

April 12, 2010

Chairman Dianne 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 Peter Hoekstra
House Permanent Select Committee
on Intelligence
H-405 Capitol
Washington, DC 20515

Dear Chair Feinstein and Vice-Chair Bond:

The undersigned organizations, concerned with government openness and accountability, civil liberties, and privacy, are writing to support the exclusion of a provision to exempt terrorist identity information (TII) from the Freedom of Information Act from the Intelligence Reauthorization Act of 2010. The provision was struck from the Senate-passed bill, S. 1494, and is contained in Section 364 of the House-passed bill (H.R. 2701). 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 continued attention to this critical issue, and urge you to not include the TII exemption in the final conferenced bill.

Sincerely,

OpenTheGovernment.org

American Booksellers Foundation for
Free Expression

American Library Association

Center for Democracy and Technology

Center for Media and Democracy

Citizens for Responsibility and Ethics in
Washington

The Constitution Project

Defending Dissent Foundation

The E-Accountability Foundation

Electronic Frontier Foundation

The Freedom of Information Foundation
of Texas

Government Accountability Project

International Association of
Whistleblowers

iSolon.org

Liberty Coalition

Mine Safety and Health News

Muslim Legal Fund of America

National Coalition Against Censorship

National Lawyers Guild – National
Office

National Whistleblower Center

Privacy International

Progressive Librarians Guild

The Rutherford Institute

Society of Professional Journalists

US Bill of Right Foundation

cc: Senator Patrick Leahy
Senator Russ Feingold