

## ***The Cycle Continues: Congress Amends the FOIA in 2007\****

On New Year's Eve, when most Americans were welcoming in a presidential election year, those in the openness-in-government community were waiting to learn what the current president would do with the package of Freedom of Information Act amendments that Congress had passed despite Administration objections just prior to the end of its 2007 session.

President Bush could have vetoed the bill (S. 2488), though it no longer contained an arguably unconstitutional penalty provision for agency time-limit violations. He could have signed it, perhaps with one of his controversial "signing statements" designed to lay a foundation for eliding one or more of its provisions. He even could have allowed the bill to become law without his signature, under Art. I, Sec. 7 of the Constitution, given that the Senate technically was not "in recess." But he simply signed it without fanfare, and at nearly the last minute, thus ensuring that the "2007 FOIA Amendments" would join previous ones in a near-perfect 10-year cycle of legislative activity stretching back to the enactment of the Administrative Procedure Act (APA) in 1946.

Not that these amendments to the FOIA are as comprehensive as the previous ones made in 1974, 1986, and 1996. In fact, the 2007 FOIA Amendments are entirely procedural in nature and contain absolutely nothing sought by federal agencies as a needed reform from their own perspective -- hardly what one might have expected of the first major post-9/11 FOIA amendments.

Yet they nonetheless include several points of ambiguity and uncertainty that can be expected to breed litigation for years to come. Among them is a new attorney fee standard that, viewed on its face, might alter the litigation landscape more than was expected during the legislative process. Likewise, a revised definition of "agency record" that newly encompasses many records held by government contractors has a facial breadth that should spawn much litigation if it is implemented too narrowly. And no small amount of controversy -- albeit largely political, not interpretive -- surrounds a novel provision that unambiguously establishes a new governmentwide FOIA policy office within the National Archives and Records Administration.

### **New Provisions**

These new FOIA provisions, which stem from a rare bi-partisan effort begun early in 2005 by Senators Patrick Leahy (D-Vt.) and John Cornyn (R-Tex.), fall into the following ten categories:

***New Attorney Fee Standard.*** One of the primary driving forces of the 2007 FOIA Amendments was the strong dissatisfaction of media groups and other representatives of the FOIA-requester community with the availability of attorney fees in FOIA cases. When the Supreme Court rejected the longstanding "catalyst theory" for fee-shifting statutes such as the FOIA in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), that had the effect of limiting the circumstances under which FOIA plaintiffs could be awarded attorney fees and costs to only those involving formal court orders, a considerable curtailment. Members of public interest groups soon began complaining about agencies' new-found ability to withhold records until the midst of litigation and then release them in advance of such a court order, contrary to the spirit if not the letter of the FOIA's attorney fee provision, which provides for fees if a requester has "substantially prevailed." 5 U.S.C. § 552(a)(4)(E).

Congress addressed this head-on, and it did so by going so far as to explicitly define, for the first time, what is meant by its “substantially prevailed” standard:

. . . a complainant has substantially prevailed if the complainant has obtained relief through either -- (I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if the complainant’s claim is not insubstantial.

5 U.S.C. § 552(a)(4)(E)(ii), *as amended by* Pub. L. No. 110-175 (effective as of Dec. 31, 2007). By taking such a big step, Congress certainly took care of “the *Buckhannon* problem,” yet in so doing it provided an opportunity for FOIA requesters to now argue that courts should award them fees once this distinct new standard is met, regardless of any other consideration, especially as there is nothing in the amendments’ sparse legislative history that prevents that. To be sure, the statute says that courts “may” award FOIA fees, which means that judicial discretion always is involved, but the very large body of FOIA case law that preceded this major legislative action now may be called into question by FOIA plaintiffs in future cases.

Exactly which cases those soon might be is another issue that evidently will require adjudication. Like most of the amendments’ provisions, this new attorney fee standard silently took effect immediately upon enactment. But the Department of Justice soon thereafter signaled its intention to resist its applicability to cases that are already pending. On this question of “retroactivity” under the FOIA, the government previously had taken the position that legislation enacted during the pendency of litigation could be applied to a FOIA plaintiff’s *disadvantage* -- that, for example, newly enacted Exemption 3 statutes could be invoked by an agency to withhold otherwise nonexempt information even if they were enacted as late in the day as while a case was pending in a court of appeals. See, *e.g.*, *City of Chicago v. ATF*, 423 F.3d 777, 783 (7th Cir. 2005) (applying new Exemption 3 statute retroactively to pending cases); *Sw. Ctr. for Biological Diversity v. USDA*, 314 F.3d 1060, 1062 (9th Cir. 2002) (same).

Now the question is whether the government is entitled to the exact opposite result when the shoe is on the other foot, so to speak, and the new legislation benefits the other party. The basic justification for the government trying to “have it both ways” under the FOIA is that it is a waiver of sovereign immunity, so evenhandedness is not necessarily required. Such a position, if accepted by the courts, would unexpectedly defeat the immediacy of Congress’s *Buckhannon* fix. However, what it overlooks, among other things, is that when the FOIA’s attorney fee provision itself originally was enacted, as part of the 1974 FOIA Amendments, this same sovereign immunity argument was made by the government, in the same kind of effort to forestall the awarding of FOIA fees, and it was firmly rejected. *Cuneo v. Rumsfeld*, 533 F.2d 1360, 1363-64 (D.C. Cir. 1977) (holding new FOIA attorney fees provision applicable to any “action which is terminated after [its] effective date”).

***Prohibitions on Agencies Charging Fees.*** Another new provision deals with fees of a different kind. For a long time, representatives of the FOIA-requester community have urged Congress to enact some sort of “penalty provision” within the FOIA as a means of indirectly enforcing agency compliance with the Act’s time limits. Previous bills in the 109th and 110th Congresses had even gone so far as to propose that agencies be forced to waive the applicability of FOIA exemptions for their time-limit noncompliance, with insufficient safeguards for private interests and those of constitutional dimension, but that

unrealistic approach ultimately yielded to the idea of penalizing agencies through the FOIA's fee structure instead. (A miscellaneous 2007 FOIA Amendments provision specifying that attorney fees henceforth will be paid out of an agency's own budget, see S. 2488, Sec. 4(b) (likely to be codified in title 31 of the United States Code), has been called by some an additional attempt to "penalize" agencies into better FOIA compliance, but it actually is not; the legislative record is clear that it was merely a last-minute procedural device designed to comply with technical "PAYGO requirements" in order to ensure passage in the House.)

What Congress did instead was to provide that "if [an] agency fails to comply with any time limit" of the Act, its penalty is loss of its right to charge search fees for that FOIA request, no matter what type of requester is involved -- even a commercial requester. 5 U.S.C. § 552(a)(4)(A)(viii). And for the types of FOIA requesters who under the provisions of the 1986 FOIA Amendments are not obliged to pay search fees to begin with (such as representatives of the news media and academic requesters), the penalty is the complete elimination of duplication fees, no matter how many thousands of document pages or items of electronic media are involved and no matter how large the applicable fee would be.

While this penalty provision does not take effect until the end of this year (i.e., by applying to requests made on or after December 31, 2008), anyone who regularly makes FOIA requests should recognize that it holds enormous potential for affecting the administration of the Act. At many agencies, regular compliance with the Act's 20-working-day deadline is beyond their reach even for the simplest of requests. And at any other agency, even one so small that it never or hardly ever runs a "backlog," the next FOIA request to arrive could always be so large and/or complex that the same result obtains -- especially if that requester were interested in enjoying a new freedom from search and/or copying fees. This of course applies to the Act's 20-working-day deadline for adjudicating administrative appeals as well. In fact, because this new provision speaks of "*any* time limit," it should not be overlooked that it also encompasses an agency's failure to make a timely response to a request for "expedited processing," which under the 1996 FOIA Amendments must be done within ten *calendar* days. See 5 U.S.C. § 552(a)(6)(E)(i)-(ii). This last aspect alone could be used by many FOIA requesters, especially "representatives of the news media" (as newly defined -- see below), to impose upon agencies quite a penalty indeed.

The only caveat to this is that Congress left the door open to the possibility of an exception. With an oddly structured formulation, this provision imposes the new penalty "if" there is a deadline failure and then "if no unusual or exceptional circumstances . . . apply to the processing of the request." 5 U.S.C. § 552(a)(4)(A)(viii). It remains to be seen, of course, to what extent agencies will attempt to seek refuge in this terminology, let alone succeed with it in litigation. One of its two terms, "exceptional circumstances," refers to the standard applied by courts in litigation to determine whether an agency is entitled to a so-called *Open America* stay of judicial proceedings, see 5 U.S.C. § 552(a)(6)(C)(i)-(ii), so it is difficult to imagine it operating at the administrative level where fees are first set as a practical matter. The other term, "unusual circumstances," is the longstanding statutory standard by which an agency, if such circumstances do exist, invokes by letter an additional ten working days to respond to a request, see 5 U.S.C. § 552(a)(6)(B), something that agencies with time limit problems hardly ever bother doing. Furthermore,

the statute not only contemplates agencies sending requesters timely “unusual circumstances” letters when such circumstances do exist (letters which must specify an exact date for the extended response), it also pointedly commands that “unusual circumstances” be used by agencies “only to the extent reasonably necessary to the proper processing of the particular requests.” 5 U.S.C. § 552(a)(6)(B)(iii). At a minimum, FOIA processing is likely to become far more interesting due to this new provision.

**Contractor Records.** A quite novel provision in these amendments is their extension of the FOIA to records maintained not by federal agencies but by federal contractors instead. This is accomplished by supplementation of the Act’s definition of “agency record” to more expansively include information “that is maintained for an agency by an entity under Government contract, for the purposes of records management,” 5 U.S.C. § 552(f)(2)(B), *as amended by* Pub. L. No. 110-175 (effective as of Dec. 31, 2007), language that may be read either broadly or narrowly. While there are indications in the legislative history of this language that it was meant to be given a relatively narrow construction, i.e., applying only where an agency contracts out its “records management” functions per se, it nevertheless is broad enough on its face to potentially include a much wider range of contractor records under the FOIA.

For example, the federal government now engages in the “contracting out” of many agency functions in accordance with the dictates of OMB Circular A-76 (as revised in 2003), which necessarily involves the removal of records pertaining to those functions from the FOIA’s ordinary reach. The information in such contractor records typically is maintained “for an agency,” and any such contractor regularly maintains information, in the words of the definition’s separate second clause, for “purposes of records management.” It is unclear why this new definition would not readily encompass all types of records now held by contractors instead of agencies, lest they be removed from FOIA coverage merely by dint of a “contracting out” enterprise.

Also unclear is how a novel thing such as this might work in actual practice. Generally speaking, FOIA requesters know that they should make their requests to the agency (or in some cases agency component) that maintains the records sought, and agencies are obligated to search through their records for any that are responsive to a FOIA request’s terms. With the universe of records that are subject to the FOIA suddenly broadened by this provision, however, this becomes a much more complicated enterprise, far outside the norm for the FOIA’s usual administration, and it raises a host of questions. For instance, how will FOIA requesters gain the full benefit of this “agency record” expansion? Should they make their requests to an agency’s contractor, to the agency itself, or perhaps even to both? How can both requesters and agencies best ensure that adequate record (and electronic information) searches are in fact conducted with respect to this new statutory provision? And looking forward, will all disagreements over interpreting the new definition’s scope properly be preserved for litigation? When this provision took effect upon its enactment, agencies became obligated to promptly amend their FOIA regulations to address such questions (regulations which ought to be relatively uniform from one agency to the next) in order for the provision to be properly implemented.

Agencies also are obliged to put potential FOIA requesters on notice of the records that now can be sought by them under this provision. Indeed, under requirements that were added by the 1996 FOIA Amendments, each agency must maintain and promptly update a FOIA reference guide for the benefit of potential FOIA requesters, one that

serves as “a guide for requesting records or information from the agency” and addresses the “various types and categories” of records that are requestable there. 5 U.S.C. § 552(g). Inasmuch as this broadened “agency record” definition already is in effect, agencies now are out of compliance with this legal requirement as well.

**Definition of “Representative of the News Media.”** In another provision pertaining to the charging of fees, Congress also defined the term “representative of the news media,” which became a major part of the FOIA’s multi-tiered fee structure through the 1986 FOIA Amendments. It did so largely by combining and codifying the pertinent language of two sources -- the governmentwide fee guidelines that the Office of Management and Budget (OMB) issued by legislative direction in the wake of those amendments, see OMB Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,012, 10,018 (Mar. 27, 1987), and the D.C. Circuit’s FOIA fee decision in *National Security Archive v. DOD*, 880 F.2d 1381, 1383-85 (D.C. Cir. 1989). See 5 U.S.C. § 552(a)(4)(A)(ii), as amended by Pub. L. No. 110-175 (effective as of Dec. 31, 2007). But the combined codification language that Congress used is not exactly the same as what appears in those two sources, and it certainly differs from the content of existing agency regulations -- which means that agencies urgently need to amend their FOIA regulations for this purpose also, and OMB should finally update its 20-year-old governmentwide fee guidelines as well. This must happen without delay for proper implementation.

A controversial question left unresolved by this statutory definition is whether “bloggers” qualify as “representatives of the news media.” Much to the disappointment of many, they are not mentioned in Congress’s lengthy definition of the term, or even in the only committee report underlying the amendments, a Senate report dating back to April 30, 2007. Here, too, implementation regulations issued pursuant to APA notice-and-comment procedures should confront this, particularly by considering the significance of repeated individual statements by the provision’s Senate sponsors that their definition “will not automatically exclude” such requesters. This new definition also could hold significance for the granting of “expedited processing” under a provision added by the 1996 FOIA Amendments, as mentioned above, insofar as both parts of the statute now speak to the process of “disseminating information” to the public, 5 U.S.C. § 552(a)(6)(E)(v)(II), and agencies should be consistent in their implementation of the two provisions.

**Office of Government Information Services.** Congress took another novel step in the 2007 FOIA Amendments that almost immediately became controversial: It created a new office to deal with matters of governmentwide FOIA policy, the “Office of Government Information Services” (OGIS), and it placed it within the National Archives and Records Administration (NARA). Without mentioning the existing office that for decades has guided governmentwide policy under implied statutory authority -- the Justice Department’s Office of Information and Privacy (OIP), see 5 U.S.C. § 552(e)(6) -- Congress mandated that this new governmentwide FOIA policy office be established to “review” all agencies’ FOIA “policies and procedures,” to likewise review agencies’ FOIA “compliance,” and then to “recommend policy changes to Congress and the President to improve the [FOIA’s] administration.” 5 U.S.C. § 552(h)(1)-(2). This office also is to play a new statutory “ombudsman” role under the FOIA by “offer[ing] mediation services” and if need be “issu[ing] advisory opinions.” 5 U.S.C. § 552(h)(3). What’s more, while these five functions necessarily have to be discharged with existing NARA funding at least at the

outset, Congress pointedly specified, alone among all other parts of the bill, that the section containing this mandate “shall take effect on the date of enactment.” S. 2488, Sec. 10(b), Pub. L. No. 110-175.

At a conference held at American University Washington College of Law on January 16, NARA General Counsel Gary M. Stern recognized this “unfunded mandate” as immediately applicable, leading to the question of whether NARA might be able to get additional support for it through OMB in the Administration’s upcoming FY 2009 budget. This subject also was addressed at a counterpart conference held by the Justice Department later that day, but it reportedly leaked out that the Administration’s budget might instead attempt to “shift” funding to the Justice Department for this purpose, contrary to the mandate of the statute. Senators Leahy and Cornyn, thus alerted, each seized the opportunity to press new Attorney General Michael B. Mukasey on the point at an oversight hearing held on January 30, but to no avail.

On February 4, the Bush Administration’s last budget was released and it contained no proposed funding for OGIS at NARA. Rather, in a provision tucked at the end of an appendix dealing with the Commerce Department (where it presumably would have been able to escape detection had no one been alerted), the Administration proposed that the new OGIS functions be discharged by the Justice Department (i.e., OIP), not by NARA, and that, as part of the appropriations process, new subsection (h) of the FOIA be “repealed.” Predictably, such an ironically transparent gambit raised a furor in the FOIA-requester community, drew a sharp response to OMB from Senators Leahy and Cornyn, and led to increased media scrutiny of the relative neutrality of Justice and capabilities of OIP. As it now stands, it appears that the Administration will treat the OGIS mandate as if by entangling it in a lengthy appropriations process, even if no longer covertly, it can “run out the clock” on it this year. But Congress, which is expected to hold FOIA oversight hearings in both the House and the Senate this spring, may have other ideas.

**Executive Order Codification.** In a far less controversial vein, Congress also codified and thus perpetuated several elements of the executive order on the FOIA that was issued two years ago -- such as all agencies having a “Chief FOIA Officer,” a “FOIA Public Liaison,” and a “FOIA Service Center” (previously “FOIA Requester Service Center”). 5 U.S.C. § 552(j), (k), (l) (codifying, in part, Exec. Order No. 13,392). Agencies are statutorily required to comply with these requirements now, though in what appears to be a drafting error Congress included a separate “FOIA Public Liaison” provision that is largely duplicative and was not made effective upon enactment. See 5 U.S.C. § 552(a)(6)(B)(ii), *as amended by* Pub. L. No. 110-175 (effective as of Dec. 31, 2008).

**Tracking Information on FOIA Requests.** Mandating something else that long had been sought by FOIA requesters, Congress also required agencies to establish a formal “tracking system” for their FOIA requests by the end of the year, one that will allow requesters to obtain “information about the status of [their] request[s]” through “a telephone line or Internet service.” 5 U.S.C. § 552(a)(7). Although the Justice Department advised all federal agencies in January that this provision, too, just “codifies existing requirements set forth in Executive Order 13,392,” in fact it does much more than that: It compels an agency to come up with “an estimated date on which [it] will complete action on [a] request,” a date that for first time must be calculated and made readily available to FOIA requesters. 5 U.S.C. § 552(a)(7)(B)(ii).

**Time Limit Procedures.** Speaking of new complexity, and perhaps difficulty, the 2007 FOIA Amendments introduce a brand new statutory term to the Act -- the "tolling" of time limits during the pendency of an agency's request for information from the FOIA requester. 5 U.S.C. § 552(a)(6)(A)(ii), *as amended by* Pub. L. No. 110-175 (effective as of Dec. 31, 2008). They disjunctively provide that an agency "may make one request to the requester for information and toll" the Act's basic 20-working-day time limit if the information sought from the FOIA requester is "reasonably requested" by the agency "or . . . if necessary to clarify with the requester issues regarding fee assessment." 5 U.S.C. § 552(a)(6)(A)(ii)(I)-(II). "In either case," this amendment goes on to specify, "the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period." 5 U.S.C. § 552(a)(6)(A)(ii)(II). While the Justice Department in January suggested to other agencies that they may seek to heavily toll the Act's time limits with multiple information requests to their FOIA requesters, "in stages," the language of this amendment says otherwise. (At stake in this, of course, will be the triggering element of time-limit noncompliance for purposes of the potent "penalty" provision discussed above.) This amendment also makes clear that the Act's basic response time commences upon a request's receipt at the appropriate component of an agency, or no more than ten days after its receipt at "any component of the agency that is designated [to receive FOIA requests] in the agency's regulations." 5 U.S.C. § 552(a)(6)(A)(ii).

**Exemption Specification.** The closest that Congress came in these amendments to touching on the FOIA's exemptions is a provision that now mandates what can be called "exemption specification" -- but it should not be overlooked. The Act now mandates that all agencies make it a standard practice to state "the exemption under which [a] deletion is made," and to do so "at the place in the record where such deletion is made," i.e., not merely in overall language contained in a responding cover letter. 5 U.S.C. § 552(b) (concluding sentences), *as amended by* Pub. L. No. 110-175 (effective as of Dec. 31, 2007). This significant requirement was added to the amendments near the very end of the legislative process, at the behest of the House, and it began to apply to all agencies' FOIA processing immediately upon enactment. In the absence of proper attention to it, however, it is doubtful that it is being implemented throughout the executive branch as it ought to be, with full and timely compliance. Indeed, the Justice Department itself just observed that this now is standard practice at only "some agencies."

**Reports.** Lastly, the 2007 FOIA Amendments contain several provisions pertaining to FOIA-related reports, provisions which as a group (1) make extensive revisions to the contents of annual FOIA reports, including as to new categories of response times, agency component breakdowns, data on administrative appeals (with inexplicable variation between "days" and "business days"), and the long-sought addition of "average" to "median" time calculations, see 5 U.S.C. § 552(e)(1)-(2); (2) bolster the Act's administrative sanction mechanism by requiring reporting to Congress by the Attorney General and the Office of Special Counsel in all such cases, see 5 U.S.C. § 552(a)(4)(F); (3) explicitly require the Government Accountability Office to issue reports on FOIA implementation, see 5 U.S.C. § 552(i); and (4) call upon the Office of Personnel Management (OPM) to report to Congress by the end of the year on "whether changes to executive branch personnel policies could be made that would," among other things, bring about the "encouragement" and "enhance[ment]" of FOIA personnel, 5 U.S.C. § 552 note (likely codification). Interestingly, this latter report by OPM is to include consideration of

the need for further FOIA "awareness training" of agency employees, and Congress asked OPM to consider this with respect to the Privacy Act as well. *Id.*

Most significantly, Congress did not delay the effectiveness of its new annual FOIA report requirements, which means that they were in effect for the month prior to agencies' February 1 reporting deadline, but there is no indication that any federal department or agency made any effort to connect the two things at all. Much less, the Justice Department before that deadline suggested to other agencies that even at the February 1, 2009 reporting time they might file only "a partial year report" in relation to Congress's current requirements. Also lacking was advisory focus on a new provision that, although set apart from the other annual reporting requirements, should prove to be very significant to those who analyze the FOIA's administration (not to mention fairly distressing to agencies): "In addition, each agency shall make the raw statistical data used in its [annual FOIA] reports available electronically to the public upon request." 5 U.S.C. § 552(e)(3), as amended by Pub. L. No. 110-175 (effective as of Dec. 31, 2007). Not only is this provision effective immediately, there is no good reason why it would not apply to all such statistical data, for years past, that doubtless many agencies still have on hand.

In sum, the 2007 FOIA Amendments hold more than enough complexity to threaten their proper implementation, as already is evident, and to yield litigation for many years to come, perhaps well through the next decade. Ordinarily, one expects Congress to work up to enacting a new set of FOIA amendments only every decade -- in an uncanny cycle of congressional attention to government openness that traces back to the enactment of the APA in 1946, through the commencement of both House and Senate pre-FOIA hearings in 1956, the FOIA's enactment in 1966, its major amendment in 1974 (two years "early," no doubt due to Watergate), its major amendment in 1986 and again in 1996, and up to the amendments of 2007 (no doubt delayed by the issuance of Executive Order 13,392).

This time around, however, there are strong indications that Congress might "break the mold" of this 60-year legislative cycle by revisiting the Act sooner than 2016, possibly even right away. The chairmen of the both committees holding FOIA jurisdiction in the Senate (Sen. Leahy) and the House (Rep. Henry Waxman) have made statements suggesting as much. Further, there is the fact that in 2007 Congress failed in its effort to include a quite popular amendment of one exemption, Exemption 3, due to an unrectified drafting problem (see Sec. 8 of S. 849, as passed by the Senate on Aug. 3, 2007) that left it providing the opposite of what was intended; it stands as the kernel around which more comprehensive FOIA reform amendments could readily be developed. Whether the development of such an amendment package would include the consideration of provisions proposed by agencies based on their own FOIA experience -- something glaringly absent from the Bush Administration's last-minute handling of the FOIA amendment process in 2007, despite its historical antecedents -- remains to be seen.

One thing is certain, however: There are many people -- members of the FOIA-requester community, Members of Congress, and agency FOIA officers alike -- who have sound ideas for the FOIA's further improvement, ideas that should not wait another decade to be considered.

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