

September 1, 2009

Chairman Diane Feinstein
Senate Select Committee on Intelligence
211 Hart Senate Office Building
Washington, DC 20510

Vice-Chairman Christopher S. Bond
Senate Select Committee on Intelligence
211 Hart Senate Office Building
Washington, DC 20510

Chairman Silvestre Reyes
House Permanent Select Committee
on Intelligence
H-405 Capitol
Washington, DC 20515

Ranking Member Ralph Regula
House Permanent Select Committee
on Intelligence
H-405 Capitol
Washington, DC 20515

Dear Chairman Feinstein and Vice-Chairman Bond:

The undersigned organizations, concerned with government openness and accountability, civil liberties, and privacy, write to urge you to strike from the Intelligence Reauthorization Act of 2010 the provision that would exempt terrorist identity information (TII) from the Freedom of Information Act. The provision is contained in Section 354 of H.R. 2701 and Section 352 of S. 1494. We consider this provision unnecessary, overbroad and unwise.

This section is unnecessary because terrorist identity information is already exempt from disclosure under the FOIA if it is properly classified pursuant to Executive Order. (5 U.S.C. § 552(b)(1).) There is no evidence that this exemption is not currently working effectively to protect truly sensitive TII. Further, there is substantial evidence that much of the information that would be exempted by the provision in the Intelligence Authorization Act is not classified but rather is already disclosed through the National Crime Information Center (NCIC) system to law enforcement officers, including 870,000 State and local officers nationwide, and to fusion centers across the country. Indeed, the Terrorist Screening Center (TSC) has indicated that it posts unclassified versions of its daily report of encounters with known or suspected terrorists across the country on law enforcement networks. (“Terrorist Screening Center Recognized for Information Sharing Efforts,” Government Technology, Mar 11, 2009.)

This section is overbroad in that it categorically exempts all TII information from FOIA instead of narrowly addressing the stated purpose of the amendment: preventing disclosure under the FOIA of otherwise classified TII that has been declassified solely to permit dissemination to local and state law enforcement. The ODNI’s May 19, 2009 statement for the record to the Senate Select Committee on Intelligence and the Senate and House reports argued that a specific FOIA exemption for terrorist identity information, as maintained by the National Counterterrorism Center, would encourage appropriate dissemination of that information and protect it from unauthorized disclosure. If this is truly the intended purpose, a far narrower exemption should be crafted.

Finally, the provision is unwise because it unduly infringes on individuals' right to know what records the government is keeping about them. The Privacy Act created a presumption of disclosure for government records, with very few categorical exceptions. The broad exemption in the authorization bill is a very significant and far reaching change that violates the spirit of the Privacy Act. In fact, watchlists are an area of particular concern justifying greater openness, not less. It is well-documented that the watchlists are replete with errors. (DOJ Inspector General Report on the FBI's Terrorist Watchlist Nomination Practices, May 2009.) It is also well-documented that the current redress process is cumbersome and slow. The FOIA and Privacy Act processes may provide a crucial opportunity for persons mistakenly listed to clear their names. Any further barriers to redress should be narrowly drawn.

Being wrongfully nominated to a watchlist, or having the same name as a person correctly on the list but without adequate distinguishing identifiers, may have severe ramifications for a person's ability to travel, work for the government and other activities. In light of the high error rate and undue delays in the current redress process, access to one's own name on a watchlist should be a presumption, subject to the existing, and apparently working, national security exception.

We thank you for your consideration and urge you to not include the TII exemption in the final conferenced bill.

Sincerely,

Patrice McDermott, Director
OpenTheGovernment.org

Sharon Bradford Franklin
The Constitution Project

Mary Alice Baish
American Association of Law Libraries

Sue Udry
Defending Dissent Foundation

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Jim Dempsey
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Anne Weismann
Citizens for Responsibility and Ethics in
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Sean Moulton
OMB Watch

cc: Senator Russ Feingold