

Budget Office Overestimates Costs of FOIA Reform Bill

The Congressional Budget Office report estimates that S 849 will result in an additional \$6 to \$7 million a year to reimburse citizens who file FOIA suits after being denied requests. We believe the estimate is seriously wrong in several regards.

First, the report states that there are currently about 350 FOIA lawsuits filed each year and legal fee payments total about \$3 million a year.

That number is near correct for only one of the past eight years. In the seven reported years prior to 2006, the total legal fees paid by the government to plaintiffs never exceeded \$1.9 million. The annual average, including 2006, is under \$1 million.

Until a decision in *Buckhannon*, a 2001 case unrelated to FOIA, requesters who filed suit and subsequently obtained records that had been denied could ask the court to award legal fees. *Buckhannon* changed that, establishing a rule that legal fees could be recovered only if the FOIA case is adjudicated. The OPEN Government Act seeks to correct that and return to the rule of law prior to *Buckhannon*.

In an effort to calculate the impact of this change, we looked at the history of FOIA litigation, using data the Justice Department posts on its website, which report each decision was rendered and recorded in each of the respective years, and whether legal fees were paid and if so, how much.

The attached table shows the total case dispositions, the legal fees paid when the government lost and the legal fees paid when there was a settlement of the dispute prior to a court judgment. It should be noted that only that latter category of cases, Stipulated Dismissals, would be affected by the proposed law.

It should be noted that there are spikes in the data for both 2005 and 2006. In 2005, in one case lost by the government, legal fees of \$897,331 were paid. That single case exceeded the combined total of the 16 other cases the government lost that year. In 2006, the 12 combined cases of a single plaintiff, were settled out of court and the plaintiff and his company recovered \$840,000. That's more than the combined annual total for stipulated dismissal cases for the five previous years.

The first of those spikes does not affect the issue at hand. Because the government lost that case, the legal fee recovery would have been in no way impacted by the *Buckhannon*

precedent. But the second significantly skews the data and have excluded that year as a one time phenomena. Indeed, if included, it would make the CBO projections look that much worse.

In the three years prior to *Buckhannon*, there were an average of 32 stipulated dismissals a year with an average annual payout of just under \$320,000. In the first three years after *Buckhannon* (excluding 2002 as a transition year in which the precedent was may not have been uniformly applied) there were an average of only 7 cases and an average legal fees payment of only \$104,000.

Based on that difference, \$216,000, we believe a scoring of \$200,000 to \$250,000 for increased recovery costs is reasonable.

The CBO report says that it assumes the change in the law will prompt 1,000 new cases a year, each costing the government an average of \$6,000 to defend.

The historical data shows that in the three pre-Buckhannon years, there were an average of 420 case dispositions a year (and significantly fewer new cases filed, which CBO puts at 350). In 2003-2005, the average dispositions dropped to 405. That implies an impact of the *Buckhannon* ruling of about 15 cases a year. That number of new cases would cost the government an additional \$90,000 to defend.

But the CBO report assumes a quadrupling – not of the historical impact but of the total cases filed in any given year! How does that make any sense?

Note that in comparing this aspect of the report, we have also excluded the 2006 data. It shows a total of 536 final judgments. That's far higher than any previous year and 28% above the pre-*Buckhannon* average. If we added 2006 to the historical comparison, it would suggest that passage of the OPEN Government Act would result in fewer cases being filed, not more.

Given the historical data, and the failure of CBO to present any compelling data to support its conclusions, we would suggest that the true impact of the legal fee recovery provision of the OPEN Government Act is more likely to be in the \$300,000 to \$350,000 a year range: up to \$250,000 in additional legal fee recovery and up to \$100,000 in additional costs for government legal services.

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