Strides and Stumbles: Mixed Results for the Obama Administration on Freedom of Information

March 14, 2012

Summary

Upon taking office, President Obama set a goal for his administration: to become the most open in history.[1] The latest agency reports on implementation of the Freedom of Information Act (FOIA) indicate that the administration has continued to make incremental progress on transparency but has yet to achieve historic levels of openness. Several trends have improved from previous years, although most transparency indicators have not returned to the pre-Bush era or even to the average for the Bush years, a period known for secrecy.

In fiscal year (FY) 2011, the Obama administration processed more FOIA requests and withheld less information than in previous years of the administration. In fact, agencies processed considerably more requests in FY 2011 than they received altogether the previous year. Nevertheless, the surge in FOIA requests outpaced the administration's increase in processing. This resulted in a growth of the administration's combined FOIA backlog.

The bulk of the change can be attributed to a single department, the Department of Homeland Security (DHS). DHS receives far and away more requests than any other federal agency, and the number of requests it received surged even higher in FY 2011, increasing by 35 percent. Although DHS increased the absolute number of requests it processed, the department was unable to cope with such a massive influx of FOIA requests, causing its backlog to more than double. However, it did markedly curb its withholding under FOIA, reducing its use of exemptions by 15 percent. For both backlogs and exemptions, the change at DHS alone was greater than the change at all agencies in our analysis combined.

Some agencies made big leaps forward on certain FOIA issues. The State Department slashed its backlog by almost 60 percent in one year, dropping from just over 21,000 requests pending in 2010 to around 8,700 requests in 2011. DHS also stood out by sharply cutting its use of exemptions for withholding interagency materials. Other agencies slid backward in FY 2011, with growing backlogs or increased use of exemptions. Overall, though, most agencies were basically jogging in place.

The wide disparities in performance among the 25 key agencies included in our analysis show that the Obama administration has not been able to uniformly implement its open government goals across federal agencies.

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[1] Macon Phillips, "Change has come to WhiteHouse.gov," The White House, January 20, 2009, http://www.whitehouse.gov/blog/change_has_come_to_whitehouse-gov.

Strengths
- The agencies processed six percent more requests in 2011 than 2010, bringing the number of FOIA requests processed to the highest level since 2005.
- The number of requests denied based on exemptions declined by seven percent, bringing exemption use to its lowest level since 2008.
- Use of the most discretionary exemptions, exemptions 2 (internal agency rules) and 5 (inter-agency memos), decreased sharply, largely due to decreases in the use of discretionary exemptions at DHS.
    - Exemption 2 decreased by 63 percent, bringing it to its lowest levels since 2003.
    - Exemption 5 decreased by 14 percent, bringing it to its lowest levels since 2004.


Weaknesses
- The agencies' combined backlog grew by 19 percent due to a surge in requests. However, backlogs remain at their lowest level since 2003, except for the previous years of the Obama administration.
- Exemption 3 (information that is prohibited from disclosure by another federal law) saw the greatest increase of any exemption, climbing by 64 percent. The increase in exemption 3 is due to surges at the State Department (for information relating to visa applications) and the Equal Employment Opportunity Commission (for information relating to unlawful employment practices under the Americans with Disabilities Act).

Backlogs

Americans deserve timely access to public information. The FOIA specifies a time limit of 20 working days for agencies to respond to public requests, with some ability for agencies to pause the clock while getting clarification. However, there is a longstanding lack of compliance with these time limits, resulting in delays that often last several months.

In FY 2011, the Obama administration processed more FOIA requests than in the two previous years of the administration. Specifically, the 25 agencies tracked in this analysis processed more than 473,000 requests, an increase of more than 25,000, or six percent, over the number processed in 2010. However, the number of requests received increased by almost 39,000, or nine percent, which led to a combined backlog[2] increase of more than 15,000 requests despite the administration's efforts.

Requests Received, Processed, and Pending
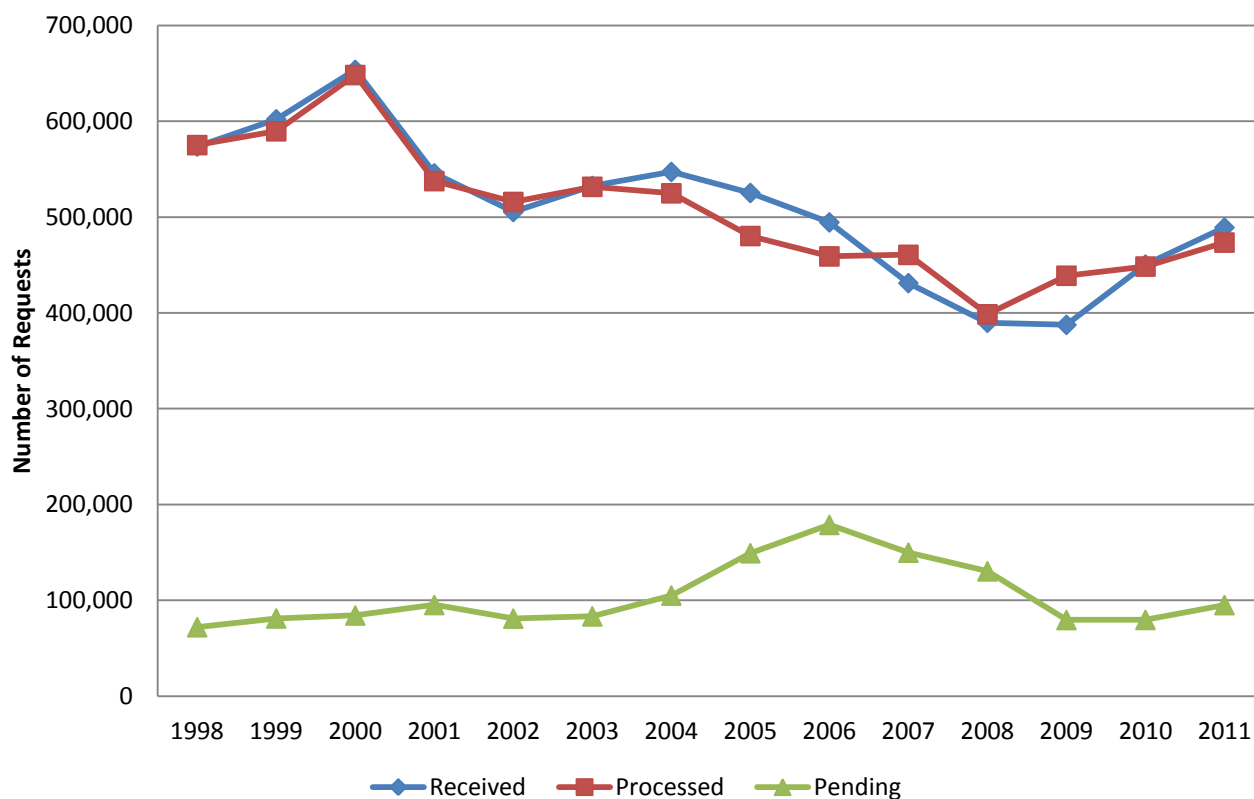
Key agencies. The agency most responsible for the significant increase in backlogged requests is the Department of Homeland Security (DHS). In 2011, DHS received 175,656 FOIA requests, an increase of 35 percent. This was the largest number of requests received by DHS since it was created in 2003. No other agency saw such a significant increase in requests in 2011. The

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[2] For the purposes of this report, backlogs are the number of FOIA requests pending at the end of a fiscal year. See methodology for more information.

vast majority of DHS's increase was in the form of additional requests to the agency's immigration and customs components: Customs and Border Patrol, Immigration and Customs Enforcement, and U.S. Citizenship and Immigration Services. There is no way to determine from the agency's report why requests to these offices increased, but it may be related to the growing number of deportations.[3]

Although DHS increased its processing by five percent in 2011, the department was unable to match the huge increase in requests, causing its backlog to more than double. Because DHS is the largest recipient of FOIA requests of any agency – receiving nearly 36 percent of the all requests – its performance dragged the combined numbers sharply down.

DHS's increased backlog represented just over half of the entire federal backlog for the 25 agencies tracked. The other agencies that represented the largest portions of the federal backlog were the Department of Defense, the Department of State, and the National Archives and Records Administration.

2011 Backlog Breakdown
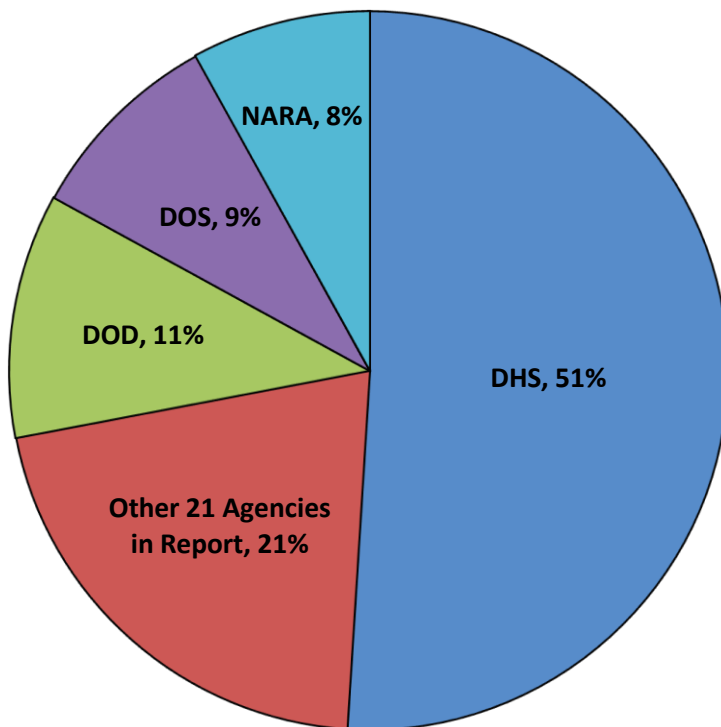
Backlog reduction goals. Since taking office, the Obama administration has placed a high priority on reducing backlogs of FOIA requests. In particular, the December 2009 Open Government Directive called on agencies with significant backlogs to reduce them by 10 percent per year.[4]

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[3] ICE Total Removals: Through February 20th, 2012. U. S. Immigration and Customs Enforcement. http://www.ice.gov/doclib/about/offices/ero/pdf/ero-removals.pdf.
[4] Peter R. Orszag, "Open Government Directive," Office of Management and Budget, Dec. 8, 2009, http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf.

Agencies' Backlog Changes			
Agency	2010 Backlog	2011 Backlog	Percent Change
National Aeronautics and Space Administration	182	73	-59.9%
State	21,135	8,715	-58.8%
General Services Administration	222	109	-50.9%
Housing and Urban Development	182	128	-29.7%
Education	456	371	-18.6%
Environmental Protection Agency	1,835	1,523	-17.0%
Agriculture	1,608	1,347	-16.2%
Defense	12,115	10,224	-15.6%
Interior	1,200	1,030	-14.2%
Justice	7,538	6,897	-8.5%
Transportation	1,702	1,612	-5.3%
Consumer Product Safety Commission	368	353	-4.1%
Securities and Exchange Commission	399	392	-1.8%
Treasury	1,144	1,236	8.0%
Commerce	267	296	10.9%
Central Intelligence Agency	880	985	11.9%
National Archives and Records Administration	7,064	8,011	13.4%
National Science Foundation	51	58	13.7%
Equal Employment Opportunity Commission	1,214	1,413	16.4%
Small Business Administration	18	21	16.7%
National Labor Relations Board	81	95	17.3%
Energy	465	558	20.0%
Labor	943	1,143	21.2%
Homeland Security	18,633	48,493	160.3%
Nuclear Regulatory Commission	22	67	204.5%
TOTALS	79,724	95,150	19.3%

Of the 11 agencies with more than 1,000 requests backlogged in 2010, five were able to meet that challenge and reduce their backlog by more than 10 percent – the State Department, Environmental Protection Agency, Department of Agriculture, Department of Defense, and Department of the Interior. The State Department achieved the largest backlog reduction, dropping from just over 21,000 requests pending in 2010 to around 8,700 requests in 2011.

Two of the other agencies reduced their backlogs but by less than 10 percent – Department of Justice and Department of Transportation. The remaining four agencies – the Department of the Treasury, National Archives and Records Administration, Equal Employment Opportunity Commission, and Department of Homeland Security – all saw their backlogs increase from 2010 to 2011.
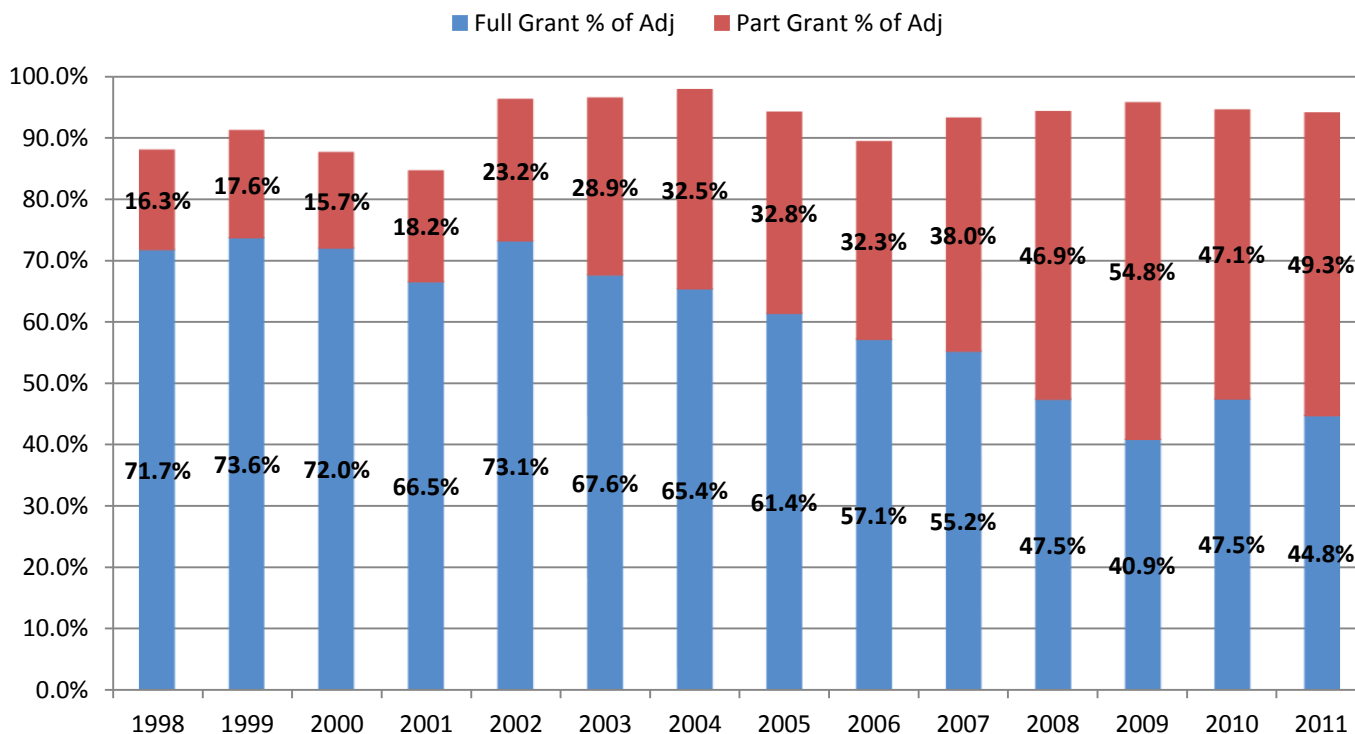
Granting of FOIA Requests

Overall, the Obama administration granted, in full or in part, 94 percent of all FOIA requests processed in 2011, a 0.5 percentage point decrease from the previous year. However, the administration's performance relies heavily on partial releases, rather than full releases.

When agencies process FOIA requests, the results are reported in one of four categories:
1) Full Grant, meaning that the requestor either received everything that was requested;
2) Partial Grant and Partial Denial, meaning that the requestor either received a portion of what was requested, with a portion denied based on FOIA's exemptions;
3) Full Denial Based on Exemptions, meaning that the requestor did not receive any records because of the exemptions that exist in FOIA; or
4) Full Denial Based on Other Reasons, meaning that the requestor did not receive any records because of fee-related reasons, the agency determined it did not have the records, the request was not reasonably described, the request was withdrawn, the request was duplicative, or the request was generally improper under FOIA.
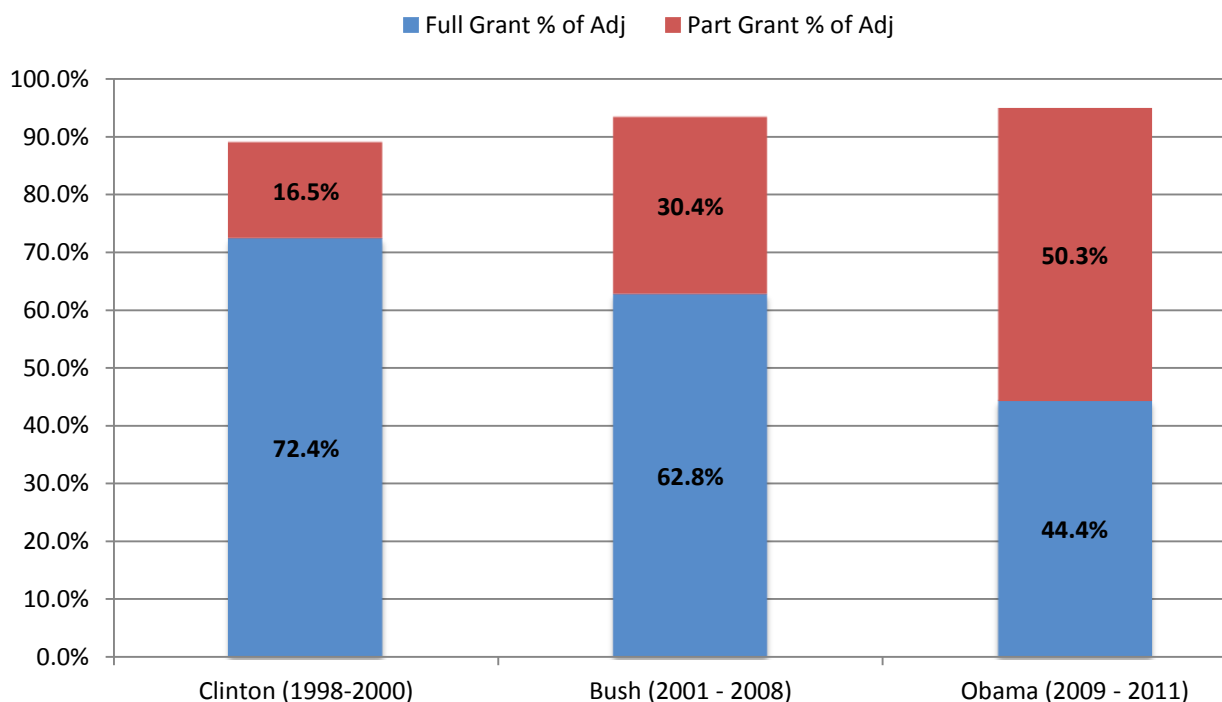
Requests Fully and Partially Granted as Percent of Processed (Requests Processed - Requests Denied for "Other" Reasons)

After a steady decline in the Bush years in the percentage of fully granted FOIA requests, the percentage increased sharply to 47 percent in 2010, only to dip again in 2011 to 45 percent. The percentage of partially granted requests in 2011 rose, almost fully offsetting the drop in fully granted requests. The growth of use of partial releases and the reduction in full releases are trends that have been playing out since 2002.

The Obama administration's combined average remains higher than the average of the Clinton (89 percent) or Bush (93 percent) administration years included in this review. Overall, the Obama administration's average for the first three years shows a slightly higher rate of granting records in response to requests, either full or partial. The Obama administration is averaging 95 percent combined, whereas the Bush administration averaged 93 percent and the Clinton administration averaged 89 percent. However, both the Clinton and Bush administrations had much higher percentages of responses that were fully granted.

Requests Fully and Partially Granted as Percent Processed
(Requests Processed - Requests Denied for "Other" Reasons)

■ Full Grant % of Adj   ■ Part Grant % of Adj

	Clinton (1998-2000)	Bush (2001 - 2008)	Obama (2009 - 2011)
Part Grant % of Adj	16.5%	30.4%	50.3%
Full Grant % of Adj	72.4%	62.8%	44.4%

Key agencies. The most significant change in the numbers came from the Department of State (DOS). DOS fully granted information 53 percent less often in 2011 (4,090) than it did in 2010 (8,710). This is particularly interesting since it processed over 8,000 more requests in 2011 (26,836) than it did in 2010 (18,386). However, it used over 10,000 more partial grants in 2011 (11,929) than it did in 2010 (1,365).

Among the most improved agencies was the Department of Transportation, with a 39 percent increase in full grants, as well as a small increase in partial grants.

Partially granted FOIA requests can be viewed as either good or bad news. On the good news side is the fact that the entire record was not withheld, and the administration disclosed some elements related to a particular FOIA request – for instance, by redacting a person's Social Security Number from a record. On the bad news side is the fact that this approach can be used to provide information that is not useful to the requestor but still pumps up overall disclosure numbers under FOIA – i.e., redacting all useful information from a record but still counting it as a "partial" disclosure. Based on the FOIA statistics from the agencies, there is no way to determine the utility of the partial records released.

Use of Exemptions

Under FOIA, agencies must treat information with a presumption of openness and may only withhold information based on a set of exemptions defined by law. The statutory exemptions are:

1: National Security
2: Internal Agency Rules
3: Other Statutory Exemptions
4: Proprietary Information, Trade Secrets
5: Inter-Agency Memoranda
6: Personal Privacy

7: Law Enforcement Records
    7a: Law Enforcement Proceedings
    7b: Depriving the Right to a Fair Trial
    7c: Personal Privacy
    7d. Identify Confidential Source
    7e: Techniques for Prosecution
    7f: Endanger Life or Safety
8: Financial Institution Reports
9: Oil and Gas Well Data

Although the exemptions are specified by law, agencies must use their judgment in whether to apply an exemption. In particular, exemptions 2 and 5 are seen as the most discretionary, as the only potential harm from disclosure would be to government functioning; the safety or rights of American citizens are not at stake.

In 2011, total use of exemptions dropped by seven percent. The changes in the use of particular exemptions, however, tell a more complicated story.

Most-used exemptions. The use of exemptions 2 (interagency rules) and 5 (interagency memos) decreased by 63 percent and 14 percent, respectively. The sharp decrease in exemption 2 was expected after the March 2011 U.S. Supreme Court decision in *Milner v. Navy*, which restricted the government's use of exemption 2.[5] However, the change also appears to be the result of a deliberate policy change by the Obama administration. The Bush Justice Department specifically encouraged agencies to use exemptions 2 and 5,[6] and their use ballooned during the Bush administration. That growth trend continued through 2009, the last year of the Bush administration and the first year of the Obama administration. In 2010 and 2011, the trend has sharply reversed, returning the levels of exemption 2 and 5 to their lowest levels since the early years of the Bush administration.

As with backlogs, these changes were driven by DHS. The decrease in DHS's use of exemption 5 was greater than the net decrease of all agencies, while its decrease in use of exemption 2 accounted for the vast majority of the decline across all agencies.

The fastest growing exemption was exemption 3 (statutory), which increased by 64 percent, reaching the highest numbers on record. The bulk of this increase is due to a surge in usage at the State Department (for information relating to visa applications), as well as at the Equal Employment Opportunity Commission (for information relating to unlawful employment practices under the Americans with Disabilities Act).

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[5] *Milner v. Navy*, 131 S.Ct. 1259 (2011), http://www.supremecourt.gov/opinions/10pdf/09-1163.pdf.
[6] U.S. Department of Justice Office of Information Policy, "New Attorney General FOIA Memorandum Issued," FOIA Post, Oct. 15, 2001, http://www.justice.gov/archive/oip/foiapost/2001foiapost19.htm.
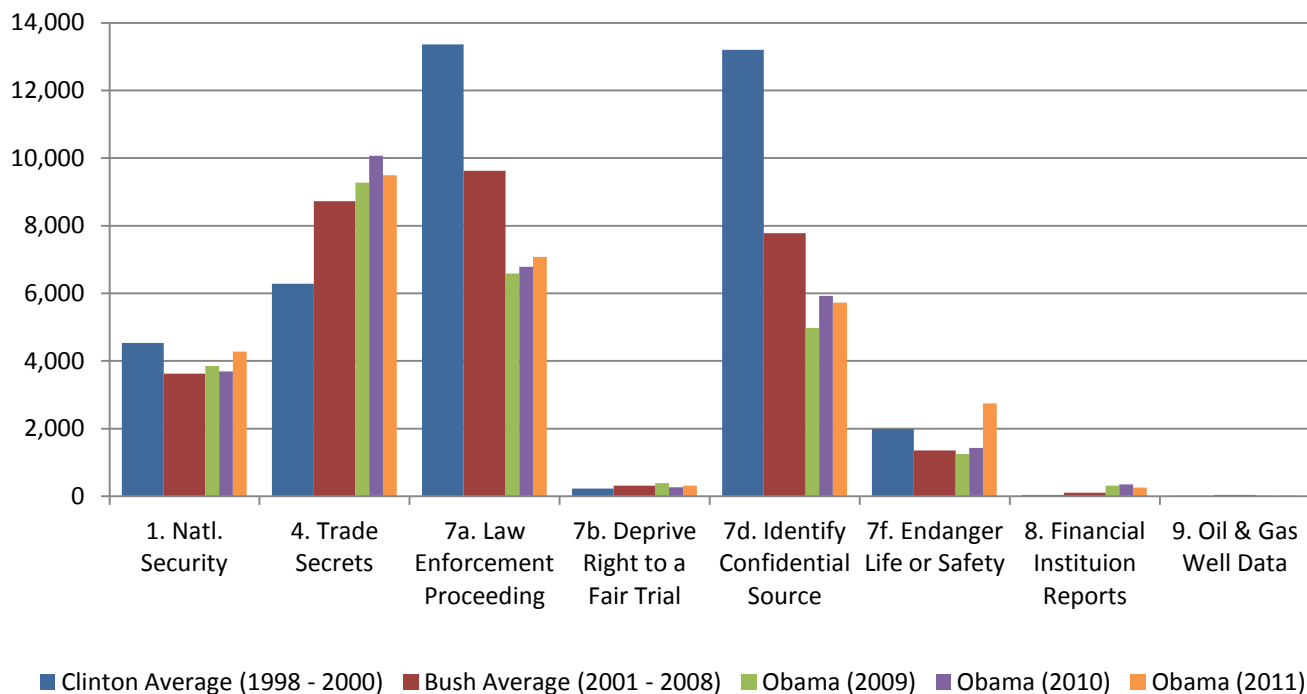
Use of FOIA Exemptions
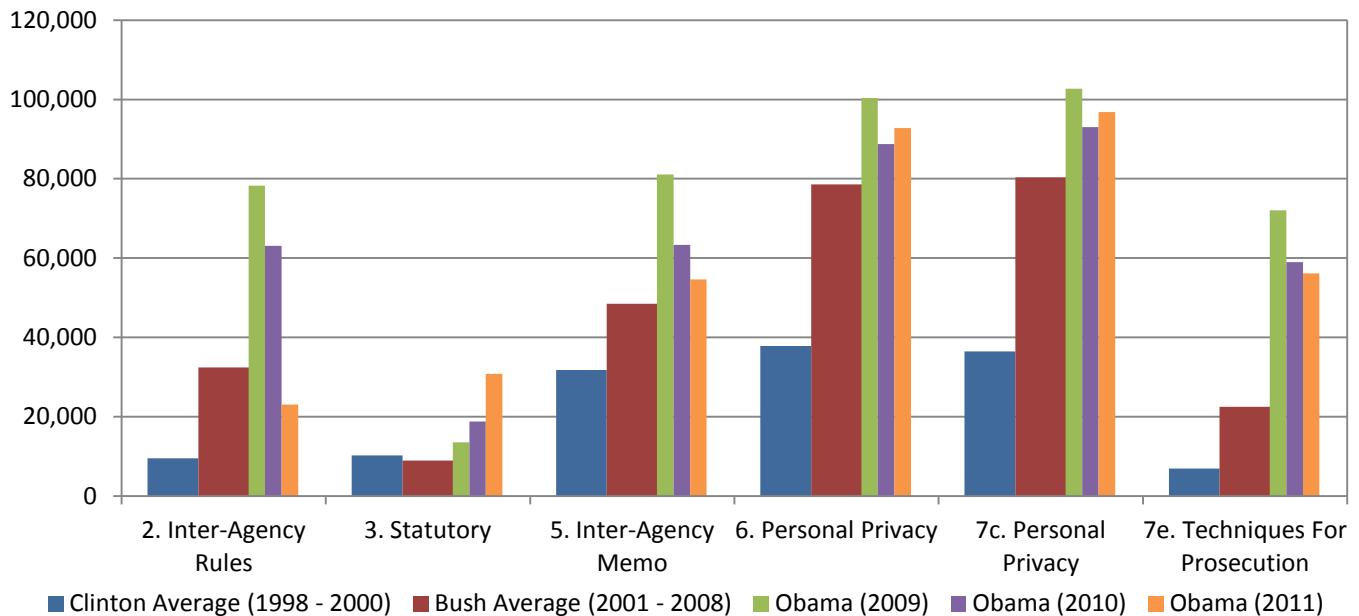
Exemptions 6 (personal privacy) and 7c (law enforcement personal privacy) remained near record highs. After growing throughout the Bush administration, their usage spiked in 2009 and dipped in 2010, like exemptions 2 and 5. However, unlike those exemptions, they increased again in 2011, reaching their highest usage for any year except for 2009, 2002, and 2001. Again, DHS is driving force behind the high use of privacy exemptions, representing 63 percent of the total use of exemption 6 and 70 percent of exemption 7c. No one is clear why the privacy exemptions have grown so much over the years. It may be due to a significant change in the information being requested. However, some openness advocates are concerned that it may be due to agencies stretching the scope of the exemptions to include records not previously considered to be covered by privacy.

Finally, use of exemption 7e (techniques for prosecution) was a more mixed story. Like the other large exemptions, exemption 7e grew throughout the Bush administration and reached its peak in 2009. Use of exemption 7e dropped sharply in 2010 but held about level in 2011.

Less frequently used exemptions. Some of the lesser-used exemptions reached historic highs in 2011, while others saw historic lows.

- Exemption 7f (Endanger Life or Safety) increased by 92 percent to its highest levels on record, due to a spike in usage by the Defense Department.
- Exemption 7d (Identify Confidential Source) dipped slightly, reaching its lowest level on record other than in 2009.
- Exemption 4 (Trade Secrets) decreased slightly but remained higher than pre-2003 levels.
- Exemption 7a (Law Enforcement Proceedings) increased slightly for the fourth year in a row but remained well below pre-2006 levels.

Use of FOIA Exemptions

Legend: Clinton Average (1998 - 2000) · Bush Average (2001 - 2008) · Obama (2009) · Obama (2010) · Obama (2011)

Categories: 1. Natl. Security · 4. Trade Secrets · 7a. Law Enforcement Proceeding · 7b. Deprive Right to a Fair Trial · 7d. Identify Confidential Source · 7f. Endanger Life or Safety · 8. Financial Instituion Reports · 9. Oil & Gas Well Data

Methodology

These data come from the Annual Freedom of Information Act (FOIA) reports filed by federal agencies with the Department of Justice and are based on a fiscal year. For data from 1998 to 2007, we have used a compilation of annual FOIA reports prepared by the Coalition of Journalists for Open Government.[7] Our analysis covers 25 federal agencies including most cabinet-level departments; the list of agencies is at the end of this section.

Denials for reasons other than exemptions. For this analysis, we have removed denials for other reasons from the number of requests processed by the agency when assessing the percentage of requests that have been approved or denied. This adjustment does not mean that denials for other reasons are not a potential area of concern. Increased problems with fees or claims that FOIA requests aren't reasonably described could indicate other problems with FOIA implementation at agencies. However, by removing these requests, we can obtain a better understanding of how agencies are acting on requests that were fully processed.

Exclusions. An issue with the underlying data for this analysis is that agency annual reports do not indicate the use of exclusions, which could complicate the number of fully granted requests. The Freedom of Information Reform Act of 1986[8] created three law enforcement exclusions, which allow agencies to treat information related to pending investigations, informants, and classified foreign intelligence as not subject to FOIA.[9] When using exclusions, agencies withhold such information from requesters without telling them that they have withheld information. Therefore, a requester may be informed that the agency has provided all responsive records when, in fact, other records have been excluded from processing under FOIA. Consequently, each request reported as fully granted may not have actually been fully granted.

The use of exclusions is believed to constitute a very small portion of all requests that agencies receive. Agencies are reporting specific numbers on their use of exclusions for the first time in their 2012 Chief FOIA Officer Reports, which were due to be published by March 12. Out of the few agencies that published these reports by press time, for example, the Justice Department reported invoking exclusions in response to 147 requests in 2012, or 0.2 percent of all requests processed. DHS reported applying exclusions fewer than 28 times. The departments of Agriculture, Commerce, Defense, and Energy reported that they did not invoke any exclusions in 2012.

Other limitations and notes.
- All years are fiscal years.
- Most percentages in the text do not have decimal places and large numbers are often rounded, so they may not match graphs and tables exactly.
- Reporting guidelines were changed in 2008 to exclude joint FOIA/Privacy Act requests; prior to 2008, these requests were included in the data. This has a particularly large impact on the number of FOIA requests received and processed by the Department of Health and Human Services, the Department of Veterans Affairs, and the Social Security Administration. Accordingly, we have excluded data from these agencies for consistency purposes across the years.

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[7] "An Opportunity Lost: An in-depth analysis of FOIA performance from 1998 to 2007," Coalition of Journalists for Open Government, July 3, 2008, http://www.cjog.net/documents/Part_1_2007_FOIA_Report.pdf.
[8] P.L. 99-570.
[9] 5 U.S.C. § 552(c)(1), (2), (3).

- Reporting guidelines were changed in 2008 to require agencies to report backlogged requests (i.e., requests pending but past the statutory deadlines). Prior to 2008, only total pending requests were reported. Thus, this report indicates the number of pending requests, not backlogged requests.
- Government agencies and their activities have changed during the period examined (e.g. the Department of Homeland Security was created in 2003).
- These data, while important, are not the only useful indicators of FOIA performance.

Departments and Agencies Covered in this Study

Department of Agriculture
Department of Commerce
Department of Defense
Department of Education
Department of Energy
Department of Homeland Security (after 2003)
Department of Housing and Urban Development
Department of the Interior
Department of Justice
Department of Labor
Department of State
Department of Transportation
Department of the Treasury

Central Intelligence Agency
Consumer Product Safety Commission
Equal Employment Opportunity Commission
Environmental Protection Agency
General Services Administration
National Archives and Records Administration
National Aeronautics and Space Administration
National Labor Relations Board
Nuclear Regulatory Commission
National Science Foundation
Securities and Exchange Commission
Small Business Administration

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