

FBI WINS ROSEMARY AWARD
March 13, 2009

Background Memorandum

1. The FBI's system of searching for records responsive to a FOIA request is calculated to return "no records" for a majority of requests.

- ***FBI has consistently responded to well over half of requests with a "no records" response.*** A "no records" response means that the agency's search did not identify any relevant records. The FY2008 data shows that FBI gave substantially more "no records" responses than any other agency. (See Chart 1 for comparison with other agencies.)

FBI "No Records" Responses vs. Total Requests Processed

FY2005: 7,210/11,155 (65%)
FY2006: 11,310/15,403 (73%)
FY2007: 8,799/12,309 (71%)
FY2008: 10,023/17,717 (57%)

The FBI also closed 20% of its cases in FY2008 (3,477 of 17,717 processed) on the basis of "records not reasonably described."

In FY2008, FBI granted in full (i.e. provided unredacted all documents the requester sought) only 89 FOIA requests (0.5% of the total processed) and granted in part only 2,276 (13% of the total process). Thus, the FBI only provided requesters with documents responsive to their requests in less than 14% of all the FOIA requests processed. This number is far smaller than the vast majority of agencies. (See Chart 2 for comparison with other agencies.)

- ***The FBI's search process is designed to conduct ineffective searches.*** In a 2007 declaration filed in federal court in Washington, DC, FBI FOIA Chief David M. Hardy described the FBI's ineffective filing system and search process:

"The Central Records System ("CRS") enables the FBI to maintain all information which it has acquired in the course of fulfilling its mandated law enforcement responsibilities. The records maintained in the CRS consist of administrative, applicant, criminal, personnel, and other files compiled for law enforcement purposes. CRS is organized into a numerical sequence of files, called FBI 'classifications,' which are broken down according to subject matter. The subject matter of a file may correspond to an individual, organization, company, publication, activity, or foreign intelligence matter (or program). Certain records in the CRS are maintained at FBIHQ, whereas records that are pertinent to specific field offices of the FBI are maintained in those field offices. While the CRS is primarily designed to serve as an investigative tool, the FBI searches the CRS for documents that are potentially responsive to FOIA/Privacy Act requests. . . .

The retrieval of data from the CRS is made possible through the ACS [Automated Case Support System] using the General Indices, which are arranged in alphabetical order. The entries in the General Indices fall into two categories:

- (a) A ‘main’ entry—A ‘main’ entry, or ‘main’ file, carries the name corresponding with a subject of a file contained in the CRS.
- (b) A ‘reference’ entry—‘Reference’ entries, sometimes called ‘cross-references,’ are generally only a mere mention or reference to an individual, organization, or other subject matter, contained in a documents located in another ‘main’ file on a different subject matter.

Searches made in the General Indices to locate records concerning particular subjects are made by searching the subjects requested in the index. . . .

The decision to index names other than subjects, suspects, and victims is a discretionary decision made by the FBI Special Agency (“SA”)—and on occasion, support employees—assigned to work on the investigation, the Supervisory SA (“SSA”) in the field office conducting the investigation, and the SSA at FBIHQ. The FBI does not index every name in its files; rather, it indexes only that information considered to be pertinent, relevant, or essential for future retrieval. . . .

In the absence of a specific request for a search of cross-references at the initial administrative stage, the FBI’s current policy is to search for and identify only ‘main’ files responsive to FOIA requests.”

SAE Productions v. FBI, No. 07-0866 (D.D.C. 2007), Declaration of David M. Hardy, filed Nov. 28, 2007, pp. 12-15.

- ***The FBI FOIA process is a “loop-de-loop.”*** According to the Reporters Committee for Freedom of the Press, when requesters who first receive a “no records” response from FBI headquarters send their request directly to a relevant field office likely to hold the records, FBI policy directs the field office to simply reroute the request back to headquarters for processing. There, the same search is performed and the requester receives the same “no records” response—an endless “loop-de-loop” from which requesters can escape only by filing a lawsuit in federal court. Loren Cochran, “Round and round and round with the FBI: Don Devereaux is caught in a bona fide FOIA loop-de-loop,” Reporters Committee for Freedom of the Press (Winter 2008), http://www.rcfp.org/news/mag/32-1/round_and_round_and_round_with_the_fbi_19.html
- ***The FBI itself has recognized that its recordkeeping and search capabilities are deficient.*** For example, DOJ wrote in its annual FOIA report for FY2007:
“The FBI’s Record Management Division continued its program to enhance the FBI’s record keeping processes, including the development of the new Central Records Complex (CRC) in Winchester, VA. These initiatives will significantly improve the FOIA section’s search and record-retrieval capabilities by increasing search accuracy, by decreasing search time, and by reducing lost files, missing serials, and the manual movement of files.”

DOJ Annual FOIA Report for FY2007,

http://www.usdoj.gov/oip/annual_report/2007/07contents.htm

In 2006, Hardy was quoted as saying: “I would say that in probably 65 percent of the [Freedom of Information Act] requests, we have absolutely no records. That we can find.” Lars-Marten Nagel, “FBI’s Most Wanted: It’s Own Files?” *Cox News Service* (Aug. 31, 2006).

The indexing and searching problems extend beyond FOIA requests:

“The FBI’s high ‘no records’ rate for citizen requests reflect a larger problem that [sic] the agency acknowledges: its antiquated computer system hinders its ability to conduct criminal investigations. Current and former FBI employees say this is because the agency relies on the same computer index to search files, regardless of whether they are for citizens or to catch criminals.” Nagel (2006).

According to Scott Hodes, an attorney who served in the FBI’s FOIA/Privacy Act Section from 1998 until 2002:

“Many FOIA requesters are confused when they make a request to the FBI and get a ‘no record’ response even though they are sure that there is a record on the subject of their request at the FBI. The FBI isn’t lying—they just have devised a system that makes requesters to go through hoops to find the information they are seeking.”

Scott A. Hodes, “FOIA Facts: Understanding FBI Records,” LLRX.com (July 27, 2007), <http://www.llrx.com/columns/foia43.htm>.

- ***The FBI’s search process produces ludicrous results.*** In 2006, the FBI responded to a request from the National Security Archive for records pertaining to al-Qaeda and its relationship to various charitable organizations with a response that read: “No records responsive to your FOIA request regarding AL QAEDA or in connections to any other organizations were located by a search of the automated and manual indices.” See Timothy Noah, “Osama Bin Who?” *Slate Magazine* (June 1, 2006), <http://www.slate.com/id/2142845/entry/2142846/>. In a 2008 interview, FBI official David Hardy said that this automated response was incorrect and resulted when someone “pushed the wrong button.” Fox 5 News Investigation, *The FBI Files: Mismanaged Secrets* (May 5, 2008), <http://media.myfoxdc.com/fbifiles/video/playerframe1.html>.

2. The FBI has some of the longest average response times in the federal government.

- ***FBI had some of the highest average response times for FOIA requests in the federal government.*** (See chart 2). In FY2008, the FBI’s average response time for simple requests was 49 days and for complex requests, 374 days, compared with the statutory requirement of 20 days for all requests. The FBI took an average of 109 days to process requests that were accorded “expedited” treatment. DOJ Freedom of Information Act Annual Report FY2008, http://www.usdoj.gov/oip/annual_report/2008/cover.htm.
- ***The FBI may have misreported its ten oldest requests.*** In its FY2008 report, the FBI reports its oldest requests ranging from 2/15/2006 to 10/4/2006. However, the Archive’s records show at least two still-pending requests filed with the FBI prior to 2006.

3. **The FBI has a routine practice of refusing to process requests unless requesters obtain a privacy waiver from living individuals about whom they have requested information.** This policy is counter to the FOIA, which requires an agency to process requests and then conduct a balancing test under Exemption 6 and/or 7(c) to determine whether any personal information is exempt under the statute.

- ***The FBI has used privacy waivers to avoid processing requests in cases where obtaining a privacy waiver would be impossible.*** Recently, the FBI has refused to process requests without privacy waivers from terrorists involved with the September 11 attacks, including Khalid Sheikh Mohammed. A lawsuit filed in December 2008 by a journalist seeking information about the murder of journalist Daniel Pearl alleges that in response to a request for records related to Khalid Sheikh Mohammed's confession to the murder of Daniel Pearl, the FBI stated that it would not process the request without a signed privacy waiver from Mohammed because any responsive records would be categorically exempt under the FOIA's privacy exemptions. The plaintiff received a similar response to a request for records about communications involving convicted shoe bomber Richard Reid. *Feinman v. CIA et. al.*, No. 08-01288 (D.D.C.), complaint filed Dec. 17, 2008. Shortly after this lawsuit was filed, the Bureau reversed course and agreed to process the requests without signed privacy waivers from the two terrorists.

4. **The FBI has failed to properly maintain and preserve its historical records, leading to destruction or inaccessibility of important records.**

- ***The FBI has admitted it has destroyed historical records, including some dealing with key civil rights cases.*** For example, in response to a request for files on John R. Poole, a Mississippi lawyer involved in the high-profile prosecution of Willie McGee, an African-American man who got the death penalty in 1945 for allegedly raping a white housewife, the FBI gave this response: "Records which may be responsive to your . . . request were destroyed on July 01, 1995. The FBI Records Retention Plan and Disposition Schedules have been approved by the United States District Court for the District of Columbia and are monitored by knowledgeable representatives of the NARA." Alex Heard, "The Department of Forgetting," *Slate Magazine* (June 24, 2008).
- ***The FBI has failed to turn over historical records that it is obligated to transfer to the National Archives and Records Administration (NARA) when they reach 25 years of age,*** according to FBI record chief David Hardy. In an interview with Fox 5 News (WTTG), Hardy states that "the FBI has not kept up [with transferring files to the National Archives] as far as everything over 25 years old... At this point, if we hold it I have to process it, and I'd rather not be processing it." Fox 5 News Investigation, *The FBI Files: Mismanaged Secrets* (May 5, 2008), <http://media.myfoxdc.com/fbifiles/video/playerframe1.html>.

Chart 1: Percentage of No Records Responses By Agency

Agency	Requests received	Requests processed	Full grants	Partial Grants	Full + Partial Grants	% Grants	Denials	No Records	% No Records	Ave. Response Time (Simple)	Ave. Response Time (Complex)	Ave. Response Time (EP)
FBI	17,241	17,717	89	2,276	2,365	13%	196	10,023	57%	49	374	109
SEC	9,586	15,596	1,635	453	2,088	13%	612	8,764	56%	158	575	3
EPA	11,492	11,635	4,712	554	5,266	45%	72	5,181	45%	43	61	51
DOJ **	59,615	61,272	20,743	6,497	27,240	44%	1,819	15,886	26%	43	273	110
DOT	9,958	10,402	3,938	2,613	6,551	63%	100	2,521	24%	37	101	126
DOL	20,798	20,970	4,706	7,750	12,456	59%	2,048	3,914	19%	23	16	17
DOC	1,936	1,885	654	338	992	53%	110	275	15%	13	109	7
FTC	1,184	1,178	612	341	953	81%	13	152	13%	8	33	N/A
TRE	20,943	21,352	9,053	2,864	11,917	56%	363	2,737	13%	10	23	4
VA	99,333	98,455	51,601	3,332	54,933	56%	9,357	12,279	12%	N/A	N/A	N/A
FCC	745	730	201	255	456	62%	9	90	12%	23	N/A	N/A
DOE	1,605	1,714	724	295	1,019	59%	44	207	12%	70	86	10
DOI	4,810	4,750	2,383	1,012	3,395	71%	111	520	11%	2	59	8
DOD	71,228	71,699	28,451	14,901	43,352	60%	2,554	7,245	10%	30	190	23
NASA	1,316	1,258	397	353	750	60%	59	126	10%	34	83	36
DOS	5,909	5,577	606	903	1,509	27%	722	542	10%	115	275	201
HUD	2,999	3,066	764	316	1,080	35%	67	265	9%	N/A	N/A	N/A
EDU	1,921	2,236	644	1,029	1,673	75%	61	179	8%	111	39	17
DHS	108,952	109,028	12,405	55,963	68,368	63%	1,190	8,616	8%	146	280	58
USDA	12,976	12,650	8,078	2,127	10,205	81%	588	907	7%	26	112	93
HHS	58,299	66,583	46,818	776	47,594	71%	1,824	4,737	7%	60	300	110
CIA	1,935	1,698	237	532	769	45%	388	111	7%	59	179	N/A
FDIC	807	780	531	44	575	74%	27	50	6%	9	15	16
FRB	836	836	496	91	587	70%	27	53	6%	3	19	136
CPSC	3,930	3,837	2,880	247	3,127	81%	133	194	5%	12	85	N/A
SBA	2,637	2,640	2,250	132	2,382	90%	44	132	5%	14	N/A	N/A
EEOC	14,460	15,007	688	9,895	10,583	71%	1,753	618	4%	38	N/A	20
NLRB	4,651	4,694	3,630	414	4,044	86%	427	67	1%	9	N/A	1
OPM	6,033	7,123	6,708	98	6,806	96%	40	71	1%	N/A	51	N/A
SSA	34,444	34,666	33,389	328	33,717	97%	460	274	1%	30	60	N/A
PC *	5,950	5,962	5,768	30	5,798	97%	4	47	1%			
PBGC	7,354	7,444	6,432	187	6,619	89%	15	36	0%	N/A	5	7
GSA	1,460	1,457	1,296	134	1,430	98%	27	0	0%	15	N/A	N/A
								Average =	13%			
* Data from FY2007; FY2008 data not available												
** Agency-wide data, includes FBI												

Chart 2: Percentage of Requests Granted By Agency

Agency	Requests received	Requests processed	Full grants	Partial Grants	Full + Partial Grants	% Grants	Denials	No Records	% No Records	Ave. Response Time (Simple)	Ave. Response Time (Complex)	Ave. Response Time (EP)
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