

Government Contracts Advisory

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Congress Passes Changes to Freedom of Information Act

On December 18, the House of Representatives passed by voice vote a bill, S. 2488, the Openness Promotes Effectiveness in our National Government Act of 2007 (Public Law 110-175), referred to as the OPEN Government Act, the first major reform to the Freedom of Information Act (FOIA, 5 USC 552 et. seq.) in more than a decade. The measure passed the Senate on December 14, and President Bush signed the bill into law on December 31, 2007. The bill enjoys broad bipartisan support in Congress and has been endorsed by more than 115 business, public interest and news organizations from across the political spectrum, including the American Library Association, the U.S. Chamber of Commerce, and Public Citizen. In general, the bill seeks to reverse trends of excessive delays and lax FOIA compliance by federal agencies, restore public confidence in government, and increase transparency in the disclosure process. One of the changes to the law made by the bill is noteworthy for the government contracting community.

Brief Background on FOIA and Goals of the Bill

With the passage of FOIA in 1966, the federal government adopted a policy of openness with respect to information within its control. Federal agencies may only withhold documents requested under FOIA, or portions of requested documents, if they fall within one or more of nine categories of exemptions established by the statute.

One of the chief concerns with FOIA has been the delays experienced by those requesting documents under the Act. According to a report by the National Security Archive, an independent non-governmental research institute, the oldest outstanding FOIA requests date back to 1989--before the collapse of the Soviet Union. Nor is the problem going away. According to the GAO, federal agencies had 43 percent more pending and open FOIA requests in 2006 than in 2002. The Bush Administration has tried to improve agency responsiveness by executive order (E.O. 13392, Dec. 14, 2005,) and the Department of Defense has promulgated additional proposed and final FOIA regulations (72 Fed. Reg. 71793, 71847, Dec. 19, 2007.) Nevertheless, passage of this bill suggests Congress' view that FOIA must be strengthened and preserved.

Key Provision of the OPEN Government Act to Government Contractors

Perhaps the single provision of S. 2488 of most consequence to government contractors is section 9 of the bill. This section amends the statutory definition of an agency record subject to disclosure under FOIA. Under current law, an agency record is defined as information that is "maintained by an agency in any format, including an electronic format." 5 USC 552(f)(2). The Supreme Court has held that federal participation in, or funding of, the generation of information by a privately controlled organization does not render that information an "agency record" under the terms of FOIA. See *Forsham v. Harris*, 445 U.S. 169 (1980).

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Section 9 of the bill amends the existing statutory definition to provide that federal agency records kept by private contractors licensed by the government to perform recordkeeping functions remain subject to FOIA, just as if those records were maintained by the cognizant government agency. 5 USC 552(f)(2) is amended so that agency record includes information “that is maintained for an agency by an entity under Government contract, for the purposes of records management.” Thus, this provision makes clear that agency generated records held by a government contractor for records-management purposes are subject to FOIA, imposing potentially burdensome administrative requirements on contractors.

The bill does not address the question of whether documents created by a contractor for or in support of an agency during the course of performance of a government contract but not maintained by the contractor for the purposes of records management are subject to FOIA disclosure.

Section 6 of the bill clarifies that the 20 day time limit on responding to FOIA requests begins on the date on which the request is first received by the agency. Moreover, if the agency fails to respond within the 20 day limit, the agency may not assert any FOIA exemption under 5 USC 552(b), except under limited circumstances, such as endangerment to national security, disclosure of personal Privacy Act information, “proprietary information,” and information otherwise protected by law, unless the agency can show good cause for the failure to timely comply by clear and convincing evidence. Thus, agencies not responding in a timely fashion will not be able to avail themselves of many tried and true FOIA exemptions, such as those for inter- and intra-agency memoranda and law enforcement records. The FOIA response deadline and penalty for noncompliance are likely to mean that contractors will be asked to respond quickly to potentially significant document production requests. The fast response and likely required assurances of completeness of the documents produced have the potential to impose significant costs on contractors that were not contemplated at the time of contract award.

Other key provisions of the OPEN Government Act include the creation of a new system of tracking numbers for FOIA requests, new standards for the award of attorneys’ fees and litigation costs for FOIA complainants, a new requirement that agencies identify the specific FOIA exemption upon which a refusal to disclose information is based, a new definition of news media for fee waiver requests, and the establishment of an ombudsman to assist in the resolution of requests and to reduce the number of cases resulting in litigation. Overall, S. 2488 may assist FOIA requesters in obtaining timely responses from federal agencies, reduce the backlog of pending requests, and increase transparency in agency compliance. For the government contracting community, the bill offers greater clarity about whether documents in their possession are subject to FOIA disclosure.

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