

Glass Half Full

2011 Knight Open Government Survey
Finds Freedom of Information Change



www.nsarchive.org

But Many Agencies Lag in Following
Obama's Openness Order

THE KNIGHT OPEN GOVERNMENT SURVEY 2011

**CONDUCTED BY
THE NATIONAL SECURITY ARCHIVE
THE GEORGE WASHINGTON UNIVERSITY**

WWW.NSARCHIVE.ORG

MARCH 14, 2011

EXECUTIVE SUMMARY

Washington DC, 14 March 2011 – The Obama administration is only about halfway toward its promise of improving Freedom of Information responsiveness among federal agencies, according to the new Knight Open Government Survey by the National Security Archive, released today for Sunshine Week at www.nsarchive.org.

On his first full day in office, January 21, 2009, President Obama issued a presidential memorandum instructing federal agencies to “usher in a new era of open government.” In March 2010, however, the 2010 Knight Open Government Survey found that only 13 out of 90 agencies had actually made concrete changes in their FOIA procedures. The resulting national headlines sparked a new White House call to all agencies to show concrete change. This year, the 2011 Knight Open Government Survey found that half of the federal agencies have complied – up from 13 to 49.

“At this rate, the president’s first term in office will be over by the time federal agencies do what he asked them to do on his first day in office,” commented Eric Newton, senior adviser to the president at the John S. and James L. Knight Foundation. “Freedom of information laws exist to help all of us get the information we need for this open society to function. Yet government at all levels seems to have a great deal of trouble obeying its own transparency laws.”

Modeled after the California Sunshine Survey and subsequent state “FOI Audits,” the Archive’s series of Knight Open Government Surveys since 2002 use open government laws to determine whether or not agencies are obeying those same laws. Recommendations from previous Knight Open Government Surveys led directly to laws and executive orders which have: set explicit customer service guidelines, mandated FOIA backlog reduction, assigned individualized FOIA tracking numbers, forced agencies to report the average number of days needed to process requests, and revealed the (often embarrassing) ages of the oldest pending FOIA requests.

“The Obama administration told us last year that one year was too short a time to show real change,” said Tom Blanton, director of the National Security Archive. “This year’s Knight Survey reveals a glass half full of open government, and some persisting deep problems including FOIA requests marooned for years in never-ending referrals among agencies.”

The 2011 Knight Open Government Survey team filed FOIA requests with the 90 federal agencies that have chief FOIA officers, asking for copies of concrete changes in their FOIA regulations, manuals, training materials, or processing guidance as a result of the “Day One” Obama memorandum, and the March 2010 White House memorandum from then-Chief of Staff Rahm Emanuel and White House Counsel Bob Bauer. The Emanuel-Bauer Memo incorporated a two-step process, telling agencies to 1) update all FOIA material, and 2) assess whether FOIA resources were adequate.

Several agencies demonstrated significant changes in their processes, major upgrades to their Web postings on FOIA, and improved responsiveness to requesters. But others showed no change as yet, or failed even to respond in a timely fashion to the Knight Survey requests. In one egregious case, the U.S. Postal Service stated it had “no responsive records.” It said it had never received the Emanuel-Bauer memo.

“Perhaps the Postal Service lost that memo in the mail,” commented Nate Jones, the Archive’s FOIA coordinator who managed the Knight Survey requests. He noted that 17 agencies are still working on the request after 117 business days when the law requires a reply within 20 business days, and that four agencies did not even acknowledge receiving the Archive’s FOIA request despite numerous follow-up calls and faxes. “That indifference toward FOIA shows just how far some agencies lag behind implementing the law that President Obama called ‘a profound national commitment to ensuring an open government,’” Jones said.

In particular, the Archive found significant change among the responsive agencies in the area of discretionary releases of information. Before the Obama proclamations, agencies withheld most drafts of internal documents, and even staff-level reports, under the 5th exemption to the FOIA that applies to “pre-decisional” or “deliberative process” information. Openness advocates had long argued that this kind of material was exactly what was necessary to bring the greatest transparency and accountability to government decision-making. Now, agency reporting shows declining use of the so-called “b(5)” exemption, and the 2011 Knight Survey even received multiple responses from the high-scoring agencies that included their own drafts and internal e-mails about how to respond to the Emanuel-Bauer memo. A standout here was the Department of the Interior, which provided copies of e-mail exchanges noting how the agency’s own IT restrictions kept FOIA officers from seeing key FOIA blogs – a problem no doubt now remedied.

Agency responses to the Archive’s FOIA requests also highlighted the real potential of online proactive disclosure as the most efficient way to inform the public and reduce the burden of individual request processing. The highest-scoring agencies in the 2011 Knight Survey provided multiple examples of online publication of materials that previously had to be requested under FOIA, but now are accessible with the click of a mouse. A notable example here was the Consumer Product Safety Commission, which finally this month is fulfilling a Congressional mandate from 2008 to put online its consumer complaints database – dealing with product defects in baby cribs, drywall, and the like. Manufacturers and Congressional critics had threatened to hold up the public’s online access to this important safety information, but Obama administration commitment clearly carried the day.

In contrast, 12 federal agencies reported still-pending FOIA requests more than six years old, when the law requires a 20-business-day response time. The Archive’s findings suggest a major part of the problem is the “daisy-chain” of referrals between agencies, since 10 out of the 12 with ancient requests reported similarly ancient referrals.

2011 Knight Open Government Survey

This chart shows which agencies have reported action on the president's open government order:

AS OF 3/10/11

FEDERAL AGENCY

FEDERAL AGENCY	CONCRETE ACTION ON TWO STEPS	CONCRETE ACTION ON ONE STEP	DOCUMENTS RELEASED, NO CONCRETE ACTION	NO DOCUMENTS	WITHHELD DOCUMENTS	NO FINAL RESPONSE TO FOIA REQUEST	NO ACKNOWLEDGEMENT OF FOIA REQUEST
AMTRAK	■						
COMMISSION ON CIVIL RIGHTS	■						
DEPARTMENT OF AGRICULTURE	■						
DEPARTMENT OF DEFENSE	■						
DEPARTMENT OF THE INTERIOR	■						
DEPARTMENT OF HEALTH AND HUMAN SERVICES	■						
NUCLEAR REGULATORY COMMISSION	■						
OFFICE OF GOVERNMENT ETHICS	■						
OCCUPATIONAL SAFETY & HEALTH REVIEW COMM.	■						
SURFACE TRANSPORTATION BOARD	■						
DEPARTMENT OF TREASURY	■						
TENNESSEE VALLEY AUTHORITY	■						
DEPARTMENT OF VETERANS AFFAIRS	■						
CORPORATION FOR NAT'L & COMMUNITY SERVICE		■					
UNITED STATES COPYRIGHT OFFICE		■					
COMMODITY FUTURES TRADING COMMISSION		■					
CONSUMER PRODUCT SAFETY COMMISSION		■					
DEPARTMENT OF HOMELAND SECURITY		■					
OFFICE OF THE DIRECTOR OF NAT'L. INTELLIGENCE		■					
DEPARTMENT OF LABOR		■					
OFFICE OF NATIONAL DRUG CONTROL POLICY		■					
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION		■					
ENVIRONMENTAL PROTECTION AGENCY		■					
FEDERAL ENERGY REGULATORY COMMISSION		■					
FEDERAL TRADE COMMISSION		■					
GENERAL SERVICES ADMINISTRATION		■					
NATIONAL ARCHIVES & RECORDS ADMINISTRATION		■					
BROADCASTING BOARD OF GOVERNORS		■					
DEFENSE NUCLEAR FACILITIES SAFETY BOARD		■					
FEDERAL DEPOSIT INSURANCE CORPORATION		■					
FEDERAL HOUSING FINANCE AGENCY		■					
FEDERAL LABOR RELATIONS AUTHORITY		■					
FEDERAL OPEN MARKET COMMITTEE		■					
FEDERAL RESERVE SYSTEM		■					
DEPARTMENT OF HOUSING & URBAN DEV.		■					
INTER-AMERICAN FOUNDATION		■					
U.S. INTERNATIONAL TRADE COMMISSION		■					
FEDERAL MINE SAFETY & HEALTH REVIEW COMM.		■					
NATIONAL CAPITAL PLANNING COMMISSION		■					
NATIONAL CREDIT UNION ADMINISTRATION		■					
NATIONAL LABOR RELATIONS BOARD		■					
NATIONAL MEDIATION BOARD		■					
NATIONAL SCIENCE FOUNDATION		■					
OFFICE OF MANAGEMENT AND BUDGET		■					
OFFICE OF SCIENCE AND TECHNOLOGY POLICY		■					

FEDERAL AGENCY

FEDERAL AGENCY	CONCRETE ACTION ON TWO STEPS	CONCRETE ACTION ON ONE STEP	DOCUMENTS RELEASED, NO CONCRETE ACTION	NO DOCUMENTS	WITHHELD DOCUMENTS	NO FINAL RESPONSE TO FOIA REQUEST	NO ACKNOWLEDGEMENT OF FOIA REQUEST
PENSION BENEFIT GUARANTY CORPORATION	■						
SMALL BUSINESS ADMINISTRATION	■						
SECURITIES AND EXCHANGE COMMISSION	■						
SOCIAL SECURITY ADMINISTRATION	■						
FEDERAL COMMUNICATIONS COMMISSION		■					
AMERICAN BATTLE MONUMENTS COMMISSION			■				
COMM. FOR PURCHASE FROM BLIND OR DISABLED			■				
DEPARTMENT OF TRANSPORTATION			■				
FARM CREDIT SYSTEM INSURANCE CORPORATION			■				
FEDERAL MEDIATION AND CONCILIATION SERVICE			■				
INTERNATIONAL BOUNDARY & WATER COMMISSION			■				
MILLENNIUM CHALLENGE CORPORATION			■				
NATIONAL ENDOWMENT FOR THE ARTS			■				
NATIONAL INDIAN GAMING COMMISSION			■				
OVERSEAS PRIVATE INVESTMENT CORPORATION			■				
PEACE CORPS			■				
THE POSTAL REGULATORY COMMISSION			■				
RAILROAD RETIREMENT BOARD			■				
SELECTIVE SERVICE SYSTEM			■				
U.S. TRADE AND DEVELOPMENT AGENCY			■				
FEDERAL RETIREMENT THRIFT INVESTMENT BRD.			■				
U.S. POSTAL SERVICE			■				
INSTITUTE OF MUSEUM AND LIBRARY SERVICES				■			
NATIONAL ENDOWMENT FOR THE HUMANITIES				■			
AGENCY FOR INTERNATIONAL DEVELOPMENT					■		
COUNCIL ON ENVIRONMENTAL QUALITY					■		
CENTRAL INTELLIGENCE AGENCY					■		
DEPARTMENT OF COMMERCE					■		
DEPARTMENT OF ENERGY					■		
DEPARTMENT OF JUSTICE					■		
DEPARTMENT OF STATE					■		
DEPARTMENT OF EDUCATION					■		
EXPORT-IMPORT BANK					■		
FEDERAL ELECTION COMMISSION					■		
FEDERAL MARITIME COMMISSION					■		
NATIONAL AERONAUTICS & SPACE ADMIN.					■		
NATIONAL TRANSPORTATION SAFETY BOARD					■		
OFFICE OF PERSONNEL MANAGEMENT					■		
OFFICE OF SPECIAL COUNSEL					■		
OFFICE OF THE U.S. TRADE REPRESENTATIVE					■		
PUBLIC HEALTH SERVICE					■		
CHEMICAL SAFETY & HAZARD INVESTIGATION BRD.						■	
COURT SERVICES & OFFENDER SUPERVISION AGY.						■	
LEGAL SERVICES CORPORATION						■	
MERIT SYSTEMS PROTECTION BOARD						■	

TABLE OF CONTENTS

Executive Summary	i
Table of Contents	iv
Acknowledgments	v
Introduction	1
Key Findings	2
Recommendations	3
Implementation of Obama Freedom of Information Act Policy and Procedure	4
Release and Denial Decisions: Big Steps, Small Steps – Generally Forward	10
Backlogs and Consultations	12
Aggregate FOIA Data	13
Methodology	15

ACKNOWLEDGEMENTS

The Knight Open Government Survey has been made possible by generous funding from the John S. and James L. Knight Foundation. For this support, the National Security Archive offers special thanks to Eric Newton (who pioneered FOIA auditing in California), Alberto Ibargüen, and Amy Starlight Lawrence.

This report was written by Nate Jones and Daniel Jenkins and was edited by Tom Blanton and Malcolm Byrne. Maria Lorena Martinez, Seth Maddox, Bernie Horowitz, and Wendy Valdes gave invaluable assistance by filing FOIA requests, processing documents, editing drafts, and compiling statistics. Ashley Houghton and Mark Reading-Smith at Rethink Media provided excellent outreach assistance, as did Marika Lynch and Tom Weinkle of Knight. Thank you to Meredith Fuchs, Barbara Elias, Catherine Nielsen, and Kristin Adair for developing earlier versions of the methodology used in this report and compiling the historical data. Gratitude goes to Jamie Noguchi for graphics and video. Michael Evans -- as always -- did a bang-up job making our text and data accessible to the public on our Web site at www.nsarchive.org.

Previous Knight Open Government Surveys prepared by the National Security Archive include:

- Sunshine and Shadows: The Clear Obama Message For Freedom of Information Meets Mixed Results (March 15, 2010)
<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB308/index.htm>
- Mixed Signals, Mixed Results: How President Bush's Executive Order on FOIA Failed to Deliver (March 16, 2008)
<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB246/index.htm>
- 40 Years of FOIA, 20 Years of Delay (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

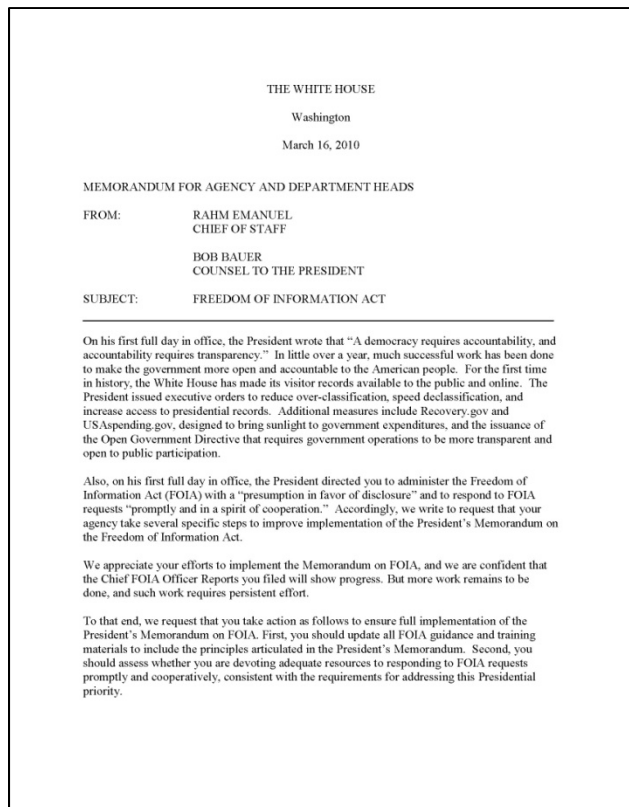
On his first full day in office, January 21, 2009, President Obama issued a presidential memorandum instructing federal agencies to “usher in a new era of open Government.”¹ The 2010 Knight Open Government Survey, *Sunshine and Shadows: The Clear Obama Message for Freedom of Information Meets Mixed Results*, found that only 13 out of 90 agencies had actually responded to the president’s order with concrete changes in their FOIA procedures during the first year of Obama’s administration.² Norm Eisen, the special counsel to the president for ethics and government reform, responded to the survey’s results by telling *The New York Times* that, “it will probably take another year before the changes are fully seen.”³

Sparked by national headlines regarding the openness gap, White House Chief of Staff Rahm Emanuel and White House Counsel Bob Bauer sent a memo on March 16, 2010 to each agency that explained, “more work remains to be done.” This work included two “specific steps:”⁴

- “Updat[ing] all FOIA guidance and training materials to include the principles articulated in the President’s Memorandum.”
- And, “Assess[ing] whether you are devoting adequate resources to responding to FOIA requests promptly and cooperatively.”

One year later – encouraged by Eisen’s reaction – the National Security Archive conducted the 2011 Knight Open Government Survey, *Glass Half Full: Freedom of Information Change*,

But Many Agencies Lag in Following Obama’s Openness Order, to audit the federal agencies’ progress on FOIA. The National Security Archive utilized the same methodology it employed in its eight previous Open Government Surveys – using Freedom of Information Act requests to test FOIA compliance by agencies. In this case, the Archive requested documents that would demonstrate whether the agencies had fulfilled the two specific steps mandated by the Emanuel-Bauer memo.



¹ http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act/

² <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB308/index.htm>

³ http://www.nytimes.com/2010/03/15/us/politics/15open.html?_r=1

⁴ http://www.whitehouse.gov/sites/default/files/rss_viewer/foia_memo_3-16-10.pdf

KEY FINDINGS

The 2011 Knight Open Government Survey finds that the Obama administration – which the president pledged would be the “most open and transparent administration in history” – is only about halfway toward its promise of improving Freedom of Information Act responsiveness among federal agencies. In summary, systematic Freedom of Information requests by the National Security Archive found:

- 49 agencies took concrete action in response to the Emanuel-Bauer memo, but only 24 agencies actually updated their FOIA training materials and guidance, and only 13 agencies fulfilled both steps required by the Emanuel-Bauer memo.
- 41 agencies failed to complete either of the steps mandated by the Emanuel-Bauer memo: 17 could not provide concrete records showing that they had followed the memo’s instructions; two agencies withheld documents by incorrectly citing FOIA exemptions; 17 agencies are still working on the request after more than 100 business days (even though only 20 business days are allowed by law); one agency provided documents which showed no evidence of following the memo; and four agencies have not even acknowledged our request despite numerous calls and faxes.
- The Archive’s analysis of FOIA data reported by the agencies on their releases and denial decisions shows mixed progress with a tentative move toward greater releases of documents through FOIA, although some agencies that were improving last year have now regressed.
- Ancient requests – as old as 18 years – still languish in the FOIA system. Twelve agencies have outstanding FOIA requests older than six years. This year’s Survey showed that the albatross-like interagency consultation process is a major contributor to delay.
- Expenditure data reported by agencies show the total cost of FOIA is less than \$1.24 per American, per year. Isn’t it worth the cost of a pack of gum each year to know what your government is up to?

RECOMMENDATIONS

Based on the findings of the 2011 Knight Open Government Survey, the National Security Archive urges White House Chief of Staff William Daley and White House Counsel Bob Bauer to issue a new memo addressed to all agency heads telling them to speed up their adoption of the President's Freedom of Information policies. Without renewed and repeated White House pressure, many agencies will continue to lag. The new "Daley-Bauer Memo" should instruct agencies to:

- Change their training manuals and guidance materials immediately to reflect the President's presumption for disclosure.
- Create a high-level "openness team" within each agency to address Freedom of Information performance together with the whole spectrum of the President's openness reforms.

These two marching orders would reinforce the best practices found by the Archive in our series of Knight Open Government Surveys over the past nine years. The Emanuel-Bauer Memo definitely had an effect on agencies, but more is needed.

Only 24 out of 90 federal agencies this year could show concrete changes to their actual training materials on FOIA as a result of the new Obama policies, and unless bureaucracies make such tangible changes, the White House calls for openness will produce sound but not substance.

Similarly, agencies that showed the most progress across multiple metrics – not only FOIA responsiveness but online publication of information and datasets – tended to be the ones that applied real leadership to the challenge, with groups of senior officials engaged. Such "openness teams" included top officials not only from the FOIA office, but the public relations and communications shops, the counsel's office, the chief information officer, technology experts, senior fiscal and operational managers, and the agency head or deputy.

The challenge for these "openness teams" is wide-ranging. In the first two years of the Obama administration, the President's openness reforms included the "Day One" memorandum on the presumption of openness, the Attorney General's memorandum on FOIA, the Open Government Directive, the expansion of online and proactive disclosure of information, the Executive Order placing restrictions on the proliferation of "controlled unclassified information," and the Executive Order calling for fundamental classification reviews in those agencies holding security classified information, among other initiatives. These laudable reforms deserve highest-level and coordinated attention in each agency, not the business-as-usual "stovepipe" approach.

IMPLEMENTATION OF OBAMA FREEDOM OF INFORMATION ACT POLICY AND PROCEDURE

In the 2010 Knight Open Government Survey, only 13 of the 90 agencies provided documentation that demonstrated concrete changes in guidance, training materials, or practices. Following the publication of those results, White House Chief of Staff Rahm Emanuel and White House Counsel Bob Bauer stated to federal agencies that “more work remains to be done” in implementing President Obama’s January 21, 2009 memorandum on the Freedom of Information Act and Attorney General Eric Holder’s March 19, 2009 memorandum on required FOIA practices.

The March 16, 2010 Emanuel-Bauer Memorandum instructed federal agencies to undertake “several specific steps” to fulfill the FOIA requirements stipulated by the President and Attorney General. Using the system to test the system, the National Security Archive sent FOIA requests to 90 federal agencies and departments asking for documents related to the two steps specifically mentioned in the Emanuel-Bauer memorandum:⁵

- “updat[ing] all FOIA guidance and training materials to include the principles articulated in the President’s Memorandum”
- “assess[ing] whether you are devoting adequate resources to responding to FOIA requests promptly and cooperatively.”

The agencies’ compliance or non-compliance with these two steps is the basis for the 2011 Knight Open Government Survey. Responsive agencies were graded on whether or not they showed concrete steps toward addressing either demand. The 2010 Knight Survey’s metrics were also integrated to note the level of response across all agencies and the level of improvement or regression since the 2010 Knight Survey.

The metric used to gauge agency responses to the FOIA request is as follows:

- 1) **Two Steps Forward:** Agency final response yields documents that demonstrate both steps of the Emanuel-Bauer memorandum being fulfilled.
- 2) **One Step Forward:** Agency final response yields documents that demonstrate one of the steps of the Emanuel-Bauer memorandum being fulfilled.

⁵ The 90 agencies are listed on the Department of Justice Office of Information Policy website, available at <http://www.justice.gov/oip/foiacontacts.htm>.

- 3) **No Documents:** Agency final response states that the agency has no documents pertaining to the FOIA request, or agency final response yields documents but they are withheld under FOIA exemption b(5)⁶.
- 4) **No Decision:** Agency has acknowledged receipt of the FOIA request, but has not sent a final decision.
- 5) **No Response:** Agency did not acknowledge receipt of the FOIA request.

To fulfill the first step asked for by the Emanuel-Bauer Memorandum, agencies had to provide evidence that they had updated their FOIA guidance and training materials to “include the principles articulated in the President’s memorandum.” Similarly, the second step required evidence of an agency assessment of resources dedicated to responding to FOIA requests “promptly and cooperatively.” Internal communications discussing “intentions” or “plans” without evidence of any action taken, or mere dissemination of the Emanuel-Bauer, Holder, or Obama memoranda were not considered concrete. Furthermore, attendance at FOIA training sessions without evidence of a review of training material used was not considered concrete.

Fifty of the 90 agencies (55%) surveyed sent final decisions that contained documents or links to FOIA websites with relevant literature. Forty-nine of these agencies are cataloged under the “One Step Forward” or “Obama Two-Step” category. These results represent marked improvement in overall Executive Branch efforts to comply with the FOIA policies put forward by President Obama⁷ compared with the 13 of 90 agencies (14%) who performed similarly in the 2010 Knight Survey.

⁶ Privileged interagency or intra-agency memoranda or letters.

⁷ Full documentation of the survey as of 3/13/2011 is available in the Appendices.

“The Obama Two-Step” (13 of 90, 14%)

Agencies that Fulfilled Both Steps (13)

- Amtrak
- Commission on Civil Rights
- Department of Agriculture
- Department of Defense
- Department of the Interior
- Department of Health and Human Services
- Nuclear Regulatory Commission
- Office of Government Ethics
- Occupational Safety and Health Review Commission
- Surface Transportation Board
- Department of Treasury
- Tennessee Valley Authority
- Department of Veterans Affairs

13 agencies fulfilled both steps of the Emanuel-Bauer memorandum. Nine agencies also showed concrete responses to the Obama administration’s FOIA policy in last year’s Survey.⁸ Documents from these “best FOIA practice agencies” include high-level conversations about improving openness, revised training materials, and internal deliberations about FOIA which likely would have previously been denied by the FOIA exemption that covers pre-decisional agency process. Here is one example of

discretionary release, by the Department of the Interior, regarding Obama’s day-one memo on the FOIA.

Date: 01/23/2009 07:21 AM
Subject: RE: FOIA Memorandum Issued by President Obama - Jan. 21, 2009

Alex,

I do find a bit of humor in not being able to visit this blog site on FOIA because we at DOI are blocking access.

If you have another link or can get one unblocked, that would be great.

Roy

Since the Department of the Interior began discussing how to improve their FOIA practices soon after Obama’s memo, released improved training materials, and granted public access to internal deliberative emails, it is also likely that the Department was quick to stop blocking its employees from accessing blogs about FOIA.

⁸ The Department of Defense, Department of Health and Human Services, Department of the Interior, Environmental Protection Agency, Federal Energy Regulatory Commission, Nuclear Regulatory Commission, Occupational Safety and Health Review Commission, Social Security Administration, Surface Transportation Board.

Updated FOIA Training Materials and Guidance (11)

- Commodity Futures Trading Commission
- Department of Homeland Security
- Office of the Director of National Intelligence
- Department of Labor
- Office of National Drug Control Policy
- Equal Employment Opportunity Commission
- Environmental Protection Agency
- Federal Energy Regulatory Commission
- Federal Trade Commission
- General Services Administration
- National Archives and Records Administration

Assessment of Resource Allocation (25)

- Broadcasting Board of Governors
- Corporation for National and Community Service
- Consumer Product Safety Commission
- Defense Nuclear Facilities Safety Board
- Federal Deposit Insurance Corporation
- Federal Housing Finance Agency
- Federal Labor Relations Authority
- Federal Open Market Committee
- Federal Reserve System
- Department of Housing and Urban Development
- Inter-American Foundation
- U.S. International Trade Commission
- Federal Mine Safety and Health Review Commission
- National Capital Planning Commission
- National Credit Union Administration
- National Labor Relations Board
- National Mediation Board
- National Science Foundation
- Office of Management and Budget
- Office of Science and Technology Policy
- Pension Benefit Guaranty Corporation
- Small Business Administration
- Securities and Exchange Commission
- Social Security Administration
- United States Copyright Office

One Step Forward (36 of 90, 40%)

Among the 36 agencies that have fulfilled only one of the steps in the Emanuel-Bauer memorandum, 17 provided some documentation of either training session attendance or outlines for fulfilling both Emanuel-Bauer steps in the future.⁹ The Federal Communications Commission did not demonstrate either of the steps in a concrete manner, but did indicate that the Emanuel-Bauer Memorandum and guidance from the Department of Justice FOIA Post¹⁰ were circulated and discussed.

This 2011 Knight Survey gives credit to 49 agencies for taking concrete steps to improve FOIA, even though the findings show only 24 of those agencies actually addressed the Emanuel-Bauer call for them to update their FOIA guidance and training materials. Therefore, calling the results a “Glass Half Full” may well overstate the degree to which agencies are getting the message.

⁹ Broadcasting Board of Governors, Corporation for National and Community Service, Consumer Product Safety Commission, Defense Nuclear Facilities Safety Board, Department of Labor, Environmental Protection Agency, Federal Housing Finance Agency, Federal Labor Relations Authority, Federal Reserve System, Department of Housing and Urban Development, National Labor Relations Board, National Credit Union Administration, National Mediation Board, Office of Science and Technology Policy, Small Business Administration, Securities and Exchange Commission, Social Security Administration.

¹⁰ <http://www.justice.gov/oip/foiapost/mainpage.htm>.

No Records (17 of 90, 18%)

- American Battle Monuments Commission
- Commission for Purchase From Blind or Disabled
- Department of Transportation
- Farm Credit System Insurance Corporation
- Federal Mediation and Conciliation Service
- International Boundary and Water Commission
- Millennium Challenge Corporation
- National Endowment for the Arts
- National Indian Gaming Commission
- Overseas Private Investment Corporation
- Peace Corps
- Postal Regulatory Commission
- Railroad Retirement Board
- Selective Service System
- U.S. Trade and Development Agency
- Federal Retirement Thrift Investment Board
- U.S. Postal Service

Documents Withheld (2 of 90, 2%)

- Institute of Museum and Library Services
- National Endowment for the Humanities

“Not Even Rahm Emanuel Could Reach” (19 of 90, 21%)

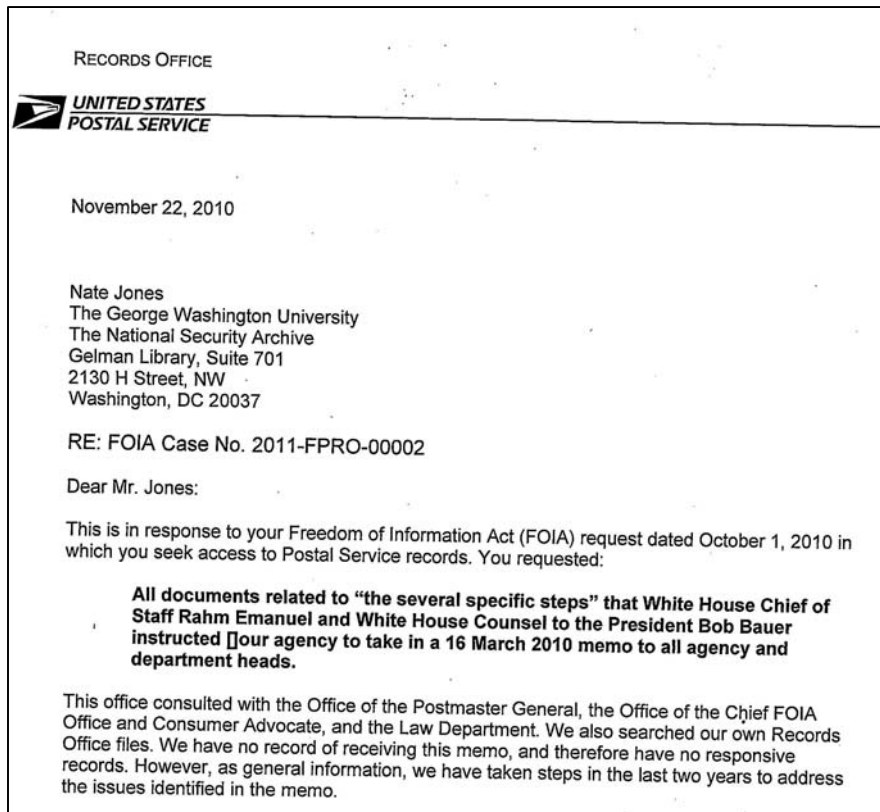
The agencies that claimed no records could be found or withheld documents under the b(5) exemption show signs of poor or obtuse FOIA practices. Documents demonstrating concrete changes should be publicly available – other agencies with positive responses showed action through annual FOIA officer reports and updated FOIA guides. In their response, the United States Postal Service claimed that they had not received the Emanuel-Bauer memorandum, and thus had no documents pertaining to it.

One of the more interesting responses we received was from the United States Postal Service which wrote that it had “no record” of receiving the

“Emanuel-Bauer Memo.”

Despite this claim, the USPS added that it had taken steps to address the very issues that the memo identified.

However, our methodology identified the USPS as responding with “no records.” In the US federal bureaucracy, if there is no paper trail, it is likely that nothing substantial happened.



- Agency for International Development
- Council on Environmental Quality
- Central Intelligence Agency
- Department of Commerce
- Department of Energy
- Department of Justice
- Department of State
- Department of Education
- Export-Import Bank
- Federal Election Commission
- Federal Maritime Commission
- National Aeronautics and Space Administration
- National Transportation Safety Board
- Office of Personnel Management
- Office of Special Counsel
- Office of the United States Trade Representative
- Public Health Service

“Still on Hold” (17 of 90, 18%)

These agencies have acknowledged receipt of the National Security Archive FOIA request, but have not sent a final decision. FOIA requires a response within 20 business days (plus a 10-day extension for “unusual circumstances”) – 117 business days have passed since the FOIA request was submitted.

The documentation required to demonstrate the most basic level of compliance with the Emanuel-Bauer Memorandum – evidence of an assessment of resources dedicated to FOIA – should be at the desk of every FOIA Officer (often as part of the

most recent FOIA Officer Report). As previously noted, agencies unable to provide concrete evidence of updated training material and guidance often cited attendance at Department of Justice FOIA training sessions. Yet the Department of Justice has been unable so far to present these frequently mentioned materials. Why that is the case is unknown, but it is a telling commentary on Justice’s ostensible leadership in this area.

“AWOL on FOIA” (4 of 90, 4%)

These agencies have failed even to acknowledge receipt of the National Security Archive FOIA request. This is despite at least two follow-up telephone calls to each agency’s FOIA liaison. In the 2010 Knight Survey, 17 of 90 agencies fell into this category. The evaluation of this response remains the same: the failure of these agencies to respond within 117 business days raises serious concerns when the law *requires a response* within 20 business days. Three agencies remain in this category for a consecutive year.¹¹ The chief FOIA officers for these agencies are:

- Chemical Safety and Hazard Investigation Board
- Court Services and Offender Supervision Agency
- Legal Services Corporation
- Merit Systems Protection Board

- **Renee Barley, FOIA Officer, Court Services and Offender Supervision Agency, (202) 220-5355**
- **Patricia Batie, FOIA Officer, Legal Services Corporation, (202) 295-1625**
- **Arlin Winefordner, FOIA/PA Officer, Merit Systems Protection Board, (202) 653-7200 ext. 1162**

¹¹ Court Services and Offender Supervision Agency, Legal Services Corporation, Merit Systems Protection Board.

RELEASE AND DENIAL DECISIONS: BIG STEPS, SMALL STEPS – GENERALLY FORWARD

Last year, the Department of Justice pointed to an increase in the “records released in full” response to FOIA requests to demonstrate that it had embraced the Obama and Holder FOIA policies of discretionary release.¹³ In response, the 2010 Knight Survey tracked the number of requests granted, granted in part, and denied to see if more information was indeed reaching the public. This year’s Survey used the same methodology to track the Obama administration’s progress.

AGENCY	Percent Change: Requests Released in Full	Percent Change: Requests Released in Part	Percent Change: Requests Denied in Full
Energy	20.8	64.5	-7.4
Trans.	19	4.8	-24.6
Hous.Urb.Dev	85.2	5	-53
Archives	6.1	5.9	-42.9
Sec.Exch.Comm.	11	5.6	-12.9
Agri.	90.4	-24.8	-18.3
Commerce	-2.7	20.8	-2.3
Interior	10.9	13.8	15.6
Justice	21	18.2	16.8
State	2254.1	63.7	137.9
EPA	8.6	0	40.8
Gen. Services	-95.3	88.7	-60.8
NASA	15.4	-5.6	-51.5
Nuc.Reg.Comm.	4	28.2	5.3
Manag.Budg.	-23.5	62.5	-53.8
Soc.Security	18.1	-51.2	-89.1
Treasury	-18.2	2.1	-0.7
Veterans	-50.4	53.9	-18.8
CIA	22	-5.9	23
Homeland Sec.	-7.8	-18.9	-46.4
Defense	12	-0.9	7.3
Labor	-7	-3.2	-15.2
Education	-2.8	-13.9	-1.4
Health.Hu.Serv.	-4.9	67.6	358.3
Natl.Sci.Found.	-28.7	46.1	17.6
SmallBus.Admin.	-18.8	-7.5	4.2
Agen.Intl.Dev.	-20	-12.6	250
Person.Manag.	Did not submit data ¹²		

¹² As of March 11, 2011, the Office of Personnel Management had not posted its Annual FOIA Report online. The FOIA requires the report be submitted to the Department of Justice by February 1, 2011.

¹³ <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012602048.html>

As we have done in previous Knight Surveys, here we have focused on the 28 agencies responsible for more than 90 percent of FOIA requests sent to the federal government. Though the results remain mixed, a gradual move toward better discretionary release practices appears to be underway when compared to last year's results.

The methodology used to assess release and denial decisions is the same as that used in the 2010 Survey. Agencies that increase the number of full and partial releases and reduce full denials are highlighted in green since more information is reaching the public. Mixed results are cataloged in the yellow or orange categories. The highlight color is determined by the number of data points indicating greater release or reduced withholding of documents: two data points for yellow, and one for orange. Agencies that released fewer records and denied more records than in 2010 are highlighted in red.

The Department of State stands as a major outlier in these results. According to the data, the Department of State released more than 22 times the number of requests, in full, over the previous year. While the Department did report withholding more in 2011 than it did in 2010, the improvement in releases indicates either that State has substantially improved its FOIA process, or that it is dealing with an anomaly in the types of requests being processed.

2010 Agency Rating	2011 Agency Rating
Agri.	Agri.
Justice	Justice
Manag.Budg.	Manage.Budg.
Small Bus.Admin.	Small Bus.Admin.
CIA	CIA
Homeland Sec.	Homeland Sec.
Commerce	Commerce
Defense	Defense
Interior	Interior
Education	Education
EPA	EPA
Gen.Services	Gen.Services
Health.Hum.Serv.	Health.Hum.Serv.
Veterans	Veterans
Energy	Energy
Labor	Labor
Hous.Urb.Dev.	Hous.Urb.Dev.
Archives	Archives
Natl.Sci.Found.	Natl.Sci.Found.
Person.Manag.	Person.Manag.
Sec.Exch.Comm.	Sec.Exch.Comm.
Soc.Security	Soc.Security
State	State
Trans.	Trans.
NASA	NASA
Nuc.Reg.Comm.	Nuc.Reg.Comm.
Treasury	Treasury
Agen.Intl.Dev.	Agen.Intl.Dev.

When compared to the results of the 2010 Survey, some trends can be seen. Generally, agencies which did poorly in 2010 improved in 2011 and agencies that did well in 2010 regressed slightly in 2011.

Overall, the number of agencies in the green increased (four to five), the number of agencies in the yellow increased (ten to twelve), and the number of agencies in the red decreased (five to one). Though the results remain largely mixed, a gradual move towards better discretionary release practices appears to be underway.

BACKLOGS AND CONSULTATIONS

Aging Backlogs

Previous Knight Surveys pioneered the method of requesting and reporting agencies' oldest active FOIA requests. The (often staggering) age of agencies' oldest requests became a key metric the Archive used to examine FOIA statistics. The "Ten Oldest" request metric was adopted by George W. Bush's Executive Order on FOIA and codified by the OPEN Government Act of 2007. Now, each agency is required by law to report its ten oldest requests in its annual FOIA report.

This audit finds that marooned FOIA requests – some as old as 18 years – remain a key obstacle to transparency. 12 key agencies – including the National Archives, the Central Intelligence Agency, Department of Defense, Department of Justice, and Department of State – have requests older than six years.

Agency	Oldest FOIA	Age (years)	Oldest Consultation	Age (years)
Archives	7/10/1992	18.67	7/10/1992	18.67
Defense	3/16/1993	18.00	3/4/1999	12.08
CIA	10/7/1998	12.50	11/24/2003	7.33
Health Hum.Serv.	1/19/2001	10.17	n/a	0.00
State	2/8/2001	10.08	8/13/2004	6.58
Energy	2/14/2001	10.08	6/14/2001	9.75
Treasury	7/1/2002	8.75	7/14/2009	1.67
Interior	10/9/2002	8.50	2/1/2010	1.17
Justice	9/4/2003	7.58	12/20/2007	3.25
Homeland Sec.	10/27/2004	6.42	4/10/2008	2.92
Energy Reg.Comm.	10/27/2004	6.42	n/a	0.00
EPA	12/1/2004	6.33	1/30/2006	5.17

Are Consultations the Cause?

Previous Knight Surveys pointed to a lack of tracking systems, personnel turnover, resource constraints, and other systemic problems as sources for delay. This year's Knight Survey highlights a core source of systemic delay in the current requirement for agency "consultations" for any documents in which other agencies claim "equity."

When an agency determines that another agency or other agencies have "equity" or "ownership" of a record requested by FOIA, that record is forwarded to the other agencies for an additional review. After subsequent review, the record is sent back to the originating agency that then completes the FOIA request. This process causes inevitable delays. Out of the 12 agencies with outstanding requests older than six years, ten showed similarly ancient consultation dates.

AGGREGATE FOIA DATA

FY	Requests Received	Requests Processed	Full or Partial Releases	Costs	Backlog	Appeals Received	Appeals Processed
2000 ¹⁴	2,235,201	2,214,402		\$253,049,516	169,180		
2001 ¹⁵	2,246,212	2,236,796		\$287,792,041	177,969		
2002 ¹⁶	2,402,938	2,428,496		\$300,105,323	148,599		
2003 ¹⁷	3,266,394	3,260,694		\$323,050,337	155,343		
2004 ¹⁸	4,016,751	3,975,388	3,766,715	\$323,124,343	175,602	9,207	7,542
2005 ¹⁹	19,950,683 ²⁰	19,908,571		\$349,561,403	220,097		
2006 ²¹	21,412,571	21,384,435		\$398,500,000	247,867		
2007 ²¹	21,758,651	21,792,896		\$369,431,500	217,237		
2008 ²²	605,491 ²³	623,186	377,626	\$338,403,831	133,295	8,800	11,179
2009 ²⁴	557,825	612,893	382,117 ²⁵	\$382,244,225	77,377	9,804	9,579

Federal agency reporting on Freedom of Information Act performance has been wildly inconsistent over the years, as the following table demonstrates. Previous Knight Surveys have shown that data points such as “median response time” – solemnly reported by agencies to Congress – had little basis in actual practice. Cumulative data from agency reports over the past ten years indicates enormous swings in the most basic of data – the number of actual FOIA requests filed each year. The variance in request counts over the ten-year period from 2000 to 2009 – a high of 21 million, a low of 558,000 – actually represents changes in counting rules, not level of public interest. From 2000 to 2004, some agencies, such as the Department for

¹⁴ Summary of Annual FOIA Reports for Fiscal Year 2000, Department of Justice: <http://www.justice.gov/archive/oip/foiaprost/2002foiaprost3.htm>

¹⁵ Summary of Annual FOIA Reports for Fiscal Year 2001, Department of Justice: <http://www.justice.gov/archive/oip/foiaprost/2002foiaprost27.htm>

¹⁶ Summary of Annual FOIA Reports for Fiscal Year 2002, Department of Justice: <http://www.justice.gov/archive/oip/foiaprost/2003foiaprost31.htm>

¹⁷ Summary of Annual FOIA Reports for Fiscal Year 2003, Department of Justice: <http://www.justice.gov/archive/oip/foiaprost/2004foiaprost22.htm>

¹⁸ Compiled from 2004 Annual FOIA Reports (Not Reported on Department of Justice website).

¹⁹ Summary of Annual FOIA Reports for Fiscal Year 2006, Department of Justice: <http://www.justice.gov/oip/foiaprost/2007foiaprost11.htm>

²⁰ Beginning in 2005, the Social Security Administration changed how it designates and records certain first-party access requests. The result of this change is the large increase in reported FOIA requests.

²¹ Summary of Annual FOIA Reports for Fiscal Year 2007, Department of Justice: <http://www.justice.gov/oip/foiaprost/2008foiaprost23.htm>

²² Summary of Annual FOIA Reports for Fiscal Year 2008, Department of Justice: <http://www.justice.gov/oip/foiaprost/2009foiaprost16.htm>

²³ 5/22/2008: The Department of Justice instructs agencies to "only include Privacy Act (PA) requests in their Annual FOIA Reports if the FOIA is utilized in any way to process the request. [...] Conversely, when an agency conducts a PA search exclusively (i.e. with a 'system of records') and does not claim a PA exemption for any records located, that request should not be included in this Report." This results in the sharp drop in requests received and processed - primarily from the elimination of PA requests reported by the Department of Agriculture, Department of Health and Human Services, Department of Labor, Department of Veterans' Affairs, and the Social Security Administration. "2008 Guidelines for Agency Preparation of Annual FOIA Reports," <http://www.justice.gov/oip/foiaprost/guidance-annualreport-052008.pdf>

²⁴ Summary of Annual FOIA Reports for Fiscal Year 2009, Department of Justice: <http://www.justice.gov/oip/foiaprost/2010foiaprost18.htm>

²⁵ Summary of Agency Chief FOIA Officer Reports with Findings and OIP Guidance for Improvement, Department of Justice: <http://www.justice.gov/oip/foiaprost/2010foiaprost23.htm>

Veterans Affairs, counted first-person Privacy Act requests with FOIA requests, since they were based on the same legal principles of access to government information and processed by the same agency staff in a combined FOIA/PA office. Then, in 2005 the Social Security Administration changed the way it designated and recorded first-party access requests, essentially counting every request it received from individuals concerning their social security accounts as a FOIA request. As a result, the number of requests received, government-wide, ballooned from around 4 million to 20 million. On May 22, 2008, the Department of Justice instructed agencies no longer to include Privacy Act requests in their annual FOIA reports, unless “the FOIA is utilized in any way to process the request.” This instruction resulted in the drop from over 21 million requests to around 600,000 requests in both 2008 and 2009. Remarkably, the cost of administering FOIA remained far more constant than the reported number of FOIA requests, totaling in the last fiscal year about \$1.24 per American citizen. That amount will buy you a pack of gum at the grocery store.

METHODOLOGY

Implementation of the Emanuel-Bauer Memorandum

On October 1, 2010 the Archive submitted FOIA requests to 90 federal agencies in order to determine their compliance with the instructions stipulated in the Emanuel-Bauer Memorandum of March 16, 2010. The Archive's FOIA request asked for:

All documents related to “the several specific steps” that White House Chief of Staff Rahm Emanuel and White House Counsel to the President Bob Bauer instructed your agency to take in a 16 March 2010 memo to all agency and department heads. The memo is available at http://www.whitehouse.gov/sites/default/files/rss_viewer/foia_memo_3-16-10.pdf

The “specific steps” that the memo instructed your office to implement include:

- 1) “updat[ing] all FOIA guidance and training materials to include the principles articulated in the President’s memorandum” and***
- 2) “assess[ing] whether you are devoting adequate resources to responding to FOIA requests promptly and cooperatively.”***

The requests were sent to the central FOIA processing office of each agency. After the statutory 20-business day limit had expired, the Archive contacted each tardy agency by telephone.

The proliferation of FOIA websites across federal agencies created a wrinkle that complicated the application of this methodology. Seven agencies sent no response to the FOIA request and 17 agencies have not sent a final decision, but among the range of responses from the 69 remaining agencies, 23 agencies included a link to their FOIA website.²⁶ Among these 23 agencies, four sent responses indicating that no documents had been found²⁷ and one withheld documents under the b(5) exemption.²⁸ Since President Obama's memorandum directed agencies to “use modern technology to inform citizens about what is known and done by their government,” the content of agency FOIA websites was included in this audit. When prompted

²⁶ The agencies that included internet links in their responses include: Broadcasting Board of Governors, Commodity Futures Trading Commission, Defense Nuclear Facilities Safety Board, Federal Deposit Insurance Corporation, Federal Housing Finance Agency, Federal Labor Relations Authority, Federal Open Market Committee, Inter-American Foundation, U.S. International Trade Commission, Federal Mine Safety and Health Review Commission, National Capital Planning Commission, National Mediation Board, National Science Foundation, Office of Government Ethics, Office of Science and Technology, Social Security Administration, Surface Transportation Board, Department of Treasury, Tennessee Valley Authority.

²⁷ Federal Deposit Insurance Corporation, Inter-American Foundation, Federal Mine Safety and Health Review Commission, National Science Foundation.

²⁸ Federal Housing Finance Board.

by the agency response, the provided internet link was followed where the most recent FOIA officer report was viewed along with any additional documents recommended by the FOIA response.

Release and Denial Decisions

Data on the number of records released in full, released in part, and denied in full were derived from each agency's Annual FOIA Report for FY 2009 and FY 2010. Annual reports are required by the FOIA to be submitted to the Department of Justice by February 1st each year. In cases where the Annual FOIA Report was on neither the Department of Justice's website, nor the respective agency's website, an indication of "no data" is used.

Using the data in the reports, the Archive calculated the percent change from FY 2009 to FY 2010 in records released in full, released in part, and denied in full because of exemptions. Agencies with decreases in denials and increases in records released in full and in part are highlighted in green, which indicates overall improvement in releases by the agencies. Agencies with increases in denials and decreases in records released in full and in part are highlighted in red, which indicates that agencies are sharing fewer records.

Agencies with ambiguous data are highlighted in yellow and orange. For the agencies in these categories, the Archive measured each agency's positive indicators, which are defined as an increase in records released in full, an increase in records released in part, and a decrease in denials of records. If two of the three positive indicators are present, the agency is highlighted in yellow. If only one of the three positive indicators is present, the agency is highlighted in orange.

Backlogs and Consultations

Data for the oldest FOIA request and the oldest consultation was obtained from the agencies' Annual FOIA Reports for Fiscal Year 2010.

Aggregate FOIA Statistics

The FOIA statistics were pieced together from several sources on the Department of Justice's FOIA website. The summaries of the Annual FOIA Reports from the Department of Justice's FOIA Post website were the primary sources for this aggregated data. When summaries were unable to provide the information needed, the aggregate statistics were compiled at the Archive using the Annual FOIA Reports. Unfortunately and inexplicably, not all summaries were available on the Department of Justice website. The Archive has since filed a FOIA request with the Department of Justice requesting the summaries not available on their website. We have not received a response.