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PRATT'S  
**GOVERNMENT  
CONTRACTING  
LAW**  
REPORT



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# New FOIA Improvement Act Increases Necessity for Contractors to Create Robust FOIA Exemption Record

*By Jon W. Burd, Tracie Winfrey Howard, and George E. Petel\**

*The authors of this article discuss the Freedom of Information Act Improvement Act of 2016, which could increase the burden on a contractor claiming an exemption to demonstrate both the statutory basis for the exemption and the “harm” that would result from releasing the information.*

President Obama recently signed into law the Freedom of Information Act (“FOIA”) Improvement Act of 2016. The stated goals of the Act are to codify the presumption-of-openness policy for FOIA responses and to streamline the FOIA process. Agencies will be prohibited from withholding requested information unless they make a determination that “the agency reasonably foresees that disclosure would harm an interest protected by an exemption” to FOIA, or where the release would be prohibited by law. The Act also establishes new administrative review and dispute resolution processes for FOIA requesters that disagree with agency decisions to withhold information, and creates a government-wide online portal to streamline the FOIA request process.

President Obama signed the Act into law on June 30, 2016. It is effective immediately and applies to all FOIA requests submitted after June 30, 2016. Some provisions of the Act, such as the new online portal, will be implemented later this year.

The new FOIA provisions could increase the burden on a contractor claiming an exemption to demonstrate both the statutory basis for the exemption and the “harm” that would result from releasing the information. Contractors should do even more on the front end to justify proposed redactions or withholdings and provide agencies with targeted proposed redactions. These measures will help agencies develop a robust record to support any proposed redactions or withholdings in response to future FOIA requests.

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**PRESUMPTION OF OPENNESS**

The Act amends 5 U.S.C. § 552 to prohibit “an agency from withholding information requested under FOIA unless the agency reasonably foresees that disclosure would harm an interest protected by a FOIA exemption or disclosure is prohibited by law.” In addition to this seemingly heightened standard, the agency must “consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible” and “take reasonable steps necessary to segregate and release nonexempt information.”

The Act also creates new administrative review processes, short of litigation, to provide FOIA requesters with more flexible avenues to seek review of an agency’s initial decision to withhold or redact information. FOIA requesters will be able to request an “appeal” by the “head of the agency” within 90 days after an adverse determination, or to seek “mediation” or “dispute resolution services from the Office of Government Information Services,” which could result in an advisory opinion on the requested release.

Lastly, the Department of Justice (“DOJ”) must report annually on its efforts “to encourage agency compliance” with the revised FOIA statute, which could lead to a division of interests between DOJ and the agency if an agency’s FOIA determination is challenged in court. Typically, DOJ takes the agency’s lead in defending FOIA litigation, but DOJ may now push back on agency decisions to withhold information, and push for agencies to disclose more information when facing litigation.

As a consequence of these presumption-of-openness provisions in the Act, agencies will likely be more aggressive in releasing information and less willing to withhold entire documents or portions of documents that are responsive to a request. This heightened standard, coupled with the additional administrative review processes, will make it all the more important for contractors to develop robust records supporting the application of any FOIA exemptions, as that written record will now have to pass muster not only with the initial agency FOIA officer, but also with additional reviewers within the agency, the Office of Government Information Services, and potentially the Department of Justice.

**STREAMLINED ELECTRONIC PROCESSES**

To streamline the process for the digital age, the Act amends FOIA to require agencies to make all adjudication final opinions and orders, statements of policy and interpretive guidance, and administrative manuals and instructions avail-

able to the public for online inspection, rather than merely for “copying,” as stated in the original FOIA. The Act also requires agencies to make available to the public electronic copies of all frequently requested records. The Act expands the so-called “frequently requested records” provision to include all records that are (or are likely to be) requested three or more times. Additionally, the Act requires the Office of Management and Budget (“OMB”) to create a consolidated online FOIA request portal, which will allow the public to submit FOIA requests for records of any agency.

The Act also prohibits agencies from charging fees for requested documents if the agency misses a FOIA response deadline, unless there are unusual circumstances and the response requires more than 5,000 pages of documents. Because the online portal will likely increase the number of FOIA requests, while the intra-agency communication process will consume some portion of the agency’s response timeline, this provision may further increase the time pressure on agencies to respond to FOIA requests. Contractors who are asked for input regarding applicable FOIA exemptions to contractor-furnished information may bear the brunt of these time pressures to meet agency demands.

## **CONCLUSION**

For all of these reasons, contractors should be prepared to quickly and thoroughly respond to agency requests by establishing a robust record in support of any claimed exemption or requested redactions, and to anticipate multiple reviews that may be subject to a heightened standard of scrutiny for any claimed exemptions.