Freedom of Information: A Foundation of Open Government and Challenge for Government Information Management

Adelaide O'Brien
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INTRODUCTION

As federal agencies modernize their records management programs and implement their Open Government plans, they are responding to transparency mandates. These mandates require not only posting data that is relevant and useful to the public but also administering new Freedom of Information Act (FOIA) initiatives that have the presumption of openness — "in the face of doubt, openness prevails." Although many agencies are taking measures to make information available to the public, challenges abound. In September 2011, IDC Government Insights conducted a focus group with seven federal government agencies to determine current FOIA challenges, recommend solutions, and share best-in-class examples of proactively providing information to the public. This white paper captures the findings of the focus group and presents the measures that agencies are taking to respond to FOIA requests. The Future Outlook section provides steps to improve freedom of information. This paper concludes with actions that government should take to overcome FOIA challenges and successfully provide the public with the information it requires.

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FOIA REGULATIONS

The Freedom of Information Act was enacted in 1966 and provides that any person has a right, enforceable in court, to obtain federal agency records, except those records/portions protected from public disclosure by one of nine exemptions that include issues of sensitivity and personal rights per Title 5 of USC, section 552. Also the Privacy Act of 1974, section 552a, establishes a code of fair information practice that governs the collection, maintenance, use, and dissemination of government documents charting individuals.

In 1996, Congress passed e-FOIA, amending FOIA to address problem areas, including electronic records, processing time limits, request backlogs, and annual reporting. e-FOIA includes the following:

- The time limit for agencies to grant or deny FOIA requests was extended from 10 business days to 20 business days, with an extension for an additional 10 business days for specified reasons.

- If an agency fails to notify the requester of its decision to grant or deny access to the requested records within 20 business days or to grant or deny the request for expedited treatment within 10 business days, the requester is authorized to file a complaint in U.S. District Court.

- If an agency denies a request for records, in whole or in part, it must inform the requester of his or her right to appeal the decision within the agency. Appeals are required to be decided within 20 working days after receipt by the agency. If the requester is dissatisfied with an agency's decision on appeal, the requester can file a complaint in U.S. District Court.

- If the court finds that an agency improperly withheld requested records, it can require the agency to release the records and pay attorney fees or other litigation costs.

THE IMPACT OF OPEN GOVERNMENT

According to President Obama's January 21, 2009, FOIA Memorandum, all federal agencies are to administer FOIA requests with a clear presumption in favor of disclosure and resolve doubts in favor of openness. Agencies must address the following five key areas in their Chief FOIA Officer Reports:

"FOIA reflects our nation's fundamental commitment to Open Government." — Attorney General Holder

- Applying the presumption of openness

- Ensuring that an efficient and effective system is in place to respond to requests

- Increasing proactive disclosures

- Improving use of technology

- Reducing any backlogs of pending FOIA requests

In responding to FOIA requests with a spirit of cooperation, agencies are to have timely disclosures, create Web site links that provide information on FOIA requests, and have capacity to respond to these requests. Agencies have been instructed to implement systems and establish ongoing procedures of routinely identifying and systematically posting records of interest to the public. These requirements are based on the premise that the more information available to the public, the fewer FOIA requests there will be, and the more transparent government will become.

FOIA requests are to be processed within 20 business days, and agencies must assign an individualized tracking number to requests that will require more than 10 business days to process and must provide that tracking number to the requester. Agencies must also establish a telephone number or Web site for requesters to inquire about the status of their requests, including the date on which the agency received the request and the estimated date on which the agency will complete action on the request.

Challenges Faced by FOIA Managers

FOIA managers are often challenged by

- Inefficient processes caused by lack of understanding of the FOIA regulations and processes

- The inability to find information requested, resulting in subject matter experts repeatedly responding to the same requests

- Manual redaction processes that produce inconsistent responses

- Headcount funding concerns

- The inability to invest in technology to improve efficiencies and process automation

Focus group participants indicated that these challenges are exacerbated by a lack of response by government employees to FOIA requests and by responses that do not address the information requested.

"Sometimes we get stuff that's just totally nonresponsive, and then we don't get what we are looking for…that's my biggest frustration and challenge." — FOIA manager

Understanding the FOIA Process

Many government employees don't understand the FOIA process or the importance of a speedy and accurate response, not only in serving citizens but also in avoiding costly litigation. Although the FOIA officer's name is on the response, every government employee is

"FOIA is a way for the public to tell government what they want to see." — FOIA manager

responsible for FOIA. Getting the correct documentation from subject matter experts is a challenge — often, the documents that the subject matter experts send back to the FOIA officer do not include a relevant response or are not returned in a timely manner.

An issue faced by many agencies is dealing with a FOIA request that pertains to another agency. In such situations, the agency that has received the FOIA request must distribute it to the correct office or interagency personnel. It often takes well-honed investigative skills to send the request to the correct agency. And if that agency is a subagency or bureau within the department, "the clock still ticks" and interagency requests still must meet the 20-day timeline, even if searching for the proper subject matter expert eats away at the overall time allowed for responding. Because of the challenges, Government FOIA officers indicate that they are educating fellow government employees on the importance of FOIA, the legalities that face FOIA, and how to go about processing FOIA requests.

Finding Requested Information

Another concern identified by FOIA managers is having the same government subject matter experts respond repeatedly to similar or the same requests. Even though electronic reading rooms have been established since the passage of e-FOIA in 1996, many reading rooms are hard to navigate and don't provide search functions that allow ease of use for the public or the FOIA manager searching for the information. Without electronic files and search engines, it is difficult to find documents that are not in the electronic reading room, and often government subject matter experts, such as scientists, are called on to produce the information that has been requested, sometimes repeatedly. FOIA managers also indicated that agencies are looking to share information with other agencies in electronic reading rooms and postings but that these postings must be user-friendly and searchable in order to assist in the timeliness of FOIA searches.

The Art of Redaction

FOIA managers involved in redaction will tell you it is an art and not a science. Those experienced in redaction indicate that manual processes allow for inconsistencies among agency personnel, and a person redacting the same document multiple times may have different results. Imagine that individuals in different branches are manually redacting, and it is almost certain that various requesters receive different versions.
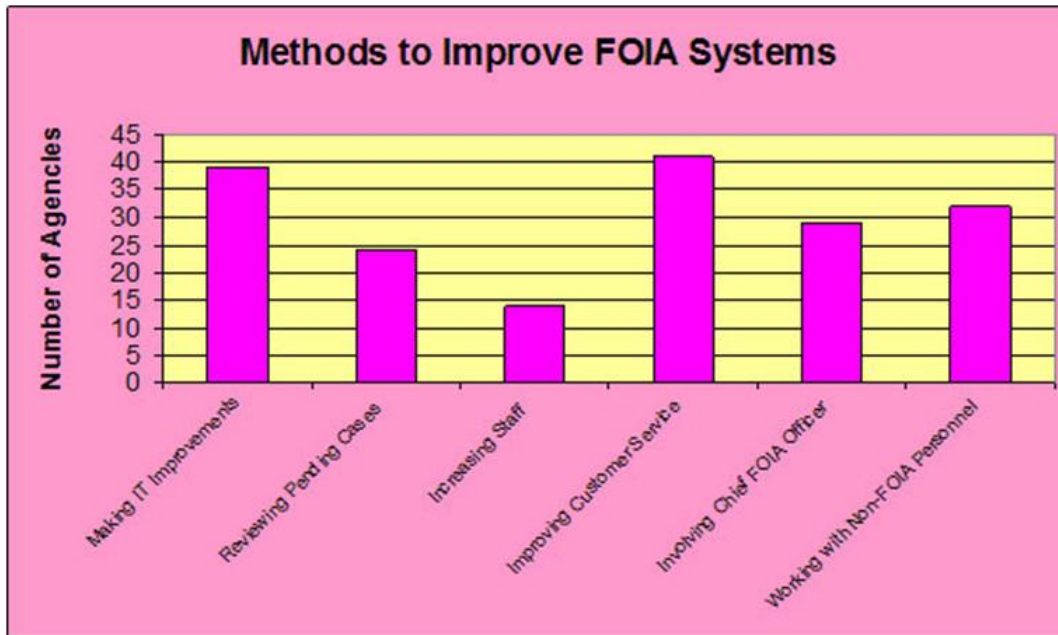
Resource Challenges

Although the Open Government Directive raised the bar on FOIA activity by requesting that agencies apply the presumption of openness and use modern technology to inform citizens about what is known and done by their government, no additional funding for Open Government was provided. According to the July 8, 2011, FOIA Post from the Department of Justice,[1] governmentwide FOIA costs for agencies to administer this law a decade after its passage were approximately $50 million. By fiscal year 2010, the estimated costs to administer the act, as reported by agencies in their Annual FOIA Reports, were over $400 million — or an increase of 700%. Moreover, in fiscal year 2010, agencies reported that nearly 4,000 full-time FOIA staff or their equivalent worked to implement the FOIA regulations across federal government. Agencies have invested a substantial amount of resources to administer this transformational law enacted by Congress in 1966. There is an expectation that government will continue to invest in FOIA and continue to make information available to the public, but the administration of FOIA, like so many other initiatives, may need to operate with reduced resources.

Figure 1 shows methods that agencies have implemented to improve FOIA systems, including such initiatives as increasing staff, involving the chief FOIA officer, and working with non-FOIA personnel to assist the FOIA office during peak workload times. However, in the current budgetary climate, government agencies are cautious about investments that do not show immediate returns and see open positions not being backfilled, at least for the time being — impacting succession planning within the FOIA ranks. Therefore, government FOIA managers need to explore technology solutions that proactively provide relevant information to citizens and enable their searches to be more efficient and complete.

The Department of Justice estimates that governmentwide FOIA costs have increased 700% since they were first measured over 30 years ago.

Methods Agencies Are Using to Improve FOIA Systems

Source: Department of Justice, July 2010

Government focus group participants indicated that information requested through FOIA is more often found in electronic format, for example, email, but the electronic files are typically printed and then mailed to the FOIA requester, and a printed copy is filed along with the FOIA request documentation. Government FOIA officers recognize the irony of this situation and would like to move this information electronically through a government records management system, but they indicated that for now, "most of us still, for better or worse, print the emails out." Also, policies at some agencies do not allow for the use of removable media, so agencies don't have the option of fulfilling a FOIA request through a CD. When journalists specifically ask for information to be provided on an electronic format media, exceptions are requested, but that isn't the norm, and nearly everything that is provided in response to a FOIA request is mailed to the requester. Because so much work is done in email, agencies are looking into leveraging some eDiscovery tools to assist them with aspects of their FOIA process, such as searching and collecting.

Proactive Information Postings

Established in 1996, when Congress passed the e-FOIA Act, electronic reading rooms place records in a consumable format and let requesters of information self-serve, sometimes preempting the need to file a FOIA request. Agencies are updating their electronic reading rooms by placing information that has been requested two or three times into these reading rooms, making them more user friendly and educating the public on what is available.

Some agencies have a goal of placing any data requested via FOIA into an electronic reading room. The Department of Defense (DoD) is an example of an agency adopting best practices in posting FOIA responses and making backlog reduction a priority. The Office of the Secretary of Defense/Joint Staff has posted 85% of all of its FOIA responses — over 300,000 pages — on its Web site and requires all DoD agencies to follow suit. Additionally, the Department of Army implemented a Backlog Reduction Project, conducted site visits to determine reasons for backlogs, and trained staff on methods to improve efficiency and to gain leadership support of the FOIA programs. These efforts led to a 68% decrease in the Army's backlog of FOIA requests.[2]

Many agencies reported in their 2011 Chief FOIA Officer Reports that they have improved their Web site and posted more information online. However, full text search isn't available for many reading rooms, and this is a critical requirement for government as well as the public to be able to fully use electronic reading rooms. Full text search will greatly assist agencies in knowing where to send redirected FOIA requests and still meet the 20-day turnaround requirement.

A solution that links many databases into one search engine is the Environmental Protection Agency's (EPA) MyPropertyInfo. Each year EPA receives thousands of FOIA requests for information on specific parcels of land as part of the due diligence process in real estate transactions. The agency created MyPropertyInfo, an online searchable database of over 2.6 million facilities or sites of interest to EPA (integrated from over 80 EPA and state databases) that provides such information as:

- Air quality systems

- Toxic waste

- Underground storage tanks

- Safe drinking water

- Brownfield properties assessed or cleaned up

MyPropertyInfo lets citizens know what EPA knows about a specific piece of property. If this type of information is requested through FOIA, EPA calls requesters and alerts them that they can download the information online themselves, obtaining the information immediately versus waiting 20 days. By proactively disclosing environmental information before it becomes the subject of a FOIA request, EPA significantly reduces the time required for the public to access this information. There has been an estimated 27% reduction in "no records found" due to the public's use of MyPropertyInfo for property due diligence and information.[3]

FUTURE OUTLOOK

Steps to Improve Information Transparency

Government FOIA managers weighed in on how to improve the process of providing information to the public, as shown in Figure 2. As with all worthwhile endeavors, improvement starts with dedicated and visionary leaders who support creating a culture of transparency and a more open and accountable government. Agency initiatives indicate that this new culture of transparency is taking hold. Technology plays a strong role in enabling efficiency through streamlined processes, ensuring accuracy, and expediting response. Agencies are measuring outcomes such as proactive release of documents to their reading rooms, reductions in backlogs, and quicker response time.

FIGURE 2

Steps to Improve Information Transparency
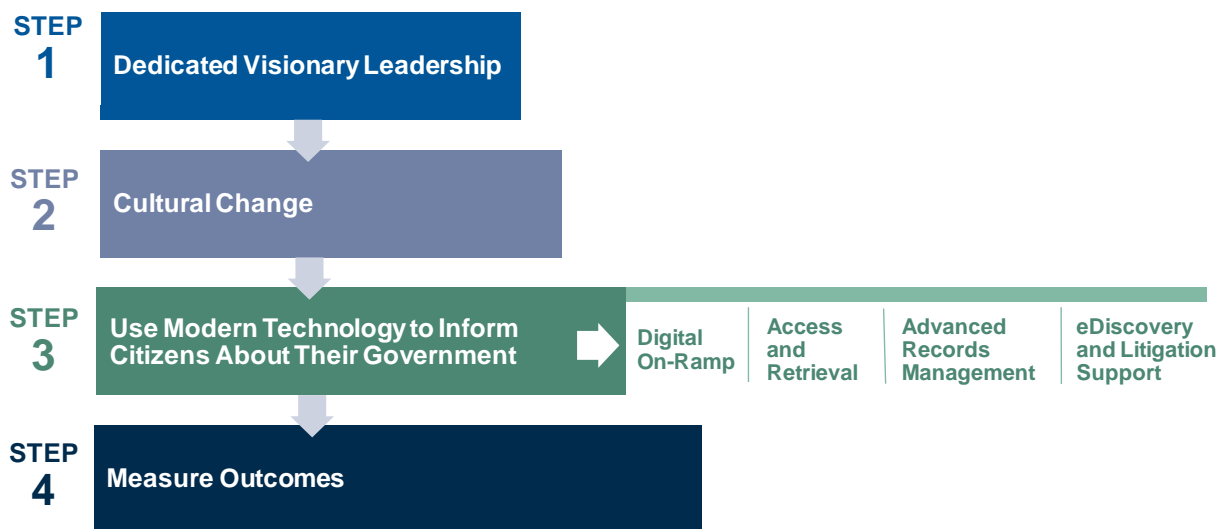
Source: IDC Government Insights, 2012

Step 1: Dedicated Visionary Leadership

Every government employee is responsible for FOIA, but the FOIA officer's name is on the response. Agency leadership, not just the chief FOIA officer and records managers, must believe that sharing information is mission critical and set examples for the agency to emulate. Government focus group participants indicated that it takes strong individuals to look at what's out there and decide what's next on the horizon because, "It's easy to say here's where we are, we're here, it's good enough, let's move on, but it takes a strong individual, someone dedicated, committed, to really look at what's good for the public, what technology is available, what do we have that we can reuse, is it possible to leverage the existing infrastructure to take it to the next level." FOIA officers working at agencies known for being proactive in information transparency attribute their success to very strong managers who are letting people do things they want to do in looking at the future and expanding their thinking to achieve the next level of openness.

Step 2: Cultural Change

Sharing information requires a cross-functional approach between records managers, IT, line-of-business staff, legal, continuity of operations plan (COOP) personnel, and FOIA, and success requires a holistic approach involving all stakeholders at every level of the organization. Agencies must foster a culture that has the capability to generate, store, access, retrieve, manage, preserve, and willingly share knowledge and knowledge resources, formally and informally, to achieve successful information management. But sharing data isn't enough; government must make a paradigm shift in interfacing with citizens to provide information and actually change the interaction process by first creating documents with an eye toward releasing information that may aid the redaction process and then using plain writing that is clear, simple, and meaningful and avoids specialized terms and acronyms.

Step 3: "Use Modern Technology to Inform Citizens About What Is Known and Done by Their Government"

President Obama's January 2009 FOIA Memorandum directed agencies to administer FOIA requests with "a clear presumption" of disclosure, and all agencies "should use modern technology to inform citizens about what is known and done by their government." Often, the first step in using technology to make information available to the public is the digital on-ramp, and agencies are deploying document imaging with intelligent scanning solutions to transition paper to electronic records. This minimizes storage and retrieval expenses and the logistics of dealing with paper files. Once information is digitized, agencies are deploying document management solutions to provide fast and reliable access to the documents requested. Access and retrieval software provides expeditious fulfillment of FOIA and legal discovery requests and everyday requests for information stored in records management applications.

In addition to a digital reading room, agencies are investing in digital records centers to provide a high-capacity, high-availability repository for storing electronic copies of critical business documents. Advanced records management software manages records throughout their life cycle — wherever the records reside — from inception through active, onsite management; archival storage management; and destruction. Discovery of electronic media can be simple; however, many organizations still have not taken the necessary steps to organize and manage digital information in a way that provides for rapid retrieval. While there are many types of electronic documents — email messages, digital transaction records, Web pages, spreadsheets, databases, etc. — email is uniquely challenging when it comes to eDiscovery because of the volume of email messages that needs to be managed. In fact, email is often stored across hundreds of computers and tapes in many different locations. Agencies are beginning to realize the benefits of centralized email archives and are rapidly adopting them. When correctly implemented, these archives provide direct access to all email messages sent and received within an agency's stated retention period.

Finally, agencies are implementing litigation support, which establishes a defensible process of capturing, coding, and organizing production through logical unitization, and loading digital information into eDiscovery platforms for review, analysis, and production.

Agencies are leveraging technology to capture information across its entire life cycle to reduce the volume of paperwork for both records and record request logs, increase efficiency and productivity in processing requests, reduce processing time in fulfilling FOIA reports, and reduce " no record found" responses.

Step 4: Measure Outcomes

Agencies are beginning to measure outcomes beyond the number of FOIA requests successfully processed and backlogs eliminated. As processes are improved, agencies are measuring positive feedback from requesters and internal users, including ease of use of technology in finding relevant information. As access to information moves beyond departments and across agencies, agencies should measure internal as well as public satisfaction with timely access and retrieval of information and, ultimately, the ability to access cross-agency information for a composite understanding, as illustrated by EPA's MyPropertyInfo. Agencies initially may expect fewer "no record found" responses and, eventually, fewer FOIA requests as relevant, contextual information is more readily available to the public.

Recommendations to Government

To increase transparency, government should seek more pervasive integration of information within and across agencies so that employees and the public have better access to government transactions and knowledge. Agencies should continue to make proactive disclosures of information and educate the public and government employees on the availability of information. Because many electronic reading rooms are hard to navigate and don't provide search functions that allow ease of use for the public or FOIA managers, agencies should consider full text search functionality. Without electronic files, it is difficult to find documents, and agencies should deploy intelligent scanning solutions to transition from paper to electronic records and minimize storage and retrieval expenses.

Agencies are implementing reforms to FOIA processes, deploying best practices in disclosing government information in accessible and useful forms, and reducing their FOIA backlogs. They should build upon these efforts by deploying document management solutions such as access and retrieval and advanced records management software to improve access to information wherever it resides. Implementing litigation support will establish defensible processes of capturing, coding, and organizing digital information into eDiscovery platforms for review, analysis, and production and can reduce agency litigation costs.

IRON MOUNTAIN

What if you could transform the way you exchange information with citizens?

When government entities look to modernize agency records management programs and respond quickly to FOIA requests, it's crucial to partner with a trusted provider with a history of expertise in records and information management. Iron Mountain's subject matter experts take a consultative approach to individual agency environments to determine the best opportunities for an efficient and cost-effective way to manage government records, including:

- Organizing, storing, and securely destroying paper records while remaining in compliance with National Archives and Records Administration (NARA) requirements

- Digitizing paper records to an electronic format to improve information accessibility, sharing, and collaboration

- Combining paper files, digital information, and hybrid files in a manner consistent with each agency's unique needs

- Gaining access to tools to organize data for easy access for FOIA requests, the Open Government Directive, internal audits, and eDiscovery

While each agency's solution is tailored to fit the mission-critical requirements of the given agency, most agencies find that a hybrid solution that combines paper and electronic records management is the best way to deliver, control, and manage information. Greater visibility into organizational information — together with the ability to produce documentation when needed — allows agencies to enhance employee efficiency and productivity, respond to questions, and provide the information needed for transparency, collaboration, participatory government, FOIA requests, and discovery or audit requests.

For more information, please visit **www.ironmountain.com** (GSA Schedule: #GS-25F-0066M and GSA Schedule 70: #GS-35F-0526U).

REFERENCES

[1] Department of Justice FOIA Post, July 8, 2011

[2] FOIA.gov, FOIA News, *2010–2011 Agency FOIA Success Stories: Creating a Culture of Transparency*

[3] Ibid.

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