

Employers Need to Know

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FOIA Requests Under the Obama Administration: What Employers Need to Know

by Neil E. Duke

Among his first acts, newly sworn-in President Obama signed an Executive Order that represented a dramatic break with the Bush administration on the issue of Freedom of Information Act (FOIA) requests. Navigating the maze of FOIA requests made through the various federal administrative agencies can be challenging. On Day 1 of the Obama administration, that challenge may have eased considerably. Here's why.

In October 2001, then-Attorney General John Ashcroft issued a memorandum to federal agencies regarding public FOIA requests. In short, the instruction was for administrative agencies to err on the side of non-disclosure. Mr. Ashcroft's exact instructions were as follows:

I encourage your agency to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA. Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.

As a result, many federal agencies adopted a stricter approach when it came to the release of information to the public. Public advocacy rights organization would certainly argue that this guidance had a discernible chilling effect and resulted in numerous legitimate FOIA requests being rejected as a result of the prior administration's anti-disclosure inclinations.

As members of the public, employers were equally subject to having their informational requests denied by federal administrative agencies. The Ashcroft memorandum had wide-ranging impact; from general employers seeking investigative file information from the Equal Employment Opportunity Commission or the Department of Labor, to health care industry employers requesting data from the Department of Justice or other investigative authorities related to compliance issues, to construction contractors in search of information from the Occupational Safety and Health Organization related to workplace safety investigations.

On January 21, 2009, President Obama broke with the prior administration's disclosure standard by signing a FOIA-related Executive Order and simultaneously issuing a Presidential Memorandum instructing the Attorney General to devise new guidelines to ensure the implementation of governmental transparency. To be sure, the shift in policy now arms employers, and the public at large, with an important tool when dealing with federal administrative agencies. The practical effect of the Obama administration's FOIA-related Executive Order is certain to be felt in the upcoming months as the policies of various federal administrative agencies shift in order to comply with the new Executive Order.

For assistance in responding to the various changes in employment law emanating from the Obama administration, dealing with federal administrative agencies or advice relating to your general human resources needs, please contact **Ober|Kaler's Employment & Labor Group**.

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