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Description of document: Copies of certain Department of Justice (DOJ) views letters from the 109th and 110th Congresses, 2005-2007

Request date: 26-August-2010

Released date: 06-December-2012

Posted date: 17-November-2014

Note: Letters giving DOJ view of the following included:
"Broadcast Indecency Enforcement Act of 2005"
"Law Enforcement and Phone Privacy Protection Act of 2006"
the President's signing statement for H.R. 6407, the Postal Accountability and Enhancement Act ("H.R. 6407")
"Openness Promotes Effectiveness in our National Government Act of 2007" or the "OPEN Government Act of 2007"
"Improving Government Accountability Act ("H.R. 928")

Source of document: Freedom of Information Act Request
Chief of Staff
Office of Information Policy
Department of Justice
Suite 11050
1425 New York Avenue, N.W.
Washington, D.C. 20530-0001
Fax: (202) 514-1009
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U.S. Department of Justice
Office of Information Policy
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

December 6, 2012

Re: OLA/10-01386 (F)
VRB:DRH:ND

This responds to your Freedom of Information Act (FOIA) request dated August 26, 2010, and received in this Office on September 2, 2010, in which you requested copies of certain views letters from the 109th and 110th Congresses. This response is made on behalf of the Office of Legislative Affairs.

Pursuant to your e-mails dated January 9, 2012, with Mr. Douglas Hibbard of this Office, you narrowed your request to sixteen specific views letters from the 109th and 110th Congresses. Please be advised that a search has been conducted in the Office of Legislative Affairs and five documents, totaling thirty-one pages, were located that are responsive to your request. I have determined these documents are appropriate for release without excision, and copies are enclosed. Please be advised that out of the sixteen views letters related to Public Laws sought, the Department provided its formal views on five. Thus, there were no views letters for the remaining Public Laws.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy, United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through this Office's eFOIA portal at <http://www.justice.gov/oip/efoia-portal.html>. Your appeal must be received within sixty days from the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Vanessa R. Brinkmann
Counsel, Initial Request Staff

Enclosures



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 15, 2005

The Honorable Ted Stevens
Chairman
Committee on Commerce, Science and
Transportation
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This presents the views of the Department of Justice on H.R. 310, the "Broadcast Indecency Enforcement Act of 2005," as passed by the House of Representatives. As was noted prior to the House's passage of this legislation, the Administration strongly supports enactment of legislation to combat broadcast indecency. The Department of Justice does, however, have a comment regarding section 4 and a specific technical concern about section 6, as explained below.

Section 4: Speech by Nonlicensees

Section 4 as introduced and reported in the House would have amended 47 U.S.C. § 503(b)(5)(B) to impose liability on nonlicensee persons who utter "obscene, indecent, or profane material that was broadcast by a broadcast station licensee or permittee, if the person is determined to have willfully or intentionally made the utterance." § 4(4)(D)(iv). This language would have allowed imposition of liability upon persons who made indecent or profane (non-obscene) statements without knowing that those statements would be broadcast. As passed by the House, this language was amended to require that non-licensees have made their statements "knowing or having a reason to know" that it would be broadcast. This or substantially similar language should be retained to prevent what would otherwise be a large number of applications that would be held unconstitutional.

Section 6: Required Public Service Announcements

Section 6 of the bill provides that the FCC "may, in addition to imposing a penalty under this section, require the licensee or permittee to broadcast public service announcements that

serve the educational and informational needs of children. Such announcements may be required to reach an audience that is up to 5 times the size of the audience that is estimated to have been reached by the obscene, indecent, or profane material, as determined in accordance with regulations prescribed by the Commission." To ensure against unconstitutional applications of this provision, we recommend the addition of the following sentence at the end: "Such announcements shall be limited to providing factual information, and the licensee or permittee shall be permitted to state that the announcement has been required by" the FCC.

Certain applications of this section could violate the First Amendment, depending upon how it is interpreted by the FCC. In particular, the section could be interpreted to compel broadcasters to espouse government-imposed viewpoints on matters of public policy.

No doubt the Government has greater leeway in imposing remedies for violations of law than it does generally in restricting speech, and a "public service" remedy appears logical in light of the kind of violations that section 6 addresses. In addition, the Supreme Court generally has granted the government greater leeway to regulate broadcasters than other sorts of media. Compare *FCC v. Red Lion Broadcasting*, 395 U.S. 367 (1969); see also *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (upholding FCC application of a statute that prohibited radio broadcast of "any obscene, indecent, or profane language"), with *Miami Publ. Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down a law that would have required a newspaper to publish the replies of political candidates whom the paper criticized); *Pacific Gas & Elec. v. Public Utils. Comm'n*, 475 U.S. 1, 18 (1986) (holding that the government could not require a public utility to include a third-party's newsletters in its quarterly billings). Although this distinction has been criticized, and arguably may not survive future Supreme Court consideration, it remains in force. See *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 638 (1994) (noting that courts and commentators have criticized the scarcity rationale that undergirds *Red Lion* and declining to extend it to cable TV, but leaving the *Red Lion* ruling intact).

Nevertheless, the First Amendment imposes limits on such remedies. If, for example, the FCC required a broadcaster not only to state that it had been found to have violated the Act and to announce certain publicly sponsored events related to the education of children, but also to state that its prior broadcast was in fact harmful to society and it was "sorry," the Government essentially would be requiring a broadcaster to engage in pro-government speech on an issue of public policy, and we doubt that such action would be upheld. At the other end of the spectrum, if the FCC simply were to require a licensee-violator to broadcast that it violated the law and that children-friendly programming was available between hours X and Y, it seems unlikely that a court would strike such a requirement down. Thus, much would depend on the content of these "public service announcements" under FCC regulations or orders, yet the statute provides no guidance or limitation.

Although we have not found case law precisely on point, we believe that several factors would be highly relevant to a reviewing court: 1) whether the required speech was factual in

The Honorable Ted Stevens

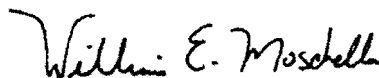
Page 3

nature; 2) whether the required speech would permit the station to notify its audience that the message was the government's message and not that of the broadcaster; 3) whether the broadcaster had to profess agreement with the government's policy; 4) how closely tailored the message was to the particular violation (the up-to-5x-as-large-an-audience requirement could raise as-applied problems in this regard). In *Environmental Defense Ctr., Inc. v. EPA*, 319 F.3d 398 (9th Cir. 2003), the Ninth Circuit upheld a requirement that providers of storm sewers educate the public about the impacts of storm water discharge and inform the public about the hazards of improper waste disposal. The court reasoned that the speech at issue was not "ideological" and stated that "[t]hese broad requirements do not dictate a specific message. They require appropriate educational and public information activities that need not include any specific speech at all." *Id.* at 420. And in *National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001), the Second Circuit upheld a regulation requiring manufacturers of mercury-containing products to inform consumers how to dispose of toxic materials. The court reasoned that "mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests." *Id.* at 114. However, these cases may be limited as "labeling requirement" cases, and we are not sure that a court would apply the same reasoning to a requirement that a broadcaster make a public service announcement about what is indecent or what is good for children, if that were what the FCC required. In fact, the court in *Sorrell* distinguished compelled disclosure of accurate factual information from other sorts of compelled speech on the ground that "[r]equired disclosure of accurate, factual commercial information presents little risk that the state is forcing speakers to adopt disagreeable state-sanctioned positions [or] suppressing dissent" *Id.*

It seems to us that there is some risk of such outcomes here, depending on how the FCC regulates. The recommended additional sentence would substantially obviate this risk.

Thank you for your attention to this matter. If we may be of additional assistance, we trust that you will not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,



William E. Moschella
Assistant Attorney General

cc: The Honorable Daniel K. Inouye
Ranking Minority Member



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 10, 2006

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The following presents the views of the Department of Justice on H.R. 4709, the "Law Enforcement and Phone Privacy Protection Act of 2006." This bill would make it a felony to obtain the customer phone records of a telephone service provider through fraud or by accessing customer accounts through the Internet without the customer's authorization. The bill also would make it a felony for data brokers and phone company employees to sell or transfer customer information without proper authorization. The legislation applies to cell, landline, and Voice-Over Internet Protocol (VOIP) phone records. We support the overall goal of this important proposal, which would add to the tools available to federal prosecutors to combat identity theft. We look forward to continuing to work with the Committee as this important bill moves forward.

1. Applicability of existing statutes.

By way of background, federal criminal law prohibits obtaining confidential consumer telephone records without authorization under many circumstances. For example, telecommunications carriers have a statutory duty to protect the confidentiality of customer proprietary network information, including telephone use records. 47 U.S.C. § 222. It is a misdemeanor for any individual, including a telecommunications carrier employee, to knowingly and willfully cause a carrier to breach that duty. 47 U.S.C. § 501. Also, when an individual, through an interstate communication, obtains customer proprietary network information by accessing a computer without authorization or in excess of authorization, that individual may be chargeable under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(2)(C).

In addition, in some situations, the wire fraud statute, 18 U.S.C. § 1343, may be used to charge the obtaining of confidential records under false pretenses. The identity theft offense at 18 U.S.C. § 1028(a)(7) also may apply in some situations, as the transfer of call logs can constitute transfer of "means of identification," assuming the Government can establish an interstate commerce nexus and lack of authorization.¹ As for the sale/movement of the records after the unauthorized acquisition, it may be possible for federal prosecutors to charge an offense of interstate transportation of stolen property under 18 U.S.C. § 2314, providing the volume or value of the stolen records is sufficiently large to satisfy the statutory value threshold (\$5,000). Thus, to some extent, much of the conduct that would be prohibited by the new 18 U.S.C. § 1039(a) is already criminalized. Notwithstanding, proposed new 18 U.S.C. § 1039(b), which would impose sanctions for certain sales of phone records, would criminalize some conduct that is harmful to consumers but that is not addressed by current criminal law.

**2. Criminal Prohibition on Access to Phone Records
(Proposed 18 U.S.C. § 1039(a)(4)).**

Proposed 18 U.S.C. § 1039(a)(4) in the bill prohibits knowingly obtaining confidential phone records by "accessing customer accounts of a covered entity via the Internet without prior authorization from the customer." *See* Section 3. We assume that the authors included the phrase "via the Internet" in order to broadly prohibit computer crime. However, it is entirely possible for a hacker to gain access to a system without using the Internet (for example, by walking into a provider's place of business and using a terminal on an employee's desk). Additionally, unlike all the other prohibitions in proposed Section 1039(a), this provision does not require proof of fraud; a provider's employee, telecommuting from home, could potentially violate this statute by accessing a customer account. Thus, we recommend changing this to read "accessing customer accounts of a covered entity by means of conduct that violates 18 U.S.C. § 1030."

**3. Criminal Prohibition on Sale or Transfer of Phone Records
(Proposed 18 U.S.C. § 1039(b)).**

We believe the inclusion of the term "prior" in proposed 18 U.S.C. §§ 1039(a)(4) and 1039(c) is very important. We suggest that, at a minimum, proposed 18 U.S.C. § 1039(b), which addresses the sale or transfer of confidential phone records, also expressly require the customer's "prior" authorization, in order for the statutory scheme to be consistent. In addition, we urge the

¹ In that regard, the Committee may wish to consider adding a specific interstate or foreign commerce nexus/requirement to this provision. *See, e.g.*, 18 U.S.C. § 1029(a) (language immediately following paragraph (10) (fraud in connection with access devices)).

House to include a requirement of "written" prior authorization in these three provisions. We recognize that the imposition of a requirement that authorization be in writing may be burdensome for service providers (and customers) unless carriers have established online electronic signature systems. However, we believe that a written authorization will provide important protection for potential identity theft victims.

4. Criminal Intent Standard in Proposed 18 U.S.C. § 1039(c).

We believe the "knowing" mental state requirement in proposed Section 1039(c) should be more broadly defined so as to encompass a broader range of criminal culpability. First, the criminal intent standard should be broad enough to avoid a defense based upon willful blindness (*see, e.g.*, 18 U.S.C. §§ 2511(1)(c),(d) (making it illegal to use or disclose communications "knowing or having reason to know" that they were intercepted in violation of law)). In addition, the phrase "knowing the information was obtained fraudulently or without prior authorization from the customer from whom such confidential records information relates" does not precisely coincide with the prohibitions in proposed Section 1039(a). We believe it is preferable to say "knowing or having reason to know that the information was obtained through conduct that would constitute a violation of this section."

5. Penalties.

We have two concerns about the penalty scheme contained in the bill. First, we are concerned that the five-year penalties in proposed 18 U.S.C. § 1039(b) and (c) (compared to the 20-year penalty in subsection (a)) may lead prosecutors not to charge offenses under these statutes in light of the longer terms available under at least two of the existing statutes noted previously. For example, the maximum sentence under 18 U.S.C. § 1028(a)(7) is 15 years, and 20 years under 18 U.S.C. § 1343. Second, we note that, under proposed 18 U.S.C. § 1039(d), anyone who violated proposed 18 U.S.C. § 1039(a) "while violating another law of the United States" would be subject to a five-year enhancement of his or her sentence. As noted above, however, several other laws of the United States could be implicated in connection with a violation of proposed 18 U.S.C. § 1039(a). We are concerned that the sentencing enhancement contained in subsection (d) may result in higher sentences because of factors that may not relate to the harm of the specific offense or the actor's culpability.

More generally, we are concerned that the blanket 20-year term that would be imposed by each of paragraphs (1) – (4) of subsection (a) of section 1039 may not be appropriately scaled to the seriousness of the various offenses set forth. For example, paragraph (4) would impose a 20-year penalty for accessing customer accounts of a "covered entity" via the Internet without prior authorization of the customer involved, even if the perpetrator does nothing more than "access" the records (*i.e.*, does not sell or misuse them). The House may wish to consider a more "modulated" sentencing scheme, perhaps along the lines of those contained in 18 U.S.C. § 1028 (fraud in connection with identification documents) or 18 U.S.C. § 1030 (fraud in connection with computers), where the offenses are more tailored to the extent to the harm inflicted.

6. Extraterritorial Jurisdiction Provision (Proposed 18 U.S.C. § 1039(f)).

We support this provision given the international nature of identity theft and the potential for links to terrorism.

7. Nonapplicability to Law Enforcement Agencies (Proposed 18 U.S.C. § 1039(g)).

We strongly support this provision, which provides that nothing in the legislation "shall be construed to prevent, hinder, or otherwise delay the production of" confidential telephone records "upon receipt of a lawful request from a law enforcement agency. . . ." We recommend, however, that this provision be amended to be consistent with the law enforcement exception contained in 18 U.S.C. § 1030(f) (*i.e.*, to take into account authorized intelligence activities of a law enforcement agency).

8. Definitions (Proposed 18 U.S.C. § 1039(h)).

"Covered Entity"

In subsection (h)(2)(A), the crucial definition of "covered entity" borrows a definition from the Communications Act of 1934. *See* 47 U.S.C. § 153(44). This definition covers phone service, but only covers a limited number of data providers. Specifically, wholesale DSL would be included in the definition of "covered entity," although retail DSL would be excluded. The Committee may wish to examine the reach of this definition, as many Internet Broadband services are not currently included in the definition and potentially may pose a risk for identity theft.

"IP-enabled voice service"

The definition in the bill of "IP-enabled voice service" in subsection (h)(4) is narrow with respect to fraud and related activities in connection with obtaining confidential phone records information of a covered entity. The House may wish to examine the reach of this definition from a consumer protection perspective and the unique circumstances of identity theft. With some experts predicting that consumers will increasingly turn to VOIP for telephone services, the House may want to consider that the bill's definition of "IP-enabled voice service" may soon be overtaken by technology. First, the bill limits that term to applications that are capable of receiving voice communications from and sending voice communications to the "public switched telephone network." Thus, the bill will only protect consumers whose voice communications travel over one particular set of wires. If, as some predict, the future of telephone communications shifts entirely away from the public switched telephone network, this bill may become obsolete.

Second, the bill requires that the service be able to both send and receive communications over the public switched telephone network. However, some VOIP providers today offer services that only allow one of those two abilities. A customer who uses such a

service would therefore receive less privacy protection than a customer who uses traditional phone service.

Third, the bill requires that the communication in part be "transmitted through customer premises equipment," meaning some sort of equipment (such as a telephone handset) in the customer's home that the customer owns. Therefore, a VOIP provider could exempt itself from this statute merely by leasing, rather than selling, handsets or other equipment to consumers.

9. Recommendation for Additional Provision re Computer Hacking.

We believe that, in order to be more effective, the legislation should also address a flaw in existing law in the computer hacking statute, 18 U.S.C. §1030, that will allow federal prosecution of offenders who steal information without crossing state lines. 18 U.S.C. §1030(a)(2) currently provides that federal courts only have jurisdiction over the theft of information from a computer if the criminal uses an interstate communication to access that computer (except if the computer belongs to the federal government or a financial institution). All other computer hacking crimes in Section 1030, such as those that involve damage to a protected computer (*e.g.*, 18 U.S.C. § 1030(a)(5)), do not require that communications used to commit the offense travel between states. Instead, federal jurisdiction over these offenses is established by proof that the victim computer is "used in interstate or foreign commerce or communication." *See* 18 U.S.C. § 1030(e)(2) (definition of "protected computer"). The requirement of an interstate communication in section 1030(a)(2)(C) has prevented federal jurisdiction in certain contexts, such as the increasing number of intrusions into wireless networks. The following investigations illustrate this impediment:

- In one case in North Carolina, an individual broke into a hospital computer's wireless access point and thereby obtained information. State investigators and the victim asked the United States Attorney's Office to support the investigation and charge the criminal. Because the communications occurred wholly intrastate, no federal law criminalized the conduct.
- In another case in Los Angeles, federal prosecutors were also unable to bring a prosecution in a case in which a criminal intruded into a computer network via a wireless access point. Again, because investigators could only prove that the individual had accessed the computer system by a purely intrastate connection, a federal charge under 18 U.S.C. § 1030(a)(2) was not possible.

Congress could amend the provision governing the theft of electronic data so that it no longer requires that information be stolen through interstate communications. Such an amendment would allow federal investigators and prosecutors to pursue in-state spyware cases and insider theft of information, as well as remove the loophole in Section 1030(a)(2) that prevents the law from applying to many wireless intrusions. The amended statute would meet the required interstate commerce nexus in the same way that many of the other subsections of 18

The Honorable F. James Sensenbrenner, Jr.
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U.S.C. § 1030 do -- namely that the victim computer is used in interstate or foreign commerce or communications. Accordingly, we suggest that H.R. 4709 amend Section 1030(a) as follows:

1030(a) Whoever--

...

(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains--

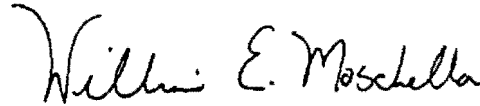
(A) information contained in a financial record of a financial institution, or of a card issuer as defined in section 1602(n) of title 15, or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.);

(B) information from any department or agency of the United States; or

(C) information from any protected computer ~~if the conduct involved an interstate or foreign communication;~~

The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter. Thank you for the opportunity to present our views. Please do not hesitate to contact this Office if we may be of additional assistance.

Sincerely,


William E. Moschella
Assistant Attorney General

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

The Honorable Lamar S. Smith
Chairman
Subcommittee on Courts, the Internet and Intellectual Property

The Honorable Howard Berman
Ranking Minority Member, Subcommittee on Courts, the Internet
and Intellectual Property



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 7, 2007

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your letter, dated March 6, 2007, concerning the President's signing statement for H.R. 6407, the Postal Accountability and Enhancement Act ("H.R. 6407" or "the Act"). Your letter asked whether the President's signing statement for the Act, which stated that the Executive Branch "shall construe subsection 404(c) of title 39 . . . in a manner consistent, to the maximum extent permissible, with the need to conduct searches in exigent circumstances, such as to protect human life and safety against hazardous materials, and the need for physical searches specifically authorized by law for foreign intelligence collection," expanded Executive Branch authority to search mail without a warrant. You also requested "a full explanation of the Administration's interpretation of the phrase 'exigent circumstances,'" and clarification about "how that definition may be different from the criteria established for warrantless searches of mail embodied in 39 C.F.R. § 233.11." In addition, you requested "a listing of all law, whether statutory, constitutional, or otherwise, that the Administration believes specifically authorizes searches of mail." We apologize for any delay in responding to your letter, but note that we did not receive it until March 20, 2007. We are sending similar responses to Chairmen Waxman and Reyes, who joined in your letter to us.

The President's signing statement for H.R. 6407 does not expand the authority of the Executive Branch to search first-class mail without a warrant. Rather, it merely clarifies that the Executive Branch does not understand the Act, which as you note only restated an existing provision of law, *see* 39 U.S.C. § 3623(d) (2000), to alter various longstanding constitutional and statutory exceptions to the Fourth Amendment's general requirement that the Government procure a court-issued warrant before opening letter-class mail. Generally speaking, there are three exceptions that permit the warrantless opening of such mail, in addition, of course, to the consent of the sender or addressee. *Cf. United States v. Licata*, 761 F.2d 537, 544-45 (9th Cir. 1985) (involving consent search of package).

First, it has long been recognized that the Fourth Amendment permits the warrantless opening of mail under "exigent circumstances." The Supreme Court has stated that "[t]he need to protect or preserve life or avoid serious injury is justification" for a warrantless search. *Mincey v. Arizona*, 437 U.S. 385, 392 (1978) (internal quotation omitted). In addition, during the Clinton Administration, the United States Postal Service promulgated a regulation providing for warrantless searches of mail under "exigent circumstances." See 39 C.F.R. § 233.11(b); 61 Fed. Reg. 28,059 (June 4, 1996). Under that regulation, exigent circumstances exist when "[m]ail, sealed or unsealed, [is] reasonably suspected of posing an immediate danger to life or limb or an immediate and substantial danger to property." 39 C.F.R. § 233.11(b). That standard continues to represent the Executive Branch's understanding of the meaning of "exigent circumstances" justifying the warrantless opening of mail.

The United States Postal Service, rather than the Department of Justice, is the principal agency that opens suspicious mail and parcels pursuant to that regulation. The Postal Service informs us that "exigent circumstance" searches typically are initiated when a postal inspector observes a suspicious package. Packages may be suspicious, for example, because they are vibrating, making noises, or leaking suspicious substances. The Postal Service indicates that, when it is possible, the postal inspector ordinarily first makes efforts to contact either the sender or the addressee in order to obtain consent to open the package without a warrant. The Postal Service indicates that it makes efforts to keep its warrantless mail searches to a minimum and limits such searches to only the most urgent circumstances. For example, the Postal Service has advised that, since October 2003, the U.S. Postal Service has handled approximately 700 billion pieces of mail. During that time, postal inspectors have opened mail without a warrant due to exigent circumstances approximately 150 times. Therefore, only a miniscule portion of the number of packages and mail transported through the postal system is subject to a warrantless search on the basis of exigent circumstances.

Second, the Fourth Amendment permits the warrantless searching of mail entering or leaving the United States. See, e.g., *United States v. Ramsey*, 431 U.S. 606, 616 (1977). Congress specifically has authorized the warrantless search of mail at the border, although some of those provisions place restrictions on the reading of correspondence. See, e.g., 19 U.S.C. § 1583(a)(1) (permitting warrantless search of "mail of domestic origin transmitted for export . . . and foreign mail transiting the United States"), (c)(1)-(2) (permitting search of first-class mail weighing more than 16 ounces if there is reasonable cause to believe that the mail contains specified contraband, merchandise, national defense or related information, or a weapon of mass destruction, but requiring a judicial warrant or consent to read any correspondence such mail contains); see also 19 U.S.C. § 482 (authorizing "[a]ny of the officers or persons authorized to board or search vessels" to "search any . . . envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law"); 31 U.S.C. § 5317(b) (authorizing search at border of, among other items, "envelopes" for evidence of currency violations). Regulations promulgated during the Carter Administration, see 43 Fed. Reg. 14,451 (Apr. 6, 1978), also authorize the warrantless opening of mail under certain circumstances, but prohibit the reading of correspondence it contains absent a search warrant or consent. 19 C.F.R. § 145.3(a) (authorizing opening of mail that appears to contain matter besides correspondence "provided that [Customs officers or employees] have reasonable cause to suspect the presence of merchandise or contraband"), (c) ("No Customs officer or employee shall

read, or authorize or allow another person to read, any correspondence contained in letter class mail" absent a search warrant or consent); 19 C.F.R. pt. 145 app. (authorizing Customs Service to examine, with certain exceptions for diplomatic and government mail, "all mail arriving from outside the Customs territory of the United States which is to be delivered within the [Customs territory of the United States]"). United States Customs and Border Protection is the entity principally responsible for implementing those statutes and regulations.

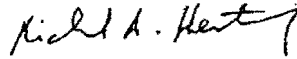
Third, provisions in the Foreign Intelligence Surveillance Act of 1978 ("FISA"), as amended, 50 U.S.C. § 1801 *et seq.*, specifically authorize the Attorney General to conduct physical searches of mail without prior judicial authorization in certain circumstances. Section 304(e) of FISA, 50 U.S.C. § 1824(e), provides that the Attorney General, under certain circumstances, may approve the execution of an emergency physical search of property, including property that "is in transit to or from an agent of a foreign power or a foreign power," *id.* § 1824(a)(3)(B), so long as the Attorney General subsequently obtains an order from the Foreign Intelligence Surveillance Court authorizing the search. Section 302 of FISA, 50 U.S.C. § 1822, permits the Attorney General to "authorize physical searches without a court order . . . to acquire foreign intelligence information" if directed against information, material, or property "used exclusively by, or under the open and exclusive control of, a foreign power or powers." Information regarding the use of these statutory authorities is exceptionally sensitive and highly classified, and it would not be appropriate in this setting to discuss whether any searches of mail have been conducted pursuant to these provisions. The National Security Division of the Department of Justice would be involved in implementing any searches conducted pursuant to those provisions. While the President has the constitutional authority to order warrantless searches for foreign intelligence purposes, *see, e.g., In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002) (noting that "all the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information"), as the Attorney General confirmed in his testimony before the Senate Judiciary Committee on January 18, 2007, we are not aware that warrantless searches of mail have been conducted pursuant to that authority during this Administration. *See also* Answer to Question 158, Senate Judiciary Committee Questions for the Record for the Attorney General (Jan. 18, 2007).

We would be happy to provide a classified briefing to Members of the House Permanent Select Committee on Intelligence regarding any use that has been made of FISA provisions to conduct warrantless mail searches. Because the Postal Service and United States Customs and Border Protection are the entities that are principally responsible, respectively, for ongoing warrantless searches of mail based on exigent circumstances and mail entering and leaving the United States, we suggest that you contact them directly if you wish to arrange a briefing.

Finally, your letter requests "any communications or documentation relating to searches of mail issued by this Administration before or after the December 20th signing statement, including but not limited to any guidance concerning when the Administration believes it is appropriate to open mail without a warrant." The Department is not aware of any Administration memorandum or guidance concerning warrantless searches of mail.

If we can be of further assistance regarding this or any other matter, please do not hesitate to contact this office.

Sincerely,

A handwritten signature in dark ink, appearing to read "Richard A. Hertling". The signature is fluid and cursive, with a long horizontal stroke at the end.

Richard A. Hertling
Principal Deputy Assistant Attorney General

cc: The Honorable Lamar S. Smith
Ranking Minority Member



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 26, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department on S. 849, the "Openness Promotes Effectiveness in our National Government Act of 2007" or the "OPEN Government Act of 2007," which amends the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The FOIA is a vital and continuously developing government disclosure mechanism that has been refined over time to accommodate both technological advancements and society's maturing interests in a transparent and fully responsible government. The Department is firmly committed to full compliance with the FOIA as a means of maintaining an open and accountable system of government, while also recognizing the importance of safeguarding national security, enhancing law enforcement effectiveness, respecting business confidentiality, and preserving personal privacy.

As a sign of the Department's continued commitment to the FOIA, it serves as the lead agency in the implementation of Executive Order 13,392, "Improving Agency Disclosure of Information," issued on December 14, 2005. This Order has immediately brought high visibility and focused attention on the FOIA by mandating the designation of a Chief FOIA Officer, FOIA Requester Service Centers, and FOIA Public Liaisons, in each agency. The Order has also focused on the improvement of FOIA processing by ensuring that agency FOIA operations are both "citizen-centered" and "results-oriented." The benefits of instituting these policies are already felt Government-wide, as agencies have developed comprehensive FOIA improvement plans and have issued their first reports mandated by this Order.

The Department opposes several sections of S. 849, as currently drafted, including, most importantly, section 6, which prevents the Government from relying on a number of FOIA exemptions, including exemptions for highly sensitive law enforcement information and privileged material, if the Government does not meet the statutory deadline for responding to requests. The Department also has concerns with section 3, which expands the definition of "representative of the news media" for purposes of assessing FOIA fees; and section 4, which

reinstates the so-called "catalyst theory" for reimbursement of attorneys fees in FOIA litigation. More generally, the Department is very concerned about the substantial administrative and financial burdens that this legislation would impose upon the Executive branch, without authorizing the resources necessary to implement its statutory scheme.

Section 6 – Time Limits for Agencies to Act on Requests

Of grave concern to the Department is section 6(b) of the legislation, which prevents an agency from relying on a number of statutorily provided exemptions from FOIA unless it meets the twenty-day accelerated deadline established in section 6, or unless the agency can make a "clear and convincing" showing to a court that there was "good cause" for its failure to meet the applicable deadline. Although this provision preserves exemptions for national security information, Privacy Act-protected information, "proprietary information," and information otherwise protected by law, section 6(b) eviscerates several critical exemptions in FOIA including exemptions for inter- or intra-agency memoranda and highly sensitive categories of law enforcement records, unless an agency persuades a court that it has good cause for failing to meet the deadline.

Section 6 of S. 849 is a misguided attempt to remedy one perceived problem – compliance with the statutory response deadlines – with a measure that would eviscerate a central principle of FOIA -- protection of sensitive information. While the basic purpose of FOIA is to ensure an informed citizenry, it balances society's strong interest in open government with other compelling public interests, such as protecting national security, enhancing the effectiveness of law enforcement, protecting sensitive business information, protecting internal agency deliberations and common law privileges and, not least, preserving personal privacy.

This provision, which would establish that failure to meet an applicable deadline would lead to the automatic release of all information with only a few narrow exceptions, is a draconian remedy with enormous consequences. For example, the automatic waiver of privileges, including privileges for attorney-client and attorney work-product information that are incorporated in FOIA through Exemption 5 and well-established by common law for centuries, is unprecedented. This would frustrate the policy behind these privileges and, among other things, would doubtless create a chilling effect on policy discussions, create public confusion that could result from disclosure of reasons and rationales that were not the grounds for agency action, and cause the premature disclosure of proposed policies before they have been sufficiently considered. It would also greatly interfere with government attorneys' work in preparing for litigation, exposing their legal strategies, approaches, and views to their opposing counsel, thereby greatly undermining their ability to represent their client. It would also chill the exchange of information to government attorneys from their clients, reducing their ability to properly represent them.

Of greatest concern to the Department is the automatic waiver of the existing exemption for law enforcement information. The wholesale release of law enforcement-related documents

would have devastating consequences for ongoing criminal investigations. Sensitive law enforcement techniques could be exposed, and the lives of witnesses, confidential informants, and law enforcement officials would, without a doubt, be placed in imminent danger. Indeed, the very system of confidentiality inherent in the federal government's law enforcement activities would be shattered by the lack of predictability that this provision would yield. This is also troubling since there is greater convergence between law enforcement activities and homeland security activities.

Further, under section 6(b), any person or organization with criminal intent (including terrorist organizations) could possibly gain access to internal military force protection information (i.e., information concerning the protection of the Pentagon reservation, munitions sites, and any other military installation) if an agency possessing such information were forced to automatically waive any applicable exemption. Disclosures of such highly sensitive information could have dire consequences for our military.

Among the limited exceptions that section 6 would allow the government to invoke after the twenty-day deadline, the exception stated for "personal private information" would be inadequate in any event. Because this exception is limited to "personal private information protected by section 552a" it would apply only to information protected by the Privacy Act. This lack of protection for information not protected by the Privacy Act could result in the public disclosure of personal information, such as third parties' social security numbers. Such a disclosure could have severe consequences for unsuspecting third parties, especially if the social security numbers were used for criminal purposes, such as identity theft. Under current law, personnel, medical, and similar files are exempt from FOIA if disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); *see also id.* § 552(b)(7)(C). This category of information is far broader than the information covered by the Privacy Act. The existing exemption has been interpreted by the courts to mean that a government decision-maker must balance the severity of the threat to an individual's privacy against the public interest in disclosure. *See Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976). By narrowing this important exemption to protect only information covered by the Privacy Act, S. 849 repudiates the policy of balancing any individual's privacy interest against the public interests in disclosure. Thus, S. 849 will significantly limit personal privacy safeguards.

Section 6(b) does contain a purported safety valve that would permit a court to waive the harsh application of the section if an agency "demonstrates by clear and convincing evidence that there was good cause for the failure to comply with the applicable time limit provisions." However, by focusing on the agency's reason for failing to meet the twenty-day deadline, rather than upon the potential harm that reasonably could be expected to be caused by the radical disclosures that would occur, this provision ignores the substantial public interest in avoiding the disclosure of highly sensitive records.

Although section 6(b) would not eliminate the availability of the President's constitutional privilege to protect the interests covered by the statutory exemptions, section 6(b)

would nonetheless raise substantial constitutional concerns that could make it unconstitutional as applied in particular circumstances. The uncertainty created by a system that depends on a court finding "good cause" for delay or upon the invocation of constitutional privilege would likely chill the candor of the constitutionally-protected deliberations of the Executive branch or otherwise harm the interests protected by the statutory exemptions in a way that could compromise the Executive's discharge of its constitutional functions. Rather than fostering responsible disclosure, this provision actually could well force agencies to deny requests by the twenty-day deadline in order to avoid waiving any exemptions, and thus needlessly increase appeals and litigation. In addition, this provision fails to take into account the complexity of many requests, the need to consult with other agencies, or the need to search for records in multiple locations, including at Federal records centers, all of which necessarily and reasonably add to the time it takes to respond to a request.¹

The Department is also opposed to section 6(a) of S. 849, which would amend 5 U.S.C. § 552(a)(6)(A)(i) by changing the twenty-day time limit so that it commences on the date that the request "is first received by the agency." This represents a very significant change from current practice in which the twenty-day clock begins once the appropriate element of an agency has received the request in accordance with the agency's FOIA regulations. Beginning the twenty-day time limit as soon as a request "is first received by the agency" does not allow for the practical necessity of forwarding a request to an appropriate field office, division, or component, which could take several or more days.² This provision is thus at odds with the longstanding practice at all Federal agencies, under regulations that have been duly promulgated and followed in accordance with the explicit direction of the Act itself. *See* 5 U.S.C. § 552(a)(3)(A). For example, Department of Justice FOIA regulations provide that "[a] request will be considered [as] received as of the date it is received by the proper component's FOIA office." 28 C.F.R. § 16.3 (2006). Additionally, given that agencies make addresses readily available on their Web sites and in their FOIA Reference Guides, it is not imposing any undue burden on a requester to direct his/her request to the appropriate office. Further, when a requester neglects to address

¹ If enacted, the penalties imposed by section 6(b) would have an equally adverse effect on NARA's ability to protect under the FOIA records that are also subject to the Presidential Record Act (PRA). When processing requests for Presidential records, the PRA requires NARA to inform the former President of its intent to publicly disclose the requested records. In conjunction with this statutory requirement, Executive Order 13,233, "Further Implementation of the Presidential Records Act," affords the former President (and the incumbent President) ninety days to conduct a records review. As a result of the drastic penalties contained in section 6(b) of S. 849, NARA would, after only twenty-days, forfeit its ability to protect certain records under the FOIA, even if such records contain sensitive private information not protected by the Privacy Act, including FBI background files and other law enforcement or investigatory information. Additionally, it would be an added burden for NARA to attempt to compel a court to waive this provision in an effort to protect information for which it already has a sound legal basis to withhold.

² Importantly, additional mail processing time is required in the post-9/11 world because the Department, as well as other agencies, now must x-ray or irradiate incoming mail, including FOIA requests. Five days might pass while the request is being irradiated and before any program office of an agency receives the x-rayed mail.

his/her request properly, agencies routinely route the request to the proper office, so the requester is not penalized in any way for a failure to properly address a request. Conversely, this proposed change in the way the time periods are calculated penalizes the agency for something completely out of its control. Requesters will have no incentive to properly address their requests. More significantly, they will actually have an incentive to use the most obscure address possible in the hope that the time expended in properly routing it will render the agency unable to meet the response deadline.

The Department is opposed to the second clause of section 6(a) which states that the twenty-day time period to respond to a request "shall not be tolled without the consent of the party filing the request." In the course of processing a FOIA request there are numerous occasions when an agency must stop its processing in order to get information from the requester, and the agency should not be penalized for the time it takes the requester to provide needed information to the agency. For example, after a request is first received by an agency the personnel responsible for processing it might determine that the request fails to reasonably describe the records that are being sought. In such situations agency personnel routinely go back to the requester for clarification of the request. Similarly, during the course of processing a request, the agency may determine that the search for responsive records will take longer than anticipated and so will cost more than the requester has agreed to pay. Again, in such situations the agency routinely goes back to the requester to see if the requester would like to narrow its request to reduce the fees owed, or to see if the requester will agree to pay the fees that are anticipated. In these situations, when the processing of the request is necessarily "on hold" while the agency awaits a decision by the requester, the time period for responding has traditionally been tolled. The language in section 6(a) would not allow that to happen without the consent of the requester. That means that absent consent – which is not likely to be given – the agency will be penalized for the failure of requesters to provide necessary information in order for their requests to be processed. Rather than having an incentive to respond quickly to the agency in order to get their request back on track, this provision will actually give requesters an incentive to delay responding to the agency's request for clarification, or for a commitment to pay fees, etc. because by doing so, they know that the twenty-day time period is ticking.

We believe that the draconian penalties in section 6 not only are unwise, but are also unnecessary since Executive Order 13,392 has improved FOIA operations by requiring agencies to review their administration of the FOIA and their compliance with the statutory deadlines. The Executive Order also requires agencies to implement improvement plans specifically focused on eliminating or reducing any backlog of FOIA requests. The Department's preliminary review of reports in this regard indicates that agencies overall are devoting increased resources to processing FOIA requests more efficiently and quickly, and indeed some agencies have already realized meaningful backlog reduction.

Section 3 – Protection of Fee Status for News Media:

Section 3 of the legislation, titled “Protection of Fee Status for News Media,” expands the definition of “representative of the news media,” and thereby exempts a larger class of requesters from the obligation to pay what can sometimes be quite significant fees assessed for searching for responsive documents. The current law represents a carefully-struck balance that establishes differing fee levels for different categories of requesters. For example, an agency is permitted to charge a requester for document search time, duplication, and review costs if the request is made for a “commercial use.” 5 U.S.C. § 552(a)(4)(A)(ii)(I). An agency may charge a requester only for document duplication if the request is made by an educational or non-commercial scientific institution, whose purpose is scholarly or scientific, or by a representative of the “news media.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). Section 3 of the legislation amends subclause (II) so that an agency “may not deny [to a representative of the news media] status solely on the basis of the absence of institutional associations of the requester, but shall consider the prior publication history of the requester” including Internet publications. Most significantly, it would further require an agency, in the absence of such prior publication history, to “consider the requestor’s stated intent at the time the request is made to distribute information to a reasonably broad audience.” Because it can be assumed that virtually all requesters claiming to be representatives of the news media will readily state that it is their “intent” to distribute the records to a broad audience, this expansion of the definition of “representative of the news media” would render the concept of “representative of the news media” virtually meaningless.

Such an expansion of the definition of “representative of the news media” would have severe fiscal and other practical consequences for the Executive branch, and is ill-advised without empirical evidence that the current definition of “representative of the news media” is insufficient to carry out FOIA’s purposes. The increased taxpayer burden that would result from the changed definition should be undertaken only after careful review by Congress in light of limitations being imposed across the board on domestic discretionary spending. Indeed, the limitation in section 3 on the Government’s ability to collect fees for FOIA processing seems inconsistent with the stated desire of many Members of Congress to improve FOIA timeliness. With no requirement that requesters pay search fees, they have no incentive to tailor their requests and so they are likely to make overly broad requests. This, in turn, will stretch agency resources and will increase the time it takes to process all requests. The Executive branch cannot process FOIA requests expeditiously without adequate manpower and resources, which is dependent on adequate funds, including FOIA processing fees deposited in the Treasury Department’s general fund.

Section 4 – Attorneys’ Fees.

Section 4 of the legislation would reinstate the so-called “catalyst theory” for the reimbursement of FOIA litigation fees. Current law permits a court to assess reasonable attorneys’ fees and litigation costs incurred when the complainant in a lawsuit challenging an

agency's response (or lack thereof) to a FOIA request has "substantially prevailed." Section 4 of S. 849 would amend 5 U.S.C. § 552(a)(4)(E) by altering and expanding the definition of "substantially prevailed" to include situations in which a "complainant has obtained relief through either (I) a judicial order, an administrative action, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the opposing party, where the complainant's claim or defense was not frivolous." We understand this provision's intent to be the overruling of the Supreme Court's decision in *Buckhannon Board & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598 (2001), and of a number of recent court of appeals decisions that have applied *Buckhannon* to reject the catalyst theory as a basis for FOIA attorneys' fee awards. See *OCAW v. Dep't of Energy*, 288 F.3d 452 (D.C. Cir. 2002); *Union of Needletrades v. INS*, 336 F.3d 200 (2d Cir. 2003).

The Department does not support the reinstatement of the catalyst theory, for many of the same reasons enunciated in Chief Justice Rehnquist's *Buckhannon* opinion. Proponents of the catalyst theory have argued that it is needed for two reasons. First, they argue that it would encourage plaintiffs with meritorious but expensive cases to bring suit. Second, they argue that it would prevent defendants from unilaterally mooted an action before judgment to avoid an award of attorneys' fees. As Chief Justice Rehnquist noted in his opinion in *Buckhannon*, however, "these assertions . . . are entirely speculative and unsupported by any empirical evidence." *Buckhannon*, 532 U.S. at 608.

More importantly, the Department is especially concerned that the catalyst theory, if reinstated, will serve as a disincentive to a Government agency's decision to voluntarily change decisions and procedures with respect to FOIA requests, because doing so could make the agency liable for a complainant's legal fees. Such a result would be inconsistent with FOIA's underlying purpose of promoting, rather than inhibiting, disclosure.

Furthermore, it is unclear what is meant by the inclusion of an "administrative action" as a possible means by which a requester can obtain "relief" that would justify attorneys' fees. If it is deemed to apply to a requester who receives documents through the administrative FOIA appeals process, that would be a major departure from long-standing administrative law practice and would severely undercut the traditional function of the administrative appeal process, which is designed to provide the requester with an avenue of further review at the agency, as well as provide the agency with a second opportunity to evaluate its response, thereby reducing the likelihood of a lawsuit. If this provision covers relief provided at the administrative appeal stage, this could increase the FOIA program costs dramatically, and would serve as a disincentive to release records at the administrative appeal stage.

Section 7 – Tracking Numbers:

Section 7 would require agencies to establish systems to assign an individualized tracking number to each request and to notify requesters of this number within ten days. In addition, the legislation mandates the establishment of a telephone line or Internet service to provide

information about the status of the request, including receipt date and estimated completion date. The need for this provision has been mitigated by the issuance of the FOIA Executive Order which required that agencies establish FOIA Requester Service Centers to provide requesters with information concerning the status of their FOIA requests. In addition, supervisory personnel have been appointed as FOIA Public Liaisons to ensure that FOIA requesters receive appropriate assistance from the service centers. Moreover, many agencies which receive higher volumes of requests already notify requesters of assigned tracking numbers when they first acknowledge receipt of requests.

Section 8 – Specific Citations in Exemptions:

Section 8 of S. 849 would amend FOIA's Exemption 3, which protects information otherwise statutorily exempted from disclosure, by requiring that newly enacted statutes that purport to limit public disclosure of information specifically cite to this section of S. 849. We believe this amendment is unnecessary. The current version of Exemption 3 was enacted in 1976 (*see* Pub. L. No. 94-409) to limit Exemption 3's availability to specific categories of statutes: those that require agencies to withhold documents with no agency discretion, or, alternatively, that establish particular criteria for withholding or refer to particular types of matters to be withheld. The 1976 amendment to Exemption 3 has worked well now for over thirty years. Courts have recognized that the congressional intent to maintain the confidentiality of particular information is the central consideration in determining whether a statute falls within Exemption 3. In focusing on congressional intent, courts have avoided imposing additional requirements that Congress use any particular "magic words" to establish a statute as an Exemption 3 statute. Thus, the Census Act, the Internal Revenue Code, the National Security Act of 1947, and the grand jury secrecy rule, Fed. R. Crim. P. 6(e), to take several well-known examples, have been determined by the courts to qualify as Exemption 3 statutes even though those statutes do not specifically refer to Exemption 3.

Moreover, subsection (e)(1)(B)(ii) of FOIA now requires agencies to include in their annual FOIA reports a complete list of all statutes that the agency relies upon to authorize withholding under Exemption 3, together with other pertinent information concerning such withholding. Thus, Congress has a ready mechanism under current law, created in the 1996 e-FOIA amendments (Pub. L. No. 104-231), to determine how Exemption 3 is being administered.

Additionally, section 8 could unduly hamper Congress in the future or even constitute a hidden trap. For example, Congress has recently enacted appropriations laws to bar the Bureau of Alcohol, Tobacco, Firearms, and Explosives from releasing certain sensitive law enforcement data to the public. Because congressional intent to maintain the confidentiality of such data is apparent from these appropriations laws, there is no reason to require, in addition, a specific reference to Exemption 3 in every subsequent annual appropriations law. Most significantly, Congress over the years has acted to revitalize certain export laws that periodically expire while Congress deliberates over policy matters. These statutes protect confidential business information submitted to the Government in connection with export applications, and the courts

have upheld Exemption 3 protection for such matters, based upon the clear import of the overall statutory scheme. *See Times Publ'g. Co. v. Dep't of Commerce*, 236 F.3d 1286 (11th Cir. 2001). Under S. 849, such confidential business information would necessarily be subject to disclosure if Congress failed to meet the additional requirement imposed by S. 849. Additionally, if this provision is enacted, it is possible that there would be recurring disagreement as to whether subsequent nondisclosure statutes that do not clearly reference Exemption 3 have impliedly repealed or amended section 8. This sort of uncertainty would eviscerate what appears to be the central purpose of this provision.

Section 9 – Reporting Requirements

Pursuant to the 1996 e-FOIA amendments (Pub. L. No. 104-231), the Department of Justice has responsibility for collecting information from other Executive branch agencies concerning FOIA compliance, including the number of determinations not to comply with requests for records, the number of appeals, the number of pending requests, and the median time to process such requests. *See* 5 U.S.C. § 552(e)(1). Section 9 expands the existing requirements in five principal areas: (1) Agencies' detailed response data based upon the date on which the request was originally received including the average number of days, the median number of days, and the range of dates to respond; (2) data concerning the 10 active requests with the earliest filing dates; (3) data concerning the 10 active administrative appeals with the earliest filing dates; (4) data concerning requests for expedited review; and (5) data on fee waiver requests.

The Department believes that these new reporting requirements would be a largely unnecessary burden upon agencies that, as described above, cuts against the timeliness objectives pursued elsewhere in the bill. In addition, as described above, using the date a request is "originally received by the agency" as the starting point for determining time periods will result in a great distortion of the annual report statistics. If requesters misdirect requests, then the time spent correcting that error (i.e., the time spent forwarding the request to the proper office) would be counted against the agency's processing time. This will result in statistics that do not actually reflect processing time. Further, it is not clear that providing the additional data will provide any new or useful information regarding agency response times. Importantly, as part of their new Executive Order reporting requirements, agencies now report on the range of dates for both pending requests and consults. Moreover, there has been a great deal of focus on the ten oldest requests by agencies.

Section 10 – Agency Records Maintained by a Private Entity:

Current law defines an agency record as information that is "maintained by an agency in any format, including an electronic format." 5 U.S.C. § 552(f)(2). The Supreme Court elaborated on this standard by holding that an "agency record" is a document "... either created or obtained by an agency and under agency control at the time of the request." *Dep't of Justice v. Tax Analysts*, 492 U.S. 136 (1989). The Supreme Court has also held that Federal

participation in, or funding of, the generation of information by a privately controlled organization does not render that information an "agency record" under the terms of FOIA. *See Forsham v. Harris*, 445 U.S. 169 (1980).

Section 10 of S. 849 amends the existing statutory definition in 5 U.S.C. § 552(f)(2) to include information "that is maintained for an agency by an entity under a contract between the agency and the entity." The Department does not object to section 10 if its intention is solely to clarify that agency-generated records held by a Government contractor for records-management purposes are subject to FOIA. On the other hand, the Department would have very serious concerns if section 10 of S. 849 were intended to disturb over twenty-five years of settled law by overruling the *Forsham* and *Tax Analysts* decisions. At the very least, section 10 is ambiguous as currently drafted and should be clarified.

Section 11 – Office of Government Information Services:

The Department has significant questions and concerns about section 11, which would create an "Office of Government Information Services" within the Administrative Conference of the United States. This new office would be charged with responsibility for reviewing policies and procedures of agencies, conducting audits of those agencies, issuing reports, recommending policy changes to the President and Congress to improve the administration of the FOIA, and offering mediation services between requesters and administrative agencies.

The Department is concerned about any intent that the proposed Office of Government Information Services would be given any sort of policymaking and adjudicative role with respect to FOIA compliance. Such a role is foreign to the traditional mission of the Administrative Conference of the United States, which was tasked with promoting improvements in the efficiency, adequacy, and fairness of procedures of the government's regulatory programs by conducting research and issuing reports. *See* 5 U.S.C. § 594 (2000). Importantly, the aforementioned policymaking role remains appropriately placed with the Department of Justice, which has long held responsibility for ensuring compliance with the FOIA throughout the Executive branch. This role is all the more important, now that the Department serves as the lead agency in implementing Executive Order 13,392.

Of additional concern is that the Office of Government Information Services would be authorized by S. 849 to provide mediation services between agencies and FOIA requesters. It should be noted that many FOIA disputes are not particularly well-suited to mediation because, *inter alia*, the two matters generally at issue in FOIA litigation – the adequacy of the search and the assertion of exemptions – are questions of law. Moreover, the authority given this Office under the bill may constitute the kind of significant authority that can only be exercised by officers duly appointed under the Appointments Clause, U.S. Const. art. II, sec. 2, cl. 2, and if that is the case, the provision would raise constitutional concerns.

Further, the establishment of such an office would be unwarranted and redundant. Agencies routinely review their FOIA policies and procedures to ensure that they are adequately funded for the administration of the program. In fact, with the recent issuance of Executive Order 13,392, agencies are now required to scrutinize their processing of FOIA requests and report to the Department of Justice on their improvements made in that regard. Agencies then report any deficiencies in the implementation of their improvement plans to the Attorney General and the President's Management Council. Also, the Executive Order required agencies to appoint Chief FOIA Officers, who "have agency-wide responsibility for efficient and appropriate compliance with the FOIA." This requirement ensures high-level visibility and accountability by an agency's "senior official." Further, the Department of Justice and the Government Accountability Office (GAO) already perform the function of holding agencies accountable, working quite well together. Indeed, there have been several GAO reports analyzing Government-wide administration of FOIA during just the past four years.

Additionally, the creation of a separate, independent office to provide Ombudsmen-type services to requesters is unnecessary in light of all agencies' meeting the Executive Order's requirement to designate FOIA Public Liaisons and establish FOIA Requester Service Centers. The Public Liaisons and Requester Service Centers are there to provide information to the public about the status of their requests, to ensure that agencies use a "service-oriented" approach in responding to FOIA-related inquiries, and to resolve disputes.

Finally, both sections 11 and 13 of the bill appear to require the submission of legislative recommendations to Congress by Executive branch agencies, requirements which conflict with the President's authority to submit only such legislative proposals as he deems "necessary and expedient." See U.S. Const. art. II, sec. 3. Any such provisions in the bill should be precatory rather than mandatory.

Conclusion:

Since its enactment in 1966, FOIA has firmly established an effective statutory right of public access to Executive branch information in the Federal government. But the goal of achieving an informed citizenry is often counterpoised against other vital societal aims, such as the public's interest in effective and efficient operations of government; the prudent use of limited fiscal resources; and the preservation of the confidentiality and security of sensitive personal, commercial, and governmental information.

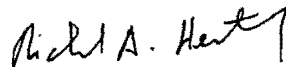
Though tensions among these competing interests are characteristic of a democratic society, their resolution lies in providing a workable scheme that encompasses, balances, and appropriately protects all interests, while placing primary emphasis on the most responsible disclosure possible.

The Honorable Patrick J. Leahy
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Regrettably, S. 849, however well intentioned, does not provide a workable regime for effective, efficient compliance with the FOIA, nor does it provide a reasonable balance for the competing and equally compelling governmental aims involved here.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard A. Hertling". The signature is fluid and cursive, with a prominent "H" and a long, sweeping tail.

Richard A. Hertling
Acting Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 1, 2007

The Honorable Henry A. Waxman
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 928, the "Improving Government Accountability Act." H.R. 928 is a bill to "amend the Inspector General Act of 1978 to enhance the independence of the Inspectors General, to create a Council of the Inspectors General on Integrity and Efficiency, and for other purposes." We have several constitutional and policy concerns.

I. Constitutional Concerns

For the reasons that follow, we conclude that Sections 2 and 3 of the bill raise grave constitutional concerns.

1. Removal Restrictions. H.R. 928 would amend the Inspector General Act of 1978 ("the Act") to provide that the President may remove inspectors general only "for cause," which section 2(a) of the bill defines as "permanent incapacity," "inefficiency," "neglect of duty," "malfeasance," or "conviction of a felony or conduct involving moral turpitude."

We have consistently raised separation of powers objections to legislative restrictions on the President's authority to remove Inspectors General. In 1977, when the Act was first considered, we objected to "the requirement that the President notify both Houses of Congress of the reasons for his removal of an Inspector General" as "an improper restriction on the President's exclusive power to remove Presidentially appointed executive officers." *Inspector General Legislation*, 1 Op. O.L.C. 16, 18 (1977) (citations omitted). We steadfastly have adhered to the basic separation of powers principles underlying our 1977 comments in objecting,

during both Democratic and Republican administrations, to proposed amendments to the Act that would further restrict the President's removal authority.

Because inspectors general function within the Executive branch in a manner that distinguishes them from independent agency officials and typical "inferior" executive officers whose core functions are subject to supervision by other appointees, legislative restrictions on the President's ability to remove inspectors general implicate the constitutional separation of powers concerns that have animated our concerns since 1977 and informed Supreme Court precedent on removal restrictions from the Court's 1926 decision in *Myers v. United States* through its 1988 decision in *Morrison v. Olson*.

Although the Supreme Court's articulation of the separation of powers principles relevant to the current bill has evolved in recent decades, the constitutional barrier these principles pose to legislative restrictions on the President's ability to remove inspectors general has not. Historically, the Court drew a distinction between Congress's authority to limit the President's power to remove "quasi-judicial" or "quasi-legislative officers," and Congress's inability to limit the President's power to remove a subordinate appointed officer within one of the "executive departments" in analyzing the constitutional problem with such removal restrictions. 1 Op. O.L.C. at 18 (concluding that inspectors general fall in the executive category); *compare also Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (upholding removal restrictions on members of an independent agency who exercised "quasi-legislative" and "quasi-judicial" functions); *Wiener v. United States*, 357 U.S. 349 (1958) (upholding removal restrictions on members of War Claims Commission charged with "adjudicatory" functions); *with Myers v. United States*, 272 U.S. 52, (1926) (emphasizing that "there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role"); *Bowsher v. Synar*, 478 U.S. 714, 732 (1986) (holding that an officer (the Comptroller General) over whom Congress has "removal authority" "may not be entrusted with executive powers").

In its 1988 opinion in *Morrison*, the Supreme Court upheld congressional restrictions on the President's ability to remove Government officers (independent counsel) who indisputably exercised "executive" power. *Morrison*, 487 U.S. 654, 691-96-97 (1988). In so doing, the Court explained that its use of the terms "quasi-legislative" and "quasi-judicial" to describe officers whose removal Congress may restrict did not conclusively limit the class of officers constitutionally amenable to such restrictions, but was simply a shorthand for distinguishing the officers at issue in *Humphrey's Executor* and *Wiener* from "executive" officers the President must be able to remove at will. *See id.* at 689-90. However, the Court emphasized that its decision to avoid what it termed "rigid categories of officials who may or may not be removed at will by the President" was *not* designed to undermine the separation of powers principles implicated by the removal restrictions in H.R. 928. *Morrison*, 478 U.S. at 689-90. On the contrary, the Court stated that its decision to divorce the constitutional inquiry in *Morrison* from the descriptive categories in prior cases was intended to help "ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed

duty to ‘take care that the laws be faithfully executed’ under Article II.” *Id.* at 690. It is this principle, and not the Court’s terminology in *Morrison* or other decisions, that renders the removal restrictions in H.R. 928 constitutionally objectionable.

As we concluded in 1994, the addition of a “for cause” removal restriction to the Inspector General Act would “interfere with the President’s exercise of the ‘executive power’ and his constitutionally appointed duty to ‘take care that the laws be faithfully executed’ under Article II.” *Morrison*, 487 U.S. at 689-90. This is so because statutory inspectors general affect the President’s ability to discharge his Article II authority in a manner that renders inspectors general constitutionally distinct from the officers (executive or otherwise) whose removal the Court has held Congress may restrict.

As noted, on a case-by-case basis, the Court has upheld legislative limits on the President’s ability to remove Government officials in only two contexts: (i) in cases involving certain officials who serve in independent agencies, *see Humphrey’s Executor*, 295 U.S. at 628 (FTC); *Wiener*, 357 U.S. at 356 (War Claims Commission); and (ii) in cases involving certain officials whose exercise of executive power was, in the Court’s view “supervised” in all but the most trivial respects by an Executive branch officer other than the President, *see Myers*, 272 U.S. at 160-62; *Morrison*, 487 U.S. at 691. Inspectors general do not fall within either category, but instead perform functions that trigger the constitutional concerns with removal restrictions the Court has consistently recognized from *Myers* through *Morrison*.

Inspectors general are not analogous to the independent agency officials for whom the Court sustained removal restrictions in *Humphrey’s Executor* and *Wiener*. In upholding congressional limits on the President’s removal of FTC Commissioners in *Humphrey’s Executor*, the Court emphasized that the officials at issue served “an agency of the legislative and judicial departments” and were thus “wholly disconnected from the executive department.” *Humphrey’s Executor*, 295 U.S. at 630 (emphasis added); *see also Wiener*, 357 U.S. at 352 (upholding removal restrictions on members of special War Claims Commission charged with “adjudicatory” functions). By contrast, inspectors general occupy permanent, continuing offices within Departments and agencies of the Executive branch. *See* 5 U.S.C. app. §§ 3, 9 (creating an “Office of Inspector General” within several Executive branch agencies).

The position inspectors general occupy within the Executive branch is significant because it fundamentally distinguishes them not only from the independent agency officials in *Humphrey’s Executor* and *Wiener*, but also from the executive officers—independent counsel—at issue in *Morrison*. The Court in *Morrison* did not just rely on the independent agency cases in framing the constitutional inquiry in that case. *Morrison*, 487 U.S. at 691 (citing *Humphrey’s Executor* and *Wiener* in stating that the “real question” is not whether independent counsel perform executive functions, but whether restrictions on their removal “impede the President’s ability to perform his constitutional duty”). The Court in *Morrison* also relied heavily on the independent agency cases in concluding that removal restrictions on independent counsel were constitutional, because they applied only to “inferior” executive officers whose

“temporary,” “limited” and “supervised” exercise of their primary executive (prosecutorial) power made them “analogous” to the FTC officers in *Humphrey’s Executor*. *Id.* at 691-93 nn.31-32 (emphasizing that FTC officers wield “analogous” “executive” “civil enforcement powers”).

The “analogy” the *Morrison* Court drew between independent counsel and independent agency officials does not extend to inspectors general. Because the parties in *Morrison* did not dispute that independent counsel were vested with some measure of “executive” power, the Court’s decision to uphold legislative restrictions on their removal hinged on the Court’s determination that independent counsel exercised their most important executive power in a “temporary” and “limited” way pursuant to the “supervision” of another Executive Branch officer (the Attorney General). *Morrison*, 487 U.S. at 691-92. As the Court recognized, this determination was critical to reconciling its decision with the “undoubtedly correct” determination in *Myers* that “there are some ‘purely executive’ officials who must be removable by the President at will if he is to be able to accomplish his constitutional role.” *Id.* at 690 (quoting *Myers*, 272 U.S. at 132-34).

Many of the factors the *Morrison* Court relied upon in upholding removal restrictions on independent counsel— particularly the “temporary” nature of their office, their “limited jurisdiction and tenure,” their lack of “ongoing responsibilities” beyond a single, externally defined investigation, and their lack of “authority to formulate policy for the Government or the Executive Branch”—simply do not apply to inspectors general. Unlike independent counsel, inspectors general occupy permanent offices within the Executive branch and enjoy wide-ranging jurisdiction to review, investigate, and report to Congress on practically every aspect of an agency’s “programs and operations.” 5 U.S.C. app. 3, §§ 4, 6-7. The 1978 Act gives them the power to define the scope and duration of their own investigations, *see id.* § 3(a), as well as the power to “recommend policies for, and to conduct, supervise, or coordinate other activities carried out or financed by [their agencies] for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, [agency] programs and operations.” *Id.* § 4. In addition, H.R. 928 would give individual occupants of each office of inspector general a seven-year term (a term nearly double that enjoyed by, for example, United States Attorneys, *see* 28 U.S.C. § 541(b)), and would expand the many “ongoing responsibilities” of each officer to include membership on a council, *see* H.R. 928 §§ 4, 11, that would “formulate policy” not just for individual departments, but “for . . . the Executive Branch.” *Morrison*, 487 U.S. at 671-72. For these reasons alone, the *Morrison* Court’s rationale for upholding legislative removal restrictions on independent counsel does not apply to inspectors general.

H.R. 928’s removal restrictions raise grave separation of powers concerns because inspectors general do *not* exhibit the characteristics that the Supreme Court has consistently relied upon in upholding such restrictions as constitutionally permissible with respect to certain types of officers. The reason removal restrictions on typical “inferior” executive officers do not jeopardize the political accountability required by the Appointments Clause or infringe the

President's Article II authority is that the core aspects of such officers' work is "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate," *i.e.*, "directed and supervised by" individuals who are politically accountable to the President. *Edmond v. United States*, 520 U.S. 651, 663 (1997) (citing *United States v. Perkins*, 116 U.S. 483 (1886)); *see also Morrison*, 487 U.S. at 661 n.4, 671, 691-92 n.31, 696 (describing independent counsel as "inferior" to the Attorney General on the basis that the existence and scope of their prosecutorial (executive) power was subject to his "authority," "supervision" and "control"). Because the most important work inspectors general perform as Executive branch officers — the conduct of investigations — is not supervised by an agency head or other individual subordinate to the President, the only political accountability within the Executive branch for an inspector general's handling of investigations comes in the form of Presidential supervision.

Removal is the ultimate form of presidential supervision because it provides the President with the means to control subordinate officers who do not obey directives that the President issues "in order to secure that unitary and uniform execution of the laws" necessary to the discharge of his obligations under Article II. *Myers*, 272 U.S. at 135. The removal restrictions in the current bill threaten the President's ability to perform this constitutional duty. By limiting the President's ability to remove inspectors general except "for cause" as defined in the bill, H.R. 928 would limit the President's ability to remove inspectors general whose investigations could impede the President's discharge of his constitutional functions in any number of ways, including by hampering Executive branch agencies with inquiries the President does not deem necessary or consistent with the "unitary and uniform execution of the laws," or by conducting investigations in a manner that did not comport with Presidential directives and priorities relating to matters ranging from the disclosure of sensitive information to the President's own judgments about when, and how, subordinate executive officers should address allegations of wrongdoing within the Executive branch.

It is no answer to argue that the foregoing restrictions on the President's ability to remove inspectors general are necessary to avoid a conflict between the President's political interests and his obligations as Chief Executive. The Constitution does not contemplate or allow a legislative solution to such a "conflict," which is not a problem for Congress to fix, but rather a consequence of the Constitution's deliberate vesting of all executive power in an elected President. Put another way, the responsibility to "take Care that the Laws be faithfully executed" — which Article II vests solely in the President — *includes* the responsibility for controlling how Executive branch officers investigate and respond to allegations of wrongdoing within the Executive branch. Inspectors general assist the President in discharging this important function with respect to individual agencies, and already have the independence necessary to perform this function — independence from supervision by the agency head in the conduct of their investigations — under the 1978 Act. H.R. 928's attempt to extend this "independence" to include independence from presidential supervision does not enhance the function of inspectors general within the Executive branch; it renders it constitutionally suspect. As the founders and the Supreme Court recognized, the President's right to exercise his Article II authority is

infringed, and the Executive's "unity may be destroyed," by subjecting the exercise of this authority to "the control and cooperation of others." The Federalist No. 70, at 424 (A. Hamilton) (Clinton Rossiter ed., 1961) *see also Myers*, 272 U.S. at 117.

Because the removal restrictions in H.R. 928 threaten the President's Article II authority to "take Care that the Laws are faithfully executed" by impairing his ability to supervise Executive branch officers (IGs) in conducting investigations that may implicate issues and information over which the President has constitutional authority, and that are not subject to supervision by other Executive branch officers, section 2 raises grave constitutional concerns under settled separation of powers doctrine.

2. Budget Requests. Section 3 of the bill would authorize inspectors general to submit budget requests directly to Congress (in addition to submitting them to the Office of Management and Budget and the relevant agency head). The bill then complements this authorization with a provision requiring the President to include each inspector general's request as a separate line item in the President's annual budget request. There is no question that an Executive branch budget request qualifies as a legislative recommendation to Congress. It is a "measure" that the Executive branch asks Congress to consider and adopt in an appropriations bill.

The Constitution provides that the President shall "recommend to [Congress's] consideration such Measures as he shall judge necessary and expedient." U.S. Const., art. II, § 3. We long have objected to legislation that purports to direct the President or his subordinates to submit legislative recommendations, including budget requests, to Congress because such legislation infringes upon the President's exclusive authority under Article II to decide whether, and when, to make such recommendations. Moreover, the Department's Office of Legal Counsel specifically has opined that "to permit Congress to authorize or require an Executive Branch officer to submit budget information . . . directly to Congress, prior to [its] being reviewed and cleared by the President or another appropriate reviewing official, would constitute precisely the kind of interference in the affairs of one Branch by a coordinate Branch which the separation of powers is intended to prevent." *Authority of the Special Counsel of the Merit Systems Protection Board to Litigate and Submit Legislation to Congress*, 8 Op. O.L.C. 30, 36 (1984); *see also Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress*, 6 Op. O.L.C. 632, 639-41 (1982). By authorizing inspectors general to circumvent the President's control over his budget requests, and by purporting to require the President to make budget recommendations whether or not he agrees with them, section 3 of the bill violates the Recommendations Clause and the constitutional separation of powers.

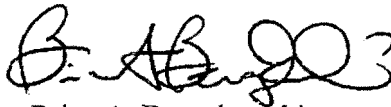
II. Policy Concerns

While we are unfamiliar with the bases leading to the perceived need for these proposals (beyond news reports regarding concern that certain inspectors general are viewed as being too close to their respective parent agency's management), we note that the bill may affect sensitive

information protected witnesses that is maintained in the files of the Department's Federal Witness Security Program. In particular, it is critical that disclosure protections regarding this program apply to the Department of Justice's inspector general's internal investigative procedures and release of information, since the inspector general's maintenance or disclosure of information related to this program — if specifics are not subject to redaction by Witness Security Program officials — could endanger the program's means and methods, personnel, and the continued safety of the program's protected witnesses. We also note that the bill does not contain protections to ensure that subsection 5(c) of the bill would not be used to subpoena highly sensitive information in its entirety if redacted documents would achieve the inspector general's investigative or audit mission without increasing the risk to witnesses. Information relating to involvement in the Federal Witness Security Program generally is protected under current law, and the exercise of additional inspector general authorities should not defeat that statutory goal.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

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Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Thomas M. Davis III
Ranking Minority Member

The Honorable Edolphus Towns
Chairman
Subcommittee on Government Management, Organization, and Procurement

The Honorable Brian Bilbray
Ranking Minority Member
Subcommittee on Government Management, Organization, and Procurement