



Testimony

Before the Subcommittee on Information
Policy, Census, and National Archives,
Committee on Oversight and Government
Reform, House of Representatives

For Release on Delivery
Expected at 2:00 p.m. EDT
Thursday, March 18, 2010

**FREEDOM OF
INFORMATION ACT**

**Requirements and
Implementation Continue
to Evolve**

Statement of Valerie C. Melvin, Director
Information Management and Human Capital Issues



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Highlights of [GAO-10-537T](#), a testimony before the Subcommittee on Information Policy, Census, and National Archives, Committee on Oversight and Government Reform, House of Representatives

Why GAO Did This Study

The Freedom of Information Act (FOIA) establishes that federal agencies must provide the public with access to government information, enabling them to learn about government operations and decisions. To help ensure proper implementation, the act requires that agencies annually report specific information about their FOIA operations, such as numbers of requests received and processed and other statistics. In work reported from 2001 to 2008, GAO examined the annual reports for major agencies, describing the status of reported implementation and any observable trends. GAO also reported on agency improvement plans developed in response to a 2005 Executive Order aimed at improving FOIA implementation, including reducing backlogs of overdue requests.

GAO was asked to testify on its previous work on FOIA implementation, as well as on selected changes in the FOIA landscape resulting from legislation, policy, and guidance.

To develop this testimony, GAO drew on its previous work, as well as publicly available information.

View [GAO-10-537T](#) or [key components](#). For more information, contact Valerie C. Melvin at (202) 512-6304 or melvinv@gao.gov.

FREEDOM OF INFORMATION ACT

Requirements and Implementation Continue to Evolve

What GAO Found

In reporting on annual report statistics over the years, along with agencies' improvement plans and backlog reduction efforts, GAO previously noted general increases in requests received and processed, as well as growing numbers of backlogged requests reported. GAO also found that the improvement plans of the agencies reviewed mostly included goals and timetables as required by the Executive Order. In subsequent reporting on backlog reduction efforts, GAO found that selected agencies had shown progress in decreasing their backlogs of overdue requests as of September 2007; however, GAO could not present a complete picture, because of variations such as differences in agencies' metrics and ability to track backlogs of overdue requests. GAO recommended that the Department of Justice issue guidance to address this issue. Justice agreed with the recommendation and issued further guidance in 2008. In addition, GAO made recommendations to selected agencies regarding the reliability of their FOIA data, with which the agencies generally agreed.

The Congress took steps to address FOIA issues by enacting the OPEN Government Act of 2007, which amended FOIA in several ways. Among other things, the act requires additional statistics on timeliness and backlog in the annual reports—including information on average processing times and ranges, as GAO had previously suggested to the Congress. In addition, the act requires agencies, among other things, to break down their response times in much greater detail: how many requests in the fiscal year reported on were responded to within the first 20 days, how many in the next 20 days, and so on in 20-day increments up to 200 days, in 100-day increments from 200 up to 400 days, and finally those that took longer than 400 days. These new requirements were reflected for the first time in the reports for fiscal year 2008.

These reports also reflected a significant change in the guidance that the Justice Department provided to agencies (in May 2008) on preparing the annual reports. In addition to providing information on the new statistics required by the OPEN Government Act, this guidance directed agencies to omit certain Privacy Act requests from their statistics, which had previously been included. (In a Privacy Act request, a requester asks for information on him- or herself.) This change had a major impact on the statistics for certain agencies, such as the Social Security Administration, whose reported requests dropped by more than 18 million from fiscal year 2007 to fiscal year 2008.

Currently, agencies are preparing Open Government plans, due in April 2010, in response to an administration directive issued in December 2009. Among other things, each plan is to describe measures to strengthen the agency's FOIA program, including milestones for reducing any significant pending backlog of outstanding requests by at least 10 percent each year. Assessing the effect on FOIA processes of these plans may be facilitated by the increased detail required in the annual reports, which should provide a clearer picture of FOIA implementation at individual agencies and governmentwide.

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to participate in today's hearing on the implementation of the Freedom of Information Act (FOIA). Generally speaking, FOIA¹ establishes that federal agencies must provide the public with access to government information, thus enabling them to learn about government operations and decisions. Specific requests by the public for information through the act have led to the disclosure of waste, fraud, abuse, and wrongdoing in the government, as well as the identification of unsafe consumer products, harmful drugs, and serious health hazards.

Since 2001, we have issued several reports on FOIA implementation, which generally examined the annual FOIA reports of major agencies. Today, as agreed with your offices, I will discuss our previous work in this area, as well as selected changes in the FOIA landscape resulting from legislation, policy, and guidance. My comments today are based on our previous work, all of which was conducted in accordance with generally accepted government auditing standards. We supplemented this work with information contained in publicly available government documents, following appropriate GAO quality assurance processes.

Background

FOIA establishes a legal right of access to government records and information, on the basis of the principles of openness and accountability in government. Before the act (originally enacted in 1966), an individual seeking access to federal records had faced the burden of establishing a right to examine them. FOIA established a "right to know" standard for access, instead of a "need to know," and shifted the burden of proof from the individual to the government agency seeking to deny access.

FOIA provides the public with access to government information either through "affirmative agency disclosure"—publishing

¹ 5 U.S.C. § 552.

information in the *Federal Register* or the Internet, or making it available in reading rooms—or in response to public requests for disclosure. Public requests for disclosure of records are the best known type of FOIA disclosure. Any member of the public may request access to information held by federal agencies, without showing a need or reason for seeking the information.

Not all information held by the government is subject to FOIA. The act prescribes nine specific categories of information that are exempt from disclosure: for example, trade secrets and certain privileged commercial or financial information, certain personnel and medical files, and certain law enforcement records or information (attachment I provides the complete list). In denying access to material, agencies may cite these exemptions. The act requires agencies to notify requesters of the reasons for any adverse determination (that is, a determination not to provide records) and grants requesters the right to appeal agency decisions to deny access.

In addition, agencies are required to meet certain time frames for making key determinations: whether to comply with requests (20 business days from receipt of the request), responses to appeals of adverse determinations (20 business days from receipt of the appeal), and whether to provide expedited processing of requests (10 calendar days from receipt of the request). Congress did not establish a statutory deadline for making releasable records available, but instead required agencies to make them available promptly.

Annual FOIA reports are required by the act under amendments that the Congress passed in 1996 to provide for public access to information in an electronic format (among other things). Under the amended act, agencies are required to submit a report to the Attorney General on or before February 1 of each year that covers the preceding fiscal year and includes information about agencies' FOIA operations, such as numbers of requests received and processed, and requests pending at the end of the fiscal year.²

² 5 U.S.C. § 552(e)(1).

Agencies are to make the reports available to the public in electronic form, and the Attorney General is required to make the reports from all agencies available online at a single electronic access point.³

In December 2005, agencies were given additional requirements by an Executive Order⁴ that introduced several innovations. The order required, among other things, that agency heads designate Chief FOIA Officers to oversee their FOIA programs, as well as establishing FOIA Requester Service Centers and FOIA Public Liaisons to ensure appropriate communication with requesters. The Chief FOIA Officers were directed to conduct reviews of the agencies' FOIA operations and develop improvement plans. These plans were to include specific activities that the agency would implement to eliminate or reduce any backlog of overdue requests—that is, requests for which agencies had not responded within the statutory time limit with a determination (generally, 20 business days).⁵ Note that this number is not necessarily the same as the pending requests reported in the annual reports, which may include requests that are less than 20 days old and thus not overdue.⁶

Our Work on Agency Annual Reports and FOIA Improvement Plans Has Noted Areas for Improvement

After the Executive Order was issued, we reported and testified on both annual report statistics and agency improvement plans, focusing on their responsiveness to the Executive Order and

³ This electronic access point is www.usdoj.gov/oip/04_6.html.

⁴ Executive Order 13392, *Improving Agency Disclosure of Information* (Washington, D.C., Dec. 14, 2005).

⁵ This time may be extended by 10 days in “unusual circumstances,” such as when requests involve a voluminous amount of records or require consultation with another agency.

⁶ In reports that we issued before the Executive Order was issued, we used the term “backlog” to refer to pending cases reported in the annual reports. After the Executive Order was issued, we distinguished “pending cases” from “overdue cases” where the distinction was relevant.

backlog reduction efforts.⁷ We found that the improvement plans submitted by the agencies in our scope mostly included the goals and timetables required by the Executive Order. We also made recommendations to selected agencies regarding the reliability of their FOIA data; the agencies generally agreed with our recommendations.

In addition, we noted certain limitations in the statistics reported in the annual reports. In discussing the fiscal year 2005 annual report data,⁸ for example, we observed, among other things, that agencies showed great variations in the median times to process requests (less than 10 days for some agency components to more than 100 days at others). However, the ability to determine trends in processing times was limited because these times were reported in medians⁹ only, without averages (that is, arithmetical means) or ranges. Although medians have the advantage of providing representative numbers that are not skewed by a few outliers, it is not statistically possible to combine several medians to develop broader generalizations (as can be done with averages or arithmetical means).¹⁰ We suggested that to improve the usefulness of the statistics in agency annual FOIA reports, the Congress consider amending the act to require agencies to report additional

⁷ GAO, *Freedom of Information Act: Agencies Are Making Progress in Reducing Backlog, but Additional Guidance Is Needed*, [GAO-08-344](#) (Washington, D.C.: Mar. 14, 2008); *Freedom of Information Act: Processing Trends Show Importance of Improvement Plans*, [GAO-07-441](#) (Washington, D.C.: Mar. 30, 2007); *Freedom of Information Act: Processing Trends Show Importance of Improvement Plans*, [GAO-07-491T](#) (Washington, D.C.: Feb. 14, 2007); and *Freedom of Information Act: Preliminary Analysis of Processing Trends Shows Importance of Improvement Plans*, [GAO-06-1022T](#) (Washington, D.C.: July 26, 2006).

⁸ [GAO-07-441](#).

⁹ In an ordered set of values, the median is a value below and above which there is an equal number of values; if there is no one middle number, it is the arithmetic mean (average) of the two middle values.

¹⁰ To find an arithmetic mean, one adds all the members of a list of numbers and divides the result by the number of items in the list. To find the median, one arranges all the values in the list from lowest to highest and finds the middle one (or the average of the middle two if there is no one middle number). Thus, medians cannot be summed. Deriving a median for two sets of numbers, for example, requires knowing all numbers in both sets. Only the source data for the medians can be used to derive a new median, not the medians themselves.

statistics on processing time, which at a minimum should include average times and ranges. (These additional statistics were later required by the FOIA amendments enacted in December 2007 as the Openness Promotes Effectiveness in Our National Government Act—OPEN Government Act—of 2007, which I discuss further later in my statement.)

Reporting on annual report data from fiscal years 2002 to 2006,¹¹ we noted that although the numbers of FOIA requests received and processed continued to rise, the rate of increase had flattened.¹² The number of pending requests carried over from year to year had also increased, although the rate of increase had declined. This increase in pending requests was primarily attributable to increases at the Department of Homeland Security (DHS). With the DHS numbers removed, the number of pending cases at the other agencies in our scope remained almost flat from 2003 to 2006.¹³ In particular, increases occurred at DHS's Citizenship and Immigration Services, which accounted for about 89 percent of DHS's total pending requests in fiscal year 2006. However, the rate of increase at DHS from fiscal year 2005 to 2006 was slightly less than it had been from fiscal year 2004 to 2005.

We also observed that following the emphasis on backlog reduction in the Executive Order and agency improvement plans, several agencies showed progress in decreasing their backlogs of overdue

¹¹ We based our analysis on data from 21 of the 24 major agencies covered by the Chief Financial Officers Act. Data from the General Services Administration and the Departments of Agriculture and Housing and Urban Development were omitted from our analysis because we could not be assured that the data were accurate and complete. Agencies included were the Agency for International Development, Department of Commerce, Department of Defense, Department of Education, Department of Energy, Department of Health and Human Services, Department of Homeland Security, Department of the Interior, Department of Justice, Department of Labor, Department of State, Department of the Treasury, Department of Transportation, Department of Veterans Affairs, Environmental Protection Agency, National Aeronautics and Space Administration, National Science Foundation, Nuclear Regulatory Commission, Office of Personnel Management, Small Business Administration, and Social Security Administration.

¹² [GAO-08-344](#).

¹³ The comparison is from 2003, rather than 2002, because DHS had not yet been established in 2002.

requests. In response to our query, selected agencies provided information on their progress in addressing these backlogs as of September 2007. Notably, according to this information, DHS was able to decrease its backlog of overdue requests by 29,972, or about 29 percent.¹⁴ However, we could not present a governmentwide picture of progress in backlog reduction, because not all agencies provided data and not all data provided were comparable. For example, some agencies were unable to track overdue requests as opposed to pending requests. (Although FOIA requires agencies to report pending requests at the end of each fiscal year in their annual reports, neither the act nor the Executive Order required agencies to track and report numbers of overdue cases.) We recommended that, to help agencies achieve the backlog reduction goals planned for future years and to ensure that comparable statistics on backlog are available governmentwide, the Department of Justice provide additional guidance to agencies on plans to achieve these goals and on tracking and reporting backlog. The department agreed with our recommendation and issued additional guidance in 2008.

Changes in Law, Guidance, and Policy Have Affected FOIA Implementation

As I mentioned earlier, the passage of the OPEN Government Act (enacted December 31, 2007) addressed the limitations of using median numbers by increasing the statistics that agencies are required to report.¹⁵ It also requires much more detailed breakdowns of timeliness statistics: for instance, agencies are required to report how many requests were responded to within the first 20 days, how many in the next 20 days, and so on in 20-day increments up to 200

¹⁴ In GAO, *Freedom of Information Act: DHS Has Taken Steps to Enhance Its Program, but Opportunities Exist to Improve Efficiency and Cost-Effectiveness*, [GAO-09-260](#) (Washington, D.C.: Mar. 20, 2009), we noted that DHS reported making progress in reducing backlog. According to DHS's annual FOIA report for fiscal year 2009, the department has continued to make progress in this area: it reported that pending requests at the end of the fiscal year had gone from 84,096 at the beginning of fiscal year 2009 to 27,182 at the end of the fiscal year.

¹⁵ Openness Promotes Effectiveness in Our National Government Act of 2007, Public Law 110-175.

days, in 100-day increments from 200 up to 400 days, and finally those that took longer than 400 days. Requiring agencies to track processing at this level of detail should help provide additional insight into backlog issues, including overdue requests.

The new requirements resulting from the OPEN Government Act were first reflected in the annual FOIA reports for fiscal year 2008. These reports also reflected a significant change in the guidance that the Justice Department provided to agencies on preparing the annual reports. In addition to providing information on responding to the requirements of the OPEN Government Act, this guidance (issued May 2008) directed agencies to omit certain Privacy Act requests from their statistics, which had previously been included.¹⁶ (In a Privacy Act request, a requester asks for information on him- or herself.) This change is significant for certain agencies, such as the Social Security Administration (SSA), that process large numbers of Privacy Act requests. This change led to a drop in SSA's reported requests of more than 18 million in fiscal year 2008.

Besides increasing reporting requirements, the OPEN Government Act includes several other provisions, including codifying the requirement for agencies to designate Chief FOIA Officers and Public Liaisons (introduced by the 2005 Executive Order) and providing specific definitions and criteria to be used in administering FOIA. (For example, the act provides additional criteria for determining the time period for processing FOIA requests, and it provides a definition of "a representative of the news media," which affects the kinds of fees that agencies are permitted to charge requesters.) It also established the Office of Government Information Services within the National Archives and Records Administration. This new office, also known as the "FOIA Ombudsman," is to review agency FOIA activities and recommend changes to the Congress and the President, as well as offering mediation services to FOIA requesters as a "non-exclusive

¹⁶ Specifically, according to the guidance, "In order to provide a clear report of agency FOIA activities, agencies shall only include Privacy Act (PA) requests in their Annual FOIA Reports if the FOIA is utilized in any way to process the request. ... [W]hen an agency conducts a PA search exclusively (i.e., within a 'system of records') and does not claim a PA exemption for any records located, that request should not be included in this Report."

alternative to litigation.” This new office may also “issue advisory opinions if mediation has not resolved the dispute.”

Recently we have seen further changes affecting the FOIA landscape. Among the first steps taken by President Obama on taking office was to issue two memorandums: one on Open Government and one on FOIA. Both included a focus on increasing the amount of information made public by the government. In particular, the FOIA memo directed agencies to adopt a presumption in favor of disclosure in all FOIA decisions, take affirmative steps to make information public, and use modern technology to inform citizens. This echoed the Congress’s finding, in passing the OPEN Government Act, that the Freedom of Information Act establishes a “strong presumption in favor of disclosure.”

Further, as is traditional at the beginning of a new administration, the Attorney General issued a FOIA policy memo, which also promotes this “strong presumption.” In particular, the Attorney General’s memo encouraged agencies to make “discretionary” releases of records: that is, to disclose information even if it technically falls into one of nine categories of information exempt from FOIA.¹⁷ Under the new policy, the Department of Justice undertakes to defend an agency’s denial of a FOIA request only if the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions (or if disclosure is prohibited by law).¹⁸

Most recently, on December 8, 2009, the Office of Management and Budget issued the Open Government Directive (Memorandum 10-06), in accordance with the President’s Open Government memorandum. This directive encourages openness through

¹⁷ As the memo points out, the act provides a number of permitted exemptions; see attachment 1.

¹⁸ This “foreseeable harm” standard replaced the previous standard, under which the department would defend agency decisions to withhold records “unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.”

promoting transparency, participation, and collaboration. It requires agencies to take steps toward the goal of creating a more open government by, for example, publishing government information online and improving the quality of government information. It also directs agencies to establish Open Government plans by April 2010; these plans are to include proposed changes, technological resources, or reforms needed to strengthen FOIA response processes. In addition, agencies with a significant pending backlog of outstanding FOIA requests are directed to take steps to reduce such backlog by 10 percent a year and include in their plans milestones detailing how they will do so.

To sum up, as our work has reflected, addressing backlogs in FOIA request processing is a continuing concern. The changes made to the requirements for reported statistics have made year-to-year comparisons of past years problematic, but the increased detail should provide a clearer picture of FOIA implementation in the years ahead, both at individual agencies and governmentwide. This type of information will be important in assessing the effect on FOIA processes of the Open Government plans called for in the recent Open Government Directive.

Mr. Chairman, this completes my prepared statement. I would be pleased to respond to any questions you or other Members of the Subcommittee may have at this time.

Contact and Acknowledgments

If you should have questions about this testimony, please contact me at (202) 512-6304 or melvinv@gao.gov. Other major contributors include Barbara Collier, Lee McCracken, and J. Michael Resser.

Attachment I. Freedom of Information Act Exemptions

The act prescribes nine specific categories of information that are exempt from disclosure:

Exemption number	Matters that are exempt from FOIA
(1)	(A) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order.
(2)	Related solely to the internal personnel rules and practices of an agency.
(3)	Specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that matters be withheld from the public in such a manner as to leave no discretion on the issue or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.
(4)	Trade secrets and commercial or financial information obtained from a person and privileged or confidential.
(5)	Interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.
(6)	Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.
(7)	Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information
(A)	could reasonably be expected to interfere with enforcement proceedings;
(B)	would deprive a person of a right to a fair trial or impartial adjudication;
(C)	could reasonably be expected to constitute an unwarranted invasion of personal privacy;
(D)	could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by confidential source;
(E)	would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or
(F)	could reasonably be expected to endanger the life or physical safety of an individual.
(8)	Contained in or related to examination, operating, or condition of reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.
(9)	Geological and geophysical information and data, including maps, concerning wells.

Source: 5 U.S.C. § 552(b)(1) through (b)(9).

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