

**RESPONSES FROM
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TO WRITTEN QUESTIONS OF SENATOR PATRICK LEAHY**

***HEARING ON OPEN GOVERNMENT: REINVIGORATING THE FREEDOM OF
INFORMATION ACT, MARCH 14, 2007***

E-FOIA

1. It has been a decade since the Congress enacted the E-FOIA amendments. Given the overall problems with FOIA enforcement, I worry about whether our federal agencies are meeting the requirements under that law. How are federal agencies doing in carrying out Congress' intent under the E-FOIA Act?

Ten years after passage of the Electronic Freedom of Information Act Amendments of 1996 (E-FOIA), most federal agencies have not fully complied with the requirements of the law. Our recent survey of federal agency Web sites (covering 149 agencies and major components) found significant deficiencies across the government in implementing Congress's mandate.

Most agencies have taken initial steps towards implementing E-FOIA by establishing FOIA Web pages and linking to them from agency home pages. Based on our review, however, only 21 percent of agencies clearly post on their FOIA sites all four of the required categories of information (policy statements, opinions and orders, staff manuals, and frequently requested records). In addition, many agencies offer only basic guidance for FOIA requesters as to how to make requests and protect their rights, but fail to provide all of the essential elements that Congress and the Department of Justice have described as necessary.

Most notably, agencies have largely failed to implement Congress's most transformative mandate of proactively disclosing information to the public by making available on FOIA web sites frequently requested records and categories of records related to matters of strong public interest. Most agencies have no clear policy for affirmative and proactive disclosure. Our review found that only 59 percent of agencies post their frequently requested records, despite Congress's clear intention to make such posting the government-wide norm. Moreover, of those agency Web sites that include frequently requested records, many are either missing obvious example of frequently requested records or are so poorly organized that users are unlikely to find the records without significant effort.

As we studied agency compliance with specific E-FOIA requirements, we also discovered some overarching problems that have impeded full implementation of Congress's mandate. Some agency Web sites are so poorly organized, difficult to navigate, or dysfunctional that, while the agency may technically comply, in practice the public does not actually have access to required records. In some cases, the majority of links to required records or guidance information on a FOIA web site were broken or outdated. In addition, many large agencies that have decentralized FOIA programs and have failed to establish agency-wide policies or exercise oversight to ensure that components are fulfilling their FOIA obligations.

2. *One of the things that the E-FOIA Act requires is that agencies post their most frequently requested documents online. This practice would certainly make government information more accessible to the public, but doesn't posting records on agency websites also save agencies money and resources?*

In 1996, Congress acted to revolutionize government dissemination of information to the public by requiring agencies to post on their Web sites records frequently requested under FOIA. This provision was innovative because it aimed to make records of heightened public interest available immediately to anyone who accessed the agency Web site. Additionally, it was expected that agencies that proactively disclosed records over the Internet would receive fewer FOIA requests and could direct requesters to the agency Web site, thus saving time and resources. As the Senate Report noted: "FOIA processes should not be encumbered by requests for routinely available records or information that can be more efficiently be made available to the public through affirmative dissemination means." S. Rep. 104-272, at 13 (1996).

A few agencies have recognized the potential benefits of posting frequently requested records. For example, in its FY2000 FOIA report, the U.S. Department of Agriculture (USDA) described its success: "The creation of the electronic Purchase Cardholder Information system on the FOIA Web site has helped improve public availability of this information. Numerous requesters were referred to the FOIA Web site which eliminated the need for written FOIA requests." USDA, *Freedom of Information Act Annual Report FY 2000*, at 12. The Department of State has made available a number of record collections that it deemed to be of significant public interest, with positive results: "By proactively making declassified record collections available to the requesting public in our electronic reading room, we believe we have reduced the amount of direct FOIA cases received per year. This belief is supported by the 16% decrease in number of cases received this reporting period." Department of State, *Freedom of Information Act Annual Report Fiscal Year 2002*. Similarly representatives of the Food and Drug Administration (FDA) have reported anecdotally that the agency's proactive posting program has permitted a reduction in the number of FOIA staff.

Other agencies have made information available in response to significant events of interest to the public, in an attempt to satisfy potential requests before they are made. The National Aeronautics and Space Administration (NASA) received an "influx of requests" following the loss of the Columbia Space Shuttle in 2003. As a result, NASA established a special electronic reading room on its Web site and dedicated extra resources to process and make available as many responsive documents as possible. NASA, *FY 2003 Annual Freedom of Information Act Report*, at 5-6. NASA's efforts should serve as a model to other agencies to use proactive disclosure to reduce FOIA backlogs and satisfy FOIA requesters quickly and with minimal expense of resources.

TRACKING NUMBERS

1. *Based on the National Security Archive's extensive experience with a wide range of federal agencies, do you think it is important to harmonize the way federal agencies track FOIA requests, so that there can be more transparency and accountability regarding how these requests are being handled?*

Improving and standardizing agency tracking of FOIA requests is essential, both for an individual FOIA requester to ensure his or her request is getting the attention it deserves and for Congress, agencies, and advocates to identify specific problems in the FOIA system and work to fix them.

The importance of tracking can be illustrated by the problems faced at one agency that lacks a tracking system. The National Security Archive sued the Department of the Air Force because of its serious FOIA delays. Through that suit it became clear that the Air Force has no system-wide tracking system in place and no tools to manage FOIA requests. In many cases, FOIA requests had been lost or simply thrown out. A federal judge found that the Air Force “has engaged in a pattern or practice of failing to make timely determinations on its FOIA requests and appeals.” *Nat’l Security Archive v. Dep’t of the Air Force*, No. 05-CV-571, 2006 U.S. Dist. LEXIS 21037, at *3 (D.D.C. Apr. 19, 2006).

Several of the failures highlighted in our lawsuit against the Air Force are indicative of the broader problems that reform of FOIA tracking systems can resolve. First, many of the requests stalled at Air Force were referrals—sent both from Air Force to other agencies and from other agencies to Air Force—for review of equity information. Few agencies have an adequate means to track and follow up on requests forwarded to other agencies, and these requests often fall into a black hole in the inter-agency system. Harmonizing tracking could allow requesters and agencies to follow requests through every step of the process in order to ensure efficient and complete processing of each request.

Second, Air Force—itself a component of the Department of Defense—maintains a highly decentralized FOIA processing system. The main FOIA office at Air Force headquarters does not generally process FOIA requests, but rather forwards them to a component office, base, or other facility for processing. Our lawsuit revealed that agency officials could not keep track of the requests sent out to components and offices. Many requests are essentially lost within Air Force itself. In one instance, the Archive sent a request for FOIA processing data to an Air Force component—Air Materiel Command. The response we received from that office was that they did not have the data because the AMC central office did not track or monitor processing at each of its sub-offices. In order to respond to our request, the central office would have to forward our request to each Air Materiel Command office and wait for a response. If Air Force instead maintained a centralized, agency-wide tracking database, that FOIA officer easily could have pulled up the data and responded to our request.

These types of scenarios play out every day, across the federal government. Ensuring uniform, effective tracking of FOIA requests is a vital component of better reporting and better oversight, allowing Congress and the public to identify problems with FOIA processing and compel agencies to conduct their FOIA programs with greater efficiency and transparency.

2. Section 7 of the OPEN Government Act requires that federal agencies establish a system to assign tracking numbers to all FOIA requests and that federal agencies set up a FOIA hotline so that FOIA requestors can use this number to track their requests. Do you think that these FOIA reforms would improve FOIA processing times and make government records more accessible to the public?

By mandating that all agencies assign tracking numbers to requests they receive, provide members of the public with comprehensive tracking information for requests, and set up FOIA hotlines, Congress can ensure that requesters have the tools they need to follow up on their requests, advocate for their rights and expose deficiencies in the system. Using such tools to work with agencies to accomplish processing of requests helps the public hold agencies accountable.

Several of the specific requirements in Section 7 of the OPEN Government Act may assist requesters in getting a more timely response from agencies. In particular, the bill compels agencies to provide requesters with a tracking number for their request within 10 days after the request is received. This provision is important because it will discourage agencies from stalling or ignoring requests for a period of time after they are received. If agencies provide a tracking number right away, the requester would be assured that his or her request arrived in the right hands rather than wondering for weeks or more about whether it even was received.

In addition, I applaud the effort in the bill to encourage agencies to use electronic means to communicate with requesters about the status of requests. A handful of agencies already provide online status inquiry forms, but the OPEN Government Act would hopefully encourage more agencies to do so. By giving requesters the information they need online or via e-mail, agencies can satisfy status inquiries more quickly and expend fewer resources that could be used to process requests.

Similarly, requiring agencies to provide requesters with an estimated timeline for completing processing is important, both to keep requesters more informed about the process and to reduce the burden on agencies in responding to multiple inquiries from unsatisfied requesters who are waiting for a response. More practically, mandating that agencies set a tentative deadline for themselves to complete processing of a request may compel them to stay on track.

FOIA REPORTING

1. A recent GAO Report on FOIA Processing Trends found significant problems with the current reporting requirements for federal agencies under FOIA. According to this report, GAO found that “more complete information would be useful for public accountability and for effectively managing agency FOIA programs, as well as for meeting the act’s goal of providing visibility into government FOIA operations.” Do you agree with GAO’s conclusion that better agency reporting is needed?

The Government Accountability Office (GAO) has recommended that Congress take action to amend the FOIA’s reporting requirements. Gov’t Accountability Office, *GAO-07-441 FOIA Implementation and Improvement Plans* 32 (2007). GAO is correct that the current reporting requirements are deficient in several respects and impede accurate assessment of trends and shortcomings in FOIA operations throughout the federal government. FOIA annual reports do not permit Congress to conduct quality oversight, agency managers to identify problems and improve processing, and the public to press for responses. The data that agencies currently

report hide the true extent of the delay and backlog problems. GAO's concerns about its inability to aggregate data expressed as median times is well-founded and further illustrates the problem of poor reporting.

In particular, the median processing times that are reported now give no sense of the outer limits (the oldest pending requests) or even the average time a FOIA requester can expect to wait. After two National Security Archive audits that revealed the ten oldest FOIA requests in the federal government, Department of Justice officials realized the importance of this measure and, in April 2006, recommended that agencies include as part of additional statistics in their annual reports the time range of requests and consultations pending. DOJ, FOIA Post, "Executive Order 13,392 Implementation Guidance" (April 27, 2006).

Consequently, many agencies did include the time ranges of pending requests and consultations in their recently-released FY2006 annual reports, shedding new light on both the backlog problem and the flaws in reporting. For example, it now appears that the Criminal Division, a component of DOJ, has the oldest pending request in the federal government—originally filed on July 10, 1989. A brief glance at the processing data for the Criminal Division paints a very different picture, however; the component reports that its median processing time for complex FOIA requests is 40 days—a far cry from the more than 4500 business days one requester has been waiting for a reply. DOJ, *Freedom of Information Act (FOIA) Report for Fiscal Year 2006*.

Another significant problem with the current reporting is that many agencies aggregate FOIA and Privacy Act processing data together. The Privacy Act covers first-party requests generally for routine agency files. These requests usually can be processed quickly and easily. In some agencies, the Privacy Act data skews the overall numbers to show a much better track record. For example, the Department of Veterans Affairs (VA) reports some of the shortest processing times of any federal agency. In FY2002, the VA reported median processing times between 4 and 24 days, but was not able to respond within ten months to the Archive's simple request for VA's ten oldest pending FOIA requests.

Moreover, median times reported to Congress do not include the delays from wrangling over fee waivers and news media status. Under the current system, there are no strict rules for when agencies must begin counting the time for processing a request. Many do not start the 20-day period until the request has reached the proper office within the agency for processing, until the request has been "perfected," or until disputes with the requester have been settled. In effect, an agency can leave a request sitting on the fax machine for weeks, then shuffle it around the office for a few more weeks, then follow up with the requester and wait for a response about the scope of the request. If after all this initial delay, the agency finally processes the request in a few days, that is the "processing time" that gets reported to Congress, excluding the months of stonewalling.

2. *Section 9 of the OPEN Government Act includes a number of additional reporting requirements for federal agencies, including the average and median number of days it took an agency to respond to FOIA requests and data on the 10 active requests with the earliest filing*

dates. In your view, would these additional reporting requirements be effective in reducing the heavy backlogs of FOIA requests?

The additional reporting requirements that the OPEN Government Act of 2007 would impose on agencies are essential to help the public and Congress oversee FOIA processing and target specific agencies and components with backlogs and other deficiencies. Reporting alone cannot eliminate backlogs; but reporting can help us understand the problems, press agencies on their specific failings, and generalize about trends and successes government-wide to help focus future FOIA reform efforts.

Each of the new reporting requirements, in Sec. 9 of the bill, is essential to getting a full picture of FOIA operations at each agency. As discussed in response #1 above, the median processing time is essentially a meaningless number. It conceals long backlogs and does not accurately reflect the true state of FOIA operations at an agency. In addition, it is difficult to derive other statistics, including trends across agencies, from median data because these numbers cannot be aggregated.

Average processing times and processing time ranges for requests and appeals are necessary to provide accountability about agency FOIA programs and give requesters an idea of how long they actually may have to wait for a response. In addition, the time pending for the ten oldest requests and appeals is an important measure that can reveal how some agencies leave requesters waiting for years. Exposure of these figures can have an impact—agencies whose oldest requests were put in the spotlight by the Archive’s highly-publicized audits have made it a priority to process those old requests. The Department of Defense recently completed processing of its oldest request, 17 years after it was filed.

Agencies should also include complete data about expedited processing and fee waiver requests. The current reporting is limited—agencies need only reveal how many expedited processing requests they have granted and the median time to process them. Without an accurate count of how many such requests were received and how many were denied, however, Congress and the public cannot assess whether agencies are complying with the law. Similarly, detailed reporting on the granting of fee waivers will bring transparency to the process and discourage abuse.

Finally, it is essential that Congress continue to monitor the state of agency FOIA resources. In some cases, the imposition of additional reporting requirements will be a burden on agency FOIA offices, largely because of the deficiencies in tracking discussed above. If an agency does not adequately track its requests in a database or by other reliable means, it will be difficult for that agency to report the range of data that now is required for the FOIA Annual Report. However, both tracking and reporting are vital, as I have emphasized here. Congress therefore should ensure that agencies allocate necessary funds and attention to their FOIA programs so that the new requirements can serve their important purpose.