

The Presidential Order on FOIA

There is only one plausible explanation for the executive order on FOIA signed yesterday by President Bush: The White House felt the growing momentum for some repair of FOIA and wanted to head off legislative reform, crafting any change itself. Five of the leading sponsors of the OPEN Government Act were hastily invited to stand behind him while he signed. Four showed. The primary sponsor, Republican Sen. John Cornyn, was positive but restrained, "The President's directive moves us forward..." The Senate co-sponsor, Sen. Patrick Leahy, D-VT, didn't attend. He issued a statement calling the order "constructive" but said even more is needed. "We can do better."

Without question. The executive order ignores some of the most important provisions of the OPEN Government Act. And it is silent on the cultural sea change to FOIA philosophy directed by the infamous Ashcroft memo of 2001. Bush's executive order is aimed solely at improving the "customer service" of agencies in handling FOIA requests. It does nothing to alter the nature of the discretionary decisions being made not to release information the public should have.

We've been hearing for months that the White House was drafting a response to the OPEN Government Act. It would have been difficult, if not disaster, for the Bush White House to come out in direct opposition to fellow Texan John Cornyn's bill. Moreover, the Justice Department had been ineffective in its testimony at last May's House Government Reform hearing, when it tried to suggest there's no need for serious reform of FOIA. Indeed, committee members repeatedly expressed dismay at the lack of consequences for poor FOIA performance, and the failure of any to be penalized for stonewalling in the act's nearly 40-year history. In conversations on the Hill in recent weeks, we've had the clear impression that the House committee would finally take some action and that there was a genuine possibility of legislation in the coming year.

It's too early to know whether the White House's preemptive strike will be successful and the executive order will effectively blunt reform by Congress. The optimist might suggest the mandated assessments of FOIA performance, if comprehensive, would themselves create a mandate for legislative reform.

The answer probably depends on how the media and other open government advocates respond over the coming months, and whether they aggressively stay on top of the issue. There's no question in my mind that increased media attention on FOIA has made a difference in the past year and kept the possibility of reform alive. It's important that we not let up in our reporting and commentary on open government generally and FOIA specifically. These issues also need to be regularly raised in editorial board conversations with Congress members. The Sunshine in Government Initiative, which has been regularly talking about FOIA in visits on the Hill, must become even more active. We hope we can step up our own research and reporting on those topics.

What does the order do and what are the possible consequences?

First and foremost, it raises FOIA's profile within each department and agency by creating a high level (assistant secretary) chief FOIA officer, and it mandates an internal assessment of FOIA service problems with a working plan to make improvements. It also calls for creation of FOIA Requester Service Centers and a FOIA Public Liaison a grieved requester could go to in each agency. But the former may not be a one-stop service center because departments can have more than one. Nor is it clear just how this might function differently than the current FOIA or FOIA/Privacy offices. The liaisons might best be described as a pseudo-ombudsman, thus negating the need for an ombudsman's office. (The ombudsman proposed in the OPEN Government bill would provide a form of mediation for requesters). Best case, these changes will lead to more efficient operations and more posting of routine documents on the Internet. Routine, non-controversial information should become more accessible, and this can make the report numbers look good.

For requesters on the cutting edge of departmental discretion, there's not likely to be much change, although it may now be easier to know that you're a victim of deliberate delay, not inefficiency.

For those concerned about open government, there are five important benchmark dates in the President's directive.

1. January 14. Deadline for naming chief FOIA officers. This is the first time any agency will have a high-ranking person with direct FOIA oversight. Who is tapped may tell a lot about how responsive the departments really want to be. Is the person a career FOIA officer or someone with an access-oriented background, or is it a political appointee whose decisions will reflect the administration's views on transparency.
2. June 14. Deadline for a department-agency plan, sent to the Office of Management and Budget and the Justice Department, outlining compliance problems and providing a plan for improvements. These must be published and may reflect how seriously the agencies take the pro-access language of the order's policy preamble..
3. October 14. Justice, working with OMB, must report on the progress of improvements, and offer recommendations. Justice oversight on operational issues has historically been largely advisory. The requirement that agencies be held to specific goals and the inclusion of OMB in the process could make this review more rigorous. But there are no stated consequences for ignoring the advice.
4. March, 2006 and 2007. Departments and agencies file their public annual FOIA reports and provide individual details of compliance. The reports provide for limited accountability to the public, but they've been routinely ignored by the media and just about everyone else in the past.
5. June 1, 2006 and 2007. Supplemental Justice/OMB reports on FOIA performance.

The executive order offers no relief for under-funded and under-staffed FOIA offices. Many FOIA officials say a part of the reason for backlogs and delays in processing requests, and sometimes poor service, is a lack of resources to do the assigned job. The question that might be asked: Is this another unfunded mandate?

As is almost always in the case with government, the devil is in the details of execution and the will of the bureaucracy.