

# MSPB FOIA ANNUAL REPORT

FOR  
10/01/2017  
THROUGH  
09/30/2018

The following **Annual Freedom of Information Act** report covers the Period 10/01/2017, through 09/30/2018, as required by 5 U.S.C. 552.

## I. BASIC INFORMATION REGARDING REPORT

1. Name, Title, Address, and Telephone Number

William D. Spencer  
Chief FOIA Officer  
Merit Systems Protection Board  
1615 M Street, NW, Suite 500  
Washington, DC 20419  
202-653-7200

2. Electronic address for Report on the agency web site.

Electronic copies of the report are on the Merit Systems Protection Board's (MSPB) website at <http://www.mspb.gov/foia/foiareports.htm>.

3. How to obtain a copy of the report in paper form.

Paper copies of the report may be obtained by writing to the above address.

## II. MAKING A FOIA REQUEST

1. Name, address, telephone number, and email of the MSPB office where FOIA requests can be filed are found below:

Office of the Clerk of the Board  
1615 M Street NW  
Suite 500  
Washington, DC 20419  
(202) 653-7200  
FAX (202) 653-7130  
[foiahq@mspb.gov](mailto:foiahq@mspb.gov)

## 2. BRIEF DESCRIPTION OF REQUESTS

The MSPB is an independent, quasi-judicial agency in the Executive branch that serves as the guardian of Federal merit systems. Many of the FOIA requests received by MSPB concern merit cases that have been appealed to the Board. The Board's appellate records are maintained in a system of records subject to the Privacy Act of 1974. These records are related to MSPB's adjudicatory process and customarily include all of the parties' pleadings, allegations, notices, orders, and decisions issued by MSPB. Records in those case files often contain privacy information which is exempted in accordance with Exemption 6.

## 3. FOIA REGULATIONS

<https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=278732&version=279052&application=HTML>

### III. ACRONYMS, DEFINITIONS, AND EXEMPTIONS

#### 1. Acronym used:

<b>Acronym</b>	<b>Definition</b>
MSPB	Merit Systems Protection Board

#### 2. Definition of terms used in this report:

1. **Administrative Appeal** – a request to a federal agency asking that it review at a higher administrative level a FOIA determination made by the agency at the initial request level.
2. **Average Number** – the number obtained by dividing the sum of a group of numbers by the quantity of numbers in the group. For example, of 3, 7, and 14, the average number is 8.
3. **Backlog** – the number of requests or administrative appeals that are pending at an agency at the end of the fiscal year that are beyond the statutory time period for a response.
4. **Component** – for agencies that process requests on a decentralized basis, a “component” is an entity, also sometimes referred to as an Office, Division, Bureau, Center, or Directorate, within the agency that processes FOIA requests. The FOIA now requires that agencies include in their Annual FOIA Report data for both the agency overall and for each principal component of the agency.
5. **Consultation** – the procedure whereby the agency responding to a FOIA request first forwards a record to another agency or component within the same agency for its review because that other agency has an interest in the document. Once the agency in receipt of the consultation finishes its review of the record, it responds back to the

agency or component within the same agency that forwarded it. That agency, in turn, will then respond to the FOIA requester.

6. **Exemption 3 Statute** – a federal statute that exempts information from disclosure and which the agency relies on to withhold information under subsection (b)(3) of the FOIA.
7. **FOIA Request** – a FOIA request is generally a request to a federal agency for access to records concerning another person (i.e., a “third-party” request), or access to records concerning an organization, or a particular topic of interest. FOIA requests also include requests made by requesters seeking records concerning themselves (i.e., “first-party” requests) when those requesters are not subject to the Privacy Act, such as non-U.S. citizens. Moreover, because all first-party requesters should be afforded the benefit of both the access provisions of the FOIA as well as those of the Privacy Act, FOIA requests also include any first-party requests where an agency determines that it must search beyond its Privacy Act “systems of records” or where a Privacy Act exemption applies, and the agency looks to FOIA to afford the greatest possible access. All requests which require the agency to utilize the FOIA in responding to the requester are included in this Report. Additionally, a FOIA request includes records referred to the agency for processing and direct response to the requester. It does not, however, include records for which the agency has received a consultation from another agency. (Consultations are reported separately in Section XII of this Report.)
8. **Full Grant** – an agency decision to disclose all records in full in response to a FOIA request.
9. **Full Denial** – an agency decision not to release any records in response to a FOIA request because the records are exempt in their entirety under one or more of the FOIA exemptions, or because of a procedural reason, such as when no records could be located.
10. **Median Number** – the middle, not average, number. For example, of 3, 7, and 14, the median number is 7.
11. **Multi-Track Processing** – a system in which simple requests requiring relatively minimal review are placed in one processing track and more voluminous and complex requests are placed in one or more other tracks. Requests granted expedited processing are placed in yet another track. Requests in each track are processed on a first in/first out basis.
  - i. **Expedited Processing** – an agency will process a FOIA request on an expedited basis when a requester satisfies the requirements for expedited processing as set forth in the statute and in agency regulations.
  - ii. **Simple Request** – a FOIA request that an agency using multi-track processing places in its fastest (non-expedited) track based on the low volume and/or simplicity of the records requested.
  - iii. **Complex Request** – a FOIA request that an agency using multi-track processing places in a slower track based on the high volume and/or complexity of the records requested.
12. **Partial Grant/Partial Denial** – in response to a FOIA request, an agency decision to disclose portions of the records and to withhold other portions that are exempt under the FOIA, or to otherwise deny a portion of the request for a procedural reason.
13. **Pending Request or Pending Administrative Appeal** – a request or administrative appeal for which an agency has not taken final action in all respects.

14. **Perfected Request** – a request for records which reasonably describes such records and is made in accordance with published rules stating the time, place, fees (if any) and procedures to be followed.
  15. **Processed Request or Processed Administrative Appeal** – a request or administrative appeal for which an agency has taken final action in all respects.
  16. **Range in Number of Days** – the lowest and highest number of days to process requests or administrative appeals.
  17. **Time Limits** – the time period in the statute for an agency to respond to a FOIA request (ordinarily twenty working days from receipt of a perfected FOIA request).
3. Concise descriptions of the nine FOIA exemptions:
- a. **Exemption 1:** classified national defense and foreign relations information
  - b. **Exemption 2:** information that is related solely to the internal personnel rules and practices of an agency
  - c. **Exemption 3:** information that is prohibited from disclosure by another federal law
  - d. **Exemption 4:** trade secrets and other confidential business information
  - e. **Exemption 5:** inter-agency or intra-agency communications that are protected by legal privileges
  - f. **Exemption 6:** information involving matters of personal privacy
  - g. **Exemption 7:** records or information compiled for law enforcement purposes, to the extent that the production of these records (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions, or (F) could reasonably be expected to endanger the life or physical safety of any individual
  - h. **Exemption 8:** information relating to the supervision of financial institutions
  - i. **Exemption 9:** geological information on wells

### 3. Agency Component Abbreviations

Component Abbreviation	Component Name

#### IV. EXEMPTION 3 STATUTES

Statute	Type of Information Withheld	Case Citation	Agency / Component	Number of Times Relied upon by Agency / Component	Total Number of Times Relied upon by Agency Overall
10 U.S.C. § 130b	Personally identifiable information pertaining to members of the armed forces assigned to "routinely deployable unit[s]" and certain employees of DOD and DHS.	Hall v. CIA, No. 04-00814, 2012 WL 3143839, at *16 (D.D.C. Aug. 3, 2012); Hiken v. DOD, 521 F. Supp. 2d 1047, 1062 (N.D. Cal. 2007); O'Keefe v. DOD, 463 F. Supp. 2d 317, 325 (E.D.N.Y. 2006); Windel v. United States, No. A02-306, 2005 WL 846206, at *2 (D. Alaska Apr. 11, 2005).	MSPB	1	1
26 U.S.C. §§ 6103, 6105	Certain tax return information, to include Taxpayer Identification Numbers of third parties, and certain tax convention information.	Church of Scientology v. IRS, 484 U.S. 9 (1987); Leonard v. US Dep't of Treasury, 590 F. App'x. 141 (3d Cir. 2014); Pac. Fisheries, Inc. v. IRS, 395 F. App'x. 438 (9th Cir. 2010); Tax Analysts v. IRS, 217 F. Supp. 2d 23 (D.D.C. 2002).	MSPB	1	1
49 U.S.C. § 114	Information obtained or developed in carrying out security under the authority of the Aviation and Transportation Security Act or under chapter 449 of this title.	Skurrow v. DHS, No. 11-1296, 2012 WL 4380895 at *9-10 (D.D.C. Sept. 26, 2012); Tooley v. Bush, No. 06-306, 2006 WL 3783142, at *19 (D.D.C. Dec. 21, 2006), aff'd on other grounds, 586 F.3d 1006 (D.C. Cir. 2009); Gordon v. FBI, 390 F. Supp. 2d 897, 900 (N.D. Cal. 2004).	MSPB	1	1

49 U.S.C. § 40119(b) (Federal Aviation Act)	Certain information obtained or developed in ensuring transportation security if disclosure of that information would: constitute an invasion of personal privacy, reveal a trade secret or confidential commercial or financial information, or be detrimental to transportation safety.	Pub. Citizen, Inc. v. FAA, 988 F.2d 186, 194 (D.C. Cir. 1993); Gordon v. FBI, 390 F. Supp. 2d 897, 900 (N.D. Cal. 2004).	MSPB	1	1
50 U.S.C. § 403-1(i)(1) (currently at 50 U.S.C. § 3024(i)(1)) (National Security Act of 1947)	Intelligence sources and methods.	CIA v. Sims, 471 U.S. 159, 167 (1985); ACLU v. DOJ, 681 F.3d 61, 72-75 (2d Cir. May 21, 2012); ACLU v. DOD, 628 F.3d 612, 619, 626 (D.C. Cir. 2011); Berman v. CIA, 501 F.3d 1136, 1137-38, 1140 (9th Cir. 2007).	MSPB	1	1
50 U.S.C. § 403g (currently at 50 U.S.C. § 3507) (Central Intelligence Agency Act of 1949)	Intelligence sources and methods; certain information pertaining to Agency employees, specifically: "the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency"	ACLU v. DOJ, 681 F.3d 61, 72-75 (2d Cir. 2012); Larson v. Dep't of State, 565 F.3d 857, 865 n.2 (D.C. Cir. 2009); Berman v. CIA, 501 F.3d 1136, 1137-38, 1140 (9th Cir. 2007); Makky v. Chertoff, 489 F. Supp. 2d 421, 442 (D.N.J. 2007), aff'd on other grounds, 541 F. 3d 205 (3d Cir. 2008).	MSPB	1	1
5 U.S.C. § 574(j)	Dispute resolution communications.	N/A	MSPB	3	3

**V.A. FOIA REQUESTS -- RECEIVED, PROCESSED AND PENDING FOIA REQUESTS**

Agency / Component	Number of Requests Pending as of Start of Fiscal Year	Number of Requests Received in Fiscal Year	Number of Requests Processed in Fiscal Year	Number of Requests Pending as of End of Fiscal Year
MSPB	78	173	200	51
AGENCY OVERALL	78	173	200	51

**V.B.(1). DISPOSITION OF FOIA REQUESTS -- ALL PROCESSED REQUESTS**

Agency / Component	Number of Full Grants	Number of Partial Grants / Partial Denials	Number of Full Denials Based on Exemptions	Number of Full Denials Based on Reasons Other than Exemptions									TOTAL
				No Records	All Records Referred to Another Component or Agency	Request Withdrawn	Fee-Related Reason	Records not Reasonably Described	Improper FOIA Request for Other Reason	Not Agency Record	Duplicate Request	*Explain in Chart Below	
MSPB	59	58	8	41	2	2	0	7	18	0	2	3	200
AGENCY OVERALL	59	58	8	41	2	2	0	7	18	0	2	3	200

**V.B.(2). DISPOSITION OF FOIA REQUESTS -- "OTHER" REASONS FOR "FULL DENIALS  
 BASED ON REASONS OTHER THAN EXEMPTIONS"**

Agency / Component	Description of "Other" Reasons for Denials from Chart B(1)	Number of Times "Other" Reason Was Relied Upon	TOTAL
MSPB	Unable to Locate or Contact Requester	3	3
AGENCY OVERALL			3

**V.B.(3). DISPOSITION OF FOIA REQUESTS -- NUMBER OF TIMES EXEMPTIONS APPLIED**

Agency / Component	Ex. 1	Ex. 2	Ex. 3	Ex. 4	Ex. 5	Ex. 6	Ex. 7(A)	Ex. 7(B)	Ex. 7(C)	Ex. 7(D)	Ex. 7(E)	Ex. 7(F)	Ex. 8	Ex. 9
MSPB	0	1	5	0	8	59	4	0	5	0	6	0	0	0
AGENCY OVERALL	0	1	5	0	8	59	4	0	5	0	6	0	0	0

**VI.A. ADMINISTRATIVE APPEALS OF INITIAL DETERMINATIONS OF FOIA REQUESTS -- RECEIVED, PROCESSED, AND PENDING ADMINISTRATIVE APPEALS**

Agency / Component	Number of Appeals Pending as of Start of Fiscal Year	Number of Appeals Received in Fiscal Year	Number of Appeals Processed in Fiscal Year	Number of Appeals Pending as of End of Fiscal Year
MSPB	0	13	8	5
AGENCY OVERALL	0	13	8	5

**VI.B. DISPOSITION OF ADMINISTRATIVE APPEALS -- ALL PROCESSED APPEALS**

Agency / Component	Number Affirmed on Appeal	Number Partially Affirmed & Partially Reversed/Remanded on Appeal	Number Completely Reversed/Remanded on Appeal	Number of Appeals Closed for Other Reasons	TOTAL
MSPB	3	4	0	1	8
AGENCY OVERALL	3	4	0	1	8

**VI.C.(1). REASONS FOR DENIAL ON APPEAL -- NUMBER OF TIMES EXEMPTIONS APPLIED**

Agency / Component	Ex. 1	Ex. 2	Ex. 3	Ex. 4	Ex. 5	Ex. 6	Ex. 7(A)	Ex. 7(B)	Ex. 7(C)	Ex. 7(D)	Ex. 7(E)	Ex. 7(F)	Ex. 8	Ex. 9
MSPB	0	1	0	0	1	1	0	0	0	0	2	0	0	0
AGENCY OVERALL	0	1	0	0	1	1	0	0	0	0	2	0	0	0



**VI.C.(3). REASONS FOR DENIAL ON APPEAL -- "OTHER" REASONS**

Agency / Component	Description of "Other" Reasons for Denial on Appeal from Chart C(2)	Number of Times "Other" Reason Was Relied Upon	TOTAL
MSPB	Moot	1	1
AGENCY OVERALL			1

**VI.C.(4). RESPONSE TIME FOR ADMINISTRATIVE APPEALS**

Agency / Component	Median Number of Days	Average Number of Days	Lowest Number of Days	Highest Number of Days
AGENCY OVERALL	18.00	17.25	8.00	28.00

**VI.C.(5). TEN OLDEST PENDING ADMINISTRATIVE APPEALS**

Agency / Component		10th Oldest Appeal	9th	8th	7th	6th	5th	4th	3rd	2nd	Oldest Appeal
	Date of Appeal										
	Number of Days Pending										
AGENCY OVERALL	Date of Appeal	N/A	N/A	N/A	N/A	N/A	2018-09-27	2018-09-14	2018-08-21	2018-08-21	2018-08-21
	Number of Days Pending	0	0	0	0	0	1	10	27	27	27

**VII.A. FOIA REQUESTS -- RESPONSE TIME FOR ALL PROCESSED PERFECTED REQUESTS**

Agency / Component	SIMPLE				COMPLEX				EXPEDITED PROCESSING			
	Median Number of Days	Average Number of Days	Lowest Number of Days	Highest Number of Days	Median Number of Days	Average Number of Days	Lowest Number of Days	Highest Number of Days	Median Number of Days	Average Number of Days	Lowest Number of Days	Highest Number of Days
AGENCY OVERALL	3	15.63	<1	348	272	298.3	2	868	1	192.67	<1	577

**VII.B. PROCESSED REQUESTS -- RESPONSE TIME FOR PERFECTED REQUESTS IN WHICH INFORMATION WAS GRANTED**

Agency / Component	SIMPLE				COMPLEX				EXPEDITED PROCESSING			
	Median Number of Days	Average Number of Days	Lowest Number of Days	Highest Number of Days	Median Number of Days	Average Number of Days	Lowest Number of Days	Highest Number of Days	Median Number of Days	Average Number of Days	Lowest Number of Days	Highest Number of Days
AGENCY OVERALL	6	21.75	<1	348	317	345.26	16	868	577	577	577	577

**VII.C. PROCESSED SIMPLE REQUESTS -- RESPONSE TIME IN DAY INCREMENTS**

Agency / Component	<1-20 Days	21-40 Days	41-60 Days	61-80 Days	81-100 Days	101-120 Days	121-140 Days	141-160 Days	161-180 Days	181-200 Days	201-300 Days	301-400 Days	401+ Days	TOTAL
MSPB	109	8	2	1	1	1	0	0	0	1	1	1	0	125
AGENCY OVERALL	109	8	2	1	1	1	0	0	0	1	1	1	0	125

**VII.C. PROCESSED COMPLEX REQUESTS -- RESPONSE TIME IN DAY INCREMENTS**

Agency / Component	<1-20 Days	21-40 Days	41-60 Days	61-80 Days	81-100 Days	101-120 Days	121-140 Days	141-160 Days	161-180 Days	181-200 Days	201-300 Days	301-400 Days	401+ Days	TOTAL
MSPB	4	9	1	0	1	3	0	1	1	1	4	8	13	46
AGENCY OVERALL	4	9	1	0	1	3	0	1	1	1	4	8	13	46



**VII.D. PENDING REQUESTS -- ALL PENDING PERFECTED REQUESTS**

Agency / Component	SIMPLE			COMPLEX			EXPEDITED PROCESSING		
	Number Pending	Median Number of Days	Average Number of Days	Number Pending	Median Number of Days	Average Number of Days	Number Pending	Median Number of Days	Average Number of Days
AGENCY OVERALL	35	422	382.89	15	423	421.4	1	924	924

**VII.E. PENDING REQUESTS -- TEN OLDEST PENDING PERFECTED REQUESTS**

Agency / Component		10th Oldest Request	9th	8th	7th	6th	5th	4th	3rd	2nd	Oldest Request
AGENCY OVERALL	Date of Receipt	2016-06-01	2016-03-22	2016-03-08	2016-03-07	2016-02-29	2016-02-16	2016-01-26	2015-11-23	2015-06-08	2015-01-23
	Number of Days Pending	585	635	646	556	651	660	674	716	708	924

**VIII.A. REQUESTS FOR EXPEDITED PROCESSING**

Agency / Component	Number Granted	Number Denied	Median Number of Days to Adjudicate	Average Number of Days to Adjudicate	Number Adjudicated Within Ten Calendar Days
AGENCY OVERALL	2	15	2	2.24	17

### VIII.B. REQUESTS FOR FEE WAIVER

Agency / Component	Number Granted	Number Denied	Median Number of Days to Adjudicate	Average Number of Days to Adjudicate
AGENCY OVERALL	1	3	89	71

## IX. FOIA PERSONNEL AND COSTS

Agency / Component	PERSONNEL			COSTS		
	Number of "Full-Time FOIA Employees"	Number of "Equivalent Full-Time FOIA Employees"	Total Number of "Full-Time FOIA Staff"	Processing Costs	Litigation-Related Costs	Total Costs
MSPB	1	1.01	2.01	\$250,081.77	\$0.00	\$250,081.77
AGENCY OVERALL	1	1.01	2.01	\$250,081.77	\$0.00	\$250,081.77

## X. FEES COLLECTED FOR PROCESSING REQUESTS

Agency / Component	Total Amount of Fees Collected	Percentage of Total Costs
MSPB	\$0.00	0.00%
AGENCY OVERALL	\$0.00	0.00%

### **XI.A. NUMBER OF TIMES SUBSECTION (C) USED**

Agency / Component	Number of Times Subsection Used
MSPB	0
AGENCY OVERALL	0

**XI.B. NUMBER OF SUBSECTION (A)(2) POSTINGS**

Agency / Component	Number of Records Posted by the FOIA Office	Number of Records Posted by Program Offices
MSPB	28	104
AGENCY OVERALL	28	104

## **XII.A. BACKLOGS OF FOIA REQUESTS AND ADMINISTRATIVE APPEALS**

Agency / Component	Number of Backlogged Requests as of End of Fiscal Year	Number of Backlogged Appeals as of End of Fiscal Year
MSPB	47	3
AGENCY OVERALL	47	3

**XII.B. CONSULTATIONS ON FOIA REQUESTS -- RECEIVED, PROCESSED, AND PENDING CONSULTATIONS**

Agency / Component	Number of Consultations Received from Other Agencies that were <u>Pending</u> at the Agency as of <u>Start</u> of the Fiscal Year	Number of Consultations <u>Received</u> from Other Agencies During the Fiscal Year	Number of Consultations Received from Other Agencies that were <u>Processed</u> by the Agency During the Fiscal Year	Number of Consultations Received from Other Agencies that were <u>Pending</u> at the Agency as of <u>End</u> of the Fiscal Year
MSPB	0	1	0	1
AGENCY OVERALL	0	1	0	1



**XII.D.(1). COMPARISON OF NUMBERS OF REQUESTS FROM PREVIOUS AND CURRENT ANNUAL REPORT -- REQUESTS RECEIVED AND PROCESSED**

Agency / Component	NUMBER OF REQUESTS <u>RECEIVED</u>		NUMBER OF REQUESTS <u>PROCESSED</u>	
	Number Received During Fiscal Year from Last Year's Annual Report	Number Received During Fiscal Year from Current Annual Report	Number Processed During Fiscal Year from Last Year's Annual Report	Number Processed During Fiscal Year from Current Annual Report
MSPB	176	173	190	200
AGENCY OVERALL	176	173	190	200

**XII.D.(2). COMPARISON OF NUMBERS OF REQUESTS FROM PREVIOUS AND CURRENT ANNUAL REPORT -- BACKLOGGED REQUESTS**

Agency / Component	Number of Backlogged Requests as of End of the Fiscal Year from Previous Annual Report	Number of Backlogged Requests as of End of the Fiscal Year from Current Annual Report
MSPB	70	47
AGENCY OVERALL	70	47

**XII.E.(1). COMPARISON OF NUMBERS OF ADMINISTRATIVE APPEALS FROM PREVIOUS AND CURRENT ANNUAL REPORT -- APPEALS RECEIVED AND PROCESSED**

Agency / Component	NUMBER OF APPEALS <u>RECEIVED</u>		NUMBER OF APPEALS <u>PROCESSED</u>	
	Number Received During Fiscal Year from Last Year's Annual Report	Number Received During Fiscal Year from Current Annual Report	Number Processed During Fiscal Year from Last Year's Annual Report	Number Processed During Fiscal Year from Current Annual Report
MSPB	16	13	20	8
AGENCY OVERALL	16	13	20	8

**XII.E.(2). COMPARISON OF NUMBERS OF ADMINISTRATIVE APPEALS FROM PREVIOUS AND CURRENT ANNUAL REPORT -- BACKLOGGED APPEALS**

Agency / Component	Number of Backlogged Appeals as of End of the Fiscal Year from Previous Annual Report	Number of Backlogged Appeals as of End of the Fiscal Year from Current Annual Report
MSPB	0	3
AGENCY OVERALL	0	3