



Contents lists available at ScienceDirect

Government Information Quarterly

journal homepage: www.elsevier.com/locate/govinf

Essential or extravagant: Considering FOIA budgets, costs and fees

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ARTICLE INFO

Keywords:

Freedom of Information Act
 Freedom of information
 Budgets
 Funding
 Costs
 Fees
 Access to government information
 Public records
 Access to information

ABSTRACT

This study seeks to square the competing arguments of the Freedom of Information Act's necessity versus its financial burden by analyzing more than 500 FOIA annual reports, representing 93% of all cabinet-level data from 1975 until 2015.

FOIA expenses account for less than 1% of agency budgets, and while costs per request have increased over time, the small proportion of FOIA expense versus general budgets has remained stagnant.

1. Introduction

Despite any private compunction, President Lyndon B. Johnson might have had in endorsing the Freedom of Information Act (Archibald, 1993, p. 726), he issued an enthusiastic signing statement:

This legislation springs from one of our most essential principles: A democracy works best when people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest...I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded (Johnson, 1966).

Repeated and clear rhetoric in favor of a strong FOIA from presidents, the Supreme Court and Congress has nonetheless left implementation short of Johnson's rhetorical flourishes (Kirtley, 2006; Pozen, 2017; Stewart & Davis, 2016). One of the most enduring complaints, though, has little to do with agency compliance with the law but the expense of FOIA administration. The cost of access mechanism has been a subject of consternation since shortly after Johnson signed it into law.

A prominent critic of FOIA expense was the late Justice Antonin Scalia, who cast a definitive argument against FOIA, making an early case that while transparency may be an element of democracy, FOIA was scarcely a primary federal concern and certainly did not justify the financial burden. Just before President Ronald Reagan nominated Scalia for a seat on the D.C. Circuit Court, Scalia composed a 1982 essay noting the ineffectiveness, inefficiency and expense of the FOIA. He

wrote:

[FOIA] is the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored....The question, of course, is whether this public expense is worth it, bearing in mind that the FOIA requester is not required to have any particular 'need to know.' The inquiry that creates this expense...may be motivated by nothing more than idle curiosity. The 'free lunch' aspect of the FOIA is significant not only because it takes money from the Treasury that could be better spent elsewhere, but also because it brings into the system requests that are not really important enough to be there (Scalia, 1982, pp. 15–17).

Scalia, then a professor at the University of Chicago Law School and a former assistant attorney general in the Justice Department, observed that granting citizens unfettered access to public records to be a noble goal but in practice little more than a romantic notion. FOIA had severely confused federal priorities and as a statute was likely unsalvageable. He concluded by branding the FOIA an "unthinking extravagance" (p. 19).

Scalia was not alone in his concern for the expense of FOIA implementation. Cost has been an issue raised by government figures during the discussion of all amendments to the FOIA. One of President Ford's reservations in vetoing the 1974 FOIA amendment (a veto ultimately overridden by the Congress) was the "unworkable" nature of the proposed alterations. He believed the more requester-friendly statute would prove excessively costly and generally onerous to agency administration (H.R. Rep. No. 93-876, 1974). In writing for the federal court, the assistant attorney general opposed the amendment under a

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<http://dx.doi.org/10.1016/j.giq.2017.09.001>

Received 17 January 2017; Received in revised form 1 September 2017; Accepted 2 September 2017
 0740-624X/ © 2017 Published by Elsevier Inc.

belief that implementation “would be unduly expensive and essentially unnecessary” (Hawk, 1974). In a hearing prior to the EFOIA amendment, a co-sponsor of the bill expressed reticence in modernizing the law largely due to perceived cost increases (Brown, 1992, p. 6). Even Sen. Daniel Patrick Moynihan's pro-transparency Senate report cautioned against the financial excesses of the FOIA (Commission on Protecting and Reducing Government Secrecy, 1997, p. 16). In the aftermath of the Hillary Clinton email fiasco, the Department of State produced an internal investigation of FOIA practices where they blamed their unsatisfactory FOIA performance on a failure to sufficiently staff the FOIA office. The report claimed the State Department had regularly requested additional funding for more personnel but each time was denied due to the expense (Evaluation of the Email Records Management, 2016, pp. 8–9).

Despite the federal support of the law generally and the sustained disquiet regarding the cost and funding of the FOIA, there is next to no statutory requirement in governing the finances of agency FOIA administration. This paper seeks to consider whether the FOIA is an undue burden - an excessively expensive one - on federal agencies, as contended by FOIA critics.

2. Literature review

There exists a significant amount of scholarship exploring both the civic use and federal administration of the FOIA. Two studies have applied similar research methods to those in the present study by exploring the use and implementation of the U.S. FOIA. Wasike (2016) built a similar database across an abbreviated time period in considering the FOIA records of presidents George W. Bush and Obama. Notable observations include a decrease in information over both administrations with the rate of denial growing worse during the Obama administration and little discrepancy in the type or frequency of exemption claims between the two presidencies, before concluding, “the study returned mixed results for FOIA performance” (pp. 424–425). Kim (2007) conducted a very similar study a decade earlier comparing FOIA use and implementation data under the Clinton and George W. Bush administrations. Kim documented initial requests with a special focus on department and agencies' ability to process the request, finding that, over the period of study (1998–2005), the Department of State was especially bad at processing requests (a trend the continues today). She made a notable observation in the decline of full grants over the life of the Bush presidency. During three years of analysis during Clinton's term, full grants were provided at least 55% of the time (p. 327). In the first year of the Bush presidency, it drops to 54%, then progressively sinks until reaching 40% in the final year of the analysis. Kim's analysis further considered exemption use and administrative appeal, determining that Bush's “changes in FOIA implementation supports the prevailing perception among scholars and public access advocacy groups that the Bush administration has sought to limit the scope of the FOIA and has impaired the effectiveness of the FOIA as an instrument of access” (p. 337).

Other scholars have considered the costs of freedom of information, perhaps none more directly than Roberts (2012). His study assesses the application of access to public records laws in Canada during periods of austerity measures in the 1990s and post-recession 2000s. He found the international community turning its back on transparency, with officials in the Netherlands and Australia calling for more efficient use of time and money and U.K. government agencies actively seeking higher fees in “consideration of the financial impact of FOIA” (p. 16). Roberts reported the United States witnessed heavy cuts in spending on transparency measures (2012, p. 17). He suggested the financial meltdown of 2007 was at least partially due to the lack of transparency in financial practices, and the result of the recession was even less federal support for transparency measures. Roberts concluded that the present government climate around the globe regarding freedom of information laws is that they are treated as a luxury, when in fact such access

mechanisms are some of “the most important tools for restoring political and economic stability” (p. 30).

Colquhoun (2010) produced a report comparing the costs and functions of freedom of information laws in the U.K., Scotland, Ireland, Canada, Australia and the United States. When compiling the average government cost for processing a freedom of information request, Colquhoun found that Scotland and the United States were able to administer their access laws at the least expense, while Canada and Australia were two, nearly three, times as expensive on a per request basis. Colquhoun also demonstrated the difficulty in accounting for the costs of freedom of information laws.

While few match Scalia's vitriol for the FOIA, he is not alone in sentiment in expressing concern for the cost of FOIA administration (Cate, Fields, & McBain, 1994; Sinrod, 1994; Wald, 1984). Cate et al. conclude, “[T]he importance of public access to government information cannot be overstressed” before warning that unnecessary FOIA requests and their exponential increase “pose an enormous burden on private individuals and organizations, administrative agencies, and the courts” (p. 73). Sinrod acknowledged the Clinton administration's rhetorical support of the FOIA, calling for tangible support if these wishes were to become reality: “These well-intentioned statements will not solve the FOIA backlog problem without a serious commitment of further government personnel, equipment and monetary resources” (p. 363). Sinrod said the requisite funding would be of such a significant sum that securing it from Congress would be “highly unlikely in the foreseeable future” (p. 363).

When considering the new FOIA fee structure in 1986, Feinberg (1986) quoted staffers in the Reagan administration as viewing the “fees as barriers” and the autonomy in each department and agency as a low-profile way of enforcing fees as impediments to disclosure (p. 619). Fees collected from requesters were originally thought to be a method for funding, if not all of FOIA administration, at least a substantial portion of it (Beesley & Newman Glover, 1987), yet Wald concurred Feinberg, demonstrating that the CIA, among many other agencies, use cost not only as a requester deterrent but as an excuse for not fully fulfilling the legislative mandate, and that these costs could be tremendous (p. 673). Not surprisingly, tales of exorbitant fees are legion (Brown, 2016; Maas & Mackey, 2016; Schick, 2012). In 2015, the FOIA ombudsman stated that agencies are prone to using fee estimates as discouragement to requesters (Jones, 2015).

2.1. Congressional comment on FOIA costs

Despite enduring concern about the expense in implementing the FOIA and the lack of resources in meeting statutory expectation there is little in the way legislative control or guidance in FOIA funding and spending. Congress has identified a lack of resources as a primary problem in meeting the statutory mandate of the FOIA. A 1986 House review of the first 20 years of FOIA use and implementation cited a lack of resources as a primary cause of the dissatisfactory performance (H.R. Rep. No. 99-832, 1986). A 1996 House report observed, “Lack of sufficient resources has constrained the effectiveness of the FOIA. At some agencies failure to allocate sufficient staff to comply with the Act has resulted in lengthy backlogs measures in years. Efforts at improving FOIA response time have centered on better prioritization of requests and more efficient administrative practices” (H.R. Rep. No. 104-795, 1996, pp. 6–7). And in 2007 testimony before the House, a representative said, “An insufficient level of resources available for FOIA processing is one reason requesters are being forced to wait long periods of time for responses from agency FOIA offices” (153 Cong. Rec. H2502, 2007).

At present, the law makes one mention, providing the chief FOIA officer:

subject to the authority of the head of the agency – (A) have agency wide responsibility for efficient and appropriate compliance with

this section...(C) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section (5 U.S.C. § 552).

Prior to the 2007 FOIA amendment – where the FOIA officer position is created – no provision existed giving responsibility to any individual for the expenses or budgeting of FOIA administration. There is no statutory direction in how FOIA administration is to be budgeted, other than that it is expected to come out of each agency's general budget. Beyond annual reports to be submitted to both houses of Congress, there is no oversight or regulation of how agency expense and funding of FOIA processes. FOIA administration – a transparency mechanism often begrudgingly undertaken – must compete financially with other agency priorities.

2.2. Federal court comment on FOIA costs

While there exists very little in the way of legislative responsibility regarding funding and costs accrued, there is considerable dialogue in the federal court system and it is inextricably tied to the discussion of delays in processing requests. In considering delay in FOIA protocol, a major decision occurred in the 1976 case *Open America v. Watergate Special Prosecution Force*, where the D.C. Circuit established the common law practice of authorizing “exceptional circumstances” that allowed for delay in the processing of FOIA requests. In the decision, four conditions were outlined for reaching the exceptional circumstances threshold with one being “inadequate resources.” (*Open America v. Watergate Special Prosecution Force*, 1976, pp. 615–616). The court isolated the failure of the 1974 amendment as a rationale for common law extensions, reasoning:

That such a safety valve might well have been contemplated and is presently needed is evidenced by the fact that Congress appropriated no additional resources whatsoever for implementation of the 1974 FOIA amendments, but instead contemplated that any additional costs could be absorbed within the operating budgets of the agencies” (*Open America*, p. 612).

A concurring opinion by Judge Harold Leventhal affirmed the principle behind “*Open America* stays” but questioned the wisdom of the court interposing itself in the financial matters of the FOIA, calling the resources condition overbroad and outside the purview of the court. Leventhal identified the crucial failure in recognizing a poverty complaint to stand as a reason for often indefinite extension, allowing such an argument would require an audit of agency finances.

The 1996 EFOIA amendment codified *Open America* stays, though with narrowed conditions for exceptional circumstances (Electronic Freedom of Information Act). The House report for the amendment addressed the funding issue (H.R. Rep. No. 104-795, 1996), but the legislation provided no direction regarding how resources were to be used. After enactment, James O'Reilly proclaimed, “Workload is no longer an excuse” (O'Reilly, 2015, p. 361). Yet, the case history demonstrates workload – and its corollary, resources – are still an active reason for delay (*Electronic Frontier Foundation v. Department of Justice*, 2007; *National Immigrant Justice Center v. Department of Homeland Security*, 2015; *Sibel v. Edmonds*, 2005).

In *Donham v. Department of Energy*, a federal court squarely confronted the issue of resources and budgeting. The defendant made an exceptional circumstances plea, meeting each of the requisite conditions with a rationale and explaining, “The reality is that the Defendant has limited resources and limited personnel to deal with hundreds of voluminous FOIA requests” (*Donham v. Department of Energy*, 2002, p. 881). The plaintiff criticized the department's “personnel and budget allocations to its FOIA Office,” lobbying the court to consider the practices underlying the claim. The District Court acknowledged the plaintiff's request for aid, calling the substance of the resources

condition “immaterial to the Court's disposition on the case” (Donham, p. 885), after deciding not to “second guess the Department of Energy's allocation of limited resources or engage in a critique of the Department of Energy's budget and personnel decisions” (Donham, p. 882). For its part, the department's division responsible for FOIA administration deferred any responsibility, “Senior management, not the FOIA Office, made the decision. The FOIA Office has no control over senior management or the sites' or programs' budget resources where the requested records are kept” (Donham, p. 884).

The FOIA provides federal departments and agencies the opportunity to recoup the costs incurred in administering the access mechanism. The statute calls for each agency subject to the law to produce its own fee schedule, as well as rules governing reduced or waived fees (5 U.S.C. § 552). Sen. Patrick Leahy, long-time member of the Senate Judiciary Committee, said the 1986 amendments (*Anti-Drug Abuse Act, 1986*) to fee structure (where a three-tiered system was put into place) were made “so that more costs of FOIA will be recouped, and at the same time relieve the news media of the need to pay a high cost for access to Government records” (132 Cong. Rec. S14,033, 1986). Sen. Orrin Hatch, a sponsor of the precursor legislation to the 1986 amendment, was especially optimistic about commercial requesters potentially footing the bill, “This could generate as much as \$60 million in additional fees to offset the costs of FOIA processing” (132 Cong. Rec. S14,040, 1986). This figure would prove to be wildly off-base but in-line with Congress's general ignorance of the FOIA's financial matters (H.R. Rep. No. 93-876, 1974, p. 9).

3. Research questions

RQ1a: What are the costs accrued by cabinet-level departments in administering the FOIA and how have they changed over time?

RQ1b: How have total FOIA costs accrued by cabinet-level departments been allocated between processing and litigation costs?

RQ2: What proportion of cabinet-level departments' budgets has FOIA administration costs accounted for?

RQ3a: How much money has been collected in fees from FOIA requesters and how have fees collected from FOIA requesters changed over time?

RQ3b: What proportion of cabinet-level FOIA administration costs has been recouped through FOIA fees collected?

4. Methods

4.1. Sampling

The sample consisted of all 15 cabinet-level departments. In recent years, cabinet-level departments have processed 83% of all FOIA requests. Since 1975, all departments and agencies subject to the FOIA have been required to submit an annual report outlining yearly activity in administering the FOIA. The composition of the cabinet, and the departments themselves, has varied over time, and the study's data reflects these changes while attempting to retain consistency. For instance, the Department of Health, Education and Welfare (HEW) existed until 1979 and then split into the separate departments of Health and Education. The database isolates the Education Agency's, an internal department of HEW, FOIA data as the Department of Education's from 1975 to 1979; leaving the remainder of the HEW annual report data as the Department of Health. The Department of Veterans Affairs was the Veterans Administration until 1989. The database treats the organization as one continuous department.

However, the study predominately analyzes data by aggregate year, rarely considering department-by-department figures. It should be noted that independent agencies like the EPA and NASA are not included in the sample, while agencies like the FBI (Department of Justice) and U.S. Fish and Wildlife Services (Department of the Interior) are folded into their parent departments' annual FOIA reports.

4.2. Data collection

A database was built using these annual reports, collecting 542 of the 584 annual reports produced between 1975 and 2015. The data collection necessitated a variety of methods. Annual reports from 1998 and after are required to remain available online. Many of the pre-1998 reports were acquired through a physical search of the National Archives. Since enactment, each annual report is to be submitted to the House of Representatives and the Senate, making them congressional records. These are publicly available for in-person review (though there is a 30-year moratorium on House records and a 20-year hold on Senate records), and more than 150 of the annual reports were individually located and scanned according to an executive communication number. In April 2015, FOIA requests were submitted to each department for any missing annual reports, and in an audit of cabinet-level FOIA practices worthy of a case study in and of itself; many of the departments were eminently responsive, some were sluggish but helpful and others outright dismissive. The result of the three methods was a database comprising 93% of the sought annual reports.

4.3. Data categories

Statutory changes to the annual reporting requirements have produced three distinct periods of analysis: 1975 to 1997, 1998 to 2007 and 2008 to 2015. The firmament for reporting categories was set by the 1974 amendment (Privacy Act) with the 1996 EFOIA statute (Electronic Freedom of Information Act) adding significant detail in temporal requirements and the 2007 Open Government Act (Honest Leadership and Open Government Act) amending considerable detail in a number of areas. The requisite reporting categories in annual reports have evolved over time but have always included information on costs accrued by agencies in administering the FOIA and fees collected from requesters, and these categories provide the foundation of the analysis for this study. After 1998, agencies were required to submit more comprehensive data on requests, including number of requests processed annually, and costs accrued, where additional categories for costs of processing and litigation are separated out from the larger figure. At present, the categories included in the annual report consist of requests received and processed during the year, disposition on initial requests (full grant, partial grant, full denial), exemptions claims, other authorities for denial, administrative appeals received and processed, disposition on administrative appeal, exemption claims on administrative appeals, other authorities for denial of administrative appeals, a wide and varying range of data on the amount of time to process requests and appeals, requests for expedition, requests for fee waivers, personnel and total costs, fees collected from requesters, instances where dispute resolution was sought, instances of proactive disclosure and an annual count of backlogs.

The database tracks all of the provided categories of information, but the present study focuses on primarily on two financial categories tracked throughout the life of the annual reporting requirement: costs accrued in administering the FOIA and fees collected from FOIA requesters (see Appendix). After 1997, FOIA costs accrued are given more detailed reporting, dividing these costs between processing and litigation costs. After 2007, annual FOIA reports include the number of fee waivers granted and fee waivers denied. Fee waivers are a part of the request process where an individual asks the agency to waive any potential fees associated with processing the request. The merit of a fee waiver request is judged by the request's public interest value, as determined by the agency. Requests processed were considered as a marker of general usage and activity. As FOIA funding must compete with other agency priorities for general budget dollars, federal budgets were also used in the study and acquired from a 2016 report by the Congressional Budget Office (2016). Due to a conflation of Privacy Act and FOIA administration data, inflated figures by the Department of Veterans Affairs obscure some of the data reporting from 1998 to 2007,

and the study adjusts for these figures as needed (and acknowledged in each instance).

The quantitative measures used in the study are relatively basic, most often relying on simple descriptive statistics, like aggregates and averages, to help build the narrative of FOIA costs accrued and fees collected. In exploring use and implementation data against the federal record, fluctuations and disruptions of trends drawn from descriptive statistics are a primary focus. As the cabinet-level departments comprise the preponderance of yearly FOIA activity, little is left to inferential methods. With a high capture rate of cabinet-level annual reports, the database comprises a near census population. The study relies on univariate analysis. In pursuing a larger, more comprehensive analysis of FOIA use and implementation, one primarily focused on simple statistical that produce findings across time and unit of analysis manifesting observations that identify reoccurring issues and failures in FOIA's financial elements.

5. Findings

In analyzing the financials of the FOIA, requests received and requests processed have demonstrated consistent growth since 1975. Cabinet-level requests have grown from roughly 150,000 annually in the first year of annual reports to well over 600,000 requests processed in 2015. The number of administrative appeals has also increased nearly four-fold over the same period of time.

RQ1a: What are the costs accrued by cabinet-level departments in administering the FOIA and how have they changed over time?

Cabinet-level departments have accrued an expense of \$6.3 billion in processing over 31 million FOIA requests since 1975. When controlling for Veterans Affairs, that amounts to \$386 per request. The cost of doing FOIA business has steadily increased over time, but even in the early days of annual reports, the expense well surpassed congressional estimates, climbing to \$28 million for cabinet-level departments alone in 1979. It was approaching \$100 million by the end of the first period of analysis, was nearly \$300 million by 2007 and registered \$403 million in 2015. Proportionally, the rise in expense well exceeded the increase in requests. From 1975 to 1997, it cost a department on average \$181 per request.

Between 1998 and 2007 (when controlling for Veterans Affairs due to collection errors discussed in the methods section), it was \$340 per request. In the most recent period, cost per request has soared with a figure north of \$660 for each request processed (Fig. 1.)

RQ1b: How have total FOIA costs accrued by cabinet-level departments been allocated between processing and litigation costs?

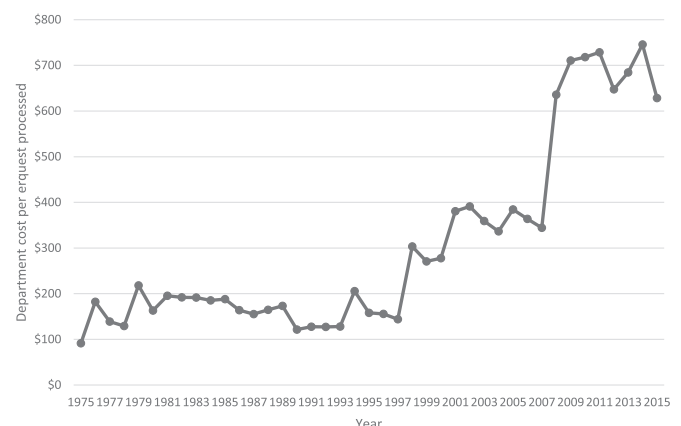


Fig. 1. FOIA costs per request processed, 1975–2015 (adjusted for Veterans Affairs).

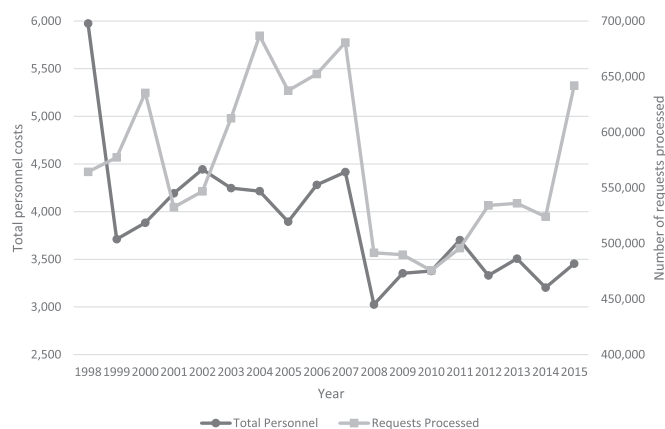


Fig. 2. Total personnel costs and requests processed, 1998–2015.

Beginning in 1998, annual reports include not only a general cost of FOIA administration, but more detailed figures on personnel, processing costs and litigation costs. The breakdown of processing costs versus litigation costs has remained consistent since 1998.

Processing costs have accounted for 95% of total costs, ranging between 92 and 97% over the 18 years, leaving only 5% to be spent on litigating FOIA appeals in federal courtrooms.

In the first year of reporting FOIA staffing, cabinet-level departments claimed 5974 staff members, when combining part-time and full-time personnel data. That amount has vacillated but trended downward since then, and in 2015 cabinet-level departments reported 3454 FOIA staffers, a 42% decrease from 1998. Over that same time period, processing costs have rose 121%, and requests processed were up 14% from 1998 to 2015 (when adjusted for Veterans Affairs) (Fig. 2).

RQ2: What proportion of cabinet-level departments' budgets has FOIA administration costs accounted for?

As mentioned above, cabinet-level department costs of FOIA administration since 1975 is \$6.3 billion. According to the Congressional Budget Office, the aggregate budget of those same cabinet-level departments over the same period of time is more than \$55 trillion. The FOIA budget's share amounts to 0.011% of that grand budget total

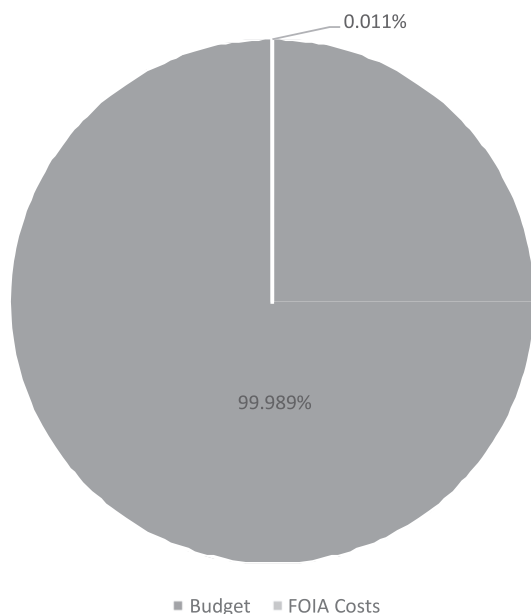


Fig. 3. FOIA costs as part of total department budgets, 1975–2015.

(Fig. 3).

That percentage has fluctuated a bit over time but has never approached even two-tenths of a percent. In the first period of analysis, 1975 to 1997, it was at its lowest, at 0.007% of cabinet-level budgets. It more than doubled over the next period of analysis, 1998 to 2007, registering at 0.015% of the aggregate budget. The percentage shrank a small amount over the next period of analysis, 2008 to 2015, at 0.013%. The Department of Justice stands as a bit an outlier, spending 0.25% of its budget of FOIA over the course of the study. On the other end of the spectrum (among the departments with fuller cost records), the Department of Health & Human Services has spent a miniscule 0.004% of its budget on FOIA administration.

RQ3a: How much money has been collected in fees from FOIA requesters and how have fees collected from FOIA requesters changed over time?

The aggregate amount of fee money collected from requesters demonstrates some fluctuation around the time of the 1986 establishment of a new fee structure. It is not a linear path, but fees collected rose steadily from 1975 until 1993, increasing 400% over the span. The crest of fees collected was 1993 with cabinet-level departments accumulating over \$10 million from requesters. After the 1993 apex, the amount of fees collected dropped off precipitously, leveling off around \$3.5 million annually in 1998. Fees collected have remained in that ballpark until 2014 and 2015, when they have dipped below \$3 million for the first time since the late 1970s. Analyzing the amount of fees collected per request makes the diminished revenue all the more stark. In the first period of analysis, 1975–1997, fees collected per request was \$22.44; over the next period, 1998–2007, that figure (when controlling for Veterans Affairs) was \$5.15; and in the most recent, period, 2008–2015, it is \$6.44 (Fig. 4).

RQ3b: What proportion of cabinet-level FOIA administration costs has been recouped through fees collected from FOIA requesters?

The shrinking return is all the more noticeable when juxtaposed against the costs of FOIA administration. Costs accrued have increased considerably over time, but Sen. Leahy's hope of recouping a significant amount of the costs through requester fees has not occurred. Over the life of the database, a scant 3.1% of costs have been covered by collected fees (Fig. 5).

The fees previously accounted for a significant percentage of costs, ranging as high as 20% in the earliest days of annual reports, but this decreased drastically over time. The first period of analysis saw 12% of costs recouped in collected fees, but then dropped to 2% in the middle period of analysis and in the most recent period of analysis fees collected have accounted for less than 1% of all costs accrued.

While the amount of fee waiver requests remains low relative the

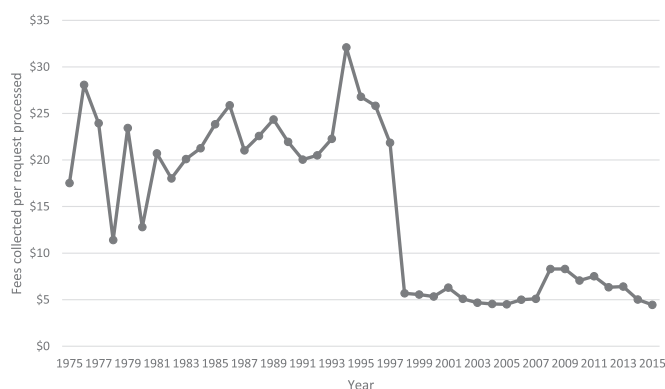


Fig. 4. Fees collected per request processed, 1975–2015 (adjusted for Veterans Affairs).

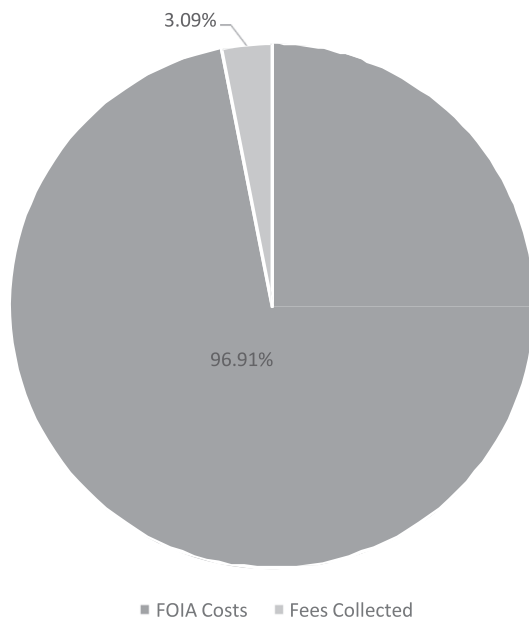


Fig. 5. Fees collected as part of total costs, 1975–2015.

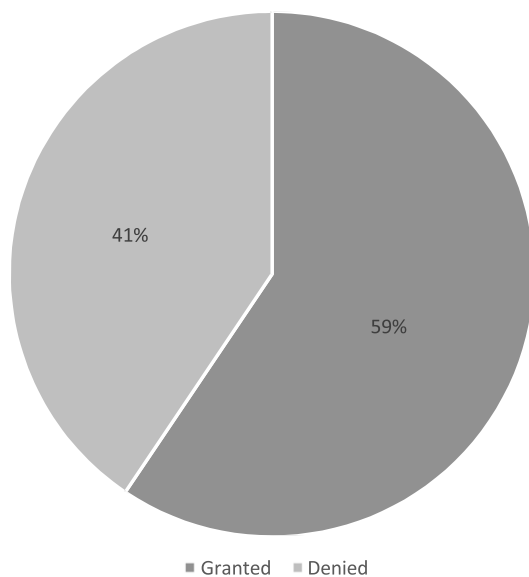


Fig. 6. Fee waivers, 2008–2015.

total number of requests processed, with 1.5% of all requests seeking financial relief, they have proved to be attainable. From 2008 and after, more than 63,000 fee waivers requests have been submitted, and just under 59% of those have been granted (Fig. 6).

6. Discussion

The findings demonstrate that despite significantly higher costs per request in administering the FOIA, the costs of FOIA are a very small part of general department budgets. Whether the rising FOIA costs, both total and per request, have impacted the overall administrative performance of departments is beyond the scope of this study, but lack of resources claims are still commonplace in federal courtrooms. The *Open America* decision is a pivotal case in understanding FOIA administration. It documents the administrative challenges of the 1974 amendment, and along with *Donham*, and regular congressional comment, demonstrates the present judicial stance in acknowledging lack of resources as a common issue in implementing the FOIA, while leaving any

structural change to the legislature. Congress has long discussed the lack of resources, but outside of appointing FOIA officers has produced no material changes to the statute to confront the issue.

The analysis suggests that what money is spent on FOIA is not specifically tied to number of requests or appeals. A comparison between processing costs and requests processed documents fluctuation in the number of personnel and the number of requests processed. It is outside the scope of this study, but existing research advises it likely accords to present budget demands or other departmental priorities.

Analysis of the fees collected demonstrates a dwindling source of income for departments. The stated intention of the 1986 amendment of the fee structure was to push the burden of FOIA administration on commercial users, while ensuring requests in the public interest were charged very little. The success rate of fee waiver requests, at nearly 60%, suggests agencies are interested in removing financial impediments to requests viewed to be in the public interest. However, it is difficult to attribute the precipitous decline in fees collected in the mid-1990s as either a delayed response to the 1986 aims or an intentional move away from recouping money from requesters, the present state of fees collected is at its lowest ebbs since the 1970s, despite four-times as many requests processed. At less than 1% of FOIA costs since 2010, it no longer stands as a significant method for offsetting the expense of FOIA, and presents a question of whether assigning requester fees is a worthwhile (or even cost-effective) pursuit in its own right.

Were the FOIA the priority courts, presidents and Congress claim it to be there would be no cries of extravagance. If it was indeed essential, as identified by President Johnson, there would be no question of its price. The total cost of FOIA implementation, among cabinet-level departments from 1975 until 2015, totaled \$6.3 billion. FOIA costs for the year 2015 amounted to \$403 million. The 2014 federal budget allows for some context, with the finalized budget totaling \$3.8 trillion (Federal spending: where does the money go, n.d.). Federal priorities like social security, unemployment and labor accounted for \$1.3 trillion; Medicare and health costs rang up \$1.1 trillion; and military spending totaled \$609 billion. Interest on debt alone was \$229 billion. Landmark infrastructure projects, along with military and space programs, shed some light on priorities. The Hoover Dam, built in 1936, cost \$140 million at the time of construction (nearly triple initial estimates), or \$2.4 trillion in present-day value (Hillinger, 1987). The Panama Canal, the single most expensive U.S. construction project at the time of its completion, is thought to have cost \$375,000 in 1914, or \$9 billion in present-day value (End of construction). NASA's space shuttle program had a lifetime cost of \$197 billion, or roughly \$1.5 billion per flight (Hsu, 2011). The Department of Defense spent \$1.5 trillion on the F-35 Joint Strike fighter program, or \$8.7 billion for each of the 171 planes (Francis, 2014). The 10 Nimitz-class aircraft carriers are thought to cost \$4.5 billion a piece (O'Rourke, 2005). One of the aircraft carriers represents 71% of all cabinet-level FOIA implementation costs since 1975.

In a country obsessed with the dollars and cents of government expenditure, the failure to adequately fund or financially manage the country's primary transparency mechanism speaks volumes. Federal courts have called for legislative change. But there is reticence in requesting more explicit guidance in budgeting FOIA administration, fearing a line-item would ultimately become little more than a political pawn, likely swept off the board in a time of constraint or unpopularity, as Roberts discussed. But the status quo presents a similar game where there is merely less knowledge of resource allocation and a lack of transparency in year-to-year fluctuations. The policy suggestions are fairly self-evident: Statutory change that requires earmarked funds for FOIA administration. The figure could be tied to the previous year's requests processed figure or as a set percentage of the department's general budget. In either case, clear statutory guidance at least allows the public to witness the financial machinations of the FOIA in the light of observable budgets and congressional comment.

7. Limitations and conclusion

A notable limitation of the study is the validity of the dataset. Analysis of the aggregated annual FOIA reports data should be considered suggestive and not necessarily conclusive in nature. Individuals, ranging from congressional librarians to FOIA-focused attorneys have raised questions as to whether the figures in the FOIA annual reports are accurate. In reviewing the early reports from the 1970s, it is clear there is some variation in how different departments fulfilled their annual reporting requirement, but the process appears to become more consistent over time as Congress continues to refine the reporting requirements. There are pockets of missing records, most significantly between 1995 and 1997 due to a moratorium on releasing congressional records, and the Department of Veterans Affairs submitted a succession of outlier reports from the years 1999 to 2007, where Privacy Act results were commingled, resulting in inflated figures throughout the period. But the preponderance of department-supplied records leaves the dataset with a significant portion of the population, enough to draw strong suggestive conclusions. Analysis of the database also relies primarily on descriptive statistics in an effort to observe simple trends in use and implementation. Aggregates, averages and percentage change are the most common tools used in exploring fluctuations and disruptions in the costs of FOIA administration and the fees collected from requesters. These descriptive observations provide valuable insights but fail to draw more insightful, less intuitive conclusions a more rigorous quantitative analysis likely would.

The present study evinces the discrepancy between the federal rhetoric supporting transparency and the FOIA and the refrain of criticisms – from both public and private entities – at the undue expense of FOIA administration. Roberts's study demonstrates that when financial straits occur, funding for freedom of information administration is one of the first cuts. In the United States, there are no formal cuts to be made. At a fraction of the departmental budgets, there is little financial commitment to the sustained health of the FOIA and even less transparency in how the access mechanism is funded. Interest in the law, as gauged by requests processed, suggests fluctuating but consistent support. The expense of administering the FOIA, as a proportion of total agency budgets, is also relatively consistent. These reliable returns though have produced a system unsatisfactory to many, with a House committee releasing a 2016 report titled “FOIA Is Broken” (FOIA Is Broken: A report, 2016). Yet, the subsequent amendment made only modest reforms (FOIA Improvement Act of, 2016). The first step in making change is placing the FOIA on secure financial footing, beginning with funding through a line-item in agencies' general budgets. This financial commitment needs to more closely reflect the rhetoric of support so often voiced by the federal government. The rhetoric of support needs to translate into political will; political will evidenced by an increase in capital support.

Roberts warns about ulterior motives in complaints about the financial excesses of FOIA administration, while Feinberg observed agencies using the costs of FOIA administration as a disincentive to requesters. Colquhoun demonstrated that relative to other similar freedom of information systems, the U.S. FOIA was relatively efficient. The present demonstrates that the federal government has long espoused support for the FOIA as an important element of the American governance. And nearly as long as the FOIA has existed there have been both complaints from critics about how unacceptably expensive it is and claims of a lack of resources from departments. More than 50 years after FOIA was enacted, the financial complaints and poverty claims remain largely unaddressed. While President Johnson may have written of its necessity and Justice Scalia railed at its expense, use and implementation analysis suggests it is neither “essential” nor “extravagant” to those carrying out the FOIA.

Appendix A. Supplementary data

Supplementary data to this article can be found online at <http://dx.doi.org/10.1016/j.giq.2017.09.001>.

References

- 132 Cong. Rec. S14,033 (1986).
- 132 Cong. Rec. S14,040 (1986).
- 153 Cong. Rec. H2502 (2007).
- Anti-Drug Abuse Act (1986). *Pub. L. No. 99-570, § 1801, 100 Stat. 3207*.
- Archibald, S. (1993). *The early years of the Freedom of Information Act – 1955 to 1974*. Vol. 26(4), PS: Political Science and Politics 726–731.
- Beesley, S. L., & Newman Glover, T. A. (1987). Developments under the Freedom of Information Act: 1986. *Duke Law Journal*, 1987(3), 521–567.
- Brown, H. (1992). *The Electronic Freedom of Information Improvement Act: Hearing Before the Subcommittee on Technology and the Law*. Committee on the Judiciary (102 CONG. 6).
- Brown, J. (2016). *The Pentagon's \$660 million FOIA fee*. MuckRock. Retrieved from: <http://www.muckrock.com/news/archives/2016/feb/26/biggest-foia-fee-all-time/>.
- Cate, F. H., Fields, A., & McBain, J. K. (1994). The right to privacy and the public's right to know: The “central purpose” of the Freedom of Information Act. *Administrative Law Review*, 46(1), 41–74.
- Colquhoun, A. (2010). *The cost of freedom of information*. London, England: Constitution Unit.
- Commission on Protecting and Reducing Government Secrecy (1997). *Senate Doc. No. 105-2*.
- Congressional Budget Office (2016). *The Budget and Economic Outlook: 2016 to 2026*. Retrieved from: <https://www.cbo.gov/publication/51129>.
- Donham v. Department of Energy (2002). 192 F.Supp. 2d 877 (S.D. Ill).
- Electronic Freedom of Information Act (1996). *Pub. L. 104-231, 110 Stat. 3049-3054; §§ (e)(1)-(2)*.
- Electronic Frontier Foundation v. Department of Justice (2007). End of the construction. *Panama Canal Project*. 517 F.Supp. 2d 111 (D.C.C.). Retrieved from: <http://www.pancanal.com/eng/history/history/end.html>.
- Evaluations of the email records management and cybersecurity requirements (2016). Department of State, Office of the Inspector General.
- Federal spending: where does the money go National Priorities Project. Retrieved at: <https://www.nationalpriorities.org/budget-basics/federal-budget-101/spending>.
- Feinberg, L. E. (1986). Managing the freedom of information act and federal information policy. *Public Administration Review*, 46(6), 615–621.
- FOIA Improvement Act of (2016). S. 338. 114th congress.
- FOIA is broken: A report (2016). *House of representatives*. Committee on Oversight and Government Reform.
- Francis, D. (2014, July 31). *How the DOD's \$1.5 trillion F-35 broke the Air Force*. Fiscal Times. Retrieved from: <http://www.cnbc.com/2014/07/31/how-dods-15-trillion-f-35-broke-the-air-force.html>.
- H.R. Rep. No. 104-795 (1996).
- H.R. Rep. No. 93-876 (1974).
- H.R. Rep. No. 99-832 (1986).
- Hawk, M. D. (1974). *Letter to Chet Holifield, chairman of Committee on Government Operations, reprinted in Freedom of Information Act and Amendments of 1974 Source Book: Legislative History, Texts, and Other Documents*. ((1975) (1974)).
- Hillinger, C. (1987). Hoover Dam – it will be paid off in full today, Los Angeles Times. *Honest Leadership and Open Government Act*, *Pub. L. 104-231* May 31. (§§ (e)(1) (2007)).
- Hsu, J. (2011). *Total cost of NASA's space shuttle program: Nearly \$200 billion*. Astrobiology Magazine. April 11. Retrieved from: <http://www.space.com/11358-nasa-space-shuttle-program-cost-30-years.html>.
- Johnson, L. B. (1966). *Statement upon signing Pub. L. No. 89-487*. July 4.
- Jones, N. (2015). *Unnecessary Freedom of Information Act fees*. Reporters Committee for Freedom of the Press. Retrieved from: <http://sunshineweek.rcfp.org/unnecessary-freedom-of-information-act-fees>.
- Kim, M. (2007). Numbers tell part of the story: A comparison of FOIA implementation under the Clinton and Bush administrations. *Communication Law and Policy*, 12(3), 313–339.
- Kirtley, J. (2006). Transparency and accountability in a time of terror: The bush administration's assault on freedom of information. *Communication Law and Policy*, 11(4), 479–509.
- Maas, D., & Mackey, A. (2016). *The 2016 Foibles*. Electronic Frontier Foundation. Retrieved from: <https://www.eff.org/deeplinks/2016/03/foibles-2016-recognizing-worst-government-responses-public-records-requests>.
- National Immigrant Justice Center v. Department of Homeland Security (2015). No. 12 C 5358, 2015 U.S. District LEXIS 11520 (N.D. Ill.).
- Open America v. Watergate Special Prosecution Force (1976). 547 F.2d 605 (D.C. Cir.).
- O'Reilly, J. T. (2015). *Federal information disclosure*. New York, NY: Thomson Reuters.
- O'Rourke, R. (2005). *Navy CVN-21 aircraft carrier program: background and issues for Congress*. Department of the Navy. Retrieved from: http://www.history.navy.mil/content/history/nhlc/404_page_not_found.html.
- Pozen, D. E. (2017). *Freedom of information beyond the freedom of information act*. Vol. 165(5), University of Pennsylvania Law1097–1158 Review.
- Privacy Act (1974). *Pub. L. 93-502, 88 Stat. 1561-1564; §§ (d)(1)-(7)*.
- Roberts, A. S. (2012). *Transparency in troubled times*. Tenth World Conference of the International Ombudsman Institute, Suffolk University Law School. Research

- Paper12–35.
- Scalia, A. (1982). The freedom of information act has no clothes. *Regulation*, 6 (pp. 14–19). .
- Schick, T. (2012). Outrageous cost estimates for open records requests. *Investigative Reporters & Editors*. Retrieved from: <http://ire.org/blog/transparency-watch/2012/11/21/outrageous-cost-estimates-open-records-requests/>.
- Sibel v. Edmonds (2005). *417 F.3d 1319 (D.C. Cir.)*.
- Sinrod, E. J. (1994). Freedom of information act response deadlines: Bridging the gap between legislative intent and economic reality. *The American University Law Review*, 43, 325–377.
- Stewart, D. R., & Davis, C. N. (2016). Bringing back full disclosure: A call for dismantling FOIA. *Communication Law and Policy*, 21(4), 515–537.
- Wald, P. M. (1984). The freedom of information act: A short case study in the perils and paybacks of legislating democratic values. *Emory Law Journal*, 33, 649–683.
- Wasike, B. (2016). FOIA in the age of “Open.gov”: An analysis of the performance of the Freedom of Information Act under the Obama and Bush administrations. *Government Information Quarterly*, 33(3), 417–426.

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