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Freedom of Information Act Legislation in the 114th Congress: Issue Summary and Side-by- Side Analysis

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Summary

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 FOIA was originally enacted in 1966 and has been amended numerous times since—most recently in 2009.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

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

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

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

In some areas, amendments to the House and Senate bills made the bills more similar. For example, an amendment to H.R. 653 brought the process for determining FOIA-related search or duplication fees assessed after statutory deadlines have passed more in line with the provisions in S. 337.

In other areas, amendments were added to H.R. 653 that are not found in any version of S. 337. For example, H.R. 653 contains provisions requiring annual training for federal employees on their FOIA-related responsibilities. H.R. 653 would also provide authority to suspend or remove federal employees found to have violated FOIA or a FOIA-related regulation. S. 337, as amended, does not contain the training requirement or violation provisions.

This report provides a side-by-side comparison of the bills, using the versions that have passed each of their originating congressional chambers. The report also provides context related to bill amendments and language additions that occurred between bill versions, when applicable. Finally, the report provides analysis of certain provisions of the bills.

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Background

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

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

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

In March of 2009, Attorney General Eric Holder distributed a memorandum related to FOIA to the heads of all executive departments and agencies. The memorandum built upon a previous memorandum from President Obama, which stated that FOIA “should be administered with a clear presumption: In the face of doubt, openness prevails.”⁴ To reinforce this point, the

¹ P.L. 111-83; 123 Stat. 2142.

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

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

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

memorandum from the Attorney General instructed agencies to preemptively disclose information prior to a public request, partially disclose information in the event that some aspect of a record must be withheld, and not withhold information simply because it falls within the strict legal parameters of an exemption.⁵ Further, the memorandum stated that

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

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

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

While the legislation proposed in both the House and Senate seeks to address many of the same aspects of FOIA—often through very similar language—there are substantive differences between the bills. For example, while H.R. 653, as referred in the Senate, would authorize inspectors general to review agencies’ FOIA compliance and potentially recommend adverse action,⁷ the Senate bill does not. Furthermore, the House legislation, as referred in the Senate, would limit the scope of Exemption 5, preventing the withholding of “opinions that are controlling interpretations of law,” “final reports or memoranda created by an entity other than the agency ... [that are] used to make a final policy decision,” and “guidance documents used by the agency to respond to the public.” S. 337 has no similar articulation of specific information outside of the scope of Exemption 5.⁸

Additionally, H.R. 653, as referred in the Senate, includes provisions that prescribe a particular process a federal agency is to follow when it is required to contact another agency or a nongovernmental entity to determine whether to release a requested record. H.R. 653 also contains provisions requiring annual training for employees on their FOIA-related responsibilities. S. 337, as amended, does not contain the new process or the training requirement provisions.

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

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

⁷ H.R. 653 §2(n)(1).

⁸ H.R. 653 §2(b)(1)(A). These provisions will be discussed in further detail later in the report.

In some areas, the amendments to the House and Senate bills made the bills more similar. For example, an amendment to H.R. 653 brought the process for determining FOIA-related search or duplication fees assessed after statutory deadlines have passed more in line with the provisions in S. 337. As amended, both bills seek to place more requirements and standards on federal agencies—including a 10-day extension for providing records in particular cases, and a notice requirement for agencies to tell requesters when such particular circumstances apply.⁹

Comparison of Legislation in the 114th Congress

Senator John Cornyn introduced the FOIA Improvement Act of 2015 (S. 337) on February 2, 2015, and the Judiciary Committee reported the bill on February 9, 2015. This legislation was primarily built on similar legislation from the 113th Congress (S. 2520), which is discussed in greater detail below. In the House, Representative Darrell E. Issa introduced the FOIA Act (H.R. 653) on February 2, 2015, which was referred to the Committee on Oversight and Government Reform. This bill is based in large part on H.R. 1211, proposed in the 113th Congress. Both S. 337 and H.R. 653 address many of the same topics, with important similarities and differences in their approaches. Since their introductions, both bills have been amended, including S. 337 having its title amended to reflect the date change to 2016.

On January 11, 2016, H.R. 653 was passed on a motion to suspend the rules and pass the bill. On January 12, 2016, the bill was received in the Senate and referred to the Senate Committee on the Judiciary. On March 15, 2016, S. 337 passed the Senate by unanimous consent. Since March 16, 2016, the bill has been held at the desk in the House. No further action has been taken on either bill.

Table 1 below provides a side-by-side comparison of S. 337 and H.R. 653, using the version of S. 337 passed by the Senate and the version of H.R. 653 that was referred to the Senate's Committee on the Judiciary. In most cases, footnotes indicate amendments made to the bill from its introduced version. When applicable, the footnote includes current FOIA requirements and practices, providing context to the amending language.

The substantive components of the bills have been grouped into four categories:

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

⁹ H.R. 653, as referred to the Senate Committee on the Judiciary, §2(j); S. 337, as passed by the Senate, §2(1)(B).

Table I. Side-by-Side Comparison of Legislation in the 114th Congress

	S. 337, FOIA Improvement Act of 2016 (Introduced by Senator John Cornyn on Feb. 2, 2015)	H.R. 653, The FOIA Act (Introduced by Representative Darrell E. Issa on Feb. 2, 2015)
	As Passed by the Senate	As Referred to the Senate Committee on the Judiciary
<i>I. Presumption of Openness</i>		
Standard for Disclosure	<ul style="list-style-type: none"> Would establish a standard whereby information can be withheld only if the agency foresees that disclosure would harm an interest protected by an exemption or the disclosure is prohibited by law. Would require agencies to consider the partial disclosure of information when possible. §2(1)(D)^a 	<ul style="list-style-type: none"> Would establish a standard whereby information can be withheld only if the agency foresees that disclosure would “cause specific identifiable harm to an interest protected” by an exemption or the disclosure is prohibited by law. §2(b)(2) Would clarify that an agency cannot employ FOIA to withhold information from Congress. §2(c)^b
Preemptive Disclosure ^c	<ul style="list-style-type: none"> Would require agencies to make available records that have been requested three or more times. §2(1)(A)(ii)^c Would require all applicable agencies to establish procedures for identifying records of general interest and making them available in a publicly accessible, electronic format. §4 	<ul style="list-style-type: none"> Would require agencies to make available records that have been requested three or more times. §2(a)(1)(A)^c Would require all applicable agencies to review and identify records of general interest and, if they are determined to be in the public interest or increase understanding of government operations and activities, make them available in a publicly accessible, electronic format. For these records, this legislation would also require agencies to redact or segregate information to make these records available even when the whole document cannot be released. §2(g) Would clarify that the name and position of any employee “responsible for the denial or partial denial” or responsive records should be included in the requester’s notification of denial. §2(b)(3)^d

	S. 337, FOIA Improvement Act of 2016 (Introduced by Senator John Cornyn on Feb. 2, 2015)	H.R. 653, The FOIA Act (Introduced by Representative Darrell E. Issa on Feb. 2, 2015)
	As Passed by the Senate	As Referred to the Senate Committee on the Judiciary
<i>II. FOIA Administration and Exemption Use</i>		
Electronic Access to Records	<ul style="list-style-type: none"> • Would require agencies to make records and FOIA guidance available for public inspection in an electronic format. §2(1)(A)(i); §2(1)(A)(iii); §2(4); §4 • Would require agencies to make their annual FOIA reports, and any raw statistical data used for those reports, electronically accessible and available in a searchable format. §2(3)(B) • Would require the Attorney General (AG) to make the annual report FOIA submitted to Congress, as well as any raw statistical data used for the report electronically accessible and available in a searchable format. §2(3)(D) • Would direct the Office of Management and Budget (OMB) to establish, in consultation with the AG, a consolidated online request portal for information requests governmentwide. This centralized portal is not intended to limit or replace agency-specific portals, and the Director of OMB would be responsible for establishing interoperability among these platforms. §2(7) 	<ul style="list-style-type: none"> • Would require agencies to make records and FOIA guidance available for public inspection in an electronic format. §2(a)(1)(A); §2(a)(2) • Would require agencies to make their annual FOIA reports, and any raw statistical data used for those reports, electronically accessible and available in a searchable format. §2(i)(2) • Would require the Attorney General (AG) to make the annual FOIA report submitted to Congress, as well as any raw statistical data used for the report electronically accessible and available in a searchable format. §2(i)(5) • Would direct the Office of Management and Budget (OMB) to establish, in consultation with the AG, a consolidated online request portal for information requests governmentwide. This centralized portal is not intended to limit or replace agency-specific portals, and the Director of OMB would be responsible for establishing interoperability among these platforms. §2(a)(3) • Would require agencies to assign a tracking number to all requests and establish an automated system that would allow requestors to check the status of their request. Under current law, tracking numbers are only assigned to requests that will take longer than 10 days to process. §2(a)(1)(B)^e • Would require agencies to provide a name, phone number, and email address of an agency employee who can provide information on the status of each request received by the agency. §2(a)(1)(B)(iii) • Would require the Director of the Office of Information Policy (OIP)^f at DOJ to make the annual report to Congress on categories of information for disclosure available in an electronic, publicly accessible, format. §2(h)
Intelligence Sources and Information	<ul style="list-style-type: none"> • No similar provision. 	<ul style="list-style-type: none"> • Would clarify that the act would not require disclosure of classified information or information protected for national defense or foreign policy purposes.

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As Passed by the Senate	As Referred to the Senate Committee on the Judiciary
Consultation with Outside Entities	Permits agencies to withhold information that “would adversely affect intelligence sources and methods that are protected by” existing FOIA exemptions. §2(b)(2)(A) ^g
<ul style="list-style-type: none"> No similar provision. 	<ul style="list-style-type: none"> Would require the agency to notify a requester in cases when the agency consults with another agency or outside entity that has a substantial interest in the requested record. The provision also requires the agency to provide the requester the name of the consulted entity and a brief description of the consultation process. §2(f)(2)(B)^b Would establish a process requiring written engagement with any outside agency or entity consulted in relation to the possible release of a requested record. The process would provide 15 days to the consulted entity to express any concerns or objections to the records release. In cases of high volume records requests, consulted entities can agree to a mediation process involving the Office of Government Information Services (OGIS). Elements of the Intelligence Community (as defined in 50 U.S.C. §3003(4)) are exempted from the consultation process requirements. §2(f)^b
Fees ^h	Would prohibit agencies from assessing search or duplication fees if they have failed to comply with a statutory deadline and no unusual circumstances apply. If unusual circumstances do apply, and the agency has provided a timely written notice to the requestor, the deadline is excused for an additional 10 days. Beyond that 10-day period, no fees would be permitted to be assessed for unusual circumstances. §2(j) ^{i,k}
<ul style="list-style-type: none"> Would prohibit agencies from assessing search or duplication fees if they have failed to comply with a statutory deadline and no unusual circumstances apply. If unusual circumstances do apply, and the agency has provided a timely written notice to the requestor, the deadline is excused for an additional 10 days. Beyond that 10-day period, no fees would be permitted to be assessed for unusual circumstances.ⁱ §2(1)(B) 	<ul style="list-style-type: none"> Would prohibit agencies from assessing search or duplication fees if they have failed to comply with a statutory deadline and no unusual circumstances apply. If unusual circumstances do apply, and the agency has provided a timely written notice to the requestor, the deadline is excused for an additional 10 days. Beyond that 10-day period, no fees would be permitted to be assessed for unusual circumstances. §2(j)^{i,k} Would require the court to assess “reasonable attorney fees and other litigation costs” against the U.S. government in cases when a complainant prevails in a FOIA lawsuit. §2(d)^l Would require agencies to provide “a detailed explanation” of assessed FOIA administration fees, which would include the actual or estimated number of records duplicated, hours needed to search for the records, files searched, and

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As Passed by the Senate		As Referred to the Senate Committee on the Judiciary	
Use of Exemption 3	<ul style="list-style-type: none"> No similar provision. 	hours needed for review of records. §2(j)	<ul style="list-style-type: none"> Would further clarify that agencies that apply Exemption 3, which authorizes the use of additional statutory withholding exemptions, “shall identify the statute that exempts the record from disclosure.” §2(b)(1)(C)(ii)
Use of Exemption 5	<ul style="list-style-type: none"> Would prohibit an agency from applying exemption 5 of FOIA (5 U.S.C. §552(b)(5)) to any record that is more than 25 years old. This exemption prevents the disclosure of intra- and inter-agency memoranda or letters, and is commonly referred to as the “deliberative process exemption.” §2(2)^m 	<ul style="list-style-type: none"> Would prohibit an agency from applying exemption 5 of FOIA (5 U.S.C. §552(b)(5)) to any record that is more than 25 years old. This exemption prevents the disclosure of intra- and inter-agency memoranda or letters, and is commonly referred to as the “deliberative process exemption.” §2(b)(1)(A) Would prevent the withholding of opinions that are controlling interpretations of law, final reports or memoranda created by an entity other than the agency that the agency used to make a final policy decision, guidance documents used by the agency to respond to the public. §2(b)(1)(A)ⁿ 	
Use of Exemption 6	<ul style="list-style-type: none"> No similar provision. 	<ul style="list-style-type: none"> Would clarify Exemption 6 of FOIA (5 U.S.C. §552(b)(6)), which allows agencies to withhold records that would “constitute a clearly unwarranted invasion of privacy” if released. The provision would clarify that “personal information such as contact information or financial information” can be appropriately withheld. §2(b)(1)(B)^b Would clarify that releasing the name of a federal employee engaged in an official duty would not constitute an invasion of personal privacy. §2(b)(2)(B)^o 	
Dispute Resolution	<ul style="list-style-type: none"> Would require agencies to notify requestors of the right to seek assistance from the FOIA Public Liaison for the responding agency and the right of a requestor to seek dispute resolution services from either the liaison of the responding agency or the Office of Government Information Services (OGIS). The deadline for requestors to appeal the FOIA response from an agency would be set by the agency and cannot be fewer than 90 days following the determination. §2(1)(C) 	<ul style="list-style-type: none"> Would require agencies to notify requestors of the right to seek assistance from the FOIA Public Liaison for the responding agency and the right of a requestor to seek dispute resolution services from either the liaison of the responding agency or the Office of Government Information Services (OGIS). The deadline for requestors to appeal the FOIA response from an agency would be set by the agency and cannot be fewer than 90 days following the determination. §2(f)(1)(A) 	

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Notification of Withheld Records	<ul style="list-style-type: none"> No similar provision. 	<ul style="list-style-type: none"> Would require an agency that denies a records request to provide the requester a list of the records that were withheld, unless provision of such a list is prohibited by law. §2(h)(3)^b Would require agencies to report and justify to the Department of Justice each case in which they determine that “disclosure of the existence of the records could reasonably be expected to interfere” with law enforcement proceedings or could identify a confidential informant.
<i>III. Oversight and Reporting</i>		
Oversight Activities ^P	<ul style="list-style-type: none"> Would update committee notification requirements and submission timelines for annual FOIA reports to Congress. §2(3)(C) 	<ul style="list-style-type: none"> Would update committee notification requirements and submission timelines for annual FOIA reports to Congress. §2(i)(3) Would require the Government Accountability Office (GAO) to conduct audits of individual agencies’ FOIA practices, catalog the use of Exemption 3, and review and prepare a report on FOIA requests by agencies pertaining to entities that received assistance under Title I of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. §5211 et seq.). §2(k) Would require GAO to study at least five agencies “to assess the feasibility of implementing a policy requiring non-custodians to search for records” responsive to a FOIA request. §2(o)(2)^{b, q} Would authorize applicable federal inspectors general to review agency compliance with FOIA, make recommendations to their respective agency heads, and recommend adverse action to the agency head if needed. §2(o)(6)
Reporting Requirements	<ul style="list-style-type: none"> Would make OGIS a recipient (along with DOJ) of annual agency FOIA reports. Adds new requirements to these reports, including (1) information on the number of times records were withheld related to criminal investigations, and (2) the number of records made publicly available in a searchable format. §2(3)(A) Would require all agencies to review existing regulations related to FOIA and issue new regulations that reflect 	<ul style="list-style-type: none"> Would make OGIS a recipient (along with DOJ) of annual agency FOIA reports. Adds new requirements to these reports, including (1) information on the number of times records were withheld related to criminal investigations, (2) the number of times the agency engaged in dispute resolution with OGIS assistance, (3) the number of records made publicly available in a searchable format, and (4) the number of times the agency assessed a

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As Passed by the Senate

**As Referred to the Senate Committee
on the Judiciary**

amendments made to the law. These regulations must include procedures for engaging in dispute resolution and working with OGIS. §3

search or duplication fee, while failing to comply with the time limits. §2(i)(1)

- Would require all agency heads to review existing regulations related to FOIA and issue new regulations that reflect amendments made to the law. These regulations must include procedures for engaging in dispute resolution and working with OGIS. §2(o)
- Would require OIP, in consultation with the Director of OGIS, to submit a report to the appropriate committees of jurisdiction for FOIA oversight regarding categories of records that would be appropriate for proactive disclosure. §2(h)

IV. New Roles and Responsibilities

Chief FOIA Officers Council

- Defines the role of the Chief FOIA Officer at each agency to include responsibility for serving as the liaison between the agency, OGIS, and OIP, as well as responsibilities for training agency staff on FOIA roles. The Chief FOIA Officer would also be responsible for completing an annual compliance determination that would review agency regulations, fee assessments, use of exemptions, dispute resolution services with OGIS, and the timeliness of FOIA responses. §2(6)
- Would establish a Chief FOIA Officers Council, to be comprised of the Chief FOIA Officers of each agency, as well as senior officials from OMB, DOJ and OGIS. This Council would be co-chaired by the Director of OIP and the Director of OGIS. The roles of this Council would include developing recommendations, disseminating information about agency practices, identifying initiatives to increase transparency, and promoting performance measures to ensure compliance for the administration of FOIA. §2(6)

- Defines the role of the Chief FOIA Officer at each agency to include responsibility for serving as the liaison between the agency, OGIS, and OIP. The Chief FOIA Officer would also be responsible for completing an annual compliance determination that would review agency regulations, fee assessments, use of exemptions, dispute resolution services with OGIS, and the timeliness of FOIA responses. §2(l)
- Would establish a Chief FOIA Officers Council, to be comprised of the Chief FOIA Officers of each agency, as well as senior officials from OMB, DOJ and OGIS. This Council would be co-chaired by the Director of OIP and the Director of OGIS. The roles of this Council would include developing recommendations, disseminating information about agency practices, identifying initiatives to increase transparency, and promoting performance measures to ensure compliance for the administration of FOIA. §2(l)

Office of Government Information Services

- Would establish a Director as the head of OGIS. §2(5)(A)
- Would require OGIS to submit an annual report outlining their oversight of agency FOIA practices, legislative policy recommendations, advisory opinions, and usage of dispute resolution services. This report would be submitted to the

- Would establish a Director as the head of OGIS. §2(e)(2)
- Would require OGIS to submit an annual report outlining their oversight of agency FOIA practices, legislative policy recommendations, advisory opinions, and usage of dispute resolution services. This report would be submitted to the

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As Passed by the Senate	As Referred to the Senate Committee on the Judiciary
<p>appropriate committees of jurisdiction for FOIA oversight. Also would require OGIS to hold an open and public meeting on these reports once per year. §2(5)</p> <ul style="list-style-type: none"> • Would provide OGIS with the authority to submit reports, as well as any other information deemed appropriate, directly to Congress, without review or approval from any other entity, including DOJ and OMB. §2(5) 	<p>appropriate committees of jurisdiction for FOIA oversight. Also would require OGIS to hold an open and public meeting on these reports once per year. §2(e)(2)</p> <ul style="list-style-type: none"> • Would provide OGIS with the authority to submit reports, as well as any other information deemed appropriate, directly to Congress, without review or approval from any other entity, including DOJ and OMB. §2(e)(2) • Would require the Director of OMB to consult with the Director of OGIS before promulgating rules establishing a uniform schedule of FOIA fees for all agencies. §2(e)(1) • Would require agencies to ensure all employees receive annual training on their FOIA-related responsibilities. §2(n)(1)^b • Would require agencies to ensure that all FOIA officers receive annual training on FOIA's statutory requirements. §2(n)(1)^b • Would require agencies to report any violation of FOIA laws or regulations to the affiliated agency inspector general. Employees found to have intentionally violated a FOIA law or regulation would be subject to the suspension and removal provisions of Title 5. §2(n)(1)^{bs}
<p>Executive Branch Agencies</p>	<ul style="list-style-type: none"> • No similar provisions.

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

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

- S. 337, as introduced, included in these provisions language that explicitly prohibited the withholding of information simply as a technical matter or because it would embarrass the agency. This language was removed from S. 337, as passed by the Senate.
- This provision was not included in H.R. 653, as introduced.
- Guidance from the Department of Justice related to Frequently Requested Records states that the existing statutory standard in 5 U.S.C. §552(a)(2)(D) is "sometimes referred to as establishing a 'rule' of three requests- the first one, plus at least two more." Department of Justice, Office of Information Policy, *FOIA Counselor Q&A: "Frequently Requested Records"*, September 27, 2002, at <http://www.justice.gov/oip/blog/foia-post-2003-foia-counselor-qa-frequently-requested-records>.
- Currently, the law requires "[a]ny notification of denial of any request for records ... shall set forth the names and titles or positions of each person responsible for the denial." 5 U.S.C. §552(a)(6)(C)(i)
- Currently, agencies are required to provide status updates on FOIA requests, but the updates are not required to be automated.
- According to the website for the Office of Information Policy, the office "is responsible for encouraging agency compliance with the Freedom of Information Act (FOIA) and for ensuring that the President's FOIA Memorandum and the Attorney General's FOIA Guidelines are fully implemented across the government." More information on OIP can be found at <http://www.justice.gov/oip>.

- g. This provision was not included in H.R. 653, as introduced.
- h. The decision to assess fees under FOIA can include factors such as the intent of the request (commercial or non-commercial), the possible applicability of a fee waiver, or the nature of the requestor (educational scientific institutions or representative of the news media). Additional information about fee assessments can be found in the Department of Justice, *Guide to the Freedom of Information Act: Fees and Fee Waivers*, at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fees-feewaivers.pdf>.
- i. 5 U.S.C. §552(a)(6)(B)(iii) states that “ 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.”
- j. In H.R. 653, as introduced, the provision sought to prohibit agencies from assessing search or duplication fees if they had failed to comply with a statutory deadline for a FOIA response and did not submit a written notice to the requestor justifying the fees assessed. §2(h)
- k. H.R. 653, as referred in the Senate, provides agencies authority to assess FOIA administration fees after the time limit has expired in cases when the requested information is greater than 3,000 pages, the agency “has provided timely written notice to the requester,” and “a court has determined that exceptional circumstances exist.” In such cases, agencies would be afforded “the length of time provided by the court order” to complete fulfill the FOIA request.
- l. Currently, FOIA provides that the court “**may** assess” “reasonable attorney fees and other litigation costs” to a successful complainant. 5 U.S.C. §552(a)(4)(E)(i).
- m. S. 337, as introduced, had slightly different language in this provision. It appears that the language in S. 337, as passed by the Senate, seeks to clarify the 25-year cap on the application of Exemption 5.
- n. As introduced, H.R. 653 included language that sought to prevent the withholding of “records that embody the working law, effective policy, or the final decision of the agency.” §2(b)(1)(A)
- o. No similar provision was included in H.R. 653, as introduced. Current law requires agencies to provide an estimate of the volume of the requested records withheld. 5 U.S.C. §552(a)(6)(F). The provision requiring the list would be in addition to an estimate of the volume.
- p. As introduced, H.R. 653 included a provision similar to one in H.R. 653, as referred in the Senate, which would have required GAO to conduct audits of individual agencies’ FOIA practices, catalog the use of Exemption 3 and Exemption 5, complete a study of efforts to reduce backlogs of FOIA requests, and submit all of these documents to the appropriate committees of jurisdiction for FOIA oversight. §2(6), of H.R. 653, as introduced.
- q. This provision was not included in H.R. 653, as introduced. The language in H.R. 653, as amended, does not define “non-custodian.”
- r. Both S. 337 and H.R. 653 include administrative provisions related to the operations of the Chief FOIA Officers Council, including administrative functions and meeting and notice requirements, that are not included in this summary.
- s. Pursuant to H.R. 653, an referred in the Senate, inspectors general at certain agencies—those agencies required by 31 U.S.C. §901 to have a chief financial officer (CFO), would be required to perform audits of FOIA administration at their affiliated agencies not less than every two years. §3(b) This additional requirement for CFO agencies was not included in H.R. 653, as introduced.

Analysis of Selected Policy Implications

As noted above, H.R. 653 and S. 337 have some similar and identical provisions, while there are other components of each bill that are unique. Below some of the policy issues embedded in the bills are discussed and analyzed in greater detail to provide context to the legislative debate.

Presidential Discretion

The amendments to FOIA outlined above present a number of distinct issues or questions for FOIA moving forward. Both S. 337 and H.R. 653, since their introduction, have sought to make a number of changes to the role of the Administration in FOIA implementation. Both bills, for example, would codify the current standard for information disclosure set in place by the Obama Administration—or the “presumption of openness.” While this codification should not affect current agency practices, it may limit the discretion available to future Presidents to make changes in the overall level of openness provided under FOIA. For instance, as noted earlier in this report, the previous DOJ standard during the Bush Administration did not include language addressing partial disclosures or recommending discretionary release of information where an exemption could technically be applied.¹⁰

Additionally, both the House and Senate legislation would provide the OIGIS the authority to report directly to Congress and provide legislative recommendations without review, comment, or approval from other executive branch agencies—including the National Archives and Records Administration, the Department of Justice, or the Office of Management and Budget. This direct reporting mechanism, which is included in statute for certain independent agencies, may arguably limit presidential authority over agency recommendations.¹¹

The Use of Exemption 5

Both bills under consideration in the 114th Congress would prohibit an agency from applying Exemption 5 of FOIA to any record that is more than 25 years old. Pursuant to 44 U.S.C. §2107(a)(2), after 30 years, records of “historical or other value” are to be transferred to NARA for permanent preservation.¹² According to a NARA bulletin discussing legal transfer of permanent records, NARA does not apply Exemption 5 to the permanent records it accepts from agencies, even if they are transferred less than 30 years.¹³ Records transferred to NARA for permanent preservation become NARA’s legal custody, and NARA generally “does not consult with agencies regarding the release” of any records it accepts for permanent retention, provided the records are unclassified.¹⁴ The amendments to Exemption 5 proposed by both S. 337 and H.R.

¹⁰ The text of this memorandum can be found at <http://www.justice.gov/archive/oip/011012.htm>.

¹¹ A list of bypass provisions in place in the executive branch can be found in documents from the Office of Management and Budget collected by Public Citizen. These documents can be found at <http://www.citizen.org/litigation/briefs/FOIAGovtSec/articles.cfm?ID=19293>. For a discussion of the effect of these provisions on agency independence, see CRS Report R43562, *Administrative Law Primer: Statutory Definitions of “Agency” and Characteristics of Agency Independence*, by Jared P. Cole and Daniel T. Shedd. As stated in this report, an “exemption from OMB legislative clearance requirements arguably may provide an agency with greater independence from the President by allowing the agency to express its own view on a certain policy or program without the President’s input.” p. 5.

¹² Records of historical or other value that are accessioned to NARA are referred to as *permanent records*. *Permanent records*, as defined by 36 C.F.R. §1220.18, are those for which the disposition is deemed permanent on NARA’s standardized records management form. The term includes all records accessioned into NARA and any federal record that has been determined by NARA to have sufficient value to warrant its preservation in NARA—even while it remains in agency custody. The FRA authorizes an agency to retain permanent records beyond 30 years, if the agency head certifies “in writing to the Archivist that such records must be retained in the custody of such agency for use in the conduct of the regular business of the agency.” 44 U.S.C. §2107(a)(2).

¹³ NARA Bulletin 2015-01 clarifies when a federal agency should transfer permanent records to NARA. See David S. Ferriero, NARA Bulletin 2015-01, U.S. National Archives and Records Administration, Washington, DC, June 17, 2015, at <https://www.archives.gov/records-mgmt/bulletins/2015/2015-01.html>.

¹⁴ *Ibid.*

653, therefore, are likely to apply to very few records—specifically records that remain in agency custody for 25 or more years. The volume and substance of non-permanent records that remain in agency custody for more than 25 years is unclear.

H.R. 653, as referred in the Senate, goes further than S. 337, as passed by the Senate, removing an agency’s ability to apply Exemption 5 to “opinions that are controlling interpretations of law,” “final reports or memoranda created by an entity other than the agency ... [that are] used to make a final policy decision,” and “guidance documents used by the agency to respond to the public.”¹⁵ In these cases, it appears that Exemption 5 could likely no longer be applied to records in cases where a final agency interpretation of law or determination of policy is made. Such action could make many federal records available to the public years prior to when they otherwise might have been released—making executive branch agency decision making and deliberations more transparent and publicly accessible. The provision, however, could also make federal employees involved in these deliberations wary of speaking candidly about concerns or alternative options. If a federal employee understands that deliberative records could be released as soon as a policy determination is made, he or she may be fearful of expressing unpopular opinions or potential outcomes that could prompt public attention or anger.

Creation of an Interagency Management Council

Since their introductions, both H.R. 653 and S. 337 have sought to establish a Chief FOIA Officers Council, comprised entirely of federal employees and headed by the Directors of DOJ’s Office of Information Policy and OGIS. This council would be similar to others established by law. For example, the Office of Executive Councils at the General Services Administration lists five interagency management councils and one board:

- the Chief Acquisition Officers Council (CAOC),
- the Chief Financial Officers Council (CFOC),
- the Chief Information Officers Council (CIOOC),
- the Performance Improvement Council (PIC),
- the President’s Management Council (PMC), and
- the President’s Management Advisory Board (PMAB).¹⁶

All of these councils, as well as the potential Chief FOIA Officers Council that would be established by these bills, are restricted solely to federal employees. Currently, however, a FOIA Advisory Committee comprised of both federal and private members is focused on many of the issues that would be under the purview of the Chief FOIA Officers Council established by these bills.¹⁷ These councils could be complementary, or could at times appear duplicative. The Director of OIP and the Director of OGIS would sit on both the committee and the council. These two officials, therefore, could play a role in ensuring a unique role for each entity.

¹⁵ H.R. 653 §2(b)(1)(A). H.R. 653, as introduced also sought to narrow and limit Exemption 5—specifically by seeking a 25-year cap on withholding records. The bill, as introduced, however, did not include language explicitly seeking to prohibit the withholding of specific types of records.

¹⁶ A complete description of each of these councils can be found at the website for the Office of Executive Councils within GSA, at <http://www.gsa.gov/portal/category/101095>.

¹⁷ The FOIA Advisory Committee “is established in accordance with the NAP and the directive in the Freedom of Information Act, 5 U.S.C. §552(h)(1)(C), that the Office of Government Information Services (OGIS) “recommend policy changes ... to improve” the Freedom of Information Act (FOIA) administration.” More information on this committee can be found at <https://ogis.archives.gov/foia-advisory-committee.htm>.

Assessment of Search and Duplication Fees

Both S. 337, as passed by the Senate, and H.R. 653, as referred in the Senate, could create barriers to agencies seeking to charge search and duplication fees beyond a certain statutory timeline. Agency administration of fees has been a subject of considerable debate in recent years, receiving attention from the FOIA Advisory Committee, which established a Fees Subcommittee to address the issue. During a meeting on December 3, 2014, this subcommittee reviewed fees assessed by other countries for comparable requests and considered the possibility of eliminating FOIA fees for all but commercial requestors. In addition, this group discussed the impact of such a change on the small number of requestors that account for a large percentage of agency requests, referred to as “vexatious” requestors. While both S. 337 and H.R. 653 address fee assessments for requests in which an agency has missed a deadline, they do not exempt entire classes of requestors from fees or provide any mechanism for managing “vexatious” requestors.¹⁸

Amendments added to H.R. 653, as referred in the Senate, would require executive branch agencies to include “a detailed explanation” of the FOIA fees they would assess a requester. Pursuant to H.R. 653 §2(j), as amended, federal agencies would be required to provide a requester the actual or estimated number of

- records duplicated;
- hours of searching;
- files searched;
- records searched;
- custodians searched;¹⁹
- records reviewed; and
- hours of review.²⁰

Additionally, executive branch agencies would have to link the costs for each of these categories to the agency’s schedule of FOIA fees.²¹ These provisions appear to address congressional and public concerns that some agencies were quoting requestors unnecessarily large FOIA fees to administer requests.²²

¹⁸ The minutes of the Fees Subcommittee for the meeting held on December 3, 2014, suggest that many other nations define “vexatious” or “extreme” requestors in different ways and have differing approaches for identifying and managing these requestors under their respective access laws. Overall, these types of requestors are those that request records at an unreasonable level. Additional information related to the activities of the Fees Subcommittee can be found at <https://ogis.archives.gov/Assets/foia-fees-committee-status-2015-01-27-revised.pdf>.

¹⁹ The term *custodian* is not defined in the bill.

²⁰ H.R. 653, as referred to the Senate Committee on the Judiciary, §2(j).

²¹ Pursuant to 5 U.S.C. §552(a)(4)(A)(i), all covered executive branch agencies are required to promulgate regulations that govern certain aspects of its FOIA administration process. A FOIA fee schedule, which lists “reasonable standard charges” and fees related to the costs of completing certain FOIA requests.

²² See, for example, U.S. Congress, House Committee on Oversight and Government Reform, *FOIA Oversight and Implementation Act of 2015*, 114th Cong., 2nd sess., January 7, 2016, H.Rept. 114-391 (Washington: GPO, 2016), p. 12. According to the House report, “[s]ome agencies ... charge excessive fees, or engage in fee assessment practices designed to dissuade requestors.” See also, Nate Jones, “Unnecessary Freedom of Information Act Fees,” *Sunshine Week Blog*, March 13, 2015, at <http://sunshineweek.rcfp.org/unnecessary-freedom-of-information-act-fees/>.

Action in the 113th Congress

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

In the House, the FOIA Act (H.R. 1211) was introduced by Representative Darrell Issa on March 15, 2013. Also in March of 2013, the House Oversight and Government Reform Committee held a hearing entitled, “Addressing Transparency in the Federal Bureaucracy: Moving Toward a More Open Government.” During this hearing, Members expressed their support for the “presumption of openness” established by the President and asked questions of those who provided testimony on many of the issues that were addressed by the FOIA Act, including a single portal for FOIA requests government-wide and a more independent role for OIG in FOIA implementation.²³ The FOIA Act was reported by the House Oversight and Government Reform Committee on July 16, 2013, and passed the full House unanimously on February 25, 2014, by a vote of 410-0.

This legislation differed from H.R. 653 in two substantive ways. First, H.R. 1211 did not include any provisions altering the use of Exemption 5. Second, Section 3 of H.R. 1211 would have required OMB to establish a three-year pilot program to review the centralized portal for requests. This review would have required OMB to select agencies with differing levels of FOIA request traffic, assess the benefits of the centralized portal, and provide a report to Congress on the success of the pilot. The legislation currently being considered by the 114th Congress includes the creation of a consolidated portal, but no pilot program for review. In regard to both the use of Exemption 5 and the consolidated portal, H.R. 653 is closer to its Senate counterpart than H.R. 1211 was during the 113th Congress.

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²³ U.S. Congress, House Committee on Oversight and Government Reform, *Addressing Transparency in the Federal Bureaucracy: Moving Toward a More Open Government*, 113th Cong., 1st sess., March 13, 2013, HRG-2013-CGR-0007 (Washington: GPO, 2013).