

FOIA AMENDMENTS EXPECTED AT HOUSE MARKUP July 10th, 2002

by Darren Samuelsohn

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One of the most heated debates before the House Government Reform Committee as it heads into its Thursday markup of H.R. 5005 -- the Bush administration proposal to create a Cabinet-level Department of Homeland Security -- centers around whether or not to create a new Freedom of Information Act exemption for critical infrastructure information submitted voluntarily to the government.

Under the White House-House GOP bill as written, a blanket exemption would be created that allows for nongovernment entities to submit information to the government without facing FOIA disclosure. Such an approach has been long advocated by industry groups concerned that under the current statutory scheme, relevant information is not getting submitted to the proper authorities out of fear of public disclosure to potential criminals and terrorists. On Tuesday, the Association of Metropolitan Water Agencies, North American Electric Reliability Council and Partnership for Critical Infrastructure Security testified before the House Energy and Commerce Investigations and Oversight Subcommittee in support of the H.R. 5005 language. At the same time, FOIA users at U.S. Public Interest Research Group and the Electronic Privacy Information Center spoke out against the language. David Sobel, general counsel at EPIC, said that existing FOIA exemptions already cover the types of material that industry groups are concerned would be affected. He said he has found no example of FOIA in its current state ever leading to the release of a document which would serve as a so-called "roadmap" for terrorists.

At the markup, Rep. Janice Schakowsky (D-Ill.) is expected to push an amendment that would remove the FOIA exemption language, according to her spokesman, Nadeam Elshami. But Sobel, along with PIRG's Jeremiah Baumann, said they expect the House to ultimately adopt the FOIA exemption provisions. Instead, they said they have their sights set on the Senate, where Governmental Affairs Committee Chairman Joe Lieberman (D-Conn.) is moving the homeland security bill and has so far indicated he would not include the Bush provision.

White House Office of Homeland Security Director Tom Ridge has said he is uncertain if Congress was ready to accept the FOIA exemption language this year. And Sen. Bob Bennett (R-Utah), the lead sponsor of a more-specific FOIA exemption bill, S. 1456, has said he would press to advance the measure in any available legislative vehicle, from the homeland security department bill to a separate entity either this Congress or next.

Amendments are also expected from Rep. Thomas Davis (R-Va.) to expand the FOIA section to limit potential liability suits and anti-trust actions from the government that are based on the voluntarily submitted information. Such exemptions were part of a Davis bill, H.R. 2435, that was floated to little fanfare prior to the Sept. 11 attacks but has since garnered increased attention in light of the move to create a new homeland security department (Environment & Energy Daily, June 10). But Sobel said he was concerned with the liability and anti-trust language because of its potential to tie the hands of government in the event it discovers "gross negligence" with regard to security precautions or other violations of the law.