

Openness Promotes Effectiveness In Our National Government Act Of 2007
("Open Government Act Of 2007")
Section-By-Section Analysis

Sec. 1. Short Title. The Open Government Act of 2007.

Sec. 2. Findings. The findings reiterate the intent of Congress upon enacting the Freedom of Information Act (FOIA), 5 U.S.C. 552 as amended, and restate FOIA's presumption in favor of disclosure.

Sec. 3. Protection of Fee Status for News Media. This section amends 5 U.S.C. 552(a)(4)(A)(ii) to make clear that independent journalists are not barred from obtaining fee waivers solely because they lack an institutional affiliation with a recognized news media entity. In determining whether to grant a fee waiver, an agency shall consider the prior publication history of the requestor. If the requestor has no prior publication history and no current affiliation with a news organization, the agency shall review the requestor's plans for disseminating the requested material and whether those plans include distributing the material to a reasonably broad audience.

Sec. 4. Recovery of Attorney Fees and Litigation Costs. This section, the so-called *Buckhannon* fix, amends 5 U.S.C. 552(a)(4)(E) to clarify that a complainant has substantially prevailed in a FOIA lawsuit, and is eligible to recover attorney fees, if the complainant has obtained relief through a judicial or administrative order or if the pursuit of a claim was the catalyst for the voluntary or unilateral change in position by the opposing party. The section responds to the Supreme Court's ruling in *Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598 (2001), which eliminated the "catalyst theory" of attorney fee recovery under certain Federal civil rights laws. FOIA requestors have raised concerns that the holding in *Buckhannon* could be extended to FOIA cases. This section preserves the "catalyst theory" in FOIA litigation.

Sec. 5. Disciplinary Actions for Arbitrary and Capricious Rejections of Requests. FOIA currently requires that when a court finds that agency personnel have acted arbitrarily or capriciously with respect to withholding documents, the Office of Special Counsel shall determine whether disciplinary action against the involved personnel is warranted. *See* 5 U.S.C. 552(a)(4)(F). This section of the bill amends FOIA to require the Attorney General to notify the Office of Special Counsel of any such court finding and to report the same to Congress. It further requires the Office of Special Counsel to report annually to Congress on any actions taken by the Special Counsel to investigate cases of this type.

Sec. 6. Time Limits for Agencies to Act on Requests. The section clarifies that the 20-day time limit on responding to a FOIA request commences on the date on which the request is first received by the agency. Further, the section states that if the agency fails to respond within the 20-day limit, the agency may not then assert any FOIA exemption under 5 U.S.C. 552(b), 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 can demonstrate, by clear and convincing evidence, good cause for failure to comply with the time limits.

Sec. 7. Individualized Tracking Numbers for Requests and Status Information.

Requires agencies to establish tracking systems by assigning a tracking number to each FOIA request; notifying a requestor of the tracking number within ten days of receiving a request; and establishing a telephone or Internet tracking system to allow requestors to easily obtain information on the status of their individual requests, including an estimated date on which the agency will complete action on the request.

Sec. 8. Specific Citations in Exemptions. 5 U.S.C. 552(b) (3) states that records specifically exempted from disclosure by statute are exempt from FOIA. This section of the bill provides that Congress may not create new statutory exemptions under this provision of FOIA unless it does so explicitly. Accordingly, for any new statutory exemption to have effect, the statute must cite directly to 5 U.S.C. 552(b) (3), thereby conveying congressional intent to create a new (b) (3) exemption.

Sec. 9. Reporting Requirements. This section adds to current reporting requirements by mandating disclosure of data on the 10 oldest active requests pending at each agency, including the amount of time elapsed since each request was originally filed, and requires additional breakdowns depending on the length of delay. This section further requires agencies to calculate and report on the average response times and range of response times of FOIA requests. (Current requirements mandate reporting on the median response time.) Finally, this section requires reports on the number of fee status requests that are granted and denied and the average number of days for adjudicating fee status determinations by individual agencies.

Sec. 10. Openness of Agency Records Maintained by a Private Entity. This section clarifies that agency records kept by private contractors licensed by the government to undertake recordkeeping functions remain subject to FOIA just as if those records were maintained by the relevant government agency.

Sec. 11. Office of Government Services. This section establishes an Office of Government Information Services within the Administrative Conference of the U.S. Within that office will be appointed a FOIA ombudsman to review agency policies and procedures, audit agency performance, recommend policy changes, and mediate disputes between FOIA requestors and agencies. The establishment of an ombudsman will not impact the ability of requestors to litigate FOIA claims, but rather will serve to alleviate the need for litigation whenever possible.

Sec. 12. Accessibility of Critical Infrastructure Information. This section requires reports on the implementation of the Critical Infrastructure Information Act of 2002, 6 U.S.C. 133. Reports shall be issued from the Comptroller General to the Congress on the number of private sector, state, and local agency submissions of CII data to the Department of Homeland Security and the number of requests for access to records. The

Comptroller General will also be required to report on whether the nondisclosure of CII material has led to increased protection of critical infrastructure.

Sec. 13. Report on Personnel Policies Related to FOIA. This section requires the Office of Personnel Management to examine how FOIA can be better implemented at the agency level, including an assessment of whether FOIA performance should be considered as a factor in personnel performance reviews, whether a job classification series specific to FOIA and the Privacy Act should be considered, and whether FOIA awareness training should be provided to federal employees.