

.....
(Original Signature of Member)

109TH CONGRESS
1ST SESSION

H. R. _____

To restore and strengthen the laws that provide for an open and transparent
Federal Government.

IN THE HOUSE OF REPRESENTATIVES

Mr. WAXMAN introduced the following bill; which was referred to the
Committee on _____

A BILL

To restore and strengthen the laws that provide for an
open and transparent Federal Government.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Restore Open Govern-
5 ment Act of 2005”.

6 **SEC. 2. TABLE OF CONTENTS.**

7 The table of contents for this Act is as follows:

Sec. 1. Short title.

Sec. 2. Table of contents.



- Sec. 3. Promotion of public disclosure.
- Sec. 4. Revocation of the Ashcroft and Card Memoranda that encourage the withholding of information.
- Sec. 5. Elimination of unnecessary pseudo-classification.
- Sec. 6. Restoration of public access to presidential records.
- Sec. 7. Prohibition on secret advisory committees.
- Sec. 8. Promotion of timely declassification of Government documents.
- Sec. 9. Improvements to operation of Freedom of Information Act.

1 **SEC. 3. PROMOTION OF PUBLIC DISCLOSURE.**

2 (a) FINDINGS.—Congress finds the following:

3 (1) Public access to information held by the
4 Federal Government is vitally important to the func-
5 tioning of a democratic society.

6 (2) The Freedom of Information Act was en-
7 acted to ensure such public access to information.

8 (3) The Freedom of Information Act specifies
9 limited exemptions to the general requirement for
10 disclosure, where disclosure could potentially threat-
11 en other important public policy goals.

12 (4) In establishing the categories of exempt in-
13 formation under the Freedom of Information Act,
14 Congress allowed agencies to withhold information in
15 those categories, but did not in any way mandate or
16 encourage such withholding.

17 (b) POLICY.—The policy of the Federal Government
18 is to release information to the public in response to a
19 request under the Freedom of Information Act—

20 (1) if such release is required by law; or



1 (2) if such release is allowed by law and the
2 agency concerned does not reasonably foresee that
3 disclosure would be harmful to an interest protected
4 by an applicable exemption.

5 (c) GUIDANCE.—All guidance provided to Federal
6 Government employees responsible for carrying out the
7 Freedom of Information Act shall be consistent with the
8 policy set forth in subsection (b).

9 **SEC. 4. REVOCATION OF THE ASHCROFT AND CARD MEMO-**
10 **RANDA THAT ENCOURAGE THE WITH-**
11 **HOLDING OF INFORMATION.**

12 The “Memorandum for Heads of all Federal Depart-
13 ments and Agencies” on “The Freedom of Information
14 Act” issued by Attorney General John Ashcroft on Octo-
15 ber 12, 2001, and the “Memorandum for the Heads of
16 Executive Department and Agencies” on “Action to Safe-
17 guard Information Regarding Weapons of Mass Destruc-
18 tion and Other Sensitive Documents Related to Homeland
19 Security” issued by Andrew H. Card, Jr., Assistant to the
20 President and Chief of Staff, on March 19, 2002, shall
21 have no force or effect.

22 **SEC. 5. ELIMINATION OF UNNECESSARY PSEUDO-CLASSI-**
23 **FICATION.**

24 (a) REPORT ON THE PROLIFERATING USE OF PSEU-
25 DO-CLASSIFICATION DESIGNATIONS.—



1 (1) REPORT REQUIREMENT.—Not later than
2 nine months after the date of the enactment of this
3 Act, the Archivist of the United States shall submit
4 to the congressional committees described in sub-
5 section (d) a report describing the use of pseudo-
6 classification designations.

7 (2) MATTERS COVERED.—The Archivist shall
8 report on, at a minimum, the following:

9 (A) The number of pseudo-classification
10 designation policies used by Federal agencies,
11 and a list of each of the pseudo-classification
12 designations that includes the agency or agen-
13 cies that use the designation.

14 (B) Any existing guidance, instruction, di-
15 rective, or regulations regarding each agency's
16 use of the pseudo-classification designations.

17 (C) The number of documents categorized
18 by each agency in each of the previous three fis-
19 cal years under each designation.

20 (D) The number and level of experience
21 and training of Federal agency, office, and con-
22 tractor personnel authorized to make pseudo-
23 classification designations.



1 (E) The cost of placing and maintaining
2 information under each pseudo-classification
3 designation.

4 (F) The extent to which information placed
5 under pseudo-classification designations has
6 subsequently been released under section 552 of
7 title 5, United States Code (popularly known as
8 the Freedom of Information Act).

9 (G) The extent to which pseudo-classifica-
10 tion designations have been used to withhold
11 from the public information that is not author-
12 ized to be withheld by Federal statute, or by an
13 Executive order relating to the classification of
14 national security information.

15 (H) The statutory provisions described in
16 subsection (c).

17 (3) INPUT FROM OTHER FEDERAL AGENCIES.—
18 In order to report on the use of pseudo-classification
19 designations, the Archivist shall solicit and consider
20 input from Federal agencies, offices, and contrac-
21 tors, and all federal agencies, offices, and contrac-
22 tors shall cooperate fully and promptly with all re-
23 quests by the Archivist in the fulfillment of this sec-
24 tion.



1 (4) NOTICE AND COMMENT.—The Archivist
2 shall provide notice and an opportunity for public
3 comment on the report.

4 (b) ELIMINATION OF UNNECESSARY PSEUDO-CLAS-
5 SIFICATION DESIGNATIONS.—

6 (1) REGULATIONS.—Not later than 15 months
7 after the date of the enactment of this Act, the Ar-
8 chivist of the United States shall promulgate regula-
9 tions banning the use of unnecessary pseudo-classi-
10 fication designations.

11 (2) STANDARDS FOR INFORMATION CONTROL
12 DESIGNATIONS.—If the Archivist determines that
13 there is a need for some agencies to use information
14 control designations to safeguard information prior
15 to review for disclosure, beyond those designations
16 established by statute or by an Executive Order re-
17 lating to the classification of national security infor-
18 mation, the regulations under paragraph (1) shall
19 establish standards for the use of those designations
20 by agencies. Such standards shall address, at a min-
21 imum, the following issues:

22 (A) Standards for utilizing the information
23 control designations in a manner that is nar-
24 rowly tailored to maximize public access to in-
25 formation.



1 (B) Procedures for providing specified
2 Federal officials with authority to utilize the in-
3 formation control designations, including train-
4 ing and certification requirements.

5 (C) Categories of information that may be
6 assigned the information control designations.

7 (D) The duration of the information con-
8 trol designations and the process by which they
9 will be removed.

10 (E) Procedures for identifying, marking,
11 dating, and tracking information assigned the
12 information control designations, including the
13 identity of officials making the designations.

14 (F) Specific limitations and prohibitions
15 against using the information control designa-
16 tions.

17 (G) Procedures for members of the public
18 to challenge the use of the information control
19 designations.

20 (H) The manner in which the use of the
21 information control designations relates to the
22 procedures of each agency or office under sec-
23 tion 552 of title 5, United States Code.

24 (3) REGULATION TO CONSTITUTE SOLE AU-
25 THORITY.—A regulation promulgated pursuant to



1 this subsection shall constitute the sole authority by
2 which Federal agencies, offices, or contractors are
3 permitted to control information for the purposes of
4 safeguarding information prior to review for disclo-
5 sure, other than authority granted by Federal stat-
6 ute or by an Executive order relating to the classi-
7 fication of national security information.

8 (c) REVIEW OF STATUTORY BARRIERS TO PUBLIC
9 ACCESS TO INFORMATION.—

10 (1) REVIEW OF STATUTES.—As part of the re-
11 port required under subsection (a), the Archivist
12 shall examine existing Federal statutes that allow
13 Federal agencies, offices, or contractors to control,
14 protect, or otherwise withhold information based on
15 security concerns.

16 (2) RECOMMENDATIONS.—The report shall
17 make recommendations on potential changes to the
18 Federal statutes examined under paragraph (1) that
19 would improve public access to information governed
20 by such statutes.

21 (d) DEFINITIONS.—In this section:

22 (1) The term “congressional committees”
23 means the Committees on Government Reform, Ju-
24 diciary, Homeland Security, and Appropriations of
25 the House of Representatives and the Committees



1 on Homeland Security and Governmental Affairs,
2 Judiciary, and Appropriations of the Senate.

3 (2) The term “pseudo-classification designa-
4 tions” means information control designations, in-
5 cluding “sensitive but unclassified” and “for official
6 use only,” that are not defined by Federal statute,
7 or by an Executive order relating to the classifica-
8 tion of national security information, but that are
9 used to manage, direct, or route Government infor-
10 mation, or control the accessibility of Government
11 information, regardless of its form or format.

12 **SEC. 6. RESTORATION OF PUBLIC ACCESS TO PRESI-**
13 **DENTIAL RECORDS.**

14 Executive Order number 13233, dated November 1,
15 2001 (66 Fed. Reg. 56025), shall have no force or effect,
16 and Executive Order number 12667, dated January 18,
17 1989 (54 Fed. Reg. 3403), shall apply by its terms.

18 **SEC. 7. PROHIBITION ON SECRET ADVISORY COMMITTEES.**

19 (a) DEFINITION.—The term “Presidential inter-
20 agency advisory committee” is any committee or task force
21 that—

22 (1) is composed wholly of full-time, or perma-
23 nent part-time, officers or employees of the Federal
24 Government;



1 (2) includes officers or employees of at least
2 two separate Federal agencies;

3 (3) is established or utilized to provide advice,
4 ideas, or recommendations to the President or Vice
5 President on a specified topic or topics; and

6 (4) has at least one officer or employee as-
7 signed full-time as a staff member of the committee
8 to support the functions of the committee.

9 (b) REQUIREMENTS.—

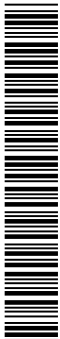
10 (1) The President shall ensure that the names
11 of the members of the committee are published in
12 the Federal Register.

13 (2) The committee must make public each sub-
14 stantive contact between the advisory committee, or
15 individual members of the advisory committee acting
16 on the committee's behalf, and any person who is
17 not a full-time or permanent part-time officer or em-
18 ployee of the Federal Government, including—

19 (A) the date of the contact;

20 (B) the form of the contact (in person, by
21 telephone, by e-mail, or in writing);

22 (C) the names and affiliations of the par-
23 ties involved; and



1 (D) the substance of the communication
2 and the communication itself, if in electronic or
3 written form.

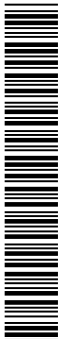
4 (3) For purposes of this subsection, a contact
5 shall be considered substantive if the information
6 conveyed influenced or was reflected in any way in
7 the committee's advice, recommendations, or report
8 to the President or Vice President.

9 (c) APPLICABILITY.—The requirements of this sec-
10 tion do not apply to substantive contacts exclusively with
11 the President or the Vice President or their immediate
12 personal staff.

13 **SEC. 8. PROMOTION OF TIMELY DECLASSIFICATION OF**
14 **GOVERNMENT DOCUMENTS.**

15 (a) FUNDING.—Section 708 of the Public Interest
16 Declassification Act of 2000 (title VII of Public Law 106–
17 567; 50 U.S.C. 435 note; 114 stat. 2856) is amended by
18 adding at the end the following new subsection:

19 “(c) FUNDING.—For any fiscal year in which funds
20 appropriated pursuant to the authorization in subsection
21 (a) are insufficient, as determined by the Archivist of the
22 United States, to support the activities of the Board, the
23 Archivist shall levy from each agency, and may retain, a
24 fee of not more than \$0.005 per page classified by each
25 agency. The Archivist shall use the fees retained under



1 this section to fund the activities of the Board. Fees re-
2 ceived in a fiscal year and retained under this section shall
3 remain available for obligation until expended.”.

4 (b) SUNSET.—Subsection (b) of section 710 of such
5 Act is amended to read as follows:

6 “(b) SUNSET.—The provisions of this title shall ex-
7 pire 8 years after the date of the enactment of the Restore
8 Open Government Act of 2005.”.

9 **SEC. 9. IMPROVEMENTS TO OPERATION OF FREEDOM OF**
10 **INFORMATION ACT.**

11 (a) RESTORATION OF THE INTEGRITY OF THE FREE-
12 DOM OF INFORMATION ACT BY LIMITING THE BROAD EX-
13 EMPTION FOR CRITICAL INFRASTRUCTURE INFORMATION
14 UNDER THE HOMELAND SECURITY ACT OF 2002.—

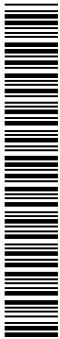
15 (1) IN GENERAL.—Title II of the Homeland Se-
16 curity Act of 2002 (Public Law 107–296) is amend-
17 ed by striking subtitle B and inserting the following:

18 **“Subtitle B—Protection of Volun-**
19 **tarily Furnished Confidential**
20 **Information**

21 **“SEC. 211. PROTECTION OF VOLUNTARILY FURNISHED**
22 **CONFIDENTIAL INFORMATION.**

23 “(a) DEFINITIONS.—In this section:

24 “(1) CRITICAL INFRASTRUCTURE.—The term
25 ‘critical infrastructure’ has the meaning given that



1 term in section 1016(e) of the USA PATRIOT ACT
2 of 2001 (42 U.S.C. 5195c(e)).

3 “(2) FURNISHED VOLUNTARILY.—

4 “(A) DEFINITION.—The term ‘furnished
5 voluntarily’ means a submission of a record
6 that—

7 “(i) is made to the Department in the
8 absence of authority of the Department re-
9 quiring that record to be submitted; and

10 “(ii) is not submitted or used to sat-
11 isfy any legal requirement or obligation or
12 to obtain any grant, permit, benefit (such
13 as agency forbearance, loans, or reduction
14 or modifications of agency penalties or rul-
15 ings), or other approval from the Govern-
16 ment.

17 “(B) BENEFIT.—In this paragraph, the
18 term ‘benefit’ does not include any warning,
19 alert, or other risk analysis by the Department.

20 “(b) IN GENERAL.—Notwithstanding any other pro-
21 vision of law, a record pertaining to the vulnerability of
22 and threats to critical infrastructure (such as attacks, re-
23 sponse, and recovery efforts) that is furnished voluntarily
24 to the Department shall not be made available under sec-
25 tion 552 of title 5, United States Code, if—



1 “(1) the provider would not customarily make
2 the record available to the public; and

3 “(2) the record is designated and certified by
4 the provider, in a manner specified by the Depart-
5 ment, as confidential and not customarily made
6 available to the public.

7 “(c) RECORDS SHARED WITH OTHER AGENCIES.—

8 “(1) IN GENERAL.—

9 “(A) RESPONSE TO REQUEST.—An agency
10 in receipt of a record that was furnished volun-
11 tarily to the Department and subsequently
12 shared with the agency shall, upon receipt of a
13 request under section 552 of title 5, United
14 States Code, for the record—

15 “(i) not make the record available;
16 and

17 “(ii) refer the request to the Depart-
18 ment for processing and response in ac-
19 cordance with this section.

20 “(B) SEGREGABLE PORTION OF
21 RECORD.—Any reasonably segregable portion of
22 a record shall be provided to the person re-
23 questing the record after deletion of any portion
24 which is exempt under this section.



1 “(2) DISCLOSURE OF INDEPENDENTLY FUR-
2 NISHED RECORDS.—Notwithstanding paragraph (1),
3 nothing in this section shall prohibit an agency from
4 making available under section 552 of title 5, United
5 States Code, any record that the agency receives
6 independently of the Department, regardless of
7 whether or not the Department has a similar or
8 identical record.

9 “(d) WITHDRAWAL OF CONFIDENTIAL DESIGNA-
10 TION.—The provider of a record that is furnished volun-
11 tarily to the Department under subsection (b) may at any
12 time withdraw, in a manner specified by the Department,
13 the confidential designation.

14 “(e) PROCEDURES.—The Secretary shall prescribe
15 procedures for—

16 “(1) the acknowledgement of receipt of records
17 furnished voluntarily;

18 “(2) the designation, certification, and marking
19 of records furnished voluntarily as confidential and
20 not customarily made available to the public;

21 “(3) the care and storage of records furnished
22 voluntarily;

23 “(4) the protection and maintenance of the con-
24 fidentiality of records furnished voluntarily; and



1 “(5) the withdrawal of the confidential designa-
2 tion of records under subsection (d).

3 “(f) EFFECT ON STATE AND LOCAL LAW.—Nothing
4 in this section shall be construed as preempting or other-
5 wise modifying State or local law concerning the disclosure
6 of any information that a State or local government re-
7 ceives independently of the Department.

8 “(g) REPORT.—

9 “(1) REQUIREMENT.—Not later than 18
10 months after the date of the enactment of the Re-
11 store Open Government Act of 2005, the Comp-
12 troller General of the United States shall submit to
13 the committees of Congress specified in paragraph
14 (2) a report on the implementation and use of this
15 section, including—

16 “(A) the number of persons in the private
17 sector, and the number of State and local agen-
18 cies, that furnished voluntarily records to the
19 Department under this section;

20 “(B) the number of requests for access to
21 records granted or denied under this section;
22 and

23 “(C) such recommendations as the Comp-
24 troller General considers appropriate regarding
25 improvements in the collection and analysis of



1 sensitive information held by persons in the pri-
2 vate sector, or by State and local agencies, re-
3 lating to vulnerabilities of and threats to critical
4 infrastructure, including the response to such
5 vulnerabilities and threats.

6 “(2) COMMITTEES OF CONGRESS.—The com-
7 mittees of Congress specified in this paragraph
8 are—

9 “(A) the Committees on the Judiciary and
10 Homeland Security and Governmental Affairs
11 of the Senate; and

12 “(B) the Committees on the Judiciary and
13 Government Reform of the House of Represent-
14 atives.

15 “(3) FORM.—The report shall be submitted in
16 unclassified form, but may include a classified
17 annex.”.

18 (2) TECHNICAL AND CONFORMING AMEND-
19 MENT.—The table of contents for the Homeland Se-
20 curity Act of 2002 (Public Law 107–296) is amend-
21 ed by striking the items relating to subtitle B of title
22 II and sections 211 through 215 and inserting the
23 following:

“Subtitle B—Protection of Voluntarily Furnished Confidential Information

“Sec. 211. Protection of voluntarily furnished confidential information.”.



1 (b) CREATION OF TRANSPARENCY IN AGENCY COM-
2 PLIANCE WITH THE FREEDOM OF INFORMATION ACT.—

3 (1) ADDITIONAL MATTERS COVERED BY RE-
4 PORT.—Section 552(e)(1) of title 5, United States
5 Code, is amended—

6 (A) by striking “fiscal year and which”
7 and inserting “fiscal year. Information in the
8 report shall be expressed in terms of each prin-
9 cipal component of the agency and”;

10 (B) in subparagraph (E), by inserting be-
11 fore the semicolon “, based on the date on
12 which the requests were originally filed with the
13 agency”; and

14 (C) by redesignating subparagraphs (F)
15 and (G) as subparagraphs (L) and (M), respec-
16 tively, and inserting after subparagraph (E) the
17 following new subparagraphs:

18 “(F) based on the number of business days
19 that have elapsed since each request was origi-
20 nally filed with the agency—

21 “(i) the number of requests for
22 records for which the agency has re-
23 sponded with a determination up to and
24 including 20 days, and in 20 day incre-
25 ments up to and including 200 days;



1 “(ii) the number of requests for
2 records for which the agency has re-
3 sponded with a determination greater than
4 200 days and less than 301 days;

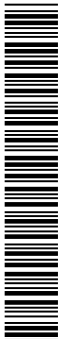
5 “(iii) the number of requests for
6 records for which the agency has re-
7 sponded with a determination greater than
8 300 days and less than 401 days;

9 “(iv) the number of requests for
10 records for which the agency has re-
11 sponded with a determination greater than
12 400 days;

13 “(v) the average number of days for
14 the agency to respond to a request;

15 “(G) data on the 10 requests for records
16 with the earliest filing dates pending before the
17 agency as of September 30 of the preceding
18 year, including the number of business days
19 that have elapsed since each of the requests was
20 originally filed with the agency;

21 “(H) data on the 10 active administrative
22 appeals with the earliest filing dates pending
23 before the agency as of September 30 of the
24 preceding year, including the number of busi-



1 ness days that have elapsed since the requests
2 were originally filed with the agency;

3 “(I) the median and average number of
4 days for the agency to respond to administra-
5 tive appeals based on the date on which the ap-
6 peals originally were filed with the agency; the
7 highest number of business days taken by the
8 agency to respond to an administrative appeal;
9 and the lowest number of business days taken
10 by the agency to respond to an administrative
11 appeal;

12 “(J) the number of fee status requests
13 that are granted and denied, and the average
14 number of days for adjudicating fee status de-
15 terminations;

16 “(K) the number of expedited review re-
17 quests that are granted and denied, and the av-
18 erage number of days for adjudicating expe-
19 dited review requests;”.

20 (2) NO AGGREGATION OF REPORTS.—Section
21 552(e) of such title is further amended by adding at
22 the end the following new paragraph:

23 “(6) The reports required by this section shall not
24 aggregate requests for records to the agency made under



1 subsection (a) with requests for records to the agency
2 made by first parties under section 552a of this title.”.

3 (c) INCREASED FEASIBILITY OF CITIZEN GROUP
4 CHALLENGES TO IMPROPER WITHHOLDING OF GOVERN-
5 MENT INFORMATION.—Section 552(a)(4)(E) of title 5,
6 United States Code, is amended—

7 (1) by inserting “, or in any case seeking infor-
8 mation from a Federal agency or official under any
9 other Federal law,” after “case under this section”;
10 and

11 (2) by adding at the end the following: “For
12 purposes of this section, a complainant has ‘substan-
13 tially prevailed’ if the complainant has obtained
14 some of its requested relief through a judicial or ad-
15 ministrative order or an enforceable written agree-
16 ment, or if the complainant’s pursuit of a nonfrivo-
17 lous claim or defense has been a catalyst for a vol-
18 untary or unilateral change in position by the oppos-
19 ing party that provides any significant part of the
20 relief sought.”.

