SUMMARY AND ANALYSIS OF THE OPEN GOVERNMENT ACT OF 2007

On December 31, 2007, President Bush signed into law the "OPEN Government Act of 2007," which contains much-needed reforms to the Freedom of Information Act (FOIA). The changes in the law are aimed at improving agency processing of FOIA requests and, accordingly, do not alter the scope of FOIA or its exemptions. Instead, they to try to remove the procedural roadblocks that, too often, keep members of the public from being able to receive information from the government in a timely and efficient manner.

As the findings section of the Open Government Act explains, our system of government depends upon informed consent by the American people. Although FOIA "establishes a 'strong presumption in favor of disclosure," "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act." Congressional review was needed "to determine whether further changes and improvements are necessary to ensure that the Government remains open and accessible to the American people and is always based not upon the 'need to know' but upon the fundamental 'right to know.'"

The reforms in the OPEN Government Act fall into four broad categories: 1) Changes aimed at encouraging agencies to comply with FOIA's timing and other legal requirements; 2) Clarifications of how FOIA applies given changes in news media and in how records are stored; 3) Changes aimed at improving communications between FOIA requesters and processors; and 4) Reporting Requirements. This article summarizes the changes and improvements in the OPEN Government Act and explains how they may affect your ability to receive records under FOIA.

I. Provisions to Encourage Agency Compliance with FOIA

One of the big problems with FOIA is that agencies do not always comply with it: They withhold records they are legally required to release; they miss the deadlines with impunity. The OPEN Government Act contains provisions designed to encourage agencies to comply with the legal requirements of FOIA.

The Buckhannon Fix

One of the most important sections of the OPEN Government Act is Section 4, which provides that a FOIA requester can receive attorney fees for litigating a FOIA case if the case serves as a catalyst for the agency to hand over requested records, even if the government does so before a judge rules on the case.

FOIA contains a "fee-shifting provision" that provides that if a plaintiff in a FOIA case "substantially prevails," the government will pay the requesters' attorney fees and costs. Because FOIA requesters often cannot afford private attorneys, the attorney-fees provision is vital for them to be able to find counsel to take their cases, and therefore necessary to effective enforcement of the Act. Until recently, FOIA requesters were eligible for fees under the fee-shifting provision whenever their lawsuit served as a catalyst for the government to disclose

records, whether the government did so before or after a judge ruled on the case. In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), however, the Supreme Court stated that if the government responds to a suit by doing what it was asked to do before the court rules, the plaintiff is not entitled to attorney fees.

The application of *Buckhannon* to FOIA cases severely undermined the goals of the attorney-fees provision and, accordingly, endangered the public's ability to enforce the Act. Because agencies can hand over requested records at any point in FOIA litigation, the application of *Buckhannon* to FOIA reduced agencies' incentives to release records in a timely manner, without the need for judicial intervention. Agencies could withhold records until long after they were legally required to release them, knowing that so long as they released the records before a court decision on the merits, they would not have to pay the requesters' attorney fees. In addition, the application of *Buckhannon* to FOIA reduced incentives for attorneys to take FOIA cases. If a lawyer knows that a government agency can avoid paying fees by handing over the requested records after a significant amount of work has been completed, but before a judge has ruled, the lawyer will be less likely to agree to take the case in the first place and FOIA requesters who are illegally denied records will not have any way to challenge those denials.

The OPEN Government Act amends FOIA to state that a plaintiff can substantially prevail if the plaintiff obtains relief either through a judicial order, or enforceable written agreement or consent decree, or through "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." In other words, the Act clarifies that *Buckhannon* does not apply to FOIA cases.

The only requirement for a plaintiff who has obtained relief through a voluntary change in the agency's position to be eligible for fees is that the plaintiff's claim must not have been insubstantial. The Supreme Court has considered the word "insubstantial" in the context of federal jurisdiction, and has stated that a "claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" *Hagans v. Lavine*, 415 U.S. 528, 538 (1974) (citation omitted).[1] Thus, unless a case is essentially

---

[1]In discussing the amendment he introduced that inserted the "not insubstantial" language into an earlier version of the OPEN Government Act, Senator Kyl explained that:

> Substantiality is a test that is employed in the Federal courts to determine whether a federal claim is adequate to justify retaining jurisdiction over supplemental or other State law claims. It is generally understood to require only that the plaintiff's complaint not be clearly nonmeritorious on its face and not be clearly precluded by controlling precedent. The classic and most-quoted statement of the substantiality standard appears to be that in the Supreme Court's decision in *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105 (1933), in which Justice Sutherland explained that a claim may be "plainly unsubstantial either because obviously without merit, or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the

frivolous, requesters will be eligible for fees if they receive the relief after filing suit.

The OPEN Government Act requires that all attorney fees be paid out of agency budgets, rather than out of Treasury's Claims and Judgment Fund (which had previously been the source for attorney fees in FOIA cases). That agencies will themselves be responsible for paying attorney fees in FOIA litigation will hopefully encourage them to follow FOIA's legal requirements to avoid such litigation.

Penalties for Delay, and Tolling of the Permissible Time to Respond

Perhaps the largest problem with the processing of FOIA requests is that although FOIA requires agencies to respond to requests and appeals within 20 working days, agencies often disregard those time limits and fail to respond for months, or even years. To try to rectify this problem, Section 6 of the OPEN Government Act includes penalties for agencies that fail to abide by FOIA's time limits. If an agency misses the 20-day deadline, it cannot assess search fees (or duplication fees for requesters who are representatives of the news media or education or noncommercial scientific institutions whose purpose is scholarly or scientific research) unless "unusual or exceptional circumstances" apply.[2]

The penalty provision has the potential to reduce delay both by serving as an incentive for agencies to respond to FOIA requests within the time limits and by reducing disagreements over fees. If an agency misses a deadline in responding to a request by a member of the news media, for example, unless exceptional or unusual circumstances apply, it will not be able to charge any fees (since members of the news media are only charged duplication fees, not search and review fees). The provision may therefore reduce time-consuming communications between the agency

---

inference that the questions sought to be raised can be the subject of controversy." 154 Cong Rec. S10989 (Aug. 3, 2007).

[2]Under FOIA, "unusual circumstances" are the circumstances under which an agency's time to respond can be extended for an additional ten business days upon written notice to the requesters. Unusual circumstances include, to the extent "reasonably necessary," the need to search for and retrieve records from facilities that are separate from the office processing the request; the need to search for, collect, and examine a "voluminous amount of separate and distinct records which are demanded in a single request;" and the need for consultation with another agency or among two or more components of the agency that have a substantial interest in the request. 5 U.S.C. § 552(6)(B)(iii). "Exceptional circumstances" is not specifically defined in FOIA, but it is part of the test for when a court can grant a stay (generally called an Open America stay after the case *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976)) and allow the agency additional time to respond to a request. FOIA specifies that delay that results from predicable backlogs is not "exceptional circumstances," unless the agency can show reasonable progress in reducing that backlog. 5 U.S.C. § 552(6)(C)(ii).

and requester over fees. On the other hand, there is also potential for agencies to abuse the exemption from the penalty for "unusual or exceptional circumstances." If agencies claim such circumstances whenever they miss time limits, the penalty provision could increase both disputes over fees and litigation over whether fees should have applied at all.

In addition to introducing penalties for failing to comply with the 20-day time limits, Section 6 explains when the time limits begin to run and includes provisions for tolling the time limits. The 20-day time limit now starts from when the request is received by the "appropriate component" of the agency, which cannot be more than ten days after the request is received by the component of the agency designated to receive requests by the agency's regulations. (Previously, the time limit began when the request was received by the "agency" without further detail). Once the 20-day clock starts, the agency can toll it under two circumstances: 1) while it is awaiting a response to information that it has reasonably requested from the requester; and 2) if necessary to clarify with the requester issues about fees. The agency can only toll the time period once for requests for information, but can do so multiple times while clarifying fee issues. Under both circumstances, the tolling ends when the agency receives the requester's response to the request for information or for clarification.

The new provisions on starting the 20-day clock and tolling have the potential to cause some confusion for requesters about when they have exhausted their administrative remedies. Under FOIA, a requester is deemed to have exhausted administrative remedies and can file suit if the agency does not respond to the request within the specified time periods. Because it is unlikely that a requester will know exactly when the component that receives requests forwarded the request to the "appropriate component" (which seems to mean the component of the agency that has the records), and because the requester may not know when the period has been tolled for one of the permissible reasons, the requester will not necessarily know when the 20-day time period has run. Hopefully, the requirement that agencies provide tracking numbers for requests (discussed below) will help clarify when the time period has run. Nonetheless, if a requester is unsure about what component was the "appropriate component," it is probably advisable for a requester to wait at least 30 working days (the 20-day time period, plus the 10 days necessary for the agency to send the request to the right component) before filing suit based on the agency's lack of a response.

Section 6 applies to requests made more on or after December 31, 2008, a year after the date of the Act's enactment.

II. Provisions to Improve Communications Between Agencies and Requesters

Although requesters can litigate denials of FOIA requests (or failure of agencies to respond to requests), litigation is expensive and time-consuming for all involved. The OPEN Government Act includes provisions to improve communications between requesters and agencies and institute non-litigations way of resolving disputes that will hopefully cut down on the need for requesters to file suit to receive the records to which they are entitled.

FOIA Ombudsman

Perhaps the provision of the Act with the potential to have the biggest impact on FOIA processing—but whose impact is the most uncertain—is Section 10, which establishes an Office of Government Information Services (OGIS) in the National Archives to serve as a FOIA ombudsman. OGIS will provide mediation services to resolve disputes between FOIA requesters and agencies. Importantly, these services are an alternative to litigation; they do not replace requesters' rights to go to court once they have exhausted their administrative remedies. At its discretion, OGIS will issue advisory opinions if mediation does not resolve a dispute. It will also review agencies' FOIA policies and procedures and compliance with FOIA, and recommend policy changes to improve administration of FOIA. Some states, including New York and Texas, have state agencies that provide advisory opinions or engage in other non-litigation efforts to help resolve disputes under open government laws, and the general sense is that those agencies have been useful in smoothing relationships between requesters and agencies.

Tracking Numbers and Describing Exemptions

Too often, FOIA requesters are baffled about what is happening with the requests they have filed: They file a request and then hear nothing for months; or they receive a denial, but do not understand why the records have been withheld. The OPEN Government Act includes two provisions that will enable FOIA requesters to have a better sense of what is going on with their requests.

First, Section 7 of the Act requires agencies to establish a system for assigning tracking numbers for requests that will take more than 10 days to process and provide the requesters with the tracking numbers, and to establish a telephone or internet hotline that provides information about the status of each request by tracking number. The information in the hotline must include the date on which the agency received the request and an estimated date on which the agency will fully respond to it. Assuming it is properly implemented and kept up to date, the tracking number and hotline system will go a long way toward resolving the feeling among requesters that they are sending their requests into thin air. Like the penalties in section 6, the tracking system applies to requests made on or after December 31, 2008, a year after the date of enactment of the Act.

Second, the OPEN Government Act requires agencies, when they redact information from a released record, to specify the exemption under which the deletion is made. This indication has to be made on the released portion of the file, unless doing so would harm the interest protected by the exemption. This provision should help clarify for requesters why the agency has withheld portions or records they requested.

Chief FOIA Officers and Public Liaisons

In December 2005, President Bush issued an executive order on "Improving Agency

Disclosure of Information" that, among other things, required each agency to designate a Chief FOIA Officer and FOIA Public Liaisons. The OPEN Government Act codifies these positions. Under the Act, each agency must designate a senior official at the agency to be a Chief FOIA Officer, with responsibility for ensuring the agency efficiently and appropriately complies with FOIA and for making suggestions for improving FOIA implementation. The Chief FOIA Officers is also charged with appointing FOIA Public Liaisons to whom requesters can raise concerns about the service they received after the initial response from the agency FOIA staff. The Public Liaisons are also supposed to help reduce delays, increase understanding of the status of requests, and resolve disputes. Like the FOIA ombudsman, the appointment of public liaisons provides an additional method through which requesters and agencies can attempt to come to agreement without litigation.

III. Provisions that Clarify FOIA's Application in a Changing World

In 1996, Congress enacted the E-FOIA amendments to bring FOIA into the computer age. Although those amendments were vital to keep FOIA in step with technology, the intervening years have seen additional changes in society, and some provisions of the OPEN Government Act clarify how FOIA's provisions apply given those changes.

Protection of Fee Status for Representatives of the News Media

FOIA has long given representatives of the news media a special status for the purposes of what fees are charged, but it did not previously contain a definition of what constituted a "representative of the news media." The OPEN Government Act provides a definition for this term, clarifying that "'a representative of the news media' means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." It also specifies that as methods of news delivery evolve, new forms of media will be considered representatives of the news media, and that freelance journalists will be regarded as working for the news media if they can demonstrate a solid basis for expecting publication. These provisions are important for ensuring that, as technology changes, people who disseminate news in new media formats (such as bloggers) will be able to access records from the government at the same fee rates as those who disseminate news through more traditional formats.

Openness of Agency Records Maintained by a Private Entity

This OPEN Government Act clarifies that records kept by private contractors hired by agencies to perform record keeping functions are subject to FOIA. This provision keeps agencies from being able to evade FOIA's requirements by contracting out their record keeping duties.

IV. Reporting Requirements

Finally, the Act contains reporting requirements to provide increased information about

FOIA compliance and potential ways to improve it. These reporting requirements could provide insight into FOIA processing that could inform the next set of FOIA amendments.

New Reporting on Processing Times in Annual Reports

Section 9 of the Act specifies information that must be included in agency annual FOIA reports. This information includes the average number of days pending requests have been pending; the average, median, and range of days it takes the agency to respond to a request; the number of requests responded to within the statutory limit of 20 days, and in various increments up to 400 days; the average, median, and range of days for the agency to provide information when it grants a request; and the average, median, and range of days it takes the agency to respond to appeals. The reports must also include data on the agency's 10 oldest requests and 10 oldest appeals; the number of expedited review requests the agency granted and denied, along with the average and median time it took the agency to respond to those requests and the number it responded to within the statutory 10-day limit; and the number of fee-waiver requests granted and denied, along with the average and median time to adjudicate those fee-waiver requests.

The Act requires that information in the report be provided both for each principal component of the agency and for the agency overall, and that agencies make the raw statistical data used in preparing the report available to the public upon request. The new information in the report should help the Administration, Congress, and public gain a better sense of FOIA processing to inform future amendments to the Act.

Reporting Disciplinary Actions for Arbitrary and Capricious Rejections of Requests

FOIA contains a provision specifying that when a court finds that circumstances surrounding the withholding of records raise questions of whether agency personnel acted in an arbitrary and capricious manner, the Special Counsel must initiate a proceeding to determine whether discipline is necessary and report its findings and recommendations to the agency, which must take the corrective steps the Special Counsel recommends. The OPEN Government Act contains a section to make this provision more effective. Section 5 of the Act requires the Attorney General to notify the Special Counsel of every civil action that raises questions of whether agency personnel acted arbitrarily and capriciously, and to submit an annual report to Congress on the number of such actions that year. It also requires the Special Counsel to submit an annual report to Congress on its actions under the provision that year.

Report on Personnel Policies Related to FOIA

One idea of how to improve FOIA processing is to provide incentives through personnel policies for employees to comply with FOIA. The OPEN Government Act requires the Office of Personnel Management (OPM) to report to Congress about this idea. Specifically, OPM must submit a report to Congress examining whether changes could be made to personnel policies that would provide greater encouragement to employees to fulfill their duties under FOIA and

enhance the stature of FOIA staff. The report must also examine whether FOIA compliance should be included in performance evaluations, whether there should be a special employment classification series for FOIA compliance; whether the highest level FOIA official should be paid at or above a particular rate; whether all federal employees should be trained in FOIA; and whether there are other changes to personnel policies that could ensure there is a clear career track for FOIA professionals. Rewarding compliance with FOIA by federal employees could make FOIA more efficient without changing the substance of the law, and OPM's report will hopefully provide useful analysis of what personnel policy incentives would prove effective.

CONCLUSION

The OPEN Government Act provides useful provisions for addressing FOIA's procedural roadblocks. However, the Act is unlikely to eliminate FOIA delays or resolve all FOIA processing problems. FOIA professionals, policy makers, and open government advocates should continue studying and thinking about FOIA and how it can be improved to best provide the public with information about the activities and operations of its government.