

# H.R. 5073 WOULD RESTORE PRESUMPTION OF DISCLOSURE UNDER FREEDOM OF INFORMATION ACT



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Representative Henry Waxman (D-CA) joined by nine other members of the House of Representatives has introduced HR 5073, which amongst other things would restore the presumption of the federal government that documents are subject to disclosure under the Freedom of Information Act (5 USC 552) unless expressly exempted.

The policy of the United States Department of Justice, per a memorandum issued by then-Attorney General Janet Reno, was to defend a federal executive department Freedom of Information Act exemption claim only when the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. This presumption in favor of disclosure was reversed by Attorney General John Ashcroft. The so-called Ashcroft Memo on the subject, issued October 12, 2001, ordered the Justice Department to defend any federal agency exemption determination unless they lack a sound legal basis. In other words, a release of documents that would not harm any conceivable national interest could be refused simply because it could be justified legally.

Subsequently, President Bush issued Executive Order 13292 (March 25, 2003) which carved this policy in stone for all federal agencies in a variety of ways. EO 13292 reversed the previous federal policies which held that if there is significant doubt about the need to classify information, it shall not be classified... and that if there was a doubt within an agency about the appropriate level of classification, the lower level should be adopted. EO 13292 eliminated both of these provisions outright so that agency heads have free rein to block disclosure of information, even when their subordinate career civil service employees believe the disclosure or classification level is unwarranted.

HR 5073 would reverse these trends. It begins with findings of public policy consistent with the original intent of the Freedom of Information Act:

(a) Findings – Congress finds the following:

- (1) Public access to information held by the Federal Government is vitally important to the functioning of a democratic society.

(2) The Freedom of Information Act was enacted to ensure such public access to information.

(3) The Freedom of Information Act specifies limited exemptions to the general requirement for disclosure, where disclosure could potentially threaten other important public policy goals.

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

(b) Policy – The policy of the Federal Government is to release information to the public in response to a request under the Freedom of Information Act –

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

(c) Guidance – All guidance provided to Federal Government employees responsible for carrying out the Freedom of Information Act shall be consistent with the policy set forth in subsection (b).

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