OPEN Government Act Restores Promise of FOIA

by James C. Ho

Christmas came a few days early this year for advocates of open government when, on December 18, Congress passed the first major reform of the Freedom of Information Act in over a decade. Just hours before the beginning of the new year, the President quietly signed into law the Openness Promotes Effectiveness in our National Government Act. The OPEN Government Act reflects years of perseverance of two longstanding champions of FOIA, Senators Patrick Leahy (D-Vt.) and John Cornyn (R-Tex.).

Background

FOIA offers every American one simple promise: the right to know what your government is doing. Under that law, our government is based on a presumption in favor of disclosure. Openness must sometimes give way to competing values, such as individual privacy or national security. But the people have a fundamental and presumptive right to know, and the burden is on the government to prove otherwise – not the other way around.

As good government advocates across the political spectrum have long realized, however, the promise of FOIA has not always been fulfilled.

When first signed into law by a reluctant President Lyndon Johnson on July 4, 1966, FOIA required all federal agencies, "upon request," to make agency records "promptly available to any person," unless the record is specifically exempted by law. Individuals could seek injunctive relief against recalcitrant agencies in federal district court, where government lawyers would have the burden to justify the decision to withhold documents.

But the law contained noticeable weaknesses. It imposed no consequences if an agency failed to comply with a request for documents; no deadlines on agencies to respond to such requests; and no limits on how much an agency could charge requestors. Congress amended FOIA in 1974 in response to these concerns, and again in 1986 and 1996. But important gaps remain.

Recovery of Attorney Fees

For example, under the 1974 amendments, any person can now seek to recover the costs of attorney fees from the government, in the event that an agency forces the requestor to go to court, and the court subsequently rejects the agency's basis for nondisclosure. This was an important development, because unlike other causes of action, there are no money damages for winning one's FOIA claim – and thus no compensation available to pay for one's attorney fees.

But federal agencies have since uncovered a loophole that allows them to effectively avoid reimbursing citizens for attorney fees at will, notwithstanding the express language and underlying spirit of FOIA. In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), the U.S. Supreme Court, by a 5-4 vote, announced a new principle of law for determining when a party may recover attorney fees under federal statute.

It is well established that a party may seek recovery under an attorney fee statute when the government loses a lawsuit on the merits or agrees to a settlement enforced by consent decree. Under *Buckhannon*, however, the government does not have to pay attorney fees absent a "judicially sanctioned change in the legal relationship of the parties" (emphasis added).

That means that any government agency can effectively nullify FOIA's attorney fee provision simply by refusing to disclose documents, forcing the requestor to file suit, and then relinquishing the documents moments before a court enters judgment against the agency. An agency may thereby moot the litigation, and avoid payment of fees, even if it is clear that it would not have disclosed the documents but for the lawsuit – because under these circumstances, the requestor will not have received any "judicially sanctioned" form of relief.

The late Chief Justice William Rehnquist himself acknowledged these risks. As he explained in his majority opinion in *Buckhannon*, "fear of mischievous defendants only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." As noted, monetary damages are not available under FOIA. Justice Antonin Scalia likewise observed that the *Buckhannon* ruling will "sometimes den[y] fees to the plaintiff with a solid case whose adversary slinks away on the eve of judgment."

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Thus, as Senator Cornyn testified before a House committee on May 11, 2005, "the *Buckhannon* ruling effectively taxes all potential FOIA requestors. As a result, many attorneys could stop taking on FOIA clients – and many FOIA requestors could stop making even legitimate and public-minded FOIA requests – rather than pay what one might call the Buckhannon tax."

He supplemented his testimony with various incidents in which courts suspected government agencies of exploiting this loophole but were nevertheless required to deny attorney fees under *Buckhannon*. *See, e.g., Landers v. Department of Air Force*, 257 F. Supp. 2d 1011 (S.D. Ohio 2003).

Yet despite this evidence, Justice Department lawyers vociferously denied the existence of any *Buckhannon* effect throughout negotiations with Capitol Hill. A Department representative even testified against the need for any change in law.

The OPEN Government Act eliminates the *Buckhannon* tax. Under section 4 of the Act, the agency may now be required to pay attorney fees if, by filing suit, the requestor secures a judicial order, an enforceable written agreement or consent decree, or "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial."

Agency Deadlines and Penalties

The 1974 amendments also imposed a 10-day deadline (expanded to 20 days in 1996) on agencies to prepare at least an initial response to any request for documents. But the deadlines have always lacked teeth.

In fact, according to a survey by the National Security Archive, 53 of 57 federal agencies reported backlogs in processing. At least 12 agencies admitted holding requests that have been pending for more than 10 years. The oldest unprocessed FOIA request has languished at the State Department since 1987.

When it was first introduced by Senators Cornyn and Leahy in 2005, the OPEN Government Act would have imposed dramatic consequences for agency tardiness. Any agency failing to respond within the 20-day period would be denied the opportunity to assert any exemption under FOIA (except under limited circumstances such as endangerment to national security or disclosure of personal private information protected by the Privacy Act of 1974) unless the agency could demonstrate, by clear and convincing evidence, good cause for failure to comply with the time limits. This enforcement mechanism was inspired by similar provisions under Texas law – and by the desire, in Senator Cornyn's words, to "bring a little Texas sunshine to Washington."

As enacted, the OPEN Government Act imposes more modest sanctions for agency tardiness. The 1974 amendments placed important limits on the fees that agencies may charge requesters for the costs of searching, reviewing, and duplicating documents. Under Section 6 of the OPEN Government Act, agencies are further restricted from imposing such fees if they fail to comply with the statutory deadlines without cause. This legislation marks the first time that agencies will suffer consequences of any kind for failing to meet deadlines under FOIA. (The provision takes effect at the end of 2008.)

Improving FOIA Administration

The Act also provides important updates to various provisions of FOIA, in light of changes in technology and government administration.

In particular, section 3 of the Act codifies a definition of the term "representative of the news media" for purposes of FOIA's privileged fee status for media requestors. The definition recognizes the growing influence of the Internet, and gives bloggers and other Web-based publishers, for the first time, an opportunity to take advantage of FOIA's fee waiver provision.

Section 9 makes clear that FOIA applies even when the government subcontracts recordkeeping functions to private contractors.

Other provisions of the OPEN Government Act are designed to further improve the administration of FOIA in a variety of ways. For example, Section 7 of the Act requires all agencies, by the end of this year, to establish individualized tracking numbers for all FOIA requests that will take longer than 10 days to process, and to put into place a telephone or Internet service to allow citizens to track the status of their requests.

The Act requires each agency to designate a chief FOIA officer, at the Assistant Secretary level or higher, to strengthen political accountability for FOIA compliance –

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thereby codifying into law similar provisions of an executive order issued by President Bush on December 14, 2005.

It also improves agency disclosure requirements regarding compliance with FOIA, including disclosure of the ten oldest active requests pending at each agency and other statistical information concerning agency response time and delay.

Finally, the Act also establishes a new Office of Government Information Services, within the National Archives and Records Administration, to review and improve FOIA compliance policies across the executive branch, and to recommend further changes to Congress and the President. In addition, the new office may serve as a FOIA ombudsman and mediate disputes between requestors and agencies as an alternative to litigation, including the issuance of advisory opinions. (Recent press reports indicate, however, that the Administration may be attempting to locate the new office in the Justice Department, which defends the federal government in FOIA suits, rather than the National Archives.)

Conclusion

The OPEN Government Act offers renewed hope that the spirit of openness that motivated the original drafters of FOIA will, at long last, become a reality. It is also a shining demonstration that bipartisanship can still thrive, even in today's partisan Washington. As Senators Cornyn and Leahy explained in a joint op-ed announcing their effort in March 2005: "Openness in government is not a Republican or a Democratic issue. Any party in power is always reluctant to share information, out of an understandable – albeit ultimately unpersuasive – fear of arming its enemies and critics. Whatever our differences may be on the various policy controversies of the day, we should all agree that those policy differences deserve as full and complete a debate before the American people as possible." There is real cause for hope that the OPEN Government Act will help improve the quality of that debate.

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