

Fewer Requests, Fewer Responses, More Denials

An analysis of federal agencies performance
in responding to
Freedom of Information Act
requests in 2008

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The last Congress passed a law reforming the Freedom of Information Act and the last president, trying to head off that law, issued an executive order directing agencies to be more customer friendly. Despite both, getting public records from the federal government remains a slow and frequently unsatisfying process.

A review by the Sunshine in Government Initiative of just-reported performance data by 25 departments and agencies shows that about one-third of the requests remain backlogged despite fewer people apparently filing, that agencies continue to miss the statutory response deadline in a majority of cases, and that agencies said they rejected a highest percentage of requests since performance reporting began.

The data also shows that, regardless of the mandate to improve service, departments and agencies cut FOIA personnel.

The reports for fiscal 2008 followed new guidelines in the Openness Promotes Effectiveness in our National (OPEN) Government Act that require more precise and useful data. The result is new information that better spotlights the problems citizens face in getting information from the government.

Under the new reporting guidelines, agencies also stopped treating Privacy Act requests as FOIA requests and including them in the numbers they presented in their annual FOIA performance reports. That change has an impact on some of the comparisons in this report, but there is no way of knowing the extent of that impact since agencies did not update previous reports. However, including the Privacy Act numbers in the past likely inflated the number of reported requests received and processed in prior years; it tended to reduce the reported backlog and increase the reported grants because privacy act requests are quickly processed and routinely granted.

With those qualifications, here are the findings:

- **Doing Less with More:** Despite the fact that the agency funds allocated for FOIA have risen more than 40 percent in the past 10 years, the number of staffers allocated to FOIA declined by 34 percent and the number of requests processed annually fell 31 percent. The average cost of a request handled at the 25 agencies more than doubled from \$294 in 1998 to \$611 in 2008.
- **The Oldest of the Old:** Each department and agency is now required to report the dates of its 10 oldest outstanding FOIA requests and the number of federal working days – 251 to the year – that a requester has been waiting for a response. The winners, or loser depending on your perspective:

The CIA	May 1, 1992
National Archives	September 2, 1992
Department of Defense	December 1, 1992
<u>Other "Slow"lights:</u>	
Department of Justice	February 13, 1995
Department of Energy	November 16, 1999
Department of Homeland Security	February 25, 2000

Homeland Security should probably get a special award, since its oldest unanswered request pre-dates the agency's existence by more than three years. The FOIA request was made to U.S. Coast Guard in February 2000.

- **How Long Is That Long Wait:** When reporting on FOIA performance began in 1998, agencies were required only to give the public a vague idea of how long people are typically kept waiting for a response. For the first nine years, they listed only the median waiting time – the number working days at the midpoint of the long list that recorded every response from the quickest to the longest wait. The new law requires agencies to also report the average delay. And in most cases, that tells a much different story.

A few examples:

	<u>Median Days</u>	<u>Average # of Days</u>
<u>Agriculture Department</u>		
Simple Requests	2	26
Complex	21	112
<u>Securities and Exchange Commission</u>		
Simple Requests	66	158
Complex	37	575

Only one agency, Homeland Security, looked better when using the average rather than median waiting time as a measure of performance. But neither measure put the agency close to compliance with the 20-day law.

Complex requests	374	280
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- **Deadline? What Deadline?** Agencies must now disclose how many of their responses came within the 20-working-day deadline. Several achieved high percentages in handling what are classed as “Simple” requests but only two were able to report that they met the deadline with more than half of the “Complex” requests. The State Department said it met the statutory deadline in only four percent of both the Simple and Complex requests, and only 17 percent of those it accorded “Expedited” handling.

In contrast, the Small Business Administration said it responded to 98 percent of its requesters within the 20-working-day deadline.

The Commerce Department responded to only four percent of its Complex requests within the deadline and the Transportation Department processed only eight percent. Both, however, did much better on Simple requests, 87 and 73 percent respectively.

- **Once the Wait Is Over?** More requesters than ever were disappointed as the agencies grant making hit a record low. Only 55 percent of requesters got either a full or partial grant of the information sought. The number of full grants dropped steadily through the years of the Bush Administration. In 2008, it fell to 100,423, down from the 270,525 full grants approved in 2001.
- **You Can Always Appeal:** Yes, and in 2008 you had a much better chance of getting some relief, although the odds were a modest one in four. However, the waiting time for an appellate decision, not previously reported, is monumental. The average wait for an appellate decision in 2008 was 203 working days. The 25 agencies finished the year with a 61 percent appeals backlog. The Department of Interior and the CIA have the greatest appellate backlogs, 84 percent and 150 percent respectively.

Requesters who appeal an Interior FOIA decision can expect to wait an average of seven years. One requester has been waiting more than thirteen and a half years. But the how-long-can-a-requester-be-kept-waiting award goes, no surprise, to the CIA, which has kept one appeal open since early 1983.

- **The Backlogs Stay Stacked:** The number of new FOIA requests fell for the third straight year, dropping 10 percent to the lowest level since reporting began in 1998. But the 25 agencies cut FOIA personnel by 23 percent. Over the decade 1998 to 2008, the waiting time grew and the annual backlog rose from 13 percent to 33 percent of the requests received, a 153 percent gain. Even though 2008 saw a continuing drop in the number of new requests, the agencies lost the opportunity to make equally large cuts in their backlogs. These agencies' backlog going into 2008 of 33 percent of fulfilled requests for the year remained unchanged at the end of the year. One notable improvement: In a two-year-long effort, the SEC brought a 126 percent backlog down to 6 percent in 2008.
- **And How Old Are Those Backlogs?** In the past, the backlog numbers reported have masked the extent of the delay for those still waiting. The new reporting requires agencies to show not just how many requests are carried over at the end of each year but how long those requesters have been waiting. The data is revealing. The 117 requests backlogged at the National Labor Relations Board have been in the process an average of 874 working days, or three-and-a-half years. The average backlogged request at Interior has been there for 23 months, at the CIA for 13 months, and at the Department of Education for just over a year.
- **What About Expedited Requests?** More than 80 percent of the requests for expedited handling were denied in 2008. And while expedited handling does speed up the process, nine of the 25 agencies in 2008 missed the 20-day response deadline, on average, in handling expedited responses.
- **Stretching Nine Exemptions into 330,110:** The 25 departments and agencies issued only 13,339 outright denials of FOIA requests in 2008 but they also said “no” to parts of 109,848 other requests. Between full and partial denials, they cited one of the nine FOIA exemptions 330,110 times as the reason for withholding information. That’s more than double the withholding citations used in 10 years earlier, despite the fact the same agencies processed 150,000 fewer FOIA requests in 2008. The most frequently used exemptions involve privacy: 7C, involving privacy in law enforcement records, was cited 71,763 times in 2008; Exemption 6, the general privacy provision, 68,648 times.

The other popular exemptions are 2 and 5, which exempt internal agency rules and inter and intra agency memoranda. These escalated in popularity in 2002 when top Bush Administration officials suggested they be broadly used to withhold “sensitive” information. In 2008, they were used 50,618 and 58,495 times, respectively.

- **There Are Many Other Ways of Saying No:** In 1998, while processing 574,935 requests, the 25 agencies turned down 134,081 requesters by citing “other reasons for nondisclosure.” In 2008, the agencies processed only 398,607 requests but said “No” for “other” reasons 163,777 times. In 2008, the most frequently used of those “Other” reasons was “not a proper request.” It was cited 28,473 times, a one-year citation increase of 147 percent.