

MIXED SIGNALS, MIXED RESULTS: How President Bush's Executive Order On FOIA Failed to Deliver

We the People

Federal Register
Vol. 70, No. 242
Monday, December 19, 2005

Presidential Documents

75373

Title 3—
The President

Executive Order 13392 of December 14, 2005 Improving Agency Disclosure of Information

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to ensure appropriate agency disclosure of information, and consistent with the goals of section 552 of title 5, United States Code, it is hereby ordered as follows:

Section 1. Policy.

(a) The effective functioning of our constitutional democracy depends upon the participation in public life of a citizenry that is well informed. For nearly four decades, the Freedom of Information Act (FOIA) has provided an important means through which the public can obtain information regarding the activities of Federal agencies. Under the FOIA, the public can obtain records from any Federal agency, subject to the exemptions enacted by the Congress to protect information that must be held in confidence for the Government to function effectively or for other purposes.

(b) FOIA requesters are seeking a service from the Federal Government and should be treated as such. Accordingly, in responding to a FOIA request, agencies shall respond courteously and appropriately. Moreover, agencies shall provide FOIA requesters, and the public in general, with citizen-centered ways to learn about the FOIA process, about agency records that are publicly available (e.g., on the agency's website), and about the status of a person's FOIA request and appropriate information about the agency's response.

(c) Agency FOIA operations shall be both results-oriented and produce results. Accordingly, agencies shall process requests under the FOIA in an efficient and appropriate manner and achieve tangible, measurable improvements in FOIA processing. When an agency's FOIA program does not produce such results, it should be reformed, consistent with available resources appropriated by the Congress and applicable law, to increase efficiency and better reflect the policy goals and objectives of this order.

(d) A citizen-centered and results-oriented approach will improve service and performance, thereby strengthening compliance with the FOIA, and will help avoid disputes and related litigation.

Sec. 2. Agency Chief FOIA Officers.

(a) Designation. The head of each agency shall designate within 30 days of the date of this order a senior official of such agency (at the Assistant Secretary or equivalent level), to serve as the Chief FOIA Officer of that agency. The head of the agency shall promptly notify the Director of the Office of Management and Budget (OMB Director) and the Attorney General of such designation and of any changes thereafter in such designation.

(b) General Duties. The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency:

- (i) have agency-wide responsibility for efficient and appropriate compliance.



George W. Bush

THE WHITE HOUSE,
December 14, 2005.

THE KNIGHT OPEN GOVERNMENT SURVEY

The National Security Archive

www.nsarchive.org

Sunshine Week 2008
March 16, 2008

MIXED SIGNALS, MIXED RESULTS: How President Bush's Executive Order on FOIA Failed to Deliver

HIGHLIGHTS

Issued with great fanfare in December 2005, Executive Order 13,392 on “Improving Agency Disclosure of Information” sought to address several problems that have plagued the Freedom of Information Act (FOIA) system since its inception, including excessive backlogs and sluggish response to the requesters for whom FOIA was intended as a powerful tool to hold the government accountable. The executive order instructed agencies to take a “citizen-centered” and “results-oriented” approach to their FOIA programs to ensure compliance with the law, improve customer service, avoid FOIA disputes and litigation, and eliminate or reduce backlogs. Agencies implemented the order by drafting improvement plans that set goals for reform in a number of areas. Behind its ambitious façade, however, the order lacked both carrot and stick: it provided agencies no additional resources for achieving their goals and has no enforcement mechanisms for agencies that set insubstantial goals or fall short of necessary improvements.

The National Security Archive's Knight Open Government Survey examines how agencies have fared in implementing the executive order. Key findings of the survey include:

- **Mixed results and erratic improvements.** The order raised the profile of FOIA at many agencies, instructing them to examine their existing FOIA programs and acknowledge problems by setting improvement goals. Giving higher level agency officials responsibility for overseeing FOIA enabled some agencies to leverage existing resources to make much-needed changes in their FOIA processing. But the order falls short in several respects. Without resources or meaningful enforcement, some agencies that set ambitious goals have found themselves without the means to accomplish them, while the self-guided process has allowed agencies with historically lackluster FOIA performance to perpetuate the status quo.
- **Overall improvement in customer service.** The executive order mandates a new three-tiered customer service system, featuring FOIA Service Centers, Public Liaisons, and Chief FOIA Officers at each agency. This system has helped standardize FOIA customer service, compelling straggling agencies to meet a minimum benchmark and giving requesters a clear point of contact for assistance at each agency. The Archive's experience with this system was generally positive: most agency representatives were courteous and helpful, and almost all proved responsive to the Archive's inquiries at the Service Center and Liaison levels.
- **Uneven results in backlog reduction.** Although some agencies established concrete goals and met them, resulting in backlog reductions, other agencies fell far short. Of the agencies that had backlogs when the executive order was issued, 30% reported an *increase* in pending requests over the last two years. Notably, 15% of the agencies and components—nine in total—actually claimed to have met all of their backlog reduction goals but still reported an *increase in pending requests* during the implementation period. The number of pending requests government-wide was only 2% lower at the end of FY2007 than it was before the executive order was issued.
- **The executive order did not substantially improve agency Web sites or E-FOIA compliance for previously noncompliant agencies.** In its 2007 audit, *File Not Found: 10 Years After E-FOIA, Most Federal Agencies Are Delinquent*, the National Security Archive found that many agencies failed to post essential guidance information and required documents and had poorly-designed Web sites that were difficult to navigate. A follow-up review of the 12 worst agencies identified in *File Not Found* revealed that only five out of 12, or 42%, significantly improved their

Web sites, while the same portion, 42%, made *no apparent improvement* to their Web sites, despite serious deficiencies.

- **The executive order produced improvements at agencies already engaged in the FOIA process, but was not effective at compelling stragglers to improve.** Agencies that have historically taken FOIA seriously tended to show greater diligence in approaching the executive order, setting goals calculated to achieve measurable improvement in processing requests and reducing backlogs. With nothing in the order to compel progress, however, agencies that typically marginalized FOIA had little incentive to change their ways.

Despite spurring progress in some areas, President Bush's executive order on FOIA has produced only limited improvements in FOIA compliance, and many of the 90 agencies surveyed have fallen short of meeting their own goals set pursuant to the order. Although the Knight Open Government Survey identified some across-the-board areas of improvement, as well as several agencies that are making meaningful efforts to reduce backlogs and improve online access to records and guidance, the results overall suggest that lack of resources and enforcement mechanisms largely crippled the order's effectiveness and allowed some agencies to remain out of compliance without consequences. The congressional intent at the heart of the Freedom of Information Act requires greater external oversight, increased resources, and internal commitment by agency leadership to open government ideals.

TABLE OF CONTENTS

Acknowledgements.....	1
Introduction: The White House’s Surprise FOIA Initiative.....	2
Customer Service: If You Give Them a Phone, They Will Answer It.....	4
Backlog Reduction: No Carrots or Sticks, Little Progress.....	6
Agency Web Sites: Still “File Not Found”.....	13
Conclusion: Mixed Signals, Mixed Results.....	17
Bibliography.....	18

ACKNOWLEDGEMENTS

The Knight Open Government Survey was made possible by generous funding from the John S. and James L. Knight Foundation.

This report was written by Kristin Adair and Catherine Nielsen and was edited by Tom Blanton, Meredith Fuchs, and James Haynes. Michael Evans deserves our appreciation for his efforts in making our text and data accessible to the public on our Web site at www.nsarchive.org.

Previous National Security Archive audits and Knight Open Government Surveys include:

- 40 Years of FOIA, 20 Years of Delay: Oldest Pending FOIA Requests Date Back to the 1980s (July 2, 2007). <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB224/index.htm>
- File Not Found: 10 Years After E-FOIA, Most Federal Agencies are Delinquent (March 12, 2007). <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB216/index.htm>
- Pseudo-Secrets: A Freedom of Information Audit of the U.S. Government's Policies on Sensitive Unclassified Information (March 14, 2006). <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB183/press.htm>
- A FOIA Request Celebrates Its 17th Birthday: A Report on Federal Agency FOIA Backlog (March 12, 2006). <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB182/press.htm>
- Justice Delayed is Justice Denied: The Ten Oldest Pending FOIA Requests (November 17, 2003). <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB102/press.htm>
- The Ashcroft Memo: "Drastic" Change or "More Thunder Than Lightning"? (March 14, 2003). <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB84/press.htm>

Introduction: The White House's Surprise FOIA Initiative

When Congress passed the Freedom of Information Act ("FOIA") in 1966, it sought to provide the public with a tool for holding the government accountable for its policies and decisions. The FOIA presumes that all government records belong to the people. The law requires federal agencies to produce documents in a timely fashion in response to a FOIA request and only permits withholding when an agency can demonstrate that a significant countervailing interest meets the standards of the specifically enumerated exemptions. Often, however, the requester is treated as a nuisance rather than as a participant in a system of representative government. Thus, requesters navigating the FOIA system regularly face roadblocks and lengthy delays. Although the FOIA requires agencies to respond to requesters within 20 business days, agencies have struggled with backlogs of pending requests since the FOIA's passage over 40 years ago. Requests can languish at agencies for months or even years. Agency FOIA backlogs range from as few as one or two requests to over 80,000.

President Bush's Executive Order 13,392 on "Improving Agency Disclosure of Information" (the "executive order") calls for agencies to take a "citizen-centered" and "results-oriented" approach to their FOIA programs in order to improve efficiency, ensure compliance with the FOIA, and avoid disputes and litigation.¹ The executive order recognizes FOIA requesters as customers who are entitled to good service from the government and directs agencies to ensure adequate information is made available to requesters to educate them on the FOIA and on how to submit a FOIA request.² The executive order acknowledges the problem of FOIA backlogs, calling for agencies to review their FOIA programs and identify ways to eliminate or reduce their backlogs.³

Another focus of the executive order is on agency Web sites as important "citizen-centered" FOIA tools. The order instructs agencies to "provide FOIA requesters, and the public in general, with citizen-centered ways to learn about the FOIA process, about agency records that are publicly available (e.g., on the agency's Web site), and about the status of a person's FOIA request and appropriate information about the agency's response."⁴ Each agency was directed to carry out activities aimed at improving online access to records and information about FOIA.

Under the executive order, agencies were required to issue improvement plans setting measurable, outcome-oriented goals. However, the executive order does not provide for any resources to achieve these goals; rather, the goals were to be set "consistent with available resources."⁵ Moreover, the executive order provided for reporting, but no formal enforcement mechanism to guarantee that agencies meet their self-designed goals.

Notably, when the executive order was issued in December 2005, several pieces of FOIA reform legislation were pending in Congress. Senator Leahy, a key sponsor of the legislation eventually enacted in late 2007, stated that the president's executive order was "a constructive step, but . . . not the comprehensive reforms we need."⁶ The OPEN Government Act of 2007, which President Bush signed into law on December 31, 2007, codifies portions of the executive order but goes much further by implementing penalties for agency delay and mandating important new reporting obligations and tracking requirements for all agencies.⁷

¹ Executive Order no. 13,392, 70 Fed. Reg. 75,371 (Dec. 19, 2005), sec. 1(d).

² *Id.* sec. 1(b) and 1(d).

³ *Id.* sec. 3(a)(v).

⁴ *Id.* sec. 1(b).

⁵ *Id.* sec. 3(a)(v).

⁶ "Reaction of Senator Patrick Leahy to President's FOIA Executive Order," *States News Service*, December 14, 2005.

⁷ *OPEN Government Act of 2007*, Public Law 110-175, *U.S. Statutes at Large* 121 (2007):2525 (enacted Dec. 31, 2007).

During several years of negotiations, the Bush administration was one of the strongest critics of the FOIA reform legislation. In its statement opposing one version of the bill in 2007, the White House stated that “it would be premature and counterproductive to the goals of increasing timeliness and improving customer service to amend FOIA before agencies have had sufficient time to implement the FOIA improvements that the President directed them to develop, put into place, monitor, and report on during FYs 2006 and 2007.”⁸ As this report will show, while the executive order has accomplished some important improvement, it has not proved capable of bringing the sweeping upgrades that the troubled FOIA system so badly needs.

The National Security Archive’s Knight Open Government Survey examines how agencies have fared in implementation of the executive order. To measure this, the Archive sent FOIA requests asking for documents regarding the executive order to all 90 agencies that submitted FOIA improvement plans and examined each agency’s FOIA improvement plan as well as its reports to Congress. The Archive focused specifically on the new customer service mechanisms established by the executive order, backlog reduction, and agency Web sites.

⁸ Executive Office of the President, *Statement of Administration Policy on H.R. 1309 – Freedom of Information Act Amendments of 2007*, March 14, 2007.

Customer Service: If You Give Them a Phone, They Will Answer It

Numerous studies demonstrate that the quality of FOIA programs varies widely among agencies. FOIA offices have often been marginalized within their agencies and provided only limited resources to carry out the FOIA's statutory mandates. Before President Bush issued the executive order, the FOIA customer service infrastructure was not visible at some agencies.

The executive order changed this, requiring agencies to institute a new three-tiered customer service system. First, FOIA Customer Service Centers were established as an initial point of contact for requesters to follow up on and track the status of their requests. Second, a requester who does not get a satisfactory response from the Customer Service Center can contact the FOIA Public Liaison. The one or more FOIA Public Liaison(s) at each agency "serve as supervisory officials to whom a FOIA requester can raise concerns about the service the FOIA requester has received from the Center."⁹ The Liaisons are also charged with ensuring that the FOIA program is customer-oriented and working to reduce delays, providing transparency with regard to the status of requests, and resolving disputes with requesters. Finally, each agency was directed to designate a Chief FOIA Officer to exercise agency-wide oversight of the FOIA program. The Chief FOIA Officer serves as a liaison between the FOIA program and the agency head, monitors the FOIA process, and makes recommendations to the head of the agency on ways to increase efficiency and compliance.¹⁰

In September 2007, the Archive submitted a FOIA request to each of the 90 agencies that developed a FOIA improvement plan in response to the executive order, asking for records related to implementation of the executive order and the agencies' FOIA improvement plans. The responses to these requests varied significantly. While some agencies provided the Archive with copies of internal guidance and directives, others provided only copies of the executive order and their published FOIA improvement plans. Several agencies informed the Archive that much of their executive order planning was informal, and therefore, there were no documents created that were responsive to the FOIA request.

To test the efficacy of the FOIA customer service centers and public liaisons, the Archive called agencies where the request had been pending beyond twenty business days.¹¹ The Archive confirmed whether the request had been received, checked on its status, and inquired about an estimated date of completion. If an agency did not answer, a message was left. If the agency did not call back within one week, the Archive called the FOIA public liaison and requested the same status information.

In general, the experience with the Service Centers and Liaisons was positive. (See Figure 1). The majority of the agency representatives were courteous and helpful. All of the agencies we reached were able to confirm whether the request had been received. Although most were unable to provide an estimated completion date, several were able to identify where the request was in the processing queue. In the cases where the Archive called the public liaison, with the exception of two agencies that never returned the Archive's calls,¹² the public liaison either called the Archive back directly or instructed the service center to call the Archive back with an update on the status of the request.

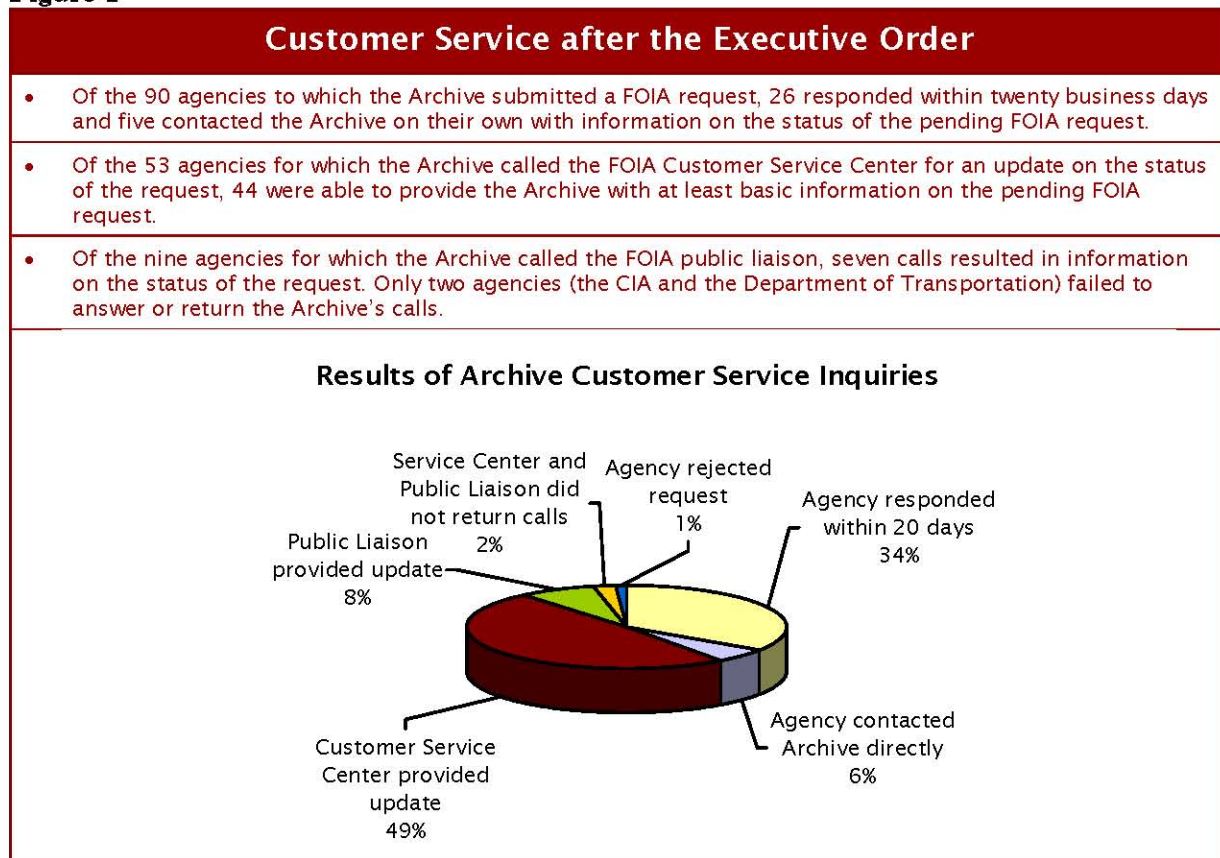
⁹ E.O. 13,392, sec. 2(c)(ii).

¹⁰ E.O. 13,392, sec. 2(b).

¹¹ Of the 90 agencies to which the Archive submitted FOIA requests, 59 did not respond within the twenty business day deadline. The Archive called the Service Centers for 53 of these agencies. (Five agencies contacted the Archive on their own with an update of the status of their requests, and one agency rejected the Archive's FOIA request. These agencies are not included in the total number called.)

¹² The Archive was unable to reach the Central Intelligence Agency's Service Center or Public Liaison. (The same phone number serves both offices.) The Archive tried calling multiple times, but no one answered the phone and the voicemail service did not pick up, so the Archive was unable to leave a message. The Department of Transportation did not return voicemail messages left with the Service Center and the Public Liaison.

Figure 1



Although many agencies had the means to track FOIA requests before the executive order, the three-tiered system established by the order has helped to standardize this process, making it easier for requesters to identify and contact agency FOIA offices with questions related to FOIA or FOIA requests.¹³ Whether the public will use the new customer service options and whether this will ameliorate the negative public perception that the FOIA system is unresponsive remain to be seen. For agencies that did not take initiative on their own to set up a customer service system, the executive order has imposed a baseline and brought outliers up to a standard they had not previously been meeting.¹⁴ Additionally, the executive order, combined with recent FOIA amendments,¹⁵ reaffirms the principle that the FOIA program should be requester-oriented and that the burden should not be on the requester to ensure that his or her request is being processed in accordance with the law.

¹³ Based on the Archive's own experience with its previous FOIA audits, the new customer service system has made it easier to follow up on requests. Previously, it was difficult to find the right person to contact regarding a FOIA request at some agencies, and often the person who answered the phone was unable to provide information about the request. By designating a person or office responsible for responding to requesters, there is a clear path for requesters to follow up on their requests.

¹⁴ Some agencies set other goals under the executive order related to improving customer service. These included offering training for FOIA personnel on customer service and standardizing FOIA response letters and ensuring letters to requesters are in "plain English." Other agencies set goals to reach out to requesters for feedback on their FOIA programs. Some agencies, such as the Federal Labor Relations Authority, the General Services Administration and the Department of Labor, planned to send out customer service surveys to their requesters. Other agencies, such as Labor, the Department of Energy, and the Department of State planned to meet with requesters to solicit feedback. The General Services Administration planned to develop a pamphlet of best practices for customer service that would be implemented agency-wide.

¹⁵ Recent amendments to the FOIA codify and expand some elements of the executive order. The position of FOIA public liaison is now required by law. The Act also directs each agency to assign tracking numbers to FOIA requests that take longer than ten days to process and to set up either a telephone or online system whereby requesters can check on the status of requests and obtain estimated dates of completion for their requests. OPEN Government Act of 2007.

Backlog Reduction: No Carrots or Sticks, Little Progress

The Department of Justice's executive order implementation guidance to agencies stresses that backlog reduction "should be a major underpinning of the implementation plans."¹⁶ Justice's Office of Information and Privacy reviewed all of the agencies' FOIA improvement plans, and those agencies identified as having insufficient backlog reduction goals were instructed to revise their improvement plans.¹⁷ Additionally, in his second report to the President on agency progress under the executive order, the Attorney General recommended that backlog reduction goals be extended past the time period set forth in the order and directed agencies to set backlog reduction goals for fiscal years 2008, 2009 and 2010.¹⁸ As part of the assessment of the executive order's effectiveness, the Archive reviewed the backlog goals in each agency's improvement plan as well as each agency's description in its FY2006 and FY2007 annual FOIA reports to Congress on implementation of the executive order.

Backlog Reduction after the Executive Order: A Mixed Picture

The executive order's impact on backlogs across the government presents a mixed picture. Some agencies set concrete goals and followed meaningful steps to meet them, resulting in very significant reductions in the number of backlogged requests. But other agencies did not improve their backlogs significantly. In some cases, agencies set goals for backlog reduction that, if met, would produce only minimal change,¹⁹ or the goals set were not directly related to backlog reduction or would produce results that are not measurable.²⁰ Other agencies set measurable, meaningful goals but, for various reasons, were unable to meet them. The inability to meet established milestones and increases in the number of incoming requests at some agencies meant that a number of agencies gained only minimal ground—or even lost ground—in efforts to reduce backlogs since the executive order was implemented.

Of the 107 agencies and components included in our review,²¹ nearly half did not set any backlog-reduction goals, generally because they had no backlog of requests when the improvement plans were drafted.²² ***Of the 59 agencies and components surveyed that had backlogs and that established at least one backlog-related goal, we found that:***

¹⁶ Department of Justice, "Executive Order 13,392 Implementation Guidance," *FOIA Post*, April 27, 2006, <http://www.usdoj.gov/oip/foiapost/2006foiapost6.htm>.

¹⁷ Department of Justice, *Attorney General's Report to the President Pursuant to Executive Order 13,392, Entitled 'Improving Agency Disclosure of Information'*, October 16, 2006.

¹⁸ Department of Justice, *Attorney General's Report to the President Pursuant to Executive Order 13,392, Entitled 'Improving Agency Disclosure of Information'*, June 1, 2007. On September 7, 2007, OIP issued new guidance requiring all agencies to set quantifiable goals for backlog reduction. Department of Justice, "Guidance on Submitting Backlog Reduction Goals for Fiscal Years 2008, 2009, and 2010," *FOIA Post*, September 7, 2007, <http://www.usdoj.gov/oip/foiapost/2007foiapost9.htm>.

¹⁹ For example, a goal to reduce overall backlog by 5% or less.

²⁰ For example, improvements in software to speed processing of requests or staff meetings to discuss backlog concerns.

²¹ The total number of agencies and components covered includes the 90 agencies with FOIA improvement plans as well as major components (i.e., those that receive more than 500 requests per year) of those agencies that submitted decentralized improvement plans where components set individual goals and where the goals for each component were reported separately in agency annual reports.

Although the Office of Administration of the Executive Office of the President submitted a FOIA improvement plan and annual FOIA reports until FY2006, the Office of Administration has since declared that it is not an agency subject to FOIA. Therefore, it has stopped reporting on its improvement plan goals or FOIA backlog.

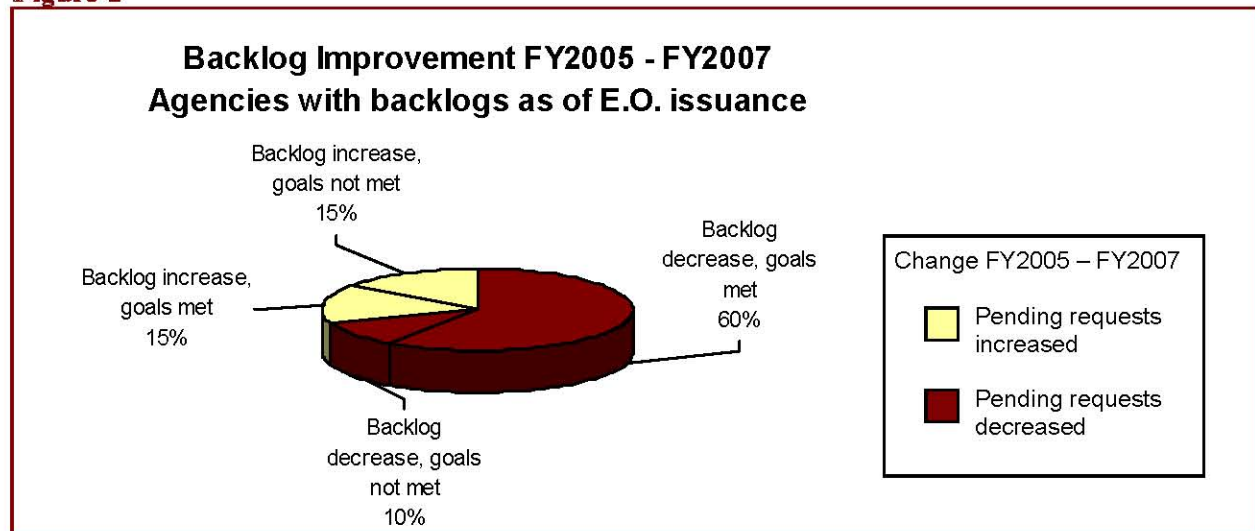
²² Of the 45 agencies that did not set backlog goals in their FOIA improvement plans, most had no backlog at the time the improvement plan was drafted. However, six agencies (the Council on Environmental Quality, the Farm Service Agency at the Department of Agriculture, the Export-Import Bank, the Federal Labor Relations Authority, the National Labor Relations Board, and the Postal Service) that did not set backlog goals appear from their annual reports and improvement plans to have had backlogs at the end of FY2005, and four of these agencies set supplemental backlog goals for FY 2008, 2009, and 2010. Other agencies may have had backlogs at the end of FY2005 that are not discernible from their annual reports.

- **75% (44 agencies)** met all of their backlog reduction goals set to be completed in FY2006 and FY2007;
- **25% (15 agencies)** failed to meet some or all of their goals.²³

Of those 59 agencies, there are signs that the backlogs may have increased at some agencies during the implementation period:

- **30% (18 agencies)** reported an increase in pending requests between the end of FY2005 and FY2007;
- **15% (9 agencies)** claimed to have met all of their scheduled backlog reduction goals but nonetheless saw a growth in their pending requests during that period.

Figure 2



The broad impact of the executive order is questionable in part because agencies' achievement of their self-directed goals does not correlate across-the-board with reduction of backlogs. ***Of the 44 agencies that met all of their backlog reduction goals:***

- **80% (35 agencies)** reported a decrease in pending requests between the end of FY2005 and the end of FY2007;
- **20% (9 agencies)** actually saw an *increase in pending requests* during that time, despite having met their backlog goals.

Of the 15 agencies that failed to meet at least some of their backlog goals:

- **60% (9 agencies)** had an increase in backlog between the end of FY2005 and FY2007;
- **40% (6 agencies)** reported a decrease in the backlog of pending requests.

Backlog Reduction Goals: Oversight and Commitment Lead to Success

Agencies that were successful in reducing their backlogs employed a variety of approaches, but the common themes included tailoring the steps taken to the agency's specific challenges and combining measurable, concrete goals with ongoing monitoring of the implementation by senior FOIA officials

²³ As of March 10, 2008, four agencies with backlog goals for 2007 (the U.S. Agency for International Development, the Legal Services Corporation, the Department of Housing and Urban Development, and the Office of Science and Technology Policy) still had not posted their FY 2007 annual FOIA reports to Congress (although the reports were due on February 1, 2008 and must be made available electronically), so the Archive was unable to assess whether they had met their 2007 backlog goals. Therefore, these four agencies are not part of the 59 agencies covered by this data.

within the agency. In general, a comprehensive approach—attacking entrenched backlogs from several different angles—appears to have been the most effectual.

For example, the Department of Energy focused on its oldest cases, setting a goal to reduce by 50% the backlog of cases more than one year old. The steps Energy chose to accomplish this goal were significant. Focusing on the challenges of decentralized FOIA processing, the agency instituted several new reporting procedures: monthly reports on pending requests to senior program managers and to the Chief FOIA Officer as well as bi-weekly status reports from program and field offices on pending cases. In this way, the Chief FOIA Officer can monitor processing throughout the agency, spot problems, and give program and field offices incentives to process requests as efficiently as possible. Energy simultaneously implemented goals to increase FOIA training for all agency staff and developed standard procedures for processing FOIA requests agency-wide. Between FY2005 and FY2007, Energy reduced its backlog agency-wide from 1,162 pending cases to 438 pending cases, a more than 60% reduction.

The Department of the Interior took a similar approach, focusing on several bureaus that reported significant backlogs. Interior FOIA personnel asked each bureau to submit a backlog reduction plan and then monitored the bureaus' backlogs and helped to develop remedial actions as necessary on an ongoing basis. By targeting specific problem areas and providing ongoing oversight, Interior was able to reduce its backlog of pending requests by nearly 50% from 1,763 at the end of FY2005 to 894 at the end of FY2007.

A number of agencies focused on increasing staff resources as a way to reduce the backlog. This approach was effective in some cases, generally where it formed part of a more comprehensive backlog reduction program. For example, the CIA set goals emphasizing both closure of the oldest pending requests and overall backlog reduction, but also established a new task force of staff dedicated exclusively to processing the oldest requests. As a result, the backlog of cases older than five years was reduced by 25% in FY2006 and 74% in FY2007. The Nuclear Regulatory Commission set a goal of hiring additional FOIA staff, including one FOIA specialist and one contractor, with the aim of reducing response times for both simple and complex requests by 2008. The number of pending requests has since dropped by more than half, from 80 at the end of FY2005 to 34 at the end of FY2007.

Backlog Reduction Goals: Aiming High, Falling Short

A number of agencies and components submitted improvement plans with measurable, forward-looking goals and implementation steps, but for various reasons fell short of meeting their goals and achieving meaningful backlog reduction. The challenges that these agencies face are largely representative of the challenges FOIA programs across the government have faced for decades, namely lack of funding and other resources, limited acceptance of FOIA as part of the agency mission, and a rise in the number of FOIA requests.

Several agencies noted that they received an influx of requests that prevented them from achieving their goals to close older requests or reduce or eliminate backlogs. For example, the Department of Health and Human Services set substantive goals of closing all pre-2004 cases and reducing overall backlog by 5% agency-wide by the end of FY2006. Despite completing steps to increase staff and verify requester interest in older requests, however, Health and Human Services failed to complete both of its backlog reduction goals during 2006. The reason offered to explain the deficiency was that an unexpected surge of new requests impaired the staff's ability to close older requests. Because of its inability to predict the number of incoming FOIA request, Health and Human Services revised its goal to achieving a 5% reduction in FY2007 of the backlog of only those FOIA requests received *prior* to FY2007. Health and Human Services achieved a reduction of 24% of backlogged requests received prior to FY2007.

A number of other agencies claimed that staffing issues or budgetary constraints contributed to deficiencies in meeting backlog reduction goals. In particular, unfilled positions, retirement or departure of trained personnel, and staff members' conflicting obligations prevented some agencies from reducing their backlogs as hoped. For example, several Justice Department components reported staffing shortages resulting in backlog reduction deficiencies. Facing budget constraints, the Drug Enforcement Administration imposed a hiring freeze and therefore could not increase staff working on backlogged FOIA requests despite seven vacancies. Similarly, staffing vacancies and the demands of a case in litigation prevented the Executive Office for United States Attorneys from realizing an ambitious goal to reduce its backlog by 75% as of September 1, 2007. (Instead, the Executive Office for United States Attorneys reduced its backlog only 10% during FY2007).

Although the executive order emphatically called on agencies to pursue activities aimed at eliminating or reducing their FOIA backlogs, it also cautioned agencies to "tak[e] appropriate account of the resources available to the agency and the mission of the agency" when developing milestones, timetables, and outcomes to be achieved.²⁴ Some agencies did not heed this warning, instead setting lofty improvement targets and then falling short of meeting them. One example is the Department of Homeland Security, which set an overarching goal of eliminating the FOIA backlog agency-wide by December 31, 2007. Homeland Security included in its plan a number of useful steps to be taken by individual components, such as hiring new FOIA personnel, instituting operational changes to improve workflow and increase efficiency, and close oversight of component progress by the Chief FOIA Officer. These steps, however, were not accompanied by manageable interim targets towards the final goal of eliminating the agency's backlog. Homeland Security reported in its most recent annual report that, while it managed to meet all of its management-oriented backlog goals, it only achieved a backlog reduction of 25%. The number of pending requests at Homeland Security increased slightly since the issuance of the executive order—from 82,544 in FY2005 to 83,661 in FY2007.²⁵

Some agencies made minimal progress or even regressed in terms of overall backlog. For example, the FBI set several goals to process older requests by certain dates during FY2006 and FY2007, but failed to meet all of them and pushed the completion dates back by a year on two occasions. The FBI met several other goals, namely to decrease median processing time for different types of requests during FY2005, but the number of pending requests has nonetheless increased since the start of the executive order implementation. Focusing on median processing time for incoming requests without an efficient mechanism to also deal with older pending cases will not necessarily result in overall backlog reduction.²⁶

Although Justice reviewed each improvement plan and suggested modifications where goals were insufficient or not provided, a number of the plans remained lacking in concrete, measurable goals for backlog reduction. In addition to some apparently insufficient or unambitious goals, several other agencies that reported backlogs of requests did not establish any goals in their improvement plan directed at backlog reduction.²⁷

²⁴ E.O. 13,392, sec. 3(b)(iv).

²⁵ The number of pending requests at Homeland Security increased between FY2005 and FY2006, from 82,544 to 110,542. There was a decrease in the number of pending requests between FY2006 and FY2007. Homeland Security reports 73,847 pending requests in its Backlog Reduction Goals for FY2008, FY2009, FY2010. For the purposes of this report, the Archive is using the number of pending requests reported in the FY2007 annual FOIA report—83,661—since the annual report was published after the supplemental backlog reduction goals and may contain pending requests not previously reported.

²⁶ The use of median processing times is problematic because medians describe only the middle number in a series of numbers. The median processing time statistic provides no means of assessing the outer limits or average length of an agency's backlog and thus is of limited utility in assessing the period of time that FOIA requesters may actually have to wait for a substantive response. The recently-enacted FOIA amendments require agencies to report the average age and range of pending requests, beginning with the next annual reporting cycle.

²⁷ See footnote 23.

Backlog Reduction Goals: Missing the Point

Another significant problem is that some agencies set measurable goals to reduce their backlogs, but the methods used to achieve those goals run counter to the letter and spirit of the FOIA. In some cases, agencies appear to be taking a “wait out the requester” approach to backlog reduction. Rather than directing resources to processing older requests, some agencies have simply relied on requesters' losing interest and eventually withdrawing or abandoning their requests. In some cases, agencies are expending time and resources reaching out to determine whether requesters still want their old requests processed rather than actually processing them.

For example, the Department of the Treasury FOIA Improvement Plan indicates that the agency planned to tackle both the front end (incoming requests) and back end (“administratively stagnant requests”) of its backlog with the goal of reducing the backlog 10 percent by January 1, 2007. Success was to be measured by the number of closed cases. Over the past two years, the Archive has received a number of letters from Treasury asking whether the Archive is still interested in its long-pending requests. The letters stated that if Treasury did not receive a response within 15 business days, the requests would be closed.²⁸ The inquiries have been received for 42 separate requests. For 27 of these requests, Treasury has inquired a second time about the Archive’s interest, after the Archive had confirmed its interest once, and for one case, the Archive has received three separate inquiries. In at least 42 instances, Treasury asked the Archive to send a copy of the FOIA request because the original request letters “may have been among files that were destroyed in error.”

Additionally, the Archive received letters for ten of these requests indicating that the documents had been recently transferred to the National Archives and Records Administration, and, therefore, the Archive must now resubmit its FOIA request to the National Archives. These letters were sent between December 19, 2007 and January 4, 2008, more than ten years after most of the requests were filed. This seems to indicate that, rather than processing the “administratively stagnant” requests, Treasury hopes to deal with these requests by simply closing them or waiting so long to process them that it no longer holds the documents. In its FY2006 Annual Report to Congress, Treasury reported that 60 requests were withdrawn by requesters and 48 were closed because of “no response from requester” and 30 were closed because

Wait out the Requester: Department of Treasury Approach to the FOIA Backlog

Oldest pending Archive FOIA request to Treasury: 3/17/1987
Number of requests for which Treasury asked the Archive at least once if it was still interested in its request: 42*
Number of requests for which Treasury asked the Archive two or more times if it was still interested: 27
Number of times Treasury asked the Archive to re-send a copy of a pending FOIA request since the “request letters may have been among files that were destroyed in error”: 42
Number of times Treasury sent the Archive a “no documents” response for files it transferred to NARA several years after failing to process the Archive’s initial FOIA request: 10
Number of requests between FY2005 and FY2007 withdrawn by requesters: 1,269
Number of requests between FY2005 and FY2007 Treasury closed due to no response from requesters: 307
Number of requests between FY2005 and FY2007 Treasury closed due to mail returned: 67
* Treasury has since at least partially processed 15 of these requests and has since closed ten for which the documents were transferred to NARA.

²⁸ After a January 11, 2007, letter of complaint from the Archive requesting that Treasury continue to process all of the Archive’s pending FOIA requests, Treasury expanded this deadline to 30 business days.

of “mail returned.”²⁹ In FY2007, Treasury reported that 437 requests were withdrawn by requesters. Additionally, the agency closed 124 requests because there were no responses from the requesters and 19 requests based on returned mail.

Treasury’s approach is in stark contrast to other agencies with extensive backlogs, such as Defense and the CIA, which have made concerted efforts to process their older cases. In its modified FOIA improvement plan, Defense set a goal of continually identifying and working to close the ten oldest cases in the Office of the Secretary of Defense. Defense has a staff member dedicated to reviewing old cases, communicating with requesters on the status and scope of their requests, and ensuring the requests are processed. As part of its FOIA improvement plan, the CIA set a goal of reducing its backlog of cases five or more years old by 25%. In its 2007 FOIA annual report to Congress, the CIA reported that it had far exceeded this goal and reduced its oldest cases backlog by 74%. Unlike Treasury, the CIA achieved its reduction by reviewing documents responsive to these requests and releasing information, such as the CIA “Family Jewels” document, which had been one of the oldest pending FOIA requests at the CIA.

Our review of the FOIA improvement plans identified eight agencies and components³⁰ that set as a goal contacting requesters to confirm continued interest in backlogged requests. While it is not inherently improper for agencies to follow up with requesters to ensure they still need the requested documents, agencies should not place the burden on requesters by requiring them to confirm interest in a short period of time or else closing the request. Agencies should operate on the assumption that the requester is still interested in a request—even one many years old—unless the requester informs them otherwise.

The Results: Insufficient Commitment, Minimal Impact

Based on our assessment of the backlog goals and current agency backlogs, it is difficult to say that the executive order succeeded in reducing FOIA backlogs across the government. There was only a 2% decrease overall in pending requests government-wide between the end of FY2005 and the end of FY2007.³¹ But while some agencies set ambitious goals and realized a reduction in their FOIA backlogs, 31% of the agencies with backlogs actually reported an increase in the number of pending requests between 2005 and 2007, despite some of these agencies having set solid backlog reduction goals and meeting them. Of the agencies that did reduce their backlogs, many did so by only a small margin.

Although the executive order has been instrumental in raising the profile of FOIA and FOIA backlogs at federal agencies, it is far from a comprehensive solution to the problem. The varied goals and results in backlog reduction highlight a key problem with the executive order. Agencies that have always taken their FOIA responsibilities seriously tended to set good goals, yet, as illustrated above, in some cases they were unable to meet these goals due to lack of resources. Other agencies took minimal interest in improvement, failing to set adequate, measurable goals that were reasonably likely to reduce the backlog. With no oversight mechanism obliging compliance with the executive order, these agencies—many of which had a history of laxity in observing the FOIA—were allowed to continue with the status quo.

²⁹ The “no response from requester” and “mail returned” categories were first listed in Treasury’s FOIA annual report in FY2005, and apparently signify the so-called stagnant requests that were closed after an inquiry was sent and the requester did not respond confirming his or her continued interest. In FY 2005, 416 requests were withdrawn by requesters, and Treasury closed 120 requests because of no response from the requester and 18 in the “mail returned” category.

³⁰ These include: The Federal Reserve Board, the Peace Corps, the National Transportation and Safety Board, Treasury, Health and Human Services, the Animal and Plant Health Inspection Service at Agriculture, the U.S. Agency for International Development, and the U.S. Chemical Safety and Hazard Investigation Board.

³¹ Based on the National Security Archive’s calculations aggregating data from the available FY2005 and FY2007 annual reports, there were approximately 217,000 requests pending government-wide at the end of FY2005 and approximately 212,000 pending at the end of FY2007.

Moreover, some agencies continue to be unprepared to meet the challenges of the executive order properly. The Attorney General's recent report on executive order implementation acknowledged that backlog reduction was the most challenging area of the executive order, due in part to the increase in the number of requests filed with some agencies as well as other factors beyond each agency's control, such as complexity of requests and referrals.³² Though agencies have set supplemental backlog goals for 2008, 2009 and 2010, there are no details about how agencies will meet these goals, even though some are very aggressive. The analysis above demonstrates that it is not enough for agencies simply to set a numerical target without incorporating specific strategies tailored to the agency's unique circumstances, including resources, FOIA program structure, and the nature of the backlogged requests and record holdings. Insufficient oversight and lack of an enforcement mechanism combined with near-universal shortages of personnel and resources will continue to hamper agencies' efforts to reduce their FOIA backlogs significantly in the coming years.

³² Department of Justice, *Attorney General's Report to the President Pursuant to Executive Order 13,392, Entitled 'Improving Agency Disclosure of Information'*, June 1, 2007.

Agency Web Sites: Still “File Not Found”

The concept of proactive disclosure and the use of agency Web sites to disseminate information and communicate with requesters—a key focus of the executive order—are not new. In 1996, with the nascent Internet becoming a fixture in millions of American homes, Congress set out to bring agency FOIA programs into the computer age. The Electronic Freedom of Information Act Amendments of 1996 (E-FOIA) sought “to encourage on-line access to Government information available under the FOIA . . . [which would] result in fewer FOIA requests, thus enabling FOIA resources to be used more efficiently.”³³

E-FOIA required agencies to make certain categories of information—traditional reading room records like agency policy statements, opinions and orders, and staff manuals as well as the new category of so-called “frequently requested records”³⁴ and certain FOIA guidance—available to the public electronically. It was this mandate that led to the majority of agencies establishing FOIA Web sites and “electronic reading rooms” to comply with the new statutory mandate. Ten years after E-FOIA went into effect, however, many agencies have not fully complied.³⁵ Glaringly absent from the Web sites of some major federal agencies are one or more categories of required documents which, if available, would allow potential FOIA customers to quickly and easily access the records they are seeking without filing a request, reducing both backlogs and administrative costs.

Agency Web Site Goals: A Mixed Bag

Agencies adopted a variety of approaches to reviewing their Web sites and E-FOIA compliance and setting goals for improvement. Some agencies set very broad or general goals that indicated they had not thoroughly reviewed their Web sites and policies for posting required records prior to drafting their plans. For example, several agencies set goals to review their central and/or component Web sites and develop new guidelines or protocols for posting required materials. Problematically, though, the development of protocols for E-FOIA compliance and proactive disclosure may not translate into more publicly-available information. To achieve that goal, agencies must designate responsible officials to monitor compliance consistently, ensuring that components and program offices that create and maintain section (a)(2) required records provide these materials on an ongoing basis, as the records are created and/or identified.

Seeking to fulfill the executive order’s direction to provide citizens with more information about FOIA, many agencies reviewed and revised their FOIA reference guides or handbooks. Some agencies went further in the spirit of the executive order, for example by taking direct action to determine what changes could make agency FOIA Web sites more useful to requesters and the public. In accordance with its improvement plan goals, the Department of State held a focus group with key requesters to discuss how they use the State Department FOIA Web site and what improvements they would suggest. Following the focus group, which members of the National Security Archive staff attended, State made significant improvements to its Web site by reorganizing guidance information and making the site easier to navigate.

Some agencies, including several with Web sites already generally compliant with E-FOIA, focused on proactive disclosure. This term is most commonly used to distinguish disclosure not required by § 552(a)(2), where agencies make available records or categories of records that they believe will be of

³³ House Committee on Government Reform and Oversight, *Electronic Freedom of Information Amendments of 1996*, 104th Cong., 2nd sess., 1996, H.R. Rep. 104-795, 11.

³⁴ These are records that “have become or are likely to become the subject of subsequent requests for substantially the same records.” 5 U.S.C. § 552(a)(2)(D).

³⁵ National Security Archive, *File Not Found: 10 Years After E-FOIA, Most Federal Agencies Are Delinquent*, March 12, 2007, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB216/index.htm>.

interest to the public. Several agencies identified specific types of information that may be subject to many FOIA requests or is of interest to the public,³⁶ which they would begin posting on a regular basis even if the documents did not fall into one of the required categories. One agency, the Department of Housing and Urban Development, went a step further with its goals, proposing a new system whereby program area offices within the agency submit regular reports to the Chief FOIA Officer, identifying specific types of documents maintained in those offices that can be made available to the public as well as “hot button issues” that may be the subject of subsequent FOIA requests. In this way, agency-wide records surrounding issues or events of considerable public interest can be posted in a timely manner, allowing users easy access to the key records without a request—an approach that would be very useful for many of the larger decentralized agencies.

Case Study: Some “E-Delinquents” Still Delinquent

To evaluate whether the executive order has been effective in improving agency Web sites and proactive disclosure, the Archive looked at those agencies and components identified as having the worst Web sites in our 2007 report, *File Not Found: 10 Years After E-FOIA, Most Federal Agencies Are Delinquent*.³⁷ Although that report was completed after the agencies had drafted their initial improvement plans, the agencies’ own reviews *should* have identified the same serious deficiencies in their sites that the Archive found in its standardized review of each Web site. These reviews, based on the statutory requirements and Justice Department guidance on agency FOIA Web sites, looked at a number of features of each site—availability of required records and guidance and/or a FOIA handbook, as well as the overall organization, functionality, and ease of use of their sites.

Eight of the nine agencies in the follow-up review³⁸ established at least one goal relevant to E-FOIA or the agency’s Web site. Several of the agencies, including Defense and Interior, set out comprehensive plans for redesigning their sites. The follow-up review, based on an assessment of the selected agencies’ own reports on their progress and a review of their FOIA Web sites identical to that conducted for all agencies in early 2007, revealed that some agencies took the executive order’s mandate seriously and overhauled their FOIA Web sites with great success. Others apparently took minimal action, despite having set concrete goals, and their Web sites remain inadequate as a tool to help members of the public to get information without a FOIA request or learn about the FOIA process.

Of the 12 agencies and components analyzed, only *five*³⁹ made significant improvements to their Web sites to ensure that they at least complied with all of the basic requirements of E-FOIA and Justice guidance. *Two agencies*⁴⁰ made limited improvements, for example adding comprehensive guidance but failing to post required documents, or vice versa. *Five out of 12 agencies*⁴¹ made no measurable improvements to their Web sites between our initial review and the time that the executive order goals were completed, although all but one (the Office of National Drug Control Policy) of the 12 agencies had goals of bringing their sites into compliance. (See Figure 3)

³⁶ For example, agency contracts (Education); documentation of successful grant proposals (Housing and Urban Development); and certain databases maintained by the agency (Office of Management and Budget).

³⁷ The “E-Delinquents” identified in the Archive’s audit are: the Department of Defense, the Air Force, Department of the Interior, Department of Labor, Federal Labor Relations Authority, Immigration and Customs Enforcement, Transportation Security Administration, Office of the Director of National Intelligence, Office of National Drug Control Policy, Small Business Administration, U.S. Trade Representative, and Department of Veterans Affairs.

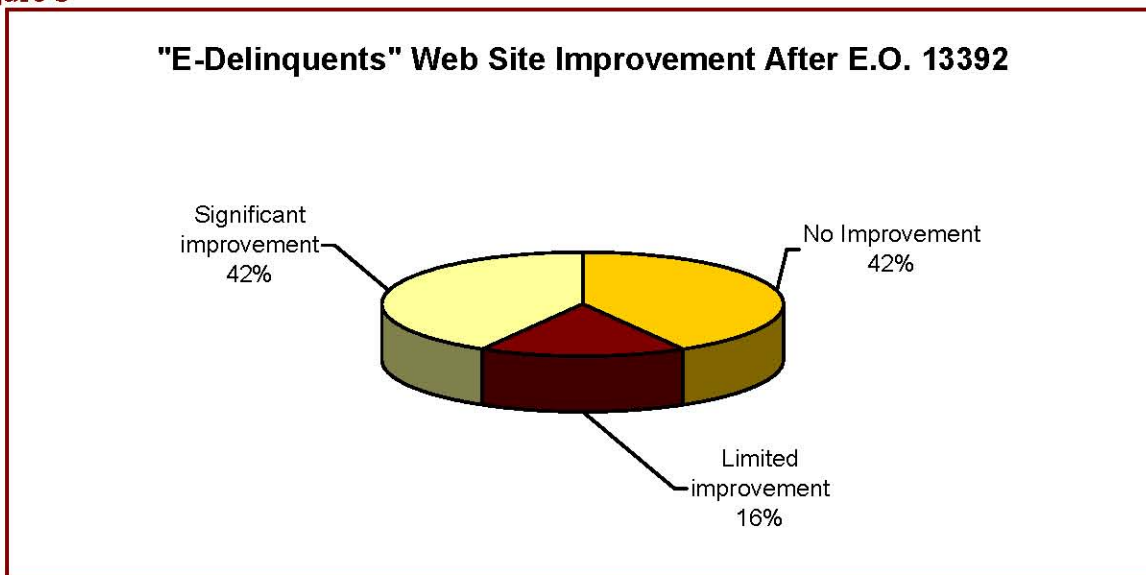
³⁸ The 12 “E-Delinquents” identified in the *File Not Found* report included three agency components that are subsumed under their parent agency for purposes of the E.O. 13,392 improvement plans.

³⁹ The agencies that made significant improvements include: Defense, Air Force, Labor, Office of the Director of National Intelligence, and Veterans Affairs.

⁴⁰ The agencies that made only limited improvements include: Interior and U.S. Trade Representative.

⁴¹ The agencies that made no apparent improvements include: Federal Labor Relations Authority, Immigration and Customs, Transportation Security, Small Business, and Office of National Drug Control Policy.

Figure 3



Of all of the previously delinquent agencies, the Department of Defense had the most success improving its Web site. In accordance with its improvement plan goals, Defense completed a comprehensive overhaul of the agency's central FOIA Web site, creating a portal site to link together all of the component sites and revamping the electronic reading room on the Office of the Secretary of Defense site, which serves as a central repository for agency-wide materials. In addition, Defense published standards for all component FOIA sites and directed components to improve their sites. The Air Force, which received one of the poorest evaluations in our 2007 survey, has enhanced its Web site significantly, posting key guidance and some required materials where none were available before. The Office of the Secretary of Defense site, which also fared poorly in the original review, is now well-organized, and guidance materials and required documents are generally available and easy to locate. Defense's success in improving and standardizing main and component FOIA sites agency-wide is significant, promoting the customer service and efficiency goals of the executive order and moving the agency towards full compliance with the E-FOIA mandates.⁴²

Several agencies, however, made virtually no changes to their Web sites, despite having set goals to improve the sites in accordance with the executive order's directives. Both the Federal Labor Relations Authority and the Small Business Administration announced goals to redesign their Web sites (and the Small Business Administration claimed in its annual report to have completed the overhaul as of the end of FY2007), but the recent reviews showed sites seemingly identical to the previous versions and still seriously lacking in compliance with E-FOIA and basic customer service and guidance materials.⁴³

⁴² Other agencies that achieved significant improvement include Labor, which added an electronic reading room and began posting required documents from many components, as well as significant new guidance and links and contact information for all component offices. The Office of the Director of National Intelligence improved what had been a rudimentary site with virtually no guidance and few required documents by adding a comprehensive handbook and frequently requested records. The Director of National Intelligence also plans for proactive disclosure going forward, including posting more unclassified records that are of interest to the public. The Veterans Administration significantly improved its guidance materials and the organization of its FOIA site. The site now provides well-organized links to guidance information and required documents, as well as other records posted on the Veterans Administration site.

⁴³ Likewise, the two Homeland Security components that fared most poorly in our original survey (Immigration and Customs Enforcement and Transportation Security Administration) appear to have made very slight improvements, but neither has added any guidance information and Immigration and Customs Enforcement posts no required documents while the Transportation Security Administration includes only some frequently requested records but no other (a)(2) records. The situation at Homeland Security demonstrates the significant challenges faced by large, decentralized agencies, particularly with regard to implementing the executive order mandates. Homeland Security set several goals, to be completed in 2006 and 2007, including assessing and initiating improvements to all component FOIA sites, confirming compliance with § 552(a)(2)

Several other agencies made slight improvements, or improved in only one area, but their sites remain deficient. For example, Interior achieved its goal of revising its Reference Guide and redesigning its main FOIA Web site, but the Interior FOIA site still does not have a comprehensive guide for FOIA requesters—only an abbreviated question and answer page that is lacking in important guidance information such as details about fee status and fee waiver and the required indexes of major information and record locator systems.⁴⁴

Going Forward: Web Sites Are a Powerful Tool for Customer Service

Although the executive order directed agencies to review and improve their Web sites, both to bring them into compliance with the law and to use them as tools for customer service and efficient communication with requesters, it is clear that the president's directive did not result in meaningful progress across the board. With neither specific directives about how agencies should be using and updating their Web sites, nor an enforcement mechanism to ensure full compliance with E-FOIA at every agency, the executive order is largely an ineffectual tool. Many agencies that were already inclined to comply with E-FOIA, and with the FOIA in general, took this as an opportunity to begin using the Internet to its fullest potential, benefiting their FOIA programs and improving customer service and public access without incurring significant additional expense. But others that had not previously been motivated to engage in affirmative and proactive disclosure and comply with E-FOIA had little incentive under the executive order to change their ways substantially.

Many of the goals agencies set were too broad to result in substantial improvements to FOIA sites, particularly at the component level. Moreover, many of the problems identified in our earlier E-FOIA report likely stem from agencies' inability—not simply unwillingness—to comply with the law. For example, agencies that lack electronic tracking systems for requests cannot adequately identify frequently requested records and ensure that they are posted. Similarly, agency FOIA personnel may not have the necessary knowledge about types of records created elsewhere in the agency and whether they may fall into one of the categories for which posting is required. Some agencies set goals aimed at meeting these challenges—such as conducting audits of agency records to find those that fall within the (a)(2) categories and establishing guidelines for identifying frequently requested records—but this area is particularly difficult because it requires an ongoing commitment to post records as they are identified. Agencies should consider their unique organizational structure, reaching out to those officials or program offices that create the records to identify those that should be disclosed without a FOIA request.

Agencies should also think creatively about the most effective ways to improve their FOIA Web sites—for example, talking with frequent requesters to identify potential improvements or seeking user feedback through the site itself. In addition, more agencies should consider using their Web sites to interact with requesters, including by permitting FOIA requests and status inquiries to be submitted electronically to allow for more efficient processing. Although E-FOIA does not require agencies to receive requests by electronic means, the increasing public familiarity with online forms makes this option feasible. The recently enacted FOIA amendments specifically mandate that agencies establish a telephone or Internet service that allows requesters to find out specific status information about their requests, including tracking numbers and estimated completion dates. In implementing this mandate in light of the executive order's customer service emphasis, agencies should provide for both types of status inquiries.

requirements for posting records, and “[i]ncreas[ing] proactive disclosure of documents on component and office web sites to allow public access to records without submitting a FOIA request.”

⁴⁴ The Office of the U.S. Trade Representative has also improved guidance materials available on its FOIA site and added a FOIA link to the main agency home page, but no required documents are available despite a goal to review the FOIA site quarterly to ensure that all required documents are posted.

Conclusion: Mixed Signals, Mixed Results

Since Executive Order 13,392 went into effect with great fanfare in December 2005, measurable progress in fixing the broken FOIA system across the federal government has been inconsistent. The order raised the profile of FOIA at many agencies and called attention to rampant FOIA backlogs (an effort started by the Archive's FOIA Audits several years before the executive order was issued). Pushing higher level agency management to take responsibility for FOIA enabled some agencies to leverage more resources for FOIA programs. The order also pressed agencies to look closely at their FOIA programs, identify problems, and set goals to improve their programs—steps that many agencies starved for resources and staff would not have otherwise undertaken.

In many ways, however, the executive order has proved to be an ineffective tool. It was not accompanied by any resources, which many agencies needed to carry out some of the more ambitious goals. Additionally, the executive order lacks a genuine enforcement mechanism, leaving the improvement plan process to be self-guided at agencies where FOIA has been neglected and poorly managed for decades. Those agencies that have always taken FOIA seriously and have seen it as an integral part their agency's mission tended to approach the executive order with greater diligence and set more aggressive, forward-looking goals calculated to result in real improvement of FOIA processing and a reduction in the FOIA backlog. For those agencies where FOIA has always been marginalized, there is nothing in the order to compel them to change their ways. But even some of the most conscientious agencies failed to make significant progress because of insufficient resources or systemic defects that they cannot unilaterally change, such as those that afflict the process for inter-agency referrals and consultations. Moreover, reporting on the executive order by the Department of Justice, which was charged with some oversight of the implementation process, has painted a rosy picture that masks deficiencies and shortcomings of agency goals and fails to acknowledge the resource challenges at many agencies.

Through recent legislation amending the FOIA, Congress has provided a mandate with more teeth and much greater accountability to the public. By codifying some elements of the executive order and requiring better reporting and tracking as well as penalties for noncompliance, the amendments establish the enforcement mechanism that is notably absent from the executive order. The recent FOIA amendments, however, are just one of the necessary steps to fixing the many challenges FOIA faces. Without more resources and better Congressional and public oversight, some agencies may continue to be unable or unwilling to bring their FOIA programs into full compliance with the law.

Bibliography

LEGISLATIVE HISTORY

OPEN Government Act of 2007, Public Law 110-175, *U.S. Statutes at Large* 121 (2007):2525 (enacted Dec. 31, 2007).

Electronic Freedom of Information Act Amendments of 1996, Public Law 104-231, *U.S. Statutes at Large* 110 (1996):3048.

EXECUTIVE BRANCH MATERIALS

Agency FOIA Improvement Plans under E.O. 13,392. Available at www.usdoj.gov/oip/agency_improvement.html

Agency Annual FOIA Reports to Congress. Available at http://www.usdoj.gov/oip/04_6.html

Agency Backlog Reduction Goals for Fiscal Years 2008, 2009, and 2010. Available on each agency's FOIA Web site.

Executive Office of the President, *Improving Agency Disclosure of Information*, Executive Order 13,392. December 14, 2005.

Executive Office of the President. *Statement of Administration Policy on H.R. 1309 – Freedom of Information Act Amendments of 2007*. March 14, 2007.

Government Accountability Office. *Freedom of Information Act: Preliminary Analysis of Processing Trends Shows Importance of Improvement Plans*, Testimony of Linda D. Koontz before the Subcommittee on Government Management, Finance and Accountability, Committee on Government Reform, House of Representatives, GAO-06-1022T. July 26, 2006.

Government Accountability Office. *Freedom of Information Act: Processing Trends Show Importance of Improvement Plans*, Testimony of Linda D. Koontz before the Subcommittee on Information Policy, Census, and National Archives, House Committee on Oversight and Government Reform, GAO-07-491T. February 14, 2007.

Government Accountability Office. *Freedom of Information Act: Processing Trends Show Importance of Improvement Plans*, GAO-07-441. March 2007.

Office of Management and Budget. *Memorandum: Implementation of the President's Executive Order "Improving Agency Disclosure of Information"*. Joel D. Kaplan, M-06-04. December 30, 2005.

U.S. Department of Justice. *Freedom of Information Act Guide. March 2007*. http://www.usdoj.gov/oip/foia_guide07.htm.

U.S. Department of Justice, Office of the Attorney General. *Attorney General's Report to the President Pursuant to Executive Order 13,392, Entitled "Improving Agency Disclosure of Information."* June 1, 2007.

U.S. Department of Justice. "Executive Order 13,392 Implementation Guidance." *FOIA Post*, 2006. <http://www.usdoj.gov/oip/foiapost/2006foiapost6.htm>.

U.S. Department of Justice. "Guidance on Submitting Updated Status Reports to the President's Management Council." *FOIA Post*, 2007. <http://www.usdoj.gov/oip/foiapost/2007foiapost5.htm>.

U.S. Department of Justice. "Upcoming Conferences and Training Related to Implementation of Executive Order 13,392." *FOIA Post*, 2007. <http://www.usdoj.gov/oip/foiapost/2007foiapost7.htm>.

U.S. Department of Justice. "Guidance on Submitting Backlog Reduction Goals for Fiscal Years 2008, 2009, and 2010." *FOIA Post*, 2007. <http://www.usdoj.gov/oip/foiapost/2007foiapost9.htm>.

U.S. Department of Justice. "Supplemental Guidance for Preparation and Submission of Section XII of Agency Fiscal Year 2007 Annual FOIA Reports." *FOIA Post*, 2007. <http://www.usdoj.gov/oip/foiapost/2007foiapost17.htm>.

U.S. Department of Justice. "Modified Templates to Use When Submitting Backlog Reduction Goals for Fiscal Years 2008, 2008, and 2010." *FOIA Post*, 2007. <http://www.usdoj.gov/oip/foiapost/2007foiapost18.htm>.

NEWS ARTICLES AND MISCELLANEOUS

"Reaction of Senator Patrick Leahy to President's FOIA Executive Order." *States News Service*, December 14, 2005.

OpenTheGovernment.org. *FOIA's 40th Anniversary: Agencies Respond to the President's Call for Improved Disclosure of Information*, July 4, 2006.