United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240
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Memorandum

To: Assistant Secretaries
Heads of Bureaus and Offices

From: Michael J. Howell
Chief FOIA Officer

Subject: Freedom of Information Act Amendments

This memorandum highlights several significant amendments to the Freedom of Information Act (FOIA) contained in the "OPEN Government Act of 2007" (the "Act"), which became law on December 31, 2007.[1] The Act resulted from Congress' belief that the FOIA has not lived up to its strong presumption in favor of disclosure. Through the Act, Congress sought to strengthen the FOIA and promote accessibility, accountability, and openness in Government.

The Act mandates a number of substantial procedural requirements, including designation of Chief FOIA Officers and FOIA Public Liaisons, improvements to tracking of FOIA requests, and increased reporting requirements. The Act also limits the agency's ability to assess certain FOIA fees for requests not responded to within the statutory timeframes. It does not, however, change the FOIA exemptions that enable withholding of certain types of records.

You should be aware of two particularly important changes that involve payment of attorney fees and costs for FOIA litigation. First, the Act expands the circumstances in which a plaintiff may be awarded attorney fees to include when the plaintiff obtained relief in the litigation due to a voluntary or unilateral change in the agency's position. Second, the Act provides that attorney fees and costs from FOIA litigation may no longer be paid from the Judgment Fund in the Treasury, but rather **shall be paid from annual appropriations of the agency.**

The full effect of these changes will not be known until they have been addressed in litigation. It is, however, clearly possible that, where an agency fails to properly process a FOIA request by either not responding in time, improperly asserting exemptions, or failing to search adequately, a plaintiff may be entitled to attorney fees and costs when the agency releases documents or otherwise attempts to resolve the matter after a case is filed. It is also clear that each bureau's budget may be adversely affected by awards of attorney fees resulting from inadequate FOIA responses. Bureau personnel should therefore be made aware that their FOIA decisions and activities now carry much greater significance. FOIA decisions or actions should be made in consideration of the financial consequences that may result from inadequate or incorrect FOIA processing.

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[1] The statute is entitled the "Openness Promotes Effectiveness in our National Government Act of 2007."

Additional guidance will be forthcoming as the Act is implemented. You may contact Alex Mallus, DOI FOIA Officer, (202) 208-5342 or Alexandra_Mallus@ios.doi.gov, if you have questions regarding the Act.

cc: Bureau/Office CIOs
Bureau/Office FOIA Officers
Designated FOIA Attorneys