



CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

November 9, 2006

S. 394

OPEN Government Act of 2005

As reported by the Senate Committee on the Judiciary on September 21, 2006

SUMMARY

S. 394 would make several amendments to the Freedom of Information Act (FOIA), which generally allows any person the right to obtain federal agency records protected from disclosure. Specifically, the legislation would:

- Expand the FOIA definition of the news media;
- Expand the recovery of attorney fees and litigation costs by FOIA requestors whose information was withheld by the government;
- Require agencies to provide tracking numbers for FOIA requests and status information;
- Amend the types of information that are exempt from disclosure under FOIA;
- Require federal agencies to prepare additional reports concerning FOIA activities;
- Require new reports concerning agencies' FOIA programs from the Government Accountability Office (GAO), the Department of Justice (DOJ), the Office of the Special Counsel (OSC), and the Office of Personnel Management (OPM); and
- Establish an Office of Government Information Services to review FOIA policies and procedures, conduct audits, and offer mediation services.

CBO estimates that enacting this legislation would increase direct spending by \$6 million in 2007 and \$65 million over the 2007-2016 period to reimburse citizens making FOIA requests for attorneys' fees and litigation cost payments. In addition, we estimate that implementing the bill would have discretionary costs of \$5 million in 2007 and \$33 million over the 2007-2011 period, assuming appropriation of the necessary amounts to establish the OGIS

and implement new agency reporting requirements. S. 394 would codify and expand Executive Order 13392 that requires agencies to improve their FOIA operations, including improving efficiency and customer services.

S. 394 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary impact of S. 394 is shown in the following table. The costs of this legislation fall within budget function 800 (general government) and all other budget functions that include federal salaries and expenses.

	By Fiscal Years, in Millions of Dollars									
	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
CHANGES IN DIRECT SPENDING										
Attorneys' Fees and Litigation Costs										
Estimated Budget Authority	6	6	6	6	6	7	7	7	7	7
Estimated Outlays	6	6	6	6	6	7	7	7	7	7
CHANGES IN SPENDING SUBJECT TO APPROPRIATION										
Office of Government Information Services										
Estimated Authorization Level	3	6	6	7	7	7	7	8	8	8
Estimated Outlays	3	5	6	6	7	7	7	8	8	8
Reporting Requirements										
Estimated Authorization Level	2	2	2	*	*	*	*	*	*	*
Estimated Outlays	2	2	2	*	*	*	*	*	*	*
Total Changes										
Estimated Authorization Level	5	8	8	7	7	7	7	8	8	8
Estimated Outlays	5	7	8	6	7	7	7	8	8	8

NOTE: * = Less than \$500,000.

BASIS OF ESTIMATE

For this estimate, CBO assumes that S. 394 will be enacted early in fiscal year 2007, that the necessary funds will be provided for each year, and that spending will follow historical patterns for similar programs.

Enacted in 1966, FOIA was designed to enable any person—individual or corporate, regardless of citizenship—to request, without explanation or justification, access to existing, identifiable, and unpublished executive branch records on any topic. The Office of Management and Budget issues guidelines to agencies on fees to charge for providing copies of information requested, while DOJ oversees agency compliance with FOIA. Based on information from GAO for fiscal year 2005, federal agencies (excluding the Social Security Administration) received more than 2.5 million FOIA requests. In addition, DOJ reports that in fiscal year 2005, agencies devoted about 5,000 employee-years to processing and litigating FOIA requests at a cost of over \$300 million.

Direct Spending

Attorneys' Fees and Litigation Costs. Under the legislation, FOIA requestors would be entitled to recover any attorneys' fees and litigation costs incurred to receive requested information through a judicial or administrative order or because of a voluntary change in an agency's FOIA policies. These payments would be made from the Judgment Fund (a permanent, indefinite appropriation for claims and judgments against the United States). The cost of implementing this section would depend on the number of successful challenges to FOIA requests that are either fully or partially denied and any changes in FOIA disclosure policies.

Under current law, when a FOIA request is denied or partially granted, the requestor can administratively appeal the decision. If the administrative appeal is also denied, a requestor has the right to appeal the decision in federal court. Based on a review of FOIA decisions by federal courts over the 2001-2005 period, CBO estimates that about 350 FOIA cases are presented annually, and about 6 percent of complainants subsequently challenge agency decisions and are reimbursed for attorneys' fees and litigation costs. Those payments by the Judgment Fund cost about \$3 million a year. In addition, based on information from 15 major agencies over the 2001-2005 period, including the Departments of Veterans Affairs, Treasury, Defense, Labor, State, and Justice, CBO estimates that requestors successfully appeal about 1,000 FOIA cases each year.

CBO estimates that the average cost of litigating a FOIA lawsuit or administrative appeal is about \$6,000 per case. Assuming that agencies act on about 1,000 FOIA cases each year, CBO estimates that enacting this legislation would increase direct spending from the Judgment Fund by about \$6 million in 2007 and \$65 million over the 2007-2011 period.

News Media Fee Status. FOIA requests from researchers associated with academic institutions and the news media are charged fees for the duplication of records that are larger than 100 pages. All other requestors are charged fees for research time and duplication costs after the first two hours of research and 100 pages of copying. Section 3 would expand the definition of news media researchers to FOIA requestors who have no affiliation with a media outlet but have a publishing history. CBO expects that this change would reduce the amount of fees currently collected for retrieval of information. Those fees are recorded on the budget as revenues and deposited into the general fund of the Treasury. Based on a review of annual FOIA reports from 15 major agencies over the fiscal year 2003-2005 period, CBO estimates that agencies collect about \$4 million in FOIA fees annually. Based on information from some of those agencies, CBO estimates that expanding the definition of the news media would reduce the amount of FOIA fees collected by less than \$500,000 annually.

Spending Subject to Appropriation

Office of Government Information Services. Section 11 would establish an Office of Government Information Services within the Administrative Conference of the United States. The office would review FOIA policies and practices, make recommendations, offer mediation services, and conduct audits of agency's FOIA programs.

Based on information from DOJ and the cost of similar offices, CBO estimates that implementing this provision would cost about \$7 million annually for additional staff to conduct audits of FOIA programs. CBO expects that the new agency would take about two years to reach that level of effort. We estimate that the new office would cost \$27 million over the 2007-2011 period, assuming appropriation of the necessary amounts.

Reporting Requirements. S. 394 would require new reports by a number of government agencies. GAO would be required to report on critical infrastructure information that is collected by the government from the private sector but is exempt from FOIA disclosure. DOJ and OSC would be required to report on legal actions related to the rejection of FOIA requests, and OPM would be required to produce a report on FOIA personnel policies. Based on the costs of similar reports, CBO estimates that implementing those provisions would cost \$6 million over the 2007-2011 period, assuming the availability of appropriated funds.

Other Provisions. Some of the provisions of S. 394, including increased reporting requirements for federal agencies and providing tracking numbers for FOIA requests and status information, would expand on the provisions of Executive Order 13392 issued on December 14, 2005. That order calls upon all federal agencies to improve their FOIA

operations, including customer service and assistance. Specifically, the order requires agencies to develop FOIA improvement plans, designate a Chief FOIA officer, and establish FOIA requestor centers. In addition, as discussed above, section 3 would expand the definition of the news media to FOIA requestors who have no institutional affiliation, but have prior publication history. Based on information from DOJ and a review of annual reports by 15 major agencies over the 2001-2005 period, CBO estimates that these provisions would not significantly increase agencies' costs to implement FOIA.

INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

S. 394 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

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