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## **FOIA Litigation Decisions, 1999 – 2004**

A review of six years of Justice Department reports on FOIA cases for which there was a decision offers some insights that may be helpful in discussing the OPEN Government Act and several of its provisions.

- Filing a law suit is clearly a remedy of last resort. On average, there were slightly more than 400 FOIA legal case “decisions” each year. In comparison, the 15 federal departments and ten of the larger federal agencies denied 20,784 requests in 2004. Those numbers suggest that less than 2 percent of the requesters who are denied information turn to litigation. For reference, another 266,511 requests were not granted in 2004 for reasons other than a formal denial that cited a FOIA exemption.
- Litigation seems likely to remain an unattractive remedy for requesters. The government wins outright by judgment, or indirectly through voluntary or technical dismissal of cases, 70 percent of the time. Plaintiffs win outright in less than 3 percent of the cases filed. In the remaining 27 percent of cases, the plaintiffs get some of the records sought through court order or by stipulated grant from the agency prior to trial.
- Numerically, the media are minor players. Only 18 of the 2460 cases reported by DOJ involved media companies. That’s 7/10ths of one percent. One other case involved an individual journalist, Terry Anderson, seeking personal information.
- The 2001 *Buckhannon* decision, which is increasingly being used as precedent to argue against the award of legal fees and costs to plaintiffs in cases that do not go to trial, has had a pronounced impact on plaintiffs who sue but then obtain some or all of the disputed records before a court rules. In 1999 and 2000, there were 206 lawsuits settled by stipulated dismissal, meaning the agency gave up some documents and the plaintiff agreed to drop the case. In 40 percent of those cases, the plaintiffs were awarded legal fees that totaled \$633,615. Contrast that with 2003 and 2004, when 160 cases were settled by stipulation but only three percent resulted in government payment of legal fees and cost to plaintiffs who had at least partially prevailed. The cost to the government in 2003 and 2004 was \$66,161, about one-tenth of what was paid out in the two years before *Buckhannon*.

- Total reported spending on FOIA litigation almost doubled in 2004 to \$18 million, primarily because the Justice Department reported spending \$12.4 million, an increase of \$8.4 million from 2003. The explanation was that not every division had accurately reported litigation costs in prior years. In 2004, reported spending in the Civil Division, for instance, went from \$30,000 the previous year to \$6.7 million. The reporting variances make valid expense comparisons over the six year period impossible. The 2004 litigation expense total, however, suggests that the award of legal fees is a small portion of the overall government litigation expense. The average in yearly legal fee awards in all cases over the six years reviewed – whether the government won, settled, or lost – was \$580,416.
- Even the process of going to court to seek information a requester believes to be public does not escape the government’s secrecy shroud on occasion. The addendum to the 2001 report lists the following, rather puzzling decision:  
 SEALED V. SEALED  
 DISPOSITION: Court ordered case sealed and closed.

Here’s a look at the percentages related to the overall results of FOIA litigation and to the impact of the *Buckhannon* decision. Statistical tables are attached.

|  | <b><u>Annual<br/>Average</u></b> | <b><u>Percent</u></b> |
|--|----------------------------------|-----------------------|
| Cases resolved:                          | <b>410</b>                       |                       |
| Cases won outright by plaintiff:         | <b>13</b>                        | <b>3.2%</b>           |
| Cases won outright by government         | <b>226</b>                       | <b>55.1 %</b>         |
| Cases w/partial judgment for plaintiff   | <b>27</b>                        | <b>6.6%</b>           |
| Cases settled by stipulation             | <b>86</b>                        | <b>20.9%</b>          |
| % stipulations where fees awarded        | <b>20</b>                        | <b>23.7%</b>          |
| Cases voluntarily withdrawn by plaintiff | <b>25</b>                        | <b>6.1%</b>           |
| Cases dismissed for other reasons        | <b>33</b>                        | <b>8.0%</b>           |

|             | <b><u>Percent of total cases<br/>settled by stipulation</u></b> | <b><u>Percent of stipulations<br/>in which government paid<br/>plaintiff legal costs</u></b> |
|-------------|---|--|
| <b>1999</b> | <b>21.2%</b>  | <b>52.8%</b>   |
| <b>2000</b> | <b>26.1%</b>  | <b>31.0%</b>   |
| <b>2001</b> | <b>19.0%</b>  | <b>17.3%</b>   |
| <b>2002</b> | <b>19.4%</b>  | <b>28.7%</b>   |
| <b>2003</b> | <b>23.1%</b>  | <b>3.0%</b>  |
| <b>2004</b> | <b>16.3.7%</b>  | <b>3.0%</b>  |

### Media cases 1999 to 2004

Decisions favoring the plaintiff are indicated in boldface, the government in italice.

- 2004 New York Times v. Labor Department: **Plaintiff**
- 2003 Dayton Newspapers v. Veterans Administration: **Plaintiff**  
New York Times v. Port Authority: *Remanded to state court*
- 2002 Dow Jones v. Federal Energy Regulatory Commission: **Plaintiff**  
Detroit Free Press v. DOJ: **Plaintiff**  
Dan Malone and Dallas Morning News v. INS: **Stipulated dismissal**
- 2001 Cox Newspapers v. State Department: **Stipulated dismissal**  
Navigator Publishing Co. v. DOT: *Government*  
Baltimore Sun v. U.S. Marshals Service: **Plaintiff**
- 2000 Dayton Newspapers v. Navy: *decision for the government*  
Times Publishing v. Department of Commerce: **Plaintiff**
- 1999 Philadelphia Newspapers v. HHS: **In part for plaintiff**  
Nation Magazine v. State Dept: **In part for plaintiff**  
Chicago Tribune v. HHS: **Plaintiff**  
Dayton Newspapers v. Air Force: **In part for plaintiff**  
Fox TV-Philadelphia v. NTSB: **Stipulated dismissal**  
Times Picayune v. DOJ: *Government*  
Time Inc and Time Warner v. Labor Dept: *Voluntary Dismissal*  
Terry Anderson v. CIA: **In part for plaintiff**

A “stipulated dismissal” notation in the Department of Justice reports signifies that some form of agreement was reached between the agency and the plaintiff after the filing of the suit, and as a result both sides agreed to terminate the litigation. It means the plaintiff won at least a partial victory.

A “voluntary dismissal” designation means the plaintiff agreed to drop the litigation without having gained any of the information sought, in effect a victory for the government agency that denied the initial request and administrative appeal.

## FOIA Litigation 1999-2004

| Fiscal Year       | Total Cases Resolved | Judgment for |            |             | Cases Dismissed |             |            | Legal Fees, Costs Awarded |                    |                      |                    |
|-------------------|----------------------|--------------|------------|-------------|-----------------|-------------|------------|---------------------------|--------------------|----------------------|--------------------|
|                   |                      | Plaintiff    | Partial    | US Govt     | Stipulated      | Voluntary   | Other      | Plaintiff Win             |                    | Stipulated Dismissal |                    |
|                   |                      |              |            |             |                 |             |            | Number                    | Amount             | Number               | Amount             |
| 2004              | 380                  | 8            | 34         | 196         | 62              | 34          | 46         | 7                         | \$321,477.04       | 1                    | \$3,280            |
| addendum          | 23                   | 0            | 1          | 12          | 4               | 2           | 4          | 0                         | \$0.00             | 1                    | \$5,650            |
| 2003              | 379                  | 13           | 20         | 200         | 88              | 16          | 42         | 8                         | \$216,323.84       | 3                    | \$62,231.07        |
| addendum          | 43                   | 1            | 0          | 20          | 10              | 6           | 6          | 1                         | pending            | 0                    | \$0.00             |
| 2002              | 319                  | 10           | 33         | 190         | 52              | 13          | 21         | 8                         | \$168,275.19       | 14                   | \$129,926.66       |
| addendum          | 57                   | 0            | 1          | 27          | 21              | 6           | 2          | 0                         | 0                  | 7                    | \$43,072.62        |
| 2001              | 354                  | 13           | 22         | 226         | 63              | 15          | 15         | 9                         | \$101,717.23       | 10                   | \$320,652.93       |
| addendum          | 39                   | 1            | 1          | 17          | 12              | 2           | 6          | 2                         | pending            | 3                    | \$3,932.19         |
| 2000              | 392                  | 15           | 14         | 222         | 100             | 20          | 21         | 5                         | \$445,180.58       | 35                   | \$264,738          |
| addendum          | 64                   | 0            | 1          | 31          | 19              | 5           | 8          | 2                         | \$37,021.42        | 2                    | \$27,500           |
| 1999              | 356                  | 15           | 34         | 185         | 75              | 22          | 25         | 8                         | \$342,365.21       | 43                   | \$326,738.58       |
| addendum          | 54                   | 2            | 2          | 29          | 12              | 7           | 2          | 1                         | \$16,000           | 3                    | \$14,638.68        |
| <b>Total</b>      | <b>2460</b>          | <b>78</b>    | <b>163</b> | <b>1355</b> | <b>518</b>      | <b>148</b>  | <b>198</b> | <b>51</b>                 | <b>\$1,648,361</b> | <b>122</b>           | <b>\$1,202,361</b> |
| <b>Annual Av.</b> | <b>410</b>           | <b>13</b>    | <b>27</b>  | <b>226</b>  | <b>86.3</b>     | <b>24.6</b> | <b>33</b>  | <b>8.3</b>                | <b>\$274,727</b>   | <b>20.3</b>          | <b>\$200,394</b>   |

**Notes:** Legal fees/costs of \$253, 039.59 were awarded to plaintiffs in 14 cases won by the government. "Addendum" reports are filed by DOJ after the annual report, listing cases for which "a decision was rendered in prior years." Consistent with DOJ reporting format, we have listed these as separate reports. This could result in minor duplication, and the totals in any category may be recorded as being slightly higher than actual. This should not, however, significantly affect comparisons.

### FOIA Litigation Costs, 2004

| <b>Department</b>          | <b>Litigation Cost</b> |
|----------------------------|------------------------|
| <b>Agriculture</b>         | <b>\$ 266,025</b>      |
| <b>Commerce</b>            | <b>\$ 396,280</b>      |
| <b>Defense</b>             | <b>\$ 428,202</b>      |
| <b>Education</b>           | <b>\$ -</b>            |
| <b>Energy</b>              | <b>\$ 189,035</b>      |
| <b>Homeland Security</b>   | <b>\$ 562,803</b>      |
| <b>HUD</b>                 | <b>\$ 18,968</b>       |
| <b>Interior</b>            | <b>\$ 358,718</b>      |
| <b>Justice</b>             | <b>\$ 12,394,368</b>   |
| <b>Labor</b>               | <b>\$ 160,000</b>      |
| <b>State</b>               | <b>\$ 123,156</b>      |
| <b>Transportation</b>      | <b>\$ 90,381</b>       |
| <b>Treasury</b>            | <b>\$ 408,575</b>      |
| <b>CIA</b>                 | <b>\$ 730,000</b>      |
| <b>Cons.Prod.Safety</b>    | <b>\$ 2,000</b>        |
| <b>EEOC</b>                | <b>\$ 26,759</b>       |
| <b>EPA</b>                 | <b>\$ 290,309</b>      |
| <b>NARA</b>                | <b>\$ -</b>            |
| <b>NASA</b>                | <b>\$ 118,344</b>      |
| <b>NLRB</b>                | <b>\$ 46,860</b>       |
| <b>SEC</b>                 | <b>\$ 663</b>          |
| <b>SBA</b>                 | <b>\$ 1,800</b>        |
| <b>HHS</b>                 | <b>\$ 1,427,345</b>    |
| <b>Veterans Affairs</b>    | <b>\$ 210,461</b>      |
| <b>Social Security Ad.</b> | <b>\$ 20,489</b>       |
| <b>Total</b>               | <b>\$ 18,271,541</b>   |

**Justice Department Litigation Costs, 1998 - 2004**

| <b>Year</b> | <b>Civil Division</b> | <b>EOUSA</b>        | <b>DOJ Total</b>     | <b># Cases</b> |
|-------------|-----------------------|---------------------|----------------------|----------------|
| <b>2004</b> | <b>\$ 6,746,198</b>   | <b>\$ 2,004,184</b> | <b>\$ 12,394,368</b> | <b>403</b>     |
| <b>2003</b> | <b>\$ 30,000</b>      | <b>\$ 40,000</b>    | <b>\$ 4,098,374</b>  | <b>422</b>     |
| <b>2002</b> | <b>\$ 30,000</b>      | <b>\$ 256,169</b>   | <b>\$ 4,305,061</b>  | <b>376</b>     |
| <b>2001</b> | <b>\$ 25,000</b>      | <b>\$ 332,423</b>   | <b>\$ 3,736,454</b>  | <b>393</b>     |
| <b>2000</b> | <b>\$ 15,500</b>      | <b>\$ 748,000</b>   | <b>\$ 3,607,471</b>  | <b>456</b>     |
| <b>1999</b> | <b>\$ 24,655</b>      | <b>\$ -</b>         | <b>\$ 1,013,219</b>  | <b>410</b>     |
| <b>1998</b> | <b>\$ 31,486</b>      | <b>\$ -</b>         | <b>\$ 3,448,090</b>  |                |

The numbers raise the question as to whether the cost are in any way a reflection of the impact of the Ashcroft memo. The number of cases filed however, indicate there has not been a significant increase in litigation. Justice says that the officially reported numbers for litigation costs have been estimates, rather than precise accounting, since the start of the mandated reporting in 1998. The 2004 report reflects efforts to get the various divisions to report more accurately.

