



September 2016

FREEDOM OF INFORMATION ACT

Litigation Costs For Justice and Agencies Could Not Be Fully Determined

GAO Highlights

Highlights of [GAO-16-667](#), a report to the Committee on the Judiciary, U.S. Senate

Why GAO Did This Study

FOIA requires federal agencies to provide the public with access to government information and each year, agencies release information. Nevertheless, many FOIA requests are denied or not responded to in a timely manner. The act allows requesters to litigate if the agency does not respond to a request within the statutory time frames. Over the last decade, Justice reported 3,350 FOIA lawsuits filed against agencies, with a 57 percent increase in lawsuits filed since 2006 (see figure).

GAO was asked to determine FOIA litigation-related costs incurred by federal agencies for lawsuits in which the plaintiffs substantially prevailed. To do so, GAO reviewed Justice's data on FOIA-related lawsuits with a decision rendered from 2009 through 2014, and identified 112 lawsuits across 28 federal agencies where the plaintiff substantially prevailed. GAO reviewed cost data from Justice and the selected agencies, and interviewed agency officials to discuss the availability and reliability of these data.

What GAO Recommends

If Congress determines that transparency in the reporting of FOIA litigation costs outweighs increased costs for systems and processes to be developed, then it could consider requiring Justice to provide a cost estimate for collecting and reporting information on costs incurred when defending lawsuits in which the plaintiffs prevailed. In commenting on a draft of this report, Justice stated that it appreciated GAO's recognition of the need to balance the cost and benefit of additional reporting to achieve good FOIA administration.

View [GAO-16-667](#). For more information, contact Valerie Melvin at (202) 512-6304 or melvinv@gao.gov.

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What GAO Found

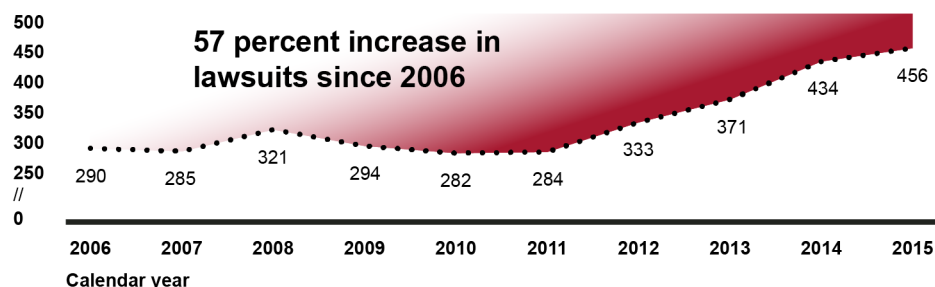
Of the 1,672 Freedom of Information Act (FOIA) lawsuits with a decision rendered between 2009 and 2014, GAO identified 112 lawsuits where the plaintiff substantially prevailed. Litigation-related costs for these 112 lawsuits could not be fully determined. Costs associated with such lawsuits are comprised of (1) the Department of Justice's (Justice) costs for defending the lawsuits on behalf of agencies, (2) the agencies' respective costs for the lawsuits, and (3) any attorneys' fees and costs as assessed by a court or based on settlement agreements awarded to the plaintiffs' attorneys.

Of the 112 lawsuits, Justice provided information on its costs for defending 8 lawsuits totaling about \$97,000. Justice officials stated that the department does not specifically track costs for lawsuits in which the plaintiffs substantially prevailed and that its attorneys are not required to track such costs for individual lawsuits. Regarding individual agencies, 17 of the 28 in GAO's study had a system or process in place that enabled them to provide cost information on 57 of the 112 selected lawsuits. According to this information, the agencies incurred approximately \$1.3 million in FOIA litigation-related costs for these lawsuits during fiscal years 2009 through 2014. The remaining agencies did not have a mechanism in place to track FOIA litigation-related costs where the plaintiffs prevailed. These agencies said costs were not tracked because Justice's guidance does not require agencies to collect and report costs related to specific lawsuits, or if the plaintiff prevailed as a result of a lawsuit.

As required by FOIA, Justice has reported annually on the results of all lawsuits, including any awards of attorneys' fees and costs to the plaintiffs. However, for 11 of the 112 selected lawsuits, Justice reported an amount of attorneys' fees and costs awarded that differed from the amounts reported by the defending agencies. According to Justice, the differences in the award of attorney's fees and costs were due to the appeals process and settlement agreements between the respective agencies and the plaintiffs.

Although requiring Justice and agencies to report actual cost information could lead to better transparency regarding federal operations, costs would be associated with such reporting. Considering these costs, as well as potential benefits, could help Congress in determining whether such a requirement would be cost-effective for enhancing oversight of FOIA litigation-related operations.

Number of Freedom of Information Act Lawsuits Filed from 2006 through 2015



Source: The Department of Justice Freedom of Information Act litigation and compliance reports. | GAO-16-667

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Figure 1: Simplified Freedom of Information Act (FOIA)
Administrative Appeal and Litigation Process

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Abbreviations

CASES	Civil Division's Case Management System
FOIA	Freedom of Information Act
Justice	Department of Justice
LIONS	Legal Information Office Network System
PACER	Public Access to Court Electronic Records
TaxDoc	Tax Division's Case Management System
USA-5	United States Attorneys' Resource Summary Reporting System

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September 8, 2016

The Honorable Charles Grassley
Chairman
Committee on the Judiciary
United States Senate

The Honorable Patrick Leahy
Ranking Member
Committee on the Judiciary
United States Senate

The Freedom of Information Act (FOIA) requires federal agencies to provide the public with access to government information on the basis of the principles of openness and accountability in government.¹

Accordingly, federal agencies release information to requesters that contribute to the understanding of government actions, including the disclosure of waste, fraud, and abuse.

Nevertheless, even as agencies respond to hundreds of thousands of FOIA requests each year, many requests (or portions thereof) may be denied or not responded to in a timely manner. For this reason, the act allows requesters to challenge an agency's final decision in federal court through a lawsuit if the agency does not respond to a request for information within the statutory time frames² or if the requesters believe they are entitled to information that is being withheld by the agency.

In addition, the act states that the court may assess against the government reasonable attorneys' fees and other litigation costs incurred in a FOIA lawsuit if the requester has obtained relief through either a judicial order, or an enforceable written agreement or consent decree; or a voluntary or unilateral change in position by the agency, if the plaintiff's claim is not insubstantial. The Department of Justice (Justice) reported that, in fiscal year 2015, federal agencies received 713,168 FOIA

¹5 U.S.C. § 552.

²Agencies are generally required to make a determination on a FOIA request within 20 working days.

requests. The department further reported that 483 FOIA-related lawsuits were filed against federal agencies during calendar year 2015.

This report responds to your request that we conduct an audit of the amount of money spent by the federal government as a result of FOIA lawsuits. Our specific objective was to determine the FOIA litigation-related costs incurred by federal agencies for lawsuits in which the plaintiff substantially prevailed.

To address the objective, we obtained and reviewed Justice's Litigation and Compliance Reports, covering the time period from January 2009 through December 2014, to identify FOIA lawsuits where decisions were rendered. Our review led to the identification of 1,672 lawsuits for that time period. Of this total number of lawsuits, we identified those lawsuits in which information indicated that the courts or a stipulation had awarded attorneys' fees and costs to the plaintiffs. (For this study, we established that if a plaintiff was awarded attorneys' fees and costs, then the plaintiff had substantially prevailed in the lawsuit).³This resulted in our identification of 112 lawsuits across 28 federal agencies where the courts had awarded attorneys' fees and costs.

We then developed and administered a data collection instrument to obtain information on the 28 agencies' respective litigation costs for the identified lawsuits and the attorneys' fees and costs paid to the plaintiffs. We gathered information on the process used by each agency to collect and report information on the lawsuits to determine the reliability of the data provided in the responses. We administered the data collection instrument in February 2016 and received responses from all 28 agencies.

We used the information that agencies provided in their responses to the data collection instrument to help determine the costs incurred for the lawsuits. Specifically, for each of 17 agencies that reported having an established process for collecting and reporting lawsuit information (and that we found to be reliable), we calculated litigation costs by multiplying

³For example, FOIA states that a complainant is considered to have substantially prevailed if relief has been obtained through either a judicial order, or an enforceable written agreement or consent decree; or a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

the agency's reported time spent on each lawsuit by the reported hourly salary rates for these staff, and then added in any additional overhead costs reported by the agency.

We also compared the amounts of attorneys' fees and costs reported by agencies to the amounts of attorneys' fees and costs assessed by courts, as reported by Justice, in order to identify any discrepancies between these amounts. We supplemented our analysis of the information with interviews of relevant FOIA officials in the 28 agencies involved with the selected lawsuits.

Further, to determine the costs incurred by Justice for litigating the 112 selected lawsuits, we obtained available information on the department's process for tracking any time spent by staff on lawsuits and reviewed information obtained from the department's various case management systems. In addition, we interviewed relevant Justice officials, including attorneys and information technology specialists, to better understand how the department utilizes its case management systems to manage and track lawsuit information.

We conducted this performance audit from September 2015 through September 2016 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. A more detailed discussion of our objective, scope, and methodology is provided in appendix I.

Background

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

Any person, defined broadly to include attorneys filing on behalf of an individual, corporations, and organizations, can file a FOIA request. For example, an attorney can request labor-related work compensation files on behalf of his or her client, and a commercial requester, such as a data broker that files a request on behalf of another person, may request a copy of a government contract. In response, an agency is required to provide the relevant record(s) in any readily producible form or format specified by the requester unless the record falls within a permitted exemption. Nine specific exemptions can be applied to withhold, for example, classified, confidential commercial, privileged, privacy, and several types of law enforcement information. (See appendix II for an explanation of the nine exemptions.)

Since its enactment 50 years ago,⁴ FOIA has been amended to increase openness and access to government information. As the overseer of agencies' FOIA implementation, in October and November 2008, Justice issued guidance to assist federal agencies in implementing the FOIA amendments of the 2007 OPEN Government Act.⁵ In September 2013, Justice incorporated in the procedural requirements chapter of the *Department of Justice Guide to the Freedom of Information Act* procedures for agencies to follow when responding to FOIA requests.⁶ Specifically, the guidance discusses how requests are to be processed—from the point of determining whether an entity in receipt of a request is subject to FOIA, to responding to the review of an agency's decision regarding a request on an administrative appeal.

Agencies are generally required to make a determination on a FOIA request within 20 working days of receiving a request. A request may be

⁴In June 2016, the President signed into law the FOIA Improvement Act of 2016. The act addresses a range of procedural issues, including requirements that agencies establish a minimum of 90 days for requesters to file an administrative appeal and that they provide dispute resolution services at various times throughout the FOIA process. It also created additional duties for Chief FOIA Officers, created the Chief FOIA Officer Council, and made changes to the requirements for Justice's FOIA Litigation and Compliance Report to Congress, among other changes.

⁵Openness Promotes Effectiveness in Our National Government Act of 2007, Pub. L. No. 110-175 (Dec. 31, 2007).

⁶*Department of Justice Guide to the Freedom of Information Act*, "Procedural Requirements," (Sept. 4, 2013).

received in writing or by electronic means. Once received, the request goes through multiple phases, which include assigning a tracking number, searching for responsive records, processing records, and releasing records.

FOIA allows a requester to challenge an agency's final decision on a request through an administrative appeal or a lawsuit. Specifically, a requester has the right to file an administrative appeal if he or she disagrees with the agency's decision on their request. Agencies generally have 20 working days to respond to requesters regarding administrative appeals. A requester should generally exhaust their administrative remedies, such as filing an administrative appeal, before a lawsuit can be filed.⁷ If a request is denied on appeal, the requester then has 6 years to file a lawsuit pertaining to the request.⁸ Further, if a requester substantially prevails in a FOIA lawsuit, the court may assess against the government reasonable attorneys' fees and litigation costs.⁹

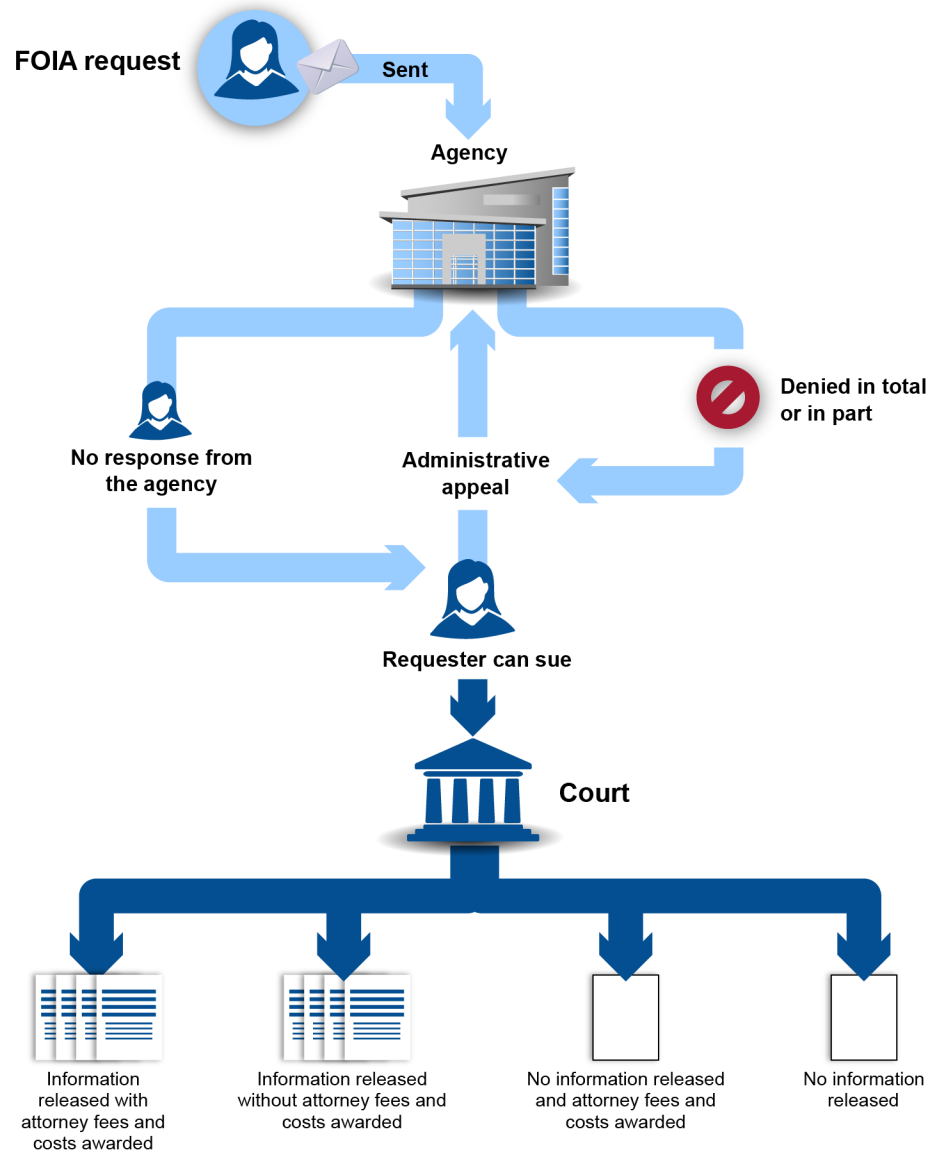
Figure 1 provides a simplified depiction of the federal government's FOIA administrative appeal and litigation process.

⁷The Court of Appeals for the District of Columbia Circuit has held that exhaustion of the administrative appeal process is "generally required before filing suit in federal court." *Hidalgo v. FBI*, 344 F.3d 1256, 1258 (D.C. Cir. 2003).

⁸28 U.S.C. § 2401(a). The general statute of limitations for civil suits against the federal government is 6 years.

⁹To substantially prevail, a plaintiff must have obtained relief through either (1) a judicial order, or an enforceable written agreement or consent decree; or (2) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

Figure 1: Simplified Freedom of Information Act (FOIA) Administrative Appeal and Litigation Process



Source: GAO analysis of agency information. | GAO-16-667

Justice Oversees Federal Agencies' Implementation of FOIA Requirements and Defends Agencies When Lawsuits Arise

FOIA assigns Justice the responsibility to develop guidance for federal agencies on the implementation of the law and to oversee the agencies' compliance with FOIA requirements. Justice also provides training to agencies on all aspects of FOIA and prepares annual summary reports on agencies' FOIA processing and litigation activities. These activities are carried out by the department's Office of Information Policy, as follows:

- **Develops guidance.** The office develops guidance and best practices documents to assist federal agencies in complying with FOIA requirements. For example, it has developed guidance for ensuring timely determinations on requests; expediting the processing of requests; and reducing backlogs. It also has developed guidance to inform agencies on what information should be contained in their Annual FOIA Reports, to include information on agencies' overall processing and litigation costs. In addition to the guidance, the office has documented best practices for improving transparency.
- **Oversees agency compliance.** To oversee FOIA operations, the office collects information from agencies, including through Annual FOIA Reports and Chief FOIA Officer Reports. These reports include information such as the number of FOIA requests received and processed in a fiscal year, the disposition of requests processed, and total costs associated with processing and litigating requests.
- **Provides training.** The office conducts training sessions on a variety of FOIA-related topics. For example, it conducts an annual training class that provides a basic overview of the act. It also offers a seminar for attorneys that handle FOIA litigation, which includes lectures and instruction on, for example, a successful litigation strategy. Hands-on courses focused on the procedural requirements involved in processing a request from start to finish also are offered.
- **Prepares annual reports.** As required by FOIA, the office prepares an annual report—Justice's Litigation and Compliance Report.¹⁰ This report, which is submitted to Congress, describes the department's efforts during the year to encourage compliance with the act. It also provides a listing of all FOIA lawsuits filed or decided in that year, along with information on the exemptions involved in each case, the disposition of each case, and any court-assessed costs, fees, and penalties.

¹⁰5 U.S.C. §552(e)(6).

In addition to the aforementioned responsibilities, Justice is responsible for representing federal agencies if they are sued for an action or inaction under FOIA.¹¹ The department's attorneys and support staff are assigned to work on each lawsuit. (The agency subject to the lawsuit also plays a supporting role.) Justice's Civil Division and the 93 United States Attorneys' Offices handle the defense of the majority of the lawsuits on behalf of other federal agencies. According to the department, the United States Attorneys' Offices handle about 70 percent of the lawsuits, while the Civil Division handles most of the remaining lawsuits brought against agencies. A small percentage of FOIA lawsuits are handled by other components of Justice, such as the Tax Division. However, if a lawsuit involves multiple agency defendants, a United States Attorneys' Office may be primarily responsible for the lawsuit.

Once a case is assigned to a specific division within Justice, the attorneys use various case management systems to track the lifecycle of the lawsuit (e.g., from receipt of complaint to final disposition). Specifically, Justice identified three case management systems that are used by the United States Attorneys' Offices and the Civil Division:

- The United States Attorneys' Offices primarily use two systems to track lawsuits—the Legal Information Office Network System (LIONS) and the United States Attorneys' Resource Summary Reporting System (USA-5). LIONS allows individual Attorneys' Offices to maintain, track, and report information on pending employee workloads and lawsuit assignments. This system contains data fields for limited, pre-specified case-specific information, such as the amounts of relief requested, estimated, or granted. FOIA lawsuits are specifically identified through a "cause of action" field in LIONS. However, according to Justice officials in the Executive Office for United States Attorneys, FOIA lawsuits can also be included under other categories in this system, such as categories for lawsuits related to the Privacy Act or miscellaneous claims against the government.

¹¹Exceptions are made for the National Labor Relations Board, the Securities Exchange Commission, the Equal Employment Opportunity Commission, the Tennessee Valley Authority, and the National Railroad Passenger Corporation, which usually represent themselves in court. All of which, by statutory authority or agreement with the Attorney General, handle FOIA cases in which they are the defendant.

The United States Attorneys' Offices also use USA-5 to track lawsuits. Within this system, attorneys do not track the amount of time spent on individual lawsuits, but instead, the amount of time spent on particular program categories. FOIA litigation lawsuits are generally included in the "Program Litigation" category, which is a category that includes programs others than FOIA, such as administrative matters, veterans' re-employment rights, and the Privacy Act.

- Justice's Civil Division uses its automated case management system (CASES) to track lawsuit-related information. According to the department, this system is primarily used for assigning lawsuits to a particular section within the Civil Division; routing case-related mail; identifying the attorneys handling a particular case; and generating statistical, management, and budget information, such as the amount of time spent by an attorney on a particular lawsuit. The system may also include information on the amount of attorneys' fees and costs paid in a lawsuit, if applicable.

Justice Reports Annually on FOIA Litigation Lawsuits

As previously mentioned, Justice annually publishes a litigation and compliance report that is required by FOIA. This report provides information on all of the FOIA lawsuits filed¹² in federal district court each year, as derived directly from the federal courts' docketing systems through the Public Access to Court Electronic Records (PACER) system.¹³ Justice's litigation and compliance reports indicated that 3,350 FOIA lawsuits were filed across the federal government between 2006 and 2015, as shown in table 1.

¹²Not all lawsuits filed as FOIA claims keep that designation. A court may determine after a lawsuit has been filed that it does not actually pertain to FOIA.

¹³PACER is an electronic public access service that allows users to obtain case and docket information online from federal appellate, district, and bankruptcy courts, and the PACER Case Locator. PACER is provided by the Federal Judiciary in keeping with its commitment to providing public access to court information via a centralized service.

Table 1: Number of Freedom of Information Act Litigation Lawsuits Filed from 2009 through 2015

Year	Number of lawsuits
2006	290
2007	285
2008	321
2009	294
2010	282
2011	284
2012	333
2013	371
2014	434
2015	456
Total	3,350

Source: The Department of Justice Freedom of Information Act Litigation and Compliance Reports for 2009 through 2015. | GAO-16-667

The litigation and compliance reports also identify the FOIA lawsuits for which a decision was rendered by federal courts each year. According to the department, the report data are compiled through a summary of court decisions issued by the Office of Information Policy on a weekly basis and a survey of PACER data. The reports provide a description of the disposition in each FOIA case, any claimed exemptions, and any costs, fees, or penalties assessed by the courts.

Agencies' Costs Associated with FOIA Lawsuits Where the Plaintiffs Prevailed Could Not Be Fully Determined

For the 112 selected FOIA lawsuits where the plaintiffs had prevailed, litigation-related costs could not be fully determined. Litigation-related costs associated with such lawsuits are comprised of (1) Justice's costs for defending the lawsuits on behalf of agencies, (2) the agencies' respective costs for the lawsuits, and (3) any attorneys' fees and costs as assessed by a court or based on settlement agreements awarded to plaintiffs. However, Justice does not collect and track all of the costs that its attorneys and staff incur for individual lawsuits in which the plaintiffs prevailed. Moreover, agencies involved in the selected lawsuits did not have mechanisms in place to track FOIA litigation costs where the plaintiff prevailed, thus hindering their reporting of these costs for 55 of the selected lawsuits. Justice's and the agencies' FOIA officials stated that they had not taken steps to track their expenses for individual lawsuits where the plaintiffs prevailed because there is no statutory requirement for them to do so. Further, while Justice's annual Litigation and Compliance reports contained information on attorneys' fees and costs

assessed by the courts as required by FOIA, the information was not comprehensive because it did not reflect attorneys' fees and costs awarded to plaintiffs in settlement agreements or changes in award amounts due to the appeals process.

Justice Does Not Collect Litigation Cost Data for Individual Lawsuits

While Justice defends FOIA lawsuits on behalf of the federal government, it does not track all costs that the department incurs in defending individual lawsuits in which the plaintiffs prevailed. As noted previously, Justice relies on its three case management systems to manage the lawsuits. However, officials in the United States Attorneys' Offices stated that their case management systems—LIONS and USA-5—do not track any expenses related to FOIA lawsuits. According to the officials, these systems were not designed to track costs that the department incurs in defending individual lawsuits. Furthermore, these systems are not used by the department to specifically track FOIA lawsuits in which the plaintiffs prevailed.

Officials in the Civil Division stated that their case management system, CASES, includes data fields that can be used to track time spent on each FOIA lawsuit and the award of any attorneys' fees and costs paid to the plaintiffs. However, according to the officials, the department does not require its staff to enter such data into these fields.

Accordingly, of the 112 selected lawsuits, Justice provided cost information, totaling about \$97,000 for 8 lawsuits in which the plaintiffs substantially prevailed. Officials in the Office of Information Policy, the United States Attorneys Offices, and the Civil Division told us that the department did not provide cost information for the other 104 lawsuits because it could not easily or accurately calculate hours and the value of the time spent by the department's attorney or other staff that worked on the lawsuits. They stated that the department did not have tracking capabilities that would allow staff to easily produce the information without significant resources. For example, they explained that providing information on all 112 lawsuits would be a time-consuming task that would require staff to gather piecemeal data from each of the 93 United States Attorneys' Offices throughout the country.

Further, the officials acknowledged that their systems do not contain comprehensive cost information on individual FOIA lawsuits that would enable them to easily or accurately calculate the total time spent by their attorneys and other staff on the lawsuits. They stated that there is no statutory requirement for them to have such information.

In the absence of a requirement for Justice to collect and track comprehensive information on its expenses incurred for individual FOIA lawsuits where the plaintiffs prevailed, the ability to reliably ascertain the department's costs associated with such lawsuits would be difficult.

Actual Costs Incurred for FOIA Lawsuits Are Not Tracked by All Agencies

Federal agencies have received guidance from Justice that asks them to provide their total litigation-related costs to the department as part of the annual FOIA reporting process. The guidance states that the agencies' total litigation-related costs are to include the salaries of personnel involved in the litigation, litigation overhead expenses, and any other FOIA litigation-related costs. In addition, it states that an agency's annual FOIA budget may be used as a resource for determining and reporting the FOIA litigation expenses.

In response to the guidance, the agencies involved with the selected lawsuits had provided litigation-related cost information to Justice as part of their annual reporting on FOIA. For fiscal years 2009 through 2014, these agencies collectively reported costs totaling \$144 million for all of the FOIA lawsuits that they defended.¹⁴ However, with respect to cost data at the individual lawsuit level, 17 of the 28 agencies provided cost information in response to our data collection instrument for 57 of the 112 lawsuits where the plaintiff substantially prevailed. According to this information, the agencies incurred approximately \$1.3 million in FOIA litigation-related costs for these lawsuits during fiscal years 2009 through 2014. For example, the Department of Energy reported \$76,440 in litigation-related costs for its 2 lawsuits, while the Social Security Administration reported \$7,284 in litigation-related costs for its 3 lawsuits. (Appendix III provides descriptive examples of the 112 selected lawsuits and appendix IV identifies any costs reported by the 28 agencies for these lawsuits.)

As part of their responses to our data collection instrument, each of these 17 agencies told us they had a system or process in place for tracking FOIA litigation-related cost information. The agencies described various systems or processes that they used. For example, the Internal Revenue

¹⁴The FOIA litigation-related costs reported to Justice also include the costs for lawsuits in which the plaintiff substantially prevailed.

Service stated that it tracked FOIA litigation cost data in a database that it used to collect information related to all of its lawsuits. Similarly, the Federal Election Commission provided cost data and noted that staff members in its Office of General Counsel were required to file monthly time reports in an electronic case management system that showed the lawsuits on which they had worked. Further, the Nuclear Regulatory Commission stated that its staff reported the hours worked on lawsuits and had time codes for the lawsuit in our review.¹⁵

Other agencies also reported that they were able to provide cost data by going back to specific lawsuit case files or time and attendance systems to determine the information. For example, Social Security Administration officials stated that agency's attorneys input their time spent on individual lawsuits into a docket management information system. Additionally, the General Services Administration said it based its data on a review of case notes and e-mails from the attorneys that worked on specific cases.

However, for the remaining 55 selected lawsuits where the plaintiff substantially prevailed, litigation-related costs were not provided by the responsible agencies.¹⁶ Officials representing these agencies generally stated that they did not have mechanisms in place to track FOIA litigation-related costs where the plaintiffs prevailed. Moreover, they pointed to the fact that Justice's guidance does not require them to collect and report this information.

For example, an Associate Deputy General Counsel at the Department of Defense noted that the department's attorneys did not track their work on any particular FOIA cases and that there were no other offices within the department that tracked the hours worked by their staff on individual cases. Similarly, FOIA officials at the Departments of Transportation,

¹⁵While the Nuclear Regulatory Commission tracked its FOIA litigation costs for the lawsuit in this review, it no longer uses the same process to track lawsuit data. Specifically, time codes associated with individual lawsuits were recently eliminated as a result of a new cost-accounting system at the agency.

¹⁶A number of these agencies reported variations in their components' abilities to collect and report cost information. For example, with regard to the selected lawsuits, five components within the Department of Homeland Security (including headquarters) were able to provide cost information for their lawsuits, while four components were not able to provide cost information for their lawsuits.

Treasury, Homeland Security, Agriculture, State, Justice, Health and Human Services, Education, and Commerce; the Environmental Protection Agency; the Office of Personnel Management; the Office of Management and Budget; the Central Intelligence Agency; the Consumer Financial Protection Bureau; and the Federal Housing Finance Agency stated in their responses that they could not provide information on specific FOIA lawsuits because the data were not being tracked or because staff that had worked on the lawsuits were no longer employed at these agencies and, thus, were not available to reconstruct the data.

Requiring agencies to collect information on actual costs incurred in defending FOIA lawsuits, including those in which the plaintiffs prevailed, could enhance transparency in federal government operations. However, such a requirement would likely necessitate costly modifications to agencies' information systems and business processes.

Justice's Annual Compliance Reports Include Required Information, but Lack Complete Information on Appeals and Settlement Agreements

FOIA requires Justice to report on attorneys' costs and fees assessed by the courts and associated with lawsuits for which decisions have been rendered by the end of a calendar year. Specifically, Justice is to annually report to Congress a listing of the number of FOIA cases handled by each agency; the exemption(s) involved in each case; the disposition of each case; and the cost, fees, and penalties assessed and awarded to plaintiffs by the courts.

To meet this requirement, Justice has posted annually on its website using information derived from the federal courts' docketing system—the Public Access to Court Electronic Records—its Litigation and Compliance reports.¹⁷ Specifically, the Litigation and Compliance reports include information for lawsuits with decisions rendered by the end of the calendar year, the disposition of each lawsuit, the exemptions involved, and fees awarded by the courts, if any. These reports also include any decisions made by the appellate courts and, to the extent available on PACER, any stipulations of dismissals filed by the parties due to settlement.

¹⁷Justice has posted the list of FOIA lawsuits in which a decision was rendered to its website each year since 1998.

For fiscal years 2009 through 2014, the department reported that the courts had awarded \$587,438 in attorneys' fees and costs to the attorneys representing the plaintiffs in 10 of the 112 selected lawsuits. However, for these 10 lawsuits, Justice's reported cost information differed from the cost information provided by agencies for 8 lawsuits.¹⁸ Specifically, the agencies reported that they had paid higher award amounts than what were reported by Justice. Conversely, for 1 lawsuit, the amount of attorneys' fees and costs that the agency reported paying was less than what was reported by Justice. For the other lawsuit, the appeal process was ongoing and no attorneys' fees and costs had been paid as of June 2016. The differences in Justice's and the agencies' reporting on these lawsuits, which amounted to \$58,576 (more than what agencies said had been paid), are shown in table 2.

Table 2: Differences in Department of Justice and Agency Reported Attorneys' Fees and Costs from 2009 through 2014

Agency subject to the lawsuit	Justice reported attorneys' fees and costs assessed by the Court for each lawsuit	Agency reported attorneys' fees and costs for each lawsuit
Department of Homeland Security	\$3,322	\$9,750
Department of Homeland Security	\$15,000	\$19,217
Department of Homeland Security	\$4,170	\$4,963
Department of Homeland Security	\$321,014	None to date
Department of the Interior	\$455	\$86,885
Department of the Interior	\$17,000	\$60,000
Department of Justice	\$21,393	\$83,318
Department of Justice	\$12,417	\$7,158
Department of State	\$40,484	\$64,569
Department of Veterans Affairs	\$152,181	\$193,000

Source: The Department of Justice Litigation and Compliance Reports and agency-provided information. | GAO-16-667

¹⁸Agencies provided information regarding attorney's fees and costs paid in response to our data collection instrument.

According to the department, the differences in the awards of attorneys' fees and costs are due to the appeals process and the settlement agreements between the respective agencies and the plaintiffs. For example, during the appeals process, courts may change their rulings and either increase or decrease the awards of attorneys' fees and costs. Further, when a plaintiff and an agency enter into a settlement agreement, the court documents may not reflect the agreed upon amounts to be awarded. According to officials in Justice's Office of Information Policy, the inclusion of costs resulting from settlement agreements and appeals is not required to be included in the department's reports to Congress.

Since Justice is not required to track and report on appeals, which can impact the total amount awarded to a plaintiff, the actual costs associated with the awards of attorneys' fees and costs may not be known. Requiring Justice to include in its Litigation and Compliance reports the awards of attorneys' fees and costs resulting from appeals and settlement agreements could keep Congress and the public more informed of the results and costs associated with FOIA lawsuits. However, it should be noted that such a requirement could be costly to Justice. Thus, a consideration of both the costs and benefits of such a requirement would assist Congress in determining whether a requirement to include information on appeals and settlement agreements would lead to an efficient use of government resources.

Conclusions

Each year, federal agencies are subject to hundreds of lawsuits from FOIA requesters whose requests were denied or not responded to in a timely manner. Agencies subject to the lawsuits and Justice incur costs to defend against these lawsuits and may, in lawsuits where the plaintiff prevailed, be ordered to pay the plaintiff's attorneys' fees and costs. However, the costs associated with FOIA lawsuits where the plaintiff prevailed cannot be fully determined because not all federal agencies, including Justice, track their costs at the individual lawsuit level. Moreover, the data regarding attorneys' fees and costs reported by Justice do not capture changes in award as a result of appeals or settlement agreements. Although requiring Justice and agencies to report actual cost information on lawsuits, and tracking the appeals process and settlement agreements between agencies and plaintiffs could lead to better transparency and openness in federal operations, there would be costs associated with doing so. Considering these costs relative to the potential benefits could help in determining whether establishing such a requirement would be an effective means of enhancing FOIA litigation-related operations.

Matters for Congressional Consideration

To provide greater transparency in the reporting of FOIA litigation costs, Congress could consider requiring Justice to provide a cost estimate for collecting and reporting information on costs incurred when defending lawsuits in which the plaintiffs prevailed.

Further, Congress could consider amending the act to require Justice to reflect in its Litigation and Compliance reports, changes in the award of attorneys' fees and costs resulting from the appeals process and settlement agreements between agencies and plaintiffs, if deemed to be cost-effective.

Agency Comments and Our Evaluation

We received written comments on a draft of this report from Justice. In its comments (reprinted in appendix V), Justice stated that, in the face of ever-increasing numbers of FOIA requests, the department appreciated our recognition of the need to balance the cost of additional reporting against the benefit it could provide to achieve the goal of good FOIA administration. Further, the department noted a number of steps that it had taken to provide new information on agency FOIA administration, both at the administrative stage, which comprises the majority of FOIA activity, and for requests that reach litigation. In addition, Justice provided technical comments, which we incorporated, as appropriate.

Beyond Justice, we sought comments on the draft report from the 27 other agencies included in our study. Of these, 20 agencies told us they had no comments on the draft report. The 7 remaining agencies—the Departments of Commerce, Interior, and Transportation; the Nuclear Regulatory Commission, the Social Security Administration, the Federal Election Commission, and the U.S. Railroad Retirement Board—provided technical comments. We also incorporated these comments, as appropriate.

We will send copies of this report to other interested congressional committees, the Attorney General, the Secretaries of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, the Interior, Labor, State, Transportation, the Treasury, and Veterans Affairs; the administrators of the Environmental Protection Agency, General Services Administration; the commissioners of the Nuclear Regulatory Commission and the Social Security Administration; the directors of the Office of Personnel Management, Office of Management and Budget, Federal Housing Finance Agency, and the Consumer Financial Protection

Bureau; and the Chairman of the Railroad Retirement Board. In addition, this report will be available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-6304 or melvin@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix VI.

Valerie C. Melvin

Valerie C. Melvin
Director, Information Management and Technology Resources Issues

Appendix I: Objective, Scope, and Methodology

Our objective was to determine the Freedom of Information Act (FOIA) litigation-related costs incurred by federal agencies for lawsuits in which the plaintiff substantially prevailed.

To address the objective, we obtained and reviewed the Department of Justice's (Justice) Litigation and Compliance Reports, covering the time period from January 2009 through December 2014, to identify FOIA lawsuits where decisions were rendered. Our review led to the identification of 1,672 lawsuits for that time period. Of this total number of lawsuits, we identified those lawsuits in which information indicated that the courts or a stipulation had awarded attorneys' fees and costs to the plaintiffs. (For this study, we established that if a plaintiff was awarded attorneys' fees and costs, then the plaintiff had substantially prevailed in the lawsuit).¹ We did not include lawsuits where the plaintiffs may have substantially prevailed in the lawsuits but were not awarded attorneys' fees and costs. This resulted in our selection of 112 lawsuits across 28 federal agencies where the courts had awarded attorneys' fees and costs.

For the 28 agencies, we developed and administered a data collection instrument to obtain information on the agencies' respective litigation costs for the identified lawsuits and the attorneys' fees and costs paid to the plaintiffs. We requested the following for each lawsuit: (1) the number of hours spent by each employee (e.g., attorney, administrative assistant, and FOIA staff) that worked on the lawsuit; (2) the annual salary for each employee that worked on the lawsuit; (3) an explanation as to whether the lawsuit was or was not exclusively related to FOIA; (4) the amount of litigation overhead and any other FOIA litigation-related expenses associated with the lawsuit; and (5) the total amount of judgment paid, including date paid, if applicable. We administered the data collection instrument in February 2016 and received responses from all 28 agencies.

To test the accuracy and completeness of data provided to us by agencies we performed the following procedures: compared cost data against available court records; interviewed FOIA staff and legal counsels

¹For example, FOIA states that a complainant is considered to have substantially prevailed if relief has been obtained through either a judicial order, or an enforceable written agreement or consent decree; or a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

in the Departments of Agriculture, Defense, Housing and Urban Development, and State, and the Environmental Protection Agency and the Office of Management and Budget to determine what cost data are collected and reported; and determined agencies' processes in reporting estimated hours spent on litigating FOIA-related lawsuits. Based on the results of our testing, we believe the data were reliable enough for the purposes used in this report. For agencies that had an established process for collecting and reporting lawsuit information, we calculated the total cost for the agency by multiplying time spent by staff on a case with the employee's hourly salary rate and added any applicable overhead costs reported by the agency.²

To determine the costs incurred by Justice on these lawsuits, we first determined how Justice tracks lawsuit information and attorney time spent on each lawsuit. We then requested and received documentation on case management systems used across Justice's divisions and reviewed this documentation to determine if these systems had capabilities to track the amounts of time attorneys and other staff spent working on FOIA litigation lawsuits. We reviewed system documentation for the following Justice case management systems: United States Attorneys' Resource Summary Reporting System (USA-5), Legal Information Office Network System (LIONS), Civil Division's Case Management System (CASES), and Tax Division's Case Management System (TaxDoc).³ We then requested information from these systems on the amounts of time recorded by Justice staff for the 112 lawsuits included in our study. We supplemented this information by interviewing Justice officials in the Office of Information Policy, the Executive Office for United States Attorneys, and the Civil Division.

²We determined the hourly salary rate by dividing the employee annual salary by 2,087, the average number of hours worked by government employees in a year. 5 U.S.C. 5504(b).

³USA-5 is used to manage and analyze personnel resources allocated (by program category). The LIONS system is used to store basic information about matters, cases, and appeals. The CASES system is used to track information related to the cases received and initiated, including time spent on litigating its cases. TaxDoc is used to track the status of outstanding judgments and the amount of attorney and paralegal time devoted to judgment collection.

To determine the details of selected lawsuits, we reviewed case information and court documentation for each of the 112 lawsuits obtained from www.foiaproject.org, CourtLink, and Public Access to Court Electronic Records (PACER) and selected a variety of types of lawsuits to illustrate in our report.⁴

To determine attorney fees and costs for the 112 lawsuits, we reviewed Justice's annual litigation and compliance reports, where information on attorney fees and costs awarded by the court to the plaintiff is reported. We then compared these amounts to the totals reported by agencies on what they paid to plaintiffs to identify any differences. In lawsuits where there was a difference, we asked Justice and the agencies for information on why the differences could have occurred.

We conducted this performance audit from September 2015 through September 2016 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

⁴www.foiaproject.org/ provides public access to FOIA cases with a goal to provide the public with timely and complete information about every instance in which the federal government grants or withholds records under FOIA.

Appendix II: Freedom of Information Act Exemptions

The Freedom of Information Act (FOIA) prescribes nine specific categories of information that are exempt from disclosure, which are described below.

Table 3: Information Exempt from Disclosure under the Freedom of Information Act (FOIA)

Exemption number	Matters that are exempt from FOIA
(1)	(A) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to the Executive Order.
(2)	Related solely to the internal personnel rules and practices of an agency.
(3)	Specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that matters be withheld from the public in such a manner as to leave no discretion on the issue or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.
(4)	Trade secrets and commercial or financial information obtained from a person and privileged or confidential.
(5)	Interagency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.
(6)	Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.
(7)	Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information: <ul style="list-style-type: none"> (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by confidential source; (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or (F) could reasonably be expected to endanger the life or physical safety of an individual.
(8)	Contained in or related to examination, operating, or condition of reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.
(9)	Geological and geophysical information and data, including maps, concerning wells.

Source: 5 U.S.C. § 552(b)(1) through (b)(9). | GAO-16-667

Appendix III: Examples of FOIA Litigation Lawsuits

Of the 112 lawsuits selected where the plaintiff substantially prevailed, a lawsuit was filed either because (1) the agency failed to respond within the statutory time frame (58 lawsuits); (2) the agency failed to provide all of the documentation in the FOIA request (46 lawsuits); or (3) for other reasons, such as denial of a fee waiver or appealing a dismissal of a claim (8 lawsuits). The following examples illustrate the reasons lawsuits were filed and the corresponding decisions rendered that resulted in payments of attorneys' fees and court costs to the plaintiffs.

Failure to Respond Within the Statutory Time Frame

- In May 2011, a requestor sought records from the Federal Election Commission related to correspondence pertaining to agency business between three commissioners and any outside entities. The Federal Election Commission acknowledged receipt of the request by e-mail the next day and granted the requestor a fee waiver. Two months after the initial request was submitted, the Federal Election Commission informed the requestor that it had received the first set of potentially responsive documents from its searches, was still performing more searches, and was reviewing thousands of potentially relevant documents. The requestor claimed the agency had said it could release the first batch of responsive documents within 2 weeks and filed suit when the agency failed to do so. The Federal Election Commission responded with the first set of records about 3 weeks later and completed its response 10 days after that by releasing two more batches of records. At that time, the agency provided an explanation of its exemption claims and told the requestor that it could file an appeal. The court ultimately found that the agency acted unreasonably in withholding documents in response to the FOIA request and ordered it to pay the requestor \$153,759 in attorneys' fees.
- In March 2013, a requestor asked the Office of Management and Budget to provide documents relating to communications to or from Congressional staff which contained information on federal expenditures. After 4 months with no response, the requestor filed a lawsuit. The Office of Management and Budget and the requestor entered into a settlement agreement resulting in the lawsuit being dismissed and the agency paying \$4,182 in attorneys' fees and costs.
- In March 2012, a requestor sought documentation related to a warrant search. The Federal Bureau of Investigation produced more than 1,000 pages of responsive records and withheld approximately 600 under the Privacy Act and various FOIA exemptions. The requestor filed a lawsuit after not receiving a response to the administrative

appeal. The court ordered the Federal Bureau of Investigation to release the information that was withheld and to pay \$7,500 in attorneys' fees and costs arising from the lawsuit.

- In March 2014, a requester asked the Office of Personnel Management to provide documents relating to understanding the basis of the agency's annuity computations. After 5 months with no response, the requestor filed a lawsuit. The Office of Personnel Management and the requester entered into a settlement agreement resulting in the lawsuit being dismissed and the agency paying \$1,250 in attorneys' fees and costs.

Agency Failed to Provide All Documentation

- In March of 2013 the requester filed a lawsuit in connection with a request for records concerning how the Department of Labor audits permanent labor certification applications made by employers pursuant to the Immigration and Nationality Act. The lawsuit was filed after a year of correspondence concerning fees and the scope of the request. Over the course of several months after the suit was filed, the department provided 347 documents in full or in part to the requester but attempted to withhold other sensitive records and information regarding how the audits are conducted. In November 2013, the court ruled against the department's FOIA exemption assertions and ordered an additional search. As a result, the original 347 documents were all released in full in addition to approximately 1,045 additional documents. In October of 2014, the Department of Labor and the requester entered into a settlement where it agreed to pay the requester \$51,000 to cover attorneys' fees, expenses, and costs in exchange for the plaintiff withdrawing any remaining claims.
- In July 2013, a requestor sought documentation related to the renovation of Consumer Financial Protection Bureau headquarters. The Consumer Financial Protection Bureau told the requester it had located 257 pages of documents and was withholding 254 pages of documents under exemptions 5 and 6. The requester filed an administrative appeal. After 3 months, the bureau upheld its decision to withhold the 254 pages and agreed to the request for a further search. The bureau located 93 additional pages and withheld 81 pages under exemptions 5 and 6. The requester then filed a lawsuit. The bureau and the requester entered into a mutual decision resulting in the lawsuit being dismissed and Consumer Financial Protection Bureau paying \$800 in attorneys' fees and costs.

Other Reasons for Lawsuit

- In December 2011, a requestor sought documentation concerning the Department of Homeland Security's social media monitoring initiatives. The department did not provide documentation or a determination regarding the request, so the requestor filed an administrative appeal. After the initial request, the requestor filed a lawsuit after not receiving a response to the administrative appeal or any documentation. The Department of Homeland Security released 286 pages in full, 173 with redactions, and withheld 286 pages. The court ruled for the jointly for the requestor and the department. The court also ordered the department to pay \$30,000 in attorneys' fees and costs.
- In 2012, a plaintiff filed a FOIA lawsuit seeking non-tax return information related to his deceased father from the Social Security Administration. Since Privacy Act rights end with death and no other federal regulation prohibited the records disclosure, the agency provided the records sought. The requestor then requested damages and litigation fees under FOIA, which was dismissed. The requestor appealed the judgment, but the dismissal was affirmed. The agency did not contest the request for litigation costs of \$350 in filing fees and awarded them accordingly.
- In January 2014, a request was made to the U.S. Fish and Wildlife Service for a 2009 memorandum concerning the legal status of the thick-billed parrot, the wood bison, the margay, and the northern swift fox under the Endangered Species Act. The agency withheld the memorandum under exemption 5 claiming it was protected by the attorney-client privilege. The requestor appealed the agency's decision and then filed a lawsuit. The parties settled with the agency paying \$8,000 to the cover the requestor's attorneys' fees and costs.

Appendix IV: Costs Reported for Selected FOIA Litigation Lawsuits

We identified 112 lawsuits across 28 federal agencies where the courts had awarded attorneys' fees and costs from 2009 to 2014. The following table shows the agencies with lawsuits, the total number of lawsuits at each agency, the number of lawsuits for which agencies provided costs, the reported costs for those lawsuits, and the amount of attorneys' fees and costs agencies reportedly paid to plaintiffs for the total number of lawsuits defended.

Table 4: Agency Reported Freedom of Information Act (FOIA) Litigation Costs and Attorneys' Fees and Costs Paid by 28 Selected Agencies to Plaintiffs from 2009 to 2014

Agency	Number of lawsuits	Number of lawsuits for which cost information was reported	Agency reported FOIA costs	Agency reported attorneys' fees and costs paid
Department of Treasury	8	7	\$427,115	\$190,916
Department of Justice	17	5	228,125	765,531 ^a
Department of the Interior	19	16	157,076	275,894
Federal Election Commission	1	1	144,571	153,759
Department of Energy	2	2	76,440	34,884
Department of Homeland Security	16	9	61,941	230,236
Department of Agriculture	7	4	40,461	106,933
Railroad Retirement Board	1	1	40,351	66,262
Department of Labor	1	1	34,695	51,375
Department of Veterans Affairs	1	1	32,348	193,000
Department of Housing and Urban Development	1	1	26,995	50,000
Department of Transportation	5	2	23,195	33,250
Department of Health and Human Services	4	1	9,658	124,415
Social Security Administration	3	3	7,284	4,500
Small Business Administration	1	1	4,951	14,282
Nuclear Regulatory Commission	1	1	3,315	1,400
General Services Administration	1	1	329	400
Department of Defense	9	0	Not reported	558,464
International Boundary and Water Commission	1	0	Not reported	64,569
Federal Housing Finance Agency	1	0	Not reported	55,000
Environmental Protection Agency	4	0	Not reported	23,500
Department of Education	1	0	Not reported	9,000
Office of Management and Budget	1	0	Not reported	4,182

**Appendix IV: Costs Reported for Selected
FOIA Litigation Lawsuits**

Agency	Number of lawsuits	Number of lawsuits for which cost information was reported	Agency reported FOIA costs	Agency reported attorneys' fees and costs paid
Central Intelligence Agency	1	0	Not reported	2,750
Department of Commerce	1	0	Not reported	2,000
Office of Personnel Management	1	0	Not reported	1,250
Consumer Financial Protection Bureau	1	0	Not reported	800
Department of State	2	0	Not reported	400 ^b

Source: GAO analysis of agency provided data. | GAO-16-667

^aDepartment of Justice attorneys' fees that were identified account for 8 of 17 lawsuits.

^bDepartment of State attorneys' fees that were identified account for 1 of 2 lawsuits.

Appendix V: Comments from the Department of Justice



U.S. Department of Justice

Washington, D.C. 20530

August 8, 2016

Ms. Valerie C. Melvin
Director, Information Management
and Technology Resources Issues
441 G Street, NW
Washington, DC 20548

Re: Draft Report GAO-16-667, Freedom of Information Act: *Litigation Costs for Justice and Agencies Could Not Be Fully Determined*

Dear Ms. Melvin:

Thank you for providing the Department of Justice (Department) with the opportunity to review and comment on the draft Government Accountability Office (GAO) Report referenced above.

Please know that the Department takes very seriously its responsibility of encouraging government wide compliance with the Freedom of Information Act (FOIA). Among the Department's many efforts, we have substantially improved FOIA accountability at the Department and that of all agencies pursuant to the law and, in turn, ensured that the Federal government's FOIA administration is itself transparent. Further, we look forward to continuing to build on these efforts. In the face of ever-increasing numbers of FOIA requests, we appreciate GAO's recognition of the need to balance the cost of additional reporting against the benefit it could provide to achieving our mutual goal of good FOIA administration.

The Department has taken many steps to provide a wealth of new information on agency FOIA administration both at the administrative stage, which comprises the overwhelming majority of FOIA activity, as well as for the small percentage of requests that reach litigation. Of the nearly five (5) million FOIA requests that have been processed since 2009 only a fraction of a percent involved FOIA litigation. And, of that less than one percent of requests that reached litigation, only a very small percentage (6.7% using GAO's numbers from 2009 through 2014) meet the focus of GAO's audit, which was on those cases where the plaintiff "substantially prevailed." The requests that GAO identified where the plaintiff substantially prevailed in litigation amounts to a fraction of a fraction of a percent of overall FOIA activity. This context should, of course, be part of any consideration when weighing the cost of additional reporting for this discrete data point.

As GAO notes, in accordance with the FOIA, the Department includes in its yearly Litigation and Compliance Report a comprehensive listing of all decisions rendered by the courts, including the disposition of those cases, any exemptions at issue, and any attorney fees and costs that are

Ms. Valerie C. Melvin

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awarded by the court. In the interest of transparency, the Department goes beyond the required elements of this report and also includes any indication of attorney fees and costs that result from a settlement agreement whenever this information is available through PACER.


Additionally, as the flagship initiative of the Department's first Open Government Plan, in March 2011 we launched FOIA.gov. FOIA.gov has transformed the way that the important data from agencies' Annual FOIA Reports is made available to the public. Members of the public can now easily track and compare statistics on all aspects of FOIA administration across agencies and over time. The FOIA Improvement Act of 2016 added new requirements for agency Annual FOIA Reports, such as the number of records made available online under subsection (a)(2) of the FOIA. We look forward to implementing these new requirements and adding this information to the wealth of information available on FOIA.gov. In just the past three months of the recent quarter, FOIA.gov received over 400,000 page views and was the second most visited DOJ website.

Improving the way agency FOIA data is made available is only one way in which we have increased transparency and accountability in FOIA administration. Since 2010, the Department has required agency Chief FOIA Officers to annually report on their efforts to implement the presumption of openness, improve their FOIA operations and facilitate information disclosure. These reports have added a wealth of information about agencies' FOIA programs that was never available before. Additionally, since 2013, agencies have been required to report certain key FOIA statistics such as the numbers of requests received, processed, and backlogged on a quarterly basis. By providing this data on a quarterly basis, the public no longer needs to wait till the end of the year in order to monitor agencies' FOIA administration.

Thank you for the opportunity to review and comment on this draft Report, and thank your team for its work on this review. The Department looks forward to continuing to build on all of the improvements it has made to the FOIA process over the past seven years and, in turn, continuing to build on our efforts to augment Federal agencies' accountability in FOIA. We realize, however, the challenges entailed in ensuring that limited Federal resources are spent in ways that most effectively support our mutual interest of good FOIA administration, a difficult task because Federal agencies continue to receive record high numbers of FOIA requests.

We look forward to working with the GAO as we strive to improve our programs and further our commitment to make continuous improvements to the management of the Department. If you wish more information, contact Richard Theis, Department Audit Liaison on 202-514-0469.

Sincerely,


for Lee Lofthus
Assistant Attorney General
for Administration

cc: Anjalique Lawrence

Appendix VI: GAO Contact and Staff Acknowledgments

GAO Contact

Valerie C. Melvin, (202) 512-6304 or melvinv@gao.gov

Staff Acknowledgments

In addition to the contact names above, Anjalique Lawrence (Assistant Director), Eric Trout (Analyst in Charge), Andrew Banister, Chris Businsky, Rebecca Eyler, Kendrick Johnson, David Plocher, Rosalind Romain, Jonathan M. Wall, and Charles Youman made key contributions to this report.

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