

COALITION OF
JOURNALISTS FOR
OPEN GOVERNMENT

**Frequent Filers:
Businesses Make FOIA Their Business**

CJOG Study Finds Commercial Uses of Government Information
Outpace Requests by Journalists and All Others

July 3, 2006

Open government is not just good public policy, it's proved good for business.

The federal Freedom of Information Act, which turns 40 on Tuesday, July 4, is a critical tool for businesses seeking government information and companies conducting competitive research. A new analysis of FOIA use showed that about two-thirds of the requests to 20 departments and agencies were from commercial requesters.

The study also showed FOIA use by the media is considerably less than conventional wisdom would have one believe.

The report by the Coalition of Journalists for Open Government analyzed 6,439 FOIA requests to 11 Cabinet-level departments and six large agencies in September 2005, the closing month of the last federal budget year. The review found that more than 60 percent of the requests came from commercial interests, with one-fourth of those filed by professional data brokers working on behalf of clients who wanted such information as the asbestos level on old Navy ships, cockpit recordings from crashed airliners and background data on prospective employees.

The second-largest group of requesters —categorized as "other" and consisting mostly of private citizens—comprised a third of the total. These were individuals from a wide swath of society: a movie producer doing research for *The Road to Guantanamo*, a divorcee searching for hidden assets and UFO enthusiasts seeking evidence of other worldly visitations.

There were also requests from a local police department mining for information on federal grants, a whistleblower trying to shore up a claim of government wrongdoing, historians digging into original source material, a cryptologist trying to recover a Navy intelligence report he had worked on years earlier, and a lawyer in the Texas Attorney General's office trying to locate parents overdue on child support payments.

"Media" requests accounted for 6 percent of the total. Many reporters say it takes too long to get information through FOIA to make it a meaningful tool for newsgathering. It is used more frequently by journalists working on longer, investigative projects.

Even accounting for a spike in journalistic activity last September, when the devastation from Hurricane Katrina prompted media requests for records on environmental and health issues, relief contracts, and aid to victims, law firms filed twice as many FOIA requests as journalists. That same month, four financial firms alone submitted more requests to just the Securities and Exchange Commission than did all journalists to the agencies surveyed.

The Coalition requested FOIA logs from 12 departments and eight agencies to determine who comprised the bulk of third-party requestors—those seeking information about people and companies other than themselves—during September 2005. The State Department did not provide the requested records. Nor did the Equal Employment Opportunity Commission, which sent a form letter that said "no such records exist or could be located." The CIA provided a log that included no information on requestors or categories.

The survey did not include three agencies that receive the most FOIA requests—the Department of Veterans Affairs, the Department of Health and Human Services and the Social Security Administration—because more than 90 percent of their requests are also filed under the Privacy Act and come from individuals seeking personal records.

The federal employees who process FOIA requests sort them into one of four categories—commercial, media, nonprofit (scientific and educational) or other—to determine processing fees. The Coalition study adopted those broad designations but made its own determination in instances where an agency did not. Requests from any type of business were classified as commercial.

Commercial use is likely even higher than the findings indicate because of the way some agencies categorize requests. For instance, the Army routinely classifies almost every request as "other." That practice allows business requesters to pay a lower fee than if their requests were categorized as commercial.

Daniel J. Metcalfe, director of the Office of Information and Privacy at the Department of Justice, said the 61 percent commercial use "strikes me as way too high an estimate on a government-wide basis." The only other study of users, a 2003 look at requests to four departments by the Heritage Foundation, found that 40 percent of requests were from corporations and 25 percent from lawyers.

The mix of requesters varies greatly by agency because each has special-interest users. For example, almost every request to the Parole Commission came from a prisoner. The Defense Supply Centers received 99 percent of their requests from companies seeking records on government contracts.

Nonprofit groups filed 3 percent of all requests. The groups seeking information in last September ranged from the Natural Resources Defense Council to the Beachside Bungalow Preservation Association of Far Rockaway, and included the Society for the

Prevention of Cruelty to Animals, New America Foundation, Alphapointe Association for the Blind, Electronic Privacy Information Center, Consumers Union, Drug Policy Alliance, the American Civil Liberties Union, the Michigan Republican Party, the Brady Center and Public Citizen.

The fourth category of users—"other"—accounted for one-third of the total. The grouping includes requests from other government agencies, but most of the requests were from individuals.

The difficulties of getting information from the government and the desire of many companies to mask their interest in particular information has resulted in the growth of a new industry—professional data brokers. The Coalition analysis indicated information brokers filed more than 15 percent of the commercial FOIA requests. Law firms accounted for 13 percent of all commercial requests.

Collecting the Data

Beginning in November 2005, the Coalition contacted 20 federal departments and agencies to gather data on who's filing FOIA requests. Some of the departments and agencies provided the information after an informal request, though most required the Coalition to file a FOIA request.

In the course of the survey, the Coalition ran into many of the same delays and roadblocks that requestors complain of and that have led to calls for FOIA reform from the White House and Congress.

Because many federal departments and agencies do not have centralized FOIA processing, separate queries had to be sent to component and field offices at many of the departments and agencies surveyed. That meant, for instance, separate requests to 33 Department of Justice components and 32 to individual National Labor Relations Board field offices.

The Department of Defense posed the greatest challenge, requiring 53 separate but identical requests sent to the Pentagon units.

Internal agency processing—forwarding, consulting, referring and farming out of requests—slowed an already slow process. It took a month for the Coalition's request, via the Department of Treasury, to get to its Alcohol and Tobacco Trade Office. The Labor Department took more than three months to forward the Coalition request to the Employment Standard Administration's Wage and Hour Division. The logs, which ESA ultimately provided, show the delay was not unique. One request recorded in the log was not forwarded to the proper field offices for six weeks. It was not until then that the 20-day statutory response deadline went into effect.

A log of FOIA requests is not a complicated record—every agency must keep such a list to prepare a required annual report. In many agencies, the information is computerized.

Yet nearly 25 percent of the 199 departments, agencies or component units that ultimately responded to CJOG did not meet the statutory requirement of a response within 20 working days.

Agencies are only required to acknowledge the request in that period; they do not have to provide any of the information requested. Indeed 34 percent did not.

"They seem to be taking a lot longer today than they did in the 1970s and the 1980s," said Louis Fallon, a New Jersey resident who filed one of the requests to the Department of Agriculture in September. Fallon said he has been filing one or two FOIA requests a year since 1973, when he read a how-to article in The New York Times.

The contract manager at a Herndon IT company, whose request was logged at the Justice Management Division in September, said she had mailed it the previous June. When Justice contacted her two months later to see if the information was still needed, she said no. Justice, in its annual report on FOIA performance, could list that request as "withdrawn" not "denied."

The government did not begin tracking its FOIA performance until 1998, but the data since then suggest Fallon's observation is on target. The backlog of requests at the agencies surveyed was 31 percent at the end of September.

Many snags stretch the response time without breaking the official 20-day deadline. The federal clock doesn't start running until the request is officially received at the agency. Sometimes, that takes awhile.

The IRS office did not record receipt of a request faxed to the Department of Treasury on Dec. 6 until the 29th. That made its Jan. 25 response within the statutory standard.

The Justice Department Management Division logged eight requests in September. All information on one of those requests was redacted, but the record on the other seven showed they took 16 days, 17 days, 25 days, 1.5 months, 2.5 months 3.5 months and 11 months to reach the division. The Federal Motor Carrier Safety Administration's "date logged," in one instance, was almost three months after the date the request was mailed.

DOJ's Metcalfe said slow processing can be the consequence of handling precautions put in place after anthrax was discovered in mail to federal offices in 2001. A notice by Metcalfe's office at the time said, delays "will continue to beset many agencies as further logistical problems... are dealt with during the coming weeks." Five years later, Metcalfe said, anthrax screening can add two weeks to the time it takes mail to reach a FOIA office.

Not all FOIA offices log requests on the day received, thus delaying the start of the 20-day reply clock. The Federal Motor Carrier Safety Administration received 78 requests in September, and logged 68 of them on Tuesdays.

Also, FOIA officers record a response on the day they draft it. However, one or more supervisors must still approve the correspondence. Delays of five working days or more before a letter is put in the mail are common. An SEC response to the Coalition request, dated Dec. 15, went into the agency's books as meeting the statutory requirement, but it was not postmarked until Dec. 22, two days after the 20-day deadline. Navy Safety Center's response was dated May 2 and postmarked May 10.

Another challenge for requesters is the discretionary decision making of the agencies. The Coalition requested the same information in the same manner from each of the departments and agencies and their components. Responses varied wildly.

Theoretically, privacy protections should be uniform, yet the decisions of FOIA officers in responding to the Coalition's request were not consistent. In one fourth of the responses, information officers cited Exemption 6, the personal privacy provision, in redacting names of requesters, and in some instances, the names of the agency employees who handled the requests.

There was even inconsistency among components of the same agency. Citing privacy considerations, the USDA's Office of Inspector General redacted the name associated with every request, including requests from reporters and officials in other government agencies. But the Rural Development office released both individual and company names and city and state for every requester.

There were other inconsistencies in the implementation.

The Department of Commerce advised that it allows 30 days for a requester to file an appeal when information is withheld, the Department of Agriculture set a 45-day deadline, and the Department of Defense, 60. The Department of Transportation's Federal Highway Administration allowed 30 days from the receipt of an undated letter. Metcalfe noted that the law is silent on this issue, giving agencies latitude in setting appeal regulations.

The Survey at a Glance

Beginning in November 2005, CJOG made requests to 208 federal units for records on FOIA users during September.

The request was a relatively simple one because agencies maintain a log for internal tracking and as the basis of an annual report on FOIA compliance. Here are the results:

- Eleven agencies had not responded as of June 16.
- Nine agencies responded informally, providing the information immediately over the phone or within days via e-mail, without going through the formal FOIA process.
- Ten agencies sent responses that were so incomplete or so heavily redacted that no useable information could be extracted.

- Forty-six agencies did not meet the statutory requirement of a response within 20 working days.
 - Sixty-eight agencies took more than the 20 working days to provide the information.
 - Forty-six agencies responded by e-mail or with data on a CD or disk, as encouraged by a 1996 FOIA Act amendment requiring electronic response.
 - Forty-eight agencies, more than one-fourth of those responding, cited Exemption 6 to withhold information, essentially contending that privacy considerations protected the names of the individual or entity that requested information.
 - Ten agencies claimed Exemption 2, which allows the withholding of information related to the internal practices of an agency, to redact data such as the tracking number assigned to a request.
 - Eight agencies cited Exemption 7, which protects law enforcement related information, in withholding information on FOIA requesters.
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FOIA Requesting Becomes a Cottage Industry

Over the last 40 years, FOIA requesting has become a business in itself. A small industry of professional requesters submits FOIA requests and resells the data to other corporations. Filing more than 12 percent of all requests, professional requesters are the second-largest subcategory of FOIA users, after law firms.

Third parties, mostly corporations, hire a professional requester when they want to mask their interest in particular information. Some professional requesters, including SEC Insight, subsist by reselling information of interest to investors obtained from the Securities and Exchange Commission. Others sell information on union activities gathered from records of the National Labor Relations Board.

Some file FOIA requests as an add-on service for corporate customers. The firm Input sells a database of government contracting information and has four of 180 employees devoted to using FOIA to fill holes in the database and make specific records requests for clients. The firm submitted 2,054 requests for information on government contracting and procurement in the last 12 months, said member services manager Alex Groff. The client, he says, gets concise information and isn't put in the position of "calling in and bugging" government officials.

Some professional request firms are reluctant to disclose the extent of their FOIA business. Centurion Research, for example, would not answer questions about how many employees specialize in FOIA. No trade association tracks that information.

One three-person firm, SEC Insight, has 1,700 requests outstanding since August 2004. The firm, whose trademarked motto is "Just because it's public information... doesn't

mean it's public knowledge," uses FOIA to scour SEC records for clues that a public company is under investigation. Access to its watch list of corporations facing investigation sells for as much as \$50,000 a year to prominent hedge funds, major mutual funds, broker-dealers, and accounting and law firms.

Shana Abderhalden files about 32 FOIA requests every month to the National Labor Relations Board regional offices on behalf of Adams, Nash, Haskell & Sheridan. The "union avoidance consultants," don't resell the information directly but use it in presentations to companies that are fighting unionization. Abderhalden thinks it helps to be a professional when trying to get information from the federal government: "It comes easily because I am in the business," she says. "If someone got their hands on the right information they can send a letter, but I don't know if the average person would know what to ask for...and it's time consuming."

Federal FOIA officers are less than thrilled at the growth of this cottage industry. A 1986 issue of FOIA Update, a Department of Justice publication, first noted the growth of these "surrogate" requesters and "data brokers." The Department considers surrogate requesting a potential abuse of FOIA "that Congress hardly envisioned," which draws heavily on federal resources for private enterprise. It noted that one service selling FDA information in 1986 was being billed on a monthly basis rather than per request, and the bills sometimes ran to \$4,000 a month.

As the time and complexity of securing a FOIA response grows, so does the market for the FOIA request business.

About CJOG:

CJOG is an alliance of more than 30 journalism-related organizations concerned about secrecy in government and the increasing closure of public records and meetings at all levels of government. Additional FOIA reports and related information can be found on the CJOG Web site, www.cjog.net.

WHO USES FOIA					
Department/Agency	Requests in September, 2005				
	Commercial	Media	Other	Non-Profits	Total
Agriculture	85	22	80	25	202
Commerce	69	8	45	16	138
Defense	960	88	782	22	1850
Education	63	2	12	1	78

Energy	18	3	7	3	31
EPA	887	58	137	1	929
Homeland Security	15	13	1	5	34
Interior	100	24	172	6	302
Justice	132	37	344	25	538
Labor	81	10	84	12	187
NARA	10	18	46	42	116
NASA	46	4	30	2	82
NLRB	223	6	24	12	265
SBA	24	16	24	3	67
SEC	661	15	26	1	703
Transportation	464	37	230	13	754
Treasury	80	12	65	6	163
Total	3,918	373	2,109	195	6,439

Department/Agency	Commercial Users by Subcategory				
	Union	Law	Profess.	Gov.	Ed.
Agriculture	2	30	6	6	5
Commerce	5	13	5	3	6
Defense	2	32	27	3	11
Education	NA				
Energy		6	4	1	
EPA	NA				
Homeland Security	NA				
Interior	NA				
Justice		93	1	8	10
Labor	5	88	0	2	0
NARA		4		1	6
NASA	1	5	5	3	1
NLRB	24	86	70	1	4
SBA	1	6			1
SEC	2	62	459	2	
Transportation	13	217	19	23	4
Treasury		29	5	4	2
Total	55	671	601	57	60