

Society of Professional Journalists
American Society of Newspaper Editors, College Media Advisers,
Criminal Justice Journalists, Government Accountability Project,
Journalism Education Association, National Newspaper Association,
Newspaper Association of America, Radio-Television News Directors Association,
Reporters Committee for Freedom of the Press, Society of Environmental Journalists

July 10, 2002

Re: FOIA Exemption in Homeland Security Act of 2002

Dear Member of Congress:

As Congress considers legislation establishing a Department of Homeland Security, the signatories below have serious concerns with certain provisions that are being considered. Section 204 of the Homeland Security Act of 2002, H.R. 5005, would exempt from the Freedom of Information Act “information provided voluntarily [to the federal government] by non-Federal entities or individuals that relates to infrastructure vulnerabilities or other vulnerabilities to terrorism.” This overbroad and unnecessary provision would severely compromise public health and safety, not to mention the public’s right to know. Congress should reject this provision, as it is ripe for misuse and abuse.

The bill does not define “infrastructure vulnerabilities” or “other vulnerabilities to terrorism.” Accordingly, it provides virtually no limit to the types of information that would be exempt from the Freedom of Information Act. Given the bill’s vague terms, it is certain that important non-confidential information supplied to the government would be exempt from disclosure to the public. The sweeping nature of this FOIA exemption invites companies to give the government information that could affect public health and safety, and by doing so automatically keep the public from getting such information. The public’s interest is hardly served by such secrecy.

In addition to the definitional problems, the proposal is unnecessary. Exemption 4 of the FOIA already protects from disclosure certain confidential or trade secret information that private entities supply to the government. The reach of Exemption 4 was debated at length during a May 8, 2002 hearing before the Senate Government Oversight Committee that was examining S. 1456, the Critical Infrastructure Information Security Act of 2001. That bill contains a provision very similar to the FOIA exemption in the Homeland Security Act. While industry representatives argued that a FOIA exemption was needed before private companies would voluntarily share infrastructure information with the government, a senior FBI official acknowledged that the FOIA already prohibits the release of sensitive commercial or financial information received from the private sector. Said Ronald L. Dick, director of the FBI’s National Infrastructure Protection Center, “[W]e believe that there are sufficient provisions in the FOIA now to protect information that is provided to us.” Furthermore, Committee Chairman Joseph Lieberman acknowledged that “[t]here are concerns that the exemptions granted [in S.

1456] might give the companies a ground for withholding some of the information that otherwise would be public.” As Senator Daniel K. Akaka added, “We must not provide inadvertent safe harbors for those who violate health and safety statutes.”

Just as the FBI, the CIA, and the State Department already have adequate means under the FOIA to prevent the release of confidential data received from the private sector (not to mention information that could endanger national security), so too would a Homeland Security Department have these tools at its disposal. The Act’s FOIA exemption would create a black hole that would shield from the public crucial information that is not otherwise sensitive or confidential. Congress should not undermine these interests in its quest to protect the nation.

We also have grave concerns about another provision in the bill. Section 730 would give the Secretary of Homeland Security the discretion to waive numerous civil service privileges contained in Title 5 of the U.S. Code, including the Whistleblower Protection Act. Like the FOIA, the Whistleblower Protection Act is a powerful ally of the public interest and those citizens who are interested in maintaining the accountability of our government and its officials. Government employees should remain free to report abuse, misfeasance, official misconduct and outright criminality, no matter what department employs them. That seems all the more important for the Department of Homeland Security, for all our sakes.

For further information, please contact Robert D. Lystad of Baker & Hostetler LLP, counsel to the Society of Professional Journalists, at 202-861-1707 or at rlystad@bakerlaw.com.

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cc: The Hon. George W. Bush
The Hon. John Ashcroft
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