixteen-member advisory Commission on Freedom of Information Act Processing Delays, and would make recommendations to Congress and the President for reducing delays in processing FOIA requests. The bill has been reported out of committee and placed on the legislative calendar. The companion bill is H.R. 1620, introduced in the House of Representatives by Democrat Brad Sherman. Senator Leahy also introduced S. 622, a bill to modify the Homeland Security Act's broad FOIA exemption for critical infrastructure information voluntarily provided by the private sector to the federal government. Critics of the exemption as drafted assert that private industry can shelter more information from public scrutiny than national security requires. For an interesting analysis of the very few types of information that actually need to be kept from public view to prevent terrorist acts versus the large majority of information that does not need to be kept from the public, see *Mapping the Risks: Assessing the Homeland Security Implications of Publicly Available Geospatial Information*, The RAND Corporation (2004).

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