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FOIA AT LAST, FOIA AT LAST, FOIA AT LAST!

By: [Stanley A. Millan](#)

A new law will be of interest to many sectors of society – media, government contractors, government claimants, environmentalists, regulated businesses, researchers, and, in short, just about anyone who needs information from the federal government.

On December 31, 2007, the President signed into law the Open Government Act of 2007. Congress passed the law, over Department of Justice objections, amending the Freedom of Information Act (“FOIA”) (5 U.S.C. §552; P.L. 110-175) because of the belief that the current administration had undermined, delayed, and frustrated the open government goal of FOIA. The new Act, with most provisions effective in a year, gives more teeth to FOIA’s records disclosure requirements.

Basically, FOIA grants a requestor of identified agency records the right to have the agency respond in 20 days, usually with research and reproduction fees, with those records or a letter identifying records that are exempt from disclosure (there are nine exemptions from disclosure, i.e., attorney-client, law enforcement, etc.). The requestor has administrative appeal rights over a denial, the right to sue over a denial or agency inaction, and the right to attorneys’ fees if the requestor prevails in court.

The new Act has more internal reporting and oversight provisions. In particular, the following are noteworthy:

- The 20-day agency response period cannot be tolled without the consent of the requestor or for the time needed for a requestor to clarify his request (now agencies can give themselves, or just take, extra time);
- If the agency exceeds statutory time limits, it would have lost the right to assert exemptions from disclosure (except for endangerment of national security, or would disclose private or proprietary information, or is expressly prohibited from disclosure by statute), but unfortunately, the Department of Justice prevailed and this provision did not make it into law – but an agency must forgo fees if it is late and has no justification therefor;
- Agency records in the custody of a private entity, e.g., agency contractors, are subject to the new Act (now contractors are not covered);
- Creation of a new office of Government Information Services which can audit agencies and offer mediation services, as an alternative to litigation, between a requestor and an agency over disclosure of agency records;

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- Provision for award of attorneys' fees to a requestor if the agency voluntarily or unilaterally changed its disclosure position in court (before a plaintiff had to prevail by court order to win attorneys' fees).

The agencies will be more under the gun to timely respond to FOIA requests than ever before. Will they hire more staff or just shirk their new duties by broadly claiming exemptions early on in the hope that more requestors lack funds to sue? Only time will tell.

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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