



Assessment of the National Archives and Records Administration's FOIA Program
Phase II: Archival Records
January 28 & 30, 2015
Observations and Recommendations¹

The Freedom of Information Act (FOIA) directs the Office of Government Information Services (OGIS) to review agency FOIA policies, procedures and compliance, 5 U.S.C. §§ 552(h)(2)(A) and (B). Our review work includes reviewing and commenting on agency FOIA regulations; working with agencies when we observe, including through our mediation work, policies or procedures that are not consistent with FOIA law or policy, or that may be different from the practices occurring at other agencies; and providing Dispute Resolution Skills training to agency FOIA professionals to help them comply with the statutory requirement that FOIA Public Liaisons assist in resolving disputes, 5 U.S.C. §§ 552(a)(6)(B)(ii) and 552(l).

We also assess individual agency FOIA programs by visiting agencies and reviewing sources including, but not limited to, agency FOIA regulations and internal guidance for processing requests; agency FOIA request and appeal files; annual agency reports to the U.S. Department of Justice (DOJ) mandated by law; FOIA litigation, including DOJ's FOIA Litigation and Compliance Reports. As with our mediation services, we review agency policies, procedures and compliance as an advocate for the FOIA process with a focus on impartiality and fairness to both the agency and the requester.

¹ Please direct all questions to Kirsten Mitchell at kirsten.mitchell@nara.gov or 202-741-5775.

We are available after an assessment to assist an agency in solving its FOIA challenges. For example, we are pleased to share best practices, connect agency FOIA professionals to colleagues in other agencies who have tackled similar challenges, or facilitate brainstorming sessions with agency FOIA and non-FOIA professionals.

The National Archives and Records Administration (NARA), of which OGIS is a part, agreed to be the subject of OGIS's first agency FOIA assessment, which we divided into two phases. For Phase I we assessed NARA's Office of General Counsel, which processes requests for access to operational records created or received in carrying out NARA's mission and responsibilities. The Office of General Counsel administers and processes all FOIA appeals for final adjudication and approval by the Deputy Archivist of the United States. It is important to point out that although NARA has a decentralized FOIA initial request process, its FOIA appeals process is centralized. Moreover, the nature of NARA's mission results in a unique intersection of access rules with regard to archival federal records, archival presidential records, Federal personnel records (both military and civilian), and operational agency records. For Phase II, we assessed NARA's Special Access and FOIA Program, which processes FOIA requests for archival Federal records² in the Washington, DC, area. We will not assess the FOIA programs at the 13 Presidential Libraries, the National Declassification Center or the Office of the Inspector General at this time.

OGIS Review Team Lead Kirsten Mitchell, Amy Bennett, and Kate Gastner assessed the Special Access and FOIA program for processing initial requests for archival records and appeals, the latter of which are processed by the Office of General Counsel. Interviews with FOIA officials and staff; direct observations of case files; review of FOIA regulations, the FOIA website and other written material including FOIA litigation involving the agency; and survey results inform this report.

Before visiting Special Access and FOIA, the OGIS Review Team sent an online survey to 15 Special Access and FOIA professionals. The survey, designed not to duplicate questions asked in

² Archival records are also known as accessioned records as they are accessioned by NARA at which time NARA gains legal custody of the records.

Annual FOIA and Chief FOIA Officer reports submitted to the DOJ, sought to supplement already existing resources and inform our visit.

On January 28, 2015, we interviewed Martha Murphy, Chief of the Special Access and FOIA staff. Special Access and FOIA could not grant us access to all of its case files or allow us to view the system it uses to process requests because OGIS review team members do not have security clearances. The lack of security clearances for review staff limited the scope of our review. Prior to our visit, Special Access and FOIA provided us with a list of all of its FOIA cases from Fiscal Year (FY) 2014. We reviewed the list to determine categories of cases including but not limited to exemptions, fees, referrals, appeals and other topics that would give us a broad view of the FOIA program and, based on data from the agency's Annual FOIA Report to DOJ, chose 50 case files to review. We reviewed the case files on January 28 and 30, 2015.

Topic: Opportunities and Challenges

Observations: NARA's Special Access and FOIA office is unique in many ways. First, the "Special Access" in its title refers to the office's ability to approach some requests for records using a slightly different process than other FOIA programs: rather than a line-by-line review as required by FOIA, the office can offer to go through a page-by-page review of responsive documents for the requester. Rather than redacting information, whole documents are withdrawn from the original file and replaced with a withdrawal sheet that describes the document and notes the case number under which the document was withdrawn. The original record is then filed separately and tracked in NARA's Holdings Management System so that it can be integrated back into the file later when all sensitivities expire. This process enables access to the rest of the material by researchers and requesters.

The office processes requests for records accessioned by NARA (granted legal custody to the agency) and located at NARA's College Park, MD, and Washington, DC, facilities. Unlike other agency FOIA offices, Special Access and FOIA primarily deals with records that were once in the legal custody of another agency. Archival records are open to the public without a FOIA request more than 90 percent of the time. Because the records are archival, the office uses a

different fee structure than other federal FOIA offices; archival fees are set by a separate statute, 44 U.S.C. § 2116(c).

The Special Access and FOIA staff is also unique in that a majority of the staff has worked in the agency, and on FOIA, for 10 years or longer.

Despite its unique characteristics—and in some ways because of them—Special Access and FOIA faces challenges that resonate with other agency FOIA offices. By far, the office’s greatest challenge is its backlog, which is one of the largest in the federal government, according to publicly available data on the Department of Justice’s [foia.gov](https://www.foia.gov). The backlog contributes to lengthy delays for requesters before they receive records. While the office is generally able to respond to requests within the 20-working day deadline prescribed by the law, even requesters who submit “simple requests” (for fewer than 200 pages) wait approximately nine months to one year before the records are processed. From the time a “complex request” (for more than 200 pages and most requests that include classified records) is made, it takes approximately three and a half years for the request to rise to the top of the queue for processing.

In addition to delays caused by the office’s backlog and volume of incoming requests, NARA’s role as the holder of records that originated in other agencies can add further delay. This delay is beyond the control of the FOIA and Special Access staff because the office has no independent authority to declassify documents or to compel agencies to which the office has sent documents for consultation to review and return the records in a timely fashion. While the records are in NARA’s legal possession, the office’s staff must be aware of other agencies’ equities in the records, particularly if the records are classified. That means it is not uncommon for the office to consult with other agencies, a process that involves sending records to the agency that has interest in the records for review before they are released. Indeed, several of NARA’s annual FOIA reports note that many of the agency’s 10 oldest pending cases involve consultations. Furthermore, the need to release records pertaining to high-profile current events, particularly those that involve records from a special investigation or special prosecutor, has overwhelmed the office in the past. These current events have contributed to a growth in the FOIA backlog and further unintended delays for requesters.

When the office is faced with all-hands-on-deck special projects, such as responding to requests for records about a pending Supreme Court justice nominee, for example, regular FOIA processing is delayed, contributing to the backlog. We understand that NARA's senior management recognizes that Special Access and FOIA requires more staff, and has authorized the unit to hire 10 additional staff members.

Recommendations: We encourage Special Access and FOIA leadership to develop a strategy to help the newly expanding staff tackle the agency's backlog and more easily handle the additional work demanded by short-term high-profile projects. Based on our discussion with the office's staff regarding the nature of some of the oldest pending requests at NARA, we also encourage Special Access and FOIA to consider exploring whether it can engage OGIS' mediation services on some of its oldest pending requests.

Topic: Good Customer Service

Observation/ Best Practice: Our review of the agency's case files and processes shows that Special Access and FOIA generally provides great customer service. Each day a Special Access and FOIA employee is "on-call" at the Archives facility in College Park, MD, to assist researchers who visit the facility. The on-call employee is available to provide "on-demand" screening allowing in many, but not all, cases records that were flagged as "possibly restricted" when they were accessioned by NARA to be released without a FOIA request. The on-call employee also is available to help requesters with filling out standard FOIA request forms and to answer other FOIA-related questions.

When agency staff members identify issues with a request, they follow up with the requester to clarify and possibly narrow the scope of the request. Additionally, staff members contact requesters when they recognize how a complex request could be easily narrowed to move it into the simple track or when the records could be obtained without a FOIA through the Special Access process. The staff has also adopted a standard operating procedure for requests with a very large amount of responsive records that helps ensure relatively smaller requests do not unfairly go unprocessed while the agency handles the large requests; for these large requests,

staff will process about 1,000 pages of the records before returning the request to the end of the office's complex processing queue. As we noted earlier, it generally takes about three and a half years for a request to make its way through the office's complex processing queue. It is worth noting that the office does not allow appeals until the request is completely processed. To help make sure the practice is as fair as possible to the requester with a voluminous records request, staff members contact the requester to discuss if he or she is still interested in the records, whether the request can be narrowed, and—perhaps most importantly—if the requester has any order in which he or she would like to receive records.

The office staff also proactively informs requesters when the responsive records include classified records and explains how those records, often times but not always, mean that the request will be placed in the complex queue and it will take a longer time for the agency to begin processing those records. When a request for classified records is placed in the complex queue upon receipt, NARA sends the records to the agency that created the documents for consultation and requests declassification. In terms of proactive engagement, the staff routinely searches the Social Security Death Index when processing requests for records pertaining to third parties. This practice ensures the third party is deceased and allows release of more information than would otherwise be released.

The office also consistently includes contact information on each letter, including a phone number and email address the requester can use to contact the agency. We recognize that the Special Access and FOIA office is able to provide great customer service because FOIA training is a cornerstone of its program. Martha Murphy encourages her staff to take as much free training as possible, and actively searches for training for employees.

Recommendation: The office should consider discussing strategies with the Office of General Counsel for giving requesters the option to appeal decisions on interim releases for requests in the complex queue. Granting requesters the opportunity to appeal on interim releases gives the requester the opportunity to have issues addressed in a timelier manner. Additionally, appeal decisions can help inform how the remainder of the records are processed. It also is important to

note that while requesters would have the option of appealing interim responses, they preserve the right to appeal after the agency's final release determination.

Topic: Improving Public Understanding through Communication

Observation: We note that Special Access and FOIA recently developed standard template letters for processors. These templates are a great first step. However, we suggest revising them with an eye towards better public understanding of the office's processes. While some frequent requesters know a great deal about how offices process requests for information, the process can be cryptic for many requesters. Providing all requesters with better explanations about what the office is doing can lessen confusion about the process.

The letters currently inform requesters that they have been placed in either the first-tier (simple) or second-tier (complex) processing queue without explaining much about what that means for the requester. Particularly with respect to larger requests that end up in the complex queue, providing requesters with an explanation of why the request is placed in the complex track, what kind of requests are placed in the simple track, and the difference in expected wait time for a response would encourage good communication between requesters and the office about the scope and intent of the request.

The template letters and the case files we reviewed do not explain in detail the exemptions used to withhold records. Including even a few additional lines explaining the exemption in plain language could improve public understanding of why material is withheld, and help requesters make more informed decisions about whether to file an appeal and on what grounds.

On the topic of fees, the template letters and case files we reviewed show that Special Access and FOIA informs the requesters that they can expect to pay archival fees for records. The case files, however, also show that, in some older cases, when a requester asked for a fee waiver or a particular fee category, Special Access and FOIA did not explain in its response why the FOIA statutes' fee category and fee waiver provisions did not apply. Additionally, while the invoice Special Access and FOIA sends to requesters explaining the fees they would have to pay provided a great breakdown of fees, an OGIS best practice, the response letter neither referenced the total from the invoice nor an enclosure in the mailing. However, we note that in more recent

cases reviewed, Special Access and FOIA now provides information about archival fees and why FOIA fees do not apply.

We also note two areas where relatively small changes could improve public understanding. First, we note two letters listed in each request's alphanumeric tracking number. We understand that these two letters are artifacts of an old system and are no longer meaningful within the office. These letters in the alphanumeric tracking number could potentially confuse requesters. Second, we note that in response to the OGIS survey, one-third of FOIA processors seemed confused regarding when NARA's FOIA regulations were last updated. Providing the FOIA team with clear information regarding the status of the agency's FOIA regulations would help to make sure all processors are following the same guidelines and providing the public with up-to-date information.

Recommendation: Revising the templates and creating a standard language bank that explains the queue system and exemptions could go a long way towards improving public understanding of the office's processes. Specifically, we recommend explaining the two-tier system and informing requesters about narrowing complex requests so that they can be placed in the simple queue; writing plain language explanations of exemptions, fee categories and fee waivers and their application to archival records; and referencing in fee letters that an invoice is enclosed. We also recommend simplifying the current potentially confusing alphanumeric FOIA tracking numbers and taking steps to ensure that FOIA processors are using the most current FOIA regulation.

Topic: Lessons Learned from Litigation

Observation/ Best Practice: As part of our review of NARA's FOIA programs, we reviewed all FOIA litigation against NARA over the past few years. In general, FOIA cases brought against NARA did not fall into specific categories and we did not notice any trends. In the few cases where a court ruled against NARA's practices, we note that Special Access and FOIA took corrective measures to avoid similar future litigation.

In particular, we note a long-standing form to which Special Access and FOIA staff added a step to its consultation process to put the office in a better position to provide requesters with an estimated date of completion if the requester asks for one—as agencies are required to do under the law. After a court settlement in a case in which the agency declined to provide an estimated date of completion when records were sent to another agency for consultation, NARA took steps to avoid similar situations in the future. Special Access and FOIA’s “classified document accountability record” now includes a line for the agency that created the record to provide an estimated date of completion before returning the “classified documents accountability record” to NARA.

Special Access and FOIA also is careful to make sure that requesters are not denied appeal rights. We reviewed several letters that stated: “We do not consider this to be a denial of your request.... If you consider this a denial, you can appeal our response.” Given the range of issues that a requester can appeal (adequacy of search, fee issues, etc), this is a best practice.

Recommendation: The creation of the “classified document accountability record” is a great first step in making sure that NARA can meet its obligations under the law to provide an estimated date of completion. We suggest that if a requester asks for a status update on a request, Special Access and FOIA staff follow up with consulting agencies that failed to fill out the information.

Topic: Enhancing Disclosure

Observation/ Best Practice: The National Archives Catalog, previously referred to as Online Public Access, provides public access to millions of records. Agency FOIA staff plan to post all reviewed/released records to the catalog as soon as they have the staff to support that process. The agency started this process in 2013 but had to stop due to a large agency push to upgrade the catalog. The agency’s software generates all documents as image files and ensures that redactions cannot be removed.

Recommendation: We suggest that the agency regularly provide links to the most recently posted documents either on its FOIA Electronic Reading Room, or on a webpage that has heavy traffic, so the public is aware of recently released documents.

Topic: Approach to Previously Privileged Information

Observation/ Best Practice: The unique nature of the records processed by Special Access and FOIA led to the development of a clear policy regarding the use of FOIA Exemption 5: simply put, the office's policy is to not use Exemption 5, which covers "inter- and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." In practical terms, Exemption 5 covers several well-known legal privileges, including the deliberative process, attorney-work product, and attorney-client privileges. Exemption 5 is not applied to historical records that are in NARA's holdings. We note both that Special Access and FOIA generally informs agencies that they should not transfer any records to NARA as long as they have an operational need for them, and that it will push back when an agency attempts to use Exemption 5 to withhold material in archival records during the consultation process.

Topic: Enhancing Awareness

Observation: As explained in the introduction, NARA's decentralized FOIA initial request process is divided by the type of requested records: operational or archival. When Special Access and FOIA refers documents to other agencies for consultation, occasionally agencies don't always understand that the records are no longer the legal responsibility of the agency being consulted; this leads to confusion on the part of agencies which suggest application of exemptions such as Exemption 5. On the other hand, even though all of the records the Special Access and FOIA office processes are archival, exemptions such as Exemption 3 statutes and Exemption 7 law enforcement exemptions may still apply, which can confuse requesters. We also note that there is some confusion among some other agencies as to what components of NARA should receive certain requests. For example, we note that some requests for military

personnel records referred from other agencies went to Special Access and FOIA, rather than the appropriate NARA component, the National Personnel Records Center (NPRC). NPRC is NARA's central repository of personnel-related records for both U.S. military and civilian workers.

Recommendation: We suggest that NARA's Chief FOIA Officer re-introduce NARA components and holdings to other agency FOIA shops in order to prevent any confusion when other agencies receive consultations and referrals from the office. In addition to Special Access and FOIA, this letter should explain the types of records processed by the NPRC and the Office of General Counsel. We also suggest that NARA consider creating a handout that selected military service FOIA offices can post in their workspace that clarifies which NARA component should receive referrals military and civilian personnel records.

The agency can also enhance awareness of the types of records it processes by educating requesters up-front about information they are unlikely to receive. The agency is already doing this in some template letters noting, for example, that "there are documents that may be redacted to protect the identity of named informants or confidential sources, including source codes and informant file numbers." Special Access and FOIA staff members have subject matter expertise that will allow them to make similar assessments of the types of information that may not be released on a case-by-case basis. Expanding this practice on a case-by-case basis would help set requester expectations as to what kinds of records likely will be released.

Observation: We note that NARA is looking for new ways to proactively disclose information to the public, such as the use of the National Archives Catalog mentioned previously. As noted in our Phase I report, the agency's FOIA page could use some minor tweaks to make it more useful to the public.

Recommendation: Changes to NARA's FOIA web pages would greatly improve the public's understanding of the process, and requesters' ability to find content. The agency should post FOIA regulations in a way and a place that is easier for the public to find. This suggestion is also included in our Phase I Report: "We suggest NARA post a searchable PDF version of its updated FOIA regulations to allow requesters to search the entire document." The agency should also

make it clear that the phone numbers listed on the FOIA contact page are intended to be used as the “tracking system” agencies were required to set up by the 2007 OPEN Government Act.

Summary of OGIS Recommendations

- Create a strategy to handle processing of requests regarding high-profile current events without stopping processing on other requests
- Explore how OGIS might be able to assist with strategies for closing some of the oldest pending cases
- Discuss strategies with the Office of General Counsel for whether to allow requesters to appeal decisions to withhold information on interim releases
- Revise template letters and create a bank of standard language that explains, in plain language, the processing queues, fee policies, and exemptions
- When a requester asks for a status update, follow up to ensure agencies complete the estimated date of completion section on the “classified document accountability record”
- Provide links to the most recently released documents on FOIA Electronic Reading Room or social media platforms
- Write letters to other agency Chief FOIA Officers and FOIA Public Liaisons, signed by the Chief FOIA Officer, explaining what Special Access and FOIA does and how it processes archival records within its custody
- Consider creating a handout that military service FOIA offices can post in their workspace that clearly communicates which NARA component should receive referrals for military and civilian personnel records
- Simplify potentially confusing alphanumeric FOIA tracking numbers
- Provide the FOIA team with clear information regarding the status of the agency’s FOIA regulations
- Educate requesters in initial responses about exemptions and why they still apply to particular records
- Post a searchable PDF version of NARA’s FOIA regulation
- Add language to FOIA website directing requesters to call the general number to track requests