



Testimony  
Before the Committee on Judiciary,  
U. S. Senate

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# FREEDOM OF INFORMATION ACT

## Agencies Are Implementing Requirements but Need to Take Additional Actions

Statement of David A. Powner, Director, Information  
Technology Management Issues

# GAO Highlights

Highlights of [GAO-18-452T](#), a testimony before the Committee on the Judiciary, U. S. Senate

## Why GAO Did This Study

FOIA requires federal agencies to provide the public with access to government records and information based on the principles of openness and accountability in government. Each year, individuals and entities file hundreds of thousands of FOIA requests for information on numerous topics that contribute to the understanding of government actions. In the last 9 fiscal years, federal agencies subject to FOIA have received about 6 million requests.

GAO was asked to summarize its draft report on federal agencies' compliance with FOIA requirements. GAO's objectives, among others, were to (1) determine the extent to which agencies have implemented selected FOIA requirements; (2) describe the methods established by agencies to reduce backlogged requests and the effectiveness of those methods; and (3) identify any statutory exemptions that have been used by agencies as the basis for withholding (redacting) information from requesters.

To do so, GAO selected 18 agencies based on their size and other factors and assessed their policies against six FOIA requirements. GAO also reviewed the agencies' backlog reduction plans and developed a catalog of statutes that agencies have used to withhold information.

## What GAO Recommends

GAO's draft report contains recommendations to selected agencies to post records online, designate chief FOIA officers, update regulations consistent with requirements, and develop plans to reduce backlogs.

View [GAO-18-452T](#). For more information, contact David A. Powner at (202) 512-9286 or [pownerd@gao.gov](mailto:pownerd@gao.gov).

March 2018

# FREEDOM OF INFORMATION ACT

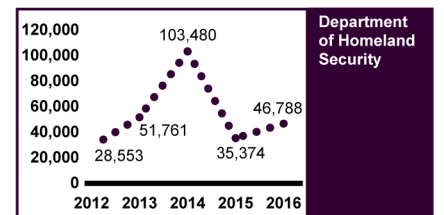
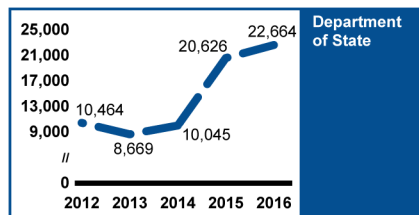
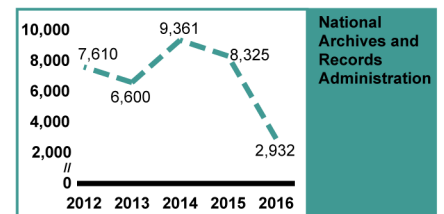
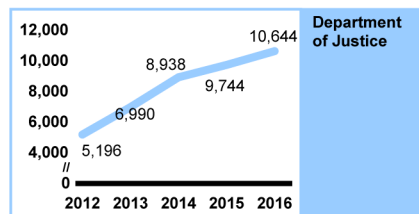
## Agencies Are Implementing Requirements but Need to Take Additional Actions

### What GAO Found

In its draft report, GAO determined that all 18 selected agencies had implemented three of six Freedom of Information Act (FOIA) requirements reviewed. Specifically, all agencies had updated response letters to inform requesters of the right to seek assistance from FOIA public liaisons, implemented request tracking systems, and provided training to FOIA personnel. For the three additional requirements, 15 agencies had provided online access to government information, such as frequently requested records, 12 agencies had designated chief FOIA officers, and 5 agencies had published and updated their FOIA regulations to inform the public of their operations. Until these agencies address all of the requirements, they increase the risk that the public will lack information that ensures transparency and accountability in government operations.

The 18 selected agencies had backlogs of varying sizes, with 4 agencies having backlogs of 1,000 or more requests during fiscal years 2012 through 2016. These 4 agencies reported using best practices identified by the Department of Justice, such as routinely reviewing metrics, as well as other methods, to help reduce their backlogs. Nevertheless, these agencies' backlogs fluctuated over the 5-year period (see figure). The 4 agencies with the largest backlogs attributed challenges in reducing their backlogs to factors such as increases in the number and complexity of FOIA requests. However, these agencies lacked plans that described how they intend to implement best practices to reduce backlogs. Until agencies develop such plans, they will likely continue to struggle to reduce backlogs to a manageable level.

Number of Backlogged FOIA Requests for Selected Agencies, Fiscal Years 2012-2016



Source: GAO analysis of FOIA.gov data. | GAO-18-452T

Agencies used various types of statutory exemptions to withhold information when processing FOIA requests during fiscal years 2010 to 2016. The majority of these fell into the following categories: personally identifiable information, national security, law enforcement and investigations, and confidential and commercial business information.

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Chairman Grassley, Ranking Member Feinstein, and Members of the Committee

Thank you for the opportunity to participate in today's hearing on the *Freedom of Information Act* (FOIA). As you know, FOIA was enacted into law more than 50 years ago, requires federal agencies to provide the public with access to government records and information based on the principles of openness and accountability in government.<sup>1</sup> Each year, individuals and entities file hundreds of thousands of FOIA requests for information on numerous topics that contribute to the understanding of government actions. In the last 9 fiscal years, agencies subject to FOIA have reported receiving about 6 million requests.

Given the significance of FOIA, Congress has had a longstanding interest in the manner in which the act is being implemented, including the extent to which federal agencies respond to FOIA requests, the timeliness of the responses, and the number and nature of exemptions claimed by agencies in withholding requested information. Since 1978, we have issued a number of reports that have addressed various aspects of federal agencies' efforts to implement the act.<sup>2</sup>

As requested, this statement summarizes key preliminary findings based on our draft report reviewing, among other things, federal agencies' compliance with FOIA requirements, backlogs, and use of exemptions. Specifically, this statement (1) determines the extent to which agencies have implemented selected FOIA requirements; (2) describes the methods established by agencies to reduce backlogged requests and the effectiveness of those methods; (3) identifies any statutory (b)(3) exemptions that have been used by agencies as the basis for withholding

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<sup>1</sup>5 U.S.C. § 552.

<sup>2</sup>For example, GAO, *Freedom of Information Act: Litigation Costs for Justice and Agencies Could Not Be Fully Determined*, [GAO-16-667](#) (Washington, D.C.: Sept. 08, 2016); GAO, *Freedom of Information Act: Department of Labor Can Improve Management of Its Program*, [GAO-16-248](#) (Washington, D.C.: June 02, 2016); GAO, *Freedom of Information Act: Additional Actions Can Strengthen Agency Efforts to Improve Management*, [GAO-12-828](#) (Washington, D.C.: July 31, 2012); and GAO, Report By The Comptroller General Of The United States: *Government Field Offices Should Better Implement The Freedom Of Information Act*, LCD-78-120 (Washington, D.C.: July 25, 1978).

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(redacting) information.<sup>3</sup> The draft report on FOIA compliance is currently out for comment with selected agencies. Accordingly, the draft report is subject to revision prior to final issuance, expected in April 2018.

In our FOIA draft report, for our first and second objectives, we reviewed the FOIA-related actions of a nonprobability sample of federal agencies. We identified these agencies by considering the following factors: the number of FOIA requests received, the sizes of FOIA backlogs, and the average time for processing FOIA requests for fiscal years 2012 through 2016. We also chose the agencies to represent a range of sizes (by number of employees)—large (10,000 or more), medium (1,000 to 9,999), and small (999 or fewer). Based on these criteria, we selected 18 agencies for our review.<sup>4</sup>

For the first objective, we reviewed six FOIA requirements outlined in the *FOIA Improvement Act of 2016* and the *OPEN Government Act of 2007*.<sup>5</sup> These specific requirements call for agencies to (1) update response letters, (2) implement tracking systems, (3) provide FOIA training, (4), provide required records online, (5) designate chief FOIA officers, and (6) update and publish timely and comprehensive regulations. We then obtained and reviewed available documentation from the 18 selected agencies describing their decisions and actions related to the

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<sup>3</sup>For the purposes of this testimony, we define a statutory (b)(3) exemption as a federal statute that a federal agency has claimed, or could reasonably claim, as authority for withholding information when answering a FOIA request as permitted under exemption 3 of FOIA (5 U.S.C. § 552(b)(3)). We refer to this exemption as the statutory (b)(3) exemption.

<sup>4</sup>The 18 agencies were the Administrative Conference of the United States, American Battle Monuments Commission, Broadcasting Board of Governors, Department of Homeland Security, Department of Interior, Department of Justice, Department of State, Equal Employment Opportunity Commission, Federal Deposit Insurance Corporation, Federal Trade Commission, National Aeronautics and Space Administration, National Archives and Records Administration, National Transportation Safety Board, Office of Management and Budget, Pension Benefit Guaranty Corporation, Tennessee Valley Authority, U.S. African Development Foundation, and U.S. Agency for International Development.

<sup>5</sup>FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016) (provisions codified at 5 U.S.C. § 552) and Pub. L. No. 110-175 (Dec. 31, 2007). According to the Department of Justice, the act addressed a range of procedural issues, including requirements that agencies establish a minimum of 90 days for requesters to file an administrative appeal and that agencies provide dispute resolution services at various times throughout the FOIA process. The act also codified the department's "foreseeable harm" standard, amended exemption 5, creates a new FOIA Council, and added two new elements to agency annual FOIA reports.

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requirements. We also interviewed relevant officials at each selected agency, the Office of Management and Budget (OMB) and the Department of Justice's (Justice) Office of Information Policy (OIP) to discuss the status of efforts to develop a government-wide FOIA request portal, as required by the 2016 amendments to FOIA. The findings related to our first objective are not generalizable to the 117 FOIA reporting agencies.

For the second objective, we first reviewed requirements for agencies to produce backlog reduction plans, as outlined in Justice's annual chief FOIA officer report guidance and OMB's Open Government Directive of 2009. We then determined whether agencies had developed such plans as required, by interviewing relevant agency personnel and reviewing existing plans. Further, we analyzed data on Justice's FOIA.gov website to identify any instances of a reported reduction in an agency's FOIA backlog when the agency had a backlog reduction plan in place.

To address the third objective, we developed a catalog of (b)(3) statutes that agencies previously have used to withhold information in FOIA records under the (b)(3) exemption.<sup>6</sup> To develop the catalog, we compiled a list of (b)(3) exemptions, along with the number of times each exemption was used by at least 1 of 117 agencies for which annual FOIA report data covering fiscal years 2010 through 2016 were available on Justice's FOIA.gov website and could use.<sup>7</sup>

In addition, this statement summarizes our findings based on an additional report, being issued today, which provides information regarding federal court decisions that pertain to the improper withholding of FOIA records. For this report we reviewed Justice's annual *FOIA Litigation and Compliance* reports for calendar years 2008 through 2016 to identify instances in which the department had notified OSC of a

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<sup>6</sup>Agencies available on FOIA.gov include federal agencies and other entities subject to FOIA.

<sup>7</sup>Justice's website, called FOIA.gov, presents electronic versions of data from agencies annual FOIA reports that are required to be submitted to Justice and includes information such as what (b)(3) statutes are used by an agency. To identify what (b)(3) exemption statutes were used by agencies, in a readily available and aggregate form, we collected (b)(3) exemption statute data on FOIA.gov that spanned from fiscal year 2010 through fiscal year 2016. We chose these years because Justice acknowledged that data prior to 2010 were not reliable. Therefore, our scope was limited to fiscal years 2010 to 2016, which consisted of 117 agencies that reported to Justice for at least one fiscal year during this time period. Fiscal year 2017 data was not yet available at the time of our review.

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lawsuit regarding improperly withheld FOIA records. We focused our review on these specific years because the OPEN Government Act of 2007 amended FOIA to require Justice to report on court findings.<sup>8</sup> Justice began including this information in its 2008 FOIA Litigation and Compliance reports, and at the time of our review, had completed reports through calendar year 2016.

The work upon which this testimony is based is being conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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## Background

The *Freedom of Information Act* establishes a legal right of access to government information on the basis of the principles of openness and accountability in government. Before FOIA's enactment in 1966,<sup>9</sup> an individual seeking access to federal records faced the burden of establishing a "need to know" before being granted the right to examine a federal record. FOIA established a "right to know" standard, under which an organization or person could receive access to information held by a federal agency without demonstrating a need or reason. The "right to know" standard shifted the burden of proof from the individual to a government agency and required the agency to provide proper justification when denying a request for access to a record.

Any person, defined broadly to include attorneys filing on behalf of an individual, corporations, or organizations, can file a FOIA request. For example, an attorney can request labor-related workers' compensation files on behalf of his or her client, and a commercial requester, such as a data broker who files a request on behalf of another person, may request a copy of a government contract. In response, an agency is required to provide the relevant record(s) in any readily producible form or format specified by the requester, unless the record falls within a permitted exemption that provides limitations on the disclosure of information.

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<sup>8</sup>*Openness Promotes Effectiveness in our National Government Act of 2007*, Pub. L. No. 110-175 (Dec. 31, 2007).

<sup>9</sup>The law was enacted in 1966 and went into effect in 1967.

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## FOIA Amendments and Guidance Call for Improvements in How Agencies Process Requests

Various amendments have been enacted and guidance issued to help improve agencies' processing of FOIA requests, including:

- The *Electronic Freedom of Information Act Amendments of 1996* (e-FOIA amendments) strengthened the requirement that federal agencies respond to a request in a timely manner and reduce their backlogged requests.<sup>10</sup> The amendments, among other things, made a number of procedural changes, including allowing a requester to limit the scope of a request so that it could be processed more quickly and requiring agencies to determine within 20 working days whether a request would be fulfilled. This was an increase from the previously established time frame of 10 business days.<sup>11</sup>

The amendments also authorized agencies to multi-track requests—that is, to process simple and complex requests concurrently on separate tracks to facilitate responding to a relatively simple request more quickly. In addition, the amendment encouraged online, public access to government information by requiring agencies to make specific types of records available in electronic form.

- *Executive Order 13392*, issued by the President in 2005, directed each agency to designate a senior official as its chief FOIA officer.<sup>12</sup> This official was to be responsible for ensuring agency-wide compliance with the act by monitoring implementation throughout the agency and recommending changes in policies, practices, staffing, and funding, as needed. The chief FOIA officer was directed to review and report on the agency's performance in implementing FOIA to agency heads and to Justice on an annual basis. (These are referred to as chief FOIA officer reports.)

*The OPEN Government Act*, which was enacted in 2007, made the 2005 executive order's requirement for agencies to have a chief FOIA officer a

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<sup>10</sup>*Electronic Freedom of Information Act Amendments of 1996*, Pub. L. No. 104-231 (Oct. 2, 1996).

<sup>11</sup>The 20-day time period to respond to a request may be extended beyond 30 days in certain circumstances. For example, the agency may notify the person making the request that the time limit cannot be met and provide the person with an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request.

<sup>12</sup>Executive Order 13392, *Improving Agency Disclosure of Information* (Washington, D.C.: Dec. 14, 2005).

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statutory requirement.<sup>13</sup> It also required agencies to submit an annual report to Justice outlining their administration of FOIA,<sup>14</sup> including additional statistics on timeliness. Specifically, the act called for agencies to adequately track their agency's FOIA request processing information throughout the reporting year and then produce reports on that topic to comply with FOIA reporting requirements and Justice guidance for reporting.

- The *FOIA Improvement Act of 2016* addressed procedural issues, including requiring that agencies: (1) make records available in an electronic format if they have been requested three or more times; (2) notify requesters that they have a minimum of 90 days to file an administrative appeal, and (3) provide dispute resolution services at various times throughout the FOIA process.<sup>15</sup> This act also created more duties for chief FOIA officers, including requiring them to offer training to agency staff regarding FOIA responsibilities. The act also revised and added new obligations for OGIS, and created the Chief FOIA Officers Council to assist in compliance and efficiency. Further, the act required OMB, in consultation with Justice, to create a consolidated online FOIA request portal that allows the public to submit a request to any agency through a single website.

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## FOIA Authorizes Agencies to Use Other Federal Statutes to Withhold Information Prohibited from Disclosure

In responding to requests, FOIA authorizes agencies to utilize one of nine exemptions to withhold portions of records, or the entire record. Agencies may use an exemption when it has been determined that disclosure of the requested information would harm an interest related to certain protected areas. These nine exemptions can be applied by agencies to withhold various types of information, such as information concerning foreign relations, trade secrets, and matters of personal privacy.

One such exemption, the statutory (b)(3) exemption, specifically authorizes withholding information under FOIA on the basis of a law which:

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<sup>13</sup>*Openness Promotes Effectiveness in our National Government Act of 2007*, Pub. L. No. 110-175 (Dec. 31, 2007).

<sup>14</sup>The Office of Government Information Services resides within NARA.

<sup>15</sup>*FOIA Improvement Act of 2016*, Pub. L. No. 114-185, 130 Stat. 538 (2016) (provisions codified at 5 U.S.C. § 552).



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- requires that matters be withheld from the public in such a manner as to leave no discretion on the issue; or
  - establishes particular criteria for withholding or refers to particular types of matters to be withheld; and
  - if enacted after October 28, 2009, specifically refers to section 552(b)(3) of title 5, United States Code.

To account for agencies use of the statutory (b)(3) exemptions, FOIA requires each agency to submit, in its annual report to Justice, a complete listing of all statutes that the agency relied on to withhold information under exemption (b)(3). The act also requires that the agency describe for each statute identified in its report (1) the number of occasions on which each statute was relied upon; (2) a description of whether a court has upheld the decision of the agency to withhold information under each such statute; and (3) a concise description of any information withheld.<sup>16</sup> Further, to provide an overall summary of the statutory (b)(3) exemptions used by agencies in a fiscal year, Justice produces consolidated annual reports that list the statutes used by agencies in conjunction with (b)(3).

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## Processing a FOIA Request

As previously noted, agencies are generally required by the *e-FOIA amendments of 1996* to respond to a FOIA request within 20 working days. Once received, the request is to be processed through multiple phases, which include assigning a tracking number, searching for responsive records, and releasing the records response to the requester.

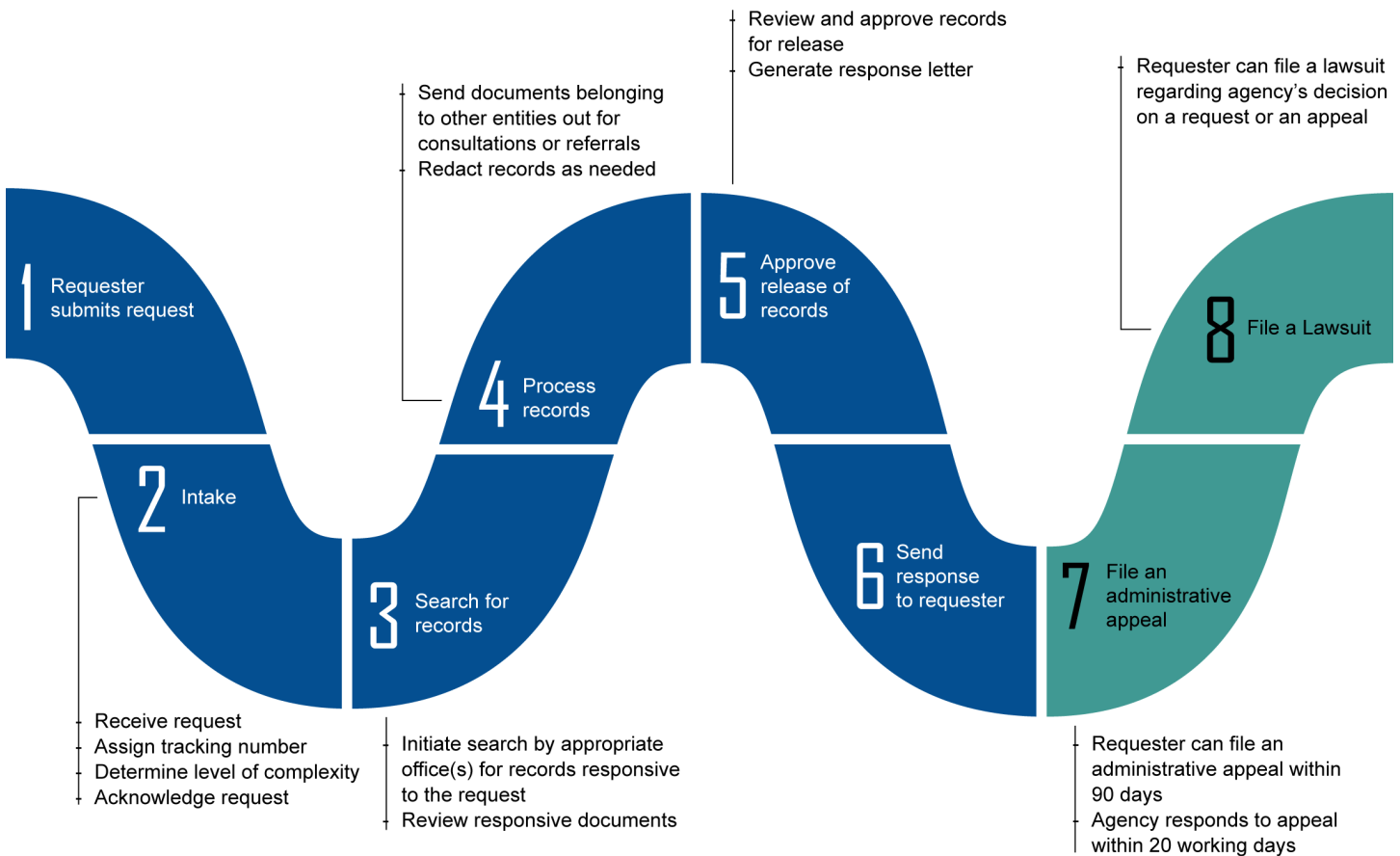
Also, as relevant, FOIA allows a requester to challenge an agency's final decision on a request through an administrative appeal or a lawsuit. Specifically, a requester has the right to file an administrative appeal if he or she disagrees with the agency's decision on their request. Agencies have 20 working days to respond to an administrative appeal.

Figure 1 provides a simplified overview of the FOIA request and appeals process.

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<sup>16</sup> 5 U.S.C. § 552(e)(1)(B)(ii).

**Figure 1: Simplified Overview of the Federal Government’s Freedom of Information Act Request and Appeal Process**



Represents the **typical** Freedom of Information Act (FOIA) process  
 Represents a FOIA **litigation** process

Source: GAO analysis of simplified FOIA process. | GAO-18-452T

In a typical agency, as indicated, during the intake phase, a request is logged into the agency’s FOIA tracking system, and a tracking number is assigned. The request is then reviewed by FOIA staff to determine its

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scope and level of complexity.<sup>17</sup> The agency then typically sends a letter or email to the requester acknowledging receipt of the request, with a unique tracking number that the requester can use to check the status of the request.

Next, FOIA staff (non-custodian) begin the search to retrieve the responsive records by routing the request to the appropriate program office(s). This step may include requesting that the custodian (owner) of the record search and review paper and electronic records from multiple locations and program offices.

Agency staff then process the responsive records, which includes determining whether a portion or all of any record should be withheld based on FOIA's exemptions.<sup>18</sup> If a portion or all of any record is the responsibility of another agency, FOIA staff may consult with the other agency or may send ("refer") the document(s) to that other agency for processing. After processing and redaction, a request is reviewed for errors and to ensure quality. The documents are then released to the requester, either electronically or by regular mail.

In addition, FOIA allows requesters to sue an agency in federal court if the agency does not respond to a request for information within the statutory time frames or if the requesters believe they are entitled to information that is being withheld by the agency. Further, the act requires the Office of Special Counsel (OSC) to initiate a proceeding to determine whether disciplinary action is warranted against agency personnel in cases involving lawsuits where a court has found, among other things that agency personnel may have acted arbitrarily or capriciously in responding

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<sup>17</sup>Factors that increase the complexity of a request include the volume of information involved, the number of offices that might have responsive documents, the extent to which the information is technical or difficult to understand, and the need to communicate with third parties, such as other agencies or owners of proprietary information.

<sup>18</sup>Some FOIA requests are closed before reaching this stage, for example, if no responsive documents can be found, if all responsive documents originated with another agency and were referred to that agency for processing, or if, after being notified of fees, the requester is unwilling to pay the estimated fees.

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to a FOIA request.<sup>19</sup> The act requires Justice to notify OSC when a lawsuit meets this requirement.

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## FOIA Oversight and Implementation

Responsibility for the oversight of FOIA implementation is spread across several federal offices and other entities. These include Justice's OIP, NARA's OGIS, and the Chief FOIA Officers Council. These oversight agencies and the council have taken steps to assist agencies to address the provisions of FOIA.

**Justice's OIP** is responsible for encouraging agencies' compliance with FOIA and overseeing their implementation of the act. In this regard, the office, among other things, provides guidance, compiles information on FOIA compliance, provides FOIA training, and prepares annual summary reports on agencies' FOIA processing and litigation activities. The office also offers FOIA counseling services to government staff and the public.

- Issuing guidance. OIP has developed guidance, available on its website, to assist federal agencies by instructing them in how to ensure timely determinations on requests, expedite the processing of requests, and reduce backlogs.<sup>20</sup> The guidance also informs agencies on what should be contained in their annual FOIA reports to Justice's Attorney General.

The office also has documented ways for federal agencies to address backlog requests. In March 2009 the Attorney General issued guidance and related policies to encourage agencies to reduce their backlogs of FOIA requests. In addition, in December 2009, OMB issued a memorandum on the OPEN Government Act, which called for a reduction in backlogs and the publishing of plans to reduce backlogs. Further, in August 2014, OIP held a best practices workshop and issued guidance to agencies on reducing FOIA backlogs and improving timeliness of agencies' responses to FOIA requests. The OIP guidance instructed agencies to obtain leadership

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<sup>19</sup>OSC is an independent federal investigative and prosecutorial agency. Its primary mission is to safeguard the merit system in federal employment by protecting employees and applicants for federal employment from prohibited personnel practices, especially reprisal from whistleblowing. The office conducts investigations of alleged prohibited personnel practices, attempts informal resolution through discussion with an agency (or by offering mediation), and, when necessary, takes corrective or disciplinary action.

<sup>20</sup>Department of Justice, *OIP Policy: Guidance on Ensuring Timely Determination on Requests for Expedited Processing*, (January 21, 2015).

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support, routinely review FOIA processing metrics, and set up staff training on FOIA.

- **Overseeing agencies' compliance.** OIP collects information on compliance with the act by reviewing agencies' annual FOIA reports and chief FOIA officer reports. These reports describe the number of FOIA requests received and processed in a fiscal year, as well as the total costs associated with processing and litigating requests.
- **Providing training.** The office offers an annual training class that provides a basic overview of the act, as well as hands-on courses about the procedural requirements involved in processing a request from start to finish. In addition, it offers a seminar outlining successful litigation strategies for attorneys who handle FOIA cases.
- **Preparing administrative and legal annual reports.** OIP prepares two major reports yearly—one related to agencies' annual FOIA processing and one related to agencies' FOIA litigation and compliance. The first report, compiled from agencies' annual FOIA reports, contains statistics on the number of requests received and processed by each agency, the time taken to respond, and the outcome of each request, as well as other statistics on FOIA administration such as number of backlogs, and the use of exemptions to withhold information from a requestor. The second report describes Justice's efforts to encourage compliance with the act and provides a listing of all FOIA lawsuits filed or determined in that year, the exemptions and/or dispositions involved in each case, and any court-assessed costs, fees, and penalties.

**NARA's OGIS** was established by the *OPEN Government Act of 2007* to oversee and assist agencies in implementing FOIA. OGIS's responsibilities include reviewing agency policies and procedures, reviewing agency compliance, recommending policy changes, and offering mediation services.

The 2016 FOIA amendments required agencies to update response letters to FOIA requesters to include information concerning the roles of OGIS and agency's FOIA public liaisons. As such, OGIS and Justice worked together to develop a response letter template that includes the required language for agency letters. In addition, OGIS, charged with reviewing agency's compliance with FOIA, launched in 2014 a FOIA compliance program. OGIS also developed a FOIA compliance self-assessment program, which is intended to help OGIS look for potential compliance issues across federal agencies.

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**The Chief FOIA Officers Council** is co-chaired by the Director of OIP and the Director of OGIS. Council members include senior representatives from OMB, OIP, and OGIS, together with the chief FOIA officers of each agency, among others. The council's FOIA-related responsibilities include:

- developing recommendations for increasing compliance and efficiency;
- disseminating information about agency experiences, ideas, best practices, and innovative approaches;
- identifying, developing, and coordinating initiatives to increase transparency and compliance; and
- promoting the development and use of common performance measures for agency compliance. Selected Agencies Collect and Maintain Records That Can Be Subject to FOIA Requests.

The 18 agencies selected for our review are charged with a variety of operations that affect many aspects of federal service to the public. Thus, by the nature of their missions and operations, the agencies have responsibility for vast and varied amounts of information that can be subject to a FOIA request. For example, the Department of Homeland Security's (DHS) mission is to protect the American people and the United States homeland. As such, the department maintains information covering, among other things, immigration, border crossings, and law enforcement. As another example, the Department of the Interior's (DOI) mission includes protecting and managing the Nation's natural resources and, thus, providing scientific information about those resources. Table 1 provides details on each of the 18 selected agencies' mission and the types of information they maintain.

**Table 1: Selected Agencies' Missions and Types of Records Maintained**

<b>Agency</b>	<b>Mission</b>	<b>Examples of records maintained</b>
Administrative Conference of the United States	Develop formal recommendations and innovative solutions that make the government work better.	Information about the agency, its projects, and its body of research and recommendations.
American Battle Monuments Commission	Honor the service of the armed forces by designing, constructing, maintaining and operating permanent American cemeteries, and establish, maintain, and approve designs of memorials, markers, and monuments where American armed forces have served beyond our borders.	Final opinions related to the acceptance of private memorials into the Memorial Trust Fund Program and approval of the construction of private memorials.
Broadcasting Board of Governors	Inform, engage, and connect people around the world in support of freedom and democracy.	Procurement actions, audience survey reports, and individual personnel and/or security files.
Department of Homeland Security	Safeguard the American people, the U.S. homeland, and U.S. values.	Information covering immigration, border crossings, law enforcement, natural disasters, and maritime accidents.
Department of Interior	Protect and manage the Nation's natural resources and culture heritage; provide scientific and other information about those resources; and honor its trust responsibilities or special commitments to American Indians, Alaska Natives, and affiliated island communities.	Records ranging from those outlining general personnel rules and practices to highly specific case files and research materials.
Department of Justice	Enforce the law and defend the interests of the U.S. according to the law; ensure public safety against threats foreign and domestic; provide federal leadership in preventing and controlling crime; seek just punishment for those guilty of unlawful behavior; and ensure fair and impartial administration of justice for all Americans.	Information related to matters formally or currently under investigation, cases received and initiated by the department, and investigative and intelligence files.
Department of State	Advance the interests of the American people, their safety and economic prosperity, by leading America's foreign policy through diplomacy, advocacy, and assistance.	Records relating to the formulation and execution of U.S. foreign policy and the administration and operations of State and its missions abroad.
Equal Employment Opportunity Commission	Prevent and remedy unlawful employment discrimination and advance equal opportunity for all in the workplace.	Agency reports, policy and regulatory documents, and appellate decisions.
Federal Deposit Insurance Corporation	Maintain stability and public confidence in the nation's financial system by insuring deposits, examining and supervising financial institutions for safety and soundness and consumer protection, making large and complex financial institutions resolvable, and managing receiverships.	Information related to assets obtained from failed financial institutions and claims data supporting the closure of failed financial institutions.

<b>Agency</b>	<b>Mission</b>	<b>Examples of records maintained</b>
Federal Trade Commission	Protect consumers by preventing anticompetitive, deceptive, and unfair business practices, enhancing informed consumer choice and public understanding of the competitive process, and accomplishing this without unduly burdening legitimate business activity.	Consumer complaints, settlement agreements, competition/antitrust, and privacy assessments about companies and company officials.
National Aeronautics and Space Administration	Lead an innovative and sustainable program of exploration with commercial and international partners to enable human expansion across the solar system and bring new knowledge and opportunities back to earth. Support growth of the nation's economy in space and aeronautics, increase understanding of the universe and the nation's place in it, work with industry to improve America's aerospace technologies, and advance American leadership.	Current and former contracts with the space centers, technical reports, and information related to space accidents.
National Archives and Records Administration	Provide public access to federal government records in its custody and control.	Agency operational records and archival records including census records, federal prison records, and immigration records.
National Transportation Safety Board	Make transportation safer by conducting independent accident investigations, advocating safety improvements, and deciding pilots' and mariners' certificate appeals.	Administrative investigation reports, documentation related to accident investigations, and final case decisions of the agency.
Office of Management and Budget	Assist the President in meeting his policy, budget, management, and regulatory objectives and to fulfill the agency's statutory responsibilities.	Information pertaining to matters issued, adopted, or promulgated by OMB, including the federal budget, OMB Circulars, and other policies and management documents.
Pension Benefit Guaranty Corporation	Enhance retirement security by preserving and encouraging the continuation of private pension plans and protecting the benefits of workers and retirees in traditional pension plans.	Opinion letters regarding the provisions of Title IV of the Employment Retirement Income Security Act and decisions of the appeal board that resolve specific disputes involving individual parties.
Tennessee Valley Authority	Improve the quality of life in a seven-state region through the integrated management of the region's resources.	Policy statements adopted by the agency and final opinions rendered in the adjudication of administrative cases.
U.S. African Development Foundation	Support African-led development that grows community enterprises by providing seed capital and technical support.	Recent and active project grants and foreign assistance investments for federal programs.
U.S. Agency for International Development	Promote and demonstrate democratic values abroad, and advance a free, peaceful, and prosperous world.	Records that document the implementation of various capital assistance projects.

Source: GAO analysis of agency data. | GAO-18-452T

The 18 selected agencies reported that they received and processed more than 2 million FOIA requests from fiscal years 2012 through 2016. Over this 5-year period, the number of reported requests received fluctuated among the agencies. In this regard, some agencies saw a

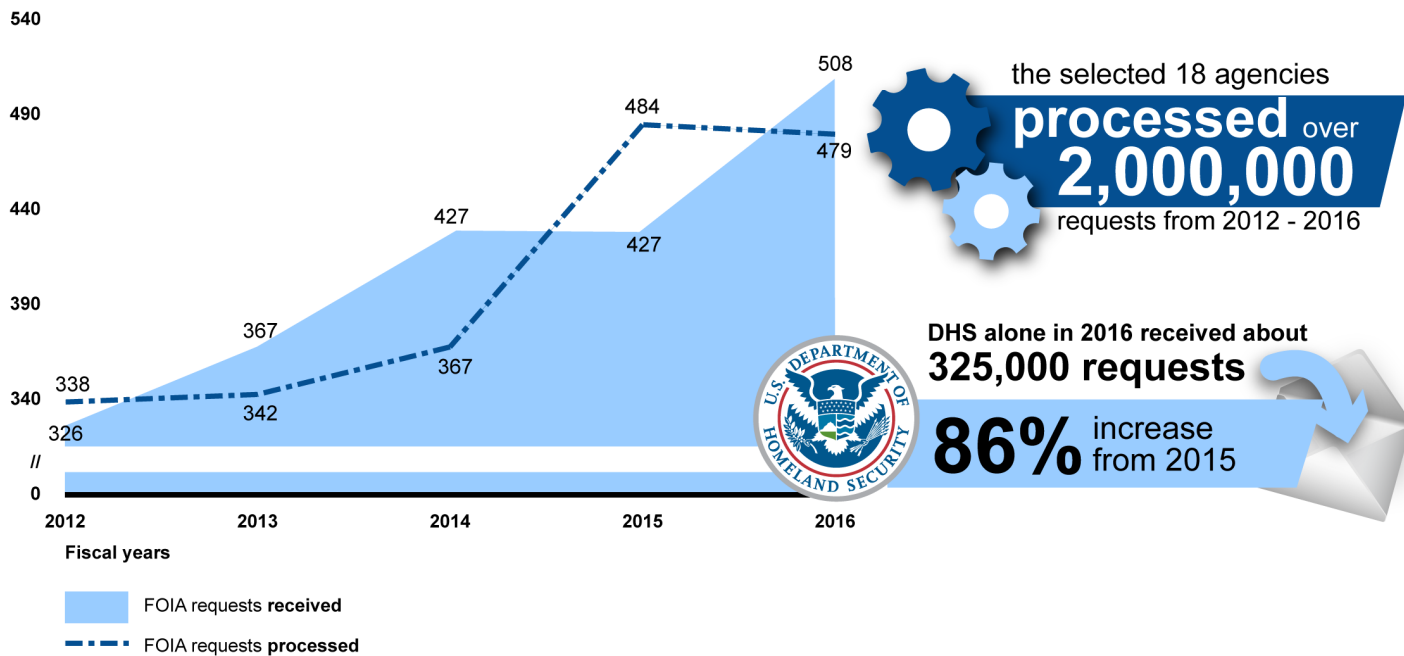


continual rise in the number of requests, while other agencies experienced an increase or decrease from year to year. For example, from fiscal years 2012 through 2014, DHS saw an increase in the number of requests received (from 190,589 to 291,242), but in fiscal year 2015, saw the number of requests received decrease to 281,138. Subsequently, in fiscal year 2016, the department experienced an increase to 325,780 requests received.

In addition, from fiscal years 2012 through 2015, the reported numbers of requests processed by the selected agencies showed a relatively steady increase. However, in fiscal year 2016, the reported number of requests processed by these agencies declined. Figure 2 provides a comparison of the total number of requests received and processed in this 5-year period.

**Figure 2: Freedom of Information Act Requests Received and Processed by 18 Selected Federal Agencies during Fiscal Years 2012 – 2016**

Freedom of Information Act (FOIA) requests for the 18 selected agencies (in thousands)



Source: GAO analysis of FOIA.gov data from fiscal years 2012-2016. | GAO-18-452T

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## Selected Agencies Implemented the Majority of FOIA Requirements Reviewed

Among other things, the *FOIA Improvement Act of 2016* and the *OPEN Government Act of 2007*<sup>21</sup> calls for agencies to (1) update response letters, (2) implement tracking systems, (3) provide FOIA training, (4), provide required records online, (5) designate chief FOIA officers, and (6) update and publish timely and comprehensive regulations. As part of our ongoing work, we determined that the 18 selected agencies included in our review had implemented the majority of the six FOIA requirements evaluated. Specifically,

- 18 agencies updated response letters, implemented tracking systems, and provided training,
- 15 agencies provided required records online, and
- 12 agencies designated chief FOIA officers.

However, only 5 of the agencies published and updated their FOIA regulations in a timely and comprehensive manner. Figure 3 summarizes the extent to which the 18 agencies implemented the selected FOIA requirements.

Beyond these selected agencies, Justice's OIP and OMB also had taken steps to develop a government-wide FOIA request portal that is intended to allow the public to submit a request to any agency from a single website.

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<sup>21</sup> FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016) (provisions codified at 5 U.S.C. § 552) and Pub. L. No. 110-175 (Dec. 31, 2007).

**Figure 3: Extent to Which 18 Agencies Implemented Freedom of Information Act (FOIA) Requirements Reviewed**

	Update response letters	Implement tracking system	Provide FOIA training	Provide required records online	Designate chief FOIA officer at appropriate level	Update and publish timely and comprehensive regulations
Administrative Conference of the United States	●	●	●	●	●	○
American Battle Monuments Commission	●	●	●	●	○	○
Broadcasting Board of Governors	●	●	●	●	●	○
Department of Homeland Security	●	●	●	●	○	●
Department of Justice	●	●	●	●	●	○
Department of State	●	●	●	●	●	○
Department of the Interior	●	●	●	○	●	●
Equal Employment Opportunity Commission	●	●	●	●	○	○
Federal Deposit Insurance Corporation	●	●	●	●	●	●
Federal Trade Commission	●	●	●	●	○	●
National Aeronautics and Space Administration	●	●	●	○	●	○
National Archives and Records Administration	●	●	●	●	●	○
National Transportation Safety Board	●	●	●	○	●	○
Office of Management and Budget	●	●	●	●	○	○
Pension Benefit Guaranty Corporation	●	●	●	●	○	○
Tennessee Valley Authority	●	●	●	●	●	○
U.S. Agency for International Development	●	●	●	●	●	●
U.S. African Development Foundation	●	●	●	●	●	○
<b>Total</b>	<b>18</b>	<b>18</b>	<b>18</b>	<b>15</b>	<b>12</b>	<b>5</b>

● Implemented ○ Not implemented

Source: GAO analysis of selected agencies FOIA compliance. | GAO-18-452T

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## Selected Agencies Have Updated Their FOIA Response Letters

The 2016 amendments to FOIA required agencies to include specific information in their responses when making their determinations on requests. Specifically, agencies must inform requesters that they may

- seek assistance from the FOIA Public Liaison,
- file an appeal to an adverse determination within a period of time that is not less than 90 days after the date of such adverse determination; and
- seek dispute resolution services from the FOIA Public Liaison of the agency or OGIS.

Among the 18 selected agencies, all had updated their FOIA response letters to include this required information.

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## All Selected Agencies Had Implemented FOIA Tracking Systems

Various FOIA amendments and guidance call for agencies to use automated systems to improve the processing and management of requests. In particular, the OPEN Government Act of 2007 amended FOIA to require that federal agencies establish a system to provide individualized tracking numbers for requests that will take longer than 10 days to process and establish telephone or Internet service to allow requesters to track the status of their requests.<sup>22</sup>

Further, the President's January 2009 Freedom of Information Act memorandum instructed agencies to use modern technology to inform citizens about what is known and done by their government.<sup>23</sup> In addition, FOIA processing systems, like all automated information technology systems, are to comply with the requirements of Section 508 of the Rehabilitation Act (as amended). This act requires federal agencies to make their electronic information accessible to people with disabilities.

Each of the 18 selected agencies had implemented a system that provides capabilities for tracking requests received and processed, including an individualized number for tracking the status of a request. Specifically,

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<sup>22</sup>The *Openness Promotes Effectiveness in our National (OPEN) Government Act of 2007*, Pub. L. No. 110-175 (Dec. 31, 2007).

<sup>23</sup>Presidential Memorandum, *Freedom of Information Act* (Jan. 21, 2009).

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- Ten agencies used commercial automated systems, (DHS, EEOC, FDIC, FTC, Justice, NTSB, NASA, Pension Benefit Guaranty Corporation, and USAID).
  - Three agencies developed their own agency systems (State, DOI, and TVA).
  - Five agencies used Microsoft Excel or Word to track requests (Administrative Conference of the United States, American Battle Monuments Commission, Broadcasting Board of Governors, OMB, and U.S. African Development Foundation).

Further, all of the agencies had established telephone or Internet services to assist requesters in tracking the status of requests; and they used modern technology (e.g., mobile applications) to inform citizens about FOIA. For example, the commercial systems allow requesters to submit a request and track the status of that request online. In addition, DHS developed a mobile application that allows FOIA requesters to submit requests and check the status of existing requests.

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### All Reviewed Agencies' Chief FOIA Officers Have Offered FOIA Training

The 2016 FOIA amendments require agencies' chief FOIA officers to offer training to agency staff regarding their responsibilities under FOIA. In addition, Justice's OIP has advised every agency to make such training available to all of their FOIA staff at least once each year. The office has also encouraged agencies to take advantage of FOIA training opportunities available throughout the government.

The 18 selected agencies' chief FOIA officers offered FOIA training opportunities to staff in fiscal years 2016 and 2017. For example:

- Eleven agencies provided training that gave an introduction and overview of FOIA (the American Battle Monuments Commission, EEOC, Justice, FDIC, FTC, NARA, Pension Benefit Guaranty Corporation, State, TVA, U.S. African Development Foundation, and USAID).
- Three agencies offered training for their agencies' new online FOIA tracking and processing systems (DOI, NTSB, and Pension Benefit Guaranty Corporation).
- Three agencies provided training on responding to, handling, and processing FOIA requests (DHS, DOI, and State).

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- Three agencies offered training on understanding and applying the exemptions under FOIA (FDIC, FTC, and U.S. African Development Foundation).
  - Two agencies offered training on the processing of costs and fees (NASA and TVA).

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## The Majority of Selected Agencies Post Required Records Online

Memorandums from both the President and the Attorney General in 2009 highlight the importance of online disclosure of information and further direct agencies to make information available without a specific FOIA request.<sup>24</sup> Further, the 2016 FOIA amendments require online access to government information and require agencies to make information available to the public in electronic form for up to four categories:

- agency final opinions and orders,
- statements of policy,
- administrative staff manuals of interest to the public, and
- frequently requested records.

While all 18 agencies that we reviewed post records online, only 15 of them had posted all categories of information, as required by the FOIA amendments. Specifically, 7 agencies—the American Battle Monuments Commission, the Pension Benefit Guaranty Corporation, and EEOC, FDIC, FTC, DOJ, and State—had, as required, made records in all four categories publicly available online. In addition, 5 agencies that were only required to publish online records in three of the categories—the Administrative Conference of the United States, Broadcasting Board of Governors, DHS, OMB, and USAID—had done so.<sup>25</sup> Further, 3 agencies that were only required to publish online records in two of the categories—U.S. African Development Foundation, NARA, and TVA—had done so. The remaining 3 agencies—DOI, NASA, and NTSB—had posted records online for three of four required categories.

Regarding why the three agencies did not post all of their four required categories of online records, DOI officials stated that the agency does not

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<sup>24</sup>Attorney General Memorandum, *The Freedom of Information Act* (Mar. 19, 2009) and Presidential Memorandum, *Freedom of Information Act*, (Jan. 21, 2009).

<sup>25</sup>Not all agencies offer final opinions, or have staff manuals that are of interest to the public. In these circumstances, we determined this requirement not to be applicable to them.

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make publically available all FOIA records that have been requested 3 or more times, as it does not have the time to post all such records that have been requested. NASA officials explained that, while the agency issues final opinions, it does not post them online. As for NTSB, while its officials said they try to post information that is frequently requested, they do not post the information on a consistent basis

Making the four required categories of information available in electronic form is an important step in allowing the public to easily access to government documents. Until these agencies make all required categories of information available in electronic form, they cannot ensure that they are providing the required openness in government.

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### Most Reviewed Agencies Designated a Senior Official as a Chief FOIA Officer

In 2005, the President issued an executive order that established the role of a Chief FOIA Officer.<sup>26</sup> In 2007, amendments to FOIA required each agency to designate a chief FOIA officer who shall be a senior official at the Assistant Secretary or equivalent level.

Of the 18 selected agencies, 12 agencies have Chief FOIA Officers who are senior officials at the Assistant Secretary or equivalent level. The Assistant Secretary level is comparable to senior executive level positions at levels III, IV, and V.<sup>27</sup> Specifically,

- State has designated its Assistant Secretary of Administration, Bureau of Administration;
- DOI and NTSB had designated its Chief Information Officers;
- Administrative Conference of the United States, Broadcasting Board of Governors, FDIC, NARA, and U.S. African Development Foundation have designated their general counsels; and
- Justice, NASA, TVA, and USAID designated their Associate Attorney General, Associate Administrator for Communications, the Vice President for Communications, and the Assistant Administrator for the Bureau of Management, respectively.

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<sup>26</sup>Presidential Executive Order 13392, *Improving Agency Disclosure of Information*, (December 19, 2005).

<sup>27</sup>5 U.S.C. § 5314-16.

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However, 6 agencies — American Battle Monuments Commission DHS, EEOC, Pension Benefit Guaranty Corporation, FTC, and OMB — do not have chief FOIA officers that are senior officials at the Assistant Secretary or equivalent level. According to officials from 5 of these agencies, the agencies all have chief FOIA officers and officials believed they had designated the appropriate officials. Officials at FTC acknowledged that the chief FOIA officer position is not designated at a level equivalent to an Assistant Secretary but a senior position within the agency. However, while there are chief FOIA officers at these agencies, until the chief FOIA officers are designated at the Assistant Secretary or equivalent level, they will lack assurance regarding the necessary authority to make decisions about agency practices, personnel, and funding.

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### Most Reviewed Agencies Have Not Updated Regulations as Required to Inform the Public of Their FOIA Operations

FOIA requires federal agencies to publish regulations in the Federal Register that inform the public of their FOIA operations.<sup>28</sup> Specifically, in 2016, FOIA was amended to require agencies to update their regulations regarding their FOIA operations. To assist agencies in meeting this requirement, OIP created a FOIA regulation template for agencies to use as they update their regulations. Among other things, OIP's guidance encouraged agencies to:

- describe their dispute resolution processed,
- describe their administrative appeals process for response letters of denied requests,
- notify requesters that they have a minimum of 90 days to file an administrative appeal,
- inform requesters that the agency may charge fees for requests determined as “unusual” circumstances<sup>29</sup>; and
- update the regulations in a timely manner (i.e., update regulations by 180 days after the enactment of the 2016 FOIA amendment.)

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<sup>28</sup>Published by NARA, the Federal Register is the federal government's official daily publication for rules, proposed rules, and notices of federal agencies and organization, as well as the executive orders and other presidential documents.

<sup>29</sup>According to Justice guidance, an unusual circumstance is defined as, for example, an agency's need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request. An unusual circumstances fee may be charged if the request is responded to within an additional ten days or exceeds 5000 pages and the requester is provided timely written notice of the unusual circumstance.



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Five agencies in our review—DHS, DOI, FDIC, FTC, and USAID—addressed all five requirements in updating their regulations. In addition, seven agencies addressed four of the five requirements: the Administrative Conference of the United States, EEOC, Justice, NARA, NTSB, Pension Benefit Guaranty Corporation, and TVA did not update their regulations in a timely manner.

Further, four agencies addressed three or less requirements (U.S. African Development Foundation, State, NASA, and Broadcasting Board of Governors) and two agencies (American Battle Monuments Commission and OMB) did not address any of the requirements. Figure 4 indicates the extent to which the 18 agencies had addressed the five selected requirements.

**Figure 4: Extent to Which Agencies' Reviewed Addressed 2016 Freedom of Information Act Requirements and Office of Information Policy's Guidance in Updating Their Regulations**

	Described dispute resolution services	Described appeals process for denied requests	Notified requester of 90 days for appeal	Informed requester of unusual circumstance fees	Updated regulations in a timely manner
Administrative Conference of the United States	●	●	●	●	○
American Battle Monuments Commission	○	○	○	○	○
Broadcasting Board of Governors	○	●	○	○	○
Department of Homeland Security	●	●	●	●	●
Department of Justice	●	●	●	●	○
Department of State	○	●	○	●	○
Department of the Interior	●	●	●	●	●
Equal Employment Opportunity Commission	●	●	●	●	○
Federal Deposit Insurance Corporation	●	●	●	●	●
Federal Trade Commission	●	●	●	●	●
National Aeronautics and Space Administration	○	●	○	●	○
National Archives and Records Administration	●	●	●	●	○
National Transportation Safety Board	●	●	●	●	○
Office of Management and Budget	○	○	○	○	○
Pension Benefit Guaranty Corporation	●	●	●	●	○
Tennessee Valley Authority	●	●	●	●	○
U.S. Agency for International Development	●	●	●	●	●
U.S. African Development Foundation	●	●	●	○	○
<b>Total</b>	<b>13</b>	<b>16</b>	<b>13</b>	<b>14</b>	<b>5</b>

● Implemented ○ Not implemented

Source: GAO analysis of selected agencies FOIA compliance. | GAO-18-452T

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Agencies that did not address all five requirements provided several explanations as to why their regulations were not updated as required:

- American Battle Monuments Commission stated that while they updated their draft regulation in August 2017, it is currently unpublished due to internal reviews with the General Counsel in preparation for submission to the Federal Register. No new posting date has been established. American Battle Monuments Commission last updated its regulation in February 26, 2003.
- State officials noted that their regulation was updated two months prior to the new regulation requirements but did not provide a specific reason for not reissuing its regulation. As such, they explained that they have a working group reviewing their regulation for updates, with no timeline identified. State last updated its regulation on April 6, 2016.
- NASA officials did not provide a reason for not updating its regulation as required. Officials did, however, state that its draft regulation is with the Office of General Counsel for review. NASA last updated its regulations on August 11, 2017.
- Broadcasting Board of Governors officials did not provide a reason for not updating its regulation as required. Officials did, however, note that the agency is in the process of updating its regulation and anticipates it will complete this update by the end of 2018. The Broadcasting Board of Governors last updated its regulation on February 2, 2002.
- OMB officials did not provide a reason for not updating the agency's regulation as required. Officials did, however, state that due to a change in leadership they do not have a time frame for updating their regulation. OMB last updated its regulation on May 27, 1998.
- The chief FOIA officer at the U.S. African Development Foundation stated that, while the agency had updated and submitted their regulation to be published in December 2016, they were unpublished due to an error that occurred with the acknowledgement needed to publish the regulation on the federal register. The regulation was subsequently published on February 3, 2017. The official further noted that when the agency responds to FOIA requests it has not charged a fee for unusual circumstances, and therefore they did not believe they had to disclose information regarding fees in its regulation.

Until these six agencies publish updated regulations that address the necessary requirements, as called for in FOIA and OIP guidance, they likely will be unable to provide the public with required regulatory and

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procedural information to ensure transparency and accountability in the government.

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### Justice and OMB Have Taken Steps to Develop an Online FOIA Request Portal

The 2016 FOIA amendments required OMB to work with Justice to build a consolidated online FOIA request portal. This portal is intended to allow the public to submit a request to any agency from a single website and include other tools to improve the public's access to the benefits of FOIA. Further, the act required OMB to establish standards for interoperability between the consolidated portal and agency FOIA systems. The 2016 FOIA amendments did not provide a time to develop the portal and standards.

With OMB's support, Justice developed an initial online portal. Justice's OIP officials stated that they expect to update the portal to provide basic functionality that aligns with requirements of the act, including the ability to make a FOIA request, and technical processes for interoperability amongst agencies' various FOIA systems. According to OIP officials, in partnership with OMB, OIP was able to identify dedicated funding source to operate and maintain the portal to ensure its success in the long term, with major agencies sharing in the costs to operate, maintain, and fund any future enhancements designed to improve FOIA processes. The first iteration of the National FOIA portal launched on Justice's foia.gov website on March 8, 2018.

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### Agencies Have Methods to Reduce Backlogged Requests, but Their Efforts Have Shown Mixed Results

In our draft report, we determined that the 18 selected agencies in our review had FOIA request backlogs of varying sizes, ranging from no backlogged requests at some agencies to 45,000 or more requests at other agencies. Generally, the agencies with the largest backlogs had received the most requests. In an effort to aid agencies in reducing their backlogs, Justice's OIP identified key practices that agencies can use. However, while the agencies reported using these practices and other methods, few of them managed to reduce their backlogs during the period from fiscal year 2012 through 2016. In particular, of the four agencies with the largest backlogs, only one—NARA—reduced its backlog. Agencies attributed their inability to decrease backlogs to the number and complexity of requests, among other factors. However, agencies also lack comprehensive plans to implement practices on an ongoing basis.

## Agencies Have FOIA Request Backlogs of Varying Sizes, and Most Increased from Fiscal Year 2012 through 2016

The selected agencies in our review varied considerably in the size of their FOIA request backlogs. Specifically, from fiscal year 2012 through 2016, of the 18 selected agencies

- 10 reported a backlog of 60 or fewer requests, and of these 10 agencies, 6 reported having no backlog in at least 1 year.
- 4 agencies had backlog numbers between 61 and 1,000 per year; and
- 4 agencies had backlogs of over 1,000 requests per year.

The four agencies with backlogs of more than 1,000 requests for each year we examined were Justice, NARA, State and DHS. Table 2 shows the number requests and the number of backlogged request for the 18 selected agencies during the 5-year period.

**Table 3: Selected Agencies' Freedom of Information Act Requests and Backlogs, Fiscal Years 2012-2016**

Agency		FY12	FY13	FY14	FY15	FY16
Department of Homeland Security	Requests	190,589	231,534	291,242	281,138	325,780
	Backlog	28,553	51,761	103,480	35,374	46,788
Department of State	Requests	18,521	18,753	19,696	24,837	27,961
	Backlog	10,464	8,669	10,045	20,626	22,664
Department of Justice	Requests	69,456	70,081	64,488	67,783	73,103
	Backlog	5,196	6,990	8,938	9,744	10,644
National Archives and Records Administration	Requests	13,345	12,243	22,237	22,555	49,966
	Backlog	7,610	6,600	9,361	8,325	2,932
Equal Employment Opportunity Commission	Requests	18,726	18,946	17,213	17,883	17,680
	Backlog	131	190	195	451	792
Department of the Interior	Requests	6,168	6,325	5,764	6,792	6,428
	Backlog	449	423	578	571	677
National Transportation Safety Board	Requests	294	466	589	566	471
	Backlog	62	147	288	679	602
U.S. Agency for International Development	Requests	267	372	373	330	377
	Backlog	201	233	265	301	318
Office of Management and Budget	Requests	191	222	152	198	154
	Backlog	6	41	27	42	60
Tennessee Valley Authority	Requests	188	162	165	198	212
	Backlog	12	10	9	11	13

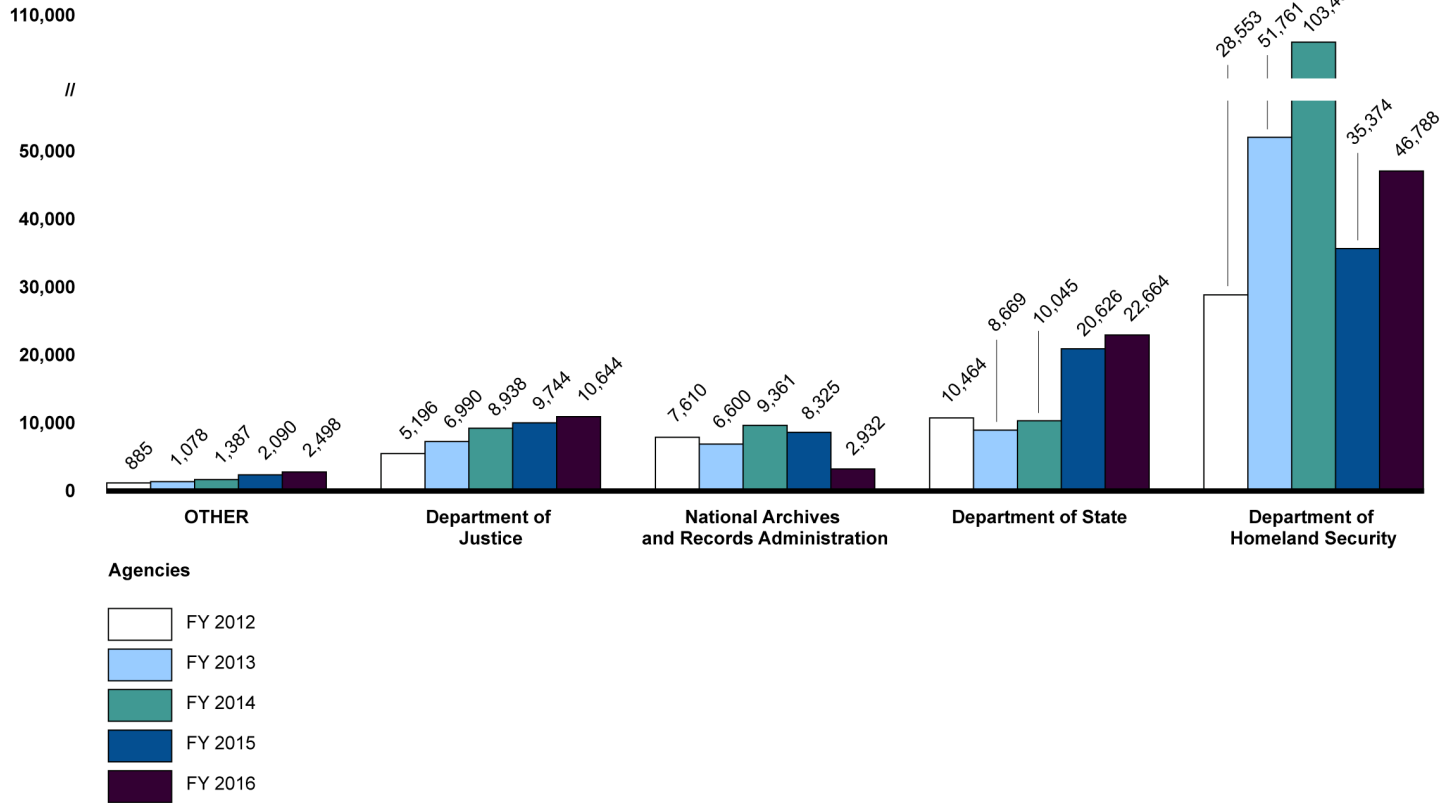
<b>Agency</b>		<b>FY12</b>	<b>FY13</b>	<b>FY14</b>	<b>FY15</b>	<b>FY16</b>
Federal Trade Commission	Requests	1,415	1,447	1,440	1,531	1,260
	Backlog	1	3	7	8	12
Broadcasting Board of Governors	Requests	40	58	138	45	54
	Backlog	0	11	7	4	12
National Aeronautics and Space Administration	Requests	886	873	792	923	834
	Backlog	22	11	11	10	8
Federal Deposit Insurance Corporation	Requests	931	732	647	630	465
	Backlog	0	0	0	13	4
Pension Benefit Guaranty Corporation	Requests	5,314	5,721	2,094	2,278	3,713
	Backlog	0	8	0	0	0
American Battle Monuments Commission	Requests	9	3	9	5	17
	Backlog	1	1	0	0	0
Administrative Conference of the United States	Requests	15	19	17	26	25
	Backlog	0	0	0	0	0
U.S. African Development Foundation	Requests	4	4	14	2	4
	Backlog	0	0	0	0	0

Source: GAO analysis of agency data. | GAO-18-452T

Over the 5-year period, 14 of the 18 selected agencies experienced an increase in their backlogs in at least 1 year. By contrast, 2 agencies (Administrative Conference of the United States and the U.S. African Development Foundation) reported no backlogs, and 3 agencies (American Battle Monument Commission, NASA and NARA) reported reducing their backlogs. Further, of the four agencies with the largest backlogs (DHS, State, Justice, and NARA) only NARA reported a backlog lower in fiscal year 2016 than in fiscal year 2012. Figure 5 shows the trends for the four agencies with the largest backlogs, compared with the rest of the 18 agencies.

**Figure 5: Number of Backlogged FOIA Requests for Selected Agencies, Fiscal Years 2012-2016**

Number of backlogged requests by fiscal year (FY)



Source: GAO Analysis of FOIA.gov data. | GAO-18-452T

Note: The 14 agencies included in the “other” category are Equal Employment Opportunity Commission, Department of the Interior, National Transportation Safety Board, U.S. Agency for International Development, Office of Management and Budget, Tennessee Valley Authority, Federal Trade Commission, Broadcast Board of Governors, National Aeronautics and Space Administration, Federal Deposit Insurance Corporation, Pension Benefit Guaranty Corporation, American Battle Monuments Commission, Administrative Conference of the United States, and U. S. African Development Foundation.

In most cases, agencies with small or no backlogs (60 or fewer) also received relatively few requests. For example, the Administrative Conference of the United States and the U.S. African Development Foundation reported no backlogged requests during any year but also received fewer than 30 FOIA requests a year. The American Battle Monuments Commission also received fewer than 30 requests a year and only reported 1 backlogged request per year in 2 of the 5 years examined. However, the Pension Benefit Guaranty Corporation and FDIC

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received thousands of requests over the 5-year period, but maintained zero backlogs in a majority of the years examined. PBGC received a total of 19,120 requests during the 5-year period and only reported a backlog of 8 requests during one year, fiscal year 2013. FDIC received a total of 3,405 requests during the 5-year period and reported a backlog of 13 requests in fiscal year 2015 and 4 in fiscal year 2016.

The four agencies with backlogs of 1,000 or more (Justice, NARA, State, and DHS) received significantly more requests each year. For example, NARA received between about 12,000 and 50,000 requests each year, while DHS received from about 190,000 to 325,000 requests. In addition, the number of requests NARA received in fiscal year 2016 was more than double the number received in fiscal year 2012. DHS received the most requests of any agency—a total of 1,320,283 FOIA requests over the 5-year period.

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### Agencies Identified a Variety of Methods to Reduce Backlogs, but Few Saw Reductions

The Attorney General's March 2009 memorandum called on agency chief FOIA officers to review all aspects of their agencies' FOIA administration and report to Justice on steps that have been taken to improve FOIA operations and disclosure. Subsequent Justice guidance required agencies are to include in their chief FOIA officer reports information on their FOIA request backlogs, including whether the agency experienced a backlog of requests; whether that backlog decreased from the previous year; and, if not, reasons the backlog did not decrease. In addition, agencies that had more than 1,000 backlogged requests in a given year were required to describe their plans to reduce their backlogs. Beginning in fiscal year 2015, these agencies were to describe how they implemented their plans from the previous year and whether that resulted in a backlog reduction.

In addition, Justice's OIP identified best practices for reducing FOIA backlogs. The office held a best practices workshop on reducing backlogs and improving timeliness. The office then issued guidance in August 2014 which highlighted key practices to improve the quality of a FOIA program. OIP identified the following methods in its best practices guidance.

- **Utilize resources effectively.** Agencies should allocate their resources effectively by using multi-track processing, making use of available technology, and shifting priorities and staff assignments to address needs and effectively manage workloads.



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- **Routinely review metrics.** Agencies should regularly review their FOIA data and processes to identify challenges or barriers. Additionally, agencies should identify trends to effectively allocate resources, set goals for staff, and ensure needs are addressed.
  - **Emphasize staff training.** Agencies should ensure FOIA staff are properly trained so they can process requests more effectively and with more autonomy. Training and engagement of staff can also solidify the importance of the FOIA office's mission.
  - **Obtain leadership support.** Agencies should ensure that senior management is involved in and supports the FOIA function in order to increase awareness and accountability, as well as make it easier to obtain necessary resources or personnel.

Agencies identified a variety of methods that they used to address their backlogs. These included both the practices identified by Justice, as well as additional methods.

Ten agencies maintained relatively small backlogs of 60 or fewer requests and were thus not required to develop plans for reducing backlogs. However, 2 of these 10 agencies, who both received significant numbers of requests, described various methods used to maintain a small backlog:

- PBGC officials credits its success to training, not only for FOIA staff, but all Incoming personnel, while also awarding staff for going above and beyond in facilitating FOIA processing. Pension Benefit Guaranty Corporation has incorporated all the best practices identified by OIP, including senior leadership involvement that supports FOIA initiatives and program goals, routine review of metrics to optimize workflows, effective utilization of resources and staff training.
- According to FDIC officials, its overall low backlog numbers are attributed to a trained and experienced FOIA staff, senior management involvement, and coordination among FDIC divisions. However, FDIC stated the reason for the increase in backlogs in fiscal year 2015 was due to increased complexity of requests.

The 4 agencies with backlogs greater than 60 but fewer than 1,000 (EEOC, DOI, NTSB, and USAID) reported using various methods to reduce their backlogs. However, all 4 showed an increase over the 5-year period.

- EEOC officials stated that it had adopted practices recommended by OIP such as multi-track processing, reviewing workloads to ensure

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sufficient staff, and using temporary assignments to address needs. However, it has seen a large increase in its backlog numbers, going from 131 in fiscal year 2012 to 792 in fiscal year 2016. EEOC attributed the rise in backlogs to an increase in requests received, loss of staff, and the complex and voluminous nature of requests.

- DOI, according to agency officials, has also tried to incorporate reduction methods and best practices, including proactively releasing information that may be of interest to the public, thus avoiding the need for a FOIA request; enhanced training for its new online FOIA tracking and processing system; improved inter-office collaboration; monthly reports on backlogs and weekly charts on incoming requests to heighten awareness among leadership; and monitoring trends. Yet, DOI has seen an increase in its backlog, from 449 in fiscal year 2012 to 677 in fiscal year 2016, an increase of 51 percent. DOI attributed the increase to loss of FOIA personnel, increase in the complexity of requests, increase in FOIA-related litigation, increase in incoming requests, and staff having additional duties.
- Officials at NTSB stated that it utilized contractors and temporary staff assignments to augment staffing and address backlogs. Despite the effort, NTSB saw a large increase in backlogs, from 62 in fiscal year 2012 to 602 in fiscal year 2016. Officials stated that reason for the increase was due to increased complexity of requests, including requests for “any and all” documentation related to a specific subject, often involving hundreds to thousands of pages per request.
- According to USAID officials, the agency conducts and reviews inventories of its backlog and requests to remove duplicates and closed cases, group and classify requests by necessary actions and responsive offices, and initiate immediate action. In addition, USAID seeks to identify tools and solutions to streamline records for review and processing. However, its backlog numbers have continually increased, from 201 in fiscal year 2012 to 318 in fiscal year 2016. USAID attributes that increase to increase in the number of requests, loss of FOIA staff, increased complexity and volume of requests, competing priorities, and world events that may drive surges in requests.

Of the four agencies with the largest backlogs, all reported taking steps that in some cases included best practices identified by OIP; however, only NARA successfully reduced its backlog by the end of the 5-year period.

- Justice made noted that it efforts to reduce its backlog by incorporating best practices. Specifically, OIP worked with

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components within Justice through the Component Improvement Initiative to identify causes contributing to a backlog and assist components in finding efficiencies and overcoming challenges. The Chief FOIA Officer continued to provide top-level support to reduction efforts by convening the department's FOIA Council to manage overall FOIA administration. In addition, many of the components created their own reduction plans, which included hiring staff, utilizing technology, and providing more training, requester outreach, and multitrack processing.

However, despite these efforts, the number of backlogs steadily increased during the 5-year period, from 5,196 in fiscal year 2012 to 10,644 in fiscal year 2016, an overall increase of 105 percent. Justice attributes the increase in backlogs to several challenges, including an increase of incoming requests and an increase in the complexity of those requests. Other challenges that Justice noted were staff shortages and turnover, reorganization of personnel, time to train incoming staff, and the ability to fill positions previously held by highly qualified professionals.

- NARA officials stated that one key step NARA took was to make corrections in its Performance Measurement and Reporting System. They noted that this system previously comingled backlogged requests with the number of pending FOIA requests, skewing the backlog numbers higher. The improvements included better accounting for pending and backlogged cases, distinguishing between simple and complex requests, and no longer counting as open cases that were closed within 20 days, but not until the beginning of the following fiscal year. In addition, officials also stated that the FOIA program offices have been successful at working with requesters to narrow the scope of requests.

NARA also stated that it was conducting an analysis of FOIA across the agency to identify any barriers in the process. Officials also identified other methods, including using multi-track processing, shifting priorities to address needs, improved communication with agencies, proactive disclosures, and the use of mediation services.

NARA has shown significant progress in reducing its backlog. In fiscal year 2012 it had a backlog of 7,610 requests, which spiked to 9,361 in fiscal year 14. However, by fiscal year 2016 the number of backlogged requests had dropped to 2,932 despite an more than doubling of requests received for that fiscal year. However, NARA did

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note challenges to reducing its backlog numbers, namely, the increase in the number of requests received.

- State developed and implemented a plan to reduce its backlog in fiscal year 2016. The plan incorporated two best practices by focused on identifying the extent of the backlog problem and developing ways to address the backlog with available resources. According to State officials, effort was dedicated to improve how FOIA data was organized and reported. Expedited and litigation cases were top priorities, whereas in other cases a first in first out method was employed.

Even with these efforts, however, State experienced a 117 percent increase in its backlog over the 5-year period. State's backlog doubled from 10,045 in fiscal year 2014 to 22,664 in fiscal year 2016. Among the challenges to managing its backlog, State reported an increase in incoming requests, a high number of litigation cases, and competing priorities. Specifically, the number of incoming requests for State increase by 51 percent during the 5-year period. State has also reported that it has allocated 80 percent of its FOIA resources to meet court-ordered productions associated with litigation cases, resulting in fewer staff to work on processing routine requests. This included, among other efforts, a significant allocation of resources in fiscal year 2015 to meet court-imposed deadlines to process emails associated with the former Secretary of State, resulting in a surge of backlogs.

In 2017 State began an initiative to actively address its backlogs. The Secretary of State issued an agency-wide memorandum stating the department's renewed efforts by committing more resources and workforce to backlog reduction. The memo states new processes are to be implemented for both the short and long-term, and the FOIA office has plans to work with the various bureaus to outline the tasks, resources, and workforce necessary to ensure success and compliance. With renewed leadership support, State has reported significant progress in its backlog reduction efforts.

- DHS, in its chief FOIA officer reports, reported that it implemented several plans to reduce backlogs. The DHS Privacy office, which is responsible for oversight of the department's FOIA program, worked with components to help eliminate the backlog. The Privacy Office sent monthly emails to component FOIA officers on FOIA backlog statistics, convened management meetings, conducted oversight, and reviewed workloads. Leadership met weekly to discuss the oldest

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pending requests, appeals, and consultations, and determined needed steps to process those requests.

In addition, several other DHS components implemented actions to reduce backlogs. Customs and Border Protection hired and trained additional staff, encouraged requesters to file requests online, established productivity goals, updated guidance, and utilized better technology. U.S. Citizenship and Immigration Services, National Protection and Programs Directorate, and Immigration and Customs Enforcement increased staffing or developed methods to better forecast future workloads ensure adequate staffing. Immigration and Customs Enforcement also implemented a commercial off-the-shelf web application, awarded a multi-million dollar contract for backlog reduction, and detailed employees from various other offices to assist in the backlog reduction effort.

Due to efforts by the Privacy Office and other components, the backlog dropped 66 percent in fiscal year 2015, decreasing to 35,374. Yet, despite the continued efforts in fiscal year 2016, the backlog numbers increased again, to 46,788. DHS attributes the increases in backlogs to several factors, including an increase in the number of requests received, increased complexity and volume of responsive records for those requests, loss of staff and active litigation with demanding production schedules.

One reason the eight agencies with significant backlogs may be struggling to consistently reduce their backlogs is that they lack documented, comprehensive plans that would provide a more reliable, sustainable approach to addressing backlogs. In particular, they do not have documented plans that describe how they will implement best practices for reducing backlogs over time, including specifying how they will use metrics to assess the effectiveness of their backlog reduction efforts and ensure that senior leadership supports backlog reduction efforts, among other best practices identified by OIP.

While agencies with backlogs of 1,000 or more are required to describe backlog reduction efforts in their chief FOIA officer reports, these consist of a high-level narrative and do not include a specific discussion of how the agencies will implement best practices over time to reduce their backlog. In addition, agencies with backlogs of fewer than 1,000 requests are not required to report on backlog reduction efforts; however, the selected agencies in our review with backlogs in the hundreds still experienced an increase over the 5-year period.

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Without a more consistent approach, agencies will continue to struggle to reduce their backlogs to a manageable level, particularly as the number and complexity of requests increase over time. As a result, their FOIA processing may not respond effectively to the needs of requesters and the public.

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## Various Types of Statutory Exemptions Exist and Many Have Been Used by Agencies

FOIA requires agencies report annually to Justice on their use of statutory (b)(3) exemptions. This includes specifying which statutes they relied on to exempt information from disclosure and the number of times they did so.<sup>30</sup> To assist agencies in asserting and accounting for their use of these statutes, Justice instructs agencies to consult a running list of all the statutes that have been found to qualify as proper (b)(3) statutes by the courts.<sup>31</sup>

However, agencies may also use a statute not included in the Justice list, because many statutes that appear to meet the requirements of (b)(3) have not been identified by a court as qualifying statutes. If the agency uses a (b)(3) statute that is not identified in the qualifying list, Justice guidance instructs the agency to include information about that statute in its annual report submission. Justice reviews the statute and provides advice to the agency, but does not make a determination on the appropriateness of using that statute under the (b)(3) exemption.

Based on data agencies reported to Justice,<sup>32</sup> during fiscal years 2010 to 2016, agencies claimed 237 statutes as the basis for withholding information. Of these statutes, 75 were included on Justice's list of qualifying statutes under the (b)(3) exemption. Further, we identified 140 additional statutes that were not identified in our 237 statutes claimed by agencies during fiscal years 2010 to 2016, but have similar provisions to other (b)(3) statutes authorizing an agency to withhold information from the public.

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<sup>30</sup> 5 U.S.C. § 552(e)(1)(B)(ii).

<sup>31</sup>This periodically updated list currently contains 78 statutes.

<sup>32</sup>There were 117 agencies subject to FOIA for which Justice provided FOIA exemption related data through FOIA.gov for fiscal years 2010 to 2016. However, the number of agencies reporting to Justice varies year to year because, for example, agencies ceased to exist during our review period. As of fiscal year 2017, there were 116 agencies subject to FOIA that report FOIA exemption related data to Justice because, for example, the Recovery Accountability and Transparency Board ceased to exist in September of 2015.

We found that the 237 statutes cited as the basis for (b)(3) exemptions during the period from fiscal year 2010 to 2016 to fall into eight general categories of information. These categories were (1) personally identifying information, (2) national security, (3) commercial, (4) law enforcement and investigations, (5) internal agency, (6) financial regulation, (7) international affairs, and (8) environmental. Figure 6 identifies the eight categories and the number of agency-claimed (b)(3) statutes in each of the categories.

**Figure 6: General Categories of (b)(3) Exemption Statutes Used by Agencies Subject to the Freedom of Information Act during Fiscal Years 2010 to 2016**



Source: GAO analysis of FOIA.gov (b)(3) exemption statutes claimed by agencies subject to the Freedom of Information Act. | GAO-18-452T

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Of the 237 (b)(3) statutes cited by agencies, the majority—178—fell into four of the eight categories:

- Forty-nine of these statutes related to withholding personally identifiable information including, for example, a statute related to withholding death certificate information provided to the Social Security Administration.<sup>33</sup>
- Forty-five statutes related to the national security category. For example, one statute exempted files of foreign intelligence or counterintelligence operations of the National Security Agency.<sup>34</sup>
- Forty-two statutes were in the law enforcement and investigations category, including a statute that exempts from disclosure information provided to Justice pursuant to civil investigative demands pertaining to antitrust investigations.<sup>35</sup>
- Forty-two statutes fell into the commercial category. For example, one statute in this category related to withholding trade secrets and other confidential information related to consumer product safety.<sup>36</sup>

The remaining 59 statutes were in four categories: internal agency functions and practices, financial regulation, international affairs, and environmental. The environmental category contained the fewest number of statutes and included, for example, a statute related to withholding certain air pollution analysis information.<sup>37</sup>

As required by FOIA, agencies also reported the number of times they used each (b)(3) statute.<sup>38</sup> In this regard, 33 FOIA-reporting agencies indicated that they had used 10 of the 237 (b)(3) statutes more than

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<sup>33</sup>42 U.S.C. § 405(r)(6).

<sup>34</sup>50 U.S.C. § 3144.

<sup>35</sup>15 U.S.C. § 1314(g).

<sup>36</sup>15 U.S.C. § 2055.

<sup>37</sup>42 U.S.C. § 7412(r)(7)(H)(iii).

<sup>38</sup>As noted previously, when accounting for the use of (b)(3) exemptions in a fiscal year, Justice's guidance states that for each request, the agency should report all (b)(3) exemption statutes relied upon in a request, but count each statute only once per request, regardless of the number of times it was applied in a single request. Our analysis was limited to numbers reported to Justice and obtained on FOIA.gov. As agencies may use a single statute multiple times in a request, the number of times an agency used any particular statute during our review period we reviewed is likely to be greater than what agencies report to Justice.



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200,000 times.<sup>39</sup> Of these 10 most-commonly used statutes, the single most-used statute (8 U.S.C § 1202(f)) related to withholding records pertaining to the issuance or refusal of visas to enter the United States. It was used by 4 agencies over 58,000 times.<sup>40</sup>

Further, of the 10 most-commonly used statutes, the statute used by the greatest number of agencies (26 U.S.C § 6103) related to the withholding of certain tax return information; it was used by 24 FOIA-reporting agencies about 30,000 times.<sup>41</sup> By contrast, some statutes were only used by a single agency. Specifically, the Department of Veterans Affairs used a statute related to withholding certain confidential veteran medical records (38 U.S.C. § 7332) more than 16,000 times. Similarly, EEOC used a statute related to employment discrimination on the basis of disability (42 U.S.C. § 12117) more than 10,000 times.

Table 4 shows the 10 most-used statutes under the (b)(3) exemption, the agency that used each one most frequently, and the number of times they were used by that agency for the period covering fiscal years 2010 through 2016.

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<sup>39</sup>These agencies were: Departments of Treasury, Homeland Security, Justice, Veterans Affairs, Energy, Defense, Transportation, Education, State, Agriculture, Labor, Housing and Urban Development, Interior, and Commerce, the Social Security and Small Business Administrations, the Federal Maritime, Securities and Exchange, Occupational Safety and Health Review, Equal Employment Opportunity, and Federal Communications Commissions, the Overseas Private Investment and Pension Benefit Guaranty Corporations, Offices of Personnel Management and Director of National Intelligence, the Federal Housing Finance, Central Intelligence Agency, and U.S. Trade and Development Agencies, U.S. Agency for International Development, National Archives and Records Administration, United States Postal Service, Council of the Inspectors General on Integrity and Efficiency, and the Privacy and Civil Liberties Oversight Board.

<sup>40</sup>The four agencies that cited 8 U.S.C § 1202(f) were State, DHS, Justice, and NARA.

<sup>41</sup>These agencies were: Departments of Treasury, Homeland Security, Justice, Veterans Affairs, Energy, Defense, Transportation, Education, State, Agriculture, Interior, and Commerce, the Social Security and Small Business Administrations, the Federal Maritime, Securities and Exchange and the Occupational Safety and Health Review Commissions, the Overseas Private Investment and Pension Benefit Guaranty Corporations, the Federal Housing Finance and U.S. Trade and Development Agencies, the U.S. Agency for International Development, National Archives and Records Administration, and the United States Postal Service.

**Table 4: Ten Most-Used Freedom of Information Act (b)(3) Exemption Statutes, the Agencies That Used Them Most, and the Number of Times Agencies Reporting Using Them for Fiscal Years 2010 through 2016**

(b)(3) Statute	Type of information withheld	Total number of reported uses	Agency using the statute the most	Agency reported Number of times used
8 U.S.C. § 1202(f)	Records pertaining to the issuance or refusal of visas to enter the United States.	58,419	Department of State	58,411
26 U.S.C. § 6103	Tax return information.	30,160	Department of Treasury	17,250
49 U.S.C. § 114(r)	Air transportation security information.	26,344	Department of Homeland Security (DHS)	26,341
42 U.S.C. § 2000e-5(b)	Equal employment opportunity enforcement information.	20,167	Equal Employment Opportunity Commission (EEOC)	20,157
42 U.S.C. § 2000e-8(e)	Equal employment opportunity investigation information.	20,167	EEOC	20,157
50 U.S.C. § 3507	Information related to sources and methods of intelligence activities of the Office of the Director of National Intelligence and the Central Intelligence Agency.	19,535	Central Intelligence Agency	13,637
38 U.S.C. § 7332	Certain confidential veteran's medical records.	16,896	Department of Veterans Affairs	16,896
42 U.S.C. § 12117	Information relating to employment discrimination on the basis of disability.	10,708	EEOC	10,708
50 U.S.C. § 3605	Information related to sources and methods of intelligence activities and personnel of the National Security Agency.	10,528	Department of Defense	10,459
26 U.S.C. § 6105	Information about tax agreements with foreign governments.	9,291	DHS	8,240

Source: GAO analysis of FOIA.gov (b)(3) exemption statutes claimed by agencies subject to the Freedom of Information Act. | GAO-18-452T

### Most Statutes Enacted after 2009 That Were Used by Agencies Did Not Specifically Cite the (b)(3) Exemption

The OPEN FOIA Act of 2009 amended FOIA to require that any federal statute enacted subsequently must specifically cite paragraph (b)(3) of FOIA to qualify as a (b)(3) exemption statute.<sup>42</sup> Prior to 2009, a federal statute qualified as a statutory (b)(3) exemption if it (1) required that the matters be withheld from the public in such a manner as to leave no

<sup>42</sup>Current Justice guidance states, "With the passage of the Open FOIA Act, all statutes enacted after 2009 that are intended by Congress to operate as Exemption 3 statutes must specifically cite to the Exemption." Department of Justice Guide to the Freedom of Information Act: Exemption 3, p. 54 (Aug 13, 2015).

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discretion on the issue, or (2) established particular criteria for withholding or refers to particular types of matters to be withheld.

In response to the amendment, in 2010, Justice released guidance to agencies stating that any statute enacted after 2009 must specifically cite to the (b)(3) exemption to qualify as a withholding statute. Further, the guidance encouraged agencies to contact Justice with questions regarding the implementation of the amendment.

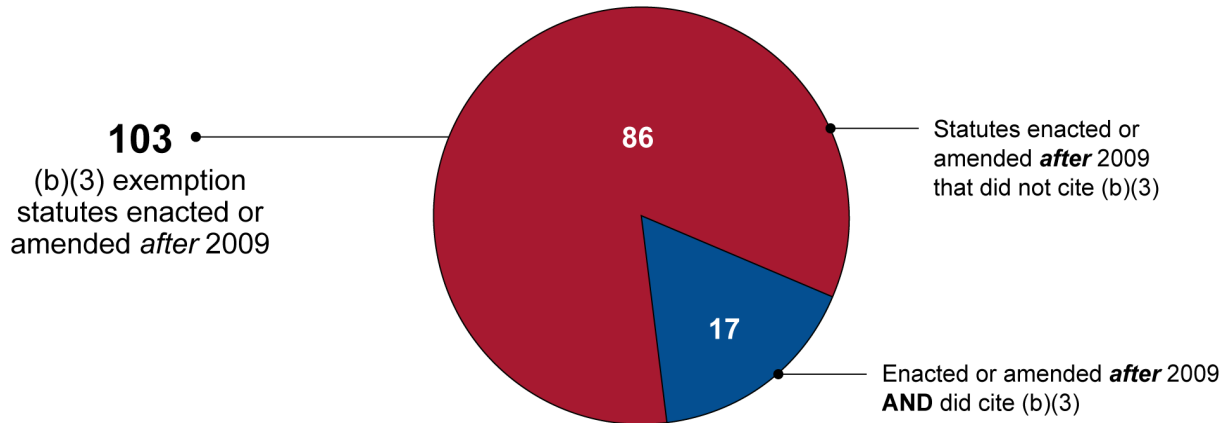
Even with this guidance, we found that a majority of agency-claimed statutes during fiscal years 2010 through 2016 did not specifically cite the (b)(3) exemption. Specifically, of the 237 (b)(3) statutes claimed by agencies, 103 were enacted or amended after 2009 and, thus, were subject to the requirement of the OPEN FOIA Act.<sup>43</sup> Of those 103 statutes, 86 lacked the required statutory text that cited exemption (b)(3) of FOIA.

Figure 7 shows the number of agency-claimed statutes subject to the OPEN FOIA Act of 2009 requirement that did not cite the (b)(3) exemption.

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<sup>43</sup>Although the requirements of FOIA specify those (b)(3) exemption statutes that are enacted after the date of enactment of the OPEN FOIA Act of 2009, our review included amendments of (b)(3) exemptions statutes as it provided evidence of congressional reconsideration of the provisions of that statutes and any attention given to the requirements set forth in 5 U.S.C § 552(b)(3)(B).

**Figure 7: Number of (b)(3) Exemption Statutes Claimed during Fiscal Years 2010 through 2016 That Included a Reference to Exemption 3 of the Freedom of Information Act**



Source: GAO analysis of FOIA.gov (b)(3) exemption statutes claimed by agencies subject to the Freedom of Information Act. | GAO-18-452T

Agencies are using these statutes as the basis for withholding information when responding to a FOIA request. This is despite these statutes not having a reference to the (b)(3) exemption as required by the 2009 FOIA amendments.

## Federal Court Decisions Have Not Required the Office of Special Counsel to Initiate Disciplinary Actions for the Improper Withholding of Records

In our report, being issued today, we found that, according to the available information and Justice and OSC officials, since fiscal year 2008, no court orders have been issued that have required OSC to initiate a proceeding to determine whether disciplinary action should be taken against agency FOIA personnel. Specifically, officials in Justice’s Office of Information Policy stated that there have been no lawsuits filed by a FOIA requester that have led the courts to conduct all three requisite actions needed for Justice to refer a court case to OSC.

Justice’s litigation and compliance reports identified six court cases (between calendar years 2013 and 2016) in which the requesters sought a referral from the courts in an attempt to have OSC initiate an investigation. However, in all six cases, the courts denied those requests, finding that each case did not result in the courts taking the three actions necessary to involve OSC.

Thus, given these circumstances, Justice has not referred any court orders to OSC to initiate a proceeding to determine whether disciplinary action should be taken against agency FOIA personnel. For its part, OSC officials confirmed that the office has neither received, nor acted on, any

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such referrals from Justice. As such, OSC has not had cause to initiate disciplinary actions for the improper withholding of FOIA records.

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In summary, the 18 agencies we selected for review fully implemented half of the six FOIA requirements reviewed and the vast majority of agencies implemented two additional requirements. However, 5 agencies published and updated their FOIA regulations in a timely and comprehensive manner. Fully implementing FOIA requirements will better position agencies to provide the public with necessary access to government records and ensure openness in government.

The selected agencies in our review varied considerably in the size of their backlogs. While 10 reported a backlog of 60 or fewer requests, 4 had backlogs of over 1,000 per year. Agencies identified a variety of methods that they used to address their backlogs, including practices identified by Justice, as well as additional methods. However, the selected agencies varied in the success achieved for reducing their backlogs. This was due, in part, to a lack of plan that describes how the agencies will implement best practices for reducing backlogs over time. Until agencies develop plans to reduce backlogs, they will be limited in their ability to respond effectively to the needs of requesters and the public.

Accordingly, our draft report contains 23 planned recommendations to selected agencies. These recommendations address posting records online, designating chief FOIA officers, updating regulations consistent with requirements, and developing plans to reduce backlogs. Implementation of our recommendations should better position these agencies to address FOIA requirements and ensure the public is provided with access to government information.

Chairman Grassley, Ranking Member Feinstein, and Members of the Committee, this completes my prepared statement. I would be pleased to respond to any questions that you may have at this time.

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## GAO Contact and Staff Acknowledgments

If you have any questions on matters discussed in this testimony, please contact David A. Powner at (202) 512-9286 or at [pownerd@gao.gov](mailto:pownerd@gao.gov). Individuals who made key contributions to this testimony are Anjalique Lawrence (assistant director), Lori Martinez (analyst in charge), Gerard Aflague, David Blanding, Christopher Businsky, Rebecca Eyer, James Andrew Howard, Carlo Mozo, David Plocher, and Sukhjoot Singh.

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