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Managing Responses To Freedom Of Information Act Requests

INTRODUCTION

The United States Supreme Court declared that the basic purpose of the Freedom of Information Act (FOIA)¹ is “to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”² At the same time the FOIA recognizes the importance of other societal goals, such as protecting national security, personal privacy, and sensitive business information, among others.³ Thus, in responding to requests agencies must balance these interests while striving to make “the fullest responsible disclosure.”⁴

In the United States, where the FOIA has been in place for over forty years, the Act continues to be utilized by an extraordinary number of requesters. During Fiscal Year 2006, the federal government received nearly three million requests.⁵ It also devoted over five thousand employee work-years to the administration of the FOIA.

¹ 5 U.S.C. § 552(b) (2000 & Supp. IV 2004).

² *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

³ See Attorney General’s Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in, *FOIA Post* (posted 10/15/01) available at <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>.

⁴ S. Rep. No. 89-813, at 3 (1965).

⁵ This figure excludes first-party requests directed to the Social Security Administration, which received over eighteen million requests.

Accordingly, a key aspect of the administration of the FOIA in the United States is the challenge of managing this large volume of requests. Complicating that challenge is the reality that for many requests extensive searches may be required, voluminous records may need to be reviewed, consultations with other agencies may need to occur, all in addition to the line by line review required to determine the applicability of any of the FOIA's nine statutory exemptions from disclosure. These realities often work against the important countervailing interest in promptly responding to requesters.

All three branches of the United States government, Congress, the Courts, and the President, have addressed this issue and tried to create a proper balance between disclosing information to the public in a timely fashion and allowing the agencies the necessary time to process requests. In the FOIA, Congress set forth a time limit for agencies to respond to FOIA requests. Simultaneously, it extended those deadlines in certain circumstances. Similarly, while the Courts have enforced statutory requirements regarding the time to respond to requests, they have also granted agencies additional time to process requests. Finally, the President has recently directed agencies to develop plans to improve their management of responses to FOIA requests, notably by directing them to take steps toward reducing their backlogs (i.e., requests pending beyond the statutory time period). These efforts have helped agencies to achieve measurable progress in the ways they respond to requests. Despite the constraints that agencies face, they can take a number of steps to improve their management of responses to FOIA requests. By properly managing responses to FOIA requests, and working closely with requesters, agencies are able to further the statute's important goals.

STATUTORY REQUIREMENTS

Congress addressed the amount of time an agency has to respond to a request for information in the FOIA itself. An agency typically has twenty working days to make a determination on a request from the date of receipt.⁶ Where an agency does not comply with the applicable time limit, a requester will be deemed to have exhausted his administrative remedies,⁷ thus satisfying a necessary prerequisite to obtaining a remedy

⁶ 5 U.S.C. § 552(a)(6)(A).

⁷ See id. § 552(a)(6)(C)(i).

in the courts.⁸ Despite the twenty day time limit generally placed on agencies, however, the FOIA allows an agency to extend the time limit where there are either unusual or exceptional circumstances.⁹

Administrative Exhaustion

Before a FOIA requester may file a lawsuit in an attempt to obtain a court order compelling an agency to disclose the requested records, the requester must exhaust his administrative remedies. Actual exhaustion occurs when the plaintiff pursues any available administrative appeal from a denial of his request prior to seeking judicial review.¹⁰ The purpose of this requirement is to present an agency with an opportunity to exercise its expertise on the matter and to make a factual record to support its decision.¹¹ Further, the exhaustion requirement also allows an agency the opportunity to correct mistakes made at lower levels, thereby preventing the need for unnecessary judicial review.¹²

Constructive Exhaustion

Agencies sometimes have difficulties in responding to FOIA requests within the twenty day working period because of the practical constraints they face. Where an agency fails to meet this deadline, the FOIA provides that requesters will be deemed to have exhausted their administrative remedies.¹³ Because the requester does not actually engage in the process of filing an administrative appeal of an agency's original decision, the process has come to be known as "constructive exhaustion."¹⁴ An important caveat in this doctrine is that a requester can no longer gain immediate judicial review where an agency responds to a request at any time before a FOIA lawsuit is actually filed, regardless of whether the requisite time limit has passed.¹⁵

⁸ See, e.g., Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 61-62 (D.C. Cir. 1990) ("Courts have consistently confirmed that the FOIA requires exhaustion of this appeal process before an individual may seek relief in the courts.")

⁹ See 5 U.S.C. § 552(a)(6)(B) (discussing unusual circumstances); see also § 552(a)(6)(C) (discussing exceptional circumstances).

¹⁰ Spannaus v. U.S. Dep't of Justice, 824 F.2d 52, 58 (D.C. Cir. 1987).

¹¹ Oglesby, 920 F.2d at 61.

¹² Id.

¹³ 5 U.S.C. § 552(a)(6)(C)(i).

¹⁴ See, e.g., Spannaus, 824 F.2d at 58 ("By deem[ing] exhaustion to occur on expiration of the relevant time limits, the statute provides for constructive exhaustion, which permits early "accrual" of a cause of action in the interests of timely disclosure." (internal quotations omitted)).

¹⁵ Oglesby, 920 F.2d at 63.

Further, the twenty day time limit is not always mandatory, as Congress recognized the necessity of including mechanisms within the FOIA by which agencies could extend the time limit in certain circumstances.

Unusual Circumstances

The FOIA provides that where unusual circumstances exist, the time limits may be extended by ten days if the agency provides written notice to the requester setting forth the unusual circumstances and the date on which a determination is expected to be dispatched.¹⁶ Unusual circumstances may only exist to the extent reasonably necessary for the proper processing of the particular requests and include three categories of requests: (1) where there is a need to search for and collect the requested records from establishments that are separate from the office processing the request; (2) where there is a need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request; or (3) where there is a need for consultation with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.¹⁷ Additionally, an agency may extend the time limit beyond the ten additional days allowed by statute where unusual circumstances exist if the requester agrees to such an extension.¹⁸

Exceptional Circumstances

Congress also established in the FOIA a “safety valve” for agencies that are inundated with a high volume of requests, by providing a mechanism for a stay of proceedings in “exceptional circumstances” when an agency has been sued by a requester for failing to meet the statutory time limits. Under this statutory provision, if the government is able to show that exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may allow the agency additional time to complete its review of the records, even if it otherwise failed to comply with applicable time limits.¹⁹ In the Electronic Freedom of Information Act Amendments of 1996, Congress specifically excluded delays resulting from a predictable agency workload of

¹⁶ 5 U.S.C. § 552(a)(6)(B)(i).

¹⁷ *Id.* § 552(a)(6)(B)(iii).

¹⁸ *Id.* § 552(a)(6)(B)(ii).

¹⁹ *Id.* § 552(a)(6)(C)(i).

requests from constituting exceptional circumstances *unless* an agency is able to demonstrate reasonable progress in reducing its backlog of pending requests.²⁰ By linking a Court’s ability to find exceptional circumstances with an agency’s ability to reduce its backlog, Congress placed a renewed focus on improving the timeliness of responses to requests. Indeed, Congress believed that backlogs should not give agencies an “automatic excuse to ignore the time limits, since this provides a disincentive for agencies to clear up those backlogs.”²¹

Congress also determined that courts should weigh a number of other factors when considering whether exceptional circumstances exist. Although “unusual circumstances” in and of themselves are not sufficient for a court to find “exceptional circumstances,” Congress did state that a requester’s refusal to reasonably modify the request or arrange an alternative time frame where unusual circumstances exist shall be considered as a factor in determining whether exceptional circumstances exist.²² Other factors that Congress thought important to consider in determining whether exceptional circumstances exist include: (1) an agency’s efforts to reduce the number of pending requests; (2) the amount of classified material involved; (3) the size and complexity of other requests processed by the agency; (4) the resources being devoted to the declassification of classified material of public interest; or (5) the number of requests for records by courts or administrative tribunals.²³

JUDICIAL REQUIREMENTS

Courts have played an important role in interpreting when the “exceptional circumstances” provided for in the statute, exist. As mentioned above, under the FOIA, courts may grant a stay of proceedings where exceptional circumstances exist and the agency is exercising due diligence in responding to the request.²⁴ Open America v. Watergate Special Prosecution Force, despite being decided prior to the 1996 FOIA Amendments that partially altered the application of the exceptional circumstances

²⁰ Id. § 552(a)(6)(C)(ii).

²¹ H.R. Rep. No. 104-795, at 24, reprinted in 1996 U.S.C.C.A.N. 3448, 3467 (1996).

²² 5 U.S.C. § 552(a)(6)(B)(ii).

²³ H.R. Rep. No. 104-795, at 24-25, reprinted in 1996 U.S.C.C.A.N. 3448, 3467-68 (1996); see Wilderness Soc’y v. Dep’t of the Interior, No. 04-0650, 2005 U.S. Dist. LEXIS 20042, at *21 (D.D.C. Sept. 12, 2005).

²⁴ 5 U.S.C § 552(a)(6)(C)(i-iii).

provision, is the leading case construing the provision.²⁵ In Open America, the Court held that exceptional circumstances may exist when an agency can show that it “is deluged with a volume of requests for information vastly in excess of that anticipated by Congress [and] when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A).”²⁶ The Court also found that the “due diligence” provision may be satisfied by an agency’s good faith processing of all requests on a “first-in/first-out” basis and that a requester’s right to have his request processed out of turn requires a particularized showing of exceptional need or urgency.²⁷ Stays of proceedings issued by courts after finding exceptional circumstances are called “Open America stays.”²⁸

While the precedent set forth in Open America has not been overturned, it has been partially altered. In the 1996 FOIA Amendments, Congress excluded any delay resulting from a predictable agency workload from consideration under the exceptional circumstances provision unless the agency demonstrates reasonable progress in reducing its backlog.²⁹ Thus, a court may not find that exceptional circumstances exist merely because an agency has a large number of pending requests.³⁰ Instead, where an agency is attempting to show exceptional circumstances on the basis of its predictable workload, it must also show reasonable progress in reducing its backlog.³¹ Where this requirement has been met, courts have been willing to find that exceptional circumstances exist.³² Further, where an agency’s request for an Open America stay of proceedings is not based on a predictable agency workload, a stay may be justified notwithstanding the lack of a reduction in the backlog.³³

²⁵ 547 F.2d 605 (D.C. Cir. 1976).

²⁶ Id. at 616.

²⁷ Id.

²⁸ See, e.g., Elec. Frontier Found. v. Dep’t of Justice, No. 06-1708, 2007 WL 1334973, at *1 (D.D.C. May 7, 2007); Wilderness Soc’y, 2005 U.S. Dist. LEXIS 20042, at *19.

²⁹ 5 U.S.C. § 552(a)(6)(C)(ii).

³⁰ Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 259 n.4 (D.D.C. 2005) (“An agency must show more than a great number of requests to establish[] exceptional circumstance under the FOIA.”).

³¹ 5 U.S.C. § 552(a)(6)(C)(ii).

³² See, e.g., Ctr. for Biological Diversity v. Gutierrez, 451 F. Supp. 2d 57, 70 (D.D.C. 2006).

³³ See, e.g., Ctr. for Pub. Integrity v. U.S. Dep’t of State, No. 05-2313, 2006 U.S. Dist. LEXIS 22281, at *14 (D.D.C. Apr. 24, 2006).

Courts look to factors other than backlog reduction in determining whether exceptional circumstances exist. Where requesters have refused to reasonably modify the scope of a request or arrange for an alternative time period for processing, courts have deemed it a relevant consideration.³⁴ Additionally, courts have also considered unpredictable increases in FOIA requests,³⁵ unforeseen increases in other information access duties,³⁶ and the adequacy of resources.³⁷ It is important to note, however, that agency motions for an Open America stay of proceedings are unsuccessful when agencies have failed to set forth sufficient facts to demonstrate the necessity of such a stay.³⁸

EXECUTIVE ORDER 13,392

The President has also affected the way in which agencies respond to FOIA requests. On December 14, 2005, President Bush issued Executive Order 13,392, entitled “Improving Agency Disclosure of Information.”³⁹ The Executive Order begins with the premise that “[t]he effective functioning of our constitutional democracy depends upon the participation in public life of a citizenry that is well informed,” and proceeds with more specific steps as to how to improve the pursuit of this overarching goal.⁴⁰ In particular, the Executive Order addresses the issue of backlog reduction and directs agencies to work to develop ways to improve in this area.⁴¹ Executive Order 13,392 has had a measurable positive impact on improving agencies’ responses to FOIA requests and advancing the goal of maintaining a well-informed citizenry.

Renewed Focus on Backlog Reduction

Executive Order 13,392 renewed the focus on backlog reduction and specifically directed agencies to address the problem. First, the Executive Order required each

³⁴ See, e.g., Peltier v. FBI, No. 02-4328, slip op. at 8 (D. Minn. Aug. 15, 2003) (“[T]he fact that plaintiff refuses to modify the scope of his request supports a finding of exceptional circumstances.”).

³⁵ See Ctr. for Pub. Integrity, 2006 U.S. Dist. LEXIS 22281, at *14.

³⁶ See id.

³⁷ See Elec. Frontier Found., 2007 WL 1334973, at *6.

³⁸ See, e.g., Wilderness Soc’y, 2005 U.S. Dist. LEXIS 20042, at *33 (finding that agency provided “no analysis, statistics, affidavits, declarations or other sworn statements from agency personnel to support [the existence of exceptional circumstances]”)

³⁹ Exec. Order No. 13,392, 70 Fed. Reg. 75,373 (Dec. 14, 2005).

⁴⁰ Id. at Sec. 1(a).

⁴¹ See, e.g., id. at Sec. 3(b)(ii).

agency's Chief FOIA Officer to evaluate the extent of an agency's backlog, if any.⁴² Next, it required the Chief FOIA Officer to identify ways to reduce or eliminate his agencies' backlog, consistent with the availability of resources and taking into consideration the volume and complexity of pending FOIA requests.⁴³ Finally, Executive Order 13,392 mandated that agencies create a plan that included, among several other items, specific activities that the agency would implement to eliminate or reduce the agency's FOIA backlog.⁴⁴ Agencies were also encouraged to include in their plan any changes that would make processing requests more streamlined and effective.⁴⁵

The Department of Justice offered agencies guidance on how to compose their individual FOIA Improvement Plans. Initially, the Department of Justice held several government-wide conferences for Chief FOIA Officers and key FOIA personnel.⁴⁶ Further, it provided written guidance to agencies on their implementation of Executive Order 13,392.⁴⁷ This guidance discussed many potential improvement areas as well as a standard template for the uniform development and presentation of plans, and addressed questions and guidance points to help implement the executive order.⁴⁸

Executive Order 13,392 compelled agencies to take various steps where they failed to meet any milestones or goals in their plans, which helped to ensure agency accountability. Where an agency was deficient in meeting a milestone, the head of the agency was required to: (1) identify the deficiency in its annual report to the Attorney General; (2) explain the reasons for the failure; (3) outline steps that the agency has already taken and will be taking in the future to address the matter; and (4) report the deficiency to the President's Management Council.⁴⁹

⁴² Id. at Sec. 3(a)(i).

⁴³ Id. at Sec. 3(a)(v).

⁴⁴ Id. at Sec. 3(b)(ii).

⁴⁵ Id.

⁴⁶ See Implementing FOIA [Freedom of Information Act] – Assessing Agency Efforts to meet FOIA Requirements: Hearing Before the Subcomm. on Information Policy, Census, and National Archives of the Comm. on Oversight and Government Reform, 110th Cong. (2007) (statement of Melanie Ann Pustay, Acting Director, Office of Information and Privacy), available at <http://www.usdoj.gov/oip/foia30.pdf> (discussing extensive Department of Justice executive order coordination efforts).

⁴⁷ See id.

⁴⁸ See *FOIA Post*, “Executive Order 13,392 Implementation Guidance” (posted 4/27/06) (containing potential improvement areas for possible inclusion in FOIA Improvement Plans) available at <http://www.usdoj.gov/oip/foiapost/2006foiapost6.htm>.

⁴⁹ Exec. Order No. 13,392, Sec. 3(c)(iii).

Agencies' Progress in Reducing Backlogs

Executive Order 13,392 has had a positive impact on reducing agencies' backlogs. During the initial phases of implementation, federal agencies made diligent and measurable progress in meeting their goals.⁵⁰ Forty-one agencies reported a decrease in the number of requests pending at the end of the fiscal year; an improvement that was made after only three months of Executive Order implementation activity.⁵¹ While agencies have not finished implementing all aspects of their plans, some have already significantly reduced their backlogs.⁵² Moreover, agencies processed a record number of FOIA requests during Fiscal Year 2006. There continue to be constraints on agencies over which they have no control, such as the number of requests that they receive.⁵³ It is clear, however, that progress already made by agencies has been steady and promising.⁵⁴

Backlog Reduction Goals for Next Three Fiscal Years

Although agencies have made considerable strides in the area of backlog reduction, many agencies continue to have backlogs. These agencies are taking further steps to resolve the issue. Each agency that has a backlog of FOIA requests or appeals at the end of fiscal year 2007 will formally establish backlog reduction goals for the next three years.⁵⁵ These goals should set forth the numbers of requests or appeals that the agency plans to process during each fiscal year as well as the number of requests or appeals that the agency estimates will be pending at the end of each fiscal year.⁵⁶ Maintaining clear goals will help agencies stay on course in their efforts to reduce their backlogs.

CONCLUSION

Recognizing the importance of the goals advanced by the FOIA and the balance involved, Congress, the Courts, and the President, have each addressed issues affecting

⁵⁰ Attorney General's Report to the President Pursuant to Executive Order 13,392, Entitled "Improving Agency Disclosure of Information," 3 (June 1, 2007), available at http://www.usdoj.gov/oip/ag_report_to_president06012007.pdf.

⁵¹ *Id.* at 7.

⁵² *See, e.g., id.* at 8 (noting that the Department of Education had exceeded its backlog reduction goal for the time period and had cut its backlog by nearly fifty percent).

⁵³ *See, e.g., id.* at 7 (noting that the Department of Veterans Affairs had received 23,811 more requests in 2006 than in 2005).

⁵⁴ *Id.* at 20.

⁵⁵ *Id.* at 18.

⁵⁶ *Id.*

the management of responding to requests. The FOIA places time limits on agencies, but Congress allowed for certain exceptions. Courts have interpreted where these exceptions may apply. The President has acted to improve the efficiency of the FOIA's administration through Executive Order 13,392, particularly regarding backlog reduction. Agencies have taken many steps to improve their management of responses to requests, thus helping to ensure that the overall goals of the FOIA are achieved.⁵⁷

⁵⁷ This paper was prepared with the invaluable assistance of OIP law clerk Patrick Deklotz, whose contribution is much appreciated.