

**BUSH ADMINISTRATION SECRECY:
An Empirical Study of Freedom of Information Act Disclosure**

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**I.
INTRODUCTION**

In the aftermath of the September 11, 2001 terrorist attacks, the Bush Administration issued new Freedom of Information Act ("FOIA") guidance to the federal agencies and departments in two memoranda: Attorney General John Ashcroft's memorandum issued on October 12, 2001 ("Ashcroft Memo")³⁴⁸ and White House Chief of Staff Andrew Card's memorandum on March 19, 2002 ("Card Memo").³⁴⁹

The Ashcroft Memo signaled a change in FOIA policy from the previous administration. The Clinton Administration had instituted a "presumption of disclosure", thereby encouraging open disclosure of information under FOIA.³⁵⁰ The Ashcroft Memo adopted a new FOIA standard whereby agency FOIA decisions would be defended if supported by a "sound legal basis".³⁵¹ It also advised the federal agencies to weigh important interests, such as protecting national security and law enforcement

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³⁴⁸ See Memorandum from John Ashcroft, Attorney General, Justice Department, to Departments and Agencies (Oct. 12, 2002), available at <http://www.usdoj.gov/oip/foiapist/2001foiapist19.htm>.

³⁴⁹ See Memorandum from Andrew H. Card, White House Chief of Staff, to Heads of Executive Departments and Agencies, (Mar. 19, 2002), available at <http://www.usdoj.gov/oip/foiapist/2002foiapist10.htm>.

³⁵⁰ See Memorandum from Janet Reno, Attorney General, Department of Justice, to Departments and Agencies (Oct. 4, 1993), available at <http://www.fas.org/sgp/clinton/reno.html> ("In determining whether or not to defend a disclosure decision, we will apply a presumption of disclosure.").

³⁵¹ Ashcroft Memo, *supra* note 1, at ¶ 5.

interests, when making disclosure decisions under FOIA.³⁵² While the Ashcroft Memo may have set a tone of “presumptive nondisclosure” under FOIA, it did not purport to change FOIA dissemination substantively under the law.³⁵³

In a March 2002 memorandum, the Bush Administration offered additional FOIA guidance to the federal agencies. The memorandum prepared by White House Chief of Staff Andrew Card reminded government agencies of their obligation to identify and safeguard government information pertaining to weapons of mass destruction and other information vital to our national security, such as “critical infrastructure”.³⁵⁴ It urged federal agencies to protect sensitive but unclassified information related to America’s homeland security from “inappropriate disclosure”.³⁵⁵ Furthermore, the Card Memo encouraged the use of exemptions two and four under the FOIA to protect such information, stating that “agencies should be sure to avail themselves of the full measure of Exemption 2’s for their critical infrastructure information” and that information voluntarily submitted to the government from the private sector “may readily fall within the protection of Exemption 4 of the FOIA.”³⁵⁶

Public interest groups, media organizations, and legal scholars have expressed outrage at these directives, complaining that the Bush Administration has severely restricted the public’s access to government information under FOIA. One legal scholar stated that “the Bush Administration is mounting the most sustained assault on open government since the early Reagan administration or perhaps even since President Gerald Ford vetoed the FOIA amendments in 1974.”³⁵⁷ A Congressional study,

³⁵² *Id.* at ¶ 2 and 4 (“The Department of Justice and this Administration are equally committed to protecting other fundamental values that are held by our society. Among them are safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy . . . I encourage your agency to carefully consider the protection of such values and interests when making disclosure determinations under FOIA.”).

³⁵³ *Id.* at ¶ 6 (“This memorandum . . . creates no substantive or procedural rights enforceable at law.”).

³⁵⁴ See Card Memo, *supra* note 2, ¶ 1.

³⁵⁵ *Id.* at ¶ 8.

³⁵⁶ *Id.* at ¶ 9.

³⁵⁷ Timothy W. Maier, *Bush Team Thumbs its Nose at FOIA*, INSIGHT ON THE NEWS, Apr. 29, 2002, at 20; see also MINORITY STAFF OF HOUSE COMM. ON

“Secrecy in the Bush Administration”³⁵⁸ concluded that the Bush Administration has “systematically sought to limit disclosure of government records while expanding its authority to operate in secret.”³⁵⁹ Additionally, Rep. Henry A. Waxman (D-Calif.) and minority members of the Government Reform Committee introduced legislation to reverse the Bush Administration's FOIA policies.³⁶⁰ Critics of the Bush Administration's FOIA policy cite individual examples of agency denials of FOIA requests to support their claims that the current administration has substantially restricted FOIA dissemination. In response, government officials deny that FOIA policy or disclosure has substantively changed under the Bush Administration.³⁶¹

This article analyzes FOIA disclosure data before and after the release of the Ashcroft and Card Memos (“Memos”) to evaluate whether FOIA dissemination has substantially changed as a result of the policies contained in the Memos. This article contends that the claims of both the critics and the defenders of Bush's FOIA policies are incorrect: FOIA disclosure has neither stayed at the same level nor has it markedly decreased under the Bush Administration. Rather, each is partially correct. Overall, FOIA

GOVERNMENT REFORM, 108TH CONG., SECRECY IN THE BUSH ADMINISTRATION 4 (Comm. Print 2003) (“Experts on government openness and information policy from academia and citizens' groups. . . view Bush Administration's FOIA directives as significantly constricting access to government information.”).

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 81.

³⁶⁰ See H.R. 5073, 108th Cong. (2004).

³⁶¹ Former Head of Information Security Oversight Office, Steven Garfinkel, stated

“Oh, the memo did not change the rules. The law stayed the same, and those are basically the rules. The memo just deals with whether or not the Justice Department is going to support you in particular cases, and I found that that's largely rhetoric.” *Profile: Bush's Administration's Handling of the Release of Information to Public Interest Groups* (NPR News, Mar. 25, 2002); see also REPORTERS COMMITTEE for FREEDOM OF THE PRESS, HOMEFRONT CONFIDENTIAL: HOW THE WAR ON TERRORISM AFFECTS ACCESS TO INFORMATION AND THE PUBLIC'S RIGHT TO KNOW (5th ed. 2004) (“Dan Metcalfe, co-director of the Justice Department's Office of Information and Privacy, said the change in instructions from Reno to Ashcroft did not represent a ‘drastic’ shift in the government's FOI policies as many have claimed.”).

dissemination by the federal agencies, as measured by the number of initial requests received, disposition of initial requests, exemption levels, and use of exemption two, has remained at approximately the same levels since the release of the Memos. However, some agencies that protect information related to homeland security have lessened FOIA dissemination, although not in substantial amounts. The increased use of exemption two has in part prompted the decrease in FOIA disclosure by these agencies. Part II provides background on FOIA and details the study methods of this article. Part III examines FOIA disclosure data compiled from twenty-six federal agencies from 1998 – 2003 to show that overall disclosure has not changed under the policies of the Ashcroft and Card Memos. Part IV reports on FOIA dissemination data from five agencies (Department of Defense, Department of Energy, Department of Justice, Department of Transportation, and the Nuclear Regulatory Agency) (“Five Agencies”) to show that some agencies reduced disclosure after the release of the Memos. Part V details the problems with interpreting the FOIA disclosure data. Finally, part VI concludes that: 1) Overall FOIA disclosure levels by federal agencies and departments have remained unchanged under the Bush Administration’s FOIA policies and 2) FOIA disclosure levels have decreased slightly for some federal agencies and departments that protect information related to homeland security.

II. STUDY

A. FOIA Background

FOIA was enacted in 1966 and it afforded the public a broad statutory right to access information from the executive branch of the federal government.³⁶² To make a proper FOIA request, the requester must write to the applicable agency and “reasonably describe” the records being sought.³⁶³ Within twenty days of the receipt of the request, agencies are required to make a determination as to whether to grant, partially grant or deny the request. Agencies may deny or partially grant a request only if there is an applicable

³⁶² DEPARTMENT OF JUSTICE, FOIA GUIDE (2004), *available at* <http://www.usdoj.gov/oip/foi-act.htm>.

³⁶³ H.R. REP. NO. 108-172, at 8 (2003) (“A request must be specific enough to permit a professional employee of the agency who is familiar with the subject matter to locate the record in a reasonable period of time.”)

exemption or for a procedural reason, such as if the record does not exist.³⁶⁴ While each denial or partial grant must be protected by at least one exemption, multiple exemptions may be used to deny a request, if applicable.³⁶⁵ The exemptions authorize agencies to protect information pertaining to important government interests, such as national security, privacy of individuals, proprietary interests of business, and the functioning of the government.³⁶⁶ Exemption two protects records pertaining to an agency's internal personnel rules and practices, including information that would, if disclosed, "risk circumvention of law or agency regulations."³⁶⁷ Examples of information that are protected by exemption two include agency guidelines for conducting law enforcement investigations, vulnerability assessments, agency guidelines for identifying law violators, and a Bureau of Prisons manual on prison security procedures.³⁶⁸ Exemption four protects trade secrets and confidential business and financial information voluntarily submitted to the government by individuals and businesses.³⁶⁹ Examples of information that are protected by exemption four include business sales statistics, research data, technical designs, and information on financial condition.³⁷⁰ Additionally, under FOIA, agencies may withhold only those portions of the requested record protected

³⁶⁴ DEPARTMENT OF JUSTICE, FREEDOM OF INFORMATION ACT REFERENCE GUIDE (2003, revised April 2005) *available at* http://www.usdoj.gov/04foia/04_3.html.

³⁶⁵ *See* DEPARTMENT OF JUSTICE, OFFICE OF INFORMATION PRIVACY, GUIDELINES FOR AGENCY PREPARATION AND SUBMISSION OF ANNUAL FOIA REPORTS 3 (1997) *available at* http://www.usdoj.gov/oip/foia_updates/Vol_XVIII_3/page2.htm.

³⁶⁶ DEPARTMENT OF JUSTICE, FREEDOM OF INFORMATION ACT REFERENCE GUIDE, *supra* note 17, at 15 ("The exemptions allow federal agencies to withhold information covering: (1) classified national defense and foreign relations information; (2) internal agency rules and practices; (3) information that is prohibited from disclosure by another federal law; (4) trade secrets and other confidential business information; (5) inter-agency or intra-agency communications that are protected by legal privileges; (6) information involving matters of personal privacy; (7) certain types of information compiled for law enforcement purposes; (8) information relating to the supervision of financial institutions; and (9) geological information on wells.").

³⁶⁷ *Id.* at 16.

³⁶⁸ DEPARTMENT OF JUSTICE, *supra* note 15.

³⁶⁹ *Id.* at 16.

³⁷⁰ DEPARTMENT OF JUSTICE, *supra* note 15.

by an exemption and they must disclose the rest of the document.³⁷¹ If an agency partially grants or denies a request, it must send a letter explaining the reason for the denial and informing the requester of his or her right to file an appeal to the respective head of the agency.³⁷² Typically, an office within the department headquarters handles such administrative appeals, and a decision must be made within twenty days of receipt of the appeal.³⁷³ If the appeal is denied, the agency must identify the applicable exemption. Finally, the requester may challenge a denial in federal court.³⁷⁴

B. Background on the Study

Each federal agency³⁷⁵ is required to prepare and submit an annual report to Congress regarding FOIA activity.³⁷⁶ In 1996, Congress enacted the Electronic Freedom of Information Act Amendment, requiring all federal agencies to standardize their annual FOIA reports and electronically publish them on the Department of Justice website beginning in fiscal year 1998.³⁷⁷ These annual reports, *inter alia*, are required to include initial request and appeal data. In this article, I only examine initial request data. To evaluate the effect of the Memos on FOIA disclosure, I report on: 1) the number of requests received³⁷⁸; 2) the disposition of initial requests; 3) number of total exemptions applied; and 4) the number of exemptions two and four used.

First, I compiled data on the number of requests received by federal agencies to determine whether FOIA disclosure has changed under the FOIA policies of the Bush Administration. Some FOIA experts contend that the policies contained in the Memos have deterred individuals from making FOIA

³⁷¹ H.R. REP. NO. 108-172, *supra* note 16, at 15.

³⁷² *Id.* at 13.

³⁷³ DEPARTMENT OF JUSTICE, *supra* note 17.

³⁷⁴ H.R. REP. NO. 108-172, *supra* note 16, at 21.

³⁷⁵ The use of the term “agency” in this article refers to both federal agencies and departments.

³⁷⁶ See DEPARTMENT OF JUSTICE, *supra* note 18 at 1.

³⁷⁷ *Id.* Federal Agencies and Departments report FOIA disclosure data on an annual fiscal year basis. The 1996 statute requires them to disseminate, but not analyze, FOIA disclosure data.

³⁷⁸ The number of requests received in a fiscal year differs from the number of requests processed in a fiscal year. The difference varies from agency to agency and depends on the efficiency of the agency in processing requests.

requests.³⁷⁹ Thus, a decrease in the initial requests received may indicate that FOIA disclosures have lessened under the Bush Administration because requesters, believing that their requests are less likely to be granted, have responded by making fewer requests.

Second, I accumulated data on the disposition of initial requests. Specifically, I looked at the number of grants, partial grants, and denials, and excluded the number of requests denied for procedural reasons.³⁸⁰ I report on the number of grants, partial grants, and denials, in both percent and total numbers. Although I report on the number and percent of partial grants, it is difficult to interpret partial grant data. Because a partial grant is both a grant and a denial of a request and the proportion of information disclosed and withheld may vary between partial grants, it is difficult to evaluate the effect of an increase or decrease of partial grants on FOIA disclosure. Thus, in the article I focus on grant and denial data to draw conclusions.

Third, I examined exemption data. Under FOIA, an agency may partially grant or deny a request only if there is an applicable exemption.³⁸¹ At least one exemption must be applied for each denial (denial or partial grant), but multiple exemptions may be used, if applicable.³⁸² A rise in the use of multiple exemptions per denial is another indicator that FOIA disclosure has lessened, showing that either FOIA officers are scrutinizing requests more carefully to find additional applicable exemptions or they are applying multiple exemptions to denials as part of an effort to discourage requesters from making appeals. Either way, requesters are less likely to take the time and effort to appeal an exemption containing multiple exemptions because of the belief that a request denied on several exemptions will be more

³⁷⁹ Telephone Interview with Sean Moulton, senior policy analyst at OpenTheGovernment.org Coalition (Dec. 1, 2004) (“Anecdotally, news reporters have been deterred from using FOIA because they do not believe they will get the information they need.”).

³⁸⁰ I excluded the number of requests denied for procedural reasons because the Memos specifically address the use of exemptions, rather than procedural reasons, to deny requests. Additionally, most critics of the Bush Administration FOIA policy cite the increased use of exemptions, not procedural reasons, to support their contention that the Bush Administration has curtailed FOIA disclosure.

³⁸¹ See DEPARTMENT OF JUSTICE, *supra* note 17. As stated earlier, a request may also be denied due to a procedural reason, but I have excluded such denials from my analysis.

³⁸² *Id.*

difficult to overturn.³⁸³ This particularly applies to “newspaper and magazine reporters, who need information quickly to write stories and do not want to waste time and effort on appealing a denial that is not likely to be reversed.”³⁸⁴

Finally, I report on the use of exemptions two and four by federal agencies. The Memos encourage the use of exemptions two and four;³⁸⁵ FOIA critics cite anecdotal evidence of the increased use of these exemptions.³⁸⁶ Thus, if federal agencies have decreased FOIA disclosure in response to the Memos, it would be expected that a rise in the use of exemptions two and four would be a factor in reducing FOIA disclosure. To evaluate whether exemptions two and four are being used in greater numbers, I report on: 1) the number of exemptions two and four being applied as a percent of total exemptions to examine whether these exemptions are being utilized at higher rates in comparison to other exemptions and 2) the total numbers of exemptions two and four applied. I report on the total numbers of exemptions two and four used because the proportional data may not accurately reflect the amount of utilization of exemptions two and four by federal agencies. For example, if FOIA officers invoked greater amounts of all exemptions, the proportion of exemptions two and four applied may not rise despite their overall increase in use. Each of these indices measures

³⁸³ Telephone Interview with Andy Alexander, Freedom of Information Committee, American Association of Newspaper Editors (Nov. 15, 2004) (stating that requesters will particularly be deterred from filing a judicial appeal on a denied request on multiple exemptions because of the time and expense of taking the government to court).

³⁸⁴ Moulton, *supra* note 30.

³⁸⁵ See Ashcroft Memo, *supra* note 1, at ¶ 17 (“Protection of such records or information, if requested under the FOIA, is available under Exemption 2 of the [FOIA] Act.”); see Card Memo, *supra* note 2 at ¶ 9 (directing agencies to consider Department of Justice guidance in making use of exemption two “for the protection of sensitive critical infrastructure information” and exemption four for protection of “information that is voluntarily submitted to the Government from the private sector.”).

³⁸⁶ MINORITY STAFF OF HOUSE COMM. ON GOVERNMENT REFORM, *supra* note 11, at 7-8 (“The Department of Defense, rely[ing] on the Card Memo, refus[ed] a FOIA request from the Federation of American Scientists for release of an unclassified report on . . . the 2001 anthrax attacks . . . [on exemption two grounds]. The Federation of American Scientists [appealed the denial], arguing [that exemption two did not apply]. The Department of Defense finally released a redacted version of the report.”).

different aspects of FOIA disclosure, and together they provide an overall picture of the state of FOIA disclosure following the release of the Memos.

I compiled these indices of data from the online FOIA annual reports from twenty-six federal agencies and departments³⁸⁷ for 1998-2003. Together, these twenty-six agencies handle over ninety-seven percent of all FOIA requests for information within the federal government, constituting a valid sample for evaluating FOIA disclosure.³⁸⁸ To analyze whether FOIA disclosure has changed since the Memos were distributed during fiscal year 2002³⁸⁹, I compare the annual averages of data from fiscal years³⁹⁰ 1998-2000 (pre-Memos) with the annual averages of data from 2002-2003 (post-Memos).

³⁸⁷ Federal Agencies and departments included in the study are: 1) Central Intelligence Agency; 2) Department of Agriculture; 3) Department of Commerce; 4) Department of Defense; 5) Department of Education; 6) Department of Energy; 7) Department of Health and Human Services; 8) Department of Housing and Urban Development; 9) Department of Interior; 10) Department of Justice; 11) Department of Labor; 12) Department of State; 13) Department of Transportation; 14) Department of the Treasury; 15) Department of Veteran Affairs; 16) Environmental Protection Agency; 17) Federal Emergency Management Agency (now part of the Department of Homeland Security); 18) General Services Administration; 19) National Aeronautic and Space Administration; 20) National Science Foundation; 21) Nuclear Regulatory Commission; 22) Office of Personnel Management; 23) Small Business Administration; 24) Social Security Administration; 25) U.S. Agency for International Development; 26) Department of Homeland Security.

³⁸⁸ GENERAL ACCOUNTING OFFICE, FREEDOM OF INFORMATION ACT: AGENCY VIEWS ON CHANGES RESULTING FROM NEW ADMINISTRATION POLICY (2003), available at <http://www.gao.gov/new.items/d03981.pdf>. Like the General Accounting Office (now the Government Accountability Office) study, this article reports on FOIA data from twenty-five agencies for the years 1998-2002, but includes 2003 FOIA data from the newly created Department of Homeland Security.

³⁸⁹ As noted above, the Ashcroft Memo was distributed at the beginning of fiscal year 2002 (October 12, 2001) and the Card Memo was disseminated halfway into fiscal year 2002 (March 19, 2002).

³⁹⁰ Federal agencies and departments submit FOIA annual reports on a fiscal year basis. The fiscal year covers a 12-month period from October 1 to September 30. For example, fiscal year 2000 started on October 1, 1999 and ended on September 30, 2000. See DEPARTMENT OF JUSTICE, OFFICE OF INFORMATION PRIVACY, *supra* note 18.

I included 2001 data in my tables and figures, but I excluded the data from my analysis because 2001 was a transition year between the Clinton and Bush Administrations and some FOIA critics claim that the Bush Administration began restricting FOIA disclosure prior to the release of the Memos.³⁹¹ Therefore, to draw a clear line between FOIA disclosure before and after the Bush Administration's FOIA policies, I excluded 2001 data from my analysis.

After reporting the FOIA disclosure data from the twenty-six federal agencies, I focused on FOIA disclosure data from five agencies likely to be affected by the Memos: Department of Defense (DOD), Department of Energy (DOE), Department of Justice (DOJ), Department of Transportation (DOT), and Nuclear Regulatory Commission (NRC). As explained above, the Memos were prepared in response to the terrorist attacks of September 11, 2001 and they emphasize the importance of safeguarding information critical to homeland security, such as national security, law enforcement and critical infrastructure information.³⁹² Because of this emphasis, these federal agencies, which protect information critical to homeland security in the areas of law enforcement (DOJ³⁹³); national security (DOD³⁹⁴); and critical infrastructure, such as transportation (DOT³⁹⁵), and energy (DOE³⁹⁶ and

³⁹¹ See Profile, *supra* note 14 (“David Vladeck is the director of the Public Citizen Litigation Group. He says the government began restricting the flow of information before September 11th.”).

³⁹² See Ashcroft Memo, *supra* note 1; see also Card Memo, *supra* note 2.

³⁹³ *In Nat'l Sec. Studies v. United States Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003), the Department of Justice withheld names of individuals detained after 9/11 terrorist attacks from a FOIA request.

³⁹⁴ See MINORITY STAFF OF HOUSE COMM. ON GOVERNMENT REFORM, *supra* note 11, at iii. (“Among the documents that the administration has refused to release to the public and members of Congress are . . . the communications between the Defense Department and the Vice President's office regarding contracts awarded to Halliburton . . . [Department of Defense] documents describing the prison abuses at Abu Ghraib.”); see also *id.* at 7 (“For example, the Department of Defense relied on the Card [Memo] in refusing a FOIA request . . . for release of an unclassified report on lessons learned from the 2001 anthrax attack.”).

³⁹⁵ See REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, HOMEFRONT CONFIDENTIAL: HOW THE WAR ON TERRORISM AFFECTS ACCESS TO INFORMATION AND THE PUBLIC'S RIGHT TO KNOW (5th ed. 2004) (stating that in *Coastal Delivery Corp. v. United States Customs Serv.*, 272 F.Supp.2d 958 (C.D.Cal. 2003), the U.S. Customs Service denied a FOIA request for internal documents pertaining to inspections of sea operations.); see also OMB Watch,

NRC³⁹⁷), are likely to have lessened FOIA disclosure under the Bush Administration's FOIA policies. Accordingly, leading critics of the Bush Administration's FOIA policies often cite examples of these agencies withholding information under FOIA to support their contention that the Bush Administration has restricted FOIA disclosure.³⁹⁸ An examination of FOIA disclosure data from these five agencies will show whether the Memos caused particular agencies to restrict the disclosure of FOIA information.

III.

FOIA DISCLOSURE: EXAMINATION OF ALL AGENCIES

A. Initial Requests Received: All Agencies

Federal agencies received more initial requests in 2002 and 2003 than

Access to Government Information Post Sept. 11 (Feb. 1, 2002) (reporting that the Office of Pipeline Safety within the Department of Transportation had discontinued providing open access to the National Pipeline Mapping System on its website) at <http://www.ombwatch.org/article/articleview/213/1/104>.

³⁹⁶ See MINORITY STAFF OF HOUSE COMM. ON GOVERNMENT REFORM, *supra* note 11, at 5 (discussing *Judicial Watch v. U.S. Dep't of Energy*, 319 F.Supp.2d 271, 320 (D.D.C. 2004) in which the Department of Energy fully or partially withheld over 4,500 documents in response to a FOIA request seeking information on role played by federal agencies in formulating the National Energy Policy).

³⁹⁷ See OMB Watch, *NRC Removes all Nuclear Information from its Public Website* (Nov. 2, 2004) (reporting that the Nuclear Regulatory Commission removed its entire online public reading room, consisting of 700,000 documents, from its website for the second time since the 9/11 terrorist attacks) at <http://www.ombwatch.org/article/articleview/2498/1/1?TopicID=1>.

³⁹⁸ See *e.g.*, MINORITY STAFF OF HOUSE COMM. ON GOVERNMENT REFORM, *supra* note 11, at 5-7 (citing examples of where the Department of Defense and Department of Energy withheld large amounts of information in response to FOIA requests); REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *supra* note 14 (supporting its claim that the Bush Administration has lessened FOIA dissemination with examples of FOIA denials by the Department of Transportation and Department of Justice); OMB Watch, *supra* note 47 (reporting that the Nuclear Regulatory Commission removed its entire online public reading room, consisting of over 700,000 documents from its website for the second time since the 9/11 attacks).

the years before the Memos were released (Figure 1) (Table 1). However, the boost in initial requests received is wholly attributable to an increasing number of requests made to the Social Security Administration (SSA) and Department of Veteran Affairs (VA), which together account for eighty percent of all FOIA requests (Figure 1) (Table 1). The Department of Veteran Affairs and the Social Security Administration began including Privacy Act requests in FOIA disclosure data in 1999 and 2002, respectively, resulting in the rise in the number of FOIA initial requests received (Figure 1) (Table 1).³⁹⁹ Excluding the Social Security Administration and Department of Veteran Affairs FOIA data, the number of initial requests received by federal agencies did not substantively change between the pre-Memos and post-Memos years, suggesting that the Bush Administration's FOIA policies have not discouraged requesters from continuing to make initial requests (Figure 1) (Table 1). This is consistent with my thesis that overall FOIA disclosure by federal agencies has not changed since the Memos were disseminated.

B. Disposition of Initial Requests: All Agencies

In 2002 and 2003, federal agencies granted FOIA initial requests at similar rates as in the years prior to the release of the Memos. The percentage of requests granted did increase from the period 1998-2000 to 2002-2003 (Figure 2) (Table 2). However, since 1999, the percent of initial requests granted, partially granted, and denied has remained virtually the same, with the percent of requests granted increasing only two percent from 1999 to 2003 (Figure 2) (Table 2). Again, this slight increase is solely due to the substantial increase in the number of FOIA requests submitted to the Social Security Administration and the Department of Veterans Affairs. These two agencies handle the vast majority of FOIA requests and their portion of total requests has risen since 1998.⁴⁰⁰ Because a substantial proportion of requests from these two agencies are granted, the increase in the number of requests has

³⁹⁹ A substantial majority of FOIA requests made to the Social Security Administration (SSA) and the Department of Veteran Affairs (VA) are Privacy Act requests by individuals seeking their own records. *See* SSA ANN. REP. (2003); *see also* VA ANN REP. (2003).

⁴⁰⁰ For 1998-2000, FOIA requests submitted to the Social Security Administration and the Department of Veterans Affairs constituted sixty-five percent of total requests (Figure 1). In 2003 over eighty percent of all FOIA requests were made to the Social Security Administration and Department of Veteran Affairs (Figure 1).

caused the percentage of requests for all federal agencies to rise.⁴⁰¹ Consequently, excluding the FOIA data from these two agencies, FOIA disclosure has remained approximately the same for 1998-2003, with the percentage of both grants and denials decreasing slightly between 1998-2000 and 2002-2003 (Figure 3) (Table 3). Additionally, the total number of requests (excluding Social Security Administration and Department of Veteran Affairs data) granted from 2002-2003 was about the same as 1998-2000 levels, with a slight increase in the number of grants (Figure 5) (Table 5). Therefore, the data on disposition of initial requests, by proportion (showing a slight decrease in the percent of requests granted) and total numbers (showing a slight increase in the total number of requests granted), indicates that overall FOIA disclosure by the federal agencies has remained at similar levels since the Memos were disseminated, which is consistent with my thesis.

C. Total Exemptions: All Agencies

As explained above, an agency may partially grant or deny a FOIA request only if there is an applicable exemption.⁴⁰² At least one exemption must be applied for each denial (denial or partial grant), but multiple exemptions may be applied, if applicable.⁴⁰³ Overall, federal agencies did apply a higher rate of exemptions from 2002-2003 than in 1998-2000 (Figure 6) (Table 6). However, inconsistencies in the reporting of total exemptions data from the INS (Immigration and Naturalization Service)⁴⁰⁴ for 2001 and 2002 account for the large increase in total exemptions and exemptions per denial for all agencies between 1998-2000 and 2002-2003. In 2001, the INS changed its procedure for counting exemptions. Previously, a FOIA officer would apply a given type of exemption (e.g. exemption two) once per requested document. However, in 2001 and 2002, FOIA officers in INS/USCIS (now the United States Citizenship and Immigration Service) applied a exemption to every paragraph of a document, meaning a single request could contain multiple exemption twos. This procedural change accounted for the overall large increases in total exemptions and exemptions per denial for federal agencies in 2001 and 2002. In 2003, INS/USCIS

⁴⁰² See DEPARTMENT OF JUSTICE, *supra* note 17.

⁴⁰³ *Id.*

⁴⁰⁴ INS was reorganized as the United States Citizenship and Immigration Service (USCIS) on March 1, 2003.

returned to its previous policy of counting an applicable type of exemption once per requested document.⁴⁰⁵

Excluding INS/USCIS exemption data, the federal agencies slightly increased the number of exemptions per denial between 1998-2000 and 2002-2003 (Figure 6) (Table 7), although fewer exemptions per denial were applied in 2002 and 2003 than 1998. However, because INS/ USCIS accounts for a large proportion of the total exemptions applied by the federal agencies⁴⁰⁶, excluding INS/USCIS data does not conclusively show whether a greater number of exemptions were applied from 2002–2003 than 1998–2000. In fact, if 2002 exemption data from the federal agencies were excluded to eliminate the INS/USCIS data inconsistency, then exemptions per denial remained the same between 1998-2000 and 2003 (Figure 6) (Table 6). Therefore, although the INS data inconsistencies make it difficult to conclusively determine, exemption use levels seem to have remained approximately the same since the Memos were distributed, supporting my thesis that overall FOIA disclosure by the federal agencies has remained unchanged.

D. Exemptions Two and Four: All Agencies

Because of inconsistencies with INS/USCIS data, the data on the number of exemptions two and four reported by the federal agencies may be distorted for 2001-2002.⁴⁰⁷ Therefore, excluding 2002 data, federal agencies applied exemptions two and four at roughly the same rates in 2003 as they did from 1998-2000. In 2003, FOIA officers applied a slightly lower rate of exemption two than 1998-2000 while exemption four was used at a slightly higher rate in 2003 than 1998-2000 (Figure 7) (Table 8).

Additionally, the total number of exemptions two and four applied by federal agencies was higher in 2003 than 1998-2000 (Figure 8) (Table 9). However, this increase may not indicate an increased use of exemption two. First, the number of exemption twos applied in 2003 was only 800 more than the average number used from 1998-2000 (9,898 from 1998-2000 and 10, 679 in 2003) (Figure 8) (Table 9). Moreover, approximately the same number of

⁴⁰⁵ Telephone Interview with Magda Ortiz, FOIA officer with the United States Citizenship and Immigrations Services. (USCIS) (formerly the Immigration Naturalization Service) (INS) (Nov. 10, 2004).

⁴⁰⁶ In 2003, the INS/USCIS applied 59,873 of 164, 638 total exemptions by the federal agencies (Table 6) (Table 7).

⁴⁰⁷ *See id.*

exemption two was applied in 2000 as 2003 and a greater number of exemption two was used in 1998 (Figure 8) (Table 9). On the other hand, the number of times exemption four was used rose substantially between 1998-2000 and 2003 (Figure 8) (Table 9). Thus, overall, exemption two levels have remained virtually unchanged since 2002, in both total numbers and as a percent of total exemptions, showing that the Memos have not increased the overall use of exemption two by federal agencies. However, use of exemption four levels has risen, indicating that the Memos may have influenced the application of this exemption.

E. Explanation of FOIA Data: All Agencies

The FOIA disclosure data for 2002 and 2003 is largely consistent with my thesis that the federal agencies have not restricted FOIA disclosure under the Bush Administration. All indices of FOIA disclosure data, except the use of exemption four, indicate that FOIA disclosure by the federal agencies has not changed since the Memos were released. Thus, the Ashcroft and Card Memos have not had the purported effect of creating a “veil of secrecy” around the administration. One possible explanation is that the FOIA directives did not substantively change FOIA law. The Memos did not create new exemptions nor did they provide new guidance as to how current exemptions could be applied.⁴⁰⁸ Rather, the adoption of the “sound legal basis” language in the Ashcroft Memo merely conveyed a message that the Department of Justice would defer to the FOIA decisions made by the federal agencies and departments.⁴⁰⁹ Likewise, the Card Memo encouraged agencies to “maintain and control sensitive information related to America’s homeland

⁴⁰⁸ The Ashcroft Memo provides links to two Department of Justice FOIA guidance memorandums: a 1989 Office of Information Privacy Guidance memorandum explaining the two types of records that courts have interpreted Exemption 2 to cover and the current FOIA Guide which provides essentially the same information as the 1989 memorandum, albeit in greater detail. See Ashcroft Memo, *supra* note 1.

⁴⁰⁹ *Supra* note 14; *see also* Department of Justice, Office of Information and Privacy, *FOIA Post Interview: Chairman Stephen Horn*, FOIA POST (Dec. 19, 2002), *available at* <http://www.usdoj.gov/oip/foiapost/2002foiapost31.htm>. (Rep. Horn (R-CA), a longtime advocate of FOIA stated, “Personally, I am not convinced that the Memorandum deserves such criticism. I believe that the Memorandum may simply represent a legitimate effort to give deference to agency officials, who, after all, are responsible by law for making FOIA decisions.”).

security,” but does not provide additional guidance as to how FOIA officers might utilize current exemptions to achieve this objective.⁴¹⁰ Also, the Card Memo emphasizes, and specifically refers to, the protection of records pertaining to weapons of mass destruction, which would apply only to a few agencies.⁴¹¹ While the Card Memo makes vague references to protecting “critical infrastructure,” no details are forthcoming as to what types of record is specifically covered under this term; nor is guidance given as to how to protect such records.⁴¹²

Additionally, few federal agencies offered guidance to their FOIA officers as to specific criteria or factors to be used in deciding whether to make a discretionary disclosure under the policies set forth in the Ashcroft and Card Memos. According to a United States General Accounting Office (GAO)⁴¹³ survey of FOIA officers from twenty-five agencies, only three⁴¹⁴ of the agencies surveyed set forth specific criteria to guide FOIA disclosure decisions in accordance with the Ashcroft Memo, and only four⁴¹⁵ agencies

⁴¹⁰ The Card Memo merely directed FOIA officers to read the Ashcroft Memo for additional guidance as to how exemptions may be used to protect information related to America’s homeland security. *See* Card Memo, *supra* note 2.

⁴¹¹ *Id.* at ¶ 1 (stating at the beginning of the memo that “[federal departments and agencies] have an obligation to safeguard Government records regarding weapons of mass destruction . . . [w]eapons of mass destruction include chemical, biological, radiological, and nuclear weapons . . . government information that could reasonably be expected to assist in the development or use of weapons of mass destruction, including information about the current locations of nuclear materials that could be exploited for use in such weapons, should not be disclosed inappropriately.”).

⁴¹² *Id.* at ¶ 6 (“[encouraging the protection of]. . . other information that could be misused to harm the security of our nation to threaten public safety.”) and ¶ 11 (“all departments and agencies should. . . safeguard sensitive but unclassified information related to America’s homeland security . . . for protection of sensitive critical infrastructure.”).

⁴¹³ The General Accounting Office has been reorganized as the Government Accountability Office (GAO).

⁴¹⁴ Department of Defense, National Aeronautics and Space Administration, and Small Business Administration. *See* General Accounting Office, Responses to Survey of FOIA Officers (2003) (unpublished survey, on file with the Government Accountability Office).

⁴¹⁵ Department of Defense, Nuclear Regulatory Commission, Department of Labor, and Department of Treasury. *See id.*

established criteria for determining whether or not to disclose critical infrastructure information in response to a FOIA request in consideration of the Card Memo.⁴¹⁶ Therefore, it is not surprising that overall FOIA disclosure has not changed since the Memos were disseminated.

While most of the data reported (including the number of requests received, disposition of initial requests, use of total exemptions, and application of exemption two) indicates that FOIA disclosure has not changed under the Bush Administration's FOIA policies, it is clear that FOIA officers are applying exemption four in greater numbers. Under FOIA, exemption four protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."⁴¹⁷ A rise in the use of exemption four by the Department of Labor (an increase of approximately 2,000 between 1998-2000 and 2003) primarily accounts for the overall rise in the application of this exemption.⁴¹⁸ According to Miriam Miller, FOIA Officer, Department of Labor, exemption four is primarily used within the Department of Labor to safeguard confidential information voluntarily submitted by businesses to the government to comply with Occupational Safety and Health Administration (OSHA) safety inspections.⁴¹⁹ The Card Memo's encouragement of the use of exemption four may have influenced the increase in its use by the Department of Labor. According to Miriam Miller, the use of exemption four has risen because "of a growing awareness by business submitters and the federal government that certain types of information voluntarily submitted to the government may be protected by exemption four."⁴²⁰ Additionally, the Department of Labor was one of the few agencies to disseminate written guidance that further specified the criteria to be used for determining whether to disclose information under the policies

⁴¹⁶ *See id.*

⁴¹⁷ 5 U.S.C. § 552(b) (4) (2000).

⁴¹⁸ The Department of Labor applied, on average 1,850 exemptions per year from 1998 – 2000. DOL ANN. REP. (1998 – 2000). In 2003, the Department of Labor used exemption four 3,942 times. DOL ANN. REP. (2003).

⁴¹⁹ Telephone Interview with Miriam Miller, FOIA Officer, Department of Labor (Dec. 15, 2004) ("Exemption four is used to protect information voluntarily submitted by businesses for Occupational Safety and Health Administration safety inspections with the expectation that it will be kept confidential.").

⁴²⁰ *Id.*

of the Card Memo.⁴²¹ Nonetheless, because exemption four is used in limited numbers (relative to the other exemptions),⁴²² and because few agencies provided their FOIA officers with specific guidance on how to implement the policy,⁴²³ the Card Memo's encouragement of exemption four has not caused an increase in the use of exemption four by other agencies. Excluding the Department of Labor and Defense (an increase of 430 between 1998-2000 and 2003), other agencies have applied exemption four at approximately the same levels, in total numbers, after the Memos were released as before.⁴²⁴

IV.

FOIA DISCLOSURE:

EXAMINATION OF HOMELAND SECURITY-RELATED AGENCIES

A. Introduction

As explained above, I examined FOIA disclosure data from five agencies that were most likely to be affected by the Memos because they safeguard information critical to homeland security in the areas of national security, law enforcement, and critical infrastructure. These agencies are: Department of Defense (DOD), Department of Energy (DOE), Department of Justice (DOJ), Department of Transportation (DOT), and Nuclear Regulatory Commission (NRC). Of these homeland security-related agencies, the Department of Defense, the Department of Justice, and the Nuclear Regulatory Commission exhibited clear patterns of decreased FOIA disclosure since the Memos were distributed. The Department of Transportation disclosed FOIA information at approximately the same levels under the Bush Administration's FOIA

⁴²¹ See General Accounting Office, *supra* note 67. Other agencies include: Department of Defense, Nuclear Regulatory Commission, and the Department of Treasury.

⁴²² MINORITY STAFF OF HOUSE COMM. ON GOVERNMENT REFORM, *supra* note 15, at 7 (stating that exemption four "does not apply to all voluntarily submitted private sector information, but only to trade secrets and privileged or confidential information or financial information.").

⁴²³ See General Accounting Office, *supra* note 67. Other agencies include: Department of Defense, Nuclear Regulatory Commission, and the Department of Treasury.

⁴²⁴ Excluding the Department of Labor and the Department of Defense, federal agencies applied an average of 3,620 exemptions four per year between 1998-2000 compared with 3,995 exemptions in 2003. See Federal Departments and Agencies ANN. REP. (2003). available at http://www.usdoj.gov/04foia/04_6.html.

policies, and the Department of Energy increased its dissemination of FOIA information in 2002 and 2003. Therefore the following sections report on FOIA data from the Department of Defense, the Department of Justice, and the Nuclear Regulatory Commission. Charts and figures of FOIA data from the Department of Transportation and the Department of Energy are included in the Appendix.

B. Initial Requests Received: Homeland Security-Related Agencies

The Department of Defense and the Department of Justice received fewer requests in the aftermath of the Memos (Figure 10) (Figure 11), while the Nuclear Regulatory Commission received thirty-seven additional requests (nine percent increase) (Figure 12) (Table 12). The Department of Defense and Department of Justice experienced substantial decreases in the number of requests between 1998-2000 and 2002-2003 with declines of 25,000 requests each (a twenty-five percent decrease for the Department of Defense (Figure 10) (Table 10) and a twelve percent decrease for the Department of Justice (Figure 11) (Table 11)). This data suggests that the policies contained in the Memos have deterred some requesters from making FOIA requests to homeland security-related agencies, and therefore, it is consistent with my thesis that some agencies have lessened FOIA disclosure as a result of the Bush Administration's FOIA policies.

C. Disposition of Initial Requests: Homeland Security-Related Agencies

The Department of Defense (Figure 14) (Table 13), the Department of Justice (Figure 15) (Table 14), and the Nuclear Regulatory Commission (Figure 16) (Table 15)) granted a lesser proportion of requests after the Memos were released. However, these agencies decreased the percent of requests granted by ten percent or less while increasing the percentage of partial grants by a corresponding amount (Figure 13) (Figure 14) (Table 13) (Figure 15) (Table 14) (Figure 16) (Table 15). Therefore, in 2002 and 2003 these agencies traded a decrease in the percent of grants for an increase in the percent of partial grants, but still denied approximately the same proportion of requests.

Additionally, the Department of Defense (Figure 17) (Table 16), the Department of Justice (Figure 18) (Table 17), and the Nuclear Regulatory Commission (Figure 19) (Table 18)) granted a lower total number of requests in 2002 and 2003 than during the years before the Memos were disseminated.

In 2002 and 2003, the Department of Defense granted substantially fewer requests from 2002-2003 than 1998-2000, while partially granting and denying about the same number of requests. (The Department of Defense granted an average of 20,000 less requests in 2002-2003, a thirty-four percent decrease (Figure 17) (Table 16)). The Department of Justice and Nuclear Regulatory Commission also granted fewer requests in 2002-2003, but the drop off was less for these two agencies. (The Department of Justice granted an average of about 3,000 less requests, only a four percent decline (Figure 18) (Table 17), while the Nuclear Regulatory Commission granted an average of only eleven fewer requests, only a six percent decrease (Figure 19) (Table 18)). The declines in grants (by percent and total numbers) by these agencies support my thesis that particular homeland security-related agencies did reduce disclosure after the Memos were disseminated.

D. Total Exemptions: Homeland Security-Related Agencies

The Department of Defense (Figure 21) (Table 19) and the Nuclear Regulatory Commission (Figure 23) (Table 22) invoked more exemptions per denial from 2002-2003⁴²⁵ than 1998-2000 (Figure 20). Because of the aforementioned inconsistencies with exemption data from INS/USCIS (formerly a Department of Justice agency) for 2001 and 2002, the overall Department of Justice exemption data is less reliable. Excluding INS/USCIS data, exemptions per denial from the Department of Justice increased between 1998-2000 and 2002-2003 (Table 21). However, INS/USCIS exemptions constituted a high proportion of the exemptions utilized within the Department of Justice and thus it is not clear from this data whether the Department of Justice applied more exemptions during 2002-2003 than in 1998-2000. In fact, if the 2002 Department of Justice exemption data is excluded, the exemptions per denial dropped between 1998-2000 and 2003. (Figure 22) (Table 20). While it is not clear whether the Department of Justice increased its use of exemptions under the Bush Administration's FOIA policies, some homeland security-related agencies (specifically the Department of Defense and the Nuclear Regulatory Commission) applied more exemptions in 2002-

⁴²⁵ For the Department of Justice, I excluded 2002 exemption data because of the aforementioned data inconsistencies with Immigration and Naturalization Service exemption data in 2001 and 2002. See Telephone Interview with Madga Ortiz, *supra* note 58.

The Department of Justice applied fewer exemptions per denial from 2002-2003 than 1998-2000. However, excluding INS/USCIS exemption data, the Department of Justice applied a slightly higher number of exemptions after the Memos were released than the years before (Table 28).

2003 than 1998-2000. This data indicates that these agencies cut back on FOIA disclosure after the Memos were distributed.

E. Exemptions Two and Four: Homeland Security-Related Agencies

Finally, the Department of Defense and the Nuclear Regulatory Commission did apply exemption two in higher numbers during 2002-2003 than 1998-2000, both as a percent of total exemptions and as a total number. The Department of Defense applied exemption two approximately 700 more times, an increase from six to nine percent of all exemptions (Figure 26) (Figure 27) (Table 23) and the Nuclear Regulatory Commission⁴²⁶ applied exemption two at a higher rate as well (from two to nine percent of total exemptions) (Figure 30) (Figure 31) (Table 25). Although the Department of Justice exemption data is not entirely reliable because of the previously discussed INS data inconsistencies, the data show that the use of exemption two by the Department of Justice did not rise between 1998-2000 and 2002-2003 (Figure 28) (Figure 29) (Table 24) (Table 25). Also, the Department of Defense (Figure 26) (Figure 27) (Table 23) and Nuclear Regulatory Commission (Figure 30) (Figure 31) (Table 26) utilized exemption four in greater numbers, both as a percent of total exemptions and in total numbers, during 2002-2003. However, these two agencies increased their use of exemption four by less than the amount than they raised their use of exemption two (the Department of Defense used exemption four 300 additional times (Figure 27) (Table 23), an increase from six to eight percent of total exemptions, and the Nuclear Regulatory Commission applied only ten more exemption fours, an increase from seven to nine percent of total exemptions) (Figure 31) (Table 26). Although the Department of Justice exemption data is not entirely reliable because of the previously discussed INS data inconsistencies, the data show that the use of exemption four by the Department of Justice did not rise either between 1998-2000 or 2002-2003 (Figure 28) (Figure 29) (Table 24) (Table 25). The Department of Justice continued to use exemption four infrequently, applying it at the same proportion (less than one percent) of total exemptions in 2003⁴²⁷ as 1998-2000 (Figure 28) (Table 24). Consequently, this data supports my thesis that some homeland security-related agencies, spurred in part by the increased use of

⁴²⁶ Although exemption two was applied only 17 more times, on average, from 2002-2003 than 1998-2000, this amount was a fivefold increase. *See* NRC ANN REP (1998-2003).

⁴²⁷ 2002 exemption data for the Department of Justice was excluded for the aforementioned reasons. *See* Telephone Interview with Magda Ortiz, *supra* note 58.

exemption two and to a lesser extent exemption four, have restricted FOIA disclosure since the Memos were released.

F. Explanation of FOIA Data: Homeland Security-Related Agencies

The Department of Defense, Department of Justice, and the Nuclear Regulatory Commission did restrict FOIA disclosure after the dissemination of the Memos. They received fewer requests (except for the Nuclear Regulatory Commission) (Figure 9); they reduced the number of requests granted (Figure 17) (Figure 18) (Figure 19) in both total numbers and as a percentage of total requests, and they increased the use of exemptions (except possibly the Department of Justice) (Figure 20), particularly exemption two (Department of Defense and Nuclear Regulatory Commission) (Figure 24).

Nonetheless, the data do not indicate a substantial reduction in disclosure by these agencies. First, the percent of requests granted by these agencies decreased by ten percent or less between 1998-2000 and 2002-2003 (Figure 13). Second, the number and percentage of initial requests denied (Figure 13) (Figure 17) (Figure 18) (Figure 19) remained approximately the same for these agencies for the two time periods, showing that agencies not making blanket denials under the Memos, as some critics have asserted.⁴²⁸ Instead, the increased number of partial grants and decreased number of grants suggest that FOIA officers are exercising greater caution in reviewing documents before disclosure and redacting exempted information as applicable, resulting in an increased number and percentage of partial grants.⁴²⁹ Finally, while the number of exemptions per denial has increased for the Department of Defense and Nuclear Regulatory Commission, these amounts are likely not substantial enough to discourage many requesters from

⁴²⁸ See Patrice McDermott, *Information Disclosures by Government: Data Quality and Security Concerns Symposium*, KAN. J.L. & PUB. POL'Y 671, 671 (2003) (stating that the federal government has responded to the events of 9/11 by "blanket withholding and remov[ing]" information under FOIA).

⁴²⁹ See Telephone Interview with Michael Sherman, FOIA Officer, Office of Information and Privacy of the Department of Justice (Nov. 18, 2004) ("There has been no change with how we process 98 percent of initial requests. We examine with more circumspection the small amount of initial requests dealing with national security."); see also Telephone Interview with Kathy Ray, FOIA Officer, Department of Transportation (Nov. 19, 2004) ("Initial requests concerning specific locations and layouts of specific locations in the transportation network are looked at more carefully now, many resulting in partial grants.").

continuing to make FOIA requests. For example, the Department of Defense applied 1.44 exemptions per denial from 1998-2000 and 1.50 exemptions per denial from 2002-2003 (Figure 21). Thus for every 100 denials of initial requests from 1998-2000, FOIA officers in the Department of Defense applied, on average, 144 exemptions while they applied, on average, 150 exemptions for every 100 denials from 2002-2003. Therefore, only a small proportion of denials (at most six out of one-hundred) resulted in additional exemptions from 2002-2003 as compared to 1998-2000. Requesters were unlikely to be deterred from making a FOIA request because a small proportion of denials contained one or possibly two additional exemptions. Therefore, consistent with my thesis, some homeland security-related agencies that were likely to restrict disclosure as a result of the Memos did in fact disclose less information under FOIA from 2002-2003, but not at substantial levels.

The results of a GAO survey of FOIA officers in 2003 support my thesis that the Memos resulted in a decrease, but not a substantial one, in disclosure for some agencies. About a third (thirty-one percent) of FOIA officers surveyed did report a decrease in FOIA disclosure under the Bush Administration (Figure 32).⁴³⁰ However, most of these FOIA officers (twenty-three percent) noted only a slight reduction in FOIA dissemination under the Bush Administration (Figure 32).⁴³¹ Only a few FOIA officers asserted that FOIA had decreased substantially (eight percent) since the Memos (Figure 32). Of those FOIA officers who reported a decrease in FOIA disclosure, a substantial portion did cite the Ashcroft Memo as a factor in affecting this change.⁴³² Lastly, a quarter of FOIA officers did report a change in the use of particular exemptions as a result of the Ashcroft Memo.⁴³³

For some agencies, such as the Department of Defense and the Nuclear Regulatory Commission, that reduced disclosure, the decrease seems to have

⁴³⁰ GENERAL ACCOUNTING OFFICE: FREEDOM OF INFORMATION ACT: AGENCY VIEWS ON CHANGES RESULTING FROM NEW ADMINISTRATION POLICY 11 (2003). The survey was conducted in 2002 and 2003 and included 205 agency-identified department level and component-level FOIA officers at twenty-five agencies. Of these, 183 FOIA officers representing twenty-four agencies responded to the survey.

⁴³¹ *Id.* at 23. Seven percent of FOIA officers surveyed reported that FOIA disclosure had increased under the Bush Administration.

⁴³² *Id.* at 26

⁴³³ *Id.* at 25.

been spurred by an increase in the use of exemption two. The Department of Defense and Nuclear Regulatory Commission applied exemption two in greater numbers during 2002-2003 than in 1998-2000 (Figure 24). These two agencies also increased their use of exemption four during this time period (Figure 25), but these increases were lower. Additionally, FOIA officers at these agencies cited the increased use of exemption two as the only significant post-Memos change in FOIA disclosure.⁴³⁴

Also, the emphasis of the Card Memo on safeguarding materials related to weapons of mass destruction may have influenced the decline in FOIA disclosure by the Nuclear Regulatory Commission and the Department of Defense. Both the Department of Defense and the Nuclear Regulatory Commission safeguard significant amounts of information pertaining to locations of nuclear stockpiles.⁴³⁵ As noted above, the Card Memo encouraged federal agencies to make the full use of exemption two to protect information regarding weapons of mass destruction, particularly locations of domestic nuclear stockpiles.⁴³⁶ According to the Department of Justice 2004 FOIA Guide, exemption two may be used to protect information “the disclosure of which would risk the circumvention of a statute or agency

⁴³⁴ See Telephone interview with David Maier, FOIA Officer, Department of Defense (Nov. 15, 2004) (stating that he has noticed an increase in the use of exemption two); see also Telephone Interview with Kathy Ray, *supra* note 82 (noting that FOIA disclosure has not changed except that exemption two is being used more since 9/11); see also Telephone Interview with Carol Ann Reed, FOIA Officer, Nuclear Regulatory Commission (Nov. 15, 2004) (“Exemption two has been used at higher rates to protect info that might aid terrorists.”).

⁴³⁵ The Department of Defense maintains control over domestic nuclear weapon stockpiles. See DEPARTMENT OF DEFENSE, U.S. STRATEGIC COMMAND FACT FILE at <http://www.stratcom.mil/factsheetshtml/taskforces.htm>.

The Nuclear Regulatory Commission conducts regular inspections of civilian nuclear facilities, to include nuclear reactors, materials, and waste facilities. See U.S. NUCLEAR REGULATORY COMMISSION, WHAT WE DO, at <http://www.nrc.gov/what-we-do.html>.

⁴³⁶ See Card Memo, *supra* note 2, at ¶ 11 (“See [DOJ Guidance] on the authority available under Exemption of the FOIA.”); see also Card Memo, *supra* note 2, at ¶ 1 (“You . . . have an obligation to safeguard Government records regarding weapons of mass destruction . . . including information about the current locations of stockpiles of nuclear materials.”).

regulation.”⁴³⁷ The majority of courts have interpreted this exemption to apply to materials related to internal administrative or personnel concerns, including law enforcement manuals “to the extent that disclosure would . . . impede the effectiveness of an agency’s law enforcement activities.”⁴³⁸ As reported by FOIA officers within these agencies, exemption two has been applied to protect records with sensitive information about United States nuclear facilities (e.g. layouts and security practices) because that information could assist terrorists in conducting attacks against these facilities.⁴³⁹ As asserted above, the agencies with information about weapons of mass destruction (Department of Defense and Nuclear Regulatory Commission) were the agencies most likely to be affected by the Card Memo because it directly encouraged the protection of such information.⁴⁴⁰ Furthermore, the Nuclear Regulatory Commission and the Department of Defense were among the few agencies that took steps to implement the policies contained in the Ashcroft and Card Memos. The Department of Defense disseminated guidance as to specific criteria to be used in deciding whether to release information in consideration of the Ashcroft Memo and both the Department of Defense and the Nuclear Regulatory Commission established criteria for determining whether to disclose critical infrastructure information in accordance with the Card Memo.⁴⁴¹

Finally, the Department of Justice granted fewer requests (by percent and total numbers) (Figure 15) (Figure 18) in the aftermath of the Memos, but unlike the other agencies it was probably not influenced by the Card Memo because the Department of Justice does not possess significant amounts of information about weapons of mass destruction. Rather, as the agency that disseminated the Ashcroft Memo and the lead agency for formulating the Administration’s FOIA policy, it is not surprising that the policy contained in the Ashcroft Memo effected a reduction in FOIA disclosure by the

⁴³⁷ See DEPARTMENT OF JUSTICE, *supra* note 15 (stating that courts have upheld use of exemption two for information related to vulnerability assessments).

⁴³⁸ *Id.*

⁴³⁹ See Telephone interview with David Maier, *supra* note 88; see also Telephone interview with Carol Ann Reed, *supra* note 87.

⁴⁴⁰ See Card Memo, *supra* note 2, at ¶ 11 (“See [DOJ Guidance] on the authority available under Exemption of the FOIA.”); see also Card Memo, *supra* note 2, at ¶ 1 (“You . . . have an obligation to safeguard Government records regarding weapons of mass destruction . . . including information about the current locations of stockpiles of nuclear materials.”).

⁴⁴¹ GENERAL ACCOUNTING OFFICE, *supra* note 67.

Department of Justice.⁴⁴² Furthermore, the Justice Department was one of the few agencies to prepare additional written guidance and provide training on how to implement the policy of the Ashcroft Memo, increasing the likelihood that it would put the FOIA directive into practice and cut back on disclosure.⁴⁴³

V. DATA PROBLEMS

It is hard to draw firm conclusions from the FOIA data for several reasons. First, it is difficult to evaluate the effect of increased numbers of partially granted requests on FOIA disclosure. The Department of Defense, Department of Justice, and Nuclear Regulatory Commission showed decreased numbers of grants and increased numbers of partial grants. While this data shows a reduction in disclosure, it is difficult to measure the extent of this reduction, because a partial grant is both a grant and a denial and the amount and proportion of information disclosed in a partial grant may vary widely. Some FOIA policy experts claim that many partially granted requests are in fact denials because only a small, insignificant portion of the document is disclosed with the substantive portions of the document being redacted.⁴⁴⁴

Second, the number of requests received is an imperfect indicator of changes in FOIA disclosure because it is influenced by the perceptions of FOIA requesters and may not reflect the reality of FOIA disclosure. Thus, FOIA requesters may be deterred from making requests because public interest groups, media organizations and legal scholars have generated the perception that the government is restricting access to information under FOIA, not because FOIA disclosure has in fact decreased.

Third, the number of requests received by federal agencies may not accurately reflect the extent to which requesters have been discouraged from making requests, because decreases in initial requests received may have been offset by increases in requests for routine information. Some FOIA policy experts report that requesters must now make FOIA requests for materials that

⁴⁴² See Ashcroft Memo, *supra* note 1.

⁴⁴³ See General Accounting Office, *supra* note 67. Other agencies include: Department of Energy, Department of Interior, Department of Labor, National Aeronautics & Space Administration, and Social Security Administration.

⁴⁴⁴ Telephone Interview with Andy Alexander, *supra* note 36 (“Agencies are partially granting requests by redacting nearly the entire document and disclosing an unimportant line or two.”).

were previously available on agency websites or through informal contacts in the government.⁴⁴⁵ In the aftermath of 9/11, several agencies withdrew significant amounts of information from their websites for several months.⁴⁴⁶ While many agencies later reposted the withdrawn information, some agencies, such as the Nuclear Regulatory Commission, still continue to limit the information available on their websites.⁴⁴⁷ Also, there is anecdotal evidence that FOIA requesters, particularly reporters and media organizations, are now making FOIA requests for routine records that previously could have been obtained through informal contacts with government officials.⁴⁴⁸ Therefore, these requests (which are now being made through FOIA rather than through informal contacts) may have distorted the initial disposition data for federal agencies by inflating the number and percent of requests granted from 2002-2003.

Finally, it is difficult to evaluate the effect of the Memos on FOIA disclosure, because the terrorist attacks of 9/11 created a new public awareness of the importance of protecting homeland security information. This new awareness was developed by the public in response to the 9/11 terrorist attacks, but has been encouraged by the federal government as well. The GAO survey results reflect the difficulty of separating out the effects of the Memos and the new public awareness of the importance of protecting homeland security on FOIA disclosure. In the GAO survey, seventy-five percent of FOIA officers surveyed that noted a decrease in disclosure cited the policy stated in the Ashcroft Memo as a factor affecting the change in FOIA disclosure.⁴⁴⁹ A comparable number (sixty-five percent) also cited concerns over protecting information related to homeland security as a factor in

⁴⁴⁵ See Telephone Interview with Andy Alexander, *supra* note 36 (stating that requesters are now having to make FOIA requests for the most rudimentary requests and citing an example of a recent request made by a reporter for the biography of an Undersecretary in the Department of Labor).

⁴⁴⁶ See REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *supra* note 14 (stating that between September 11, 2001 and May 2000, information was removed from several agency websites, including: Department of Energy, Department of Interior, Federal Aviation Administration, Department of Transportation, the Internal Revenue Service, and the Environmental Protection Agency).

⁴⁴⁷ See OMB Watch, *supra* note 50 (reporting that the Nuclear Regulatory Commission removed approximately 700,000 documents from its site in October 2004, the second time it had done so since the 9/11 attacks).

⁴⁴⁸ See Telephone Interview with Andy Alexander, *supra* note 36.

⁴⁴⁹ GENERAL ACCOUNTING OFFICE, *supra* note 41, at 24.

influencing the reduction in FOIA disclosure.⁴⁵⁰ Therefore, FOIA Officers may be withholding greater amounts of information under FOIA because they believe they should do so to protect homeland security, not because the Memos have instructed them to reduce FOIA disclosure.

VI. CONCLUSION

Despite the problems with interpreting the data, an overall examination of FOIA data from 1998-2003 indicates that the widely suggested “veil of secrecy” surrounding the Bush Administration is greatly exaggerated. Overall FOIA dissemination by the federal agencies has been at comparable levels before and after the release of the Memos, including the total number of initial requests received, disposition of initial requests (grants, partial grants, and denials); use of total exemptions; and application of exemption two.⁴⁵¹ At the same time, government officials are wrong to deny that FOIA policy and disclosure has not changed under the Bush Administration. An examination of FOIA data from five homeland security-related agencies suggests that FOIA disclosure has lessened for some agencies (The Department of Defense, Department of Justice, and the Nuclear Regulatory Commission) that were most likely to be affected by the Memos, but these decreases have not been substantial.

⁴⁵⁰ *Id.* Additionally FOIA officers interviewed did not specifically mention the policies contained in the Memos as a factor affecting disclosure, but they did acknowledge a greater emphasis on protecting information that could be used to carry out a terrorist attack in the aftermath of the 9/11 terrorist attacks. *See* Telephone interview with Carol Ann Reed, *supra* note 88 (stating that since 9/11, FOIA officers have examined documents that may aid terrorists with greater care); *see also* Telephone interview with Kathy Ray, *supra* note 83 (“There is greater awareness of what [information] could be used by terrorists.”).

⁴⁵¹ As asserted above, federal agencies did increase exemption four levels between 1998-2000 and 2002-2003 primarily due to increased use of exemption four by the Department of Labor.

TABLES AND FIGURES

Figure 1

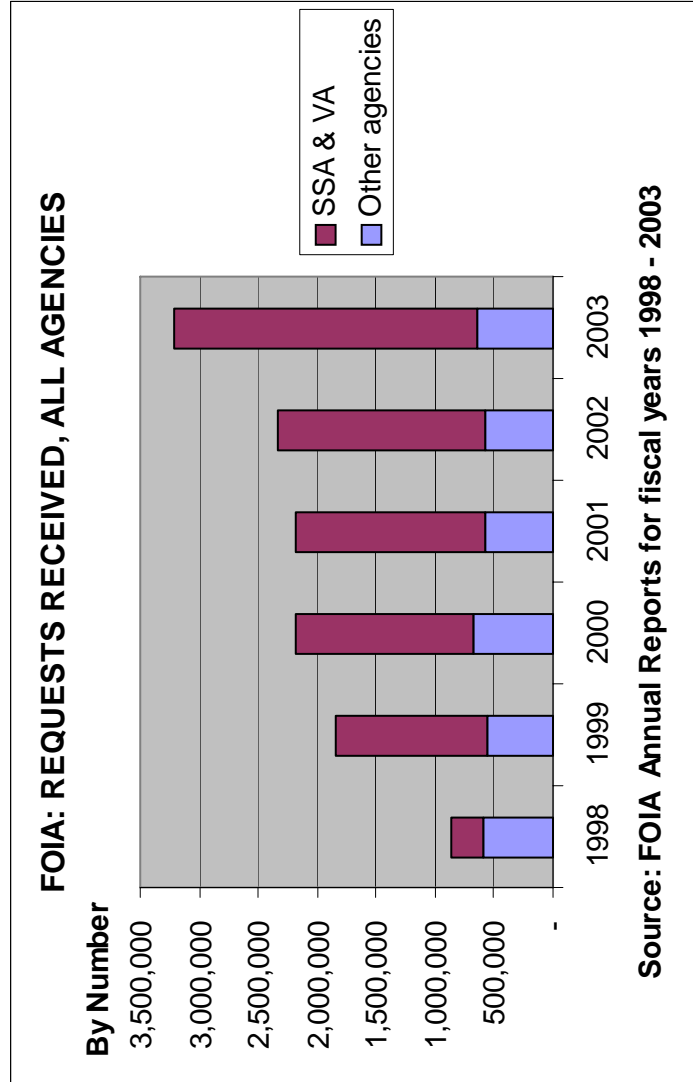


Table 1: FOIA: Requests Received, All Agencies

	Year										Total
	1998	1999	2000	2001	2002	2003	98-00	02-03			
All Agencies	868,806	1,849,682	2,174,017	2,188,799	2,338,430	3,205,969	1,630,835	2,772,200			12,625,703
SSA & VA	275,228	1,290,355	1,502,294	1,616,542	1,764,679	2,559,446	1,022,626	2,162,063			9,008,544
Other Agencies	593,578	559,327	671,723	572,257	573,751	646,523	608,209	610,137			3,617,159

Source: FOIA Annual Reports for fiscal years 1998 – 2003

Figure 2

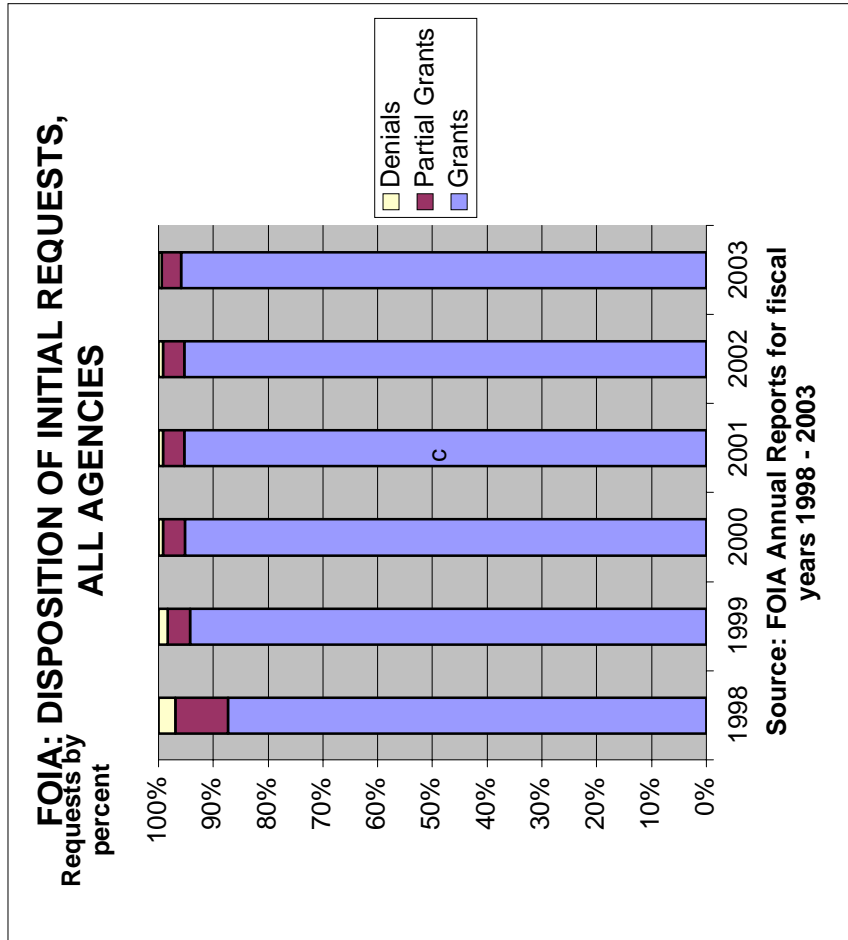


Table 2: FOIA: Disposition of Initial Requests, All Agencies (By Percent)

	Year										Total
	1998	1999	2000	2001	2002	2003	98-00	02-03			
Grants	87%	94%	95%	95%	95%	96%	92%	96%	94%	94%	
Partial Grants	10%	4%	4%	4%	4%	4%	6%	4%	5%	5%	
Denials	3%	2%	1%	1%	1%	1%	2%	1%	1%	1%	
($\chi^2 = 96149$, $n = 11497599$, $p < 0.0001$)											
Source: FOIA Annual Reports for fiscal years 1998 - 2003											

Figure 3

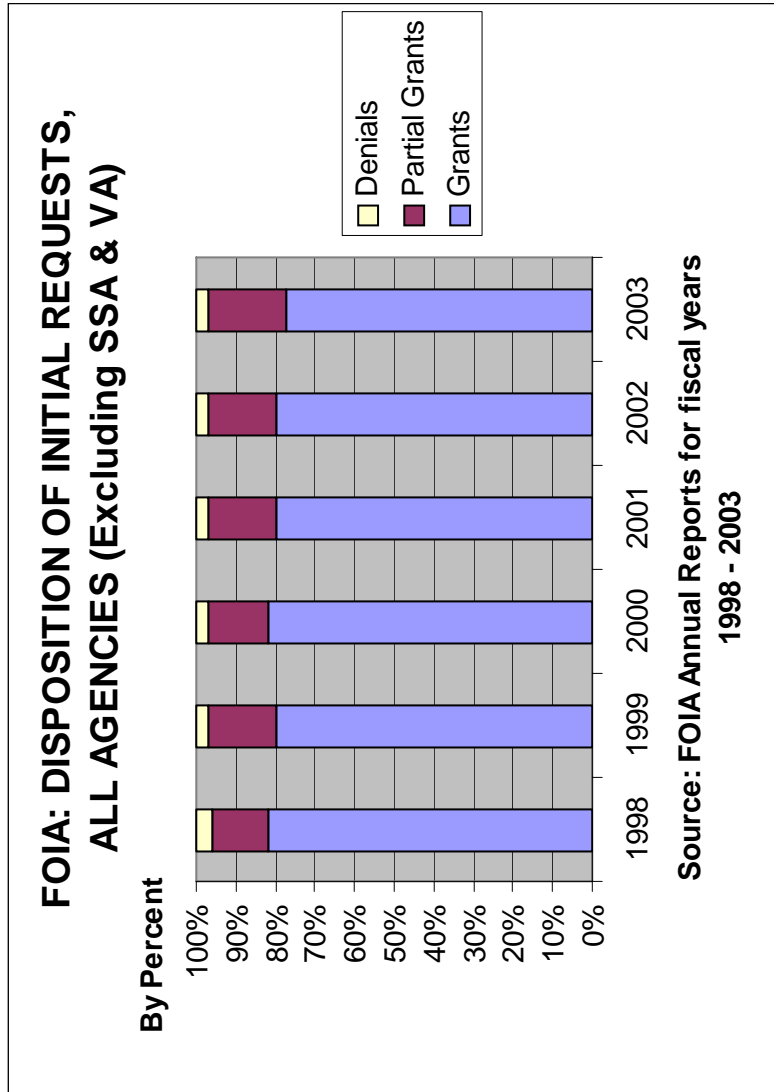


Table 3: FOIA: Disposition of Initial Requests, All Agencies (Excluding SSA and VA)

	Year									
	1998	1999	2000	2001	2002	2003	98-00	02-03	Total	
Grants	82%	80%	82%	80%	80%	78%	81%	79%	80%	
Partial Grants	14%	17%	15%	17%	17%	20%	15%	19%	17%	
Denials	4%	3%	3%	3%	3%	3%	4%	3%	3%	
($\chi^2 = 9031, n = 2621723, p < 0.0001$)										
Source: FOIA Annual Reports for fiscal years, 1998 - 2003										

Figure 4

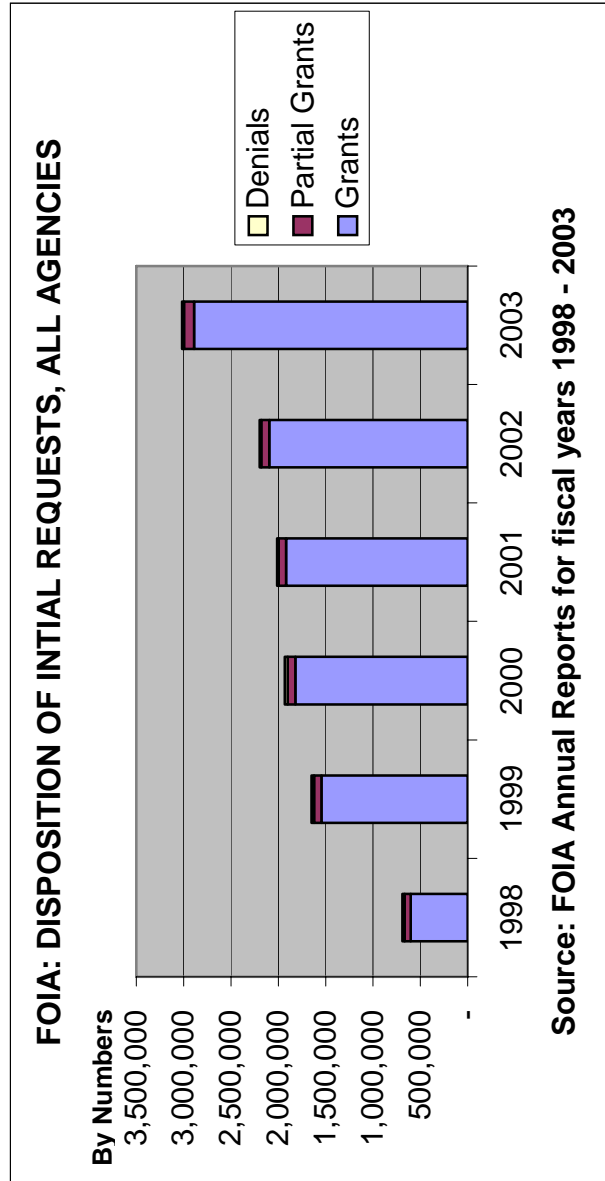


Table 4: FOIA: Disposition of Initial Requests, All Agencies (By Number)

	Year										
	1998	1999	2000	2001	2002	2003	98-00	02-03	Total		
Grants	601,502	1,545,295	1,821,174	1,917,412	2,094,325	2,891,626	1,322,657	2,492,976	11,592,489		
Partial Grants	66,430	76,136	78,491	79,308	85,460	105,920	73,686	95,690	499,001		
Denials	20,943	27,297	31,797	16,788	18,430	19,265	26,679	18,848	140,256		
($\chi^2 = 96149$, $n = 11497599$, $p < 0.0001$)											
Source: FOIA Annual Reports for fiscal years, 1998 - 2003											

Figure 5

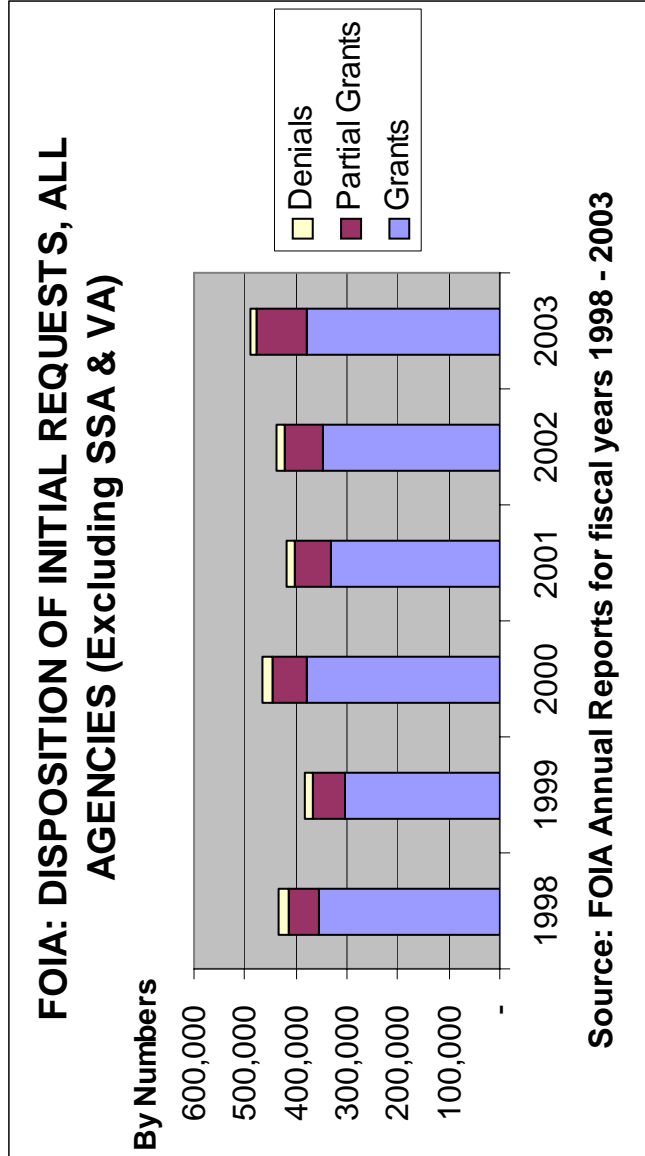


Table 5: FOIA: Disposition of Initial Requests, All Agencies (Excluding SSA & VA)

	Year										
	1998	1999	2000	2001	2002	2003	98-00	02-03	Total		
Grants	355,269	304,417	379,227	332,969	347,370	379,441	346,304	363,406	2,098,693		
Partial Grants	60,421	64,648	66,811	71,593	75,924	96,255	63,960	86,090	435,652		
Denials	17,449	12,969	17,923	13,331	13,042	12,664	16,114	12,853	87,378		
(x2 = 9031, n = 2621723, p <0.0001)											
Source: FOIA Annual Reports for fiscal years, 1998 - 2003											

Figure 6

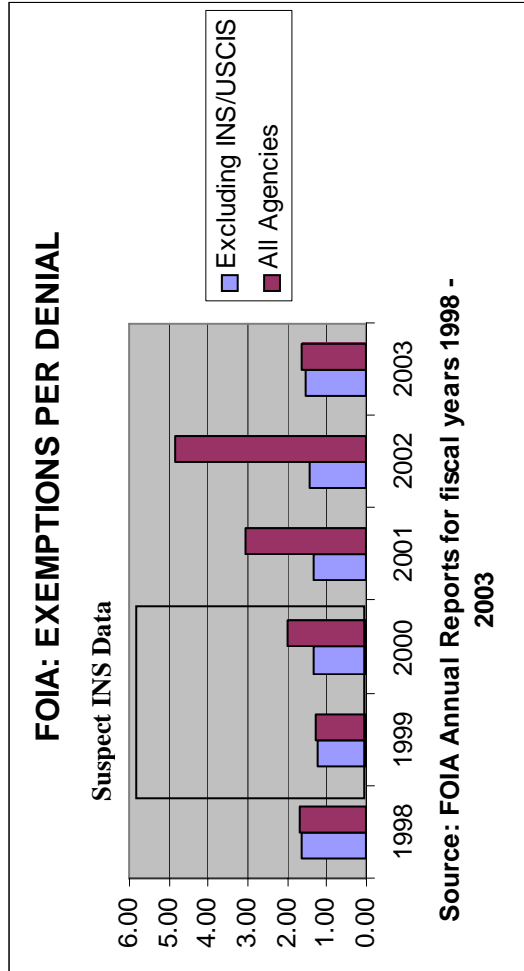


Table 6: FOIA: Exemptions Per Denial, All Agencies

	Year									
	1998	1999	2000	2001	2002	2003	98-00	02-03	Total	Total
Exemptions Per Denial	1.66	1.26	1.98	3.04	4.82	1.64	1.63	3.23	2.40	2.40
Total Exemptions	145,355	129,982	218,577	277,920	501,118	204,998	164,638	353,058	1,477,950	1,477,950
Denials (Full and Partial)	87,373	103,433	110,288	96,096	103,890	125,185	100,365	114,538	626,265	626,265
(x2 = 231589, n = 2958834, p <0.0001)										
Source: FOIA Annual Reports for fiscal years, 1998 - 2003										

Table 7: FOIA: Exemptions Per Denial, All Agencies (Excluding INS/USCIS)

	Year									
	1998	1999	2000	2001	2002	2003	98-00	02-03	Total	Total
Exemptions Per Denial	1.63	1.20	1.30	1.33	1.44	1.53	1.36	1.49	1.39	1.39
Total Exemptions	104,368	96,730	113,197	95,769	99,983	113,284	104,765	106,634	623,331	623,331
Denials	64,054	80,628	87,209	71,826	69,402	73,945	77,297	71,674	447,064	447,064
Source: FOIA Annual Reports for fiscal years, 1998 - 2003										

Figure 7

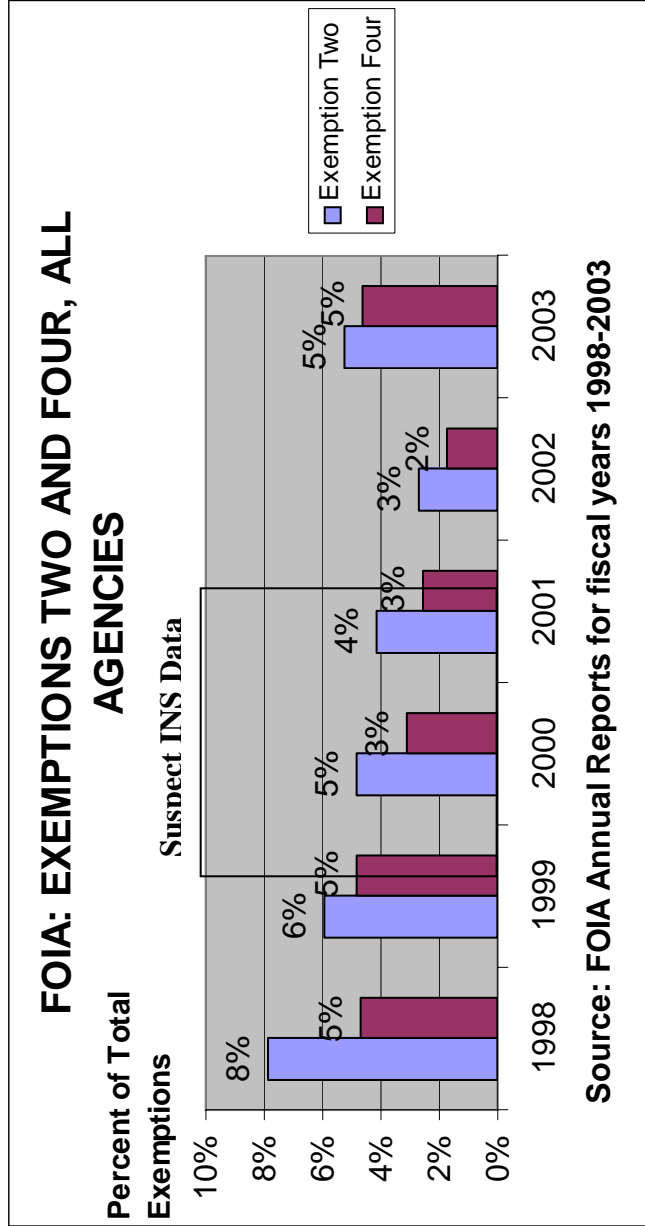


Table 8: FOIA: Exemptions Two and Four, All Agencies (By Percent of Total Exemptions)

	Year										Total
	1998	1999	2000	2001	2002	2003	98-00	02-03			
Exemption Two	8%	6%	5%	4%	3%	5%	6%	4%			5%
Exemption Four	5%	5%	3%	3%	2%	5%	4%	3%			4%

Source: FOIA Annual Reports for fiscal years, 1998 - 2003

Figure 8

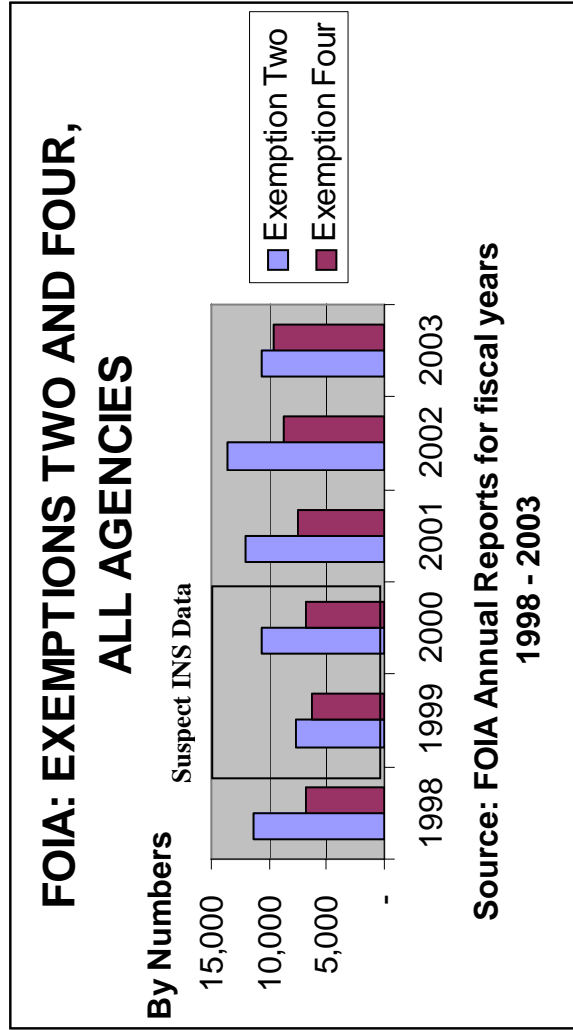


Table 9: FOIA: Exemptions Two and Four, All Agencies

	Year										
	1998	1999	2000	2001	2002	2003	98-00	02-03	Total		
Exemption Two	11,379	7,711	10,605	12,015	13,626	10,679	9,898	12,153	66,015		
Exemption Four	6,769	6,302	6,798	7,514	8,722	9,520	6,623	9,121	45,625		
Source: FOIA Annual Reports for fiscal years, 1998 - 2003											

Figure 9

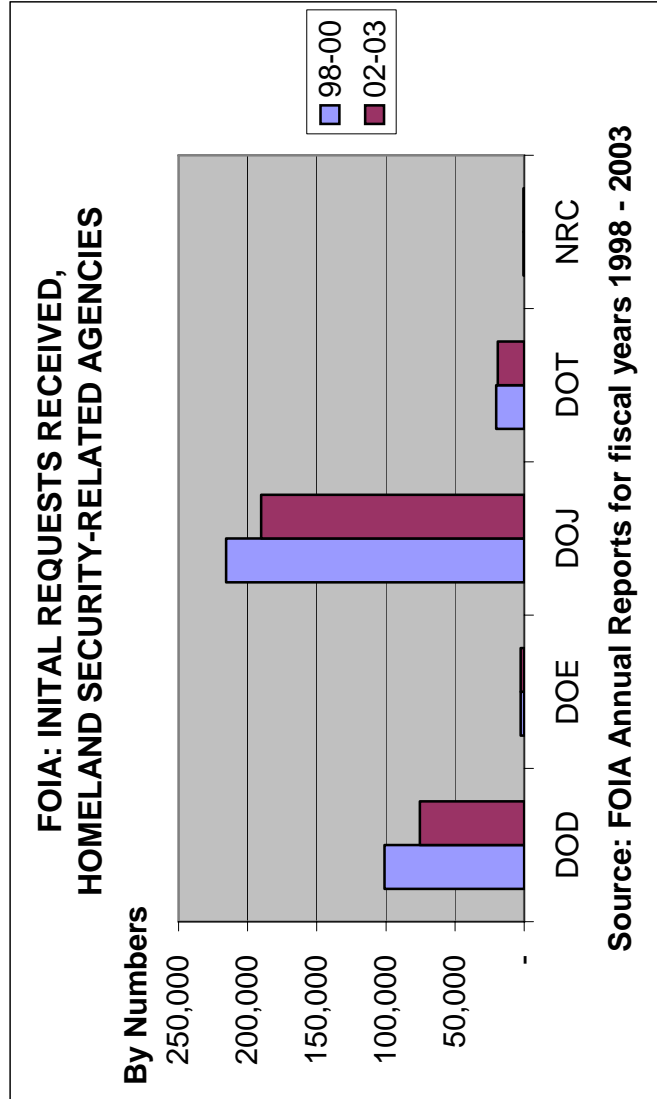


Figure 10

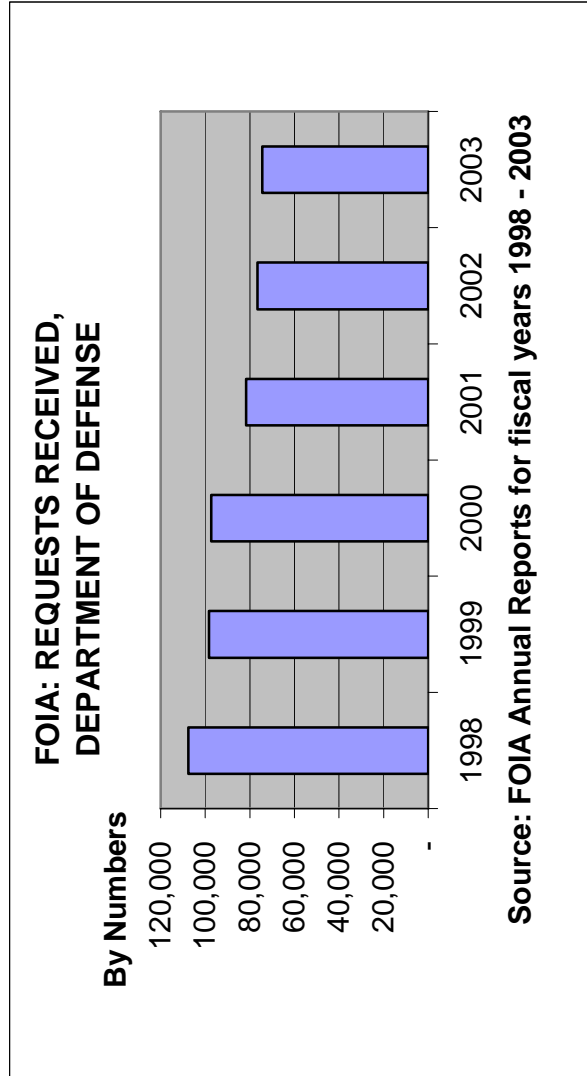


Table 10: FOIA: Initial Requests Received, Department of Defense

	Year										
	1998	1999	2000	2001	2002	2003	98-00	02-03	Change		Total
Requests Received	107,627	98,338	97,266	81,682	76,579	74,399	101,077	75,489	- 25%		535, 891
Source: FOIA Annual Reports for fiscal years, 1998 - 2003											

Figure 11

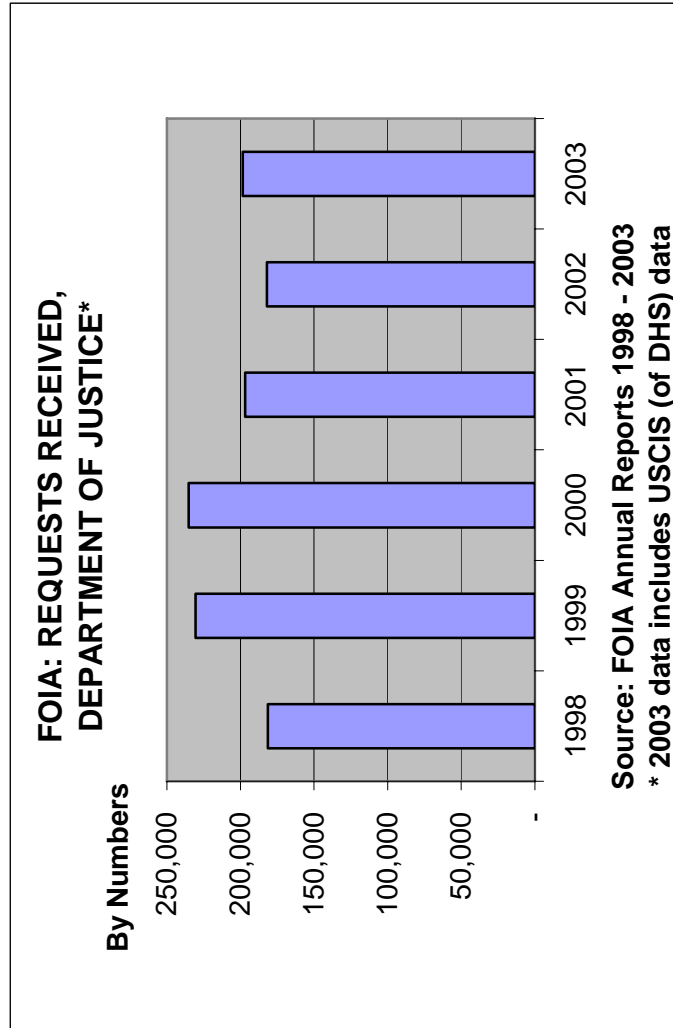


Table 11: FOIA: Requests Received, Department of Justice

	Year										
	1998	1999	2000	2001	2002	2003	98-00	02-03	Change		Total
Requests Received	181,388	230,492	235,042	196,917	182,079	198,463	215,641	190,271	- 12%		1,224,381
Source: FOIA Annual Reports for fiscal years, 1998 - 2003											

Figure 12

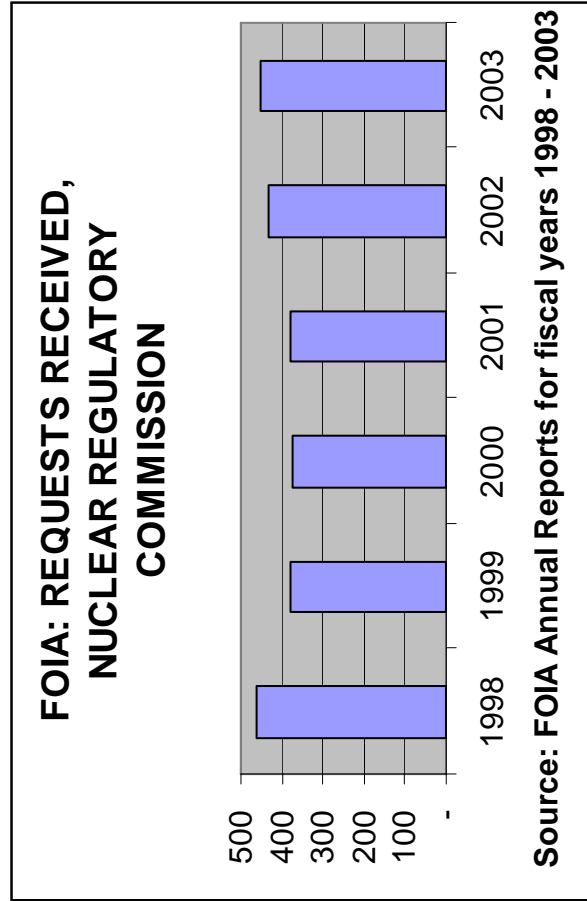


Table 12: FOIA: Requests Received, Nuclear Regulatory Commission

	Year										
	1998	1999	2000	2001	2002	2003	98-00	02-03			Change Total
Requests Received	461	379	376	379	434	450	405	442			+ 9%
Source: FOIA Annual Reports for fiscal years, 1998 - 2003											
											2,479

Figure 13

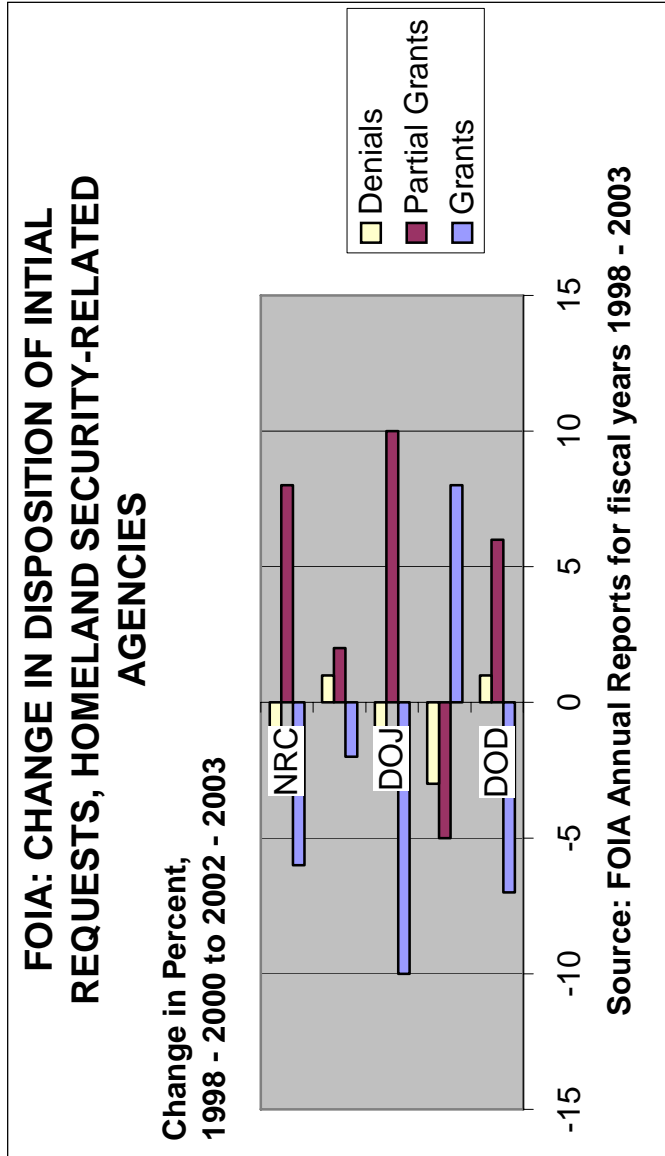


Figure 14

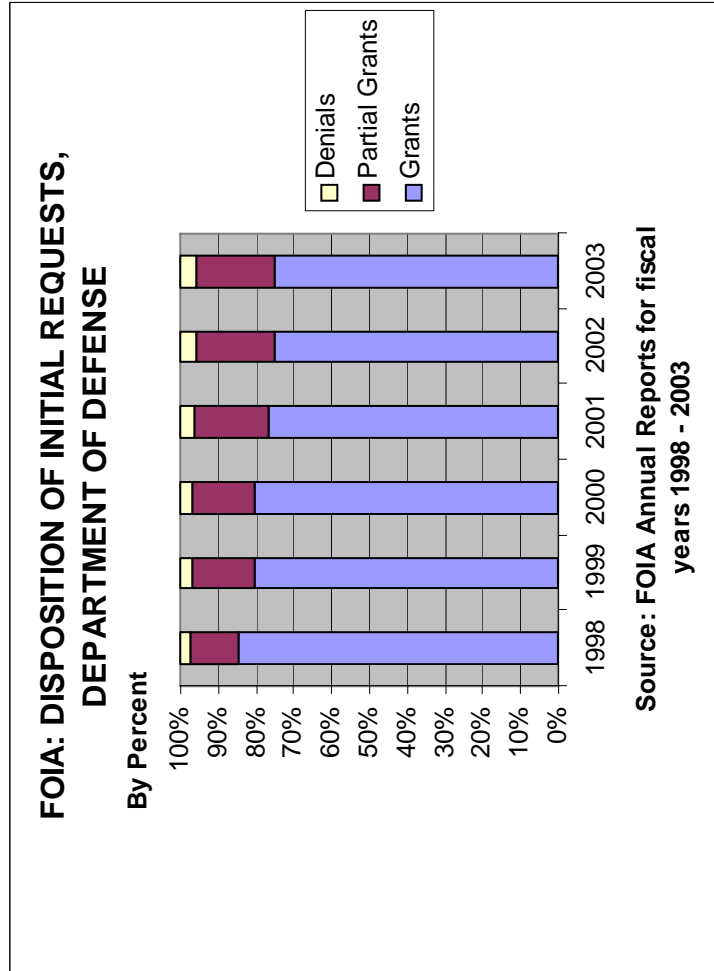


Table 13: FOIA: Disposition of Initial Requests, Department of Defense (By Percent)

	Year										
	1998	1999	2000	2001	2002	2003	98-00	02-03	Total		
Grants	84%	80%	80%	77%	75%	75%	82%	75%	79%		
Partial Grants	13%	17%	16%	20%	21%	20%	15%	21%	18%		
Denials	3%	3%	3%	4%	4%	4%	3%	4%	4%		
($\chi^2 = 2721, n = 381406, p < 0.0001$)											
Source: FOIA Annual Reports for fiscal years, 1998 - 2003											

Figure 15

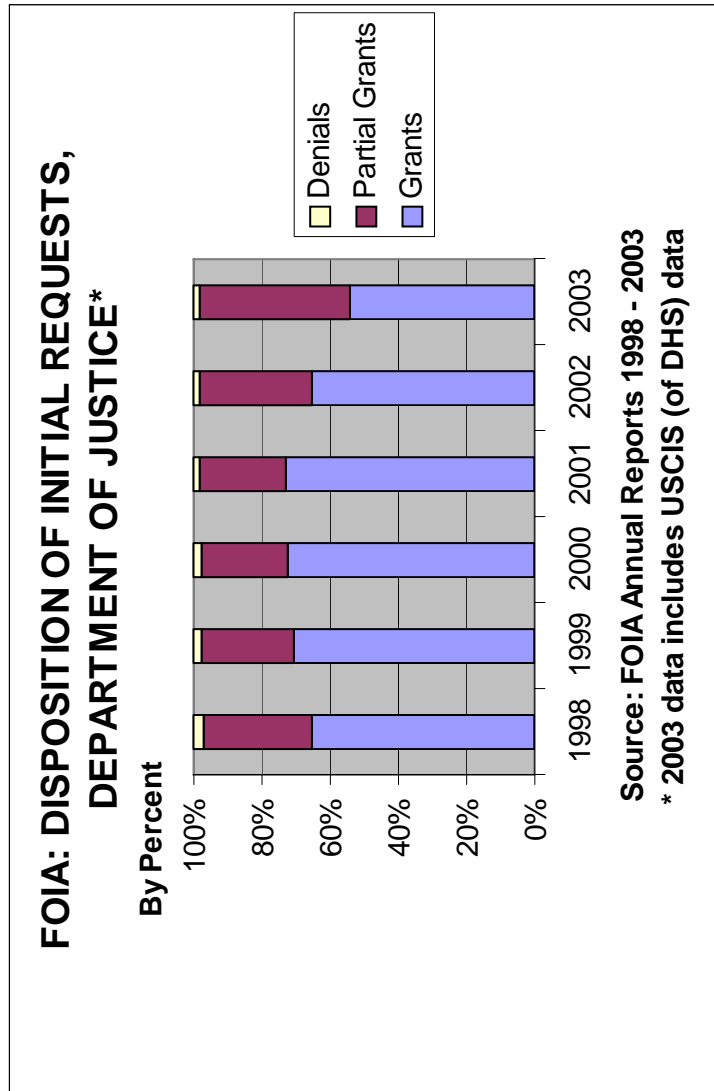


Table 14: FOIA: Disposition of Initial Requests, Department of Justice (By Percent)

	Year										
	1998	1999	2000	2001	2002	2003	98-00	02-03	Total		
Grants	66%	71%	72%	73%	66%	54%	70%	60%	67%		
Partial Grants	31%	27%	25%	25%	33%	44%	28%	38%	31%		
Denials	3%	2%	2%	2%	2%	2%	3%	2%	2%		
($\chi^2 = 16524, n = 730183, p < 0.0001$)											
Source: FOIA Annual Reports for fiscal years, 1998 - 2003											

Figure 16

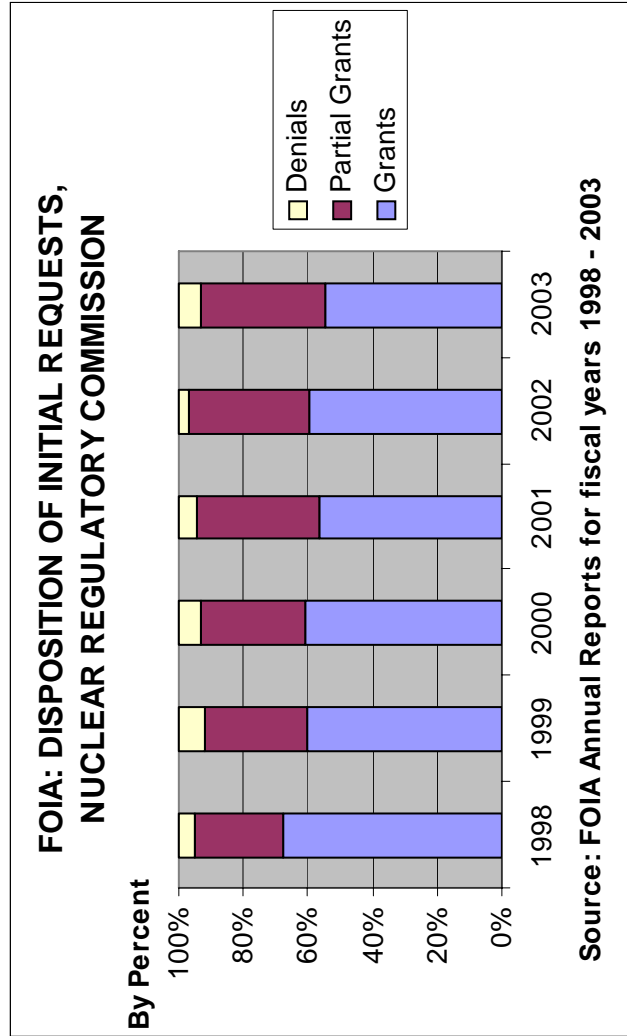


Table 15: FOIA: Disposition of Initial Requests, Nuclear Regulatory Commission (By Percent)

	Year										Total
	1998	1999	2000	2001	2002	2003	98-00	02-03			
Grants	68%	60%	61%	57%	59%	55%	63%	57%			60%
Partial Grants	27%	32%	32%	38%	37%	38%	30%	38%			34%
Denials	5%	8%	7%	5%	3%	7%	7%	5%			6%
($\chi^2 = 22, n = 1777, p < 0.0153$)											
Source: FOIA Annual Reports for fiscal years, 1998 - 2003											

Figure 17

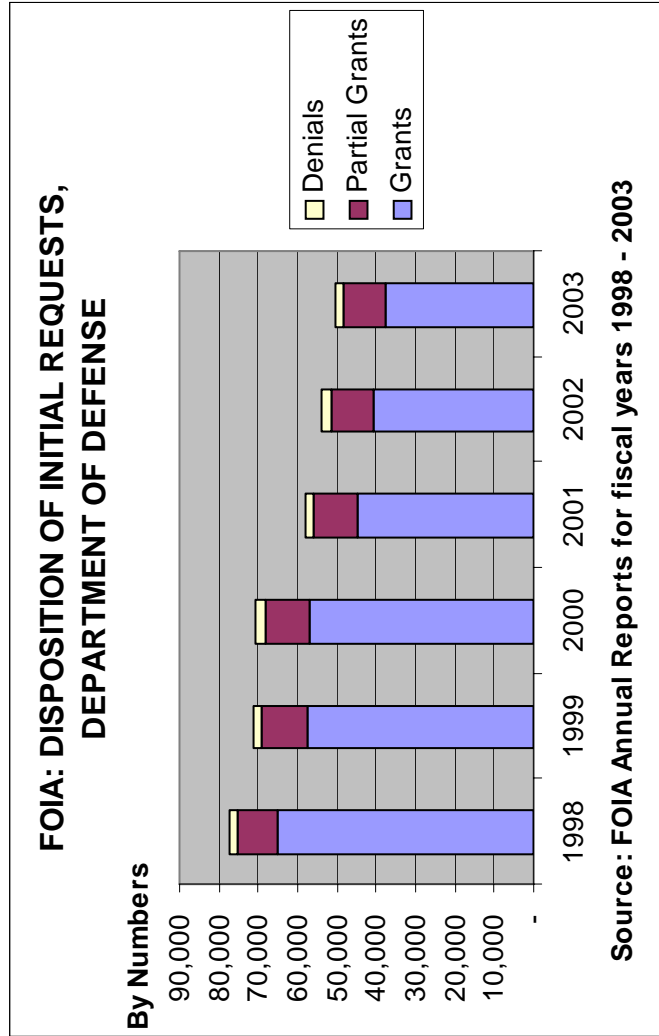


Table 16: FOIA: Disposition of Initial Requests, Department of Defense (By Numbers)

	Year											
	1998	1999	2000	2001	2002	2003	98-00	02-03	Change	Total		
Grants	65,164	57,221	56,836	44,531	40,458	37,802	59,740	39,130	- 34%	302,012		
Partial Grants	9,998	11,742	11,551	11,371	11,133	10,276	11,097	10,705	- 4%	66,071		
Denials	2,065	2,147	2,367	2,172	2,399	2,173	2,193	2,286	+ 4%	13,323		
($\chi^2 = 2721$, n = 381406, p < 0.0001)												
Source: FOIA Annual Reports for fiscal years, 1998 - 2003												

Figure 18

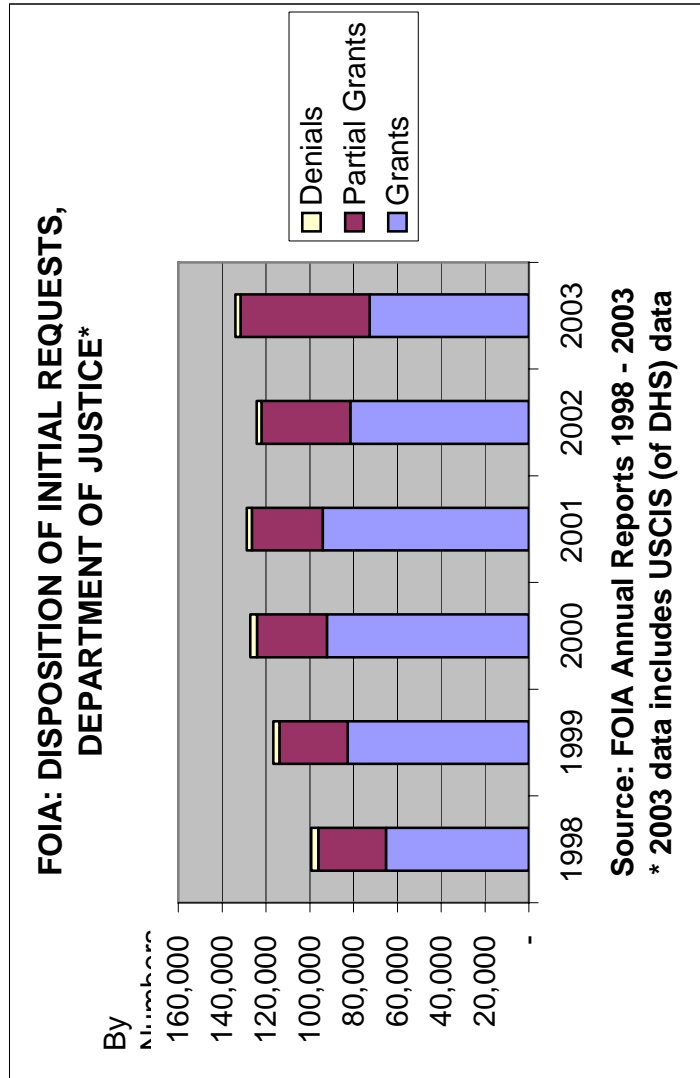


Table 17: FOIA: Disposition of Initial Requests, Department of Justice (By Numbers)

Year	1998	1999	2000	2001	2002	2003	98-00	02-03	Change	Total
Grants	65,135	82,582	92,134	94,058	81,426	72,671	79,950	77,049	- 4%	488,006
Partial Grants	31,036	31,231	32,010	32,325	40,571	58,899	31,426	49,735	+ 58%	226,072
Denials	3,188	2,870	3,024	2,427	2,187	2,409	3,027	2,298	+ 14%	16,105
($\chi^2 = 16524$, $n = 730183$, $p < 0.0001$)										
Source: FOIA Annual Reports for fiscal years, 1998 - 2003										

Figure 19

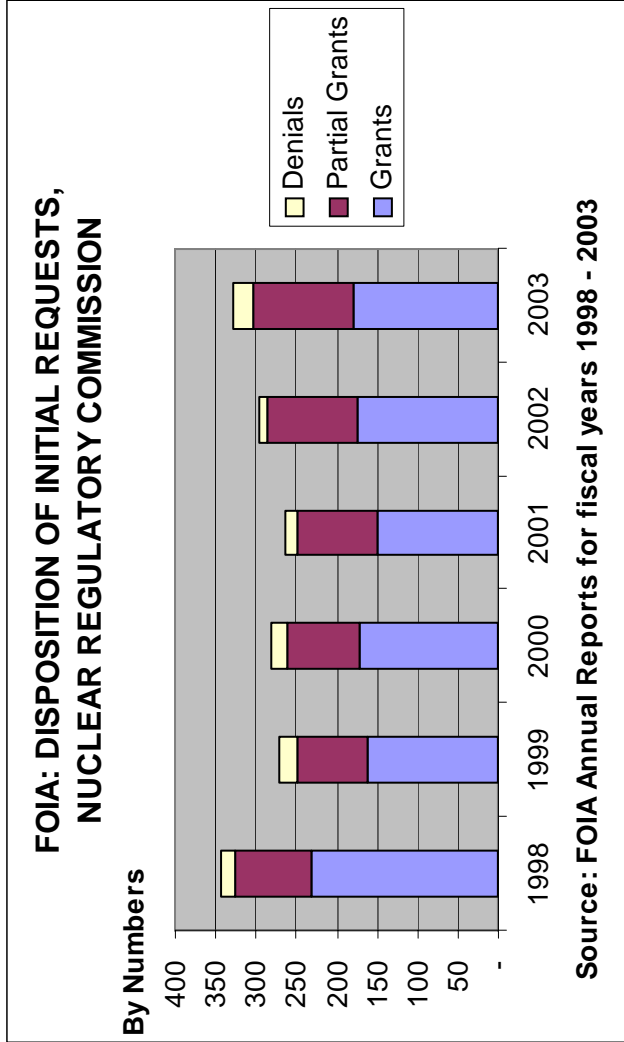


Table 18 FOIA: Disposition of Initial Requests, Nuclear Regulatory Commission (By Numbers)

	Year											Change	Total
	1998	1999	2000	2001	2002	2003	98-00	02-03					
Grants	232	162	171	149	175	179	188	177	- 6%	1,068			
Partial Grants	93	86	90	100	110	125	90	118	+ 31%	604			
Denials	17	22	19	14	10	23	19	17	- 15%	105			

($\chi^2 = 22, n = 1777, p < 0.0153$)

Source: FOIA Annual Reports for fiscal years, 1998 - 2003

Figure 20

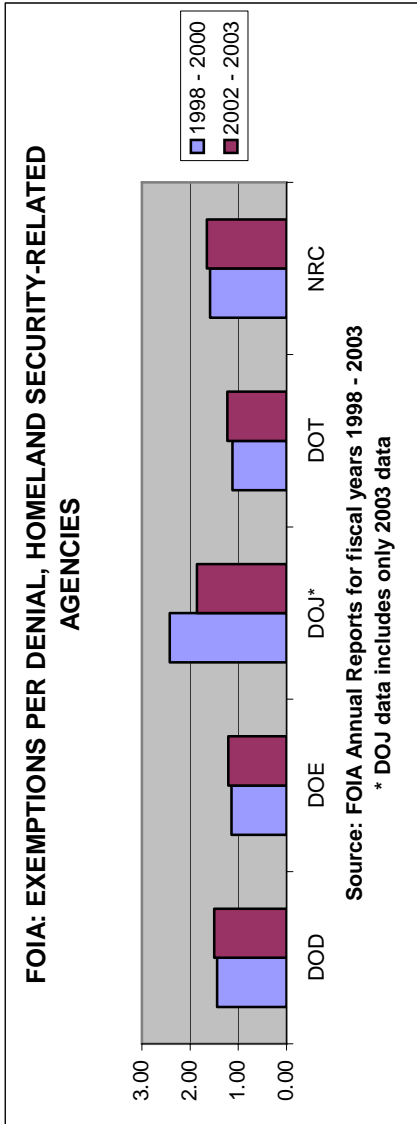


Figure 21

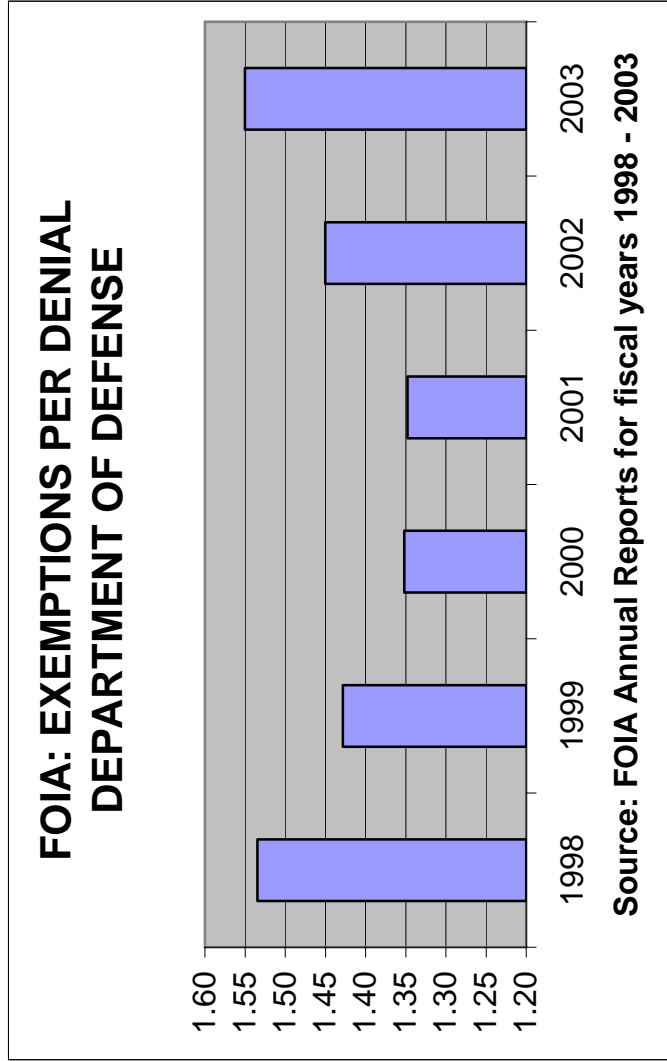


Table 19 FOIA: Exemptions Per Denial, Department of Defense

	Year										Total
	1998	1999	2000	2001	2002	2003	98-00	02-03			
Exemptions Per Denial	1.53	1.43	1.35	1.35	1.45	1.55	1.44	1.50			1.44
Total Exemptions	18,513	19,840	18,812	18,252	19,625	19,296	19,055	19,461			114,338
Denial (Full and Partial)	12,063	13,889	13,918	13,543	13,532	12,449	13,290	12,991			79,394
($\chi^2 = 138, n = 193732, p < 0.0001$)											
Source: FOIA Annual Reports for fiscal years, 1998 - 2003											

Figure 22

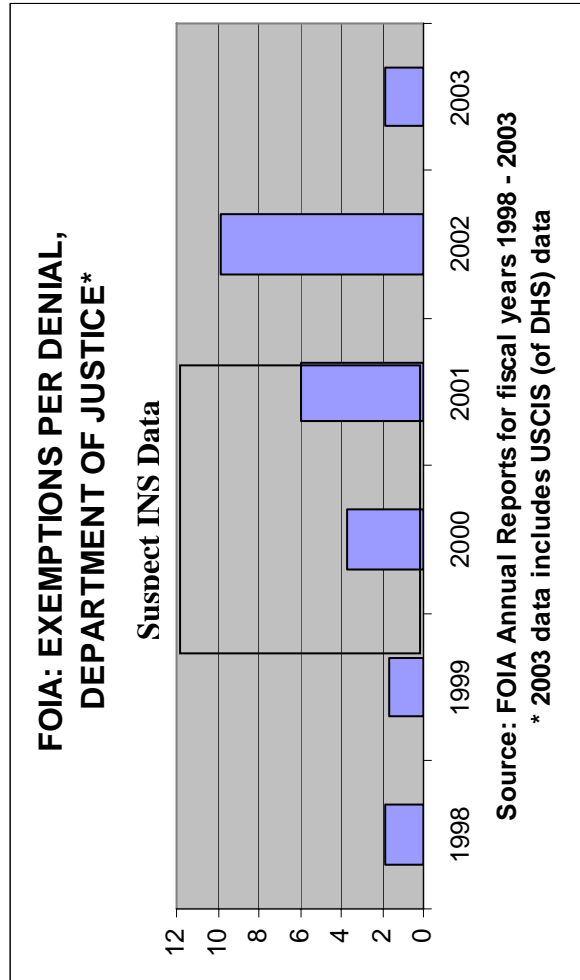


Table 20: FOIA: Exemptions Per Denial, Department of Justice

	Year										Total
	1998	1999	2000	2001	2002	2003	98-00	03			
Exemptions per denial	1.87	1.67	3.72	5.93	9.82	1.86	2.42	1.86			4.15
Total Exemptions	63927	57106	130474	205911	419759	114036	83836	266898			991213
Denial (Full and Partial)	34224	34101	35034	34752	42758	61308	34453	52033			242177
($\chi^2 = 94771$, $n = 1233390$, $p < 0.0001$)											
Source: FOIA Annual Reports for fiscal years, 1998 - 2003											

Table 21 FOIA: Exemptions Per Denial, Department of Justice (Excluding USCIS/INS)

	Year										
	1998	1999	2000	2001	2002	2003	98-00	03	Total		
Exemptions per denial	2.10	2.11	2.10	2.27	2.25	2.22	2.10	2.24	2.18		
Total Exemptions	22,940	23,854	25,094	23,760	18,624	22,322	23,963	20,473	136,594		
Denial (Full and Partial)	10,905	11,296	11,955	10,482	8,270	10,068	11,385	9,169	62,976		
($\chi^2 = 6915$, $n = 1523575$, $p < 0.0001$)											
Source: FOIA Annual Reports for fiscal years, 1998 - 2003											

Figure 23

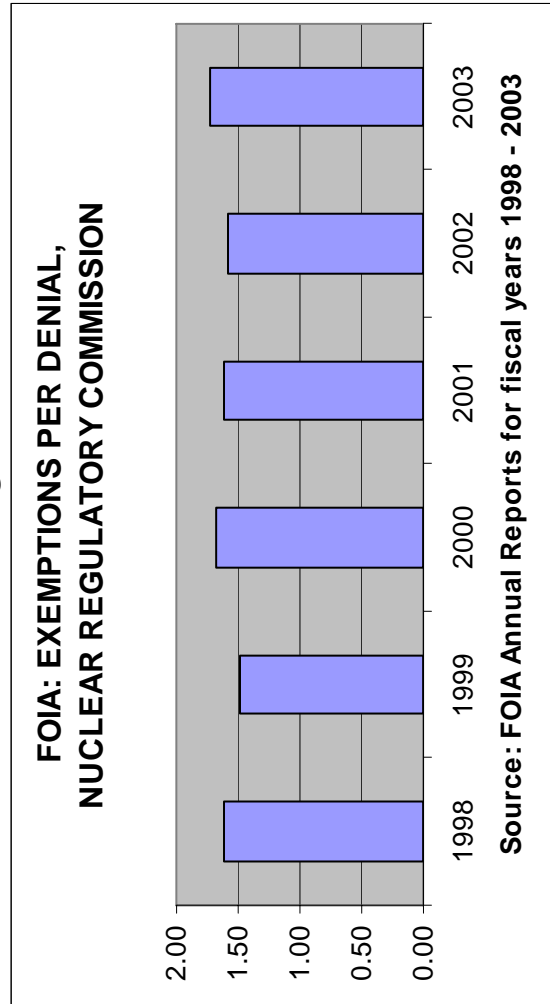


Table 22 FOIA: Exemptions Per Denial, Nuclear Regulatory Commission

	1998	1999	2000	2001	2002	2003	98-00	02-03	Total
Exemptions Per Denial	1.61	1.48	1.67	1.61	1.58	1.73	1.59	1.66	1.61

($\chi^2 = 1.04, n = 1857, p < 0.9590$)

Source: FOIA Annual Reports for fiscal years, 1998 - 2003

Figure 24

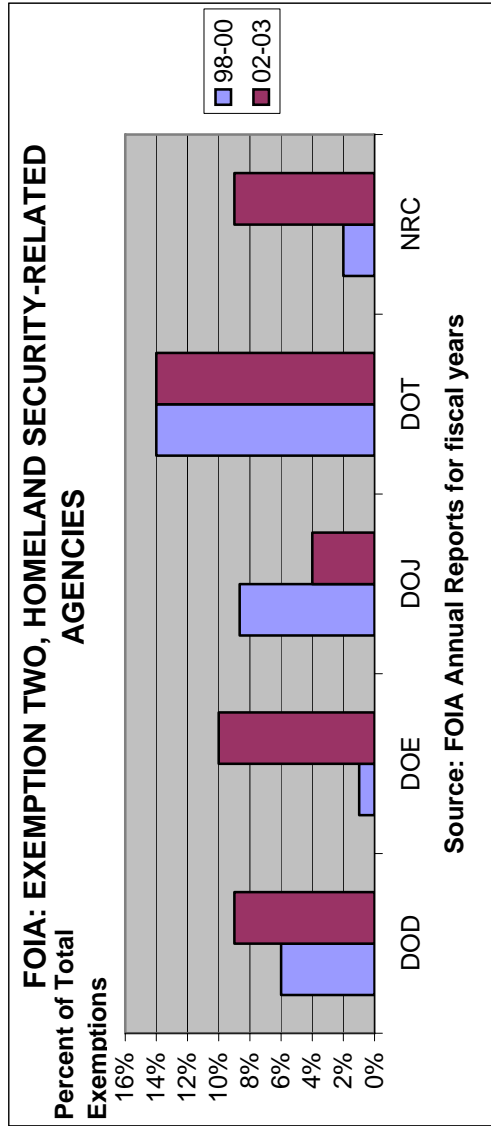


Figure 25

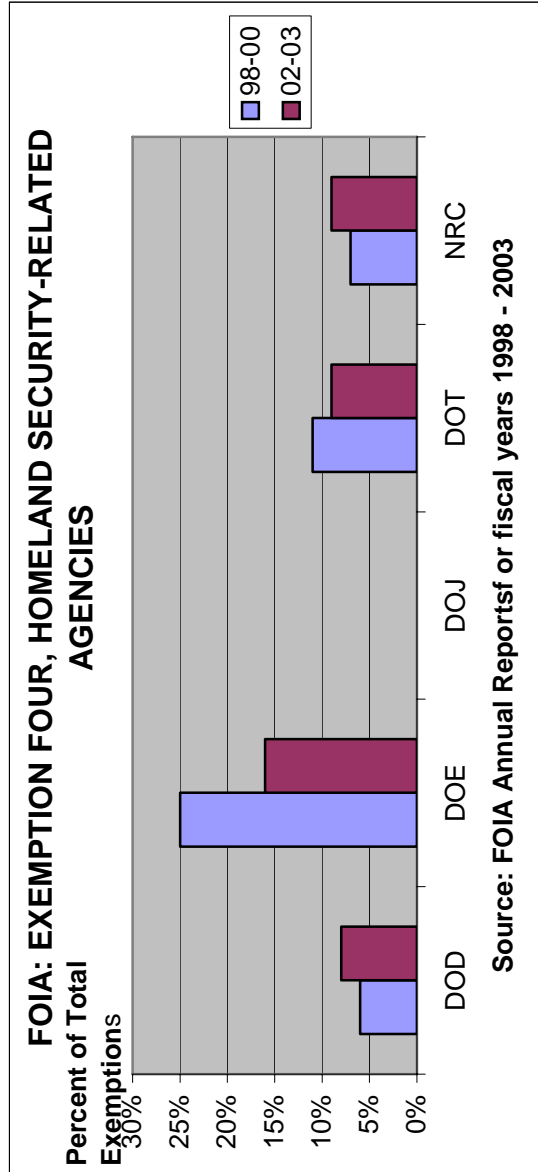


Figure 26

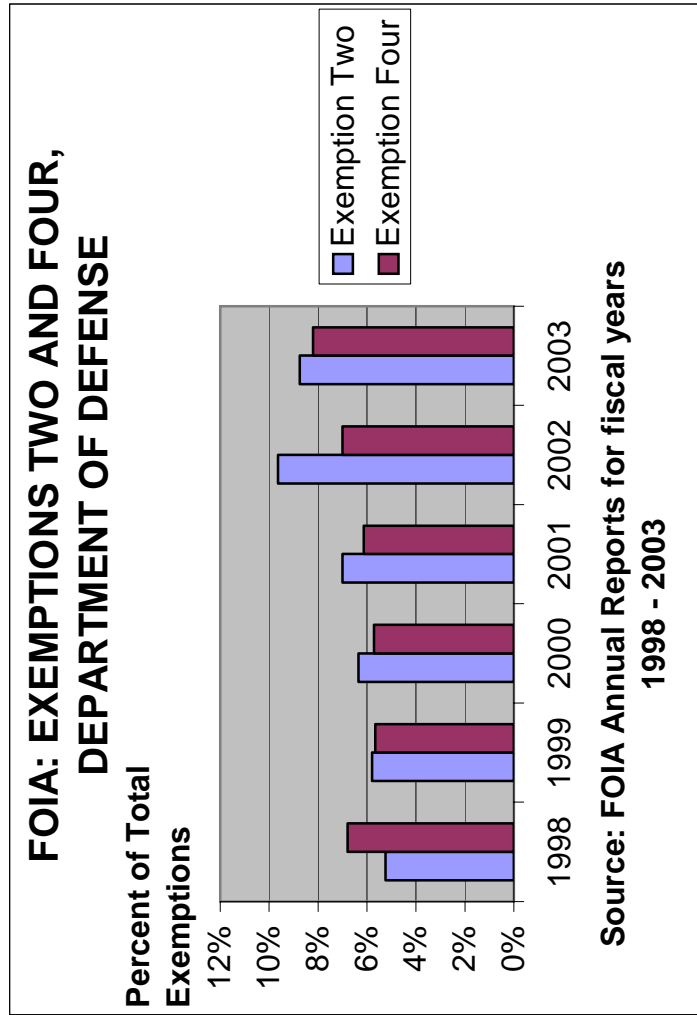


Figure 27

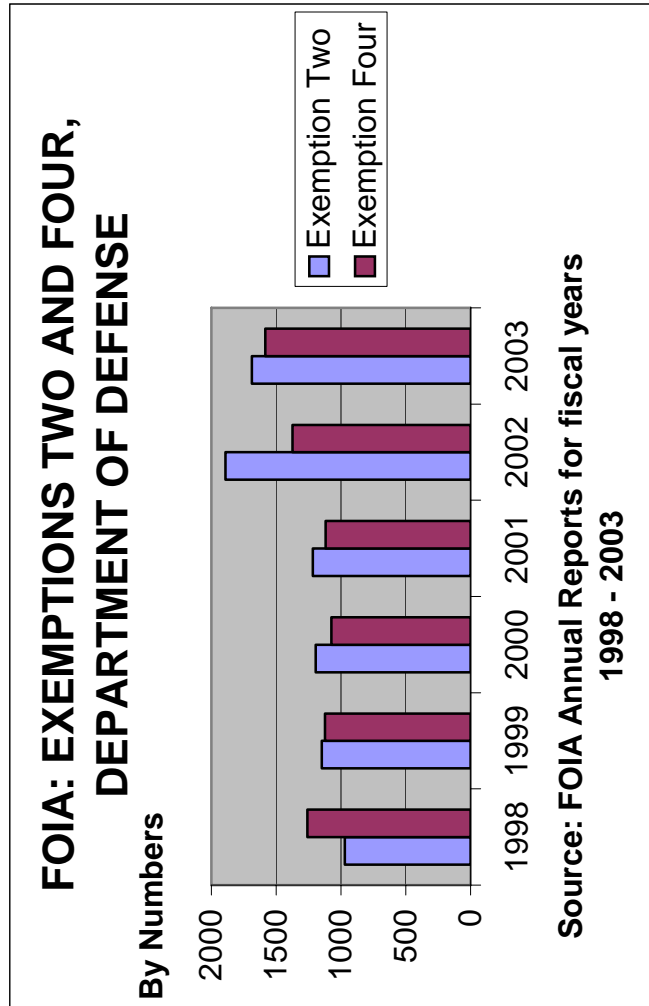


Table 23: FOIA: Exemptions Two and Four, Department of Defense

	Year										
	1998	1999	2000	2001	2002	2003	98-00	02-03	Total		
Exemption 2, Percent	5%	6%	6%	7%	10%	9%	6%	9%	7%		
Exemption 2, Total	970	1149	1196	1219	1891	1689	1105	1790	8114		
Exemption 4, Percent	7%	6%	6%	6%	7%	8%	6%	8%	7%		
Exemption 4, Total	1259	1124	1075	1119	1375	1583	1153	1479	7535		
Source: FOIA Annual Reports for fiscal years, 1998 - 2003											

Figure 28

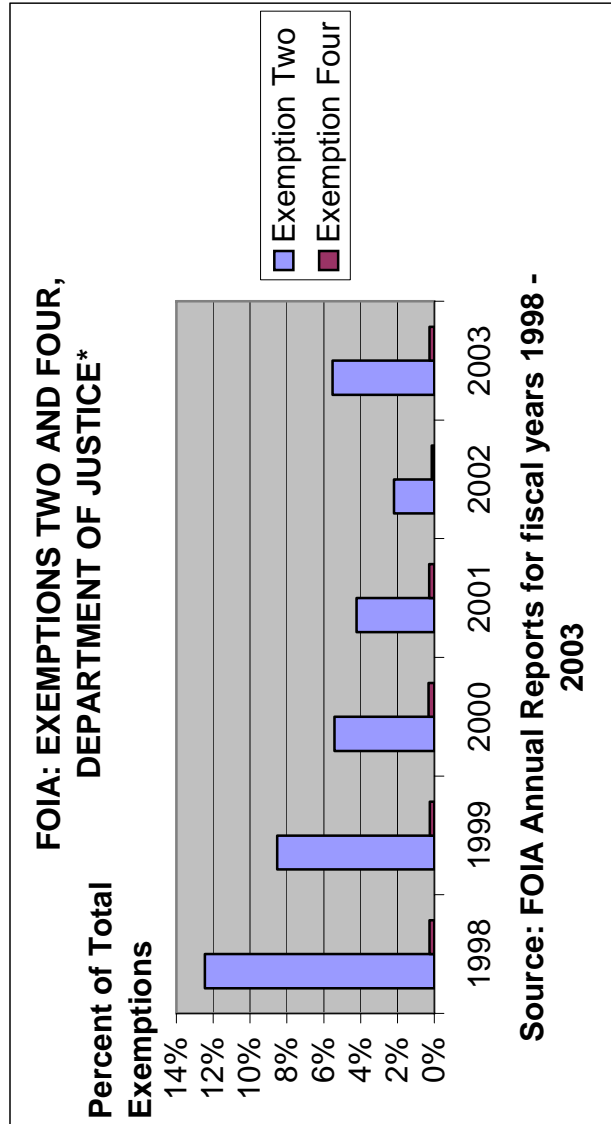


Figure 29

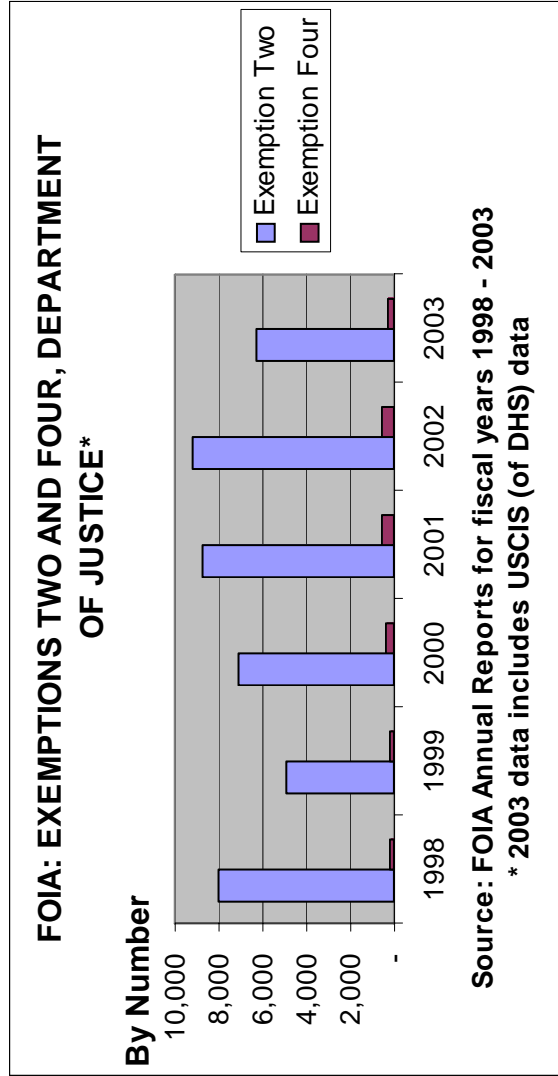


Table 24: FOIA: Exemptions Two and Four, Department of Justice									
	Year								
	1998	1999	2000	2001	2002	2003	98-00	03	Total
Exemption 2, Percent	12%	9%	5%	4%	2%	6%	9%	6%	6%
Exemption 2, Total	7,966	4,872	7,067	8,682	9,214	6,299	6,635	6,299	44,100
Exemption 4, Percent	0%	0%	0%	0%	0%	0%	0%	0%	0%
Exemption 4, Total	162	140	405	575	581	302	236	302	2,165
Source: FOIA Annual Reports for fiscal years, 1998 - 2003									
Table 25: FOIA: Exemptions Two and Four, Department of Justice (Excluding INS/USCIS data)									
	Year								
	1998	1999	2000	2001	2002	2003	98-00	03	Total
Exemption 2, Percent	14%	14%	15%	14%	13%	14%	14%	14%	14%
Exemption 2, Total	3,146	3,364	3,671	3,255	2,473	3,065	3,394	2,769	18,974
Exemption 4, Percent	1%	1%	1%	1%	1%	1%	1%	1%	1%
Exemption 4, Total	129	128	141	151	137	269	133	203	955
Source: FOIA Annual Reports for fiscal years, 1998 - 2003									

Figure 30

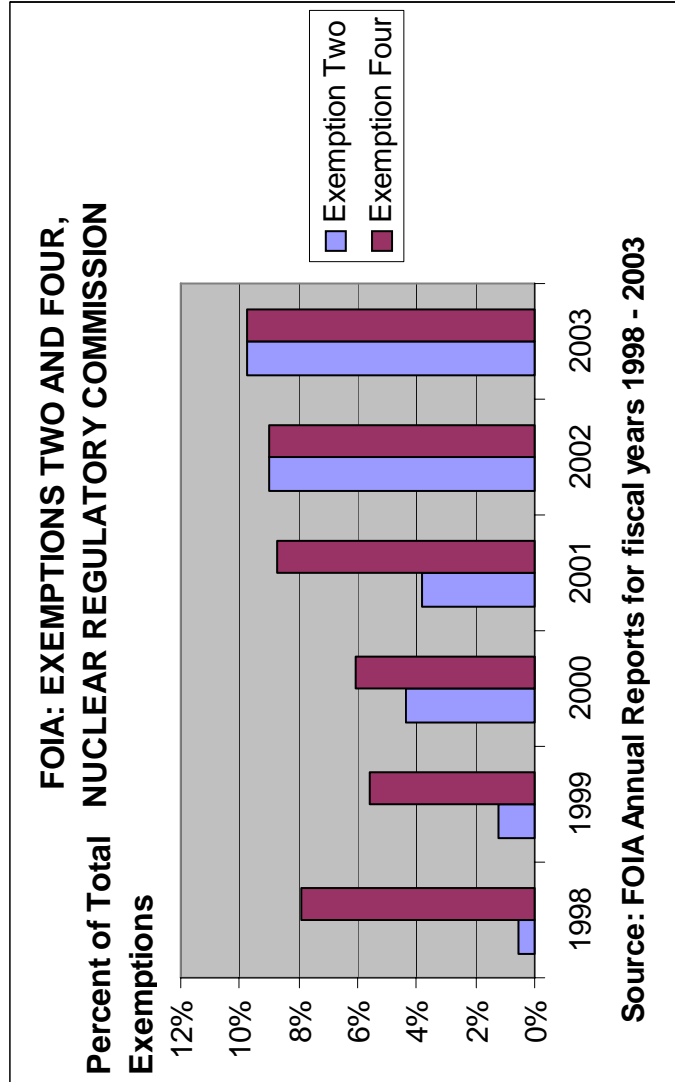


Figure 31

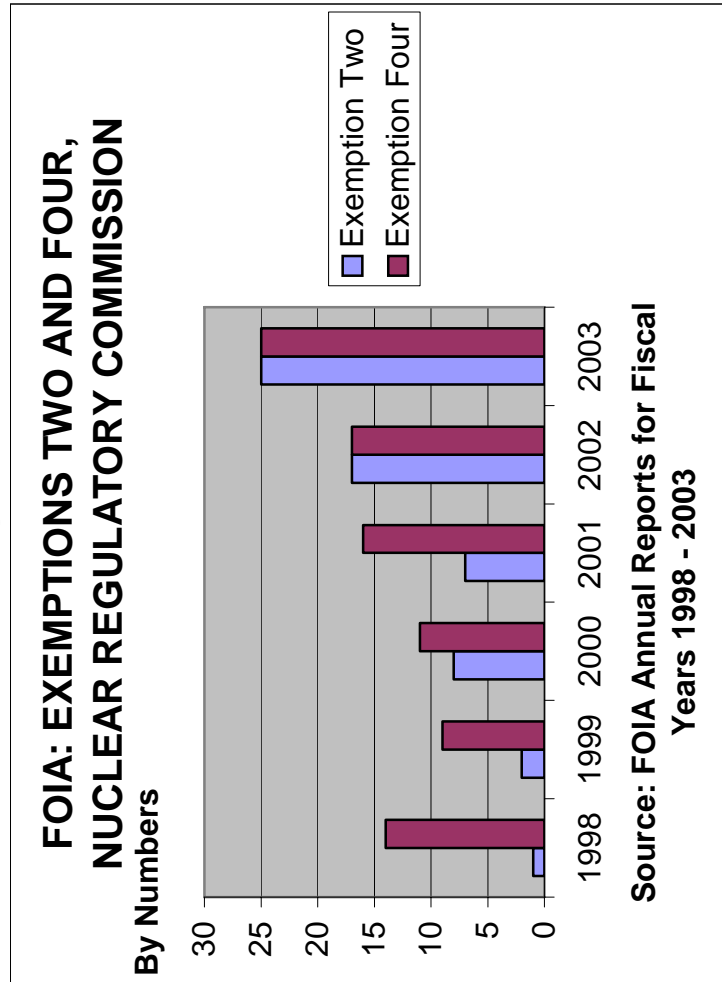
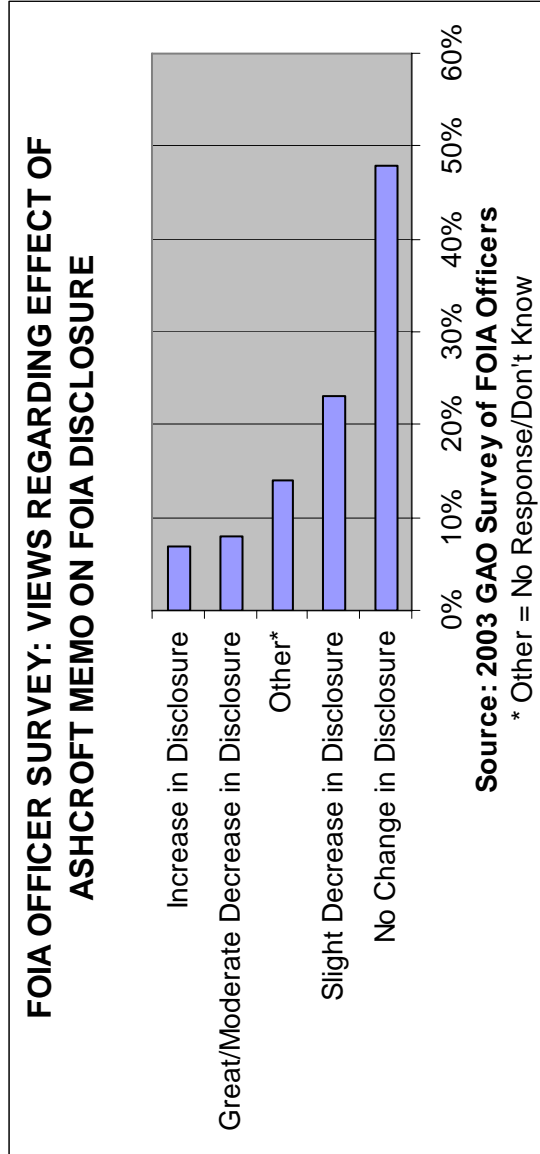


Table 26 : FOIA: Exemptions Two and Four, Nuclear Regulatory Commission

	Year										
	1998	1999	2000	2001	2002	2003	98-00	98-00	02-03	02-03	Total
Exemption 2, Percent of Total Exemptions	1%	1%	4%	4%	9%	10%	2%	2%	9%	9%	5%
Exemption 2, Total	1	2	8	7	17	25	4	4	21	21	60
Exemption 4, Percent of Total Exemptions	8%	6%	6%	9%	9%	10%	7%	7%	9%	9%	8%
Exemption 4, Total	14	9	11	16	17	25	11	11	21	21	92

Source: FOIA Annual Reports for fiscal years, 1998 - 2003

Figure 32



APPENDIX
Figure 1

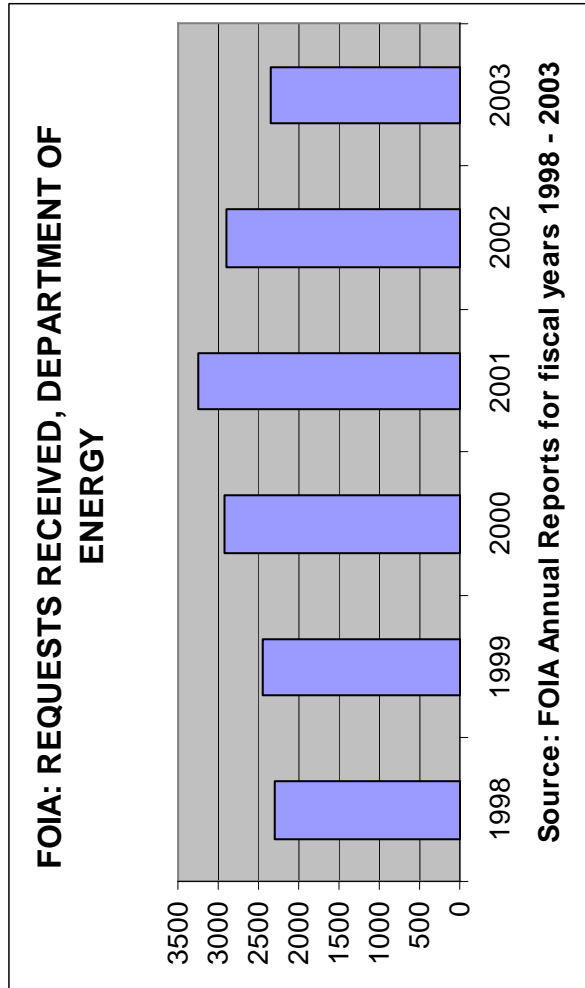


Table 1: FOIA: Requests Received, Department of Energy

	Year										
	1998	1999	2000	2001	2002	2003	98-00	02-03	Change		Total
Requests Received	2,288	2,456	2,935	3,245	2,900	2,357	2,560	2,629	+ 3%		16,181

Source: FOIA Annual Reports for fiscal years, 1998 - 2003

Figure 2

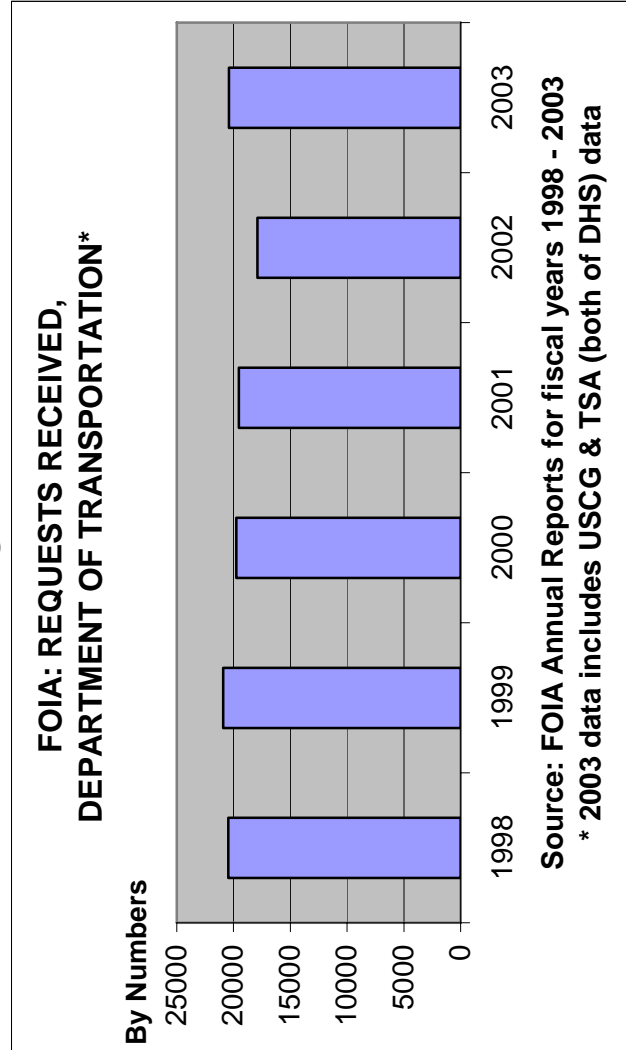


Table 2: FOIA: Requests Received, Department of Transportation									
	Year								
	1998	1999	2000	2001	2002	2003	98-00	02-03	Change Total
Requests Received	20,476	20,923	19,750	19,529	17,910	20,414	20,383	19,162	118,909
Source: FOIA Annual Reports for fiscal years, 1998 - 2003									

Figure 3

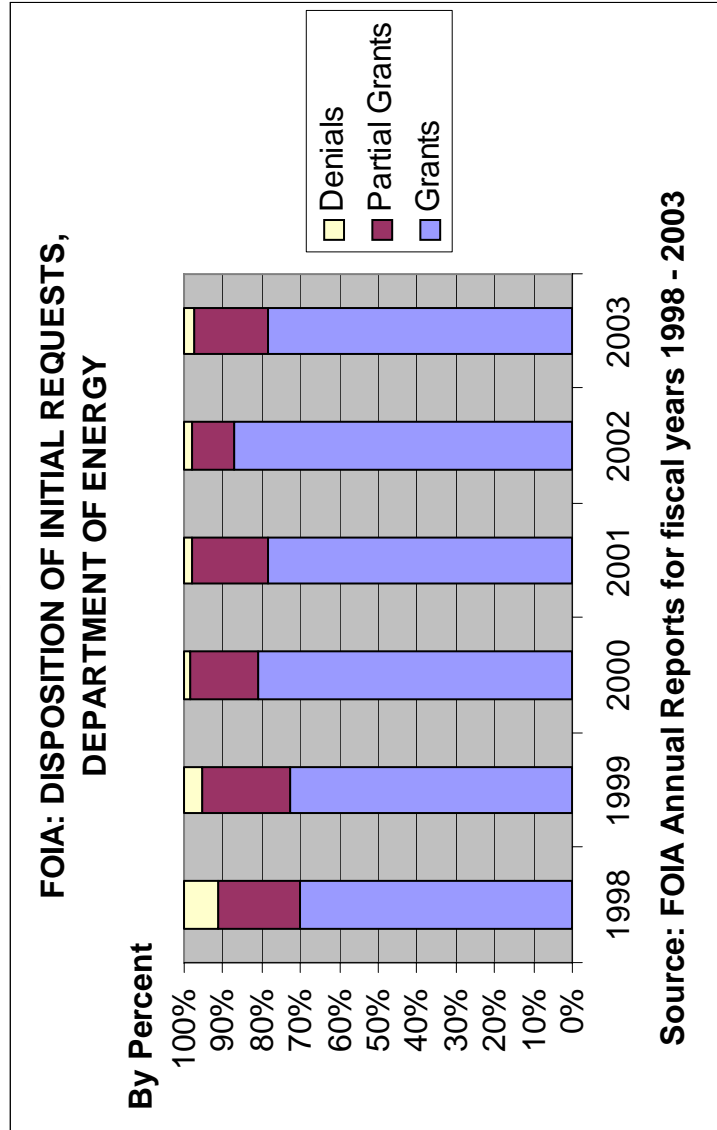


Table 3: FOIA: Disposition of Initial Requests, Department of Energy (By Percent)

	Year										
	1998	1999	2000	2001	2002	2003	98-00	02-03	Total		
Grants	70%	73%	81%	79%	87%	78%	75%	83%	78%		
Partial Grants	21%	23%	17%	20%	11%	19%	20%	15%	18%		
Denials	9%	4%	2%	2%	2%	2%	5%	2%	4%		

($\chi^2 = 366, n = 12090, p < 0.0001$)

Source: FOIA Annual Reports for fiscal years, 1998 - 2003

Figure 4

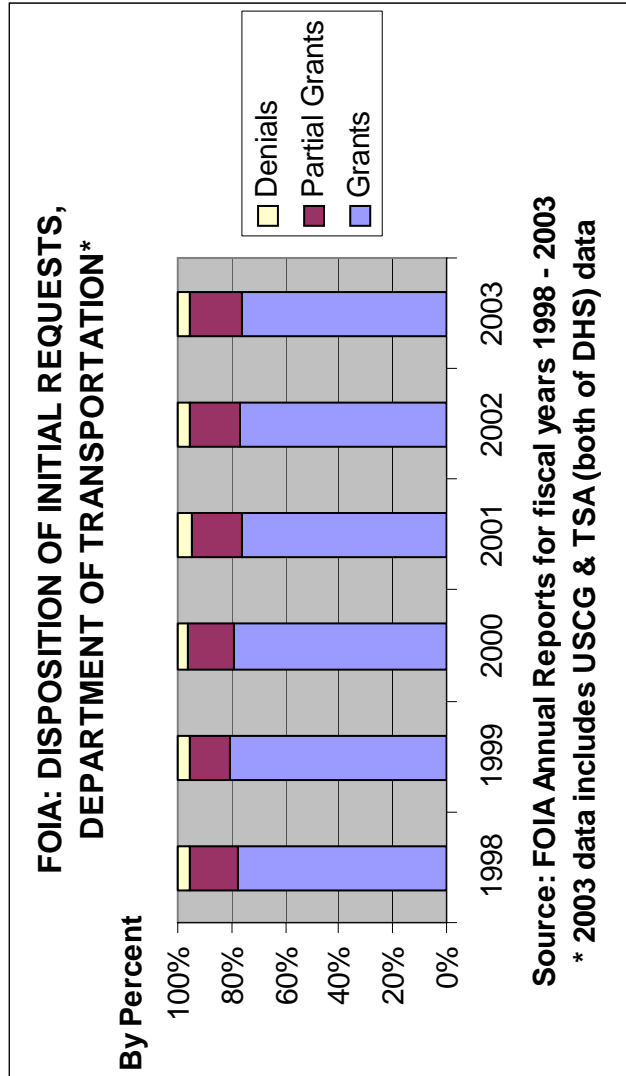


Table 4: FOIA: Disposition of Initial Requests, Department of Transportation (By Percent)

	Year										
	1998	1999	2000	2001	2002	2003	98-00	02-03	Total		
Grants	78%	81%	79%	76%	77%	76%	79%	77%	78%		
Partial Grants	18%	15%	17%	18%	19%	19%	17%	19%	18%		
Denials	4%	5%	4%	5%	5%	4%	4%	5%	5%		
($\chi^2 = 194$, n = 79125, p < 0.0001)											
Source: FOIA Annual Reports for fiscal years, 1998 - 2003											

Figure 5

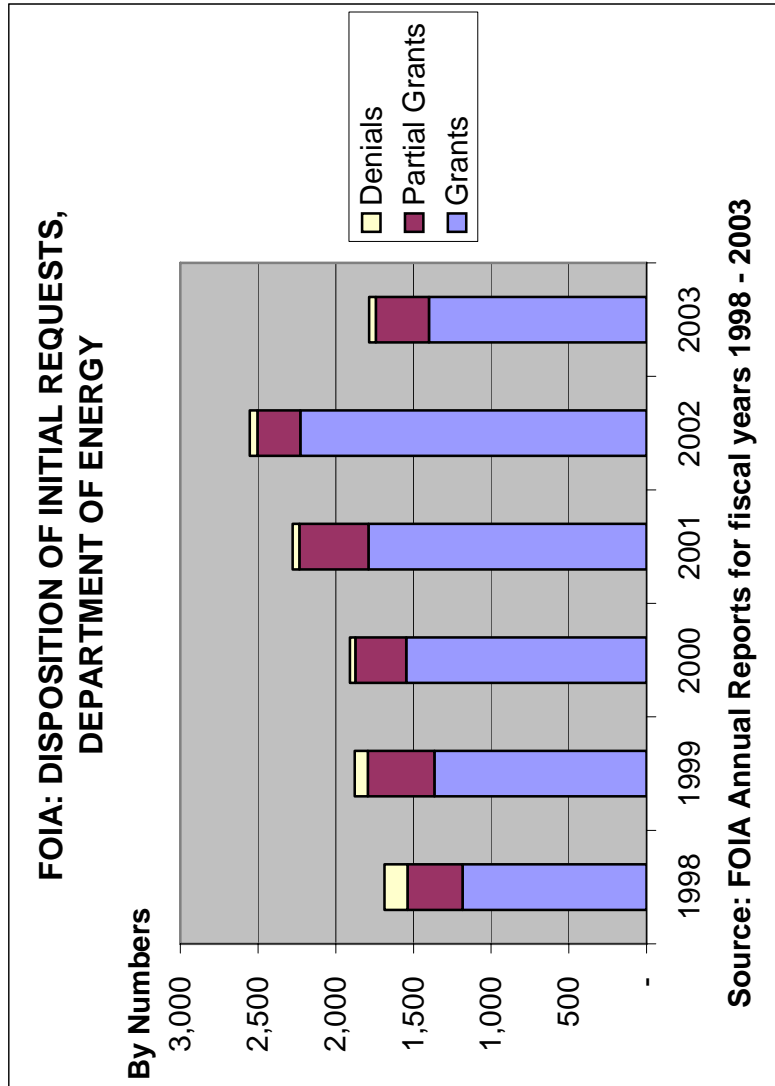


Table 5: FOIA: Disposition of Initial Requests, Department of Energy

	Year										Change	Total
	1998	1999	2000	2001	2002	2003	98-00	02-03				
Grants	1183	1365	1546	1790	2227	1400	1,365	1,814	+ 33%			9,511
Partial Grants	355	428	328	445	277	342	370	310	- 16%			2,175
Denials	149	84	34	43	50	44	89	47	- 47%			404
($\chi^2 = 366, n = 12090, p < 0.0001$)												
Source: FOIA Annual Reports for fiscal years, 1998 - 2003												

Figure 6

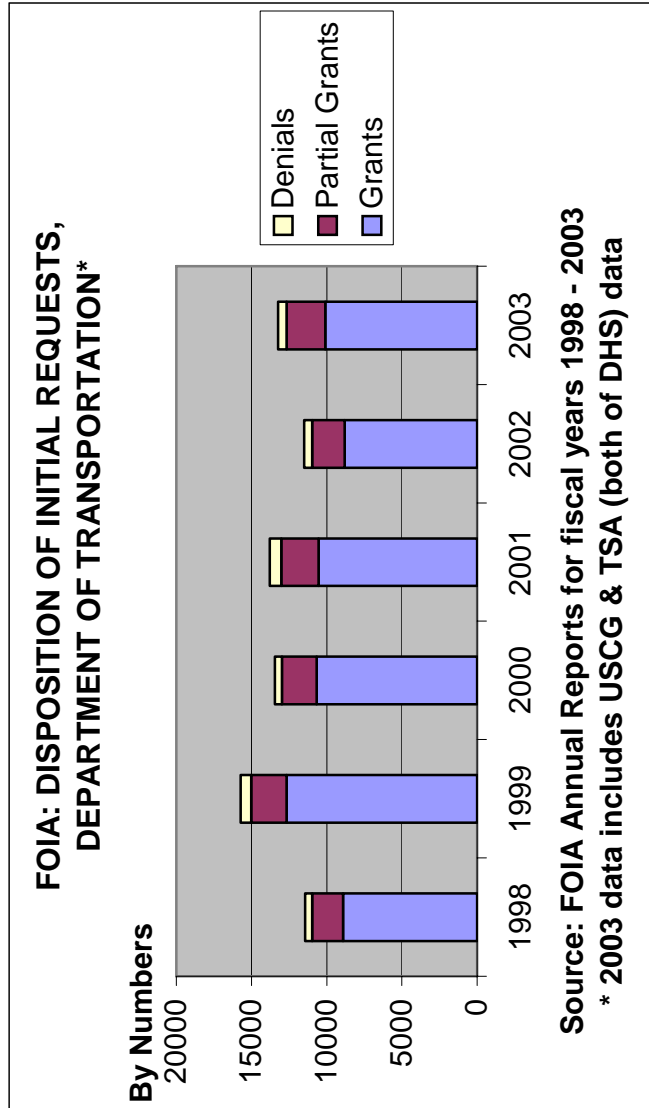


Table 6: FOIA: Disposition of Initial Requests, Department of Transportation (By Numbers)

	Year											
	1998	1999	2000	2001	2002	2003	98-00	02-03	Change	Total		
Grants	8,918	12,670	10,670	10,536	8,803	10,093	10,753	9,448	- 12%	61,690		
Partial Grants	2,047	2,340	2,303	2,493	2,171	2,562	2,230	2,367	+ 6%	13,916		
Denials	476	716	477	756	519	575	556	547	- 2%	3,519		
($\chi^2 = 194, n = 79125, p < 0.0001$)												
Source: FOIA Annual Reports for fiscal years, 1998 – 2003												

Figure 7

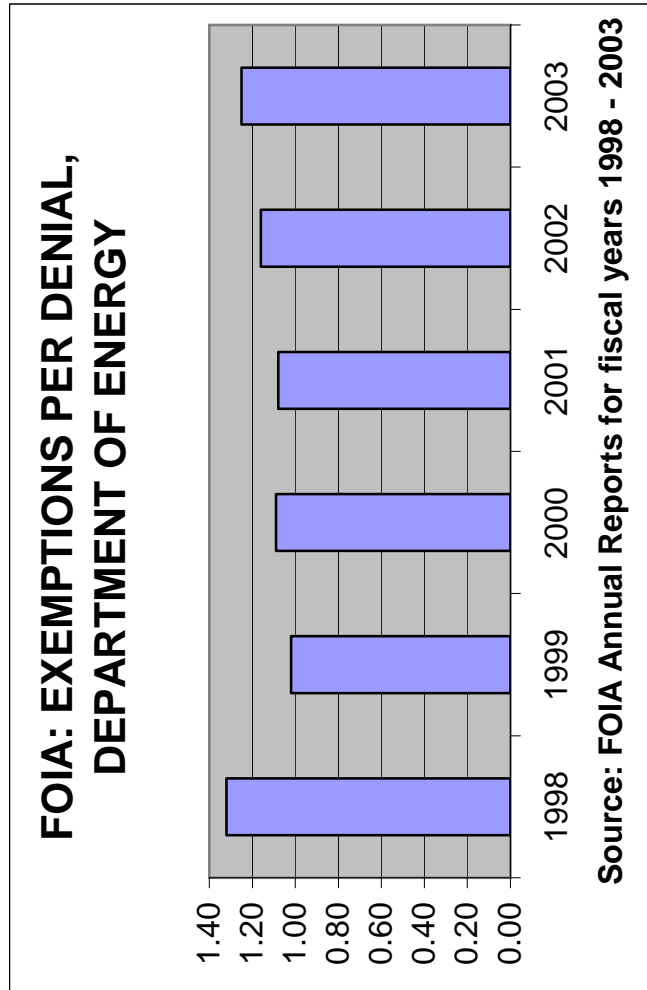


Table 7: FOIA: Exemptions Per Denial, Department of Energy

	Year									
	1998	1999	2000	2001	2002	2003	98-00	02-03	Total	Total
Exemptions Per Denial	1.32	1.02	1.09	1.08	1.16	1.25	1.14	1.21	1.15	1.15
Total Exemptions	665	522	393	525	378	481	527	430	2964	2964
Denial (Full and Partial)	504	512	362	488	327	386	459	357	2579	2579

$(\chi^2 = 12, n = 5543, p < 0.0308)$

Source: FOIA Annual Reports for fiscal years, 1998 - 2003

Figure 8

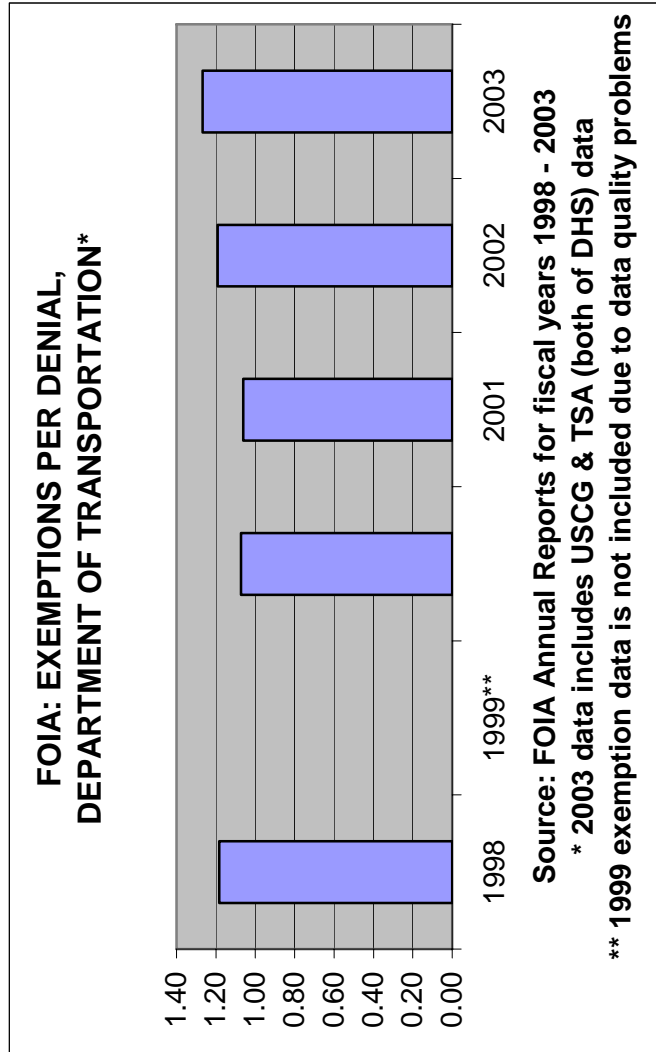


Table 8: FOIA: Exemptions Per Denial, Department of Transportation

	Year										
	1998	1999	2000	2001	2002	2003	98-00	02-03	Total		
Exemptions Per Denial	1.18	N/A	1.07	1.06	1.19	1.27	1.13	1.23	1.15		
$(\chi^2 = 135, n = 36680, p < 0.0001)$											
Source: FOIA Annual Reports for fiscal years, 1998 - 2003											

Figure 9

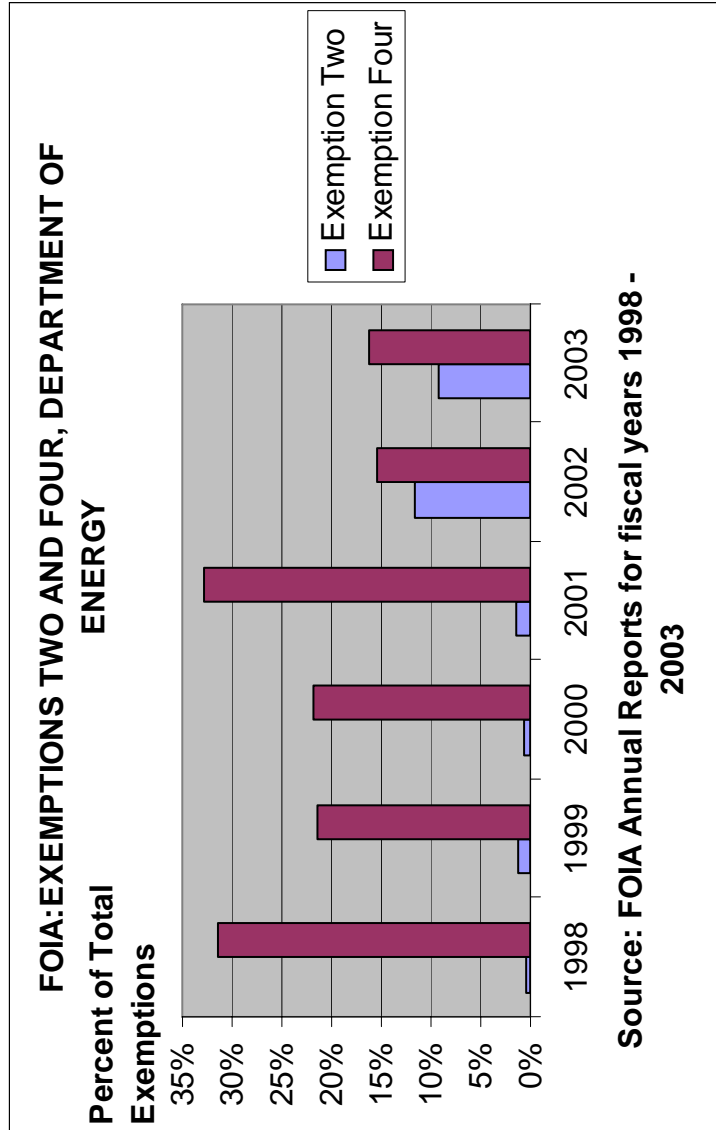


Figure 10

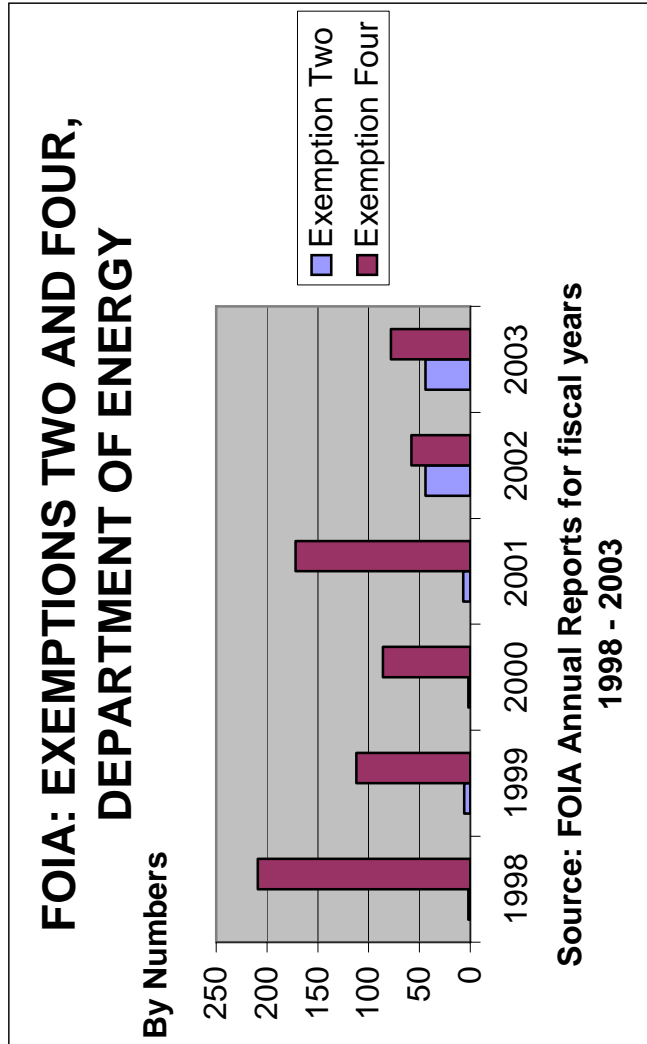


Table 9: FOIA: Exemptions Two and Four, Department of Energy

	Year									
	1998	1999	2000	2001	2002	2003	1998-00	02-03	Total	
Exemption 2, Percent of Total Exemptions	0%	1%	1%	1%	12%	9%	1%	10%	4%	
Exemption 2, Total	2	6	2	7	44	44	3	44	105	
Exemption 4, Percent of Total Exemptions	31%	21%	22%	33%	15%	16%	25%	16%	23%	
Exemption 4, Total	209	112	86	172	58	78	136	68	715	

Source: FOIA Annual Reports for fiscal years, 1998 - 2003

Figure 11

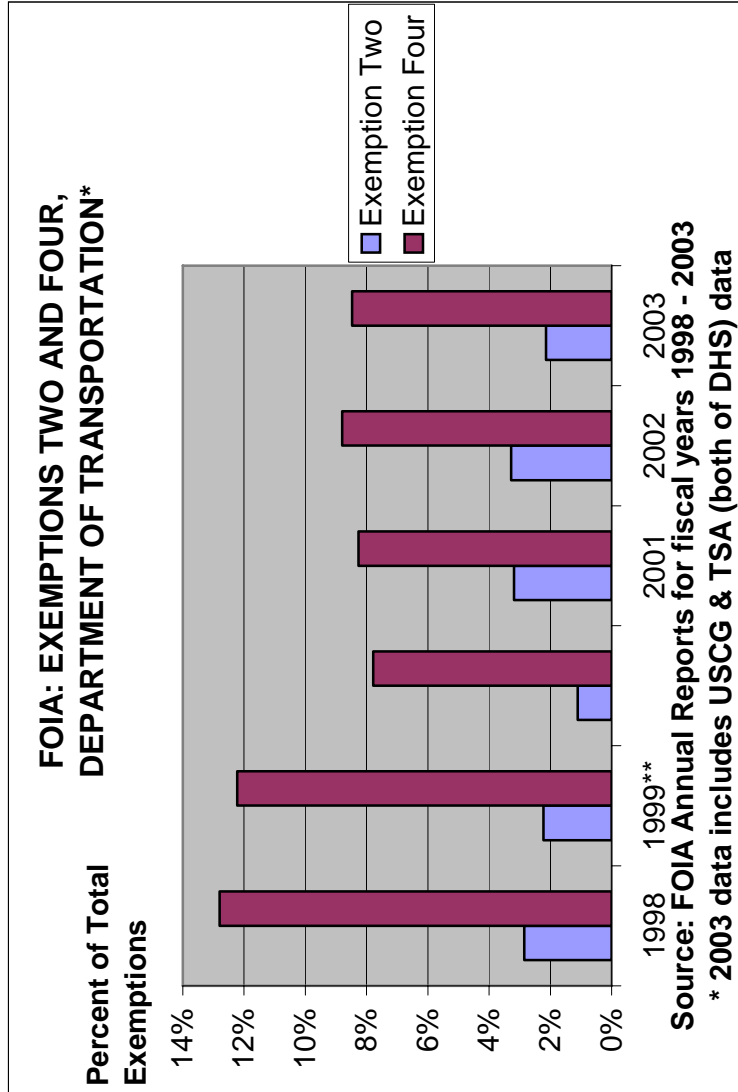


Figure 12

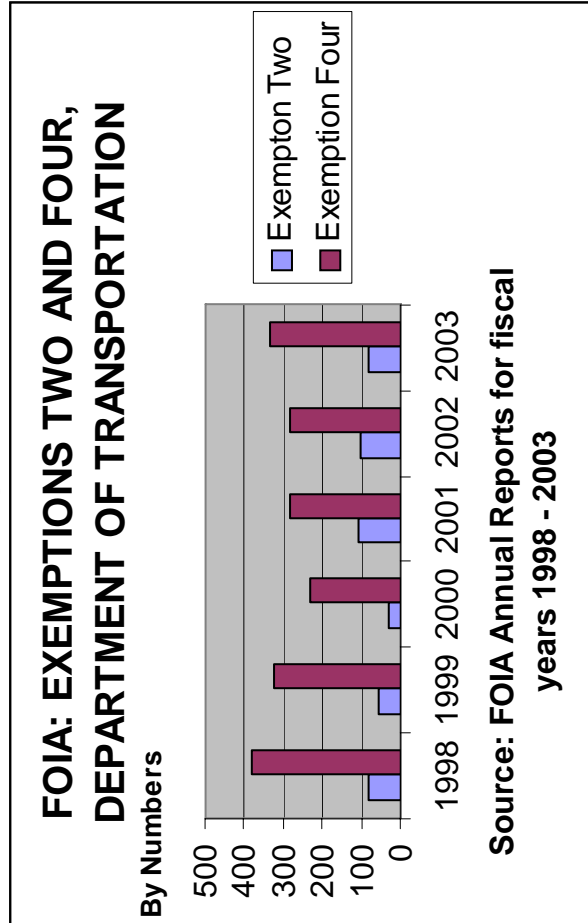


Table 10: FOIA: Exemptions Two and Four, Department of Transportation

	1998	1999	2000	2001	2002	2003	98-00	02-03	Total
Exemption 2, Percent of Total Exemptions	3%	2%	1%	3%	3%	2%	2%	3%	2%
Exemption 2, Total	85	59	33	110	105	85	59	95	477
Exemption 4, Percent of Total Exemptions	13%	12%	8%	8%	9%	8%	11%	9%	10%
Exemption 4, Total	382	324	232	285	282	337	313	310	1842

Source: FOIA Annual Reports for fiscal years, 1998 - 2003