S. 849, THE OPEN GOVERNMENT ACT OF 2007

FACT SHEET:
BACKGROUND AND RESPONSES TO DOJ OBJECTIONS

This fact sheet is intended to provide persons interested in S. 849 with background and analysis on the key provisions of the OPEN Government Act, as well as specific responses for each of the concerns voiced by the Department of Justice in its March 26, 2007, letter to the Senate Committee on the Judiciary.

Section 3. Protection of Fee Status for News Media

This section amends 5 U.S.C. § 552(a)(4)(A)(ii) to make clear that independent journalists or first time authors are not barred from obtaining fee waivers solely because they lack an institutional affiliation with a recognized news media entity; rather, agencies will consider any prior publication history as well as evidence of the intention to publish in determining whether to grant news media status.

- ***DOJ objection:*** **This section would expand the definition of "news media" to render the concept "virtually meaningless" and tax the government's resources to actually slow FOIA requests.**
- ***Response:*** **The news media has changed.**

The Coalition of Journalists for Open Government best explains why major news media organizations support this change:

> Section 3 does indeed expand the definition of "representative of the news media," but it does so in an effort to acknowledge that the media and the world of public communications have changed enormously in the 40 years since FOIA was enacted. The definition more accurately fits the way journalism is practiced in the 21st Century by requiring agencies to look beyond strict affiliation with a traditional media outlet to the publication history of the requester, a history that includes the greatly expanded variety of publication methods now in play. It also urges – while leaving it to agency discretion – that first time journalists [and authors] not be penalized if they can show clear intent to publish or broadcast the information they are requesting. Clearly, fixed employment should not be the sole criteria for this fee waiver.

Further, these criteria already are included in OMB Guidelines on FOIA fees that were issued in 1987, which require agencies to consider whether a requester has "a solid basis for expecting publication" or alternatively to look at "the past publication record of a requester." (See 52 Fed. Reg. 10012 (1987).)

Moreover, the federal government covers less than two percent of the total cost of FOIA operations from search and copying fees. The total amount of FOIA processing fees collected

each year is only in the $7 million range, and media requests represent only a small part of the request total—less than 1/100th of one percent of the total of all FOIA requests. Thus, a claim that the proposed definition of media will yield "severe fiscal" consequences is grossly overstated.

Section 4. Restoration of the Catalyst Theory for Recovery of Attorneys Fees

Section 4 provides that a complainant will have substantially prevailed in court for purposes of receiving attorneys fees if its lawsuit has caused the agency to disclose the requested information, even in the absence of a judicial order that the agency must do so. This provision would reverse courts' application of Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598 (2001), to FOIA cases; this case held, in a non-FOIA context, that a prevailing party entitled to recover fees and costs "is one who has been awarded some relief by the court." Id. at 1839.

- ***DOJ objection:*** **Restoring the catalyst theory for fee recovery is unnecessary. Citing the case responsible for eliminating that basis for recovery (Buckhannon), it contends that asserted benefits of the catalyst theory are "entirely speculative."**
- ***Response:*** **The government too often discloses documents as a tactic to avoid paying attorneys fees.**

Reinstating the catalyst theory of fee recovery would ensure proper and timely compliance with FOIA. Because agencies can easily hand over records at any point in the lawsuit, Buckhannon reduces agencies' incentives to abide by FOIA and release records in a timely manner, without the need for the requesters to file suit. Agencies can withhold records until long after they are legally required to release them, knowing that so long as they release the records before a court decision on the merits, they will not have to pay the requesters' attorneys fees. Cases such as Davis v. FBI, 460 F.3d 92 (D.C. Cir 2005), and Pacific Fisheries v. IRS, 2006 WL 1635706 (W.D. Wash 2006), demonstrate this problem. In both cases, the requesters received numerous records after their lawyers put in significant work, but they were denied attorneys fees because of Buckhannon. In Pacific Fisheries, the court actually threatened to award sanctions for agency delay tactics, despite the fact that it could not award attorneys fees within the confines of Buckhannon. Thus, the current situation discourages pre-litigation resolution of disputes or settlement of disputes.

Since Buckhannon, research has demonstrated that agencies engage in "strategic capitulation" and that Buckhannon both discourages settlement and discourages lawyers from representing plaintiffs in enforcement actions. *See The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. Rev. (forthcoming June 2007), at 41, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=937114. For example, the National Security Archive, a non-profit organization, was engaged in a FOIA dispute with the CIA. In the matter the CIA was disregarding prior D.C. Circuit and District Court judicial decisions, including one between the Archive and the CIA. The Archive met with CIA legal representatives to attempt to settle the dispute and avoid litigating the matter. Only after the Archive filed a complaint and a summary judgment motion did the CIA, at 6:30 p.m. on

the Friday evening after the summary judgment motion had been filed, decide to reverse its improper determination.

In addition, Buckhannon inhibits requesters from finding lawyers. If a lawyer knows that a government agency can avoid attorneys fees in a meritorious lawsuit by handing over the records after significant work has been completed, the lawyer will be less likely to agree to take the case in the first place and requesters who are illegally denied records will not have any way to challenge those denials.

- ***DOJ objection:*** **The catalyst theory would "serve as a disincentive to a Government agency's decision to voluntarily change decisions and procedures with respect to FOIA requests," which would be "inconsistent with FOIA's underlying purpose."**
- ***Response:*** **Voluntary disclosure will not be inhibited.**

Prior to Buckhannon, requesters could receive attorneys fees if the agency handed over records before a court ruling, yet agencies nonetheless often voluntarily disclosed records prior to judicial decisions. Moreover, if an agency litigates a case to a judicial decision and loses, the attorneys fees it will have to pay will be far greater than any it has to pay if it voluntarily discloses records early on in the judicial proceedings. Finally, in any case in which the government attorney recognizes a legal vulnerability, the lawyer is unlikely to want to risk a bad judicial decision that could impact other cases simply to avoid paying attorneys fees.

- ***DOJ objection:*** **The inclusion of "administrative action" as a means by which a requester could receive records that would make the requester eligible for attorneys fees could be read to apply to requesters who receive their records at the administrative appeal stage.**
- ***Response:*** **The provision only applies to court award of fees after a lawsuit is filed.**

The language of FOIA's attorneys fee provision, 5 U.S.C. § 552(a)(4), as it would be amended by the OPEN Government Act, does not justify this concern. The attorneys fees provision of FOIA applies only once a FOIA complaint has been filed in district court, as evidenced by its specific reference to a court assessing attorneys fees. There is no existing or practical mechanism by which another authority could award attorneys fees to a FOIA plaintiff. The only rational interpretation of this provision is that a FOIA plaintiff who has filed an action in district court would be eligible for fees if an administrative decision after the case is filed results in the plaintiff obtaining relief, even if there has been no judicial order. This provision is necessary to prevent agencies from using litigation as a stalling tactic, by denying information until a requester files a case and then unilaterally reversing their administrative position and releasing documents, thereby avoiding paying any attorneys fees.

Section 6. Time Limits for Agencies to Act on Requests

This section originally contained a provision that would deprive agencies of the use of certain exemptions, when the agency fails to comply with applicable time limits. However, Senators Leahy and Cornyn, the principal co-sponsors of S. 849, agreed in a managers' amendment, SA

1147 (introduced May 21, 2007), to remove this provision and substitute the House version when S. 849 comes to the floor. The penalties provision that was passed in the House bill, H.R. 1309, would instead deny agencies' ability to collect fees for processing requests when they exceed the 20-day time limit for a response.

- ***Response:*** **There should be consequences for agency FOIA processing delays.**

Currently, FOIA imposes no penalty on agencies that stall, delay or stonewall in responding to a request for years or even decades. Thus, agencies have long backlogs of unprocessed requests and FOIA requesters are forced to use litigation to prompt responses. There must be some incentive in FOIA to ensure agency compliance with the law. Recent studies by the Government Accountability Office, the non-profit National Security Archive (http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB224/index.htm), and the non-profit Coalition of Journalists for Open Government (http://www.cjog.net/documents/Waiting_Game_Update.pdf) demonstrate that the backlog and delay problem is real and persistent.

Although the imposition of penalties is critical to fixing the broken FOIA system, the loss of exemptions may not have been the best solution because it may have resulted in extended FOIA litigation and the release of sensitive information. It also may have caused agencies to simply deny all requests that could not be processed within 20 business days. The House version, which denies agencies the ability to charge processing fees when the 20-day time limit is not met, would impose a meaningful consequence for agencies that do not process in a timely fashion. More importantly, this approach would eliminate fee disputes as a stalling tactic. Fee status disputes can end processing of a FOIA request for months or years after the request was first received. (Under H.R. 1309, once the 20-day clock has expired, all matters related to fees are irrelevant and the agency must either process or face litigation.)

- ***DOJ objection:*** **Section 6(a), which establishes that the 20-day time limit commences when the request is first received by the agency, "represents a very significant change from current practice" and "does not allow for the practical necessity of forwarding a request to an appropriate field office, division, or component."**
- ***Response:*** **The proposal will create an incentive for efficiency and impose uniformity.**

Unfortunately, agencies often do not make a serious effort to process FOIA requests efficiently. The current FOIA backlogs result from poor management as much as difficult decision-making. There is nothing in the existing statute to cause agencies to improve their processes and make an effort to comply with the law. Often, agencies stonewall by shuffling a FOIA request around the agency before even starting the clock for a response. The proposed provision will spur agencies to solve their management challenges by developing better procedures, such as accepting FOIA requests electronically to make them easier to track and transfer.

Additionally, consistent standards for measuring agency performance will lead to more reliable annual reports to Congress, which in turn will encourage better agency management and enable better congressional oversight. The data that agencies currently report to Congress are misleading because each agency uses different standards for counting the days between receipt

of a FOIA request and response to a FOIA request. This provision in the bill would ensure that agency processing statistics do not conceal delay problems at specific underperforming agencies.

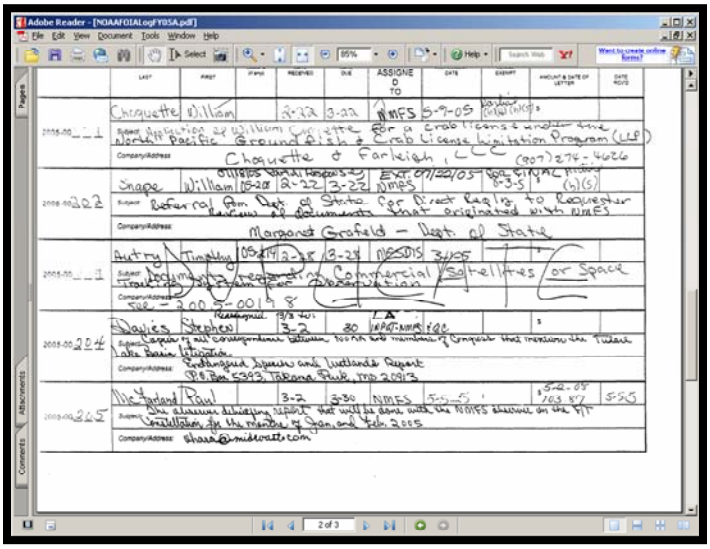
- ***DOJ objection:*** **The prohibition on tolling the time limit for a request without consent of the requester is problematic, because agencies often need to stop processing to get information from the requester and "the agency should not be penalized for the time it takes the requester to provided needed information to the agency."**
- ***Response:*** **This will help align incentives to speed processing of requests.**

Requesters do not have an incentive to stall in responding to an agency inquiry, because their goal is to get a timely response. Under the current system, however, agencies have every incentive to toll and extend the time limit and to delay processing a request. This amendment should be interpreted so that when a requester does not respond to a legitimate inquiry from the agency regarding a FOIA request within a reasonable time, the requester is considered to have consented to tolling until he or she responds.

Section 7. Tracking Numbers for Individual Requests

Section 7 would create a tracking system so FOIA requesters could track their requests online or by phone. In 2005, more than 200,000 FOIA requests went unanswered.

- ***DOJ objection:*** **DOJ argues this section is unnecessary because the executive order signed by Pres. Bush in December 2005 already creates a Public Liaison and Chief FOIA Officer within agencies, and several agencies already assign tracking numbers.**
- ***Response:*** **The amendment proposes a simple best practice.**



Looking at FOIA logs for 30 federal agencies on www.memoryhole.org illustrates how easy it is to lose track of requests and why such a tracking system is needed.

Each department/agency/office tracks FOIA differently, using various computer formats such as ASCII, Microsoft Access, Microsoft Excel, Microsoft Word, and in some cases, even handwritten logs.

FOIA requesters are not able to keep track of their requests because agencies have no standards for how requests are managed. Moreover, the only way to see such logs is to visit the agency in person or submit a FOIA request for the log.

The FOIA log example included here shows that tracking FOIA requests currently by hand is prone to time-consuming entry and problems with errors. There is no requirement in the Executive Order for agencies to maintain or provide tracking numbers.

Section 8. Specific Citation Required for FOIA Exemptions

FOIA Exemption 3 currently exempts from mandatory disclosure information that is "specifically exempted from disclosure by statute," where the statute leaves no discretion on the issue, establishes criteria for withholding, or specifies particular types of information to be withheld. Section 8 would require Congress to cite directly to Exemption 3 in any newly enacted legislation intended to carve out a new exemption from FOIA under 5 U.S.C. § 552(b)(3).

- ***DOJ objection:*** **The Justice Department asserts that Section 8 is "unnecessary," particularly given courts' reluctance to impose additional requirements to establish a statute as falling under Exemption 3.**
- ***Response:*** **This is a matter of internal congressional procedural discipline.**

That courts have been reluctant to second-guess Congress is irrelevant to Congress's own determination that it can better fulfill the purpose of Exemption 3 by imposing on itself the requirement to make its intent express in enacting an Exemption 3 statute.

Moreover, DOJ's concerns ignore that the touchstone for Exemption 3 is congressional intent, which clearly Congress is in the best position to articulate. Exemption 3 already makes clear that it is up to Congress, not the courts or the executive branch, to determine in the first instance whether a statute is intended to exempt certain information from FOIA's disclosure requirements. By requiring Congress to make that intent express, Section 8 will focus congressional attention on potential circumvention of FOIA's mandates (either intentionally or inadvertently) and will eliminate unnecessary litigation over whether a statute qualifies as an Exemption 3 statute.

Section 9. Reporting Requirements

In an effort to make departments and agencies more accountable for their FOIA performance, section 9 would require agencies to provide to Congress clearer and more complete data on the time to process requests and the oldest pending requests, as well as the handling of requests for expedited review and fee waivers.

- ***DOJ objection:*** **The additional reporting requirements represent an "unnecessary burden" on agencies that will cut into the timeliness of responses; further, it is unclear whether the additional reporting "will provide any new or useful information" regarding agency responses.**
- ***Response:*** **Better reporting will enhance agency accountability and congressional oversight.**

GAO has observed that "[t]aking steps to improve the accuracy and form of annual report data could provide more insight into FOIA processing." FOIA currently requires that agencies provide median times, but not averages, for processing times and other benchmarks. As the GAO concludes: "Current reporting requirements do not allow for meaningful analysis of how agencies fulfill legal requirements of FOIA. As a result, it is not statistically possible to combine results from different agencies to develop broader generalizations, such as a government-wide statistic based on all agency reports, statistics from sets of comparable agencies, or an agency-wide statistic based on separate reports from all components of the agency."

Since public accountability and congressional oversight depend on more complete FOIA data, providing raw statistical data would help meet those goals. In addition, most agencies only collect the data that they are required to report, so they have failed to set up tracking systems that are useful for management. Requiring better data would require them to better understand how they are processing FOIA requests and provide better tools for agency managers.

Section 10. FOIA Coverage for Contracted Data Maintenance

FOIA presently applies to information "maintained by an agency." Section 10 would include information "that is maintained for an agency by an entity under a contract between the agency and the entity."

- ***DOJ objection:*** **This section may overturn settled law excluding from FOIA's reach information generated by the private entity, even if under contract with the agency.**
- ***Response:*** **The section plainly does not overturn settled law on contractor data, but prevents circumvention of FOIA by use of contractors for recordkeeping functions.**

While DOJ's letter asserts that Section 10 is "ambiguous," it does not suggest or illustrate what interpretation might be either intended or result other than the plain meaning of the language. However, the Judiciary Committee Report on S. 849 states succinctly that "[t]his section clarifies that agency records kept by private contractors licensed by the government to undertake recordkeeping functions remain subject to FOIA just as if those records were maintained by the relevant government agency." The amendment is thus clearly and carefully limited to entities "licensed by the government to undertake recordkeeping functions." The leading case of Forsham v. Harris, 445 U.S. 169 (1980), cited in DOJ's letter, did not involve a contractor charged with recordkeeping functions but rather a grant recipient that used federal funds to generate research data. The Supreme Court properly held the data in that case could not be reached by FOIA.

Section 10 would apply, however, to avoid the possibility that FOIA could be circumvented simply because an agency entered into a contract with a private entity to receive and maintain data that would, in the absence of the contract, have been received and maintained by the agency. (The data could be received by the entity directly from the government or on the government's behalf from third parties.)

Section 11. Office of Government Information Services

S. 849 would establish an Office of Government Information Services within the Administrative Conference of the United States, and that office would have a FOIA ombudsman to review agency policies and procedures, audit agency performance, recommend policy changes, and mediate disputes between FOIA requestors and agencies. The establishment of an ombudsman will not impact the ability of requestors to litigate FOIA claims, but rather will serve to alleviate the need for litigation whenever possible. (Note: The House bill, HR 1309, puts the ombudsman within the National Archives and prescribes slightly different functions for the office.)

- ***DOJ objection:*** **The ombudsman would have a policymaking function (and thus conflict with the role of DOJ); the ombudsman functions to be provided by the independent office would duplicate agency efforts under Executive Order 13,392 (December 2005); and the ombudsman would be ill-suited to mediate FOIA disputes, which should be left to the courts.**
- ***Response:*** **A FOIA ombudsman would assist agencies and requesters, and would potentially reduce the need for costly litigation.**

The ombudsman would make independent recommendations, not policy. Justice and each federal agency would retain responsibility for making FOIA policy and carrying out the requirements of FOIA. To make recommendations with independence and integrity, the ombudsman must be independent from DOJ, which is obligated to defend FOIA disputes on behalf of other agencies in court.

Moreover, the FOIA executive order is no substitute for congressional action. The executive order has not created significant improvement in agency FOIA processing, as studies by the GAO, National Security Archive, and Coalition of Journalists for Open Government show.

Rather than mediate litigation disputes, the ombudsman would be most effective helping requesters avoid costly litigation. Only a few FOIA requesters can afford to litigate FOIA disputes. The independent ombudsman gives the requester an alternative means to resolve disputes. And had an Office of Government Information been in place, it could have worked to speed the release of vital information in many significant cases.