THE GOVERNMENT CONTRACTOR®

WEST®

Information and Analysis on Legal Aspects of Procurement

Vol. 51, No. 15 **April 15, 2009**

Focus

¶ 125

FEATURE COMMENT: The Obama Administration's Emerging Policies On Freedom Of Information, Transparency And Open Government—New Benefits And Costs For Government Contractors?

On March 19, Attorney General Eric Holder issued a new Department of Justice memorandum implementing President Obama's January 21 policy changes concerning the Freedom of Information Act. See 51 GC ¶ 106. President Obama's FOIA memo requires federal agencies to administer FOIA with a presumption of openness, a marked departure from the previous administration's treatment of FOIA, and his January 21 companion memo on "Transparency and Open Government" requires, inter alia, that the Government disclose information rapidly in forms that the public can readily find and use. See 74 Fed. Reg. 4683, 4685 (Jan. 26, 2009).

FOIA, codified at 5 USCA § 552, has long mandated broad public disclosure of records held by federal executive branch agencies, based on the presumption that all documents, except those falling under certain enumerated exceptions, should be disclosed when requested. However, since its enactment in 1966, various events have driven Congress (through enactment of legislation amending FOIA) and the executive branch (through the issuance of DOJ memos and guidance to federal agencies) to take steps that have both expanded and restricted the scope of releasable information.

For example, during the Cold War, President Reagan issued EO 12356, 47 Fed. Reg. 14874, 15557 (April 6, 1982), which authorized federal agencies to reclassify documents requested under FOIA in order to safeguard information relating to national security. On the other hand, between 1993 and 1999, the Clinton administration implemented a more robust approach to FOIA by issuing several directives that allowed the release of previously classified national security documents. In particular, then-Attorney General Janet Reno's Oct. 4, 1993 FOIA memo stated that DOJ would no longer defend an agency's withholding of information merely because there was a "substantial legal basis" for doing so. Instead, the Reno memo provided that DOJ would apply a "presumption of disclosure" when determining whether to defend an agency's nondisclosure decision. This presumption of disclosure gave way to a presumption of protection that emerged as part of the global war on terror under the post-9/11 Bush administration. On Oct. 12, 2001, then-Attorney General John Ashcroft issued a FOIA memo announcing, in effect, that DOJ was returning to the Reagan-era practice of defending an agency's decision to withhold information unless it lacked a "sound legal basis" or presented an "unwarranted risk" of affecting the ability of the agency to protect important records.

Even before the Obama administration's recent FOIA pronouncements, Congress passed the Openness Promotes Effectiveness in our National Government Act of 2007 (OPEN Government Act), P.L. 110-175, which began to swing the FOIA pendulum back towards an emphasis on disclosure and more efficient handling of FOIA requests. The OPEN Government Act amended FOIA by increasing federal agency FOIA reporting requirements and creating a new Office of Government Information Services (OGIS) to provide an alternative dispute resolution process to avoid costly FOIA litigation. Specifically, under § 10(a)(3) of the OPEN Government Act, the OGIS offers "mediation services to resolve disputes between persons making requests under this section and administrative agencies." Thus, the OGIS will mediate between parties that

might otherwise be the plaintiff (the requestor) and defendant (the agency) in a federal court action seeking to overturn the agency's refusal to release the requested records.

The OPEN Government Act also provides that all FOIA requests filed after Dec. 30, 2008, must either be processed within 20 days or the agency must assign a tracking number that the requestor can use to inquire about the status of the request online or by telephone. Agencies can only extend this 20-day response period when "unusual circumstances" exist, such as the need to search for and collect the requested records from separately located facilities or to consult with another agency having a substantial interest in the request. 5 USCA § 552(a)(6)(B)(i). Moreover, agencies can toll the 20-day period only when necessary to ask the requestor for more information about the request or to clarify issues about any fee assessment. 5 USCA § 552(a)(6)(A)(ii).

The OPEN Government Act also provided several other incentives for federal agencies to improve and streamline their FOIA processes. For example, the OPEN Government Act tasked the Government Accountability Office with conducting audits and issuing reports on agency implementation of FOIA. In this regard, GAO recently issued a report concerning the Department of Homeland Security, which found that although DHS has enhanced FOIA training for its employees and eliminated its request backlog by about 24 percent, it could still improve its FOIA program by implementing better oversight and electronic dissemination and redaction of records. See *Report on Department of Homeland Security FOIA Program* (GAO-09-260).

In addition, the OPEN Government Act expanded the circumstances under which a successful FOIA plaintiff can recover attorney fees and litigation costs, thereby codifying in FOIA the "catalyst theory" that the U.S. Supreme Court had declined to apply in *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598 (2001). Specifically, the *Buckhannon* court held that under certain federal statutes, a plaintiff could "substantially prevail," and thus recover attorney fees and litigation costs, only if a court actually ordered the defendant to change its position or approved a consent decree between the parties. However, the OPEN Government Act expressly provides that FOIA plaintiffs may now be eligible for attorney fees and litigation costs not only when they succeed in obtaining a court-ordered release of the requested records, but also when the agency changes its position and releases the requested records in the absence of a court order. Moreover, whereas previously the Government paid such attorneys fees and costs out of the U.S. Judgment Fund, the OPEN Government Act mandated that any award of fees and costs resulting from a FOIA action must be paid out of funds appropriated to the agency in question.

FOIA under the Obama Administration: Not Just Disclosure, But "Openness"—Holder's March 19 guidance on the current administration's mandate for a presumption of openness arguably swings the FOIA pendulum even further than the presumption of disclosure articulated in Reno's 1993 memo. Specifically, the new Holder memo states that the administration of FOIA is a responsibility of *all* Government employees, not just the agency's FOIA staff. Furthermore, DOJ will no longer defend an agency's decision to withhold requested records merely because the agency can demonstrate that the requested records fall within a FOIA exemption. In addition, when considering a FOIA request, agencies should make partial disclosures if the law does not permit a full disclosure, and agencies should continuously and proactively provide information to the public rather than wait for formal FOIA requests for agency information.

Finally, the President's January 21 memo and the attorney general's new FOIA guidance have prompted plaintiffs in ongoing FOIA litigation to seek stays of proceedings until the administration's new policy is implemented. For example, Electronic Frontier Foundation filed motions to stay several FOIA cases in the U.S. district courts for the District of Columbia and the Northern District of California. See *Electronic Frontier Found. v. Dept. of Justice*, No. 06-cv-1773 (RBW) (D.D.C.); *Electronic Frontier Found. v. Office of the Dir. Of Nat'l Intelligence*, No. 3:08-cv-01023-JSW (N.D. Cal.). The March 19 Holder memo expressly addresses this issue by providing that DOJ's new guidance should be applied to pending litigation if practicable when, in the judgment of DOJ and the agency, there is a substantial likelihood that applying the guidance would result in a material disclosure of additional information.

New FOIA Issues for Government Contractors—*Contractor Use of FOIA for Competitive Intelligence*: Prior to the Obama administration's new policy, contractor use of FOIA to obtain competitive

information was already relatively inexpensive and simple, with the possibility of obtaining information that would be more than worth the minimal cost, effort and time associated with making the request. Studies suggest that commercial entities have accounted for more than 60 percent of recent third-party FOIA requests received by cabinet-level departments and federal agencies, with a significant number of such requests coming from professional data brokers working on behalf of third-party requesters, including businesses seeking information about other companies. See *Frequent Filers: Businesses Make FOIA Their Business* by Coalition of Journalists for Open Government (July 2006), available at *www.cjog.net/background.html*. Under the new presumption of openness, such requests for competitively useful information should be resolved more quickly and efficiently. Moreover, guidance in the new attorney general memo suggests that under the Obama administration's presumption of openness, contractors may be able to gain access to a broader range of information about their competitors.

In this regard, the Holder memo directs agencies to disseminate information proactively by "readily and systematically post[ing] information online in advance of any public request." Although the memo does not identify specific steps for electronically posting such information, presumably agencies will make much more procurement-related information available through agency Web pages and online reading rooms. In addition, recent legislative initiatives require federal agencies to be proactive about publishing such information. For example, Federal Acquisition Circular (FAC) 2005-30 includes an interim rule implementing § 844 of the National Defense Authorization Act for Fiscal Year 2008, which amends the Federal Acquisition Regulation to require agencies to post justifications for noncompetitive contract awards on *www.fedbizopps.gov* and the agency Web site within 14 days of award (30 days for noncompetitive awards made in unusual and compelling circumstances). See 74 Fed. Reg. 2731 (Jan. 15, 2009).

Similarly, in implementing the American Recovery and Reinvestment Act of 2009 (Recovery Act), FAC 2005-32 provides interim FAR rules on publicizing contract actions—including the issuance of pre-award notices, clear and unambiguous descriptions of supplies and services sought, and postaward rationale—for all actions taken for contracts funded in whole or in part under the Recovery Act. See 74 Fed. Reg. 14622 (March 31, 2009); 51 GC ¶ 123. In addition, this FAC includes another interim rule that requires contractors to report quarterly on the use of Recovery Act funds. The reporting requirements apply to all Recovery Act-funded contractors (except those funded under classified solicitations and contracts), and the FAR councils have determined that the reporting requirements also apply to commercial-item contracts, commercially available off-the-shelf (COTS) item contracts and contracting actions below the simplified acquisition threshold. To comply with these requirements, contractors will have to submit all reports via an online reporting tool at *www.FederalReporting.gov*. That Web site is now under construction and should be operational when the first contractor reports are due in July 2009, so it is not yet clear whether FOIA will permit the public to access contractor information from the quarterly reports online.

Contractor past performance information is another target of competitive intelligence that may potentially become more accessible to contractors under the new policy of openness. The FAR requires that contracting agencies prepare and maintain contractor performance evaluations upon completion of contract performance. FAR 42.1502(a). Such past performance evaluations have typically been protected from release under FOIA Exemption 5 as inter- or intra-agency memos that are not otherwise available under federal law. See 5 USCA § 552(b)(5). Accordingly, agencies have refrained from publicly releasing records of such evaluations during the period in which the evaluations are considered "source selection information," a period which lasts for three years following contract completion. See FAR 42.1503(e). Now, under the attorney general's new FOIA guidance, it will be more difficult for agencies to justify withholding such evaluations beyond the three-year period specified in the FAR. Furthermore, the new guidance leaves open the possibility that despite Exemption 5, an agency may release certain past performance evaluations before the three-year period ends if it determines that release of such information does not pose a threat of competitive harm.

In any event, President Obama's mandate of openness—as reflected in his FOIA and Transparency and Open Government memos, in parallel with interim changes to the FAR and potential future legislation—may mean that contractors will soon be

able to quickly access unprecedented amounts of helpful competitive information without making a formal FOIA request. However, before agencies begin posting potentially confidential commercial information online, they will have to review (or perhaps establish for the first time) their policies on pre-release notification to a submitter in the absence of a FOIA request. EO 12600 requires agencies to "establish procedures to notify submitters of records containing confidential commercial information … when those records are requested under [FOIA] … if after reviewing the request, the responsive records, and any appeal by the requester, the department or agency determines that it may be required to disclose the records." 52 Fed. Reg. 23781 (June 25, 1987). Such requirements do not expressly address the proactive release of information in the absence of a FOIA request, but a 2008 decision by the U.S. Court of Appeals for the District of Columbia Circuit strongly suggests that an agency must provide pre-release notice to a submitter of confidential commercial information regardless of whether the agency received a formal FOIA request for that information. In *Venetian Casino Resort, L.L.C. v. EEOC*, 530 F.3d 925, 935 (D.C. Cir. 2008), the court held that the agency's Privacy Act policy permitting release of a submitter's confidential commercial information without first notifying the submitter was arbitrary and capricious because the policy could not be reconciled with the agency's FOIA procedures implementing EO 12600 requiring notice to a submitter before releasing confidential information pursuant to a FOIA request.

FOIA Precedent in Federal Court: FOIA decisions in the federal courts—whether resolving an appeal of an agency's decision to withhold records or so-called "reverse-FOIA" actions brought by contractors seeking to protect information that they previously submitted to the Government—have often upheld the protection of contractor records under FOIA Exemption 4, which protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." 5 USCA § 552(b)(4).

In the past, district courts have typically deferred to an agency's decision to withhold requested information under FOIA Exemption 4, and the courts of appeals only infrequently overturned such district court decisions under the Administrative Procedure Act's "arbitrary and capricious" standard, 5 USCA § 706(2)(A). The D.C. Circuit has developed perhaps the most extensive body of reverse-FOIA case law on Exemption 4, and it has repeatedly held that a threshold issue concerning whether a contractor's information is exempt from disclosure under this exemption turns on whether the information sought was submitted voluntarily or involuntarily. Specifically, confidential information submitted voluntarily to the Government is protected under Exemption 4 "if it is of a kind that a provider would not customarily release to the public." *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc). Information submitted involuntarily is protected under Exemption 4 if its disclosure would be likely either (1) to impair the Government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the contractor from whom the information was obtained. *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin.*, 180 F.3d 303 (D.C. Cir. 1999), reh'g en banc denied, No. 98-5251 (D.C. Cir. Oct. 6, 1999).

More importantly, the D.C. Circuit has held that courts need not conduct an analysis of whether contractor information was submitted voluntarily or involuntarily if disclosure of the information could cause substantial competitive harm to the submitting contractor. Id. at 306. And just last year, the D.C. Circuit reaffirmed that information in a Government contract should be protected under Exemption 4 if its release would cause substantial competitive harm to the submitter. See *Canadian Commercial Corp. & Orenda Aerospace Corp. v. Air Force*, 514 F.3d 37, 42 (D.C. Cir. 2008) (relying upon *McDonnell Douglas* in holding that contract line-item pricing in a Government contract is confidential trade secret information, the disclosure of which would cause substantial competitive harm to an incumbent contractor with regard to option years remaining on the contract); 50 GC ¶ 74. Thus, it appears that the existing body of D.C. Circuit case law on FOIA Exemption 4 may align more closely with a culture of protection than with a presumption of openness.

Conclusion—Despite the Obama administration's recent FOIA pronouncements, it appears that the presumption of openness will not reverse, at least initially, current precedent concerning contractor FOIA litigation in the federal courts. Agencies and Government contractors should therefore still be able to rely on the D.C. Circuit precedent discussed above. The courts, however, will soon face the chal-

lenge of fashioning new FOIA precedent in a context that did not previously exist, namely, the current economic crisis. Although it appears that the Obama administration intends for the presumption of openness to apply with particular force to information about lobbyists seeking to influence the expenditure of bailout funds under the economic stimulus plan, as well as to records regarding financial agents and contractors assisting the Department of the Treasury under the Troubled Asset Relief Program, it is not yet clear how far this presumption will extend. In any event, as the Obama administration's FOIA and Open Government policies evolve, Government contractors likely will need to expend additional effort to protect their confidential and proprietary information given the new presumption of openness. These efforts will certainly entail increased transaction costs for contractors doing business with the Government, which, in turn, will likely lead to increased contract prices for procuring agencies.

✦

This FEATURE COMMENT was written for THE GOVERNMENT CONTRACTOR by* James J. McCullough *and* William S. Speros, *who are members of Fried, Frank, Harris, Shriver & Jacobson LLP's Government Contracts Practice Group.

