

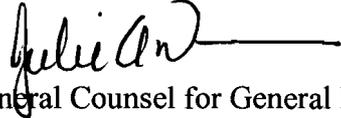


Homeland Security

February 5, 2008

MEMORANDUM FOR: DHS FOIA Officers and Counselors

FROM: Hugo Teufel III 
Chief FOIA Officer

Julie Dunne 
Associate General Counsel for General Law

SUBJECT: DHS Implementation of S. 2488, the Openness Promotes Effectiveness
in our National Government Act of 2007

This memorandum outlines DHS's implementation of the Openness Promotes Effectiveness in our National (OPEN) Government Act of 2007, which was signed by the President on December 31, 2007. This Act amended the Freedom of Information Act (FOIA) by, among many things, (1) establishing a definition of "a representative of the news media;" (2) directing that required attorney fees be paid from an agency's own appropriation rather than from the Judgment Fund; (3) prohibiting an agency from assessing certain fees if it fails to comply with FOIA deadlines; and (4) establishing an Office of Government Information Services to review agency compliance with FOIA. Several of these items are described below in more detail, but first this memorandum describes changes in FOIA processing and reporting requirements.

DHS already has implemented many of the FOIA processing and certain personnel requirements under the Act. For example, DHS has already implemented the requirements of Section 12 of the Act, which requires that the exemption being claimed be identified in the record. However, DHS must take the following additional actions to fully comply with the requirements of the statute:

1. DHS will establish an individualized tracking number system to trace each FOIA request. This individualized tracking number will be used to allow the requester to obtain current processing information via the Internet or telephone through the Requester Service Center, including the date on which DHS received the request and an estimated date on which DHS will issue its final response. DHS must implement the tracking number system and have processing information available for all FOIA requests by December 31, 2008.

2. DHS will respond within 20 days of receiving a FOIA request. This response period will begin when the appropriate component receives the request or 10 days after the FOIA request is received by any DHS FOIA office, whichever occurs first. DHS must reduce its response period to 20 days or less by December 31, 2008.
 - a. DHS can only toll the 20-day response period upon requesting additional information or clarifying a fee-related issue with the requester. The 20-day response period will then restart upon receiving a response from the requestor. An agency may only toll this 20 days response period once to obtain additional information from the requester.
 - b. If DHS is unable to fulfill the FOIA request within the 20-day response period, the penalties could be substantial. DHS will not be able to assess search or duplication fees, unless “unusual” or “exceptional” circumstances apply to the processing of the request. DHS may also be subject to enforcement litigation, including the payment of the opposing party’s attorney’s fees and costs.
 - i. “Unusual circumstances” occur when there is a need to
 1. search or collect records from field offices or similar establishments;
 2. search for and examine voluminous amounts of records; or
 3. consult with another agency or with more than two components within DHS.
 - ii. “Exceptional circumstances” are not defined in statute, but it cannot include “a delay that results from a predictable agency workload of requests ... unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.”¹
3. Each DHS component with FOIA initial denial and processing authority must individually track all FOIA requests. The DHS FOIA Officer will report these statistics to Congress and make them available to the public upon request.² The following requirements are of particular note:
 - a. The number of times the component relied upon each b(3) (statutory specific) exception;
 - b. Average and median request and appeal response times, including the range in number of days for each component to respond to FOIA requests;
 - c. Request counts by response times (i.e., how many were filled within 20 days, within 40 days, within 60 days, etc.);
 - d. The ten oldest pending requests and ten oldest appeals, including average and median appeals response time and noting the appeals that required the highest and lowest number of business days to complete;
 - e. All expedited treatment accounting, including average and median response times and the total number adjudicated within the required 10 days; and
 - f. All fee waiver accounting, including average and median response times.

¹ 5 U.S.C. 552(a)(6)(C)(ii)

² The tracking requirements will be codified at 5 U.S.C. 552(e)(1).

The Office of Government Information Services will be reviewing all agencies', including DHS's, policies and procedures, reviewing agencies' compliance with FOIA, mediating disputes, issuing advisory opinions, auditing agencies, and recommending policy changes to Congress and the President.

The Act also made several important clarifications and additions to the FOIA laws that are described below in more detail.

Definition of News Media Representatives

The Act provides a news media representative definition for the first time. This definition has fee implications, as media representatives are eligible for reduced processing and duplication fees. Section 3 provides that a news media representative includes any person or entity that gathers information, uses its editorial skills to turn the raw materials into a distinct work and distributes its distinct work to an audience. The definition provides as examples of news media representatives, television or radio stations broadcasting to the public at large and publishers of periodicals. Significantly, the definition includes freelance journalists in the definition, "if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity." The definition also notes that "alternative media," such as "the adoption of the electronic dissemination of newspapers through telecommunications services" shall be considered news media representatives. The key criterion seems to be how a "distinct work" is construed. The definition *excludes* those organizations that merely obtain information under FOIA and then distribute such information on a website or elsewhere without analysis or other original work.

Attorney Fees and Litigations Costs

Section 4 clarifies when attorney fees and litigation costs are paid and how such fees will be paid. Prior to this amendment, attorney fees and litigation costs could be assessed in cases where the complainant has substantially prevailed. Section 4 defines the term "substantially prevailed" as situations where the plaintiff obtained relief through a judicial order, enforceable written agreement or consent decree or where there has been "a voluntary or unilateral change in position by the agency, if complainant's claim is not insubstantial." Importantly, instead of paying such fees from the Judgment Fund, these fees must now be paid directly by the agency.

Definition of Record and Government Contractors

Section 9 of the Act amends the definition of a "record" under Section 552(f)(2). The definition is broadened to include "any information...that is maintained for an agency by an entity under Government contract, for the purposes of records management."

Status inquiries will continue to be fielded via the FOIA Requester Service Center. All other FOIA-related questions should be answered by Catherine Papoi, Deputy Chief FOIA Officer and legal concerns should be directed to Michael Russell, Deputy Associate General Counsel for General Law.