Reforms to the Freedom of Information Act

The Problem

The existing Freedom of Information Act (FOIA) system — meant to provide public access to federal agency records in the executive branch — is slow, confusing, and broken. Federal agencies are required to respond to FOIA requests within 20 days, with the potential to increase to 30 days if there are “unusual circumstances.” Yet in fiscal year 2020, agencies took an average of 97 days to process requests, with responses to more complex requests averaging six months. An uptick in submitted FOIA requests, combined with the chronic underfunding of agency FOIA offices, means that agency backlogs and processing delays continue to increase. When agencies do respond to requests, FOIA exemptions meant to protect classified or otherwise legally sensitive information are often used to excessively withhold information that rightfully belongs to the public.

Congress established FOIA as a way for the public to access information about what their government is doing. But when the government awards contracts to private businesses, those private contractors are not subject to FOIA, which creates a transparency and accountability gap. For example, records related to federal prisons operated by the government are subject to FOIA, while records related to private companies operating immigration detention facilities are not, and are therefore out of the public’s reach. Additionally, a 2019 Supreme Court decision made it significantly more difficult for the public to access certain types of corporate information about businesses that receive taxpayer money through government programs.

The Solution

Congress should streamline and improve the FOIA process by implementing commonsense legislative reforms that would increase the public’s access to information about government operations, establish FOIA administration as a priority for agencies, and reinforce FOIA’s pillars of accountability. Specifically, Congress should:

- **Require agencies to weigh the public’s right to know against the agency’s harm in releasing information.** The addition of a public interest balancing test to FOIA’s foreseeable harm standard would have agencies determine, before they decide not to release information, whether the harm of releasing agency information outweighs the public interest in accessing it. This fix could help prevent improper withholding of information and over-redaction when agencies respond to requests.

- **Require agencies to proactively disclose categories of commonly requested records.** Commonly requested records, including visitor logs, calendars for agency heads, and reports and testimony submitted to Congress, should be proactively
disclosed by agencies. Proactive disclosure of these records would free up capacity for FOIA offices to use resources elsewhere and help reduce FOIA backlogs.

- **Direct agencies to create line-item budgets dedicated to FOIA compliance.** Agencies should evaluate their needs to comply with FOIA and directly request a line-item budget for those needs in annual appropriations requests. Dedicating adequate funding for FOIA offices would allow the offices to increase capacity where needed and respond to requests in a timely manner, while reducing backlogs.

- **Make private prison and detention center records subject to FOIA.** Records relating to private prisons, correctional facilities, and detention facilities should be considered agency records and should therefore be subject to FOIA. Public access to these records helps hold the private contractors who run these facilities accountable for their actions.

- **Reestablish public access to government information about businesses.** Agencies should treat business records as confidential only if the release of these records could likely result in substantial competitive harm to the business. Limiting the scope of what agencies consider confidential means that records about businesses involved with government funds would become more accessible to the public.

**Additional Context**

Reforming FOIA has been a traditionally bipartisan process in both chambers of Congress, led by open government champions Senators Chuck Grassley (R-IA) and Patrick Leahy (D-VT) and Representatives Carolyn Maloney (D-NY) and James Comer (R-KY). Existing legislation in the 117th Congress directly addresses solutions listed above. Introduced by Representative Jamie Raskin (D-MD) and Senator Ben Cardin (D-MD), the Private Prison Information Act of 2021, H.R. 5853 and S. 3164, would make FOIA applicable to records kept by contract prisons, correctional facilities, and detention facilities. The Open and Responsive Government Act of 2021, S. 742, is a targeted approach to limit the Supreme Court’s broad reading of exemption 4, which covers trade secrets and commercial business information. Cosponsored by Senators Grassley, Leahy, and Dianne Feinstein (D-CA), the bill reinforces FOIA’s presumption of openness and transparency.

A broad coalition of civil society organizations — including POGO, Open the Government, the Cato Institute, Demand Progress, Americans for Prosperity, and Public Citizen — have been assisting with legislative language for an upcoming package of FOIA reforms. This package of reforms would minimize delays and improve efficiency in FOIA offices, protect and strengthen fiscal and corporate transparency, and address improper redactions of information by agency personnel.

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