RECENT DEVELOPMENTS IN INFORMATION REGULATION

THE OPEN GOVERNMENT ACT: A PROPOSED BILL TO ENSURE THE EFFICIENT IMPLEMENTATION OF THE FREEDOM OF INFORMATION ACT

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INTRODUCTION

Amid the partisan politics behind much of today's congressional action, conservative and liberal politicians, think tanks, and nonprofit organizations have joined together in the fight to ensure transparency in government. On February 16, 2005, Senators John Cornyn and Patrick Leahy introduced the Openness Promotes Effectiveness in our National Government Act of 2005 (OPEN Government Act)[1] in the Senate. On the same day, Representative Lamar Smith of Texas introduced an identical bill in the House of Representatives.[2] The members of Congress who introduced this bill believe that it will strengthen the Freedom of Information Act (FOIA) and promote additional and necessary transparency of government actions.[3] Section I of this Article will present a history of FOIA amendments and discuss FOIA's shortcomings as it is currently implemented. Section II will explain the changes to FOIA that reformers propose in the OPEN Government Act.

I. BACKGROUND

Congress enacted FOIA[4] in 1966 to reverse a presumption that government information, when in the hands of the government, should not be available to the public.[5] Subject to ten exceptions,[6] FOIA requires

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1. *See* Openness Promotes Effectiveness in our National Government Act of 2005, S. 394, 109th Cong. (2005) ("A Bill [t]o promote accessibility, accountability, and openness in Government.").

2. Openness Promotes Effectiveness in our National Government Act of 2005, H.R. 867, 109th Cong. (2005) ("A Bill [t]o promote openness in Government.").

3. *See* S. 394 (finding that, "in practice, the [Freedom of Information Act (FOIA)] has not always lived up to [its] ideals").

4. *See generally* 5 U.S.C. § 552(a)(3) (2000) (making government records available to all persons who reasonably describe such records and request the records in accordance with published rules stating the time, place, fees, and procedures to be followed); Charles J. Wichmann III, *Ridding FOIA of Those "Unanticipated Consequences:" Repaving a Necessary Road to Freedom*, 47 DUKE L.J. 1213 (1998) (outlining the history of FOIA).

5. *See* THE COMM. ON GOV'T OPERATIONS, GOV'T INFORMATION-PUBLIC ACCESS, H.R. REP. NO. 89-1497, at 4-6 (1966) (declaring a need for legislation to ensure proper implementation of the "Public Information" section of the Administrative Procedure Act (APA)). The House Report maintained that the "Public Information" section of the APA "has been used as an authority for withholding, rather than disclosing, information." *Id.* at 4.

6. FOIA enumerates ten specific exceptions to the statute's openness provisions for information that is:

> (1) Specifically authorized by a criteria set forth by Executive Order in the interest of national defense or foreign policy; (2) related solely to internal personnel rules and practices of an agency . . . ; (3) specifically exempted from disclosure by statute . . . ; (4) involving trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with that agency; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) records or information compiled for law enforcement

government agencies to determine within 20 days of a request for records whether to comply with the request and notify the requesting party immediately of the reason for its determination.[7] Although each agency has differing approaches to processing FOIA requests,[8] the major steps in processing a request are the same among the agencies.[9]

A. History of Amendments to FOIA

Throughout its history, agencies have applied FOIA ineffectively, and Congress has passed several pieces of legislation in an effort to improve the statute. In 1974, Congress reacted to agencies' abuse of discretion in denying FOIA requests[10] by passing an act amending FOIA, that eliminated deficiencies in the processing of requests and reduced agency discretion in releasing documents pursuant to FOIA requests.[11] The amendment also

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purposes . . . ; (8) contained in or related to examination, operating, or conditioning reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or (9) geological and geophysical information and data, including maps, concerning wells.

5 U.S.C. § 552(b).

7. *See* 5 U.S.C. § 552(a)(6)(A)(i) (requiring the agency to inform the party requesting the records of the right to appeal to the agency head in the event of an adverse determination); *see also* 5 U.S.C. § 552(a)(6)(A)(ii) (requiring the agency to make a determination within 20 days after receiving an appeal); 5 U.S.C. § 552(a)(6)(B) (permitting an agency to extend the deadline in responding to a FOIA request if the agency needs time to "search for and collect" the requested documents from a location other than the office processing the request; needs to gather and examine a voluminous amount of separate and distinct records which are demanded in a single request; or needs the time for consultation, which shall be conducted with all practicable speed).

8. *See* 5 U.S.C. § 552(a) (requiring agencies to promulgate rules as to what processes and procedures should be used in complying with FOIA requests).

9. *See Information Management: Implementation of the Freedom of Information Act: Hearing Before the Subcomm. on Gov't Mgmt., Fin. and Accountability of the H.R. Comm. on Gov't Reform*, 109th Cong. 1 (2005) [hereinafter *Information Policy Hearings*] (testimony of Linda D. Koontz, Dir., Info. Mgmt. Issues, Government Accountability Office (GAO)) (describing the typical agency's FOIA process as receiving the request, processing the request, retrieving the records, processing the records, approving release of the records, and releasing the records). Koontz also explained that processing a FOIA request entails logging the FOIA request, creating a case file, scoping a request, estimating the fees, and generating initial responses. *See id.* The testimony described the retrieval of records as searching for responsive records, requesting records, and reviewing responsive records. *See id.* The processing of records entails making redactions to the records, applying exemption codes, and calculating fees, and that approving the release of records consists of reviewing redacted records, generating responses, and approving the release. *Id.*

10. *See* THE COMM. ON GOV'T OPERATIONS, FREEDOM OF INFORMATION ACT, H.R. REP. NO. 876, at 2 (1974) (describing FOIA amendments as necessary in order to remedy "the inadequacy of agency indexes of pertinent information, difficulties in procedures required for the requisite identification of records, federal agency delays in responses to requests for information by the public, and the cost burden of litigation in federal courts to persons requesting information").

11. *See* Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified as amended at 5 U.S.C. § 552); JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE (West 3d ed. 2000) (describing the 1974 amendments as requiring agencies to "segregate and disclose" documents that were unfairly considered exempt, limiting exemptions, shortening the time that the agencies may respond to requests, requiring requesters to only describe the records

restricted the fees agencies could charge for FOIA requests to "reasonable standard charges for document search and duplication and provide[d] for recovery of only the direct costs of such search and duplication."[12] In implementing measures to ensure that agencies did not arbitrarily deny FOIA requests, and in eliminating agencies' charges for the process of reviewing and redacting documents, this amendment caused a larger than expected increase in the amount of FOIA requests.[13]

In response to the increase in FOIA requests resulting from the 1974 amendments and the overwhelming processing costs, Congress passed several amendments to limit the burden agencies faced due to excess FOIA requests,[14] the last of which was the Freedom of Information Reform Act of 1986 (1986 Act).[15] The 1986 Act expanded the law enforcement records exemption[16] and established a three-tiered fee system which placed all FOIA requests into one of three categories: (1) "requests for commercial use," (2) non-commercial requests by the news media, educational institutions, or scientific institutions, with a scholarly or scientific purpose, and (3) all other non-commercial requests.[17] The 1986 Act authorized agencies to charge category (1) requestors for document search, duplication, and review; assess only document duplication charges to category (2) requestors; and assess search and document duplication charges but not charges for review to category (3) requestors.[18]

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on a basis sufficient to permit the agency to find the category of document requested, and providing uniform fees for record requests).

12. 5 U.S.C. § 552(b)(1) (2000).

13. *See* H.R. REP. NO. 93-876, at 10 (1974) (estimating that costs for implementing the amendment would not exceed $50,000 for the first year and $100,000 for each of the following five years); *see also* Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605, 612 (D.C. Cir. 1976); Eric J. Sinrod, *Freedom of Information Act Response Deadlines: Bridging the Gap Between Legislative Intent and Economic Reality*, 43 AM. U. L. REV. 325, 334 (1994) (establishing that the costs for implementing the 1974 FOIA amendments for the FBI alone was $160,000 in 1974, $462,000 in 1975, and $2,675,000 in 1976).

14. *See generally* HERBERT N. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND IMPLICATIONS OF THE FREEDOM OF INFORMATION ACT 51-57 (1999) (describing legislation that Congress passed between 1982 and 1986 with the intention of expanding exemptions and limiting the extent to which agencies were responsible for disseminating information to the public).

15. Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1801-04, 100 Stat. 3207 (1986) (codified as amended at 5 U.S.C. § 552(b)(7) (2000)).

16. *See* § 1802, 100 Stat. at 3207-48 (broadening the exemption by substituting "records or information" for "investigatory records" as the exempted information and "could reasonably be expected to" for "would" as the standard risk of harm).

17. *See* § 1803, 100 Stat. at 3207-49 (requiring agency regulations to limit fees to "reasonable standard charges").

18. *See id.* (describing a limited situation in which documents may be furnished without charge).

Congress passed the most recent change to FOIA in 1996, when it enacted the Electronic Freedom of Information Act of 1996 (E-FOIA).[19] In order to improve public access to agency information and decrease the burden of excessive FOIA requests on agencies, E-FOIA requires agencies to make certain records[20] available for public inspection by "computer telecommunications or . . . by electronic means."[21]

B. Current State of FOIA Implementation

1. General Accounting Office FOIA Report

Despite the amendments to FOIA, the debate still exists as to whether federal agencies could implement the statute in a more efficient fashion. In 2004, the United States General Accounting Office (GAO) published a report on the state of FOIA's implementation status from 2000-2002.[22] In 2002, the agencies reported receiving approximately 2.3 million FOIA requests; the Department of Veterans Affairs (DVA) received 66 percent of the requests.[23] The agencies granted 88 percent of the total requests.[24] Excluding those requests granted by the DVA,[25] other agencies granted

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19. Electronic Freedom of Information Act of 1996 (E-FOIA), Pub. L. No. 104-231, 110 Stat. 3048 (1996) (codified as amended at 5 U.S.C. § 552(f) (2000)). *See generally* ELECTRONIC FREEDOM OF INFORMATION AMENDMENTS OF 1996, H.R. REP. NO. 104-795, at 11 (1996) (setting forth the "volume of [f]ederal agency records created and retained in electronic formats" as a reason for enacting E-FOIA).

20. *See* § 4, 110 Stat. at 3049 (delineating the amended provisions); 5 U.S.C. § 552(a)(2). E-FOIA specifies that the records that must be made available for inspection through public means are:

> (A) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases; (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the *Federal Register*; (C) administrative staff manuals and instructions to staff that affect a member of the public; (D) copies of all records, regardless of form or format, which have been released to any person . . . and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and (E) a general index of the records referred to under subparagraph (D).

Id. (emphasis added).

21. § 4, 110 Stat. at 3049.

22. *See* GAO REPORT TO THE RANKING MINORITY MEMBER, COMM. ON THE JUDICIARY, U.S. SENATE, INFORMATION MANAGEMENT: UPDATE ON FREEDOM OF INFORMATION ACT IMPLEMENTATION STATUS (2004) [hereinafter FOIA REPORT] (reporting on topics such as "trends of reported FOIA implementation between 2000 and 2002 and progress . . . agencies have made addressing reporting inconsistencies and data-quality problems in annual FOIA reports").

23. *See id.* at 27 (noting that agencies spent $283 million on FOIA activity and received only $6 million in fees).

24. *See id.* at 25.

25. The Department of Veteran Affairs (DVA) is a statistical outlier according to the GAO. Consequently, the statistics throughout this Article do not include the DVA's performance in order to obtain an accurate picture of the implementation of FOIA throughout all the federal government agencies. *See id.* at 24-25.

75 percent of the FOIA requests they received in full.[26] While the large percentage of full grants may seem impressive, many agencies fully approve less than 50 percent of the requests they receive.[27]

The combined FOIA backlog for government agencies in 2002 stood at 140,000 requests.[28] This represents approximately six percent of requests; however, if the DVA statistics are set aside from the analysis, the backlog rate becomes 12 percent.[29] The agencies with the highest backlog rates are the Department of State,[30] the United States Agency for International Development,[31] the Federal Emergency Management Administration,[32] the Central Intelligence Agency,[33] and the Department of Energy.[34] In six agencies, the median time for processing the pending backlog requests stood at over one year;[35] three other agencies have a median processing time of over one hundred days.[36]

2. Secrecy in the Bush Administration Report[37]

Aside from the inefficient implementation of FOIA by individual agencies, the Bush Administration has created several barriers to the public's access to government records. In 1993, during the Clinton Administration, Attorney General Janet Reno issued a memorandum (Reno Memorandum) stating that the Department of Justice would defend an agency's assertion of a FOIA exemption only if "the agency reasonably foresees that disclosure would be harmful to an interest protected by that

26. *See id.* at 24-26.

27. *See id.* at 26 (depicting the United States Agency for International Development (USAID), Central Intelligence Agency (CIA), Department of Commerce, Department of Justice (DOJ), Department of Labor, Environmental Protection Agency (EPA), Federal Emergency Management Agency (FEMA), Department of Housing and Urban Development, National Aeronautics and Space Administration, Nuclear Regulatory Commission (NRC), National Science Foundation (NSF), Department of State (DOS), and the Department of Treasury (DOT) as agencies that did not grant in full at least 50% of FOIA requests each received).

28. *See* FOIA REPORT, *supra* note 22, at 32 (noting that the backlog decreased in 2002, excluding the DVA's backlog, and the backlog of requests totaled 100,000 for federal agencies in 2002).

29. *See id.* at 33 (defining the backlog rate as the number of requests pending at the end of the year, divided by the number of requests received that year).

30. *See id.* at 34 (reporting over a 160% backlog rate in DOS FOIA requests).

31. *See id.* (reporting over a 70% backlog rate in USAID FOIA requests).

32. *See id.* (reporting over a 60% backlog rate in FEMA FOIA requests).

33. *See id.* (reporting a backlog rate of slightly less than 60% for the CIA).

34. *See* FOIA REPORT, *supra* note 22, at 34 (reporting a backlog rate of slightly less than 40% for the Department of Energy).

35. *See id.* at 45 (illustrating that the Department of the Interior, CIA, DOJ, EPA, DOS, DOT, and the Department of Agriculture have median processing times for pending requests of more than one year).

36. *See id.* (reporting that USAID, the Department of Education, FEMA, the Department of Health and Human Services, and NRC have median processing times for pending requests of more than 100 days).

37. MINORITY STAFF OF H. COMM. ON GOV'T REFORM, 108TH CONG., REPORT ON SECRECY IN THE BUSH ADMINISTRATION (2004) [hereinafter SECRECY REPORT].

exemption."[38] In stark contrast to the Reno Memorandum, Attorney General John Ashcroft reversed Reno's position in an October 2001 memorandum (Ashcroft Memorandum) that stated that the Department of Justice will defend agencies' assertions of FOIA exemptions "unless they lack a sound legal basis."[39] The Ashcroft Memorandum demonstrates the Bush Administration's policy of discouraging agencies from disclosing records if the agency can invoke any technical grounds for withholding them under FOIA.

In 2002, Andrew Card, President Bush's Chief of Staff, prepared a memorandum urging agencies to extend exemption 2[40] and exemption 4[41] of FOIA in order to safeguard records regarding weapons of mass destruction and "other information that could be misused to harm the security of our Nation and the safety of our people."[42] Additionally, President Bush included a major new exemption in the Critical Infrastructure Information Act of 2002 (CIIA),[43] exempting any information from FOIA that is voluntarily provided to the federal government by a private party if the information relates to the security of "critical infrastructure."[44] The CIIA could potentially create a protection that "will likely block the release of substantial amounts of innocuous information."[45]

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38. *See id.* at 5. (quoting Memorandum from Janet Reno, Attorney General, to the Heads of all Federal Departments and Agencies (Oct. 4, 1993)).

39. *See* SECRECY REPORT, *supra* note 37, at 5 (quoting Memorandum from John Ashcroft, Attorney General, to the Heads of all Federal Departments and Agencies (Oct. 12, 2001)).

40. *See* 5 U.S.C. § 552(b)(2) (2000) (exempting records "related solely to the internal personnel rules and practices of an agency").

41. *See* § 552(b)(4) (exempting records containing "trade secrets and commercial or financial information obtained from a person and privileged or confidential").

42. SECRECY REPORT, *supra* note 37, at 9.

43. *See* 6 C.F.R. § 29.3 (2005) (noting that this exemption applies only to documents submitted to the Department of Homeland Security (DHS)). The exception states:

> Information submitted to any other federal agency pursuant to a Federal legal requirement is not to be marked as submitted or protected under the [exemption] or otherwise afforded the protection of [the exemption] . . . provided, however, that such information, if it is separately submitted to DHS pursuant to these procedures, may upon submission to DHS be marked as Protected . . . or otherwise afforded the protections of the [exemption].

Id.

44. 6 U.S.C. §§ 131, 133 (2000); *see* SECRECY REPORT, *supra* note 37, at 8-9 (noting that in order to receive protection from FOIA disclosure under this rule a company must simply "accompany the information submitted with an 'express statement' identifying it as critical infrastructure information"). *See generally* James W. Conrad, *Protecting Private Security-Related Information From Disclosure by Government Agencies*, 57 ADMIN. L. REV. 715 (2005) (summarizing the Critical Infrastructure Information Act of 2002 and describing it as an attempt to encourage critical infrastructure sectors to share security-related information with the DHS by providing the information with an unprecedented type of protection).

45. *See* SECRECY REPORT, *supra* note 37, at 9-10 (stating that, as opposed to FOIA, under which exempt material must be redacted in order to allow disclosure of non-exempt

II. THE OPEN GOVERNMENT ACT

While agencies fully process and grant many FOIA requests, the numbers reveal a system with room for improvement. Before introducing the OPEN Government Act, Senators Cornyn and Leahy introduced two bills to enhance the effectiveness of FOIA.[46] The OPEN Government Act is the third bill that the two Senators introduced this year focusing on FOIA reform. If passed, the bill will likely be the most groundbreaking of their recent proposals. Democratic ideals motivated the Senators to introduce the bill: The bill states that constitutional democracy depends upon the consent of the governed, and the consent of the governed is meaningless unless it is informed.[47] This Part focuses on Sections 3, 4, 6, and 11 of the OPEN Government Act; these provisions contain the most significant alterations to FOIA as it currently stands.

A. Section 3

Section 3 of the OPEN Government Act provides guidelines for agencies in determining membership in the news media for purposes of designating requests under category (2).[48] FOIA will no longer permit the denial of category (2) fee status from a requester solely because the requester lacks institutional associations.[49] Instead, the agency must consider the requester's prior publication history.[50] In an era in which the public receives information from sources other than the mainstream news media, supporters of the OPEN Government Act believe that protections for those who provide credible information, despite their lack of participation in a traditional media outlet, should be ensured.[51]

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information in the document, the critical infrastructure exemption protects the entire document from disclosure). The definitions provided in the Critical Infrastructure Information Act of 2002 exempt from disclosure "everything from information about a potential leak at a chemical plant to a deficiency in a software program used by the Department of Defense." *Id.* at 8.

46. *See* S. 1181, 109th Cong. (2005) (requiring Congress to include "explicitly within the text of the bill" any new exemption to FOIA); Faster FOIA Act, S. 589, 109th Cong. (2005) (creating a 16-member advisory commission to investigate and report to Congress issues regarding FOIA processing delays).

47. OPEN Government Act, S. 394 § 2, 109th Cong. (2005). *See* Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976) (stating that "disclosure, not secrecy, is the dominant objective of [FOIA]").

48. *See* S. 394 § 3; *see also supra* notes 19-22 and accompanying text.

49. S. 394 § 3.

50. *See id.* ("Prior publication history shall include books, magazine and newspaper articles, newsletters, television and radio broadcasts, and Internet publications."). If a requester does not have a publication history, this provision requires the agency to consider the requester's "stated intent at the time the request is made to distribute information to a reasonably broad audience." *Id.*

51. *See Openness in Government and Freedom of Information: Examining the OPEN Government Act of 2005 Before the Subcom. on Terrorism, Tech. and Homeland Sec. of the S. Comm. on the Judiciary*, 109th Cong. 4 (2005) [hereinafter *OPEN Government Act*

B. Section 4

Section 4 of the OPEN Government Act[52] overturns the Supreme Court decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*.[53] In *Buckhannon*, the Court rejected the "catalyst theory" of allowing an award of attorney's fees.[54] Under the catalyst theory, if a plaintiff brings a lawsuit that prompts a "voluntary" remedial action by the defendant prior to final judgment, the plaintiff could receive attorney's fees as a "prevailing party."[55] The *Buckhannon* Court looked to the plain meaning of the term "prevailing party" and held that the complainant is not entitled to attorney's fees unless the complainant's suit results in a final judgment on the merits.[56]

A debate exists as to whether the "catalyst theory" is sound public policy.[57] In the context of FOIA post-*Buckhannon*, if the government

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Hearing] (testimony of Lisa Graves, Senior Counsel for Legislative Strategy, ACLU) (supporting § 3 of the OPEN Government Act because the "democratization of the flow of information" through the Internet, specifically through the increasing popularity of "blogs," affords these new media outlets the same benefits as traditional media corporations); *see also Information Policy Hearings*, *supra* note 9, at 1 (testimony of Ari Schwartz, Associate Director, Ctr. for Democracy & Tech.) (recognizing that, in passing § 3, Congress would remove a major hurdle to obtaining information for independent media outlets). *But see OPEN Government Act Hearing*, *supra* note 51, at 5 (testimony of Thomas M. Sussman, Ropes & Gray LLP) (maintaining that the last line of § 3, which refers to the stated intent of the requester, may be unenforceable). Mr. Sussman, however, modifies this by stating that he believes that individuals will not take advantage of this open-ended provision because the requester will be deterred by the fact that "making a false statement to a government official is a federal crime." *Id.*

52. S. 394 § 4.

53. 532 U.S. 598 (2001).

54. *See id.* at 600 (holding that when a party sues another party under the Fair Housing Amendments Act and the Americans with Disabilities Act—statutes which allow for the awarding of attorney's fees to a "prevailing party"—a court may not award attorney's fees if the suit does not result in a final judgment on the merits by the court, despite the fact that the lawsuit brought about a voluntary change in the defendant's conduct).

55. *See id.* (defining the "catalyst theory" as an award of attorney's fees when the plaintiff fails "to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct").

56. *See* 5 U.S.C. § 552(a)(4)(E) (2000) ("The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."); *see also* Buckhannon Bd. & Care Home, Inc. v. W.Va. Dep't of Health & Human Res., 532 U.S. 598, 607-10 (2001) (maintaining that the clear meaning of the term "prevailing party" used in FOIA is that a complainant must succeed on the merits of the case in order to be awarded attorneys' fees, absent clear congressional intent).

57. The Supreme Court in *Buckhannon* was divided as to whether public policy warrants a "catalyst theory" to the awarding of attorney's fees. Chief Justice Rehnquist, in the majority opinion noted that the Supreme Court has always opposed a second major litigation to determine attorney's fees and stated that a "catalyst theory" hearing would require analysis of the defendant's subjective motivations in changing its conduct, an analysis that would "likely depend on a highly factbound inquiry and may turn on reasonable inferences from the nature and timing of the defendant's change in conduct." *Buckhannon*, 522 U.S. at 608-10. The Court also maintained that the catalyst theory is necessary to prevent defendants from voluntarily mooting a case at the last moment and

initially rejected a valid FOIA request, and the requester decided to appeal the decision by filing suit, the government could wait until just before the court made its decision to disclose the requested information without being responsible for the complainant's attorney's fees.[58] The threat of forcing requesters to incur substantial attorney's fees before obtaining documents to which they have a statutory right serves as one of the government's strongest weapons in deterring people from making FOIA requests and appealing agency decisions.[59] Additionally, the possibility that FOIA

ignores the fact that "the defendants' potential liability for fees in this kind of litigation can be as significant as, and sometimes even more significant than, their potential liability on the merits, and the possibility of being assessed attorney's fees may well deter a defendant from altering its conduct." *Id.* In dissent, Justice Ginsburg argued that the catalyst theory is essential to adhering to the legislative intent behind the passing of such fee-shifting statutes, which was to "to promote vigorous enforcement" of the laws by private plaintiffs. *Id.* at 634-35 (Ginsburg, J., dissenting). Justice Ginsburg asserted that the catalyst theory may lead defendants to promptly comply with the law in order to avoid large attorney's fees if they were to continue in litigation and said that not applying the catalyst theory would discourage plaintiffs from seeking a settlement. *Id.* at 639 (Ginsburg, J., dissenting).

58. *See* Landers v. Dep't of Air Force, 257 F. Supp. 2d 1011 (S.D. Ohio 2003); Union of Needletrades v. INS, 336 F.3d 200 (2d Cir. 2003); Oil, Chem. & Atomic Workers Int'l Union v. Dep't of Energy, 288 F.3d 452 (D.C. Cir. 2002) (applying the decision in *Buckhannon* to FOIA actions); *see also Information Policy Hearings*, *supra* note 9, at 4 (testimony of Senator John Cornyn) (describing the scenario in which many agencies use the lack of a catalyst theory to their advantage). *See generally* David Arkush, *Preserving "Catalyst" Attorneys' Fees Under the Freedom of Information Act in the Wake of* Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources, 37 HARV. C.R.-C.L. L. REV. 131 (2002) (discussing *Buckhannon*'s possible affect on FOIA actions and arguing that the Court in *Buckhannon* did not intend for the holding of the case to apply to FOIA litigation).

59. The court in *Landers* recognized this weapon:

> After this litigation had been initiated, the Defendant produced responsive documents to the Plaintiff and requested that the Court, as a result, dismiss this lawsuit as moot. . . . It could not be questioned that this lawsuit was the catalyst which led to the disclosure of the documents, the production of which the Plaintiff had requested. Without filing this lawsuit, the Defendant would not have complied with its statutory duty to produce the requested documents. Nevertheless, the Plaintiff is not entitled to recover his attorney's fees, since he obtained no relief from this Court.

Landers, 257 F. Supp. 2d at 1012-13; *see also Union of Needletrades*, 336 F.3d at 202 (stating that more than one year after the FOIA request, and several months after the complainant filed suit to compel disclosure of the requested records, the federal agency voluntarily produced the requested documents); *Information Policy Hearings*, *supra* note 9, at 5 (testimony of Senator John Cornyn) (claiming that many FOIA requesters may stop making legitimate FOIA requests and appeals rather than possibly become liable for attorney's fees under *Buckhannon*). *But see id.* at 15 (testimony of Carl Nichols, Deputy Assistant Att'y Gen., Civil Div., DOJ) ("The Department of Justice believes that *Buckhannon* and its progeny represent sound public policy and should remain undisturbed."). In his testimony, Nichols cited to *Buckhannon* to illustrate that fears of abuses of the lack of a catalyst theory are "entirely speculative and unsupported by any empirical evidence." *Id.* at 15 (citing *Buckhannon*, 532 U.S. at 608). Senator Cornyn responded to Nichols' statements by providing examples set forth by members of the media and the National Security Archive describing agency "stonewalling" tactics used to prevent disclosure of certain records. *See id.* at 5 (testimony of Senator John Cornyn). Senator Cornyn further argues that, while plaintiffs involved in other causes of action have the ability to recover damages for any wrongdoing by the defendants, complainants in FOIA actions do not have this ability. Because of this, it is important that complainants are

requesters may not be able to afford attorney's fees in the event that they are not awarded has deterred attorneys from representing FOIA requesters in such matters.[60]

Section 4 of the OPEN Government Act will take this potential weapon away from the federal agencies and apply the catalyst theory to FOIA actions.[61] Section 4 amends FOIA to state that a complainant may be awarded attorney's fees if he or she has obtained "a substantial part of its requested relief through a judicial or administrative order . . . or if the complainant's pursuit of a nonfrivolous claim or defense has been a catalyst for a voluntary or unilateral change in position by the opposing party that provides a substantial part of the requested relief."[62] The OPEN Government Act, therefore, encourages greater transparency on the part of federal agencies and removes a tactical means of delay in responding to proper FOIA requests.

C. Section 6

Section 6 of the OPEN Government Act gives teeth to the time limit provisions of FOIA.[63] The 1974 amendments to FOIA established administrative deadlines of ten days for processing FOIA requests and 20 days for making a determination regarding any administrative appeals.[64] Congress allowed a ten day extension in "unusual circumstances"[65]—an extension that agencies have often invoked. In 1996, Congress further amended the time limit provisions by increasing the time period within

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protected from the government illegitimately delaying their requests. *Id.* at 6.

60. *See Information Policy Hearings*, *supra* note 9, at 13 (testimony of Senator John Cornyn) (arguing that the application of *Buckhannon* to FOIA cases has deterred many attorneys from taking on FOIA clients). Senator Cornyn attached to his testimony, a letter addressed to him from Robert Ukeiley, Esq., which read: "I generally represent my clients on a pro bono basis. However, I am no longer able to take most FOIA cases because I know it is highly likely that the agency will turn over the documents after I file suit and then refuse to pay attorneys' fees and expenses." *Id.*

61. OPEN Government Act, S. 394 § 4, 109th Cong. (2005).

62. *Id.*

63. *See OPEN Government Act Hearing*, *supra* note 51, at 2 (testimony of Lisa Graves, Senior Counsel for Legislative Strategy, ACLU) (stating that § 6 of the OPEN Government Act creates a consequence for agencies that do not comply with FOIA time limitations making compliance with FOIA a real priority for agencies rather than a tertiary obligation).

64. Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified as amended at 5 U.S.C. § 552 (2000)); *see OPEN Government Act Hearing*, *supra* note 51, at 3 (testimony of Lisa Graves, Senior Counsel for Legislative Strategy, ACLU).

65. The 1974 amendments defined "unusual circumstances" as:

> the need to search for and collect the requested records from field facilities or other establishments . . . (2) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; and (3) the need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein).

§ C, Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified as amended at 5 U.S.C. § 552).

which agencies must process FOIA requests to twenty days.[66] The 1996 amendments also defined the "exceptional circumstances" standard to assist in determining whether agencies that have not complied with the time limit set forth in FOIA should retain jurisdiction over the FOIA request.[67] This definition specifically limited this exception in stating that "the term 'exceptional circumstances' does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests."[68] Despite these amendments, agencies continue to experience delays in processing FOIA requests.[69]

Section 6 of the OPEN Government Act asserts that if an agency fails to comply with the time limits[70] of FOIA, the agency may no longer invoke any exemption in denying a FOIA request.[71] The agency will not lose the right to use an exemption, however, if disclosure will endanger national security, expose personal, private or proprietary information, or is otherwise prohibited by law.[72] The bill provides that, if the agency can prove by clear and convincing evidence that it has good cause for failing to

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66. *See* § 8(a)(b), Pub. L. No. 104-231, 110 Stat. 3052 (1996) (codified in 5 U.S.C. § 552(a)(6)(A)) (extending the time in which agencies must determine whether to comply with a FOIA request to 20 days).

67. *See* 5 U.S.C. § 551(a)(6)(C) (2000). The 1996 amendments stated:

> Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.

Id.

68. § 7(c), 110 Stat. 3052.

69. *See supra* notes 22-34 and accompanying text.

70. 5 U.S.C. § 552(a)(6) (2000). Agencies are required to:

> (i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and (ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal.

Id.

71. *See* S. 394 § 6(b)(1) (setting forth both the punishment for not complying with the time limit provisions and the exceptions to punishment); *OPEN Government Act Hearing*, *supra* note 51, at 3 (testimony of Lisa Graves, Senior Counsel for Legislative Strategy, ACLU) (expressing support for § 6 by stating that "a deadline without consequence is hardly a deadline—it is merely a hope or a wish"); *see also id.* at 4 (testimony of Meredith Fuchs, Gen. Counsel, Nat'l Sec. Archive, George Washington Univ.) (arguing that this section may help to solve the delay problem and remarking that concerns that § 6 may bring about a flood of troubling information disclosures are unfounded, particularly by the exceptions in § 6).

72. S. 394 § 6(b)(1).

comply with the time limit provisions, it will still have the right to assert an exemption.[73]

While delay in FOIA responses remains problematic, opponents of Section 6 argue that the provision is not the proper remedy for inefficient FOIA processing.[74] Carl Nichols, the Deputy Assistant Attorney General for the Department of Justice, believes that the increased number of large "database" requests made by educational institutions and the media renders the 20-day time limitation unrealistic.[75] Instead, Nichols suggests solutions to effect greater efficiencies in FOIA implementation: Specifically, he believes that Congress should fund agencies' investment in new technology,[76] use private contractors,[77] and promote greater cooperation between requesters and agencies in order to provide FOIA staff with the ability to process requests more efficiently.[78]

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73. S. 394 § 6(b)(2).

74. *See OPEN Government Act Hearing*, *supra* note 51, at 6 (testimony of Thomas M. Sussman, Ropes & Gray LLP) (arguing that the exceptions to § 6 should more closely mirror exemptions (1) and (4) of FOIA to avoid any gaps in the legislation). Sussman also asserts that there may be additional third party interest that should be better protected by § 6, such as investigations by law enforcement agencies. *Id.* He also believes that the potential effects of § 6 should be further studied by the Commission set forth in the "Faster FOIA Act," to determine what records should be given protection under the section and whether Congress should change the burden to sustain withholding in the case of delay. *Id.*

75. *See Information Policy Hearings*, *supra* note 9, at 5 (testimony of Carl Nichols, Deputy Assistant Att'y Gen., Civil Div., DOJ) (noting that many factors enter into the amount of time necessary to respond to FOIA requests, including "[1] the number of incoming requests; [2] the number of office components with responsive documents; [3] the number of office components that must be consulted prior to responding to the request; [4] the size and complexity of requests; [5] the number of resources available to the agency; and [6] the availability of the records" (numbers added for clarity)); *id.* at 8-9 (maintaining that agencies are finding it impossible to process massive database requests within the statutory time limits without diverting substantial personnel or financial resources from FOIA staff and from other agency tasks). The diverting of substantial personnel and financial resources has led to the overall backlog of requests. *Id.* Nichols further maintains that unusually complex requests and unexpected circumstances that bring about a large amount of FOIA requests within agencies not equipped to handle responses for the requests are also reasons for delay in FOIA responses. *Id.*

76. *See id.* (stating that the use of web-based automated information systems has allowed for more efficient FOIA implementation); Classified National Security Information, Part 4: Safeguarding, Exec. Order No. 12,958 (Apr. 17, 1995), 60 Fed. Reg. 19,825 (Apr. 20, 1995) (defining "automated information systems" as "an assembly of computer hardware, software, or firmware configured to collect, create, communicate, compute, disseminate, process, store, or control data or information"). Nichols also asserted that agencies could enhance FOIA efficiency by investing in record management applications and electronic recordkeeping capable of collecting documents more efficiently. *See Information Policy Hearings*, *supra* note 9, at 9 (testimony of Carl Nichols, Deputy Assistant Att'y Gen., Civil Div., DOJ).

77. *See Information Policy Hearings*, *supra* note 9, at 9 (testimony of Carl Nichols, Deputy Assistant Att'y Gen., Civil Div., DOJ) (claiming that hiring contractors to carry out various parts of the FOIA administrative process has become an increasingly significant part of FOIA's administration at a number of agencies).

78. *See id.* at 10 (stating that promoting cooperation between requesters and agencies in narrowing the scope of the desired documents can help reduce the burden on agencies that stems from the request of a broad range of documents).

D. Section 11

If passed, Section 11 of the OPEN Government Act will establish an Office of Government Information Services (OGIS), its main objective being the oversight of individual agencies in their implementation of FOIA.[79] The OGIS would have the responsibility of reviewing agencies' policies, procedures, and compliance in administering FOIA.[80] The OGIS will also recommend policy changes to Congress and the President with respect to whether agencies are receiving and spending adequate funds on the implementation of FOIA.[81] Finally, Section 11 provides that OGIS will offer mediation services between requesters and administrative agencies as a non-exclusive alternative to litigation. If mediation does not resolve the dispute, the OGIS may issue an advisory opinion on the matter.[82]

Many states have established offices that assist in the administration of efficient FOIA procedures.[83] Foreign countries and the European Union[84] have also established centralized agencies to oversee the implementation of their freedom of information policies.[85] The United States has yet to establish a similarly centralized oversight of FOIA, and Section 11 of the

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79. *See* OPEN Government Act, S. 394 § 11(a), 109th Cong. (2005) (attempting to establish the Office of Government Information Services (OGIS) within the Administrative Conference of the United States (ACUS)); *see also OPEN Government Act Hearing*, *supra* note 51, at 3 (testimony of Thomas M. Sussman, Ropes & Gray LLP) (describing ACUS as a traditionally nonpartisan agency, specifically dedicated to improving administrative procedures). Sussman also indicates that if OGIS were to be established, appropriations for ACUS must be restored. *Id.*

80. S. 394 § 11(a); *see id.* (requiring OGIS to conduct audits of administrative agencies on FOIA policies and compliance and to issue reports detailing its findings).

81. *Id.*

82. *Id.*

83. *See OPEN Government Act Hearing*, *supra* note 51, at 3 (testimony of Thomas M. Sussman, Ropes & Gray LLP) (pointing out that the Texas Attorney General, the New York Committee on Open Government, and the Connecticut Freedom of Information Commission all play large roles in ensuring the proper application of FOIA); *id.* at 1-3 (testimony of Katherine M. Cary, Chief, Open Records Div., Texas Assistant Att'y Gen.) (describing the role of the Open Records Division as one that all government agencies must seek a ruling from within 10 days of a request if the agency would like to withhold records from the public, at the expense of waiving any applicable exemptions if it does not comply); *see also* New York State Committee on Open Government, http://www.dos.state.ny.us/coog/coogwww.html (last visited Feb. 6, 2006) (describing the Committee's responsibilities for oversight and advice with regard to the Freedom of Information, Open Meetings, and Personal Privacy Protection Laws); *see also* Connecticut Freedom of Information Commission, http://www.state.ct.us/foi (last visited Feb. 6, 2006) (expressing the Commission's mission as "to administer and enforce the provisions of the Connecticut Freedom of Information Act, and to thereby ensure citizen access to the records and meetings of public agencies in the State of Connecticut").

84. *See OPEN Government Act Hearing*, *supra* note 51, at 3 (testimony of Thomas M. Sussman, Ropes & Gray LLP) (noting that the European Union has developed Freedom of Information Ombuds offices).

85. *See generally* David Banisar, THE WWW.FREEDOMINFO.ORG GLOBAL SURVEY: FREEDOM OF INFORMATION AND ACCESS TO GOVERNMENT RECORD LAWS AROUND THE WORLD, *available at* http://www.freedominfo.org/survey/survey2003.pdf (2003) (discussing the status of freedom of information procedures in 53 countries).

OPEN Government Act will create such an agency, one that many believe is essential to the proper administration of FOIA.[86] According to these reformers, the establishment of the OGIS will likely improve FOIA procedures and decrease the burden caused by the immense amount of FOIA litigation taking place in federal courts.[87]

CONCLUSION

In 1966, Congress passed FOIA and created a presumption that the public had the right to government records, unless the records met one of the exemptions set forth in the statute. In doing so, FOIA established a "'right to know' standard for access instead of a 'need to know' standard, and shifted the burden of proof from the individual to the government agency seeking to deny access."[88] Throughout the years, the inefficient implementation of FOIA has led Congress to amend the statute in order to further the goal of an open and transparent government. Senators Cornyn and Leahy have proposed the OPEN Government Act in the spirit of continuing a tradition of improving FOIA. In consideration of this bill, Congress will have to weigh the burdens that the OPEN Government Act places on the federal government, against the advantages the legislation provides individuals who wish to gain access to government records.

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86. *See id.* at 93 (asserting that FOIA is decentralized and "FOIA has been undermined by a lack of central oversight . . . ."); *see also OPEN Government Act Hearing*, *supra* note 51, at 3 (testimony of Thomas M. Sussman, Ropes & Gray LLP) (maintaining that Section 11 is the most important provision in the OPEN Government Act and expressing confidence that "OGIS will more than pay for its costs each year"); *see also OPEN Government Act Hearing*, *supra* note 51, at 3-4 (testimony of Mark Tapscott, Dir., Ctr. for Media & Pub. Policy, Heritage Found.) (stating that the absence of a neutral arbiter with authority to mediate disputes between agencies and requestors and to oversee the administration of FOIA remains one of the most serious problems in the current FOIA system and expressing support for the development of OGIS to fill the void).

87. *See* Banisar, *supra* note 85, at 93 (noting that thousands of FOIA cases have been heard in federal courts in the 35 years since the passage of FOIA); *see also OPEN Government Act Hearing*, *supra* note 51, at 6 (testimony of Meredith Fuchs, Gen. Counsel, Nat'l Sec. Archive, George Washington Univ.) (claiming that OGIS may help resolve problems quickly and alleviate the need for litigation). *But see id.* (expressing concern over the fact that OGIS's opinions will not be binding). Fuchs suggests additional provisions that would require agencies to work with OGIS in good faith, authorize OGIS to hold hearings and take testimony, and provide for publication of OGIS's opinions. *Id.* Fuchs points to the model of the New York State Committee on Open Government as one that lacks binding authority but is intricate in resolving disclosure disputes. *Id.* She believes that this model works because it publishes advisory opinions and makes recommendations to the Governor and State Legislature for improving open government laws. *Id.*

88. *See Information Policy Hearings*, *supra* note 9, at 3 (testimony of Linda D. Koontz, Dir., Info. Mgmt. Issues, GAO).

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