

FLORIDA STATE UNIVERSITY  
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APPEALS UNDER THE U.S. FREEDOM OF INFORMATION ACT:  
TIMING, LEGAL ASSISTANCE, AND REQUESTER IDENTITIES  
OF ADMINISTRATIVE APPEAL CASES AT TWO AGENCIES

By

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## **ABSTRACT**

This study examined administrative appeals under the U.S. Freedom of Information Act (FOIA) at two federal government agencies: the Department of the Army and the U.S. Forest Service. The study reviewed all provided case files for appeals received by the agencies in fiscal year 2012, which consisted of 105 appeals at the Army and 53 appeals at the Forest Service. The researcher coded each appeal with respect to the processing time of the initial request, whether a lawyer was involved in preparing the request or appeal, and the professional or situational identity of the requester (journalist, business, agency personnel, etc.).

From initial request through initial decision, the median wait time was 31 calendar days at the Forest Service and 40 days at the Army. At both agencies, a person with legal expertise assisted with roughly one-third of appealed FOIA requests. Requests from agency personnel and their families constituted the largest group of the appeals filed at the Army, while at the Forest Service the largest group of appeals came from the “other” category of requesters, including members of the general public and unidentified requesters.

# CHAPTER ONE

## INTRODUCTION

### 1.1 Significance of the Topic

The U.S. Freedom of Information Act (FOIA) provides individuals the right to request records from federal government agencies and requires agencies to promptly provide the information unless it pertains to certain specifically exempted matters (Freedom of Information Act of 1966, 2013). FOIA is considered a key law in American information policy, but its actual impact depends on members of the public to make requests under the law and on the ways in which those requesters use the law. Yet there has not been much empirical research on the information behavior of FOIA requesters (Worthy, Amos, Hazell, & Bourke, 2011, p. 30). This study seeks to contribute to that research by examining elements of requester identities and behavior during the administrative appeal stage of the FOIA request process.

FOIA overall is a topic worthy of attention in several ways. First, FOIA is an important mechanism for public access to information about the workings and decisions of the U.S. government. According to Jaeger and Burnett (2005), “Access to government information has become an essential element of democratic self-governance” (p. 469). President Lyndon B. Johnson (1967) highlighted this theme when he signed the original legislation, stating that the act “springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the Nation permits” (p. 699).<sup>1</sup>

In addition to its broad-scale impacts, FOIA is also a significant tool for people seeking information more individually pertinent to the seeker. Smith (1995) argued:

The Freedom of Information Act and the Privacy Act had great implications in the everyday lives of citizens. The passage of these laws enabled citizens to access their

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<sup>1</sup> Despite Johnson’s public praise for the law, however, he resisted signing it, presaging later struggles in the act’s implementation. According to Moyers (2008), Johnson “had to be dragged kicking and screaming to the signing ceremony. He loathed the very idea of the Freedom of Information Act; loathed the thought of journalists rummaging in government closets and opening government files; loathed them challenging the official view of reality” (p. 301).



health, school, employment and other records upon request, to have input into them, and to participate in decisions relevant to them, which before were made by others based on secret and unobtainable data. (p. 169)

Furthermore, the right to access government information has gained recognition as a human right under international law (Baker, 2011). The United Nations' Human Rights Committee (2011) commented that the International Covenant on Civil and Political Rights, which binds the 167 nations (including the United States) which are party to the covenant, "embraces a right of access to information held by public bodies" (p. 4) and called on countries to enact enabling legislation, including procedures for appealing refusals to provide access (p. 5). Birkinshaw (2006) argued that freedom of information (FOI) "enables us to fulfill our potential as humans. Without such rights, we are little more than subjects" (p. 216).

FOIA also holds professional significance for librarians and journalists, among other fields. In its code of ethics, the American Library Association (2008) stated, "In a political system grounded in an informed citizenry, we are members of a profession explicitly committed to intellectual freedom and the freedom of access to information." Similarly, in its own ethics code, the Society of Professional Journalists (2014) called on members of that trade to "seek to ensure that the public's business is conducted in the open, and that public records are open to all."

However, to realize any of these impacts, FOIA requires a member of the public to *exercise* their right under the law by making a request.<sup>2</sup> Kreimer (2008) called FOIA "a machine that won't go of itself" and explained, "The existence of records does not entail their dissemination ... Rather, the prospect of effective transparency rests on requesters who seek information" (p. 1020). According to Dokeniya (2013), "The request-driven aspect of RTI [right to information] as a tool for transparency makes the demand side particularly important" (p. 24).

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<sup>2</sup> FOIA's paragraphs (a)(1) and (a)(2), and its subsection (g), do require agencies to proactively disclose certain information as a routine matter without requiring a particular request (FOIA, 2013). However, most discussions of FOIA have focused, as this study does, on the request-response procedures established in paragraph (a)(3) of the law.

Yet research on requesters has been limited. According to Worthy, Amos, Hazell, and Bourke (2011), “Very little is known about one of the key groups involved in FOI: the requester. Yet many of the aims of FOI are dependent on the action of this one group” (p. 30). Chamberlin (2008) commented, “Far too little has been written about one of the most important subjects in our country—the role of information in our republic. We need to pay more attention to what information is and is not available, and who uses it and for what” (p. x).

## **1.2 The FOIA Request Process**

Deciding whether to appeal an adverse agency action is one of the most significant choices that requesters face in the FOIA process. Requesters denied information or a procedural benefit (timely response, waiver of fees, etc.) are entitled to formally appeal the decision within the agency (FOIA, 2013). Only upon denial or exhaustion of the administrative appeal may a requester seek judicial review of an agency’s action under FOIA (FOIA, 2013).

The decision to appeal sits at a midpoint in the FOIA request process. Generally, a FOIA request proceeds as follows:

1. *Request:* The formal process begins when a person makes a written request to a particular federal agency for certain records in that agency’s possession. Anyone may make a FOIA request, including corporate entities such as businesses, either on their own or through a representative (U.S. Department of Justice, 2013b, pp. 16-17).<sup>3</sup> Requesters do not have to explain the purpose of their request (U.S. Department of Justice, 2013b, p. 20).<sup>4</sup> The request need only describe the requested records with enough specificity to allow the agency to locate them with reasonable effort (U.S. Department of Justice, 2013b, pp. 22-23). No particular form is needed to make a FOIA request, as long as the request is identified as such (U.S. Department of Justice, 2013b, p. 27). There is no fee to make a

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<sup>3</sup> Narrow exemptions to this rule prohibit requests from fugitives related to their fugitive status and requests from foreign governments or their representatives to intelligence agencies (U.S. Department of Justice, 2013b, pp. 18-19).

<sup>4</sup> However, because the law provides for reduction or waiver of processing fees for certain types of requests (FOIA, 2013), many requesters do provide an explanation of their purpose.

FOIA request, although fees may be incurred in processing the request, particularly if it involves an extensive search or a voluminous amount of records (U.S. Department of Justice, 2013a, p. 14).

2. *Response:* The agency provides the requested records, or else a written explanation why it is denying the request. The law requires a response within 20 working days, which can be extended for certain reasons (U.S. Department of Justice, 2013b, pp. 32-33). The agency may deny the request for procedural reasons (the request did not reasonably describe the records sought, the requester did not agree to pay assessed processing fees, etc.), because the agency could not locate the record or does not control it (e.g., the record originated from another agency), or because information in the record pertains to one of the nine exempted matters specified in the FOIA (e.g., national security). The agency must provide the reason for any refusal and notify the requester of the procedure to appeal, including any filing deadline (U.S. Department of Justice, 2013b, pp. 67-68).
3. *Appeal:* If the requester decides to appeal the agency's action (or its failure to timely respond), the requester sends a written letter to the agency's designated appeal authority. As with a request, an appeal need only be in writing and identified as a FOIA appeal; no particular form or format is required.<sup>5</sup> There is no filing fee. The requester may specify certain aspects of the agency action to appeal (e.g., appealing the withholding of certain pages but not others). Appellants may, but need not, explain why they think the agency's action was erroneous; detailed legal arguments are not necessary.
4. *Appeal response:* The agency reverses its decision and provides the requested records (or remands the request within the agency for further processing), or else sends a written explanation why it is upholding its initial decision. The law requires a response to appeals within 20 working days (U.S. Department of Justice, 2013b, pp. 73-74). The agency must notify appellants of their right to seek judicial review of the agency's response; after the

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<sup>5</sup> Some agency regulations do require appellants to identify their request by the agency-assigned case number, or to include copies of the initial request and agency response letter.

agency responds to the appeal (or fails to timely respond), requesters have formally exhausted their administrative remedies (U.S. Department of Justice, 2013b, p. 74).<sup>6</sup>

5. *Litigation*: Following administrative exhaustion, a requester may seek review in U.S. district court (U.S. Department of Justice, 2013b, p. 72). As with other federal litigation, FOIA litigation generally requires legal expertise and can be challenging for *pro se* litigants (Siegal, 2012). A filing fee is required. Litigation proceeds according to the court's calendar. If requesters feel the court's decision was in error, they can appeal to the U.S. circuit court, and failing that, to the U.S. Supreme Court.

### 1.3 Administrative Appeals under FOIA

Because the procedural requirements to make an appeal are generally seen as minor, there appears to be no significant barrier that would deter a requester from seeking review of a denial. According to Grunewald (1987):

The simplicity and low cost of an appeal—merely the posting of a letter—coupled with the statutory requirement for providing notice to the requester of the right of appeal make it reasonable to assume that virtually any requester with any serious disagreement or dissatisfaction with the initial agency disposition will appeal. (p. 1359)

Yet, in fact, relatively few requesters appeal. Members of the public submitted 651,254 FOIA requests to federal agencies in fiscal year (FY) 2012 (U.S. Department of Justice, n.d.). The majority of requests processed that year faced some adverse agency action: agencies denied 230,936 requests, in full or in part, based on exemptions; and denied another 200,939 requests for other reasons, such as failure to find the records requested (U.S. Department of Justice, n.d.).<sup>7</sup>

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<sup>6</sup> However, the requester may still pursue informal remedies, such as mediation by the Office of Government Information Services within the National Archives and Records Administration (U.S. Department of Justice, 2013b, p. 74).

<sup>7</sup> These figures do not include denials of procedural benefits or constructive denials by failure to respond within statutory deadlines, both of which are also subject to appeal. For instance, agencies denied fee waivers for 3,897 requests and expedited processing for 5,915 requests (U.S. Department of Justice, n.d.).

In response to those denials, requesters filed 11,899 administrative appeals (U.S. Department of Justice, n.d.), representing less than 3% of the FOIA requests that were denied.

Requesters who do appeal stand a roughly one-in-three chance of receiving additional information or a procedural benefit that they were initially denied. In FY 2012, agencies decided 31% of appeals fully or partially in favor of the requester (U.S. Department of Justice, n.d.).<sup>8</sup>

However, there is sizable variation among agencies. The two departments which receive the most appeals, the Department of Justice (DOJ) and the Department of Homeland Security (DHS), demonstrate this variation. Requesters appealed 9% of denials at DOJ in FY 2012, while at DHS the rate was just 1%, compared to 3% government-wide (U.S. Department of Justice, n.d.). Looking at another dimension, DHS decided 48% of appeal cases fully or partially in the requester's favor, yet at DOJ the figure was only 17%, compared to 31% government-wide (U.S. Department of Justice, n.d.).

Despite the relatively low rate of usage, the administrative appeal provisions of FOIA serve an important policy purpose. An administrative appeal mechanism for agency decisions, such as in FOIA, serves two general functions, according to Handler (1969): an appeal process “gives due-process redress” in individual cases and is “a method of detecting and correcting improper administration” across the agency (p. 18). With regard to the former purpose, Sellers (1983) commented that FOIA's appeal procedures “could be seen as devices designed to provide some recourse ... short of a costly judicial trial” (p. 119). With regard to the latter, Sellers (1983) argued that the appeal processes “have most likely played a more important role in inducing compliance with the Act than any other public activity” (p. 104).

While some research has examined the identity, behavior, and perspectives of FOIA requesters, scant research has looked at appellants. Greater understanding of appellants under FOIA could shed light on the information behavior of FOIA requesters, including the decision-making process that requesters undergo when deciding whether to appeal and factors that might influence a requester's likelihood to appeal. Such knowledge could in turn inform discussion of

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<sup>8</sup> Excluding appeals closed for other reasons (e.g., because the appeal was mooted or withdrawn by the appellant), that figure rises to 41% (U.S. Department of Justice, n.d.).

FOIA as an information policy, such as the implications of the act's appeal mechanism for users of the act.

## **CHAPTER TWO**

### **LITERATURE REVIEW**

The literature review for this study did not encounter any previous empirical research on the information behavior of requesters during the appeals stage of the U.S. FOIA. Consequently, this study draws its research base from distinct, but related, contexts: empirical research on requesters during other stages of the U.S. FOIA; research on requesters under state or international public records laws; anecdotes and hypotheses advanced by FOIA researchers; and empirical and theoretical insights drawn from research on other forms of claiming and appeals.

This chapter introduces the role of the individual requester in the FOIA process, presenting arguments from previous work that requesters do not engage with FOIA in a uniform way and highlighting some key factors that may influence their information behavior. Next, the chapter discusses selected work on claiming and appeals outside of public records processes and identifies concepts which are applicable to the FOIA context. In turn, the chapter reviews the existing literature on appeals and litigation under the U.S. FOIA, as well as certain state and foreign public records laws. Finally, this chapter explains the basis in the literature for the three elements of FOIA appeals included in this study: the timing of the agency response; the involvement on the requester's behalf of a person with legal expertise; and the organizational, professional, or situational identity of the requester.

#### **2.1 Individual Factors among FOIA Requesters**

FOIA requesters are not all alike, and their differences may drive differing interactions with the FOIA. According to Kreimer (2008), "the efficacy of FOIA depends on requesters sufficiently well-funded and tenacious to deploy the expertise and personnel to overcome the roadblocks" to disclosure (p. 1023). Consequently, if different requesters have varying levels of resources and persistence, then those requesters may have divergent experiences of FOIA as an information system and a public policy.

The first point of departure is the act of requesting. In a cross-national comparison, Hazell and Worthy (2010) found the number of FOIA requests filed in a given year to be no more than 0.1%-0.2% of the population (p. 354). Such a small group of users cannot be assumed to be

representative of the full population. Dalton, Cain, and Scarrow (2003) noted that usage of FOI laws is not widely or evenly distributed among the citizenry, which “raises potential problems of democratic inclusion and equality” (p. 262).

These issues persist, and may be exacerbated, in the later stages of the FOIA process. Previous researchers have noted this particularly with regard to the litigation stage. Sellers (1983) explained that, “As a private right of action ... [FOIA’s] enforcement mechanism relies on those deprived under the Act to sue to vindicate their rights” (p. 84). But accessing the courts is a greater burden for some requesters than others, according to Grunewald (1987): litigation “seems unduly imposing” for the “unsophisticated requester,” but “simply worth the cost” for a commercial user (p. 1375). Nader (1970) commented that “few citizens are able to engage an agency in court ... [and] those who can afford judicial recourse are special interest groups who need the protection of the FOIA least of all” (p. 2).

Consequently, a requester’s failure to contest an agency’s handling of their request does not necessarily indicate agreement or indifference. According to Gianella (1971), “the absence of persistence [by a requester] may reflect a lack of sophistication and money, not a want of interest” (p. 225).

The issue of processing delays, which are endemic at some agencies, exemplifies how differences between requesters can result in unequal treatment. According to Grunewald (1998), if “the filing of a lawsuit obligates an agency to treat a case differently from the mass of other cases with expired deadlines, the requester with the resources and inclination to litigate obtains an advantage over the less well-financed or litigation-adverse requester” (p. 362). Given these realities, Gianella (1971) argued that equitable information access under FOIA “presumes a degree of sophistication on the part of the interested citizen that is exceedingly difficult, perhaps impossible, to attain” (p. 225).

If requesters are not all alike, what are the factors that differentiate them? Researchers have proposed several potential factors that may affect whether and how a person uses FOIA, including the requester’s:



- Financial resources (Gianella, 1971, p. 225; Grunewald, 1998, p. 362; Nader, 1970, p. 2; Roberts, 2006, p. 117);
- Sophistication (Grunewald, 1987, p. 1375; Gianella, 1971, p. 225), including “a good understanding of the organization of files within the bureaucracy” (Roberts, 2006, p. 117);
- Motivation by commercial interest (Grunewald, 1987, p. 1375);
- Motivation to harass (Grunewald, 1987, p. 1375);
- Inclination or aversion to litigate (Grunewald, 1998, p. 362); and
- Political self-efficacy (Roberts, 2006, p. 117).

Evidence on the role of possible demographic factors is limited and mixed. In a study of journalists’ use of federal and state FOIA laws, Cuillier (2011) found evidence for the influence of organizational and professional factors, but weak evidence for demographic factors.

Specifically, gender, age, and geographic region were not strong predictors of public records usage (pp. 13-14), while the journalist’s beat and length of experience emerged as factors (p. 14).

However, Luo and Fargo (2008) found that public and media complainants to the Indiana Public Access Counselor’s Office under that state’s open government laws were disproportionately male, college-educated, and higher-income compared to the state’s general population (p. 12).

Dokeniya (2013) reported that studies in India and Mexico found similarly skewed demographics of requesters under those countries’ laws (p. 56).

It may also be the case that governments *treat* different types of requesters differently, giving rise to divergent experiences for requesters. According to the U.S. House of Representatives Committee on Oversight and Government Reform (2011), a 2006 policy at the Department of Homeland Security required FOIA officers to notify agency political appointees of any FOIA requests filed by members of Congress, the media, or activist groups (pp. 18-19); the committee characterized a later iteration of the department’s political review process as creating delay (pp. 34-38). In a cross-national audit of access to information in 14 countries,<sup>9</sup> the Open Society Justice Initiative (2006) found that representatives of different requester types (e.g., journalist,

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<sup>9</sup> The United States was not audited in the study (Open Society Justice Initiative, 2006, pp. 25-26).

business, nongovernmental organization, member of an excluded social group) received markedly different responses (pp. 161-168). In a statistical analysis of requests to one agency in Canada, Roberts (2002) found that requests filed by the media or political parties were significantly more likely to be delayed in their processing (p. 175).

The factors discussed in the FOIA literature do not seem to fit easily within standard models of information seeking from the information studies literature. However, there is some resonance with certain information-seeking models: for instance, Case (2008) noted that in the Byström and Järvelin model, “seeking style is ... affected by the organization in which the user works” (p. 129), a theme echoed by FOIA researchers.

## 2.2 Claiming

Additional factors emerge from research on claiming and appeals in other contexts whose findings might be applicable to FOIA. Handler (1969), writing in the context of agency decisions affecting welfare recipients, proposed five factors implicated in whether a citizen will challenge an action of the government:

1. *Right*: “The challenger has to have something to challenge; he has to have a legal right which he claims has been violated” (p. 13)
2. *Knowledge of violation*: “He has to know that his right has been violated” (p. 13)
3. *Knowledge of remedy*: “He has to know ... that he has a remedy available to him” (p. 13)
4. *Resources*: “He has to have the resources with which to pursue the remedy” (p. 13)
5. *Expected net benefit*: “He has to decide whether the predicted benefits of winning will outweigh his costs of trying” (p. 13)

Handler (1969) further noted that there are costs to the challenger beyond the direct costs of litigation: “At a minimum, a challenge is a bother ... Complaining requires a commitment of scarce and valuable resources, even if only time and energy” (pp. 13-14). Handler’s factors broadly resemble a cost-benefit model, requiring both a minimum capacity of the requester to bear cost and a minimum expected benefit: “the harm has to be sufficiently serious (or the person irate enough) to justify the bother” for a citizen to challenge an agency decision (p. 13).

Transposed onto FOIA, the first factor, a legal right, clearly exists. The second and third factors, knowledge of violation and remedy, exist for denials of FOIA requests, as well as denials of requested fee waivers or expedited processing, but may not necessarily exist for violations of processing deadlines or other procedural requirements, as agencies do not always inform requesters of the violation and remedy in the latter cases. The fourth factor, resources, is prominently identified as a factor in the FOIA literature. The fifth factor, expected net benefit, can be subdivided into the expected cost and the expected benefit. For FOIA appeals, the expected cost for most requesters largely consists of the transaction costs of preparing and submitting an appeal. The expected benefit, though, is more difficult to quantify in the FOIA context than in those contexts where the potential claim involves monetary amounts. One factor that may partially reflect the value of an expected benefit is the consideration of whether a requester has a commercial interest in the information sought.

Currie (2004), writing in the context of individuals' decisions to apply for government benefits, also adopted a cost-benefit approach, wherein transaction costs – the efforts involved in applying for a benefit – are the most important component of the cost consideration (p. 11). Handler's and Currie's perspectives bear some similarity to the cost-benefit paradigm of information seeking models (Case, 2008, p. 154).

The requester's individual beliefs and personality may also factor into the decision to appeal. Benítez-Silva, Buchinsky, Chan, Rust, and Sheidvasser (1999), writing in the context of individuals' decisions to appeal the denial of Social Security Disability benefits, examined 27 potential factors. The four most important predictors of appealing were three objective indicators of the applicant's health as well as one subjective indicator, the applicant's belief that the applicant's health condition prevents the applicant from working (p. 162). With regard to the latter factor, in other words, "individuals who believe they are truly disabled are significantly more likely to appeal an initial denial" (p. 163). Translated into a FOIA context, these results suggest that the requester's conviction (or lack thereof) that the requested records should be released might be a factor predicting FOIA usage.

In their review of the propensity to sue, Dunbar and Sabry (2007) discuss several factors identified in the literature. Under the economic view of litigation, "parties weigh the costs and

expected benefits of suing based, in part, on the subjective probability of winning a suit” (p. 32), and “it is generally the case that the decisions of the actors are made with reference to expected utility” (p. 33). By contrast, under the fault and equity approach, “claiming is most likely to occur when the injured person identifies another party’s behavior rather than his or her own as the major cause of the injury” (p. 33).

In their analysis of results from a survey of individuals who reported suffering an injury or accident in the past year, Dunbar and Sabry (2007) find the strongest evidence for the latter explanation: “The perception of the cause of injury affects the claiming rate more significantly than any other variable” (p. 36). They conclude: “We cannot ignore that feelings of fairness and blame motivate strong action by the aggrieved. This is not to say that economic incentives have no role but only that they are not the only factors” (p. 41). As with the study on Social Security Disability claiming, these results could be interpreted in the FOIA context as suggesting that the requester’s belief that the records should be released may be an important factor in FOIA usage.

Another interesting finding by Dunbar and Sabry (2007) is that “prior filing experience by the injured person or someone in his or her household has no significant impact on filing” (p. 37). They posit, “It is possible that negative experiences have counterbalanced those factors that one would expect to reduce the costs to experienced filers” (p. 37). This suggests a bound or a countervailing force on the assumption that expertise with FOIA increases the likelihood of usage. In fact, the FOIA literature is replete with mentions of “horror stories” arising from bad requester experiences, which deter future requesters.

## **2.3 Appeals and Litigation**

As discussed below, several studies have examined FOIA appeals and litigation, generally looking at the share of initial requests or decisions appealed (litigated) or at the disposition of those appeals (lawsuits). Additionally, two known studies examined empirically the identity and experience of state and local public records requesters who appealed or litigated. Researchers have also proposed ideas outlining a general logic for FOIA appeals and litigation.

### **2.3.1 Appeal Rate**

The rate at which requesters make administrative appeal appears to vary depending on the time frame examined, the agencies studied, and the methodology used. In all of the studies described

below, however, the appeal rate is less than 1 in 5.

According to Hazell and Worthy (2010), governments internationally collect two FOIA performance indicators related to appeals: specifically, “How many refusals are taken to appeal?” and “How many appeals are successful?” (p. 354). Hazell and Worthy (2010) wrote that the appeal rate “can act as a ‘proxy’ satisfaction index for the system: if few requests are appealed this may indicate that requesters are satisfied, though it could also be seen as a measure of confidence in the appeal system. It is difficult to know why a requester does or does not take the case to appeal” (p. 355).

The Congressional Research Service (1972) analyzed requests made to 32 agencies from 1967-1971, the first years of the act’s operation, and found that agencies denied 1,822 requests in full and denied another 373 requests in part, of which requesters appealed 296 (pp. 104-105). By those figures, requesters appealed 13% of denials.

Grunewald (1987) reviewed appeal data from the 28 agencies with the most denials in the years 1982-1984 and found that 15% of the exemption-based denials were appealed, ranging from 14%-17% per year (p. 1359) – a similar rate to the Congressional Research Service (1972) findings.

Kim (2007) examined 24 agencies from 1998-2005 and found the median agency’s rate of appeals per denial to be 3.2%. Kim (2007) calculated this figure based on denials for *any* reason, not only those denials based on exemptions as in Grunewald (1987) (i.e., Kim included denials because the agency did not find the requested records, because the requester failed to pay the processing fee, etc.). Kim (2007) found the appeal rate was generally lower during the George W. Bush administration (2001-2005) than during the Clinton administration (1998-2000),<sup>10</sup> but there was weak evidence of a statistically significant difference (pp. 332-333). Kim (2007) speculated that the lower appeal rate during the Bush years could be due to an increased level of denials for reasons other than exemptions – either because requesters believed appeals of such

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<sup>10</sup> Kim (2007) characterizes 2001 as part of the Bush administration, although in fact Clinton was president for the first several months of FY 2001 (October 2000-January 2001).

denials were less likely to succeed or because agencies were less likely to notify requesters receiving such denials of their appeal rights (p. 334).

According to an international review by Hazell and Worthy (2010), “in any [FOI] system the number of requesters using the [appeals] system is very small” (p. 355). Over a 3-year period in the United Kingdom (UK), Ireland, Canada, and Australia, the appeal rate ranged from 1%-9% of the initial requests filed (p. 355).

### **2.3.2 Appeal Disposition**

The rate at which agencies reverse their initial decisions on administrative appeal (i.e., decide in the requester’s favor on appeal) appears to vary depending on the time frame examined, the agencies studied, and the methodology used. In the studies described below, the share of decisions fully or partially reversed on appeal is generally around 1 in 3 to 1 in 4.

Out of 275 appeal decisions, the Congressional Research Service (1972) found that the agency reversed its initial decision in full for 13% of the cases, reversed 15% in part, and upheld 71% (pp. 104-105). In total, the requester won some benefit which the agency had initially denied in 29% of appeals.

Sellers (1983) characterized this rate as a “high level of affirmed denials” (p. 101). Reforms of the administrative appeal procedures in the 1974 FOIA amendments, however, “produced a higher level of appellate activity within the agencies,” according to Sellers (1983), after which agency data showed “a slight rise in the use of reversal on appeal as an explicit check on initial decisions to withhold information” (pp. 102-103).

Grunewald (1987) reviewed appeal data from the 28 agencies with the most denials in the years 1982-1984. Of those appeal decisions, 11% of initial decisions were reversed in full (ranging from 10%-13% per year), 34% were reversed in part (ranging from 30%-36% per year), and 55% were upheld (ranging from 52%-57% per year) (p. 1359). Compared to the Congressional Research Service (1972) figures for 1967-1971, the Grunewald (1987) data reflect a comparable rate of full reversals, but a higher rate of partial reversals and a lower rate of upholding.

Kim (2007) examined 24 agencies from 1998-2005 and found that the median agency’s rate of full granting on appeal was 6.1% and the median rate of partial granting was 15.8%. These

figures were generally lower during the George W. Bush administration than the Clinton administration, with weak evidence of statistically significant difference (pp. 335-336).

A review by the Government Accountability Office (GAO, 2002) of 25 agencies from FY 1999-2001 found that the percentage of appeals completely reversed ranged from 4%-6% per year, appeals partially reversed ranged from 11%-15% per year, appeals upheld ranged from 32%-42% per year, and appeals closed with some other disposition ranged from 41%-48% per year (p. 82-83). These figures are comparable to Kim (2007). After removing those appeals closed with another disposition, the GAO figures show a rate of full reversal ranging from 7-10%, partial reversal ranging from 19-29%, and upholding ranging from 62-71% – figures not dramatically different from Grunewald (1987), with somewhat lower partial reversal and higher upholding.

In a study of FOI in Ireland and the UK over 3 years, Hazell and Worthy (2010) found that the rate of variation (reversal) on appeal ranged from 14-18% per year in Ireland and 29-39% per year in the UK (pp. 355-356). The UK rates are comparable to the GAO figures, while the Irish rates are lower.

### **2.3.3 Litigation Rate**

Studies have found that 10% or less of denied appeals proceed to litigation. Given the previously-discussed findings that requesters appeal less than one-fifth of denials, only a very small percentage of denied requests make it to the courts. Davis (1967), writing shortly after the original FOIA's passage, anticipated such a low rate of litigation: "the reality may be that fewer than one per cent of parties who want information and are entitled to it will go to court to get it" (pp. 805-806).

Grunewald (1987) examined statistics for 1982-1984 and wrote, "Of the roughly 5,000 FOIA cases [per year] with the potential for further processing after final agency disposition, approximately 500 lead to suits under the Act in federal district court" (p. 1360) – i.e., approximately 10% of denied appeals proceed to litigation.

A review by the Coalition of Journalists for Open Government (n.d.) of FOIA litigation from 1999-2004 found that the courts resolved an average of 410 FOIA cases per year, figures which

“suggest that less than 2 percent of the requesters who are denied information turn to litigation.”<sup>11</sup>

Baker (2013) found that requesters filed 333 FOIA lawsuits in calendar year 2012, equivalent to roughly 3% of the FOIA appeals denied in FY 2012.

### **2.3.4 Litigation Disposition**

A requester’s rate of success in litigation appears to have declined sharply over the years since FOIA’s enactment, starting around a 60% success rate and declining to 30% or less.

The Congressional Research Service (1972) analyzed lawsuits initiated from 1967-1971. Of those lawsuits with a known disposition, in 16 cases the court reversed the agency’s decision in favor of the requester, in another 16 cases the court partially reversed the decision, and in 23 cases the court sustained the agency’s decision (pp. 104-105) – i.e., 29% of agency decisions were reversed, 29% partially reversed, and 42% sustained.

The General Accounting Office (1979) reviewed 504 FOIA cases from 1975-1978 and found that 26% of the cases resulted in full disclosure of the requested records, 18% resulted in partial disclosure, 35% resulted in full denial, and 21% dealt with other issues or the resolution was unknown (p. 16). Out of 469 adjudicated cases, 324 cases (69%) were dismissed, 87 judgments (19%) were issued for the defendant (government), 44 judgments (9%) were issued for the plaintiff (requester), and 14 cases (3%) had an unknown or other disposition (p. 17). Several of the dismissed cases or judgments for the government nonetheless resulted in the agency releasing some information (p. 17).

Grunewald (1987) examined FOIA cases for 1980-1985 and found that, of the cases with a judgment, 82% were for the defendant (agency), 12% for the plaintiff (requester), and 7% for both parties (p. 1356).

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<sup>11</sup> The report is unclear, but this rate appears to be calculated out of *initial* full denials due to exemptions, rather than out of denials *on appeal* for any reason as in the other studies reviewed in this section.



A review by the Coalition of Journalists for Open Government (n.d.) of FOIA litigation from 1999-2004 also found a low success rate for requester litigants: “The government wins outright ... 70 percent of the time. Plaintiffs win outright in less than 3 percent of the cases filed. In the remaining 27 percent of cases, the plaintiffs get some of the records sought through court order or by stipulated grant from the agency prior to trial.”

### **2.3.5 Identities and Experiences of Appellants and Litigants**

Two studies looked at the identities and experiences of appellants or litigants. One study looked at the identities and experiences of appellant-equivalents under Indiana’s state FOI law, while the other looked at the media identity of litigants under the federal FOIA.

Luo and Fargo (2008) reviewed complaints made to Indiana’s Public Access Counselor’s Office from 2005-2007. Such complaints are roughly equivalent to an administrative appeal under that state’s public records and open meetings laws. The study found that 57% of complaints were from members of the public, 28% were from inmates, 8% were from the media, and 7% were from government officials (pp. 8-9).

A review by the Coalition of Journalists for Open Government (n.d.) of federal FOIA litigation from 1999-2004 found that “Numerically, the media are minor players ... 7/10ths of one percent [of litigants].” Comparing the two studies, it would appear that journalists made up a considerably larger share of the users of the Indiana Public Access Counselor’s Office than of federal FOIA litigants.

In addition to characterizing their identities, Luo and Fargo (2008) surveyed more than 100 complainants from the public and the media about their experience with the Public Access Counselor’s Office (p. 9). According to Luo and Fargo (2008), “this survey was the first of its kind in Indiana, and possibly the nation” (p. 17). In terms of repeat usage, 56% of respondents said they had contacted the office more than once for different cases, and more than 90% of respondents said they were very likely or somewhat likely to use the office again (pp. 10-11). In terms of disposition of the complaint, 69% of respondents said the office had advised that they should have access to the record or meeting, 65% believed that the office’s advisory opinion was

useful in gaining access, and 18% said they had to take additional legal action after receiving the office's opinion (pp. 10-11). Those figures are markedly higher than the share of federal appeals decided in favor of the requester and the percentage of appeals taken to litigation, as reported in the other studies in this review.

### **2.3.6 Logic of Appeals and Litigation**

Previous studies have suggested that requesters considering appeal or litigation confront issues of expected costs and benefits, which can shift through the stages of the FOIA process. Since both administrative appeals and litigation must be initiated by the requester, their dynamics are similar, according to Sellers (1983), although costs are generally lower for appeals (p. 100).

Discussing a requester's decision to litigate, Sellers (1983) wrote, "Whatever motivation prompted the original request must remain sufficient, despite such constraints as time and cost, to stimulate an appeal to the courts" (p. 84). The recognition that the requester's motivation "must *remain* sufficient" (emphasis added) highlights the potential effect of timing as a factor in the requester's decision-making process, as a requester's motivation may wane with the passing of time.

Within the general cost-benefit framework, there are various reasons why a requester might decide not to proceed to the appellate or litigation stages. Grunewald (1987) suggested several possible reasons in discussing denied appeals that do not proceed to litigation:

[I]t seems reasonable to assume that some portion of the requesters in these cases are satisfied by the appellate decision and drop out for that reason at that stage. Many simply accept the agency's appellate decision as correct and reasonable even though it denies them the full access they sought. Others, who received greater access through the appeal than in the initial decision, accept that result as a form of compromise. Second, some requesters have availed themselves of the appellate process because it is a virtually no-cost opportunity for review, requiring only a simple appeal letter. (p. 1395)

In considering which appeals are likely to remain in dispute after administrative exhaustion, Grunewald (1987) applied a dispute resolution framework, looking at the nature of the dispute, the relationship between the parties, the amount in dispute, the need for speed in resolution, and

the cost of undertaking the dispute resolution process (pp. 1376-1378). Many of those factors could similarly apply to understanding the likelihood of a requester to pursue administrative appeal. For instance, with regard to timing, Grunewald (1987) noted:

Speed is not an absolute consideration. The difference between two weeks and two months will be critical in some cases, while the difference between two months and two years will make little practical difference in others ... Nevertheless ... all information is considered “perishable” to some extent. (p. 1378)

## **2.4 Timing**

One of the potential factors explored in this study is timing: specifically, the length of time that requesters waited for a decision on their initial requests. This exploration is motivated by the idea that longer delays in an initial decision may reduce the likelihood that a requester will appeal, as the value of the information to the requester may diminish with time.

It is well-known that many FOIA requests face significant wait times. According to Grunewald (1998), “Delay, in varying degrees, is endemic to our legal system ... delay in processing requests for records under the federal Freedom of Information Act is a particularly stark example” (p. 345).

Various researchers have noted that the utility of information provided under FOIA can decline with the passage of time. Grunewald (1987) refers to “the time-value of information” (p. 1419). According to Kim (2007), “‘Justice delayed is justice denied’ since requested information may lose its usefulness quickly” (p. 323). Gianella (1971) speculated that agencies may delay for precisely this reason: “an agency may be inclined to drag matters out ... [in] the hope that the passage of time will exhaust the requester’s interest in documents that the agency is reluctant to produce” (p. 244).

But the issue of timing may differentially affect different types of requesters. For instance, several researchers have commented on the impact of delay for journalist users of FOIA. Grunewald (1998) stated that “requesters with particularly time-sensitive needs for information have found the Act to have only the most limited value ... news media requesters traditionally have been identified as the most disadvantaged by delay” (p. 363). Clark (1975) wrote, “The

press, in particular, found the delays prejudicial. By the time the information they sought was in hand, their stories often had lost all news value” (p. 764). Fajans (1984) cited journalist Carl Stern as stating “that usually the time involved in obtaining information through the F.O.I.A. is such that the information is of limited value when finally received” (p. 355).

Timing may also have special relevance for those users – journalists, businesses, or others – who are interested in the exclusivity of the information they seek. As Feinberg (1986) noted, “Information is a fragile, time-sensitive commodity. What is secret one week may easily be in the marketplace the next” (p. 617).

Another group of FOIA users which may be particularly affected by delay is immigrants facing deportation proceedings.<sup>12</sup> According to Sinrod (1994), “this avenue for obtaining information is futile unless the alien receives the information in time to use it in the immigration proceedings” (pp. 350-351).

For these reasons, delay may serve to suppress the likelihood of appeal. Cuillier (2010) noted, “by the time the [delay] issue is a conflict, it is usually too late for satisfactory resolution – the journalist’s deadline has passed and the newsworthiness of the records diminished” (p. 208).

Delay exists not only in the initial request stage, but also in the appeals stage. Mohammed-Spigner (2009) cited a user of Connecticut’s public records law, who “explained that ‘information sometimes has a lifespan,’ and therefore, the more timely a case is decided [on appeal], the better it serves the citizen making the request for the documents” (p. 104).

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<sup>12</sup> In recent years, immigrants have become one of the major FOIA user groups. For instance, according to Mitchell (2012), U.S. Citizenship and Immigration Services receives “an average of 600 FOIA/Privacy Act requests *each day* ... into its centralized records office ... Ninety-nine percent of those requests are from people who are not citizens or nationals of the United States seeking their own records.” However, this group was not included as a user category in this study because most such FOIA requests appear to be concentrated at the immigration agencies, which were not included in this study. Few, if any, of the appellants in this study could be identified as immigrants or seeking immigration-related information.

The view that delay reduces perceived value applies not only to information but also in monetary contexts. According to Soman et al. (2005), “there is a remarkable consensus in the literature that future outcomes are discounted (or undervalued) relative to immediate outcomes” (p. 348). For instance, in a study of applicants for Social Security Disability benefits, Parsons (1991) found that “marginal applicants may be discouraged from applying by an increase in the expected eligibility decision delay, even if the probability of an ultimately successful conclusion is unchanged” (p. 868).

Delay can also be seen as raising the cost to acquire a good. For instance, Nichols, Smolensky, and Tideman (1971) explain that “public services are frequently offered at a zero money price and then rationed by the waiting time required of recipients” (p. 313), and that such “queuing raises the cost of acquiring the good” (p. 312). The higher such a cost, the greater the possibility that it may tip the equilibrium of the requester’s cost-benefit consideration such that the information is no longer worth pursuing.

## **2.5 Legal Assistance**

Although any citizen may make a FOIA request without intercession, previous authors have noted that many requesters are represented by a lawyer or seek expert assistance in advancing their request, as discussed below.

Clark (1975) was skeptical that requesters without a lawyer would be able to make successful use of FOIA, writing that “an individual citizen is not apt to know how, nor have the resources, to take advantage of its provisions. He is likely to need an attorney” (p. 741).

Requesters might also seek help from a nonprofit organization with FOIA expertise. Roberts (2006) wrote, “Even if they seek personal information . . . individuals may rely on an advocate to make a request for them” (p. 117). According to Clark (1975), such an advocate may improve the odds of successfully receiving requested information: “With . . . institutional help, each citizen has it in his or her power to make the government pay heed to a request for information” (p. 749).

In Luo and Fargo (2008)'s study of public and media complainants to Indiana's Public Access Counselor's Office, 26% said they found out about the office from a lawyer (p. 11). This suggests that at least a quarter of complainants consulted a lawyer about their request.

However, legal expertise may not be required in order to successfully navigate the appeals process. Looking at appeals to the Connecticut Freedom of Information Commission under that state's FOIA, Mohammed-Spigner (2009) commented that "there does not seem to be a link between having legal knowledge and being able to effectively access the process of appeals" (p. 95).

## **2.6 Requester Identities**

Several researchers have looked at categories of requesters in terms of their professional or situational identities. FOIA's authors seem to have anticipated that certain professions or organizations would utilize the law in different ways than other types of users. The law provides for different fees for requests made for commercial use, scientific research, and journalism (FOIA, 2013). FOIA also offers expedited processing of requests made by a "person primarily engaged in disseminating information," such as a journalist (FOIA, 2013).

As discussed below, studies have indicated that different professional user types do, in fact, have differing experiences using the law or use the law in distinct ways. For instance, looking at individuals, media, and citizen groups who used the appeal process under Connecticut's FOIA, Mohammed-Spigner (2009) found that "indeed there are differences among these groups. The media had on average a more positive experience than did individual citizens or citizens' groups" (p. 113).

### **2.6.1 Comparative Usage**

Several previous studies, discussed below, have provided statistics on the organizational or professional identities of FOIA requesters. While the broad contours of key user categories appear similar across multi-agency studies, there seems to be extensive variation between individual agencies.

**2.6.1.1 Across multiple agencies.** Table 2.1 summarizes the results of five studies that categorized the sources of FOIA requests across multiple agencies. While the studies varied in

their methodology, including their requester typology, they all examined four common categories of requesters: businesses, journalists, lawyers, and nongovernmental organizations (NGOs).

**Table 2.1 Percentage of Requests Filed by Requester Type**

Study	Requester Type				
	Business	Journalist	Lawyer	NGO	Other
Congressional Research Service (1972) <sup>a</sup>	26	6	17	6	46
General Accounting Office (1978b)	45	1	13	4	37
Koch and Rubin (1979)	12 <sup>b</sup>	9	37 <sup>c</sup>	4	38
Tapscott and Taylor (2001)	42	6	26	8	17 <sup>d</sup>
Coalition of Journalists for Open Government (2006)	49	6	10	3	32

*Note.* Terms vary from the original studies. Rows may not total 100% due to rounding.

<sup>a</sup> Requests denied (rather than requests filed).

<sup>b</sup> Requests by corporations not the subject of an agency proceeding.

<sup>c</sup> Requests by subjects of an agency proceeding, including requests from attorneys and law firms.

<sup>d</sup> Requests by individuals. The study excluded requests from government, educational institutions, and unions.

Despite the considerable differences in methodology and the wide range of years during which the studies were conducted, there are striking similarities in their results. In four of the five studies, businesses are the largest identifiable group of requesters, followed by lawyers. (In the fifth study, which uses a unique typology, this order is reversed.) Journalists and NGOs are the third- and fourth-largest categories in each study, varying in their rank depending on the study but each accounting for less than 10% of the requests. In all of the studies, a large share of the requesters fell outside any of these four categories. These studies are discussed in greater detail below.

The Congressional Research Service (1972) reviewed 1,503 denied requests and found that corporations made 26% of the requests, private law firms made 17%, public interest groups made

6%, the media made 6%, government agencies made 4%, researchers made 3%, Congress made 2%, labor unions made 1%, and other requesters made 36% (pp. 104-106). The authors expressed concerns about the quality of the study's agency-reported data (pp. 102-103).

The General Accounting Office (GAO, 1978b) reviewed 2,515 requests to components of 10 agencies made during 1976-1977. Businesses made 45% of the requests, government made 21%, individuals made 14%, law firms made 13%, special interest groups made 4%, the news media made 1%, and other requesters made 2% (p. 37).

Koch and Rubin (1979) reviewed 1,663 requests at 14 agencies from 1975-1976. According to their classification, 37% of requests were filed by subjects of agency proceedings (including requests made by attorneys and law firms), 12% were filed by corporations not the subject of an agency proceeding, 9% by the media, 4% by "private attorneys general" such as public interest groups, 4% by scholars, and 34% by the general public and other requesters (pp. 17-19).

Tapscott and Taylor (2001) reviewed logs for 2,150 requests at four agencies during a six-month period in 2001. The study found that 42% of the requests came from corporations (ranging from 21%-49% per agency), 26% from lawyers (ranging from 24%-42% per agency), 17% from individuals (ranging from 4%-33% per agency), 8% from non-profits (ranging from 7%-15% per agency), and 6% from the media (ranging from 3%-20% per agency). The study excluded requests from government, educational institutions, and unions.

The Coalition of Journalists for Open Government (2006) analyzed 6,439 requests to 17 agencies from one month in 2005. The study found that 59% of requests came from commercial requesters, 6% from the media, 3% from non-profits, and 32% from other requesters (mostly from individuals, as well as some from government agencies). Included in the commercial category were law firms (comprising 10% of the total requests) and information brokers (9% of the total requests).

**2.6.1.2 Within individual agencies.** Individual agencies are idiosyncratic in the source of their requests, showing considerable variation from multi-agency studies. According to the Coalition of Journalists for Open Government (2006), "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.” Table 2.2 presents the largest category of requesters at various agencies according to several studies.

**Table 2.2 Largest Requester Type Group at Selected Agencies**

<b>Study</b>	<b>Agency</b>	<b>Requester Type (Percentage of Requests Filed)</b>
General Accounting Office (1978b)	Department of Defense	Businesses (80%)
General Accounting Office (1978b)	Veterans Administration	State, local, and federal government (67%)
Koch and Rubin (1979)	Securities and Exchange Commission	Subjects of agency proceedings (59%)
Koch and Rubin (1979)	Civil Rights Division of the Justice Department	General public (82%)
Bonine (1981)	Food and Drug Administration (FDA)	Industry or information brokers (85%)
Bonine (1981)	Animal and Plant Health Inspection Service of the Department of Agriculture	Businesses (54%)

Despite the individual variations, there do appear to be commonalities across agencies. Reporting on a 1979 survey of agencies, Bonine (1981) indicated, “Only a few agencies that discussed usage at all did not mention heavy use by business (e.g., the Central Intelligence Agency and the Office of Management and Budget). The responses rarely mentioned use by public-interest groups or the news media” (pp. 216-217).

### **2.6.2 General Public**

It appears that only a modest proportion of the total population have ever made use of FOIA. In a national scientific sample of adults, the American Society of Newspaper Editors Freedom of Information Committee and the First Amendment Center (2001) found that 80% said they had

never requested any records from a government agency; of those who had requested a record, only 16% said it was from the federal government (p. 17).

### **2.6.3 Journalists**

Journalists are among the most prominent users of FOIA, and the law appears to be a significant reporting tool. Yet journalists appear to file only a modest proportion of all FOIA requests. Studies have calculated the percentage of requests filed by journalists at 6% (Congressional Research Service, 1972, pp. 104-106), 1% (General Accounting Office, 1978b, p. 37), 9% (Koch and Rubin, 1979, pp. 17-19), less than 5% (*Freedom of Information Act*, 1981a, p. 161), 3%-9% (Doyle, 2000, p. 39), 3%-20% (Tapscott & Taylor, 2001), and 6% (Coalition of Journalists for Open Government, 2006).

Use of public records laws appears common among journalists, although they seem to request state and local records more frequently than federal records. In a survey of a convenience sample of 400 journalists, Cuillier (2011) found that 90% reported ever requesting a state or local record and 53% reported ever requesting a federal record (p. 21). In a survey of the top editors of daily newspapers, the American Society of Newspaper Editors Freedom of Information Committee and the First Amendment Center (2001) found that 82% reported that their newspaper had made a public records request in the past year, and 81% reported that they personally had made or overseen a public records request in their career as a journalist (p. 25).

Journalists do not all use the law with equal frequency. According to Fajans (1984), “Journalism practices regarding use of the F.O.I.A. run from the non-users, through periodic users, to extreme users” (p. 351). In Cuillier’s (2011) survey, the journalist’s beat was the strongest predictor of public records usage: journalists who covered government and crime reported using public records laws more than those who covered sports and features (p. 14). Longer experience in journalism also correlated with increased reported public records usage (p. 14). According to Worthy, Amos, Hazell, and Bourke (2011), “the general tendency with journalists is for a small group to use it heavily” (p. 30). According to Frontier Economics (2006), requesters may be characterized as either “serial requestors” or “one-off requestors,” and “journalists are one of the most significant categories of serial requestor” (p. 29).

Owing to the importance of public records to newsgathering, some news organizations have been willing to invest financial and staff resources to support the pursuit of FOIA requests (Kreimer, 2008, p. 1023). The media have also been active in the policy arena; according to Jones (2011), “Newspapers have always been ferocious advocates for open government” (p. 617).

#### **2.6.4 Business**

Businesses make considerable use of FOIA and represent a sizable proportion of all requesters. Studies have estimated the proportion of requests filed by businesses at 26% (Congressional Research Service, 1972, pp. 104-106), 45% (General Accounting Office, 1978b, p. 37), 12% (Koch and Rubin, 1979, pp. 17-19), 21%-49% (Tapscott & Taylor, 2001), and 49% (Coalition of Journalists for Open Government, 2006).

Roberts (1979) identified several motivations of businesses making FOIA requests:

If business and industry are to play the game by the government’s rules, they must know what those rules are ... Companies seeking to do business with the government or applying for research funds also make use of the FOIA to obtain copies of successful bids or grant applications so as to improve the quality of their own submissions. Or they may be trying to assure themselves that a competitor was awarded a contract instead of them because of the merits of the bid. (p. 321)

Amos (1999) reviewed the use of FOIA by federal contractors and grantees and concluded that “the Act is being widely used” by businesses seeking government grants and contracts to identify opportunities, better understand client needs, and gain insight into competitors (p. A21).

Reviewing more than 100,000 FOIA requests filed over a five year period, Mullins and Weaver (2013) found that “investors use the [FOIA] process to troll for all kinds of information.”

One particular kind of business that uses FOIA is information brokers, also known as FOIA service companies. These specialized businesses make requests on behalf of others – in many cases, without revealing the identity of their client. The Coalition of Journalists for Open Government (2006) found that 9% of the requests in its study came from information brokers. Mullins and Weaver (2013) found that one such company, “FOI Services Inc., accounted for about 10% of the 50,000 information requests sent to the FDA during the period examined.”

### **2.6.5 NGOs**

Nongovernmental organizations (NGOs) appear to file a relatively modest share of FOIA requests. Studies have estimated the proportion of requests filed by NGOs at 6% (Congressional Research Service, 1972, pp. 104-106), 4% (General Accounting Office, 1978b, p. 37), 4% (Koch and Rubin, 1979, pp. 17-19), less than 5% (*Freedom of Information Act*, 1981a, p. 161), 7%-15% (Tapscott & Taylor, 2001), and 3% (Coalition of Journalists for Open Government, 2006).

Like media organizations, NGOs may be more willing and able than the average requester to pursue a request to the later stages. According to Roberts (2006), “The U.S. Freedom of Information Act works as it does because the federal government is surrounded by nongovernmental organizations and media outlets with the resources to use the right to information aggressively. Many of these nongovernmental organizations also take a special interest in the principle of openness” (p. 118).

### **2.6.6 Academics**

Scholars appear to file a small percentage of FOIA requests. Studies have estimated the proportion of requests filed by researchers at 3% (Congressional Research Service, 1972, pp. 104-106), 4% (Koch and Rubin, 1979, pp. 17-19), 1%-5% (Lee, 2001, p. 373), and less than 5% (*Freedom of Information Act*, 1981a, p. 161).

Several authors have discussed the various applications of FOIA by academic researchers. For instance, Lee (2001) discussed its use by social scientists; Keen (1992) discussed its use by sociologists; and Price (1997) discussed its use by anthropologists.

### **2.6.7 Inmates**

Prisoners file a noteworthy share of FOIA requests, particularly at law enforcement agencies. Prisoners submitted an estimated 40% of requests to the Drug Enforcement Agency and 11% of requests to the Federal Bureau of Investigation, according to a Justice Department official testifying before the U.S. Senate (*Freedom of Information Act*, 1981a, p. 160). According to Doyle (2000), “Federal prisoners were far more prolific” a source of requests to the Drug Enforcement Administration in 1998 than were journalists (p. 39). Susman (1992) quipped that “in federal prisons ... making FOIA requests has, through the years, become as popular as volleyball as an extracurricular activity of inmates” (p. 189).

### **2.6.8 Agency Personnel**

Agency personnel – current, former, and prospective government employees and contractors – submit a considerable number of FOIA requests. In a review of 13 law enforcement agencies, the General Accounting Office (1978a) reported, “For many agencies, a second most dominant category [of requesters] was present or former employees.” A similar pattern holds internationally, according to Hazell (1989): “A high proportion of requests come from government employees: one-third in Canada, where the figures are boosted by servicemen seeking access to their promotability markings, and one-fifth in Australia” (p. 199).

### **2.6.9 Disputants**

People and businesses who have an individual dispute with or matter pending before an agency file a considerable share of FOIA requests. Koch and Rubin (1979) argued that FOIA is “used primarily as a device for informal discovery ... the Act is much more often used as a discovery device by those having some dealing with the government than it is used to obtain general information about the functioning of the government” (pp. 16-17).

According to Hazell (1989):

Requests are not generally made out of idle curiosity. The Australian Department of Social Security estimate that 45 per cent of their FOI customers are in dispute with the Department; and a survey conducted by Veterans’ Affairs showed that 70 per cent of FOIA applicants wanted the information to further a claim or appeal. The Australian Commissioner of Taxation similarly reported that the largest number of requesters were individuals or companies involved in tax litigation. (p. 199)

In a non-representative survey of English FOI requesters, Worthy, Amos, Hazell, and Bourke (2011) found that 27% reported a personal grievance as their motivation for making a request, the second-largest category of motivations (p. 31).

## **CHAPTER THREE**

### **METHODOLOGY**

#### **3.1 Research Questions**

This study seeks to enhance understanding of the information behavior of people who make requests for records to U.S. federal government agencies under the Freedom of Information Act. In particular, the research aimed to describe the behavior and identity of requesters who appealed an adverse agency decision under FOIA (appellants). Building off the literature on timing, legal assistance, and requester identities, the study explored three research questions:

- RQ1. How much time elapses between a requester's initial request and the agency's adverse action that is the basis of the requester's appeal?
- RQ2. In what percentage of appeals is a lawyer or person with legal expertise involved in preparing the request or appeal?
- RQ3. What are the professional or organizational identities or roles of appellants?

While these questions are descriptive rather than explanatory, the researcher proposes that the variables in these questions may be factors in the likelihood of a requester to appeal. Specifically, the researcher suggests that a longer wait time for a request to be processed reduces the likelihood that the requester will appeal; that the involvement of a lawyer increases the likelihood of appeal; and that certain types of requesters, such as personnel and inmates, are more likely to appeal than other types of requesters, such as members of the general public. By answering these research questions, this study sought to build a factual base for future investigation of these variables.

#### **3.2 Approach**

Chapman and Newell (2011) offered a warning about the predicament of research on FOIA requesters:

How people use FOIA and state and local open records is nearly impossible to characterize, for two reasons. First, governments are prevented by law from asking the purpose of the open records request. Second, anecdotal evidence about what people do

with public information is so diverse and idiosyncratic that it is impossible to describe except in the broadest terms. (p. 255)

Nevertheless, previous studies have indeed approached the subject. Researchers have used a variety of methods to study FOIA requesters, including review of FOIA case files, review of government request logs or statistics, surveys or interviews of requesters, surveys or interviews of records officials, and content analysis of publications referencing FOIA.<sup>13</sup>

This study is based on a review of FOIA case files. This approach allows requesters to speak in their own words, rather than relying on the judgments of government records officials.

Compared to surveys or interviews of requesters, reviewing case files avoids the need to create survey instruments or interview protocols and to recruit participants, while also circumventing the possibility of non-response bias or flawed recollections. However, case file review limits the type of questions a study can ask to those whose answers are likely to be found in case files, and eliminates the opportunity for clarifying or follow-up questions. For instance, the information contained in a case file about a requester's identity and motivations is often superficial or missing altogether; the General Accounting Office (1978a) noted that "since few requesters volunteer information about themselves [to the agency they requested records from], patterns on the sources of requests remain obscure." The researcher selected case file review for this study's method because, on the whole, it enabled review of the selected factors for the entire population of appellants at an agency in a given year.

The researcher submitted FOIA requests to two federal agencies, the Department of the Army and the Forest Service, for the case files of all FOIA appeals they received during FY 2012.<sup>14</sup> The researcher then reviewed the provided case files and coded variables related to the research questions.

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<sup>13</sup> See Appendix B, Selected Studies of Information Requesters by Method.

<sup>14</sup> The researcher also requested records from additional agencies but did not receive responses during the study timeframe.

### 3.2.1 Sample Selection

The researcher selected the Department of the Army and the Forest Service as a purposive sample of federal government agencies. The selected agencies are part of different federal departments (the Departments of Defense and Agriculture, respectively), with distinct leadership, FOIA policies, agency cultures, and budget and staffing considerations. Furthermore, the agencies vary in their missions and types of activities, and thus in the types of records they hold and perhaps in the requesters who may seek those records.

These agencies' FOIA programs also show considerable differences numerically. The Army processed 32,778 FOIA requests in FY 2012 (U.S. Department of Justice, n.d.). Among all federal agencies that year, only U.S. Citizenship and Immigration Services and the Centers for Medicare and Medicaid Services processed more requests than the Army (U.S. Department of Justice, n.d.). By contrast, the Forest Service processed 2,235 requests in FY 2012, only a fraction of the Army's figure (U.S. Department of Justice, n.d.). Additionally, the Forest Service had a relatively high rate of administrative appeals per request processed, while the Army had a relatively low rate (U.S. Department of Justice, n.d.). It is not known why some agencies receive larger numbers of requests or appeals, but these figures may reflect differences in the agencies' requesters, FOIA processing, or both.

**Table 3.1. Requests Processed and Appeals Received by Agency, FY 2012**

<b>Agency</b>	<b>Requests Processed</b>	<b>Appeals Received</b>	<b>Appeals per Request Processed</b>
Army	32,778	122	0.4%
Forest Service	2,235	66	3.0%
<i>Governmentwide total</i>	<i>665,924</i>	<i>11,899</i>	<i>1.8%</i>
<i>Note.</i> Data retrieved from FOIA.gov (U.S. Department of Justice, n.d.).			



### 3.2.2 Cases Reviewed

The Army provided 884 pages of records, consisting of 105 unique, valid appeals filed during FY 2012. The study excluded nine other cases because they were duplicates, not an appeal of a FOIA request, or were not filed during FY 2012.

The Forest Service provided 598 pages of records, consisting of 53 unique, valid appeals filed during FY 2012. The study excluded five other cases because they were duplicates or not an appeal of a FOIA request.

### 3.2.3 Coding of Variables

The researcher reviewed the provided records and coded four variables for each case based on the available evidence:

1. The date of the initial perfected request;
2. The date of the agency's initial response;
3. Whether or not a lawyer or person with legal expertise was involved in the preparation of the request or appeal; and
4. The identity of the requester, based on several common categories.

**3.2.3.1 Timing.** The researcher used variables 1 and 2 to calculate the number of days that each request was pending before the agency's response.<sup>15</sup> The resulting figure represents the requester's perceived delay prior to facing the decision to appeal.

Twelve of the Army cases (11%) and three of the Forest Service cases (6%) did not contain sufficient information to calculate the wait time. An additional five Army cases (5%) and five Forest Service cases (9%) were appeals of the agency's timeliness, filed before the agency had responded to the initial request.

**3.2.3.2 Legal assistance.** Some previous research has treated law firms or lawyers as a requester category (Congressional Research Service, 1972, pp. 104-106; General Accounting

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<sup>15</sup> This study calculated the number of calendar days from initial request to response, not excluding any weekends, holidays, or other time tolled by agencies for their calculations of processing time.

Office, 1978b, p. 37; Tapscott and Taylor, 2001; Coalition of Journalists for Open Government, 2006). However, this study instead characterizes requests based on the identity of the lawyer's client, on whose behalf the request was made. Variable 3 indicates the involvement of a law firm or a person with legal expertise with the request or appeal.<sup>16</sup>

Six of the Army cases (6%) and two of the Forest Service cases (4%) did not provide records which could indicate whether or not a lawyer was involved in preparing the request or appeal.

**3.2.3.3 Requester identity.** In variable 4, the researcher categorized the requester's identity into one of the following 9 categories:<sup>17</sup>

1. Business: a commercial entity or requester evincing a commercial interest in the request;
2. Journalist: a reporter or news media entity, making a request for news-gathering purposes;
3. Academic: an individual affiliated with an educational or scientific institution, making a request for scholarly purposes;
4. Nongovernmental organization (NGO): a not-for-profit organization, other than an educational or scientific institution or news media entity, making a request for noncommercial purposes;
5. Inmate: a person currently incarcerated in a jail, prison, or disciplinary barracks;
6. Personnel: a current, former, or prospective employee or service member of the agency or its contractors;
7. Family: kin or survivor of agency personnel;
8. State, local, or tribal government: a U.S. state, local, or tribal government official; and

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<sup>16</sup> The researcher coded the legal assistance variable as "yes" only where records included affirmative evidence, such as law firm letterhead, job title (e.g., "Attorney," "Law Clerk," etc.), use of the post-nominal letters "J.D." or "Esq.," etc. In a few cases lacking clear evidence, the researcher conducted a web search for clarification.

<sup>17</sup> Although the first three categories here roughly parallel the fee categories established in 5 U.S.C. § 552(a)(4)(a)(ii) (FOIA, 2013), the designation here is based on the requester's self-presentation in the case file rather than the agency's determination, if any.

9. Other: any other requesters, including members of the general public.

Five of the Army cases (5%) and five of the Forest Service cases (9%) did not provide records sufficient to categorize the identity of the requester.

### **3.3 Limitations**

The study's sampling method does not ensure that its results are broadly generalizable. The sample size of the study is small (158 valid unique appeals cases). Additionally, the study drew samples from only two agencies during a single year. Accordingly, the sample does not necessarily represent appeals filed at other agencies or in other years.

The study's approach of reviewing case files carries limitations arising from the fragmentary nature of the records provided. The agencies did not provide case files for all reported appeal cases (188 reported appeals vs. 158 valid unique appeals cases provided); if this discrepancy represents missing case files (rather than reporting error), then this study did not review those cases. Additionally, some of the provided case files appeared to lack relevant records, which may have limited the accuracy of coding for those cases.<sup>18</sup> Furthermore, the provided records sometimes lack relevant information (e.g., a lawyer may have been involved in preparing the request but may not be identified in the case file), which limits the accuracy of coding.

A single researcher performed the study's coding, which potentially reduces the reliability of the coding. The coding methodology may also tend to undercount legal assistance and overcount the "other" requester category, as these are the default codes. For instance, if a requester was a lawyer but did not indicate such in their request correspondence, the study would code the request as not having a lawyer involved.

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<sup>18</sup> Other studies have also noted how relying on incomplete government records complicates research about FOIA (U.S. House of Representatives Committee on Oversight and Government Reform, 2012, pp. 3-4).

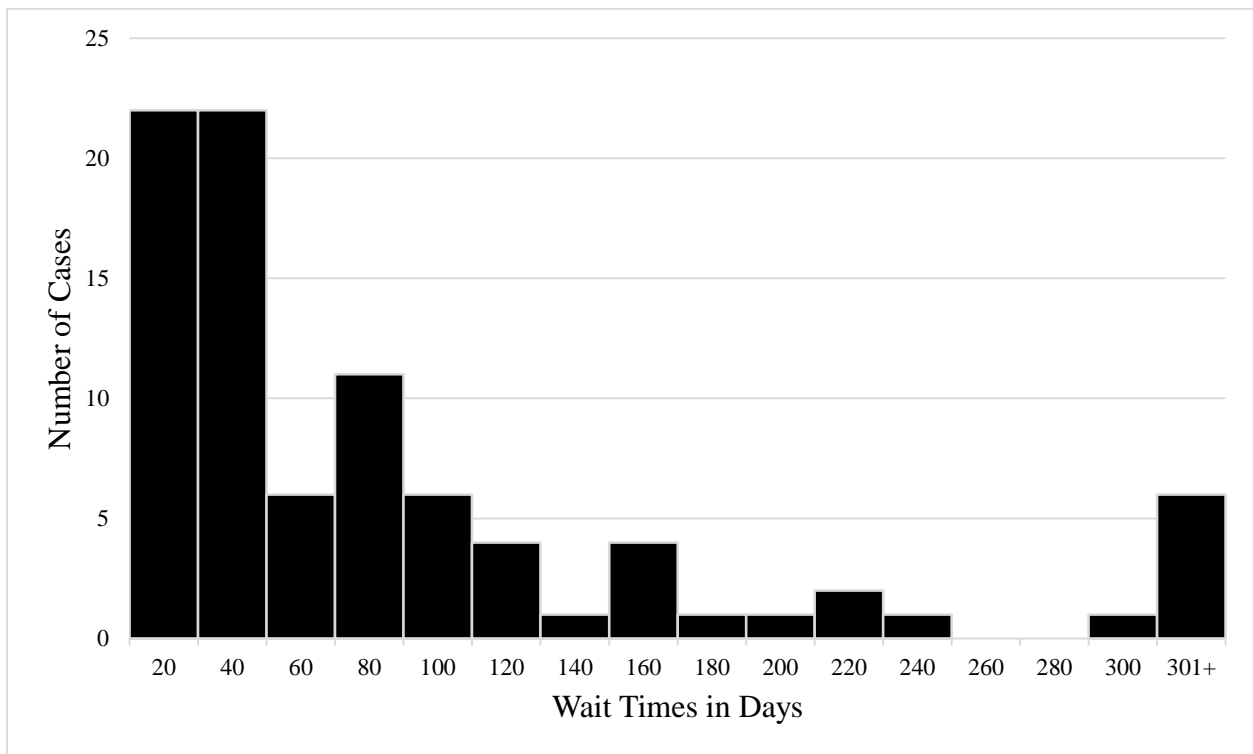
## CHAPTER FOUR

### FINDINGS AND DISCUSSION

#### 4.1 Timing

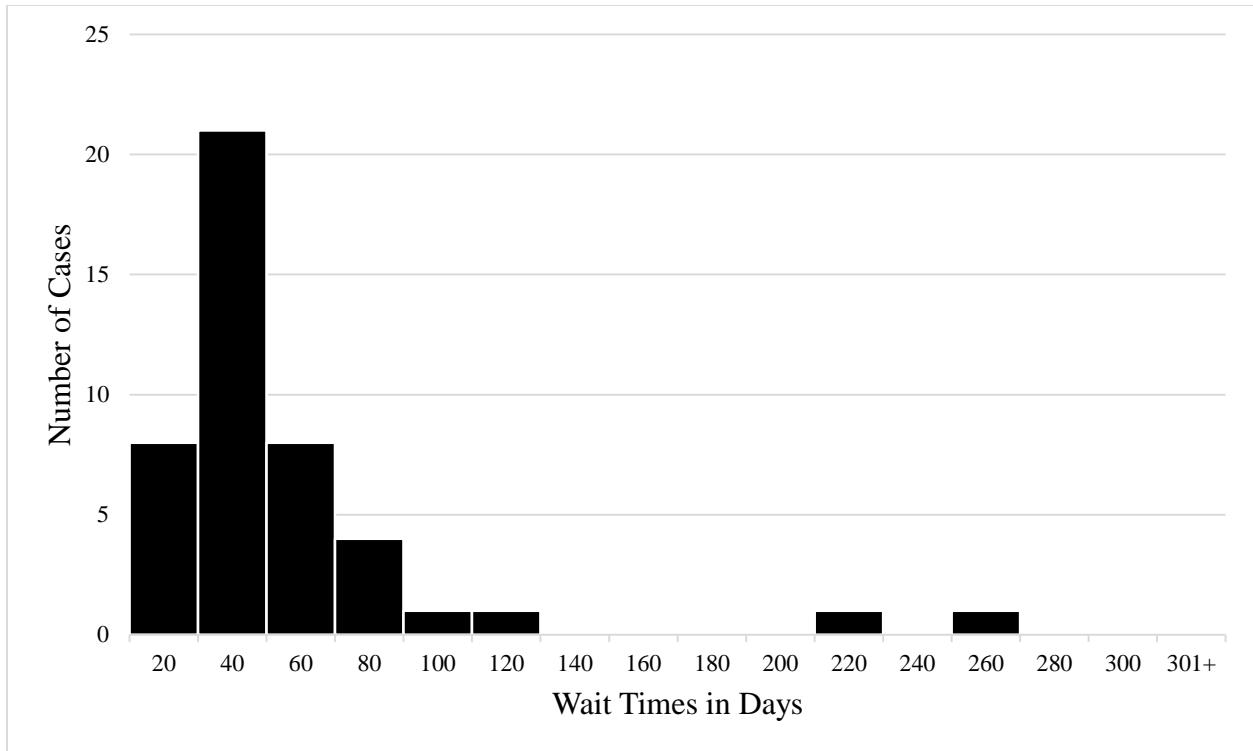
Given the importance ascribed to timeliness in the literature and in the legislation itself, the study examined the timing of appeals. RQ1 was: How much time elapses between a requester's initial request and the agency's adverse action that is the basis of the requester's appeal?

For the Army cases ( $n=88$ ), the mean wait time was 159 days and the median wait time was 40 days, with a range from 1 to 3,234 days and a standard deviation of 447. Figure 4.1 presents a histogram of the wait times for the Army cases.



**Figure 4.1. Wait Times – Army Cases**

For the Forest Service cases ( $n=45$ ), the mean wait time was 46 days and the median wait time was 31 days, with a range from 6 to 255 days and a standard deviation of 46. Figure 4.2 presents a histogram of the wait times for the Forest Service cases.



**Figure 4.2. Wait Times – Forest Service Cases**

The Mann-Whitney test<sup>19</sup> did not find a statistically significant difference between the wait times at the two agencies ( $U = 1652, p = .1187$ , significance threshold set at  $p < .05$ ).

**Table 4.1. Wait Times by Agency**

<b>Agency</b>	<b>Mean</b>	<b>Median</b>	<b>Low</b>	<b>High</b>	<b>Standard Deviation</b>
Army ( $n=88$ )	159	40	1	3,234	447
Forest Service ( $n=45$ )	46	31	6	255	46

*Note.* In calendar days.

<sup>19</sup> The Mann-Whitney test, a nonparametric test, is appropriate because the wait times do not appear to be normally distributed (Nachar, 2008).

Although wait times were more tightly clustered at the Forest Service, at both agencies there was an extensive range of wait times. Clearly, some requesters remain willing to pursue their inquiries even after several months of delay.

#### **4.2 Legal Assistance**

Previous research has identified widespread use of FOIA by lawyers and pointed to the law's legalistic intricacies and reliance on judicial enforcement. RQ2 was: In what percentage of appeals is a lawyer or person with legal expertise involved in preparing the request or appeal?

Provided records included evidence that a lawyer had been involved in preparing the request or appeal for 33% of the Army cases ( $n=99$ ) and 29% of the Forest Service cases ( $n=51$ ). This rate was closely similar at both agencies.

The sizable share of cases with a lawyer – roughly one-third at both agencies – echoes the previous literature on the significant use of FOIA by lawyers. This rate is comparable with Tapscott and Taylor (2001), who found that lawyers filed 26% of the requests in their sample. By contrast, other studies which categorized requests by law firms (as opposed to lawyers) found lower, albeit still considerable, rates: 17% (Congressional Research Service, 1972, pp. 104-106), 13% (General Accounting Office, 1978b, p. 37), and 10% (Coalition of Journalists for Open Government, 2006).

However, in the majority of cases, no lawyer appeared to be involved. FOIA remains a tool utilized by many types of users, not only the legal profession.

#### **4.3 Requester Identity**

Prior research has established the diversity of FOIA's users and pointed to differences in usage and experience depending on the type of requester. RQ3 was: What are the professional or organizational identities or roles of appellants?

At the Army, the largest group of appellants was agency personnel (i.e., service members, civilian employees, contractor staff, retirees, and applicants), which comprised 30% of the cases ( $n=100$ ). Family members and survivors of Army personnel submitted 15% of the appeals; non-governmental organizations, 11%; businesses, 10%; inmates, 7%; journalists, 4%; state, local, or tribal governments, 4%; and academic requesters, 2%. Other requesters (requesters whom the

researcher could not categorize as one of the other requester types) submitted 17% of the appeals.

The largest group of appellants at the Forest Service was the “other” group, who submitted 33% of the appeals ( $n=48$ ). Non-governmental organizations submitted 25% of the appeals; businesses, 21%; Forest Service personnel, 8%; journalists, 6%; and state, local, or tribal governments, 6%. The study did not identify any appeals submitted by academics, inmates, or family members of Forest Service personnel.

**Table 4.2. Percentage of Requests by Requester Type**

<b>Requester Type</b>	<b>Army (<math>n=100</math>)</b>	<b>Forest Service (<math>n=48</math>)</b>
Personnel	30%	8%
Family	15%	0%
NGO	11%	25%
Business	10%	21%
Inmate	7%	0%
Journalist	4%	6%
State, Local, or Tribal Government	4%	6%
Academic	2%	0%
Other	17%	33%
<i>Note.</i> Columns may not total 100% due to rounding.		

There were marked differences in the categories of requesters who submitted appeals at the two agencies. At the Army, requests from agency personnel and their families together constituted

45% of all the appeals filed. Requests from inmates, which comprised an additional 7% of Army appeals, also frequently appeared to be related to the requester's Army service. However, at the Forest Service, only 8% of appeals came from these categories. NGOs and businesses constituted a larger share of the Forest Service's appellants than at the Army.

As with previous studies, these results demonstrate how considerably requester types vary by agency – which highlights the difficulty in generalizing about requesters based on a limited number of agencies. This variation may arise due to agencies' differing missions and activities, and thus the different types of records that they hold. For instance, the substantially greater number of personnel at the Army than the Forest Service means both a larger volume of personnel-related records as well as a larger pool of potential requesters. Nonetheless, both agencies received appeals from a wide range of requester types, suggesting that even in a single agency there is likely to be a diversity of users.

#### **4.4 Interrelationships between the Variables**

Although analyses are limited by the study's sample size, some observations can be drawn about possible interactions between the variables.

##### **4.4.1 Timing and Legal Assistance**

There was not a statistically significant difference in wait time between cases based on the presence or absence of legal assistance.

For the Army cases where a lawyer was involved ( $n=28$ ), the mean wait time was 59 days and the median wait time was 34 days, with a range from 4 to 211 days and a standard deviation of 55. For the Army cases where a lawyer was not involved ( $n=57$ ), the mean wait time was 213 days and the median wait time was 42 days, with a range from 1 to 3,234 days and a standard deviation of 546. The Mann-Whitney test did not find a statistically significant difference between the Army cases with and without a lawyer ( $U = 686$ ,  $p = .2979$ , significance threshold set at  $p < .05$ ).

For the Forest Service cases where a lawyer was involved ( $n=14$ ), the mean wait time was 63 days and the median wait time was 36 days, with a range from 9 to 255 days and a standard deviation of 71. For the Forest Service cases where a lawyer was not involved ( $n=29$ ), the mean



wait time was 35 days and the median wait time was 27 days, with a range from 6 to 81 days and a standard deviation of 20. The Mann-Whitney test did not find a statistically significant difference between the Forest Service cases with and without a lawyer ( $U = 162.5$ ,  $p = .3006$ , significance threshold set at  $p < .05$ ).

#### 4.4.2 Timing and Requester Identity

There was a statistically significant difference in wait times between requester types for the Army cases, but not for the Forest Service cases.

For the Army cases ( $n=88$ ), the Kruskal-Wallis test found a statistically significant difference in the distribution of wait times between requester types ( $H = 16.34$ ,  $p = .0377$ , significance threshold set at  $p < .05$ ).<sup>20</sup> Table 4.3 presents the wait times by requester type for the Army cases.

**Table 4.3. Wait Times by Requester Type – Army Cases**

<b>Requester Type</b>	<b>Mean</b>	<b>Median</b>	<b>Low</b>	<b>High</b>	<b>Standard Deviation</b>
Personnel ( $n=26$ )	77	54	14	204	57
Family ( $n=12$ )	82	59	5	462	123
NGO ( $n=11$ )	791	67	5	3,234	1100
Business ( $n=9$ )	46	32	4	101	34
Inmate ( $n=5$ )	27	31	12	38	20
Journalist ( $n=4$ )	43	12	1	145	69

<sup>20</sup> The Kruskal-Wallis test, a nonparametric test, is appropriate because the wait times do not appear to be normally distributed (McDonald, 2014).

**Table 4.3 - continued**

<b>Requester Type</b>	<b>Mean</b>	<b>Median</b>	<b>Low</b>	<b>High</b>	<b>Standard Deviation</b>
State, Local, or Tribal Government ( <i>n</i> =4)	19	20	8	30	9
Academic ( <i>n</i> =2)	11	11	8	13	4
Other ( <i>n</i> =15)	99	72	3	291	93
<i>All Army Cases</i> ( <i>n</i> =88)	<i>159</i>	<i>40</i>	<i>1</i>	<i>3,234</i>	<i>447</i>
<i>Notes.</i> In calendar days. All Army Cases <i>n</i> is higher than the sum of category <i>n</i> values due to missing data in provided case records.					

For the Forest Service cases (*n*=40), the Kruskal-Wallis test did not find a statistically significant difference in the distribution wait times between requester types ( $H = 0.8384$ ,  $p = .9745$ , significance threshold set at  $p < .05$ ). Table 4.4 presents the wait times by requester type for the Forest Service cases.

**Table 4.4. Wait Times by Requester Type – Forest Service Cases**

<b>Requester Type</b>	<b>Mean</b>	<b>Median</b>	<b>Low</b>	<b>High</b>	<b>Standard Deviation</b>
Personnel ( <i>n</i> =3)	42	27	18	80	34
NGO ( <i>n</i> =10)	56	28	12	255	73
Business ( <i>n</i> =9)	41	29	6	119	34

**Table 4.4 - continued**

<b>Requester Type</b>	<b>Mean</b>	<b>Median</b>	<b>Low</b>	<b>High</b>	<b>Standard Deviation</b>
Journalist ( <i>n</i> =3)	29	22	14	50	19
State, Local, or Tribal Government ( <i>n</i> =2)	48	48	25	71	33
Other ( <i>n</i> =13)	48	39	9	209	51
<i>All Forest Service Cases (n=45)</i>	<i>46</i>	<i>31</i>	<i>6</i>	<i>255</i>	<i>46</i>
<i>Notes.</i> In calendar days. All Forest Service Cases <i>n</i> is higher than the sum of category <i>n</i> values due to missing data in provided case records.					

It is also interesting to note that the five Army cases with the longest wait times, as well as the oldest Forest Service case, were all submitted by NGOs. This suggests that NGOs, compared to other requester types, may be particularly willing to pursue requests over very long periods of time.

#### **4.4.3 Legal Assistance and Requester Identity**

Tables 4.5 and 4.6 present the cases with and without legal assistance by requester type at each agency. These frequencies were too small in several categories to run a chi-square test.

**Table 4.5. Legal Assistance by Requester Type – Army Cases**

<b>Requester Type</b>	<b>With Legal Assistance</b>	<b>Without Legal Assistance</b>	<b>Percentage of Cases with Legal Assistance</b>
Personnel	8	20	29%
Family	3	12	20%
NGO	5	6	45%
Business	3	7	30%
Inmate	0	7	0%
Journalist	3	1	75%
State, Local, or Tribal Government	1	3	25%
Academic	0	2	0%
Other	8	7	53%
<i>Total Army Cases</i>	<i>33</i>	<i>66</i>	<i>33%</i>
<i>Note.</i> Total Army Cases figures are higher than the sum of category columns due to missing data in provided case records.			

**Table 4.6. Legal Assistance by Requester Type – Forest Service Cases**

<b>Requester Type</b>	<b>With Legal Assistance</b>	<b>Without Legal Assistance</b>	<b>Percentage of Cases with Legal Assistance</b>
Personnel	0	4	0%

**Table 4.6 - continued**

<b>Requester Type</b>	<b>With Legal Assistance</b>	<b>Without Legal Assistance</b>	<b>Percentage of Cases with Legal Assistance</b>
Family	0	0	n/a
NGO	6	6	50%
Business	2	6	25%
Inmate	0	0	n/a
Journalist	0	3	0%
State, Local, or Tribal Government	2	1	67%
Academic	0	0	n/a
Other	4	12	25%
<i>Total Forest Service Cases</i>	<i>15</i>	<i>36</i>	<i>29%</i>
<i>Note.</i> Total Forest Service Cases figures are higher than the sum of category columns due to missing data in provided case records.			

## CHAPTER FIVE

### CONCLUSION

As an instrument for public access to information, the Freedom of Information Act only operates when activated by a request from the public. Researchers have written at length about FOIA legislation, administration, and interpretation, but they have devoted less scholarship to its use and users. This study sought to contribute to the latter literature, motivated by the belief that better understanding of FOIA's users could inform discussions of its effect and effectiveness as an information policy.

In particular, the study examined administrative appeals from requesters denied information or procedural benefits under the act. FOIA's administrative appeal procedure offers a simple, low-cost avenue for requesters to seek review of their cases and to redress agency misfeasance. Despite its apparent accessibility, though, only a small fraction of denied requesters avail themselves of the opportunity to appeal. The study described three variables that might differentiate cases where the requester appealed: the wait time for an initial decision, the assistance of a lawyer, and the requester's professional identity or role.

The study conducted a review of case files at two agencies and found both similarities and differences. The median wait time was 31 calendar days at the Forest Service and 40 days at the Army. Roughly one-third of requesters at both agencies had legal expertise or assistance. The most common requesters at the Army were agency personnel and their families, while at the Forest Service they were NGOs, businesses, and other requesters, including members of the general public.

Evaluating the effect, if any, of these variables on the likelihood to appeal was beyond the scope of this exploratory and descriptive study. Nonetheless, the researcher hopes the study will lay an empirical, theoretical, and methodological foundation for future research on FOIA requesters.

A key approach for future study could lay in comparing requests that were appealed with those that were not. Future research could review case files for appealed requests as well as a random sample of all requests, whether appealed or not. For instance, the study could compare the wait

time of typical requests with that of appealed requests. Doing so would enable explanatory research on the variables to determine if they are factors in the likelihood to appeal.

Studying additional variables could provide further information about appellants and appeals.

Future research using this study's case file review method could examine such variables as:

- The type of records requested (e.g., whether a requester seeking family history is more or less likely to appeal than a requester seeking contract information);
- The type of adverse action appealed (e.g., whether a requester is more or less likely to appeal a no-records response than a withholding under exemptions);
- The disposition of the appeal (e.g., whether certain characteristics of the request or requester are related to the likelihood to prevail on appeal); and
- Litigation after the appeal (e.g., whether certain characteristics of the request or requester are related to the likelihood to pursue litigation).

This study has demonstrated case file review as a workable method for better understanding the characteristics and decision-making of FOIA requesters. In addition, this study has contributed to the research on timing, legal assistance, and requester identity of FOIA appellants. This research can inform the efforts of those who work to ensure that FOIA is an effective and equitable system for public access to government information.

## APPENDIX A

### HUMAN SUBJECTS APPROVAL

The Florida State University  
Office of the Vice President For Research  
Human Subjects Committee  
Tallahassee, Florida 32306-2742  
(850) 644-8673, FAX (850) 644-4392

#### APPROVAL MEMORANDUM

Date: 12/10/2013

To: Gavin Baker [REDACTED]@my.fsu.edu]

Address: [REDACTED]

Dept.: INFORMATION STUDIES

From: Thomas L. Jacobson, Chair

Re: Use of Human Subjects in Research

Information Behavior of Requesters Under the U.S. Freedom of Information Act

The application that you submitted to this office in regard to the use of human subjects in the proposal referenced above have been reviewed by the Secretary, the Chair, and one member of the Human Subjects Committee. Your project is determined to be Expedited per 45 CFR § 46.110(7) and has been approved by an expedited review process.

The Human Subjects Committee has not evaluated your proposal for scientific merit, except to weigh the risk to the human participants and the aspects of the proposal related to potential risk and benefit. This approval does not replace any departmental or other approvals, which may be



required.

If you submitted a proposed consent form with your application, the approved stamped consent form is attached to this approval notice. Only the stamped version of the consent form may be used in recruiting research subjects.

If the project has not been completed by 12/9/2014 you must request a renewal of approval for continuation of the project. As a courtesy, a renewal notice will be sent to you prior to your expiration date; however, it is your responsibility as the Principal Investigator to timely request renewal of your approval from the Committee.

You are advised that any change in protocol for this project must be reviewed and approved by the Committee prior to implementation of the proposed change in the protocol. A protocol change/amendment form is required to be submitted for approval by the Committee. In addition, federal regulations require that the Principal Investigator promptly report, in writing any unanticipated problems or adverse events involving risks to research subjects or others.

By copy of this memorandum, the Chair of your department and/or your major professor is reminded that he/she is responsible for being informed concerning research projects involving human subjects in the department, and should review protocols as often as needed to insure that the project is being conducted in compliance with our institution and with DHHS regulations.

This institution has an Assurance on file with the Office for Human Research Protection. The Assurance Number is FWA00000168/IRB number IRB00000446.

Cc: Charles Hinnant, Advisor  
HSC No. 2013.11413

The Florida State University  
Office of the Vice President For Research  
Human Subjects Committee  
Tallahassee, Florida 32306-2742  
(850) 644-8673, FAX (850) 644-4392

RE-APPROVAL MEMORANDUM

Date: 9/29/2014

To: Gavin Baker [REDACTED]@my.fsu.edu]

Address: [REDACTED]

Dept.: INFORMATION STUDIES

From: Thomas L. Jacobson, Chair

Re: Re-approval of Use of Human subjects in Research  
Information Behavior of Requesters Under the U.S. Freedom of Information Act

Your request to continue the research project listed above involving human subjects has been approved by the Human Subjects Committee. If your project has not been completed by 9/28/2015, you must request renewed approval by the Committee.

If you submitted a proposed consent form with your renewal request, the approved stamped consent form is attached to this re-approval notice. Only the stamped version of the consent form may be used in recruiting of research subjects. You are reminded that any change in protocol for this project must be reviewed and approved by the Committee prior to implementation of the proposed change in the protocol. A protocol change/amendment form is required to be submitted for approval by the Committee. In addition, federal regulations require that the Principal Investigator promptly report in writing, any unanticipated problems or adverse events involving

risks to research subjects or others.

By copy of this memorandum, the Chair of your department and/or your major professor are reminded of their responsibility for being informed concerning research projects involving human subjects in their department. They are advised to review the protocols as often as necessary to insure that the project is being conducted in compliance with our institution and with DHHS regulations.

Cc: Charles Hinnant, Advisor [REDACTED]@fsu.edu]

HSC No. 2014.13680

## APPENDIX B

### SELECTED STUDIES OF INFORMATION REQUESTERS BY METHOD

**Table B.1. Review of Government Request Logs or Statistics**

Study	Access Law	Requester Types	<i>n</i>
Tapscott & Taylor (2001)	U.S. Federal	Lawyers, corporations, individuals, non-profits, and media requesters	2,150
Coalition of Journalists for Open Government (2006)	U.S. Federal	Requesters	6,439
Luo & Fargo (2008)	Indiana	Complainants	530
Worthy, Amos, Hazell, & Bourke (2011)	United Kingdom	Requesters to English local authorities	300

**Table B.2. Review of Case Files**

Study	Access Law	Requester Types	<i>n</i>
Anderson (2013)	Wisconsin	Administrative review mechanism users	304

**Table B.3. Semi-Structured Interviews of Requesters**

Study	Access Law	Requester Types	<i>n</i>
First Amendment Task Force of the Society of Environmental Journalists (2005)	U.S. Federal	Society of Environmental Journalists members	55

**Table B.3 - continued**

<b>Study</b>	<b>Access Law</b>	<b>Requester Types</b>	<b><i>n</i></b>
Holsen, MacDonald, & Glover (2007)	United Kingdom	Journalists	9
Mohammed-Spigner (2009)	Connecticut	Appellants	20
Dinan, Spence, & Hutchison (2012)	Scotland	Voluntary organizations	50 (approx.)
Anderson (2013)	Wisconsin	Administrative review mechanism users	17

**Table B.4. Structured Interviews of Requesters**

<b>Study</b>	<b>Access Law</b>	<b>Requester Types</b>	<b><i>n</i></b>
Attallah & Pyman (2002)	Canada	Journalists	6
Luo & Fargo (2008)	Indiana	Public and media complainants	343

**Table B.5. Survey of Requesters**

<b>Study</b>	<b>Access Law</b>	<b>Requester Types</b>	<b><i>n</i></b>
Gianella (1971)	U.S. Federal	Public interest groups, trade associations, newspapers, and administrative law firms	44
Bildstein (2004)	Tasmania	Journalists	9
Spence (2010)	Scotland	Voluntary organizations	705
Cuillier (2011)	U.S. (various)	Journalists	442
Worthy, Amos, Hazell, & Bourke (2011)	United Kingdom	Requesters to English local authorities	60

**Table B.6. Observation of Requesters**

<b>Study</b>	<b>Access Law</b>	<b>Requester Types</b>	<b><i>n</i></b>
Bush Kimball (2003)	Florida	Requesters to county law enforcement agencies	230

**Table B.7. Interviews with Records Officials**

<b>Study</b>	<b>Access Law</b>	<b>Requester Types</b>	<b><i>n</i></b>
Bush Kimball (2003)	Florida	Requesters to county law enforcement agencies	12 <sup>21</sup>
McDonagh (2010)	Ireland	Requesters to local authorities	8 <sup>22</sup>
Bush Kimball (2012)	U.S. (various)	Requesters	48

**Table B.8. Survey of Records Officials**

<b>Study</b>	<b>Access Law</b>	<b>Requester Types</b>	<b><i>n</i></b>
Amos (2010)	United Kingdom	Requesters to English local authorities	115 (approx.) <sup>23</sup>
Bush Kimball (2012)	U.S. (various)	Requesters	287 (approx.)

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<sup>21</sup> The researcher interviewed records custodians at 12 agencies, but the article does not specify the number of individuals interviewed.

<sup>22</sup> The researcher interviewed FoI Officers at 8 authorities, but the article does not specify the number of individuals interviewed.

<sup>23</sup> There were 112 respondents in 2005, 118 in 2006, 121 in 2007, 110 in 2008, and 117 in 2009.

**Table B.9. Content Analysis of Publications Mentioning FOI**

<b>Study</b>	<b>Access Law</b>	<b>Requester Types</b>	<b><i>n</i></b>
Attallah & Pyman (2002)	Canada	Journalists	269
Holsen, MacDonald, & Glover (2007)	United Kingdom	Journalists	602
Worthy, Amos, Hazell, & Bourke (2011)	United Kingdom	National, regional, and local press	Not provided
Worthy (2014)	United Kingdom	Members of Parliament	1,742 <sup>24</sup>

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<sup>24</sup> Comprising 627 Parliamentary questions and 1,115 mentions in debates.

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## **BIOGRAPHICAL SKETCH**

Gavin Baker received his M.S. in Library and Information Studies from Florida State University. He was Lead Policy Analyst at the Center for Effective Government (formerly OMB Watch), working there from 2010-2014. In that role, he researched FOIA performance and advocated reforms. He also filed FOIA requests and appeals, including the ones at issue in the groundbreaking decision, *Center for Effective Government v. U.S. Department of State, et al.*, No. 13-414 (D.D.C.). Previously, he served as Policy Analyst at the American Library Association, Assistant Editor at *Open Access News*, and Outreach Fellow at the Scholarly Publishing and Academic Resources Coalition. He received his B.A. in political science from the University of Florida. He filed his first public records requests as a reporter for the *Independent Florida Alligator*, the University of Florida's student newspaper.