

FOIA Executive Order vs. OPEN Government Act of 2005

While President Bush’s December 14, 2005 Executive Order on FOIA was a step in the right direction, the order falls short of the reform needed. The order’s timing, lack of meaningful penalties for failing to comply and inability to address some of the most important problems with FOIA, make it far less effective than legislation introduced in the past year, specifically the OPEN Government Act of 2005 (S. 394/H.R. 867).

Below is a comparison of the provisions of the Executive Order and the OPEN Government Act (OGA):

OPEN Government Act	Executive Order
<p>Mediation Problem: There is a lack of viable alternatives to litigation Upon receiving final denial to a FOIA request, the requester often has no option other than costly, often lengthy litigation in federal court. Some states have created an ombudsman position to help mediate between agencies and requesters, and serve as a neutral arbiter in FOIA disputes.</p>	
<p>Section 11 of the OGA mandates the creation of an <i>independent</i> FOIA office, the Office of Government Information Services (OGIS), within the Administrative Conference of the US. The Office is charged with reviewing agency policies and procedures, conducting audits and recommending policy changes to Congress and the President. Importantly, the Office would also serve as a FOIA ombudsman, offering mediation services between requesters and agencies, and issuing advisory opinions where mediation fails. This process would allow the Office to gain institutional expertise and a wealth of FOIA experience.</p>	<p>Section 2 of the Executive Order requires each agency to designate a Chief FOIA Officer at the assistant secretary level to monitor agency FOIA compliance, review and evaluate agency’s implementation of FOIA and to develop an agency-specific plan to improve implementation over the next two years. Also required is the creation of FOIA Requester Service Centers within each agency. The Centers would assist in the processing of delays and serve as a contact point when requesters have concerns about the way requests are being handled. But no specific methods are listed, and the Centers’ staffs appear to have no enforcement authority.</p>

Tracking Numbers

Problem: Requests are difficult to track

A common complaint by FOIA requesters is that they cannot get information on the status of their request. Many requests simply disappear and must be resubmitted, adding to delays.

Section 7 of the OGA requires each agency to establish an individualized tracking number system for all requests. The legislation provides that a tracking number be assigned within 10 days of an initial request, and that each agency establish systems to allow requesters to track their requests by phone or Internet.

The order requires the Chief FOIA Officer to examine the agency’s use of technology in handling FOIA requests, and to consider creating a tracking system. The creation of the system is not mandated, but rather is part of a comprehensive review of agency procedures.

Inconsistent Practices

Problem: Agencies have no uniform methods for processing requests.

This can lead to confusion among requesters. In some cases, requests for identical records will be granted by one agency, but denied by another. The responses of sub-agencies of the same department are sometimes quite different.

The OGA’s ombudsman provision creates a mechanism to resolve these kinds of inconsistencies, and additional options are being considered.

The order has no provision addressing the lack of uniformity among agencies. In fact, it encourages agencies to formulate their own, agency-specific plans for implementing the order.

Litigation Costs

Problem: Attorneys’ fees are too difficult to obtain.

Congress long ago recognized that the cost of filing suit against the federal government for documents denied under FOIA is too expensive for most requesters, and so it provided for recovery of fees if the requester is successful in that litigation. However, a 2001 court decision in a non-FOIA case has led to a legal loophole that is denying some successful litigants financial recovery. This happens when an agency, just prior to court action at the end of lengthy litigation, “voluntarily” grants all or most of the information requested. Because the requester has not “substantially prevailed” as a result of a court order, legal fee recovery is denied. As a result, the incentive Congress wrote into the law to benefit the requester with limited resources is negated.

Section 4 of the OGA strengthens existing provisions on attorneys’ fees by closing this loophole and leveling the playing field for citizens, small businesses and other requesters. It allows plaintiffs to recover fees if a substantial part of the request was granted, or if the plaintiff’s suit was a “catalyst” for a unilateral change in position by the agency.

The Executive Order fails to address this problem.

Resources

Problem: Agencies lack sufficient resources for new reporting and processing requirements

One of the chief complaints of agency FOIA officials is the lack of resources to process requests.

Section 11 of OGA provides for authorization for creating the Office of Government Information Services. In creating this office, it recognizes the scarcity of resources in the existing agency structure. It also provides an outside-the-agency advocate if resources are insufficient to do the job.

Section 2(c)(iv) of the Executive Order specifically states that agencies shall use, as appropriate, existing agency staff and resources in creating the FOIA Requester Service Centers and in designating personnel to staff the Service Centers. Moreover, the Chief FOIA Officer responsibility is merely an added duty for an existing agency executive.

Time Limits/Excessive Delays

Problem: There are no penalties for delays beyond statutory limits in processing FOIA requests

Delays in responding to and processing FOIA requests are a major problem. Current law requires agencies to respond to a requester within 20 days. However, neither the agency nor any FOIA officer face any penalty for failing to meet that deadline or for extended delays in the grant or denial of the requested information. As a result, many requests remain unprocessed for months or even years.

Section 6 of the OGA creates meaningful penalties for failing to comply with the 20-day time limit. If the agency misses the deadline, it loses the right to invoke an exemption under FOIA, unless national security or personal privacy exemptions are at issue.

The Executive Order places no concrete time limits on when agencies must respond to requesters, nor imposes penalties for failure to comply with statutory fine limits.

Reporting Requirements

Problem: Currently available FOIA data is of limited value in analysis of performance problems.

Current reporting requirements for agencies are not geared towards providing actionable data to Congress or the public. The data provided in annual and other agency reports needs to be expanded to provide more meaningful analysis and comparisons of all aspects of FOIA performance and to help identify areas where the requesters are being poorly served.

Section 9 of the OGA requires agencies to include in their annual reports detailed information on FOIA request backlogs, including data on old requests, average response times, and information on fee status requests.

Section 13 requires the Office of Personnel Management to examine how FOIA can be better implemented at the agency level, with specific emphasis on reforming personnel policies. This information could prove crucial to improving FOIA procedures within many agencies.

The Executive Order's reporting requirements are extensive. Each agency's Chief FOIA Officer is required to review agency procedures and performance and develop an improvement plan, reporting to the Attorney General by June 14. Those reports will be posted on agency websites. The Attorney General must report to the president on FOIA improvement efforts by Oct. 14. The order says nothing about this report being public. And agencies must report, by Feb. 1, 2007 on execution of their improvement plan and whether they met its milestones. The EO leaves the highlighting of specific performance issues, and improved reporting on them, to the agencies and to guidelines developed by the AG and OMB.

Agency Oversight and Enforcement

Problem: No functioning system for agency oversight or enforcement exists

Though technically in charge of enforcing FOIA among the various agencies, the Department of Justice's role is largely limited to guidance rather than oversight. It does not have authority to correct problems associated with FOIA, or properly enforce its provisions.

The OGA provides for more comprehensive oversight of agencies through the ombudsman within the OGIS. The ombudsman has the power to conduct agency audits and issue reports on the results of those audits. It would also be able to issue advisory opinions and regular reports to Congress and the President. This would provide for much more credible and extensive oversight than the self-reporting requirements found in the order.

The Executive Order presents no stated consequences for not meeting agency reporting deadlines or achieving milestones. Failure by an agency to appoint FOIA officers, create Service Centers, or review agency procedures would trigger no penalties. Although certain oversight functions are tasked to the Attorney General and OMB, those functions are for the purpose of issuing recommendations to the agencies, with no further enforcement mechanism if the agency fails to implement them.

(b)(3) Exemptions

Problem: Records are frequently exempted from FOIA by statute without proper scrutiny

FOIA allows Congress to exempt additional records by statute under subsection (b)(3). But these exemptions often take the form of a single paragraph buried in bills that are several hundred pages long. This results in the closure of information without public notice or legislative debate. Transparency should be mandated whenever the government’s law on access to information is modified.

Section 8 of the OGA requires bills with future statutory exemptions from FOIA to cite specifically to FOIA and its chapter number, so that new exemptions may be scrutinized before becoming law.

The Executive Order has no provision addressing future FOIA exemptions.

Fee Waivers

Problem: Waivers of fees for FOIA requests are too limited

FOIA provides that fees be waived for news media because the intent is to publish information for the benefit of the public. However, many journalists are denied the benefit of this provision because they lack an institutional affiliation with a recognized news media entity.

Section 3 of OGA requires agencies to consider the prior publication history of the reporter when determining whether to grant a fee waiver. If the requestor has no prior publication history and no current affiliation with a news organization, the agency shall review the requestor’s plans for disseminating the requested material and whether those plans include distributing the material to a reasonably broad audience.

The Executive Order does not address this issue.

Outsourced Recordkeeping

Problem: The FOIA status of records being maintained by a private entity on behalf of an agency is not clear.

Agencies frequently hire private contractors to store and maintain agency records. However, agencies should not be able to deny FOIA requests on the basis that the agency is not in physical possession of the records.

Section 10 of the OGA clarifies that these records are subject to FOIA.

The Executive Order has no provision addressing privately maintained records.

Critical Infrastructure Information (CII)

Problem: The recently enacted FOIA exemption relating to infrastructure security is too broad.

The Critical Infrastructure Act of 2002 created an exemption to FOIA that shielded records voluntarily submitted to the Department of Homeland Security relating to “critical infrastructure” security. However, the exemption was crafted too broadly, and potentially allows private industry to shield unrelated, embarrassing information from public view, merely by submitting it to DHS.

Section 12 of the OGA requires regular reports to Congress on the use of this exemption, as well as how the exemption has affected the requester community. The provision also requires reports on whether the nondisclosure of CII material has led to increased protection of critical infrastructure. The intent is to allow Congress to better evaluate the use of the CII exemption.

The Executive Order does not address critical infrastructure information.

Disciplinary Actions

Problem: No agency officials have ever been disciplined for refusing to disclose records, even when done in bad faith.

Current law allows for disciplinary actions against any government officials who act arbitrarily or capriciously in denying FOIA requests, but discretion is left with the Office of Special Counsel. In a May, 2005 House hearing, a representative of the Department of Justice testified that no one had ever been formally disciplined.

Section 5 of the OGA requires the Attorney General to notify the Office of Special Counsel and Congress of any finding of arbitrary or capricious withholding, and further requires the Office of Special to report annually to Congress on any actions taken to investigate these types of cases. This provision is important to effectively enforcing FOIA violations among government officials.

The Executive Order does not specifically address bad faith denials of FOIA requests.