

## Government Contracts Alert

July 12, 2016

### President Obama Signs Bill Reforming Freedom of Information Act Requests

On June 30, 2016, President Obama signed a bill into law that seeks to encourage disclosure by agencies and bring the Freedom of Information Act (FOIA) into the digital age. Widely seen as a response to criticism by journalists, researchers and Congress about agency delays and unnecessary litigation, the FOIA Improvement Act of 2016 (the “Act”) comes after years of attempts to reform the FOIA request system. The Act went into effect immediately upon receiving the president’s signature, and it applies to all FOIA requests made after June 30, 2016. The Act mandates several reforms to the FOIA disclosure process, and it has the potential to significantly streamline the disclosure process and improve the utility of FOIA requests. Although some features of the Act are immediately effective (such as the limit on the deliberative process exception discussed below), the implementation of more complex provisions (such as the online request portal discussed below) will depend on new Obama administration guidance, to be issued later this year.

#### Key Provisions of the Bill

The Act codifies the “presumption of openness” first instituted by a 2009 executive directive, which urged agencies to err on the side of disclosure when handling open records requests. The Act primarily seeks to:

- promote disclosure by agencies
- make documents more readily available online
- simplify FOIA disputes
- better monitor the effectiveness of FOIA and agency compliance.

In order to promote disclosure, the Act requires agencies to identify a specific “foreseeable harm” when withholding documents. This may effectively shift the burden to agencies to justify denying a FOIA request. The Act also limits a frequently used deliberative process exception, which allows agencies to withhold documents related to their internal decision-making process, when the records sought are more than 25 years old. To encourage prompt disclosures, the Act prohibits agencies that miss a deadline from charging a fee for providing records, unless unusual circumstances apply and more than 5,000 pages are necessary to respond to the request.

The reform also seeks to expand access to documents online. The FOIA update requires the Office of Management and Budget to create and maintain a single public records request portal for all agencies. This measure could significantly simplify the FOIA request process for the public. In addition, the Act

requires agencies to make their disclosable records available in an electronic format and to make frequently requested documents, including documents requested three or more times, available online.

Much of the criticism previously lodged at the FOIA relates to the need for FOIA requesters to resort to lengthy litigation to force agencies to disclose federal records. The Act attempts to address these concerns by requiring the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between agencies and FOIA requesters. Although this provision has the potential to simplify and shorten FOIA disputes, it might instead be treated as simply an additional hurdle for FOIA disputants to overcome.

Finally, the Act seeks to establish mechanisms for better evaluating FOIA effectiveness. The reform creates a council comprising each agency's Chief FOIA Officer that is tasked with reviewing FOIA effectiveness and recommending improvements. Chief FOIA Officers are also required to serve as the primary agency liaison with OGIS and the Office of Information Policy under the new act.

### **The Future of FOIA**

The Obama administration will issue new FOIA guidance later this year, and it has committed to implementing the centralized request portal by next year. President Obama has scheduled the first meeting of the council of Chief FOIA Officers for July 22, 2016, and has tasked the council with identifying and addressing the "biggest difficulties that exist in administering FOIA across government." He also requested that the council establish a policy by which agencies will automatically post online FOIA disclosures for public access.

The Act received bipartisan sponsorship and support in Congress, but agencies like the Federal Trade Commission and the Justice Department have pushed back against the reforms. According to the Justice Department, the Act will increase costs and cause delays in processing FOIA requests. Other critics point to the fact that President Obama, who has had FOIA reforms on his agenda since 2009, is essentially increasing the administrative burden for the next administration. Although the full impact of the Act is dependent on the forthcoming guidance, the promise of potential improvements to a request process often mired by processing delays and lengthy litigation disputes is welcome news to many FOIA requesters.

**Contact Information**

If you have any questions regarding this alert, please contact the Akin Gump lawyer with whom you usually work or

**Robert K. Huffman**[rhuffman@akingump.com](mailto:rhuffman@akingump.com)

202.887.4530

Washington, D.C.

**Scott M. Heimberg**[sheimberg@akingump.com](mailto:sheimberg@akingump.com)

202.887.4085

Washington, D.C.

**Carroll A. Skehan**[cskehan@akingump.com](mailto:cskehan@akingump.com)

202.887.4554

Washington, D.C.

**Joseph W. Whitehead**[jwhitehead@akingump.com](mailto:jwhitehead@akingump.com)

202.887.4477

Washington, D.C.