

A Review of the Federal Government's FOI Act Performance, 2004

The public demand for government information increased at least 23 percent during 2004, topping four million separate Freedom of Information Act requests in a year for the first time. The two-year growth in FOIA requests, fueled by people seeking information from the Social Security Administration, was 67 percent.

At the same time, other government departments fell further behind in complying with public information requests. The government-wide backlog for 2004 increased 15 percent, with only a small part of that attributed to Social Security offices trying to keep up with a doubling in requests.

The Coalition of Journalists for Open Government compiled information in the annual reports on FOIA compliance released individually by the 15 federal departments and for 10 of the 75 reporting agencies to get an overall picture of the federal government's performance. The 10 agencies each received at least 1,000 FOIA requests in 2004.

The department and agency reports are released individually. There is no publicly-available government-wide compilation of the statistical information. The Justice Department provides an annual narrative executive summary that discusses some of the trends. That summary for fiscal 2004 has not yet been published.

The CJOG review looks at trends that might be relevant to the pending FOIA reform legislation. For instance, the review provides statistical support for claims that a 2001 court decision has created a significant financial disincentive to suing the government for denied records. Since the decision, the awards for the legal costs to those who sued and obtained records have steadily declined and all but stopped in 2004.

The bulk of FOIA requests are from people seeking personal information from two departments and one agency: the Department of Veterans Affairs, the Social Security Administration and the Department of Health and Human Services. That's where most of the increases have been as well. In 2004, requests from people seeking their own Social Security records more than doubled to more than 1.8 million; requests to HHS increased 50 percent.

The 2004 total for the 15 departments and 10 agencies surveyed was 4,045,718. In 2003, the total for all departments and all agencies was 3,266,394.

The government-wide backlog – the number of requests carried over to another year without a response -- increased almost as dramatically to 178,900 for the departments and agencies surveyed. When the three highest-volume agencies are excluded, the backlog numbers show the remaining departments are running 20 percent behind their request load. One agency, the Securities and Exchange Commission, reported a 225 percent backlog.

It is clear from the review why many people who have used FOIA believe the government is overly protective and why the process of requesting information seems long and arduous.

The three agencies with the greatest number of requests, VA, Social Security and HHS, released all or at least part of the information 99 percent of the time. Most of the requests are for personal records and many are joint filings under both FOIA and the Privacy Act. Other agencies, asked for information the government collects about others or develops in carrying out public policy often said “no” or offered other reasons for not providing the records one-third of the time.

One of the more controversial sections of the OPEN Government Act proposed by Sens. John Cornyn (R-Texas) and Patrick Leahy (D-Vt.) and Rep. Lamar Smith (R-Texas) is a provision designed to press agencies to do a better job of meeting that response deadline. The CJOG review showed that departments and agencies continue to struggle with the law’s deadline for a response, even though the deadline was extended from 10 to 20 days and other handling reforms were instituted in 1996.

The government reports only hint at how long people have to wait for information they’ve requested. The reports list the median number of days it takes an agency to respond, a somewhat inexact indicator by itself, and one that notes only the first part of the story. “Response” under the law means only the government has told the requester whether the request will be granted all or in part, denied, if no such record exists or the record is held by another agency, or if there are administrative issues that need to be resolved before a final decision can be made. It does not mean the information itself has been delivered.

Even so, the government agencies surveyed frequently failed to meet the deadline. Twelve had at least one operating unit whose median response time for “simple” requests exceeded the 20-day deadline in the FOIA law. All 24 that handled “complex” requests reported median response times greater than the legal deadline, either for the entire agency or for one or more subunits. And 13 said their processing of “expedited” requests sometimes exceeded the statutory deadline.

At a hearing on the Freedom of Information Act held by the House Government Reform Committee in May, several members of Congress commented that the current law had no built-in incentives or consequences.

The Energy Department’s report shows that its Rocky Flats field office had at least one “complex” request it had not responded to for more than three years – 916 working days. The Office of the Inspector General in the Department of Interior’s reported a median response time for “simple” requests was 834 working days.

One provision of the OPEN Government Act calls for an ombudsman, similar to that in a number of states, who would act as a pre-litigation mediator on disputed requests. Under

current law, requesters can appeal an adverse FOIA decision within the respective departments. If still not satisfied, they can go to court.

The CJOG review showed that only 16 percent of the requesters win release of even some of the records sought through internal appeal. And the final recourse to the courts is even more of a craps shoot for the requester. Litigants got all of the information sought only three per cent of the time in the past six years. The government won total victory in 84 percent of the cases that went to trial.

Here is a more detailed look at each of the areas analyzed.

How do FOIA requesters fare?

- Most requests made under FOIA are for personal information (88 percent) and most of those requests (99 percent) are granted.
- Requesters seeking other information the government collects or records it keeps about what it is doing and why do not fare as well. They get all or some of the information sought two-thirds of the time.
- The three agencies handling 88 percent of the requests have a modest two percent backlog. The 22 other departments or agencies whose performance was reviewed had a 20 percent backlog, that is, one in five requests did not get processed in the year requested.

Delays in Responding to Requests

- Reported response times were as great as 916 working days – and that one at the Energy Department’s Rocky Flats office was still pending.
- All of the median response times posted by the Department of Housing and Urban Development exceeded the 20-day deadline.
- The Defense Department showed requests can be hustled when that is a goal. It’s median processing time for 841 expedited requests was one day.
- In contrast, one Justice Department unit, the Executive Office for US Attorneys, had 36 expedited requests pending for more than 195 working days.

Appealing a FOIA Decision

- The odds that a requester can get the denial of a FOIA request overturned, even in part, and obtain at least some of the information sought is less than one in six. Less than four percent win their appeals outright.
- The State Department is the agency most likely to consider an appeal favorably (59 percent); the Justice Department the least likely (6 percent).
- Just under half the cases appealed are dismissed for technical or other non-substantive reasons, such as fee issues, referral to another agency, or determination it is not a proper FOIA request.

- The Department of Homeland Security heard and decided only one third of the appeals filed in 2004. Overall, the government had a 17 percent appellate backlog at yearend.

The Cost of Handling FOIA requests.

- The average handling cost is \$40.36 per record request.
- There is a wide range in processing costs, from \$10.02 a request at the Social Security Administration to \$2,550.21 for the State Department.

Statistical tables are attached and a six-year analysis of FOIA litigation decisions are attached.

How FOIA Requesters Fared in 2004, by Department

Department/ Agency	Requests				Decision Made				
	Received	Processed	Yearend Backlog	%	Granted in Full	Partial Grant	Percent Granted	Denied	Other No Grant
Agriculture	61,803	61,209	2,372	4%	55,465	1,953	94%	1,774	9,471
Commerce	2,051	2,035	308	15%	950	277	60%	214	594
Defense	77,131	77,256	12,826	17%	37,914	11,779	64%	2,340	25,223
Education	2,232	2,082	348	17%	1,007	659	80%	61	355
Energy	2,289	2,440	862	35%	1,590	258	76%	59	533
Homeland Security	168,882	152,027	45,810	30%	49,835	60,612	73%	955	40,625
HUD	4,654	3,978	2,421	61%	1,824	587	61%	237	1,330
Interior	4,587	4,219	1,790	42%	1,809	854	63%	183	1,373
Justice	57,346	56,865	8,055	14%	19,186	8,495	49%	2,136	27,048
Labor	21,833	21,860	559	3%	7,378	7,551	68%	1,931	5,000
State	3,951	4,963	1,996	40%	837	1,370	44%	345	2,411
Transportation	10,375	10,905	1,971	18%	4,435	2,170	61%	292	4,008
Treasury	64,336	64,570	5,538	9%	30,114	3,413	52%	551	30,492
CIA		3,336	1,150	34%	427	1,242	50%	517	1,530
Cons.Prod.Safety	6,355	6,397	58	1%	5755	385	96%	53	204
EEOC	17,535	17,485	1,686	10%	1,109	12,384	77%	1,427	2,564
EPA	12,897	13,352	2,146	16%	7,540	635	61%	120	5,057
NARA	5,627	5,219	5,501	105%	476	110	11%	22	4,611
NASA	1,622	1567	257	16%	579	390	62%	27	511
NLRB	5,193	5295	154	3%	3980	523	85%	136	656
SEC	9,325	3,830	8,635	225%	1090	209	34%	499	2,042
SBA	1,901	1,927	30	2%	73	168	13%	1,416	270
Subtotal	541,925	522,817	104,473	20%	233,373	116,024	67%	15,295	165,908
HHS	225,006	222,408	23,545	11%	206,951	753	93%	2,134	12,570
Veterans Affairs	1,825,168	1,851,756	45,076	2%	1,812,795	8,961	98%	5,014	34,217
Social Security	1,453,619	1,450,493	5,857	0%	1,446,438	819	99%	937	2,299
Subtotal	3,503,793	3,524,657	74,478	2%	3,466,184	10,533	99%	8,085	49,086
Total	4,045,718	4,047,474	178,951	4%	3,699,557	126,557	95%	23,380	214,994

Other No Grant lists the total number of requests not granted for a variety of reasons unrelated to any of the exemptions, such as failure to front processing fees, no records found, requests referred to other agencies, a non-specific request and withdrawn requests

FOIA Request Waiting Time, 2004

Department/ Agency	Type of Request, Processing Time					
	Simple Request	Median Days	Complex Request	Median Days	Expedited Request	Median Days
Agriculture	34,067	14 \ 77	26,616	54 \ 800	526	13 \ 53
Commerce	1,654	13	465	41	6	5
Defense	63,433	17	12,922	59	841	1
Education	1,566	3 \ 30	442	2 \ 134	74	3 \ 21
Energy	1,907	10 \ 152	493	18 \ 916	40	5 \ 7
Homeland Security	116,944	8 \ 84	34,391	5 \ 111	692	3 \ 44
HUD	3,540	21 \ 95	258	30 \ 161	180	9 \ 42
Interior	3,976	15 \ 834	30	56 \ 90	63	2 \ 64
Justice	49,618	1 \ 137	7,049	15 \ 636	198	1 \ 195
Labor	17,771	2 \ 30	3,959	18 \ 60	130	2 \ 25
State	1,236	6	3,710	209	17	184
Transportation	6,232	1 \ 68	4,614	23 \ 135	59	5 \ 57
Treasury	723	2 \ 10	63,844	4 \ 172	3	10
CIA	501	7	2,834	63	1	10
Cons.Prod.Safety	5640	6	757	25	0	0
EEOC	17,164	18	0	0	321	4
EPA	13,324	15 \ 27	17	19 \ 353	11	6 \ 27
NARA	4,920	35	299	354	0	0
NASA	1,069	18	454	33	44	26
NLRB	5,295	9	0	0	0	0
SEC	3,401	30	419	202	10	8
SBA	1,927	5	0	0	0	0
HHS	44,761	9 \ 25	177,633	77 \ 325	14	66
Veterans Affairs	0	0	1,833,581	4 \ 42	18,175	1
Social Security*	1,449,631	NA	882	37	0	0

Not all agencies aggregate their response-time data, instead reporting only by unit or division. In those instances, the "Median Day" figures shown reflect the smallest and greatest processing times reported among the components.

* The Social Security Administration outsources more than 1.2 million of its simple FOIA requests and said it could not report processing time on those requests. The agency reported median times of times of 10 to 19 days for the 179,000 requests it did handle.

The Volume and Costs of FOIA, 2004

Department	Processing Cost	Requests Processed	Cost per Request
Agriculture	\$ 11,324,192	61,209	\$ 185.01
Commerce	\$ 1,373,355	2,035	\$ 674.87
Defense	\$ 46,783,592	77,256	\$ 605.57
Education	\$ 809,158	2,082	\$ 388.64
Energy	\$ 3,297,469	2,440	\$ 1,351.42
Homeland Security	\$ 46,783,592	152,027	\$ 307.73
HUD	\$ 1,998,632	3,978	\$ 502.42
Interior	\$ 7,252,721	4,219	\$ 1,719.06
Justice	\$ 54,531,828	56,865	\$ 958.97
Labor	\$ 14,645,397	21,860	\$ 669.96
State	\$ 12,656,689	4,963	\$ 2,550.21
Transportation	\$ 7,639,210	10,905	\$ 700.52
Treasury	\$ 13,577,037	64,570	\$ 210.27
CIA	\$ 8,150,000	3,336	\$ 2,443.05
Cons.Prod.Safety	\$ 1,627,309	6,397	\$ 254.39
EEOC	\$ 2,162,500	17,485	\$ 123.68
EPA	\$ 11,505,500	13,352	\$ 861.71
NARA	\$ 1,425,774	5,219	\$ 273.19
NASA	\$ 1,541,496	1,567	\$ 983.72
NLRB	\$ 746,148	5,295	\$ 140.92
SEC	\$ 2,565,389	3,830	\$ 669.81
SBA	\$ 753,750	1,927	\$ 391.15
Subtotal	\$ 253,150,738	522,817	\$ 484.21
HHS	\$ 17,797,355	222,408	\$ 80.02
Veterans Affairs	\$ 44,696,330	1,851,756	\$ 24.14
Social Security Ad.	\$ 14,531,090	1,450,493	\$ 10.02
Subtotal	\$ 77,024,775	3,524,657	\$ 21.85
All Depts/Agencies	\$ 330,175,513	4,047,474	\$ 81.58

FOIA Appeals, All Departments, 2004

Department	Appeals Received	Appeals Processed	Full Grant	Partial Grant	Percent Granted	Denial Upheld	Other* Non-Disc
Agriculture	246	160	36	47	52%	41	36
Commerce	79	68	7	10	25%	31	20
Defense	624	933	30	162	21%	433	308
Education	25	59	1	9	17%	36	13
Energy	32	28	0	4	14%	4	20
Homeland Security	2,187	722	6	30	5%	136	550
HUD	61	45	3	4	16%	30	8
Interior	254	67	32	6	57%	7	22
Justice	3,004	2,933	33	157	6%	1121	1622
Labor	335	313	16	92	35%	79	126
State	368	294	9	165	59%	100	20
Transportation	118	101	9	12	21%	40	40
Treasury	388	504	9	30	8%	278	187
CIA	220	273	0	45	16%	155	73
Cons.Prod.Safety	15	13	0	0	0%	13	2
EEOC	415	372	39	91	35%	176	75
EPA	117	105	9	9	17%	18	65
NARA	6	6	0	1	12%	2	3
NASA	22	22	0	8	36%	13	1
NLRB	49	47	2	11	28%	25	9
SEC	229	202	39	34	36%	126	3
SBA	28	28	0	13	46%	5	6
Subtotal	8,822	7,295	280	940	17%	2,869	3,209
		83%				39%	44%
HHS	168	132	17	21	29%	50	44
Veterans Affairs	117	148	10	9	13%	34	95
Social Security Ad.	76	96	19	8	28%	46	23
Subtotal	361	376	46	38	22%	130	162
Total	9,183	7,671	326	978	17%	2,999	3,371
		84%				39%	44%

* Departments list various other "non-disclosure" reasons including request withdrawn, referrals, fee-related, not reasonably described, not a proper FOIA request, not an agency record, duplicate request, available from another source.

FOIA Litigation Decisions, 1999 – 2004

A review of six years of Justice Department reports on FOIA cases for which there was a decision offers some insights that may be helpful in discussing the OPEN Government Act and several of its provisions.

- Filing a law suit is clearly a remedy of last resort. On average, there were slightly more than 400 FOIA legal case “decisions” each year. In comparison, the 15 federal departments and ten of the larger federal agencies denied 20,784 requests in 2004. Those numbers suggest that less than 2 percent of the requesters who are denied information turn to litigation. For reference, another 266,511 requests were not granted in 2004 for reasons other than a formal denial that cited a FOIA exemption.
- Litigation seems likely to remain an unattractive remedy for requesters. The government wins outright by judgment, or indirectly through voluntary or technical dismissal of cases, 70 percent of the time. Plaintiffs win outright in less than 3 percent of the cases filed. In the remaining 27 percent of cases, the plaintiffs get some of the records sought through court order or by stipulated grant from the agency prior to trial.
- Numerically, the media are minor players. Only 18 of the 2460 cases reported by DOJ involved media companies. That’s 7/10ths of one percent. One other case involved an individual journalist, Terry Anderson, seeking personal information.
- The 2001 *Buckhannon* decision, which is increasingly being used as precedent to argue against the award of legal fees and costs to plaintiffs in cases that do not go to trial, has had a pronounced impact on plaintiffs who sue but then obtain some or all of the disputed records before a court rules. In 1999 and 2000, there were 206 lawsuits settled by stipulated dismissal, meaning the agency gave up some documents and the plaintiff agreed to drop the case. In 40 percent of those cases, the plaintiffs were awarded legal fees that totaled \$633,615. Contrast that with 2003 and 2004, when 160 cases were settled by stipulation but only three percent resulted in government payment of legal fees and cost to plaintiffs who had at least partially prevailed. The cost to the government in 2003 and 2004 was \$66,161, about one-tenth of what was paid out in the two years before *Buckhannon*.
- Total reported spending on FOIA litigation almost doubled in 2004 to \$18 million, primarily because the Justice Department reported spending \$12.4 million, an increase of \$8.4 million from 2003. The explanation was that not every division had accurately reported litigation costs in prior years. In 2004, reported spending in the Civil Division, for instance, went from \$30,000 the previous year to \$6.7 million. The reporting variances make valid expense comparisons over the six year period impossible. The 2004 litigation expense total, however, suggests that the award of legal fees is a small portion of the overall government litigation expense. The average in yearly legal fee awards in all cases over the six years reviewed – whether the government won, settled, or lost – was \$580,416.

- Even the process of going to court to seek information a requester believes to be public does not escape the government's secrecy shroud on occasion. The addendum to the 2001 report lists the following, rather puzzling decision:

SEALED V. SEALED

DISPOSITION: Court ordered case sealed and closed.

Here's a look at the percentages related to the overall results of FOIA litigation and to the impact of the *Buckhannon* decision. Statistical tables are attached.

	<u>Annual Average</u>	<u>Percent</u>
Cases resolved:	410	
Cases won outright by plaintiff:	13	3.2%
Cases won outright by government	226	55.1 %
Cases w/partial judgment for plaintiff	27	6.6%
Cases settled by stipulation	86	20.9%
% stipulations where fees awarded	20	23.7%
Cases voluntarily withdrawn by plaintiff	25	6.1%
Cases dismissed for other reasons	33	8.0%

	<u>Percent of total cases settled by stipulation</u>	<u>Percent of stipulations in which government paid plaintiff legal costs</u>
1999	21.2%	52.8%
2000	26.1%	31.0%
2001	19.0%	17.3%
2002	19.4%	28.7%
2003	23.1%	3.0%
2004	16.3.7%	3.0%

Media cases 1999 to 2004

Decisions favoring the plaintiff are indicated in boldface, the government in italics.

- 2004 New York Times v. Labor Department: **Plaintiff**
- 2003 Dayton Newspapers v. Veterans Administration: **Plaintiff**
New York Times v. Port Authority: *Remanded to state court*
- 2002 Dow Jones v. Federal Energy Regulatory Commission: **Plaintiff**
Detroit Free Press v. DOJ: **Plaintiff**
Dan Malone and Dallas Morning News v. INS: Stipulated dismissal
- 2001 Cox Newspapers v. State Department: Stipulated dismissal

Navigator Publishing Co. v. DOT: *Government*
 Baltimore Sun v. U.S. Marshals Service: **Plaintiff**
 2000 Dayton Newspapers v. Navy: *decision for the government*
 Times Publishing v. Department of Commerce: **Plaintiff**
 1999 Philadelphia Newspapers v. HHS: **In part for plaintiff**
 Nation Magazine v. State Dept: **In part for plaintiff**
 Chicago Tribune v. HHS: **Plaintiff**
 Dayton Newspapers v. Air Force: **In part for plaintiff**
 Fox TV-Philadelphia v. NTSB: **Stipulated dismissal**
 Times Picayune v. DOJ: *Government*
 Time Inc and Time Warner v. Labor Dept: *Voluntary Dismissal*
 Terry Anderson v. CIA: **In part for plaintiff**

A “stipulated dismissal” notation in the Department of Justice reports signifies that some form of agreement was reached between the agency and the plaintiff after the filing of the suit, and as a result both sides agreed to terminate the litigation. It means the plaintiff won at least a partial victory.

A “voluntary dismissal” designation means the plaintiff agreed to drop the litigation without having gained any of the information sought, in effect a victory for the government agency that denied the initial request and administrative appeal.

FOIA Litigation 1999-2004

Fiscal Year	Total Cases Resolved	Judgment for			Cases Dismissed			Legal Fees, Costs Awarded			
		Plaintiff	Partial	US Govt	Stipulated	Voluntary	Other	Plaintiff Win		Stipulated Dismissal	
								Number	Amount	Number	Amount
2004	380	8	34	196	62	34	46	7	\$321,477.04	1	\$3,280
addendum	23	0	1	12	4	2	4	0	\$0.00	1	\$5,650
2003	379	13	20	200	88	16	42	8	\$216,323.84	3	\$62,231.07
addendum	43	1	0	20	10	6	6	1	pending	0	\$0.00
2002	319	10	33	190	52	13	21	8	\$168,275.19	14	\$129,926.66
addendum	57	0	1	27	21	6	2	0	0	7	\$43,072.62
2001	354	13	22	226	63	15	15	9	\$101,717.23	10	\$320,652.93
addendum	39	1	1	17	12	2	6	2	pending	3	\$3,932.19
2000	392	15	14	222	100	20	21	5	\$445,180.58	35	\$264,738
addendum	64	0	1	31	19	5	8	2	\$37,021.42	2	\$27,500
1999	356	15	34	185	75	22	25	8	\$342,365.21	43	\$326,738.58
addendum	54	2	2	29	12	7	2	1	\$16,000	3	\$14,638.68
Total	2460	78	163	1355	518	148	198	51	\$1,648,361	122	\$1,202,361
Annual Av.	410	13	27.1	225.8	86.3	24.6	33	8.3	\$274,727	20.3	\$200,394

Notes: Legal fees/costs of \$253, 039.59 were awarded to plaintiffs in 14 cases won by the government. "Addendum" reports are filed by DOJ after the annual report, listing cases for which "a decision was rendered in prior years." Consistent with DOJ reporting format, we have listed these as separate reports. This could result in minor duplication, and the totals in any category may be recorded as being slightly higher than actual. This should not, however, significantly affect comparisons.

FOIA Litigation Costs, 2004

Department	Litigation Cost
Agriculture	\$ 266,025
Commerce	\$ 396,280
Defense	\$ 428,202
Education	\$ -
Energy	\$ 189,035
Homeland Security	\$ 562,803
HUD	\$ 18,968
Interior	\$ 358,718
Justice	\$ 12,394,368
Labor	\$ 160,000
State	\$ 123,156
Transportation	\$ 90,381
Treasury	\$ 408,575
CIA	\$ 730,000
Cons.Prod.Safety	\$ 2,000
EEOC	\$ 26,759
EPA	\$ 290,309
NARA	\$ -
NASA	\$ 118,344
NLRB	\$ 46,860
SEC	\$ 663
SBA	\$ 1,800
HHS	\$ 1,427,345
Veterans Affairs	\$ 210,461
Social Security Ad.	\$ 20,489
Total	\$ 18,271,541

Justice Department Litigation Costs, 1998 - 2004

Year	Civil Division	EOUSA	DOJ Total	# Cases
2004	\$ 6,746,198	\$ 2,004,184	\$ 12,394,368	403
2003	\$ 30,000	\$ 40,000	\$ 4,098,374	422
2002	\$ 30,000	\$ 256,169	\$ 4,305,061	376
2001	\$ 25,000	\$ 332,423	\$ 3,736,454	393
2000	\$ 15,500	\$ 748,000	\$ 3,607,471	456
1999	\$ 24,655	\$ -	\$ 1,013,219	410
1998	\$ 31,486	\$ -	\$ 3,448,090	

The numbers raise the question as to whether the cost are in any way a reflection of the impact of the Ashcroft memo. The number of cases filed however, indicate there has not been a significant increase in litigation. Justice says that the officially reported numbers for litigation costs have been estimates, rather than precise accounting, since the start of the mandated reporting in 1998. The 2004 report reflects efforts to get the various divisions to report more accurately.