

September 10, 2004

Dear :

The undersigned organizations and individuals write, in anticipation of the House and Senate conference on the National Defense Authorization Act for FY 2005, to express our serious concerns with Section 1034, "Nondisclosure of Certain Products of Commercial Satellite Operations," as included in S. 2400.

Section 1034 would restrict from access under the Freedom of Information Act "data that are collected by land remote sensing and are prohibited from sale to customers other than the United States and its affiliated users under the Land Remote Sensing Policy Act of 1992." Under the bill's terms, important non-confidential commercial satellite imagery, which the government has purchased, would be restricted from disclosure to the public through the FOIA. The restriction would apply not only to commercial satellite images acquired by the government, but would also broadly exclude from public access "any... other product that is derived from such data." Thus, maps, reports, and any other non-classified government analyses or communications that are in some way "derived from" a commercial satellite image would become inaccessible through FOIA. Indeed, even if the government wishes to release such information, the bill may preclude its ability to do so.

Moreover, the legislation would preempt state and local laws mandating disclosure by a state or local government. Again, this would extend to all imagery or imagery-derived information.

The fact that this information is licensed to the government is not a legitimate reason for its restriction from access through FOIA. Federal agencies use licensed and/or purchased imagery in regulatory proceedings and numerous other mandated activities. The public requires access to this imagery in order to participate in these proceedings and importantly, to be informed about the activities of Government. Without access to this information, members of the public are unable to effectively participate in governmental activities that affect their daily lives. As noted in the recent National Research Council report, *Licensing Geographic Data and Services*: "When geographic data are used to design or administer regulatory schemes or formulate policy, affect the rights and obligations of citizens, or have likely value for the broader society as indicated by a legislative or regulatory mandate, the agency should evaluate whether the data should be acquired under terms that permit unlimited public access or whether more limited access may suffice to support the agency's mandates and missions and the agency's actions in judicial and other review." (page 229, <http://www.nap.edu/books/0309092671/html/> prepublication version)

Senate Report. 108-260 notes that disclosure of such information through FOIA “may damage the national security by mandating disclosure to the general public upon request,” and notes the desire of the government to not classify such information in order to share it quickly when needed. We are concerned, however, that this provision would further the extraordinary grants of authority by Congress to the Executive Branch, allowing it to preclude any possibility of public access to unclassified material without appropriate congressional or judicial oversight.

Indeed, the Land Remote Sensing Policy Act of 1992 notes that “The continuous collection and utilization of land remote sensing data from space are of major benefit in studying and understanding human impacts on the global environment, in managing the Earth's natural resources, in carrying out national security functions, and in planning and conducting many other activities of scientific, economic, and social importance;” and that “the Nation's broad civilian, national security, commercial, and foreign policy interests in remote sensing will best be served by ensuring that Landsat remains an unclassified program that operates according to the principles of open skies and nondiscriminatory access.” Moreover, it notes that “It is in the best interest of the United States to maintain a permanent, comprehensive Government archive of global Landsat and other land remote sensing data for long-term monitoring and study of the changing global environment,” an interest that will be harmed by this provision.

We urge Congress, instead of taking this precipitous step, to follow the recommendations of the RAND National Defense Research Institute in its report prepared for the National Geospatial-Intelligence Agency, *Mapping the Risks: Assessing the Homeland Security Implications of Publicly Available Geospatial Information*. The report recommends that federal agencies and other organizations use an analytical process to assess the potential homeland security sensitivity of specific pieces of publicly available geospatial information and to determine if restricting access to these specific pieces would enhance security. They recommend that such a process include analysis of the usefulness of the information to an attacker; its uniqueness; and the expected societal benefits of access and the costs of restricting the information.

We are also concerned with other justifications in the Report language. The bill defines “land remote sensing information” as “data that are collected by land remote sensing and are prohibited from sale to customers other than the United States and its affiliated users under the Land Remote Sensing Policy Act of 1992.” The Report notes that, “Compelled release of such data and imagery by the United States under FOIA defeats the purpose of these licensing agreements [and] removes any profit motive...” Confidential business information and trade secrets are already adequately protected under FOIA and copyrighted information under other laws and regulations. Protecting a profit motive is an entirely inappropriate reason for creating yet another exceptionally broad restriction on access through FOIA. Indeed, an amendment restricting information from public release under the FOIA unfairly restricts public *and* business use of this information, which has

significant and broad application in farming and resources industries, science and technology. In providing a restriction on behalf of one specific interest, Congress appears to neglect the broad economic and social benefit of such information.

The Freedom of Information Act is intended to be a tool for protecting and enhancing the public's access to their government. Limitations to its scope should only occur after wide public consultation and discussion, which has not occurred with this provision. We recognize the national defense concerns of the Department of Defense, which we understand requested this amendment. It is our understanding, however, that those concerns do not involve existing satellite imaging capabilities but, rather, satellite imagery that is not yet on line and will not be online in the near future. The proposed legislation raises many questions of significant import to the scientific and environmental communities, to regulatory decision making, and to the public in a wide variety of ways, including weather and storm tracking. It should not be made on the basis of one agency's request without an opportunity to fully explore the impact on others. We believe the many questions raised by the proposed statutory language need to be addressed in a more deliberate manner, and that restricting access through FOIA is not the appropriate means for addressing DOD's concerns or these questions. A careful consideration would permit decisions involving access to critical and irreplaceable information to be carefully worked out, with recognition of all of the interests involved.

Therefore, we urge the conferees to defer this amendment and Congress to delay action on this measure for a reasonable amount of time while it obtains a full impact assessment.

Thank you for your consideration of our concerns.

Sincerely,

Patrice McDermott
Deputy Director, Office of Government
Relations
American Library Association

Steven Aftergood
Project Director
Federation of American Scientists

Meredith Fuchs
General Counsel
National Security Archive

Terry Francke
General Counsel

Californians Aware

Barbara A. Petersen
President
First Amendment Foundation

David Bahr
Founder & Staff Attorney
FOIAdvocates

Prue Adler
Associate Executive Director
Federal Relations & Information Policy
Association of Research Libraries

Danielle Brian
Executive Director
Project On Government Oversight

Kevin Goldberg
General Counsel
American Society of Newspaper Editors

Carolyn Raffensperger
Executive Director
Science and Environmental Health
Network
Sean Moulton
Senior Policy Analyst
OMBWatch

Lucy A. Dalglish
Executive Director
Reporters Committee for Freedom of the
Press

S. Elizabeth Birnbaum
Vice President for Government Affairs
American Rivers

Edward Hammond
Director
The Sunshine Project

Scott Armstrong
Executive Director
Information Trust

Susan E. Kegley
Senior Scientist
Pesticide Action Network

Laura W. Murphy
Director, Washington Legislative Office
American Civil Liberties Union

Betsy Loyless
Vice President for Policy
League of Conservation Voters

Peter Weitzel
Coordinator
Coalition of Journalists for Open
Government

Greg Watchman
Executive Director
Government Accountability Project

Douglas Newcomb,
Director, Public Policy
Special Libraries Association

Lynnell Burkett
President
National Conference of Editorial Writers

Charles N. Davis
Executive Director
University of Missouri Freedom of
Information Center

Mary Alice Baish
Associate Washington Affairs
Representative
American Association of Law Libraries

Gary Cohen
Executive Director
Environmental Health Fund

Christopher Finan
President
American Booksellers Foundation for
Free Expression

Patricia S. Schroeder
President and Chief Executive Officer
Association of American Publishers.

Mary Beth Beetham
Director of Legislative Affairs

Defenders of Wildlife

James C. Benton
Legislative Representative/Research
Analyst
Common Cause

Karen G. Wayland
Legislative Director
Natural Resources Defense Council

Randall D. Snodgrass
Director, Government Relations
World Wildlife Fund

Carol Andress
Project Director
Environmental Defense
Kathleen Kirby
Counsel
Radio-Television News Directors
Association

Individuals (affiliation for information
only)

William Ferroggiaro
Writer and Consultant
Washington, D.C.

Susan Doran
Principal
Knowledge Management Consulting

Dave Jackson
Editor
The Sleep-e Times

Jocelyn Shaw
Government Documents Librarian
Hackley Public Library
Muskegon MI

Amy West

Electronic Government Publications
Librarian
University of Minnesota Libraries

Kathleen L. Amen
Government Information Librarian
Blume Library, St. Mary's University
San Antonio TX

Cecelia A. Petro
Galesville MD 20765

John Prechtel
Data Librarian
University of Georgia Libraries

Daniel C. Barkley
Coordinator, Government Information/
Microforms
Zimmerman Library, University of New
Mexico, Albuquerque, NM
Paul Neuhaus
Social Sciences Librarian
Carnegie Mellon University

Jan Fryer
Chair, Government Relations Committee
American Library Association/
Association of College and Research
Libraries (ACRL)

Susan Nevelow Mart
Reference Librarian, Hastings College of
the Law, University of California

Kathleen de la Pena McCook, PhD
Distinguished University Professor
University of South Florida

Mary Paige Smith
Head, Collection & Bibliographic Svcs.
Law Library, Shepard Broad Law Center
Nova Southeastern University

Thomas Twiss
Government Information Librarian
University of Pittsburgh

Jane Cothron
Catalog Librarian
Lincoln County Library District
Newport, Oregon

Sharon McQueen
Lecturer and Doctoral Candidate
School of Library and Inform'n Studies
University of Wisconsin - Madison

Anne Zarinnia
Associate Professor
University of Wisconsin-Whitewater

John Unsworth, Dean
Grad. School of Library & Inform'n Science
Univ. of Illinois, Urbana-Champaign