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# **The Freedom of Information Act (FOIA): Background, Legislation, and Policy Issues**

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## Summary

The Freedom of Information Act (FOIA; 5 U.S.C. §552) allows any person—individual or corporate, citizen or not—to request and obtain existing, identifiable, and unpublished agency records on any topic. Pursuant to FOIA, the public has presumptive access to agency records unless the material falls within any of FOIA’s nine categories of exception. Disputes over the release of records requested pursuant to FOIA can be appealed administratively, resolved through mediation, or heard in court.

FOIA was enacted in 1966, after 11 years of legislative development in the House, and nearly 6 years of consideration in the Senate. The perception that agencies were not properly implementing FOIA has resulted in amendments in 1974, 1976, 1986, 1996, 2007, and 2010.

FOIA is a tool of inquiry and information gathering for various sectors—including the media, businesses, scholars, attorneys, consumers, and activists. Agency responses to FOIA requests may involve a few sheets of paper, several stacks of records, or information in an electronic format. Assembling responses requires staff time to search for records and make duplicates, among other resource commitments. Agency information management professionals are responsible for efficiently and economically responding to, or denying, FOIA requests.

In FY2014, the federal government received the highest volume of requests since at least FY1998: 714,231 FOIA requests. Requests increased by 9,837 compared to FY2013 (a 1.4% increase) and have increased by more than 156,000 since FY2009 (28.0%). The Department of Homeland Security (DHS) received more FOIA requests than any other agency with 291,242 requests in FY2014 (40.8% of all FOIA requests). The increase was largely prompted by an increase in requests to DHS (particularly within the U.S. Citizenship and Immigration Service [USCIS], the U.S. Customs and Border Patrol [USCBP], and U.S. Immigration and Customs Enforcement [ICE]). A large increase in the number of FOIA requests received by DHS in FY2014 (59,708 more requests than the previous year) drove a government-wide increase in FOIA requests—even though nearly all other agencies experienced a decline in the number of FOIA requests received. It is not clear what prompted the increase in requests in DHS. In contrast, the Department of Defense (DOD) saw a 5,023 (7.6%) reduction in the number of FOIA requests it received from FY2012 to FY2014.

DHS is also the primary driver of an increasing government-wide backlog in FOIA requests. According to DHS officials, this backlog—led by USCIS, USCBP, and ICE—is prompted by a lack of resources, a loss of employees with expertise and experience, and a move to migrate to newer automated systems, which takes time and training. H.R. 1615 in the 114<sup>th</sup> Congress seeks to address DHS’s FOIA administration difficulties by, among other things, requiring DHS to update its FOIA regulations, to examine its current costs and seek ways to eliminate inefficiencies, and to draft plans that detail the implementation of tracking systems and other automation for FOIA administration purposes.

This report examines and analyzes agency administration of FOIA. Using data that executive branch agencies report publicly and to the Department of Justice, this report provides information on the volume of FOIA requests, processed, and backlogged by executive branch agencies, as well as information on how many exemptions the agencies use to withhold certain information from public release. This information can assist Congress in determining whether agencies are meeting their statutory responsibilities to provide federal information to the public in compliance with FOIA.

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## Introduction<sup>1</sup>

The Freedom of Information Act (FOIA; 5 U.S.C. §552), often referred to as the embodiment of “the people’s right to know” about the activities and operations of government, statutorily established a presumption of public access to information held by executive branch departments and agencies. Enacted in 1966 to replace the “Public Information” section of the Administrative Procedure Act (APA; 5 U.S.C. Subchapter II),<sup>2</sup> FOIA allows any person—individual or corporate, citizen or not—to request and obtain, without explanation or justification, existing, identifiable, and unpublished agency records on any topic.<sup>3</sup>

Presidential Administrations have interpreted FOIA’s presumed public access to agency records differently. For example, the Department of Justice (DOJ) under the direction of the George W. Bush Administration cautioned federal agencies to give “full and deliberate consideration of the institutional, commercial, and personal privacy interests when making disclosure determinations” and assured them that DOJ would defend agency decisions in court “unless they lack[ed] a sound legal basis or present[ed] an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.”<sup>4</sup> In contrast, the Barack H. Obama Administration requires agencies “to adopt a presumption in favor of disclosure.”<sup>5</sup>

The 114th Congress may have an interest in the implementation of FOIA and whether that implementation appropriately reflects the law. In addition to agency oversight, Congress may have particular interest in exploring some of the following FOIA-related issues:

- whether to limit, maintain, or expand the number of provisions that permit agencies to withhold certain categories of information from public release;
- how to assist agencies in reducing FOIA request backlogs; and
- how to better understand how policy or statutory changes can affect the volume of FOIA requests an agency may receive each year.

This report discusses FOIA’s history, examines and analyzes its implementation, and discusses policy options for the 114th Congress.

Both the House and Senate have considered legislation in the 114<sup>th</sup> Congress that would make substantial amendments to FOIA. In the House, H.R. 653, the FOIA Act, was introduced on February 2, 2015, and reported out of the Committee on Oversight and Government Reform on March 25, 2015. In the Senate, S. 337, the FOIA Improvement Act of 2015, was reported on February 2, 2015, and reported out of the Judiciary Committee on February 9, 2015. Both of these bills would amend FOIA to increase electronic access and oversight, create new reporting requirements related to exemption use, and establish new roles for the Office of Government

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<sup>1</sup> Parts of this report are adapted from CRS Report RL32780, *Freedom of Information Act (FOIA) Amendments: 110<sup>th</sup> Congress*, by Harold C. Relyea.

<sup>2</sup> The “Public Information” section was formerly Sec. 3 of the Administrative Procedure Act (P.L. 79-404; 60 Stat. 238).

<sup>3</sup> Although citizenship is not a requirement when submitting a FOIA, the Intelligence Authorization for Fiscal Year 2003 amended FOIA to preclude agencies of the intelligence community from disclosing records in response to FOIA requests made by any foreign government or international government organization. Intelligence Authorization Act for Fiscal Year 2003 (P.L. 107-306, §312, codified at 5 U.S.C. §552(a)(3)(E)).

<sup>4</sup> Memorandum from Attorney General John Ashcroft for *Heads of Federal Departments and Agencies: Freedom of Information Act*, October 12, 2001, at <http://www.justice.gov/archive/oip/011012.htm>.

<sup>5</sup> Memorandum from President Barack Obama for *Heads of Executive Departments and Agencies: Freedom of Information Act*, January 21, 2009, at [http://www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct/](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/).

Information Services and the National Archives and Records Administration. Much of the content of these bills is outside the scope of this report. More information on the legislation is available in CRS Report R43924, *Freedom of Information Act Legislation in the 114th Congress: Issue Summary and Side-by-Side Analysis*, by Daniel J. Richardson and Wendy Ginsberg.

In addition to these government-wide reform bills, the House has also passed legislation in the 114<sup>th</sup> Congress designed to specifically improve FOIA administration within the Department of Homeland Security (DHS). As discussed in greater detail in the “FOIA Statistics” section of this report, DHS accounts for the highest number of requests and has also driven the increased backlog in recent years. H.R. 1615, the DHS FOIA Efficiency Act of 2015, would require DHS to update its FOIA regulations to reflect changes to law and policies, develop specific guidance for reducing the backlog of FOIA requests, and report on the implementation of plans to further automate the FOIA administration process. H.R. 1615, as passed by the House, would require the department’s chief FOIA officer to “identify the total annual cost” of its administration of FOIA and identify ways to reduce those costs by eliminating duplicative FOIA processes. Furthermore, the bill would require DHS to implement certain changes that are similar to the government-wide reforms in H.R. 653 and S. 337, including the development of a tracking system and increased reporting requirements on FOIA administration within the department. On June 25, 2015, H.R. 1615 was passed by the House of Representatives by a vote of 423-0.

## FOIA Background<sup>6</sup>

FOIA’s history is an essential component of understanding the act’s scope and its utility. FOIA applies only to the departments and agencies of the federal executive branch, and serves as the foundation for public oversight and transparency of executive branch operations.<sup>7</sup> FOIA is the primary tool for the public to access federal executive branch records.

### A Focus on the Executive Branch

The scope of FOIA has been shaped by both historical and constitutional factors. During the latter half of the 1950s, when congressional subcommittees examined government information availability, the practices of federal departments and agencies were a primary focus. The public, the press, and even some congressional committees and subcommittees were sometimes rebuffed when seeking information from executive branch entities.<sup>8</sup> At the time, the preservation of, and access to, presidential records—which are today governed by the Presidential Records Act (44

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<sup>6</sup> For a more in-depth legislative history of FOIA, see CRS Report RL32780, *Freedom of Information Act (FOIA) Amendments: 110th Congress*, by Harold C. Relyea.

<sup>7</sup> At present, FOIA makes the requirements of the statute applicable only to an “agency,” which “means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include - (A) the Congress; or (B) the courts of the United States[.]” (5 U.S.C. §551)

The committees that developed FOIA—the House Committee on Government Operations (now known as the House Oversight and Government Reform Committee) and the Senate Committee on the Judiciary—were responding to perceived secrecy problems in the executive branch. Thus, FOIA was created, approved, and implemented with an executive branch focus. For more information on the limitations of FOIA applicability see Harold C. Relyea, “Congress and Freedom of Information: A Retrospective and a Look at the Current Issue,” *Government Information Quarterly*, vol. 26 (2009), pp. 437-440.

<sup>8</sup> Sen. Edward Kennedy, “The Freedom of Information Act Experience,” remarks in the Senate, *Congressional Record*, September 22, 1976, p. 31823. Senator Kennedy submitted for printing into the *Record* a document written by Harold C. Relyea entitled “The Provision of Government Information: The Federal Freedom of Information Act Experience.” This reference cites to Mr. Relyea’s document.

U.S.C. §2201-2207) and treated differently than other executive branch records—had not yet become a great public or congressional concern, so such records were ultimately not covered by FOIA.<sup>9</sup>

The accessibility of federal court records and congressional records, likewise, was not a primary congressional concern. Some Members and academics have asserted that, in the case of Congress, the secret journal clause<sup>10</sup> or the speech or debate clause<sup>11</sup> of the Constitution could be impediments to the effective application of FOIA to Congress. In a 1955 hearing, Representative John E. Moss, chairman of the newly created Special Subcommittee on Government Information, delineated the intended scope of freedom of information legislation, saying,

We are not studying the availability of information from Congress, although many comments have been made by the press in that field, but we are taking a long, hard look at the amount of information available from the executive and independent agencies for both the public and its elected representatives.<sup>12</sup>

Eleven years after that hearing, after much debate and deliberation, FOIA was enacted and was made applicable only to federal, executive-branch departments and agencies. At the time of its enactment, FOIA was regarded as a ground-breaking law. Only two other nations—Sweden and Finland—had comparable disclosure laws, and neither statute was as sweeping as the new American model. The law’s premise reversed the burden of proof that had existed under the public information section of the APA, which required requesters to establish a justification or a need for the information being sought.<sup>13</sup> Under FOIA, in contrast, access is presumed—although presidential Administrations have interpreted this presumed access differently. Agencies must justify denying access to requested information.

FOIA’s implementation in the executive branch was of great interest to Congress and the public because, among other reasons, no executive branch department or agency head had supported the legislation. President Lyndon B. Johnson was reportedly reluctant to sign the measure.<sup>14</sup> The law

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<sup>9</sup> *Presidential records* are “documentary materials, or any reasonably segregable portion thereof, created or received by the President, the President’s immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President” (44 U.S.C. §2201). For more information on preservation of and access to presidential records and vice presidential records, see CRS Report R42038, *Insurance Regulation: Issues, Background, and Legislation in the 112th Congress*, by Baird Webel.

<sup>10</sup> U.S. Constitution, Article I, Section 5, clause 3 is often referred to as the “secret journal clause.” The clause directs each house of Congress to keep a journal of its proceedings and publish the same, except such parts as may be judged to require secrecy. The “secret journal clause” has been interpreted to authorize the House and the Senate to keep certain records secret. See, for example, the National Constitution Center, “Annenberg Classroom,” at <http://constitutioncenter.org/constitution/the-articles/article-i-the-legislative-branch>.

<sup>11</sup> U.S. Constitution, Article I, Section 6, clause 1 is referred to as the “speech or debate clause.” The clause specifies that Members of Congress, “for any Speech or Debate in either House ... shall not be questioned in any other Place,” which might be regarded as a bar to requests to Members for records concerning their floor, committee, subcommittee, or legislative activity. For more information on the Speech or Debate clause, see CRS Legal Sidebar WSLG190, *Speech or Debate Clause Immunity for Members and Staff*, by Alissa M. Dolan.

<sup>12</sup> U.S. Congress, House Committee on Government Operations, *Availability of Information from Federal Departments and Agencies*, hearing, 84<sup>th</sup> Cong., 1<sup>st</sup> sess., November 7, 1955 (Washington: GPO, 1956), p. 3.

<sup>13</sup> Sen. Edward Kennedy, “The Freedom of Information Act Experience,” remarks in the Senate, *Congressional Record*, September 22, 1976, vol. 122, part 25, p. 31822. Senator Kennedy submitted for printing into the *Record* a document written by Harold C. Relyea entitled “The Provision of Government Information: The Federal Freedom of Information Act Experience.” This reference cites Mr. Relyea’s document.

<sup>14</sup> See Samuel J. Archibald, “The Freedom of Information Act Revisited,” *Public Administration Review*, vol. 39, July-August 1979, pp. 311-318. See also “NOW With Bill Moyers – Politics and Economy: Bill Moyers on the Freedom of

was not, and may continue not to be enthusiastically received by the executive branch. Supporters of FOIA, therefore, have maintained that its implementation and use may require close attention from congressional overseers.<sup>15</sup>

## FOIA Exemptions

FOIA exempts nine categories of records from the statute's rule of disclosure.<sup>16</sup> The exemptions are as follows:

1. Information properly classified for national defense or foreign policy purposes as secret under criteria established by an executive order;
2. Information relating solely to agency internal personnel rules and practices;
3. Data specifically exempted from disclosure by a statute other than FOIA if that statute
  - requires that the data be withheld from the public in such a manner as to leave no discretion on the issue;
  - establishes particular criteria for withholding information or refers to particular types of matters to be withheld; or
  - specifically cites to this exemption (if the statute is enacted after October 28, 2009, the date of enactment of the OPEN FOIA Act of 2009);<sup>17</sup>
4. Trade secrets and commercial or financial information obtained from a person that is privileged or confidential;
5. Inter- or intra-agency memoranda or letters that would not be available by law except to an agency in litigation;
6. Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy;
7. Certain kinds of records compiled for law enforcement purposes;
8. Certain information relating to the regulation of financial institutions; and
9. Geological and geophysical information and data.

Some of these exemptions, such as the one concerning trade secrets and commercial or financial information, have been litigated and undergone considerable judicial interpretation.<sup>18</sup>

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Information Act,” April, 5, 2002, at <http://www.pbs.org/now/commentary/moyers4.html>. According to Moyers, Johnson “had to be dragged kicking and screaming to the signing ceremony. He hated the very idea of the Freedom of Information Act; hated the thought of journalists rummaging in government closets; hated them challenging the official view of reality.” See also Harold C. Relyea, “Federal Freedom of Information Policy: Highlights of Recent Developments,” *Government Information Quarterly*, vol. 26 (January 2009), p. 314.

<sup>15</sup> For a detailed history of amendments to FOIA, see out-of-print CRS Report R40766, *Freedom of Information Act (FOIA): Issues for the 111<sup>th</sup> Congress*, by Wendy Ginsberg, available from the author to congressional clients upon request.

<sup>16</sup> 5 U.S.C. §552(b).

<sup>17</sup> P.L. 111-83; 123 Stat. 2142.

<sup>18</sup> For sources concerning judicial interpretation of FOIA, see Harry A. Hammitt, Marc Rotenberg, John A. Verdi and Mark S. Zaid, eds., *Litigation Under the Federal Open Government Laws: 2010*, fifth edition (Washington: EPIC Publications and The James Madison Project, 2008); James T. O'Reilly, *Federal Information Disclosure*, third edition (Eagan, MN: West Group, first published in 2000, with supplements); and U.S. Department of Justice, *Freedom of Information Act Guide*, June 2009 edition (Washington, DC: GPO, 2009), at <http://www.justice.gov/oip/>

A person denied access to requested records, in whole or in part, may make an administrative appeal to the head of the agency for reconsideration. If an agency appeal is denied, an appeal for further consideration may be made in federal district court.<sup>19</sup> The Office of Government Information Services (OGIS), which was created within the NARA, also may provide “mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation.”<sup>20</sup> OGIS services are advisory and nonbinding. The creation and role of OGIS will be discussed in more detail later in this report.

## **Obama Administration Initiatives**

On January 21, 2009, President Obama issued a memorandum on FOIA, stating that the act “should be administered with a clear presumption: In the face of doubt, openness prevails.”<sup>21</sup> The memorandum stated that under the new administration

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.<sup>22</sup>

The memorandum directed the Attorney General to “issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the *Federal Register*.”<sup>23</sup>

## **Department of Justice Guidance**

On March 19, 2009, Attorney General Eric Holder issued a memorandum in which he required “A Presumption of Openness.” The memorandum explicitly rescinded former Attorney General John Ashcroft’s October 12, 2001, memorandum. Holder’s memorandum read as follows:

First, an agency should not withhold information simply because it may do so legally.... An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.

Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure. Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure.

At the same time, the disclosure obligation under the FOIA is not absolute....

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foia\_guide09.htm.

<sup>19</sup> 5 U.S.C. §552(4)(B). See U.S. Congress, House Committee on Government Reform, *A Citizen’s Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records*, H.Rept. 109-226, 109<sup>th</sup> Cong., 1<sup>st</sup> sess. (Washington: GPO, 2005).

<sup>20</sup> 5 U.S.C. §552(h)(3).

<sup>21</sup> Memorandum from President Barack Obama for *Heads of Executive Departments and Agencies: Freedom of Information Act*, January 21, 2009, at [http://www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct/](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/).

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

[T]he Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.<sup>24</sup>

The Obama and Holder memoranda reflected a shift from the memoranda of the George W. Bush Administration, which required agency and department heads to release documents “only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.”<sup>25</sup>

Within the Department of Justice, the Office of Information Policy (OIP) is charged with “encouraging agency compliance” with FOIA and “ensuring that the President’s FOIA memorandum and the Attorney General’s FOIA Guidelines are fully implemented across the government.”<sup>26</sup> To perform these duties, OIP “develops and issues policy guidance” on FOIA implementation and maintains and makes publicly available the *United States Department of Justice Guide to the Freedom of Information Act*, which provides history and case law related to FOIA.<sup>27</sup>

## Soliciting Public Input

In 2009, the Obama Administration solicited information and ideas from the public on ways to make FOIA a more useful tool. From May 21 to July 6, for example, the Administration held a three-phase “Open Government Initiative” aimed at collecting ideas from the public on how to make government more collaborative, transparent, and participatory. The Administration sought public comment on “innovative approaches to policy, specific project suggestions, government-wide or agency-specific instructions, and any relevant examples and stories relating to law, policy, technology, culture, or practice.”<sup>28</sup>

## The Open Government Directive

On December 8, 2009, President Obama released his Open Government Directive—a presidential memorandum describing how agencies were to implement the open government and transparency values he discussed in earlier Administration memoranda.<sup>29</sup> The directive restated the Administration’s commitment to the “principle that openness is the Federal Government’s default position for FOIA issues.”<sup>30</sup> The directive also encouraged agencies to release data and

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<sup>24</sup> U.S. Department of Justice, Attorney General Eric Holder, *Memorandum For the Heads of Executive Departments and Agencies: The Freedom of Information Act (FOIA)*, Washington, DC, March 19, 2009, pp. 1-2, at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>.

<sup>25</sup> John Ashcroft, U.S. Attorney General, *Memorandum for the Heads of all Federal Departments and Agencies: The Freedom of Information Act*, October 12, 2001, at <http://www.doi.gov/foia/foia.pdf>.

<sup>26</sup> U.S. Department of Justice, “About Us,” at <http://www.justice.gov/oip/about-us.html>.

<sup>27</sup> Ibid. The *United States Department of Justice Guide to the Freedom of Information Act* is available at [http://www.justice.gov/oip/foia\\_guide09.htm](http://www.justice.gov/oip/foia_guide09.htm).

<sup>28</sup> National Academy of Public Administration (NAPA), *Open Government Dialogue*, May 21, 2009, at <http://opengov.ideascale.com/akira/panel.do?id=4049>. When the dialogue began, users could offer ideas without signing up for a log-on identity. On May 23, 2009, NAPA changed that policy and required all participants to log into the website before their comments could be posted.

<sup>29</sup> Executive Office of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive*, Washington, DC, December 8, 2009, at [http://www.whitehouse.gov/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf). For a history and analysis of the Open Government Directive, see CRS Report R42817, *Government Transparency and Secrecy: An Examination of Meaning and Its Use in the Executive Branch*, by Wendy Ginsberg et al.

<sup>30</sup> Executive Office of the President, Office of Management and Budget, *Memorandum for the Heads of Executive*

information “online in an open format that can be retrieved, downloaded, indexed, and searched by commonly used applications.”<sup>31</sup> The information, according to the directive, was to be placed online even prior to a FOIA request, to preempt the need for such requests.<sup>32</sup> Pursuant to the memorandum, agencies were required to put their annual FOIA report on the Open Government website in an accessible format.

The Obama Administration directive required agencies with a backlog of FOIA requests to reduce the number of outstanding requests by 10% per year,<sup>33</sup> but did not state how the Administration would address agencies that do not comply with its requirements. Moreover, a reduction in backlog does not necessarily mean an agency is more efficiently administering FOIA. For example, an agency could eliminate a backlog by denying complex requests that could otherwise be released in part. Denying requests may take less time than negotiating a partial release. Additionally, some agencies may have reduced their backlog simply because they received fewer requests and not because they applied FOIA more effectively.

On March 16, 2010, White House Chief of Staff Rahm Emanuel and Counsel to the President Bob Bauer released an additional memorandum stating their appreciation for current agency efforts to implement the FOIA in accordance with the Administration’s directives, but also said “more work remains to be done.”<sup>34</sup> The memorandum instructed department and agency heads to “update all FOIA guidance and training materials to include the principles articulated in the President’s [January 21, 2009] Memorandum.”<sup>35</sup> It then asked department and agency heads to “assess whether [they] are devoting adequate resources to responding to FOIA requests promptly and cooperatively, consistent with the requirements for addressing this Presidential priority.”<sup>36</sup>

Advocates of access to government records and information have stated the Obama Administration’s efforts to make government more transparent and to make federal records more accessible have seen mixed results. In December 2012, the Transactional Records Access Clearinghouse (TRAC), a research center at Syracuse University that collects FOIA data from federal agencies, found that more FOIA-related lawsuits were filed during the first term of President Obama (720 FOIA-related lawsuits) than were filed in the second term of President George W. Bush (562 FOIA-related lawsuits).<sup>37</sup> OpenTheGovernment.org, a coalition that aims to make the “federal government a more open place,”<sup>38</sup> said the Administration’s “[e]fforts to open the government continue to be frustrated by a governmental predisposition towards secrecy,

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*Departments and Agencies: Open Government Directive*, p. 1.

<sup>31</sup> Ibid.

<sup>32</sup> Publishing agency records online is one suggestion that was repeated by several members of the public who participated in the Open Government Initiative’s online collaboration.

<sup>33</sup> According to FOIA.gov, a backlogged request is one that has not been responded to within “the statutory time period for a response.” A backlogged request is different from a pending request, which is a “FOIA request or administrative appeal for which an agency has not yet taken final action in all respects.” See U.S. Department of Justice, “FOIA.gov: Glossary,” at <http://www.foia.gov/glossary.html#>.

<sup>34</sup> The White House, Rahm Emanuel and Bob Bauer, *Memorandum for Agency and Department Heads: Freedom of Information Act*, March 16, 2010, at [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/foia\\_memo\\_3-16-10.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/foia_memo_3-16-10.pdf).

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> The FOIA Project, “FOIA Lawsuits Increase During Obama Administration,” December 20, 2012, at <http://foiaproject.org/2012/12/20/increase-in-foia-lawsuits-during-obama-administration/>.

<sup>38</sup> OpenTheGovernment.org, “We Are,” at [http://www.openthegovernment.org/we\\_are](http://www.openthegovernment.org/we_are).

especially in the national security bureaucracy.”<sup>39</sup> In a February 2013 open letter to the President that addressed transparency, generally, OpenTheGovernment.org wrote:

We applaud the strides made during your first term to proactively release more information online, including on such sites as *data.gov*, *recovery.gov* and *USAspending.gov*. But more can be done toward achieving transparency.<sup>40</sup>

## FOIA Statistics

### FOIA Request Volume

The Department of Justice (DOJ) found that in FY2014 the federal government received the highest volume of FOIA requests since at least FY1998: 714,231 FOIA requests.<sup>41</sup> Requests increased by 9,837 when compared to FY2013 (a 1.4% increase). This increase is notably smaller than increases in recent years (in FY2013 requests were up 53,140, an increase of 8.2%; in FY2011 requests were up 46,750, an increase of 7.8%; in FY2010 requests were up 39,590, an increase of 7.7%) and may have contributed to the federal government’s ability to decrease backlogged FOIA requests in certain departments and agencies.

In FY2014, DHS received more requests than any other agency with 291,242 requests (29.3% of all FOIA requests).<sup>42</sup> FOIA requests at DHS increased by more than 40% in both FY2013 and FY2014.<sup>43</sup> In FY2014 alone, requests increased by 59,708, with an increase of nearly 51,000 for ICE. It is not clear whether any new policy or regulation prompted the increase in requests. DHS’s Chief FOIA Officer, in the agency’s annual 2011 FOIA report, wrote that the increase in requests demonstrated “acceptance among the public” of “government accountability through the Freedom of Information Act.”<sup>44</sup> Other possible contributors to the increase in FOIA requests include changes in immigration law or policy; use of less efficient methods to receive and respond to FOIA requests (for example, a continued reliance on paper rather than an electronic

<sup>39</sup> “2012 Secrecy Report—Sunlight Overshadowed,” *Openthegovernment.org*, September 12, 2012, press release, at <http://www.openthegovernment.org/node/3578>.

<sup>40</sup> *OpenTheGovernment.org*, “Dear Mr. President: Here’s How to Secure Your Open Government Legacy,” at <http://www.openthegovernment.org/node/3858>.

<sup>41</sup> Department of Justice, “Summary of Annual FOIA Reports for FY2012,” p. 2, at <http://www.justice.gov/oip/docs/fy-2012-annual-report-summary.pdf>.

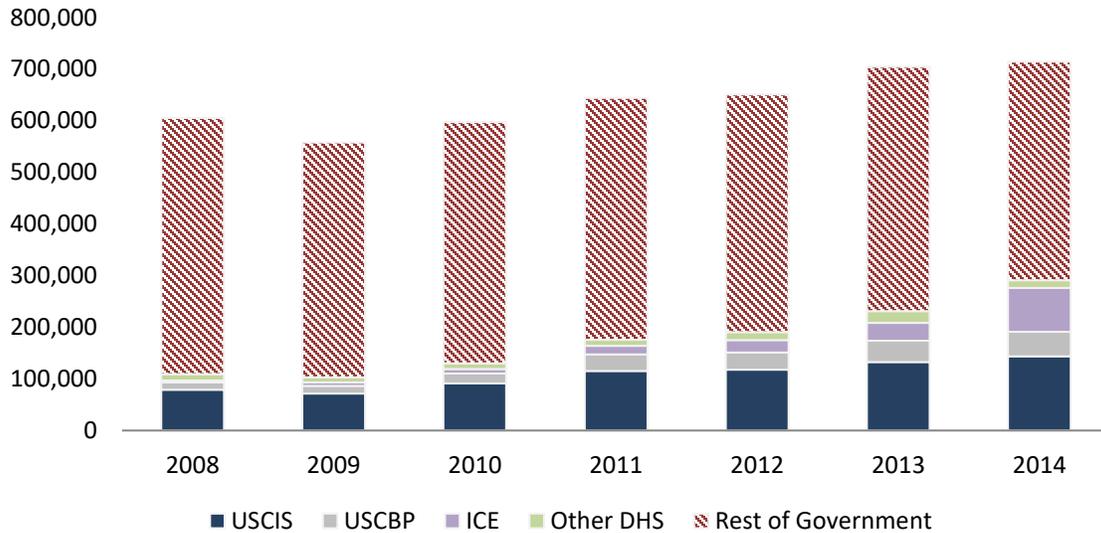
<sup>42</sup> The Department of Homeland Security’s (DHS’s) FOIA logs do not provide details on what types of requests or policy changes could be prompting the increase in FOIA requests. DHS, however, has, since 2007, adopted a policy that allows non-U.S. citizens and nonresident aliens to use FOIA to request immigration-related information. See Hugo Teufel III, *Privacy Policy Guidance Memorandum*, U.S. Department of Homeland Security, Memorandum Number 2007-1, Washington, DC, January 19, 2007, at [http://www.dhs.gov/xlibrary/assets/privacy/privacy\\_policyguide\\_2007-1.pdf](http://www.dhs.gov/xlibrary/assets/privacy/privacy_policyguide_2007-1.pdf). Pursuant to the Privacy Act (5 U.S.C. §552a), U.S. citizens and permanent resident aliens have presumptive access to personally identifiable files on themselves held by federal agencies—generally excepting law enforcement and intelligence entities. Noncitizens and nonresident aliens, however, can request personally identifiable records from DHS pursuant to Memorandum Number 2007-1. According to the policy, “[n]on-U.S. persons have the right of access to their [personally identifiable information] and the right to amend their records, absent an exemption under the Privacy Act; however, this policy does not extend or create a right of judicial review for non-U.S. persons” (p. 2). In many cases, it appears these non-U.S. citizen requests are recorded as FOIA requests. Increasing use of FOIA to access noncitizens’ personally identifiable records may be a cause of DHS’s increasing requests.

<sup>43</sup> Data are available at U.S. Department of Justice, “FOIA.gov,” at <http://www.foia.gov/index.html>.

<sup>44</sup> U.S. Department of Homeland Security, “2011 Freedom of Information Act Report to the Attorney General of the United States,” February 2012, p. ii, at <http://www.dhs.gov/xlibrary/assets/privacy/privacy-foia-annual-report-fy-2011-dhs.pdf>.

database to receive requests or find and provide records); and encouragement of stakeholder organizations to have members file FOIA requests.

**Figure 1. FOIA Requests Received by the Federal Government**  
FY2008 to FY2014



**Source:** U.S. Department of Justice, “Summary of Annual FOIA Reports” from FY2008 to FY2014, at <http://www.justice.gov/oip/reports.html>.

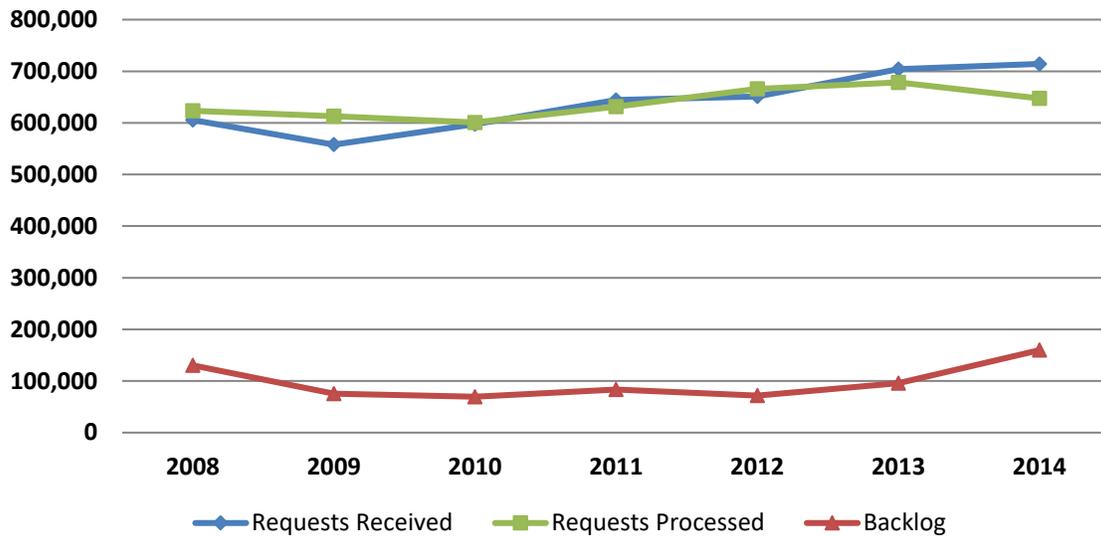
**Notes:** The Department of Homeland Security (DHS) was the federal entity that received the largest number of requests in FY2014. The U.S. Citizenship and Immigration Services and the U.S. Immigration and Customs Enforcement were the two agencies within DHS that received the largest number of requests. According to DOJ’s summary report, in FY2014, DHS reported it received 40.1% of all FOIA requests received government-wide.

## FOIA Processing

**Figure 2**, below, shows that executive branch agencies have processed between 600,000 and 650,000 requests per year. Despite the increase in total request in recent years, the number of processed requests has remained relatively stable, resulting in an increase in the overall backlog.

Executive branch agencies were able to process more requests than were received during four of the five years between FY2008 and FY2012, leading to a decrease in backlogs during that period. This trend, however, has reversed significantly in FY2013 and FY2014. For FY2014, requests received were more than 67,000 higher than requests processed.

**Figure 2. FOIA Requests Received and Processed, and the Remaining FOIA Backlog**  
FY2008 to FY2014



**Source:** U.S. Department of Justice, “Summary of Annual FOIA Reports” from FY2008 to FY2014, at <http://www.justice.gov/oip/reports.html>.

## Backlogged Requests

According to *FOIA.gov*, an online portal that includes agency-reported FOIA administration statistics, executive branch agencies have struggled to address the backlog in recent years. **Figure 3** shows the total reported federal FOIA request backlog and includes the departments and agencies that contribute the most to these trends. Despite making significant progress between FY2008 to FY2012, when the overall backlog declined by more than 58,000 requests (45%), the backlog has increased in the past two years. By the end of FY2014, the overall backlog was 159,741, which is more than double the number of backlog requests at the end of FY2012.<sup>45</sup> DHS has been the primary driver of the increased backlog since FY2012. The overall backlog at DHS grew by nearly 75,000 requests between FY2012 and FY2014, which is 85% of the overall backlog increase government-wide. This recent trend is a reversal from the years between FY2008 and FY2012, when DHS was able to cut their backlog by a third.<sup>46</sup> The recent increase in backlog at DHS has been driven by two components, Customs and Border Protection (USCBP) and Immigration and Customs Enforcement (ICE). Since FY2012, the backlog for these two components has increased by 78,079 requests, a greater increase than the overall DHS increase. As a result, these two components of DHS are the primary drivers of the increase in backlogged FOIA requests government-wide.

ICE’s increased request backlog is particularly steep from FY2011 through FY2014. In FY2011, ICE had a backlog of 18 requests. In FY2014, that backlog swelled to 56,863 requests, a 3,159.1% increase. According to DHS’s Chief FOIA Officer’s report for FY2014, an increase in coming FOIA requests, “a loss of experienced or seasoned FOIA professionals,” and increase in

<sup>45</sup> Data are available at U.S. Department of Justice, “FOIA.gov,” at <http://www.foia.gov/index.html>.

<sup>46</sup> Ibid.

the complexity of the requests received all contributed to the increased backlog of requests.<sup>47</sup> In particular, ICE also cited, “budget cuts” for its increase in backlog.<sup>48</sup> CBP officials stated it underwent two migrations to new FOIA request tracking systems “resulted in delays as request information was migrated into the new systems.” CBP officials stated that they believe the new systems will allow them to “better monitor the workflow of its requests.”<sup>49</sup>

In her 2015 Chief FOIA Officer Report, DHS Chief FOIA Officer Karen L. Neuman cited reduction of her department’s backlog as one of her “top priorities.”<sup>50</sup> Ms. Neuman stated in the report that she worked with CBP, in particular, to eliminate its backlog by using a “commercial off the shelf” web application that expedited request processing and hired three contractors to increase the agency’s FOIA efficiency. In FY2014, CBP decreased its backlog by 10%. Despite a reduction in CBP’s backlog, several other DHS components saw an increase. TSA, for example, had 924 pending requests at the end of FY2014, compared to less than 600 in both FY2012 and FY2013. DHS officials stated that the increased backlog was caused by “workforce shortages, data migration, implementation of [a] new [commercial off the shelf] web application solution, and complex requests for voluminous amounts of records.”<sup>51</sup> DHS officials stated that ICE’s backlog was prompted by a “loss of seasoned FOIA professionals,” the “inability to hire new staff,” and the receipt of “a large volume of complex requests pertaining to sequestration, and multiple immigration-related issues pertaining to unaccompanied minors, sexual assault, the criminal alien program, and prosecutorial discretion.”<sup>52</sup>

In addition, the Department of Homeland Security has recently developed a mobile app intended to make the FOIA process easier for requesters. This app, called eFOIA, is the first of its kind in the federal government and will allow requesters to both submit and monitor their requests.<sup>53</sup>

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<sup>47</sup> U.S. Department of Homeland Security, Privacy Office, *2014 Chief Freedom of Information Act Officer Report to the Attorney General of the United States*, Washington, DC, March 2014, pp. 37-38, at [http://www.dhs.gov/sites/default/files/publications/2014-chief-foia-officer-report-final\\_0\\_0.pdf](http://www.dhs.gov/sites/default/files/publications/2014-chief-foia-officer-report-final_0_0.pdf).

<sup>48</sup> *Ibid.* p. 38.

<sup>49</sup> *Ibid.*

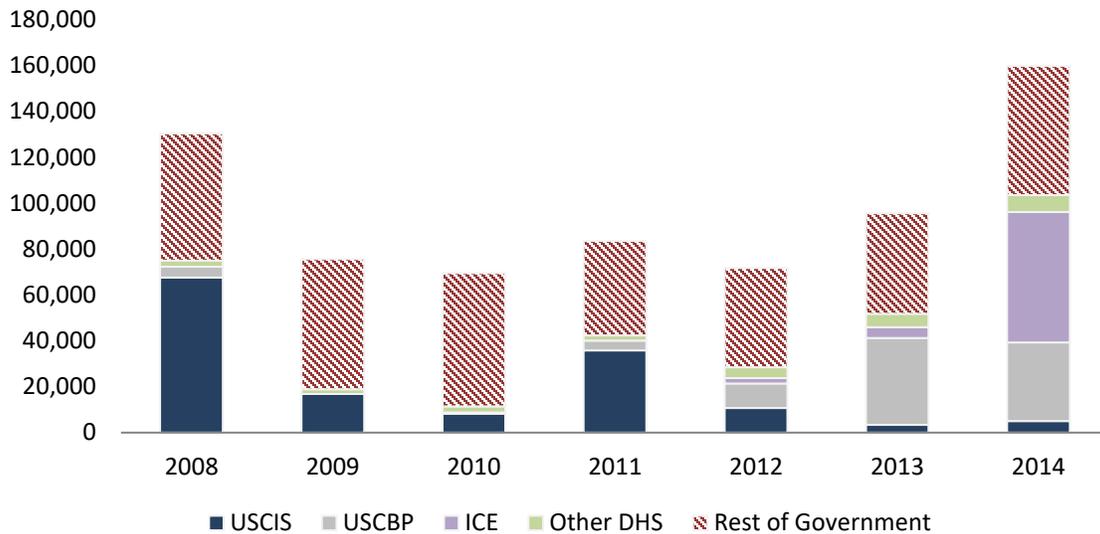
<sup>50</sup> U.S. Department of Homeland Security, Privacy Office, *2015 Chief Freedom of Information Act Officer Report to the Attorney General of the United States*, Washington, DC, March 2015, p. 2, at <http://www.dhs.gov/sites/default/files/publications/2015-chief-foia-officer-report-04082015.pdf>.

<sup>51</sup> *Ibid.* p. 41.

<sup>52</sup> *Ibid.* p. 42.

<sup>53</sup> Hallie Golden, “DHS Launches Federal Government's First FOIA App,” *Nextgov*, July 7, 2015, [http://www.nextgov.com/mobile/2015/07/dhs-becomes-first-agency-create-foia-app/117097/?oref=govexec\\_today\\_pm\\_nl](http://www.nextgov.com/mobile/2015/07/dhs-becomes-first-agency-create-foia-app/117097/?oref=govexec_today_pm_nl).

**Figure 3. FOIA Backlog in the Federal Government**  
FY2008 to FY2014



**Source:** U.S. Department of Justice, “Summary of Annual FOIA Reports” from FY2008 to FY2012, at <http://www.justice.gov/oip/reports.html>. Data are also available at Data.gov.

**Notes:** The Department of Homeland Security (DHS) was the federal entity that reported the largest number of backlogged requests in FY2014. U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement were the two agencies within DHS that reported the largest backlogs. According to CRS’s analysis of DOJ’s summary report, in FY2014, DHS reported 64.8% of all FOIA backlogged requests government-wide.

## Costs to Administer FOIA

As shown in **Figure 4**, costs to administer FOIA have increased steadily since FY2008.<sup>54</sup> In FY2014, the latest full year for which cost information is available, the total cost of all FOIA-related activities for all federal departments and agencies, as reported in their annual FOIA reports, was an estimated \$461.8 million.<sup>55</sup> The data reflect an increase of \$15.0 million in administrative costs from FY2013.<sup>56</sup> According to DOJ’s summary of FOIA reports, in FY2014, \$28.0 million (6.1%) of the federal government’s reported FOIA costs were spent on “litigation activities.”<sup>57</sup>

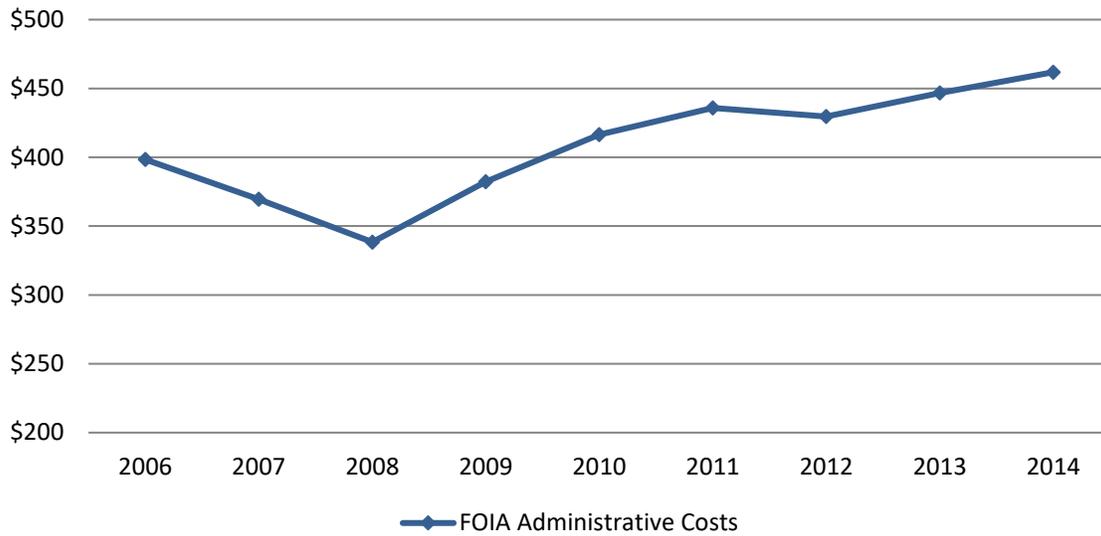
<sup>54</sup> U.S. Department of Justice, *Summary of Annual FOIA Reports* [FY2006 through FY2012]. All reports are available on DOJ’s website at <http://www.justice.gov/oip/reports.html>.

<sup>55</sup> U.S. Department of Justice, “Summary of Annual FOIA Reports for FY2012,” p. 17, at <http://www.justice.gov/oip/docs/fy-2012-annual-report-summary.pdf>. FOIA.gov does not include data on FOIA processing costs.

<sup>56</sup> U.S. Department of Justice, “Summary of Annual FOIA Reports for FY2011,” p. 21, at <http://www.justice.gov/oip/docs/fy-2011-annual-report-summary.pdf>.

<sup>57</sup> U.S. Department of Justice, “Summary of Annual FOIA Reports for FY2012,” p. 17, at <http://www.justice.gov/oip/docs/fy-2012-annual-report-summary.pdf>; and U.S. Department of Justice, “Summary of Annual FOIA Reports for FY2011,” p. 22, at <http://www.justice.gov/oip/docs/fy-2011-annual-report-summary.pdf>.

**Figure 4. Costs of FOIA-Related Activities for Federal Departments and Agencies**  
 FY2006 to FY2014, in millions



**Source:** Department of Justice “Summary of Annual FOIA Reports” from FY2006 through FY2014. All summary reports are available at <http://www.justice.gov/oip/reports.html>.

## Use and Growth of Exemptions

Pursuant to FOIA’s third exemption, 5 U.S.C. §552(b)(3), agencies may withhold particular records pursuant to other federal withholding statutes. The so-called b(3) exemption protects from disclosure any information that is specifically withheld from public release by a statute other than FOIA. For example, 18 U.S.C. §3509(d) provides authority for agencies to withhold certain information that contains identifying information pertaining to children involved in criminal proceedings. Since the October 28, 2009, enactment of the OPEN FOIA Act of 2009 (P.L. 111-83), any prospective statute that exempts material from public release must also specifically cite FOIA to qualify for exemption. It had historically been difficult to keep track of existing and newly created b(3) FOIA exemptions or to systematically examine such exemptions prior to enactment of the 2009 requirement.

Since 2011, DOJ has provided online an annual list of all the b(3) exemptions that departments and agencies reported claiming in a fiscal year.<sup>58</sup> DOJ’s “Summary of Annual FOIA Reports” and list of b(3) exemptions claimed for FY2012 show that federal agencies used 44,105 b(3) exemptions using 140 different b(3) statutes in FY2012—which is 9,744 (28.4%) more b(3) claims than in FY2011.<sup>59</sup> In FY2011, agencies cited 133 different b(3) statutes. In FY2012, therefore, agencies claimed more b(3) exemptions and cited more statutes to make those claims.

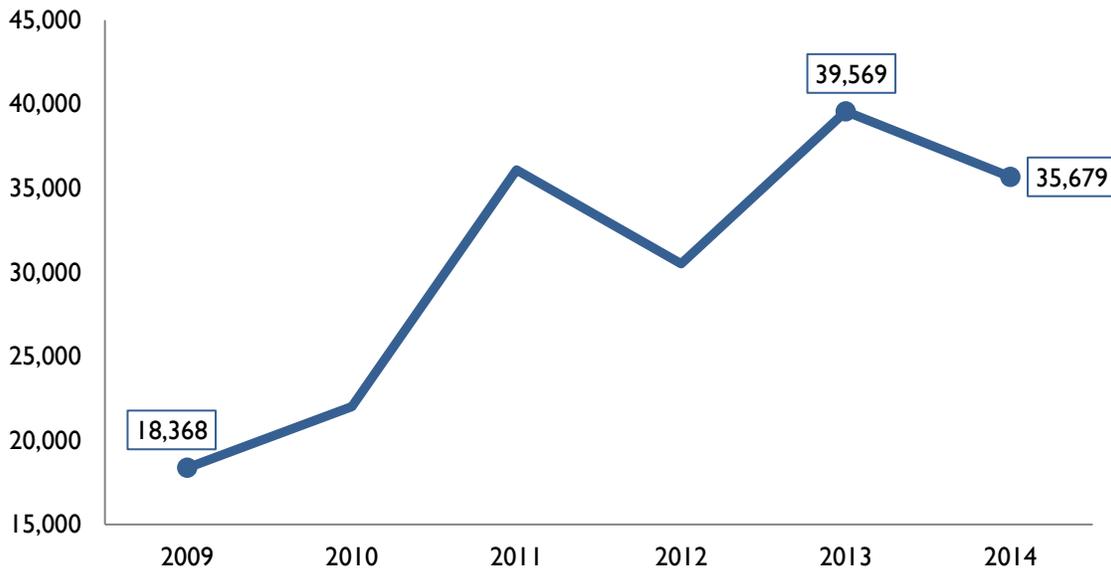
<sup>58</sup> See, for example, U.S. Department of Justice, “Statutes Used by Federal Departments and Agencies in Conjunction with Exemption 3 of the FOIA as Reported in Fiscal Year 2010 Annual FOIA Reports,” at <http://www.justice.gov/oip/docs/2010-exemption3-statutes.pdf>.

<sup>59</sup> U.S. Department of Justice, “Statutes Used by Federal Departments and Agencies in Conjunction with Exemption 3 of the FOIA as Reported in Fiscal Year 2012 Annual FOIA Reports,” at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/2012-exemption3-statutes.pdf>; “Statutes Used by Federal Departments and Agencies in Conjunction with Exemption 3 of the FOIA as Reported in Fiscal Year 2013

In some cases, however, an agency increased use of particular exemptions. According to DOJ's list of b(3) exemptions claimed by agencies, in FY2012 the DOD claimed 617 more exemptions than in FY2011 pursuant to 18 U.S.C. §798, which is related to "certain classified information pertaining to the communication, intelligence, and cryptographic devices of the United States or any foreign government."<sup>60</sup> Additionally in FY2012, the DOD claimed exemptions pursuant to 50 U.S.C. §403-1, which is related to "intelligence sources and methods."<sup>61</sup> In FY2012, DOD claimed the exemption 2,034 times. In FY2011, DOD claimed the exemption 561 times. It is not clear what statutory or policy changes may prompt increased use of this particular b(3) exemption. Agencies are not required to provide an explanation for increasing use of FOIA exemptions.

The data for the entire executive branch does suggest that the use of Exemption 3 has grown in recent years. As shown in **Figure 5**, the total use of Exemption 3 was twice as high in FY2013 as it was in FY2009. Use of exemption 3, however, declined by 3,890 (9.8%) from FY2013 to FY2014.

**Figure 5. Use of Exemption 3, FY2009-FY2013**



**Source:** "Annual FOIA Reports from All Federal Agencies," Office of Information Policy, Department of Justice, at <http://www.justice.gov/oip/reports-1>.

Annual FOIA Reports," at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/2013-exemption3-statutes.pdf>. These data are the most recent provided by the Department of Justice. A comparable report for FY2014, which would include citations on b(3) exemptions used throughout FY2013, has not yet been made available.

<sup>60</sup> To determine the increase, CRS compared the claims between the FY2011 and the FY2012 b(3) exemption lists. See U.S. Department of Justice, "Statutes Used by Departments and Agencies in Conjunction with Exemption 3 of the FOIA as Reported in FY2012 Annual FOIA Reports," p. 3, at <http://www.justice.gov/oip/docs/2012-exemption3-statutes.pdf>; and "Statutes Used by Departments and Agencies in Conjunction with Exemption 3 of the FOIA as Reported in FY2011 Annual FOIA Reports," p. 3, at <http://www.justice.gov/oip/docs/2011-exemption3-statutes.pdf>.

<sup>61</sup> U.S. Department of Justice, "Statutes Used by Departments and Agencies in Conjunction with Exemption 3 of the FOIA as Reported in FY2011 Annual FOIA Reports," p. 6; and "Statutes Used by Departments and Agencies in Conjunction with Exemption 3 of the FOIA as Reported in FY2012 Annual FOIA Reports," p. 6.

## Use of Exemption 2 after *Milner v. Department of the Navy*

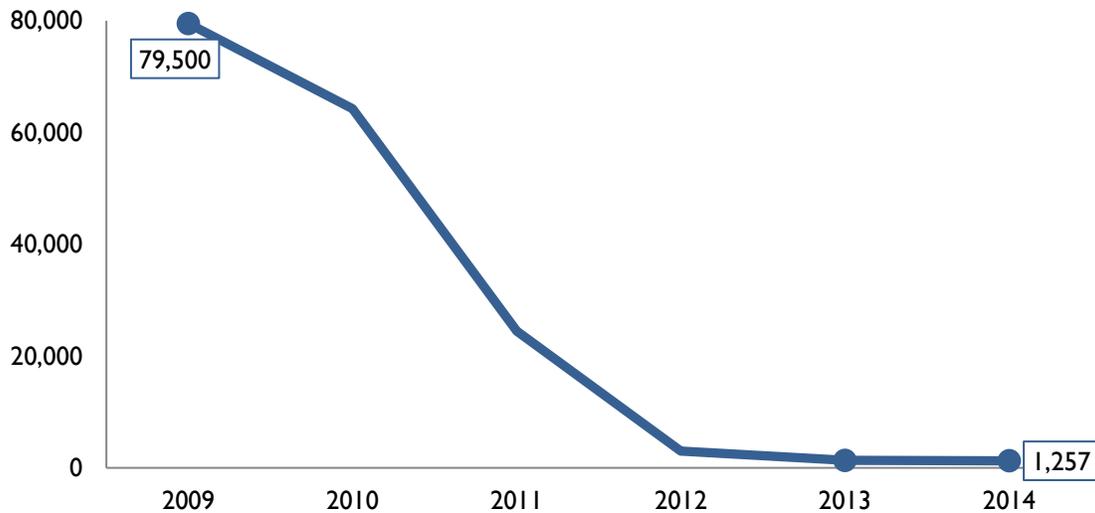
The use of Exemption 2, which protects records related to the “internal personnel rules and practices” of an agency, has changed considerably in recent years. As explained by the Department of Justice Guide to the Freedom of Information Act,

The courts have interpreted Exemption 2 to encompass two different categories of information:

- (a) internal matters of a relatively trivial nature- often referred to as “low 2” information; and
- (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement - often referred to as “high 2” information.

This protection of both “low 2” and “high 2” information was consistently applied by federal courts since the decision in *Crooker v. ATF* in 1981.<sup>62</sup> However, the Supreme Court recently addressed the protection of information under “high 2” in *Milner v. Department of the Navy*.<sup>63</sup> In an opinion delivered on March 7, 2011, the court stated that “construction of the statutory language simply makes clear that Low 2 is all of 2 (and that High 2 is not 2 at all...)” As a result of this ruling, DOJ has issued new guidance for the application of Exemption 2 throughout the government. As **Figure 5** demonstrates, there has been a consistent decline in the use of Exemption 2 since the announcement of this ruling. For both FY2009 and FY2010, executive branch agencies used Exemption 2 more than 64,000 times. In FY2012 and FY2013, the two full fiscal years after the *Milner* decision, the uses of Exemption 2 were 3,011 and 1,345, respectively. Overall, the use of Exemption 2 has declined by 98.4% during six-year period.

**Figure 6. Use of Exemption 2, FY2009-FY2013**



**Source:** “Annual FOIA Reports from All Federal Agencies,” Office of Information Policy, Department of Justice, at <http://www.justice.gov/oip/reports-1>.

<sup>62</sup> *Crooker v. ATF*, 670 F.2d 1051 (1981).

<sup>63</sup> *Milner v. Dep’t of the Navy*, 562 U.S. (2011).

## Some Policy Options for the 114th Congress

Congress has the authority to use its oversight and legislative powers to modify FOIA and affect its implementation. Conversely, Congress may determine that FOIA operations and implementation are currently effective and decide to take no action. This section of the report reviews ways in which Congress could amend FOIA or ensure that FOIA continues to be implemented in accordance with Congress's intentions.

### Reducing the Backlog of FOIA Requests

As noted in the sections above, nearly all federal departments and agencies have reduced their FOIA backlogs over the past five years. The burgeoning backlog at several DHS component agencies, however, has eclipsed those reductions and led to an overall increase in the number of backlogged requests. USCIS and ICE—the agencies experiencing the steepest increases in request backlogs—claim that lack of funding, loss of experienced staff, and adjustments prompted by upgrades to electronic processing systems are contributing to the increasing backlogs.

Congress may choose to see if the technology upgrades these agencies are implementing will facilitate quick and efficient administration of FOIA requests. With increased personnel training and effective use of technologies, it is possible that these DHS components address and eliminate the existing backlog. DHS's Chief FOIA Officer stated that increased focus on USCBP's backlog, which included the purchase of commercially available software and the hiring of contractors to assist in FOIA administration, led to that agency's reduced backlog. It may be possible to use similar strategies to address the heavy increase in volume and complexity of requests at USCIS and ICE.

Additionally, Congress may be concerned that DHS's actions alone may not eliminate the request backlog—or take too long to eliminate the backlog. Congress, therefore, may choose to increase the FOIA administration budget for DHS or establish hiring flexibilities for FOIA administration staff at DHS. FOIA administration does not appear as a line-item in an agency's congressional appropriation. If Congress chose to specifically increase DHS's FOIA budget, it may choose to do so by creating a particular account in congressional appropriation legislation, or it could include language that articulated a particular FOIA administration budget level in report language to accompany DHS appropriations. If Congress chose to enact hiring flexibilities, it may choose to limit the scope of the agency's hiring options to positions within the newly established Records and Information Management job series.<sup>64</sup> Such a limitation could ensure that DHS was hiring those with expertise in records management and access.

### Monitoring the Expansion of Additional Statutory b(3) Exemptions

As noted earlier in this report, FOIA's third exemption authorizes agencies to withhold particular records pursuant to federal withholding statutes that are not explicitly articulated in FOIA. These statutes are commonly referred to as b(3) exemptions. At hearings in March 2011, the House Committee on Oversight and Government Reform and the Senate Committee on the Judiciary

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<sup>64</sup> OPM established the Records and Information Management job series (0308) in 2014. For more information on the Records and Information Management job series, see U.S. Office of Personnel Management, "Position Classification Flysheet for Records and Information Management Series, 0308," at <http://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/standards/0300/g0308.pdf>.

discussed the growing number of FOIA b(3) exemptions.<sup>65</sup> At these hearings, several Members expressed interest in having a centralized collection of b(3) exemptions as well as having the opportunity to debate the merits and scope of new b(3) exemption proposals. At the House hearing, Rick Blum, coordinator for the Sunshine in Government Initiative, suggested the committee

take a hard look at these exemptions when they're proposed and make sure that they're absolutely necessary, that they're narrowly described, that they don't cover additional information, make sure that the drafting is narrow, make sure that they are publicly justified, and make sure that we have a chance to all weigh in.<sup>66</sup>

Giving committees with jurisdiction over FOIA implementation a chance to examine b(3) exemptions before their enactment may prevent the creation of exemptions written more broadly than intended. It also may prevent certain agencies from operating without the public being able to access data and records. Requiring each chamber to refer any legislation with a b(3) exemption to certain committees, however, might require rules changes in each chamber. Such requirements could slow down the legislative process, and, therefore, make it more difficult to enact protections for sensitive information or data.

Congress may also choose to require agencies that claim b(3) exemptions to publicly justify the need for that exemption. It is possible that every b(3) exemption is meritorious, but, in many cases, the public is not provided an opportunity to learn why the exemption was needed. Congress, for example, could require agencies, in their annual FOIA reports, to provide a policy justification, in plain language, for any b(3) exemption it claimed. To reduce time and resource burdens on agencies, Congress could narrow the scope of such reporting to justifications for the use of b(3) exemptions enacted in the past Congress. Congress could also choose to amend FOIA to require that any legislation proposing a new b(3) exemption is to include a policy justification that explains the need for any new withholding statute as a requirement for that statute to qualify as a b(3) exemption.

As noted in the "Use and Growth of Exemptions" section above, however, data demonstrate some agencies are increasing use of particular b(3) exemptions.<sup>67</sup> Requiring justifications for newly enacted b(3) statutes may not help the public understand why an agency may increasingly rely on previously existing b(3) exemptions. Congress, therefore, may choose to require agencies to provide, in their annual reports, policy justifications for increasing use of b(3) exemptions. For example, Congress could require an agency to provide a policy justification for increasing use of

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<sup>65</sup> U.S. Congress, House Committee on Oversight and Government Reform, *The Freedom of Information Act: Crowd-Sourcing Government Oversight*, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., March 17, 2011, H.Hrg. 112-19, (Washington: GPO, 2011); and U.S. Congress, Senate Committee on the Judiciary, *The Freedom of Information Act: Ensuring Transparency and Accountability in the Digital Age*, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., March 15, 2011, S.Hrg. 112-296 (Washington: GPO, 2011).

<sup>66</sup> U.S. Congress, House Committee on Oversight and Government Reform, *The Freedom of Information Act: Crowd-Sourcing Government Oversight*. The comment was made during the question and answer period and can be seen at <http://www.youtube.com/watch?v=INbMe8StyXw> (4:40 mark).

<sup>67</sup> In some cases, agencies were claiming b(3) exemptions that it had previously not used. For example, in FY2012, the Department of Defense claimed 1,473 more exemptions than in FY2011 pursuant to 50 U.S.C. §403-1, which is related to "intelligence sources and methods." See U.S. Department of Justice, "Statutes Used by Departments and Agencies in Conjunction with Exemption 3 of the FOIA as Reported in FY2012 Annual Reports," p. 6, at <http://www.justice.gov/oip/docs/2012-exemption3-statutes.pdf>; and "Statutes Used by Departments and Agencies in Conjunction with Exemption 3 of the FOIA as Reported in FY2011 Annual FOIA Reports," p. 6, at <http://www.justice.gov/oip/docs/2011-exemption3-statutes.pdf>.

a b(3) exemption if the agency's use of the exemption has met a particular numeric or percentage threshold when compared to the previous fiscal year.<sup>68</sup>

## **Amending the Exemption for Personnel Rules and Practices**

Following the Supreme Court's decision regarding Exemption 2 in *Milner v. Department of the Navy*, OIP published guidance stating that the decision "overturned thirty years of established FOIA precedents and significantly narrowed the scope of that exemption." The OIP guidance continued,

The question now is how much of Exemption 2 remains in the wake of *Milner*. As a starting point, the Supreme Court has made clear that the Exemption must be read according to its clear statutory language. That language provides for exemption of matters "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. §552(b)(2). Thus, the old formulations of "High 2" and "Low 2"- which were based on legislative history and not on this statutory language - no longer control. There is now just plain "Exemption 2," which is defined according to its text.<sup>69</sup>

As a result of this change, OIP listed Exemptions 1 (national security), 3 (other federal statutes), 4 (confidential business information), 6 (personal privacy), and 7 (law enforcement), as potential alternatives to the use of Exemption 2. However, there have also been legislative efforts intended to protect the information formerly withheld under "High 2." First, the National Defense Authorization Act of 2012 included language intended to protect the information disclosed in *Milner*, specifically related to critical infrastructure security that is sensitive but unclassified (P.L. 112-81, §1091). Furthermore, the language requested by the Department of Defense for the FY2016 National Defense Authorization Act (H.R. 1735) included a section that would restore all of the protections available under Exemption 2 prior to *Milner*. This step has been actively opposed by transparency groups, who view the return of "High 2" protection as damaging to open government and unnecessarily broad. This provision was ultimately not included in H.R. 1735, which passed the House on May 15, 2015, and passed the Senate (as amended) on June 18, 2015.

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## **Acknowledgments**

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<sup>68</sup> In selecting a threshold amount, Congress may consider ways to minimize reporting requirements by selecting a threshold that captures only significant increases in the use of a b(3) exemption. Without such limitation, agencies could be required to provide a justification in any case when an agency increased use of a b(3) exemption by only one or two claims.

<sup>69</sup> Office of Information Policy, Department of Justice, *Exemption 2 After the Supreme Court's Ruling in Milner v. Department of the Navy*, Washington, DC, August 21, 2014, at <http://www.justice.gov/oip/blog/foia-guidance-7>.

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