

# **An Analysis of Selected Sections of the "OPEN Government Act of 2007"**

**March 16, 2007**

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### **SEC. 3 PROTECTION OF FEE STATUS FOR NEWS MEDIA.**

Section 3 would require agencies to consider a FOIA requester's past publication history or his/her stated intent to distribute information to a reasonably broad audience when considering whether to grant the requester news media status. Requesters with such a history or stated intent would be eligible for the reduced fees that the status carries under FOIA.

This section would greatly help a new generation of information sharers -- freelance writers, bloggers and others -- who may not work for a traditional media outlet, but nonetheless intend to distribute information gathered under FOIA to a wide audience.

This section would codify court rulings in two federal circuits where courts have recognized the National Security Archive, the Electronic Privacy Information Center (EPIC) and Tax Analysts as eligible for news media status.

The Archive, housed at George Washington University, was "representative of the news media" and therefore eligible for reduced FOIA fees in one of its requests to the Department of Defense, the U.S. Court of Appeals for the District of Columbia ruled in July 1989. Judge Douglas H. Ginsburg noted that although the Archive had previously published only one book (about secret U.S. military assistance to Iran and the Contras), "it has expressed a firm intention, which DoD does not here question, to publish a number of what it refers to as 'document sets.'"

Judge Ginsburg also noted the legislative history of the phrase "representative of the news media." "Viewed in isolation, it is not self-evident what that term covers, but when we turn to the legislative history of [the Freedom of Information Reform Act of 1986] for guidance, we see that the sponsors were not in any disagreement relevant to the resolution of this issue; they unambiguously envisioned that an organization such as the Archive comes within the term." (*National Sec. Archive v. U.S. Dept. of Defense*, 880 F.2d 1381, D.C.Cir. 1989)

Judge Abner Mikva of the U.S. District Court of Appeals in Washington, D.C., cited *National Security Archive* in a 1992 ruling that the group Tax Analysts is a representative of the news media. "The fact that *Tax Notes'* readership is relatively small and largely composed of tax attorneys, accountants and economists is irrelevant to the point that Tax Analysts, which is in the business of disseminating information, is a news organization," Judge Mikva wrote. (*Tax Analysts v. U.S. Dept. of Justice*, 845 F.2d 1060, D.C.Cir. 1988), *aff'd* 492 U.S. 136, 109 S.Ct. 2841, 106 L.Ed.2d 112 (1989)).

Judge John D. Bates of the U.S. District Court in Washington, D.C., cited *National Security Archive* in ruling in 2003 that EPIC was eligible for news media status in its

FOIA request to the Department of Defense because it had published seven books on privacy, technology and civil liberties, disseminated information it gathered in a biweekly newsletter, and was considered a news organization by other government agencies.

“Simply put, there are no material differences between the National Security Archive and EPIC for purposes of the news media status determination. Like the Archive, EPIC's publication and sale of numerous books in the areas of privacy and civil liberties qualify it as ‘a representative of the news media,’” Judges Bates wrote. “Indeed, the publication of books in which EPIC has already actually engaged far surpasses the publishing plan that was, standing alone, sufficient in *National Security Archive* to conclude that DoD erred under [the Freedom of Information Reform Act of 1986] and DoD regulations in denying news media status to the Archive.” (*Electronic Privacy Information Center v. Dept. of Defense*, 241 F.Supp.2d 5, (D.D.C., 2003))

Finally, Judge Ann Aiken of the U.S. District Court in Oregon ruled in 2003 that the Institute for Wildlife Protection was a representative of the news media in its FOIA request to the U.S. Fish and Wildlife Service.

“Congress intended independent researchers, journalists, and public interest watchdog groups to have inexpensive access to government records in order to provide the type of public disclosure believed essential to our society. Moreover, in the 1986 amendments to FOIA, Congress ensured that when such requesters demonstrated a minimal showing of their legitimate intention to use the requested information in a way that contributes to public understanding of the operations of government agencies, no fee attaches to their request,” Judge Aiken wrote. (*Institute for Wildlife Protection v. U.S. Fish and Wildlife Service*, 290 F.Supp.2d 1226, D.Or., 2003)

**SEC. 4**  
**RECOVERY OF ATTORNEY FEES AND LITIGATION COSTS.**

Section 4 would entitle a FOIA requester to recover attorney fees if the filing of a lawsuit results in the requester receiving new information, whether through court order, administrative action, an enforceable agreement – or simply because the agency voluntarily changes its position and releases the information.

That was substantially the case before 2001, but changed when the U.S. Supreme Court, in *Buckhannon Bd. & Care Home Inc. v. W. Va. Dep't of Health & Human Res.*, rejected the possibility that a plaintiff could recover attorney fees in cases where his/her lawsuit resulted in "a defendant's voluntary change in conduct ...."

*Buckhannon*, when applied to FOIA, meant it became increasingly common for agencies to partially or fully release information requested under FOIA before a substantive court ruling, leaving plaintiff requesters unable to recover attorney fees.

Tom Curley, president and CEO of The Associated Press, told the Senate Judiciary Committee March 14, 2007, that the wire service "can litigate a FOIA denial for years and still not get our legal fees reimbursed if an agency turns over the goods before a court actually orders it to do so."

And Clark Hoyt of McClatchy Newspapers, told the House Subcommittee on Information Policy, Census and National Archives on Feb. 14, 2007, that it was left with more than \$100,000 in legal bills after the Veterans Administration released a database and other information requested under FOIA before the news service's FOIA lawsuit went to trial.

That's a price most small businesses and individual constituents cannot afford.

Last year, the *Buckhannon* precedent prevented the U.S. District Court in Seattle from awarding attorney fees in a case involving the Internal Revenue Service's last-minute release of information to Pacific Fisheries Inc. The company sued the IRS in December 2004, five months after filing its request. In March 2006, with an already extended court deadline for filing motions just days away, the IRS released the requested information.

The U.S. District Court clearly wanted to award Pacific Fisheries attorney fees. U.S. District Judge James L. Robart, bound by *Buckhannon* but recognizing that the IRS acted egregiously in waiting until the possibility of court-order appeared imminent, instead ordered the IRS to show why it should not have to pay sanctions under an excessive-cost provision governing attorneys in federal cases.

"The statute [28 U.S.C. § 1927] permits a court to assess attorneys' fees against counsel who 'unreasonably and vexatiously' multiply proceedings in litigation," Judge Robart wrote. "Here, it appears that the [IRS] 'unreasonably and vexatiously' multiplied proceedings." (Not Reported in F.Supp.2d, 2006 WL 1635706 (W.D.Wash.), 98 A.F.T.R.2d 2006-6701, 2006-2 USTC P 50,607)

The IRS last year agreed to pay \$17,274 to Pacific Fisheries for fees and costs incurred from litigating the matter in lieu of facing formal sanctions from the court.

*Buckhannon* also prevented University of Delaware Professor Ralph Begleiter, a former CNN correspondent, from collecting attorney fees in a case involving his April 2004, request for information that *already had been released to another FOIA requester*.

Begleiter sought copies of 361 photographs of honor ceremonies at Dover Air Force Base for fallen U.S. military. Nearly six months after filing his FOIA request, Begleiter sued.

His lawsuit sparked the Air Force to release some, but not all of the documents. Meredith Fuchs, general counsel of the National Security Archive at George Washington University, says Begleiter's experience "is a purposeful litigation strategy designed to put off release of information that someone does not want to release until the government knows that it can no longer resist because a court will not agree with the withholding. It is an attempt to evade FOIA's attorney's fees provision by denying the FOIA requester a judicial decision ordering the release. It diverts FOIA requesters' resources unnecessarily into litigation that could be avoided by proper initial handling of FOIA requests."

Legal reasoning supporting Section 4 of H.R. 1309 is well-articulated by David Arkush, who wrote in *Harvard Civil Rights-Civil Liberties Law Review* (Volume 37, 2002) that the Supreme Court's *Buckhannon* ruling "if extended to FOIA, could substantially undermine the Act's potential to enhance democratic government and the exercise of individual rights and liberties."

Arkush predicted, correctly, that *Buckhannon* would allow the government "to withhold documents unlawfully and litigate with impunity until an adverse judgment appears imminent."

"Attorneys would be deterred from litigating FOIA claims, and individuals, researchers, and interest groups who cannot afford to risk litigating without compensation would find their right – and thus the public's right – to government information severely diminished."

Arkush's entire article is available at

<http://www.law.harvard.edu/students/orgs/crcvl/v.37/arkush.pdf> (visited March 13, 2007)

**SEC. 6**  
**TIME LIMITS FOR AGENCIES TO ACT ON REQUESTS.**

Section 6 bars agencies from charging FOIA fees when agency officials fail to meet response time limits.

This section would positively affect thousands of FOIA users while having virtually no effect on agencies. FOIA fees collected by 26 agencies and departments in FY2005 *totalled* less than \$3 million and accounted for an average of less than 2 percent of the agencies' and departments' total costs.

DEPARTMENT/AGENCY	AGENCY FEES FY 2005	PERCENTAGE OF TOTAL COSTS
Agriculture	\$104,408	1.00%
Commerce	\$26,540	1.72%
Defense	\$470,829	1.00%
Education	\$32,825	3.09%
Energy	\$25,588	0.60%
Homeland Sec	\$280,663	0.90%
HUD	\$40,696	1.50%
Interior	\$134,114	1.00%
Justice	\$95,855	0.16%
Labor	\$180,690	1.20%
State	\$15,218	0.15%
Transportation	\$216,269	2.91%
Treasury	\$520,021	3.81%
AID	\$5,500	1.20%
CIA	\$1,258	1.00%
CPSC	\$5,119	0.50%
EEOC	\$27,379	1.37%
EPA	\$325,812	3.32%
GSA	\$58,876	4.25%
NARA	0	0.00%
NASA	\$21,362	1.90%
NLRB	\$82,383	10.34%
NRC	\$43,081	4.20%
NSF	\$1,475	0.68%
SEC	\$63,431	1.60%
SBA	\$16,250	2.00%
	<b>Subtotal:</b>	<b>Average:</b>
	<b>\$2,795,642</b>	<b>1.98%</b>
HHS	\$721,779	4.00%

OPM		\$5,696	0.70%
SSA		\$5,049,913	22.10%
VA		\$707,771	1.60%
	Subtotal:		Average:
		\$6,485,159	7.10%

HHS, OPM, SSA and VA are shown separately because the bulk of their requests come under both FOIA and the Privacy Act from individuals seeking personal records. Most do not require discretionary decisions of the agency on whether to release the documents and are automatically and quickly granted.

Source: From "FOIA: Still A Waiting Game," published by the Coalition of Journalists for Open Government based on federal agency/department annual FOIA reports filed with the Justice Department.

**SEC. 7**  
**INDIVIDUALIZED TRACKING NUMBERS FOR REQUESTS AND STATUS INFORMATION.**

Section 7 would create a tracking system so FOIA requesters could track their requests online or by phone. In 2005, more than 200,000 FOIA requests went unanswered.

Looking at FOIA logs for 30 federal departments, agencies and offices on [www.memoryhole.org](http://www.memoryhole.org) illustrates how easy it is to lose track of requests and why such a tracking system is needed.

Each department/agency/office tracks FOIA differently, using various computer formats such as ASCII, Microsoft Access, Microsoft Excel, Microsoft Word, and in some cases, even handwritten logs.

FOIA requesters are not able to track their requests because agencies have no standards for how requests are managed. What's more, the only way to see such logs is to visit the department/agency/office in person, or submit a FOIA request for the log.

Consider the handwritten FY 2005 FOIA case log for the National Oceanic & Atmospheric Administration.  
([http://www.thememoryhole.org/foi/caselogs/noaa\\_fy2005.pdf](http://www.thememoryhole.org/foi/caselogs/noaa_fy2005.pdf), visited March 13, 2007)

See attached NOAAFOIALogFY05.pdf in which a FOIA officer realized that the first entry on page 5 (Request # 2005-00-251) is the same as the first entry on page 1 (Request #2005-00-236).

See also attached NOAAFOIALogFY05A.pdf in which a FOIA officer realized a similar mix-up between Request # 2005-00-148 on page 1 and Request # 2005-00-203 on page 2.

The NOAA logs clearly illustrate that reform is needed.

## **SEC. 8 SPECIFIC CITATIONS IN EXEMPTIONS**

This section would shine the light on the congressional practice of adding statutory exemptions to FOIA in all areas of federal law.

Each year, federal agencies justify withholding documents by citing roughly 140 federal laws requiring or permitting information to be kept secret as exemptions to FOIA. The laws are known as b(3) exemptions, and most have not been tested in court to determine whether they do, in fact, qualify as b(3) exemptions.

Exemption b(3) covers records that are:

"specifically exempted from disclosure by statute ... provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or, (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

The public currently has no way of knowing when one of these exemptions are passed into law because they are most often buried in legislation that is unrelated to FOIA and may not even mention FOIA by name.

In the 109th Congress, the Sunshine in Government Initiative identified at least 9 b(3) exemptions which were introduced.

## **SEC. 9 REPORTING REQUIREMENTS.**

Section 9 would strengthen data reporting to Congress and require that raw statistical data be available to the public.

This section would address a recent recommendation from the Government Accountability Office. In Feb. 14, 2007, testimony before the House Subcommittee on Information, Policy, Census and National Archives, Linda Koontz, GAO's director of information management issues, recommended that "[t]aking steps to improve the accuracy and form of annual report data could provide more insight into FOIA processing." (p. 16, GAO-07-491T)

FOIA currently requires that agencies provide median numbers, but not the arithmetic mean, or average, for processing times and other benchmarks. Koontz explained why current reporting requirements do not allow for meaningful analysis of how agencies fulfill legal requirements of FOIA.

"Our ability to make further generalizations about FOIA processing times is limited by the fact that, as required by the act, agencies report median processing times only and not, for example, arithmetic means (the usual meaning of "average" in everyday language). To find an arithmetic mean, one adds all the members of a list of numbers and divides the result by the number of items in the list. To find the median, one arranges all the values in the list from lowest to highest and finds the middle one (or the average of the middle two if there is no one middle number). Thus, although using medians provides representative numbers that are not skewed by a few outliers, they cannot be summed. Deriving a median for two sets of numbers, for example, requires knowing all numbers in both sets. Only the source data for the medians can be used to derive a new median, not the medians themselves.

As a result, with only medians it is not statistically possible to combine results from different agencies to develop broader generalizations, such as a governmentwide statistic based on all agency reports, statistics from sets of comparable agencies, or an agencywide statistic based on separate reports from all components of the agency." (p. GAO-07-491T)

Public accountability depends on more complete FOIA data and providing raw statistical data would help meet that goal.

**SEC. 10**  
**OPENNESS OF AGENCY RECORDS MAINTAINED BY A PRIVATE ENTITY**

Sec. 10 requires that agency records maintained by a private entity/contractor be open. This section would codify rulings in three federal judicial circuits: 4<sup>th</sup>, 10<sup>th</sup> and the District of Columbia.

The U.S. Supreme Court also touched on the issue briefly in a 1980 case regarding FOIA and records of federal agency grant recipients. The U.S. District Court for the Northern District of Illinois, cited the high court's language in granting a motion to enforce a disclosure order involving HHS data about breast cancer treatment. In its May 1999 order, the lower court wrote:

“In *Forsham v. Harris*, 445 U.S. 169, 181 (1979), the Supreme Court distinguished ‘contractors’ from ‘grant recipients’ for the purposes of defining an ‘agency document’ in order to determine when documents in the possession of third parties are disclosable under FOIA. The *Forsham* Court reasoned that contractors create documents to become government property, while grant recipients accomplish a public purpose ... rather than acqui[re] ... property or service.”

*(Chicago Tribune Co. v. United States Dep't of Health and Human Services*, Not Reported in F.Supp.2d, 1999 WL 299875 N.D. Ill., 1999)

The U.S. Court of Appeals for the District of Columbia unanimously ruled in July 1996 that data tapes created and kept by a contractor are agency records because of an extension of supervision exercised by the agency. Specifically, data tapes relating to a National Cancer Institute survey of smoking habits were “agency records” for purposes of FOIA, even though the tapes were neither created by HHS employees nor located at the agency at the time of the FOIA request. (*Burka v. United States Dep't of Health and Human Services*, 87 F.3d 508 (D.C. Cir. 1996))

The U.S. Court of Appeals for the Fourth Circuit in Richmond, Va., ruled in 1988 that an army ammunition plant's telephone directory – prepared at government expense and for government use by a government contractor which operated the plant – qualified as an “agency record” for Freedom of Information Act purposes. (*Hercules, Inc. v. Marsh*, 839 F. 2d 1027, (4th Cir. 1988 ))

The U.S. District Court for New Mexico ruled in 1998 that records created by a contractor were agency records under FOIA because a government contract “establishes [agency] intent to retain control over the records and to use or dispose them of they see

fit.” (*Los Alamos Study Group v. Dep’t of Energy*, No. 97-1412, slip op. at 4 (D.N.M. 1998))

## **SEC. 11 OFFICE OF GOVERNMENT INFORMATION SERVICES.**

Section 11 would establish within the National Archives a FOIA ombudsman’s office known as the Office of Government Information

A look at just two FOIA requests – and the accompanying delays – that eventually resulted in news stories of great public importance shows the need for an ombudsman to provide guidance to FOIA requesters as a non-exclusive alternative to litigation. Such guidance could include fact-finding reviews and guidance to requesters.

The Associated Press reported in February that a 2005 government study of 60 lunchboxes found one in five contained lead levels that some medical experts consider unsafe. Several lunchboxes had more than 10 times the maximum acceptable level. The results conflicted with the Consumer Product Safety Commission’s statement that the tests uncovered “no instances of hazardous levels.”

When AP reporter Martha Mendoza first learned CPSC’s statement was not true, she filed an expedited FOIA request for the study results. Yet it took an entire year to get the 1,500 pages of lab reports and other documents, “a year in which many parents continued to buy those popular soft vinyl lunch carriers and hand them to their children without any reason to wonder if they might not be safe,” Tom Curley, President and CEO of The Associated Press, told the Senate Judiciary Committee March 14, 2007.

When AP asked why it took a year to respond to a request that FOIA says it was supposed to answer in 20 working days, the commission said “the test report could not be released until each lunchbox manufacturer had been notified that information about its product was being disclosed,” Curley testified.

Had an Office of Government Information been in place, it could have worked to speed the release of such vital information.

A FOIA battle between Knight Ridder newspapers (now McClatchy Newspapers) and the Veterans Administration in 2004 and 2005 illustrates that a FOIA ombudsman can prevent disputes from erupting into litigation.

As part of a comprehensive inquiry into how the VA determines who get disability benefits and who doesn’t, Knight Ridder journalist Chris Adams filed a FOIA request on April 15, 2004 for VA databases. Here’s what happened next:

May 6: a VA FOIA officer told reporter Chris Adams that the request was “being worked.”

May 12: Chris filed a request for additional files.

June 4: a VA official said the requests "were still being worked."

June 16: a FOIA officer said the requests "were still being worked."

July 19: "still being worked."

August 6: "still being worked."

August 8: "They are still working on them ... It is being worked ... not like it's sitting there."

September 1: "A general estimate is probably a couple months."

September 3: A VA official admits, "They did not get to it four months ago ... Part of it was the queue, part of it was the whole general counsel, and part of it was miscommunication ... I told them this has taken too long."

September 14: Asked when one of the requested files might be available, a FOIA officer said: "Hopefully, I will have that answer by tomorrow at the latest. That's my hope."

Adams and a colleague, Alison Young, eventually got what they requested, but only after Knight Ridder filed a lawsuit in U.S. District Court in Washington, D.C. Their stories, which ran in March 2005, documented how veterans nationwide are being shortchanged by a benefits system prone to long delays, wrongful denials and inconsistent rulings. Over the prior decade, 13,700 veterans died waiting for disability claims to be resolved. Chris and Alison found that 2 million poor veterans and widows were missing out on a VA pension to which they were entitled. Recent Iraq war veterans couldn't get education benefits. If a veteran asked the agency for advice, he or she was more likely to get a wrong answer than the right answer. The VA made 103,000 errors in 2004 alone in deciding veterans' benefits cases.

Clark Hoyt of McClatchy Newspapers, told the House Subcommittee on Information Policy, Census and National Archives on Feb. 14, 2007, that "had there been such an independent FOIA advocate for Chris and Alison to work with, I believe they could have obtained the records they needed from the VA faster and without the lawsuit that proved costly to us, and that had to be costly to taxpayers."

Surely, if experienced FOIA requesters who know the law need help navigating FOIA, then individual constituents and small business owners who encounter problems with FOIA would also greatly benefit from an ombudsman.