

Q&A

Obtaining Documents Through the Recently-Amended Freedom of Information Act

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February 2008

Q: I am researching an issue for possible litigation. I understand that the U.S. Department of Health and Human Services (DHHS) may have stated a position on the matter. If this is true, I need to know what the position is and what method the agency used to transmit it (e.g. opinion letter, regional letter, e-mail).¹ I asked state employees for copies of relevant documents from DHHS, but they told me they do not have anything. How can I get the documents, if any, from the federal government?

A: You can submit a Freedom of Information Act (FOIA) request to DHHS, asking for documents that refer or relate to the issue you are investigating. While the FOIA has existed for years, it has often been ignored because of the unreasonably long delays between the date of the request and the government's response (at times, exceeding two years). However, Congress recently amended the FOIA to make it a better tool for obtaining documents and improving government accountability.

Background

The "basic purpose" of the FOIA is to "ensure an informed society, . . . to check against corruption and to hold the governors accountable to the governed." *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Enacted in 1966, the FOIA applies to each agency within the executive branch of the government, including DHHS. See 5 U.S.C. § 552(f)(1).

Last year, for this first time in a decade, Congress amended the FOIA when it passed the *Openness Promotes Effectiveness in our National Government Act of 2007* (also called the *OPEN Government Act*), Pub. L. No. 110-175 (S. 2488), 121 Stat. 2524 (Dec. 31, 2007). The congressional findings reaffirm the importance of open government:

¹ The form of the document will determine the deference that it will be given in court. For information about deference in Medicaid cases, see Sarah Somers, National Health Law Program, *An Advocate's Guide to Deference* (Feb. 2008), available at <http://www.healthlaw.org> or by contracting the NC office, (919) 9968-6308 (x103).

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- “The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees.” (quoting *Barr v. Matteo*, 360 U.S. 564 (1959));
- “[D]isclosure, not secrecy, is the dominant objective of the Act.” (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 352 (1976));
- Government should be open and accessible to the American people and “always based not upon the ‘need to know’ but upon the fundamental ‘right to know.’”

OPEN Government Act, Pub. L. No. 110-175, § 2.

The OPEN Government Act includes provisions that establish stricter agency response timeframes, impose penalties on agencies that fail to make timely responses, and create an oversight Office of Government Information Services within the National Archives and Records Administration (NARA). The President signed the legislation into law on December 31, 2007.

Unfortunately, President Bush’s commitment to the OPEN Government Act is already being questioned. Senators Patrick Leahy and Thad Cochran, drafters of the 2007 legislation, have objected a provision in the President’s fiscal year 2009 budget that attempts to repeal parts of the Act and move the functions of the Office of Government Information Services from the independent NARA to the Department of Justice. See 154 *Cong. Rec.* S1050-02, 2008 WL 398113 (Feb. 14, 2008) (Statements of Senators Leahy and Cochran). According to Senator Leahy, this proposal “is not only contrary to the express intent of the Congress, but contrary to the very purpose of this legislation—to ensure the timely and fair resolution of American’s FOIA requests.” *Id.* at S1050. Implementation will need to be monitored in the coming months.

The requirements for disclosure

The FOIA requires records and information to be released to the public upon request. See 5 U.S.C. § 552; see also 45 C.F.R. part 5 (DHHS regulations implementing the FOIA). This includes final opinions and orders in the adjudication of cases, “statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register,” and administrative staff manuals and instructions to staff that affect a member of the public. 5 U.S.C. § 552(a)(2)(A)-(C). Records and information include documents on file with the agency in any format, including electronic formats, and also include any information that is maintained for an agency by an entity under government contract for purposes of records management. *Id.* at § 552(f) (as amended by OPEN Government Act, Pub. L. No. 110-175, § 9).

For records created on or after November 1, 1996, within one year after the creation date, the agency must make the records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. *Id.* at § 552(a)(2) (as amended by the Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231 (H. 3082), 110 Stat. 3048, Oct. 2, 1996). To avoid a “clearly unwarranted invasion of personal privacy,” the agency can delete identifying details, so long as the justification for the deletion is explained fully in writing and, where possible, indicated at the place in the record where the deletion occurred. *Id.*

Except in unusual circumstances, the agency must determine whether to comply with a request within 20 working days after its receipt. The agency must immediately notify the requester of the decision and of the right to appeal any adverse determination to the head of agency, who must decide the appeal within 10 working days. *Id.* at § 552(a)(6)(A). This provision was strengthened in the OPEN Government Act. Effective December 31, 2008, the 20-day period cannot be tolled by the agency except that the agency can make one request for additional information and toll the 20-day period while it is awaiting the response or to clarify issues regarding the search fee that the agency has assessed. In either case, the agency’s receipt of the requester’s response ends the tolling period. OPEN Government Act, Pub. L. No. 110-175, § 6. And, if the agency fails to meet the 20-day deadline it cannot assess any search fees unless an unusual circumstance exists. *Id.*

As noted, the timeframe to be extended only in “unusual circumstances,” defined to mean, “only to the extent reasonably necessary to the proper processing of the particular requests,” specifically for the need to:

- search for and collect records from field facilities or other establishments that are separate from the office processing the request;
- search for, collect, and examine a voluminous amount of separate and distinct records; or
- consult “with all practicable speed” with another agency having a “substantial interest” in the determination of the request.

5 U.S.C. § 552(a)(6)(B)(iii). A written notice to the person must explain the reason for the extension and the date on which a determination is expected to be dispatched (in most instances not to exceed 10 working days). Moreover, when the request cannot be processed within the time limit, the agency must provide the person with an opportunity to limit the scope of the request so that it can be processed with the time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or modified request. *Id.*²

² By February 1st of each year, the agency must report to the Attorney General on the extent to which documents have been withheld, the time frames for processing requests, and the full-time staff devoted to processing requests. These reports must be made available to the public. *See* 5 U.S.C. § 552(e) (as amended by OPEN Government Act, Pub. L. No. 110-175, § 8).

Agencies must have processes for expediting requests and respond within 10 days after the date of the request in cases where the person shows a compelling need. *Id.* at § 552(a)(6)(E).

In most cases, the agency can charge a fee for providing the documents. The agency must publish the fees schedule, including guidelines for waiving or reducing fees. *Id.* at § 552(a)(4); see 45 C.F.R. §§ 5.41-5.45 (DHHS fee procedures). Notably, the FOIA requires documents to be furnished without charge or at a reduced charge

if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii). The fee waiver provision was added in 1974 in “an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,” such as from journalists and non-profit public interest groups. See *Ettlinger v. F.B.I.*, 596 F. Supp. 867, 872 (D. Mass. 1984) (citing Senate Committee on the Judiciary, Amending the Freedom of Information Act, S. Rep. No. 854, 93d Cong., 2d Sess. 11 (1974)).³

Permissible exemptions

The FOIA provides that agency documents must be provided to the public upon request, unless the document falls within one of the nine exceptions listed in the FOIA:

1. The records are classified as secret pursuant to an Executive Order of secrecy in the interest of national defense or foreign policy;
2. The records relate “solely to the internal personnel rules and practices” of the agency;
3. The records are specifically exempted from disclosure by another statute, provided that statute leaves no discretion on the issue;
4. The records contain trade secrets and commercial or financial information that is privileged or confidential;
5. The records are inter- or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency (e.g. attorney work product, attorney-client communications);⁴

³ The fee waiver provision was amended again in 1986 to remove continued “roadblocks and technicalities.” 132 Cong. Rec. S16, 489-01 (daily ed. Oct. 15, 1986) (Statement of Sen. Leahy). See also 132 Cong. Rec. S14, 270-01 (daily ed. Sept. 30, 1986) (Statement of Sen. Leahy) (“A request can qualify for a fee waiver even if the issue is not of interest to the public at large. Public understanding is enhanced when information is disclosed to the subset of the public most interested, concerned, or affected by a particular action or matter.”).

⁴ “The FOIA is not to be used as a substitute for the traditional means of discovery available to a litigant . . . Accordingly, insofar as a requester seeks information merely to advance private lawsuits-or

6. The records are personnel, medical, and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
7. The records are compiled for law enforcement purposes, but only to the extent that release could reasonably be expected to interfere with enforcement proceedings, deprive a person of a fair trial, constitute an unwarranted invasion of personal privacy, disclose the identity of a confidential source, reveal special agency investigatory techniques and procedures, or endanger the life or safety of any individual;
8. The records are prepared by or for the use of an agency responsible for the regulation or supervision of financial institutions;
9. The records pertain to geological and geophysical information and data concerning wells.

5 U.S.C. § 552(b). The agency must note on a partially released record which exemption is being used to justify the withholding. See 5 U.S.C. § 552(b) (as amended by OPEN Government Act, Pub. L. No. 110-175, § 12).

The standard that agencies are to apply when making disclosure decisions has changed depending on the President. Congress finally weighed in as part of the OPEN Government Act. The first Bush administration defended agency withholding whenever there was a “substantial legal basis” for doing so. The Clinton administration replaced this policy with a “presumption of disclosure” that allowed use of an exemption only “where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption.” Memo from Attorney General Reno for Heads of Departments and Agencies, Oct. 4, 1993, at http://www.doj.gov/oip.foia_updates/Vol_XIV_3/page3.htm. Attorney General Ashcroft’s policy replaced the “foreseeable harm” standard with a policy that instructed agencies to base their decision to use an FOIA exemption on “sound footing, both factually and legally.” Memorandum from John Ashcroft, Attorney General, for Heads of all Federal Departments and Agencies (Oct. 12, 2001), available at <http://www.usdoj.oip/foiapost/2001foiapost19.htm>.⁵ Last year, Congress stepped in to stop the political see-saw, finding that

the Freedom of Information Act establishes a ‘strong presumption in favor of disclosure’ as noted by the United States Supreme Court in *United States Department of State v. Ray* (502 U.S. 164 (1991)), a presumption that applies to all agencies governed by the Act.

administrative claims—we will consider disclosure less “likely to contribute ... to public understanding.” *In re Steele*, 799 F.2d 461, 466 (9th Cir. 1986) (quoting 5 U.S.C. § 552(a)(4)(A)).

⁵ The Ashcroft memorandum also instructed agencies that a “wide range of information” could be withheld under Exemption 2 (regarding internal practices of the agency).

OPEN Government Act, Pub. L. 110-175, § 2(3).

Private enforcement

An individual who believes that the agency has improperly withheld records may bring an action in the United States District Court in which the complainant resides or has his principal place of business, in which the agency records are located, or in the District of Columbia. 5 U.S.C. § 552(a)(4)(B).

In addition, a requester is deemed to have exhausted his administrative remedies if the agency fails to comply with the applicable time limit provisions of the statute. If the government can show the court that “exceptional circumstances” exist and that the agency is exercising “due diligence” in responding to the request, the court can retain jurisdiction and allow the agency additional time to complete its review of the records. *Id.* at § 552(a)(6)(C). However, exceptional circumstances do not include a delay that results from a predictable agency workload of requests, unless the agency demonstrates reasonable progress in reducing the backlog of pending requests. If the person making the request refuses to reasonably modify the request or arrange an alternative time frame, this will be a factor in determining whether “exceptional circumstances” exist *Id.*

The district court exercises *de novo* review; judicial review is limited to the record before the agency. *Id.* at § 552(a)(4)(A). The court can enjoin the agency from withholding the documents and order production of them.

The court can assess attorney fees and other litigation costs against the United States. *Id.* at § 552(a)(4)(E). The OPEN Government Act establishes a right to attorney fees and litigation costs when the complainant has “substantially prevailed” by obtaining relief through either a judicial order, an enforceable written agreement or consent decree, or a voluntary or unilateral change in position by the agency. See OPEN Government Act, Pub. L. No. 110-175, § 4 (amending 5 U.S.C. § 552(a)(4)(E)).⁶ See *also* 5 U.S.C. § 552(a)(4)(F) (as amended by the OPEN Government Act, Pub. L. No. 110-175, §.5) (authorizing proceedings to determine whether disciplinary action is warranted against an employee who was primarily responsible for a wrongful withholding and requiring annual reports to Congress on the number of such actions).

Making the FOIA more responsive

To aid requesters, the OPEN Government Act amended the FOIA to requires

⁶ See H.R. Rep. No. 110-45, at 4 (2007), at <http://www.fas.org/sgp/congress/2007/hrpt110-45.pdf> (stating that this section clarifies that *Buckhannon Bd. and Care Home v. W. Va. Dept. of Health and Human Resources*, 532 U.S. 598 (2001), which rejected the “catalyst theory” of attorney fee recovery and required the litigant to prevail through a court ruling, does not apply to FOIA cases. If the agency provides the records before a court decision, the requester may receive attorney fees and litigation costs. *Id.*

each agency to make an FOIA Public Liaison available to assist in the resolution of disputes. It also requires each agency to establish a tracking system that will assign an individualized tracking number for each request that will take longer than 10 days to process. The agency must also establish a telephone line or Internet service that provides information about the status to the request, including the date on which the agency received the request and an estimated date on which the agency will complete action on the request. See OPEN Government Act, Pub. L. No. 110-175, § 7 (adding 5 U.S.C. § 552(a)(7)) (effective Dec. 31, 2008).

Government agencies are also required to report extensive information about their processing of requests, and these reports must be made available to the public on request. *Id.* at § 8 (amending 5 U.S.C. § 552(e)). Finally, the Office of Government Information Services is also established within the independent National Archives and Records Administration. The Office will review policies and agency compliance, make recommendations to Congress and the President on ways to improve administration of the FOIA, and offer mediation services to resolve disputes between requesters and agencies. See *Id.* at § 10 (adding 5 U.S.C. § 552(h)(7)).⁷

Filing a request with DHHS

You can submit an FOIA request to DHHS through a letter. Mark both the envelop and its contents: "Freedom of Information Act Request" and mail to:

Centers for Medicare & Medicaid Services
Office of Strategic Operations and Regulatory Affairs
Freedom of Information Group
Room N2-20-16
7500 Security Boulevard
Baltimore, Maryland 21244-1850

Rather than write a letter, you can use a pre-print developed by DHHS: <http://www.cms.hhs.gov/AboutWebsite/Downloads/FOIARecordsRequestForm.pdf>. You can also file on line: <http://www.hhs.gov/foia/request/index.html>.

Conclusion

For over 40 years, the FOIA has existed to improve government accountability and help keep citizens informed. The OPEN Government Act of 2007 is designed to make the FOIA more user-friendly and government more responsive. The National Health Law Program can assist you with obtaining and reviewing documents.

⁷ The President's FY 2009 budget proposes: 'The Department of Justice shall carry out the responsibilities of the office established in 5 U.S.C. 552(h). . . . In addition, subsection (h) of section 552 of title 5, United States Code, is hereby repealed. . . ." See Commerce, Justice, and Related Agencies Appropriations Act, 2008, § 519 of Title V of the Department of Commerce; p. 239 of the Appendix. As noted above, Senators Leahy and Cochran have voiced bipartisan objection to this attempted repeal.

