

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 follow. A six-year analysis of FOIA litigation decisions is attached.

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.