



OGIS Issue Assessment: Agency Compliance with the Estimated Date of Completion Requirement of the Freedom of Information Act

What OGIS Found	What OGIS Recommends
<p>1. Agency responses to requests for estimated dates of completion (EDCs) as mandated by the Freedom of Information Act (FOIA) are mixed. (<i>Recommendation 1</i>)</p> <p>2. Agency use of online tools to provide requesters with EDCs and status information is mixed. (<i>Recommendation 2</i>)</p> <p>3. Agencies are challenged by EDCs and some use data to provide status information but not EDCs. (<i>Recommendations 3 & 4</i>)</p>	<p>1. Agencies must provide EDCs to requesters upon request to comply with the FOIA statute.</p> <p>2. Agencies should ensure that online tools that provide EDCs function properly, provide the most up-to-date information possible, and provide contact information for the FOIA program.</p> <p>3. Agencies should use average processing times for simple and complex requests to help determine EDCs.</p> <p>4. Agency Chief FOIA Officers should ensure that FOIA professionals have the necessary resources to provide EDCs to FOIA requesters.</p>

<u>What OGIS Reviewed</u>
<p>The Office of Government Information Services (OGIS) reviewed:</p> <ul style="list-style-type: none"> ▪ A statistically significant random sample of its case files involving FOIA requests submitted to all of the 15 Cabinet-level departments and 17 independent agencies between July 1, 2016 and December 31, 2018; ▪ Results of surveys administered to more than 250 FOIA professionals as part of its agency FOIA assessment program at eight agencies; ▪ Agency FOIA regulations; and ▪ Guidance issued by the Office of Information Policy (OIP) at the U.S. Department of Justice.



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A Note to Readers

This issue assessment –which reflects months of research and the review of hundreds of Office of Government Information Services (OGIS) cases–was written prior to the Coronavirus (COVID-19) pandemic. It does not reflect the challenges many Freedom of Information Act (FOIA) offices face as their staff members distance themselves physically from one another and, in some cases, from the computer and records systems upon which they depend to process requests.

Please note that a particular agency’s capability to respond to FOIA requests will vary depending on the records held by the agency and technology used by the FOIA staff. This situation is extremely fluid as agencies are creating new processes and learning the extent of their limitations. For this reason, we anticipate that there are likely to be COVID-19-related processing delays at many agencies, and in some cases, estimated dates of completion will be more difficult than ever to determine.

As OGIS communicates with agencies regarding their capabilities in the current environment, we will do our best to keep the FOIA community informed. We expect that the landscape will continue to change daily. In the meantime, we are publishing this assessment now because we believe that the core message—that it is essential for agencies to communicate with requesters about the status of requests—is more relevant than ever. We urge agencies to provide information on their FOIA page regarding their current status and to update that information as the situation changes. Finally, we ask requesters to recognize the challenges faced by agencies and to be patient during this extraordinary time.



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Introduction

As the Freedom of Information Act (FOIA) Ombudsman, the Office of Government Information Services (OGIS) plays a unique role in the FOIA process, identifying and surfacing issues and recommending opportunities for change. FOIA directs OGIS to offer dispute resolution services to requesters and agencies; review agency FOIA policies, procedures and compliance; and identify procedures and methods for improving compliance.¹ This assessment of agency compliance with FOIA's estimated date of completion (EDC) requirement is the result of OGIS's dispute resolution and review work.

Background

Congress amended FOIA in 2007 to require agencies to establish a telephone line or online service that provides requesters with status information, including the date on which the agency originally received the request and “an estimated date on which the agency will complete action on the request.”²

While FOIA does not require agencies to promulgate regulations specifying their procedures for calculating EDCs, the Department of Justice's Office of Information Policy (OIP) encourages agencies to include EDC language in their FOIA regulations. Specifically, the sample language in OIP's Template for Agency Regulations states that: “Upon request, the agency will provide an estimated date by which the agency expects to provide a response to the requester.”³

The FOIA regulations for the U.S. Department of Health and Human Services (HHS) and the National Archives and Records Administration (NARA) go one step further by describing *how*

¹ 5 U.S.C. § 552(h)(2).

² 5 U.S.C. § 552 (a)(7)(B)(ii).

³ OIP Template for Agency FOIA Regulations (updated February 22, 2017), <https://www.justice.gov/oip/template-agency-foia-regulations>.

the agencies determine EDCs, and note that the estimates they provide are just that—*estimates* that are subject to change at any time. The HHS and NARA regulations also explain how the agencies determine the EDCs in situations requiring them to consult with other agencies before making release determinations.⁴

OIP issued guidance in 2008 stating that agencies “should make a reasonable judgment as to when they believe processing will be complete, based upon what remains to be done in a given case and in light of the agency’s experience with processing similar requests. The important point is that the agency and the requester are able to communicate easily regarding the status of a request.” OIP updated the guidance in 2014, reaffirming that advice.⁵

Although FOIA does not require agencies to provide EDCs for administrative appeals, both OGIS and OIP have emphasized that informal communication with requesters benefits agencies and requesters alike and facilitates the effective processing of appeals.⁶

Federal courts have ruled that the language of the statute is clear and that agencies that have a pattern or practice of not providing EDCs have violated FOIA. *See OGIS Advisory Opinion No. 2020-01, Agencies Must Provide Estimated Dates of Completion upon Request.*⁷

Why We Did this Assessment

Since OGIS opened its doors in 2009, the office has received requests for assistance from requesters seeking EDCs. We saw an increase in requests for assistance involving EDCs after the FOIA Improvement Act of 2016 was signed into law on June 30, 2016.⁸ The statutory change requires agencies to inform requesters of OGIS services at several points in the FOIA process.

In reviewing materials submitted to us through our dispute resolution program and through our compliance assessments of agency FOIA programs, we observed significant frustration among requesters and Federal agencies regarding EDCs. FOIA requesters who are unable to obtain EDCs or, in some cases, any information from agencies about the status of their requests,

⁴ HHS FOIA Regulations 45 C.F.R. § 5.26 and NARA Records Subject to FOIA 36 C.F.R. § 1250.27(a).

⁵ OIP Guidance: Assigning Tracking Numbers and Providing Status Information for Requests (posted 2008, updated August 22, 2014), <https://www.justice.gov/oip/oip-guidance-1>.

⁶ OIP Guidance: Adjudicating Administrative Appeals under the FOIA (posted February 14, 2019, <https://www.justice.gov/oip/oip-guidance/Adjudicating%20Administrative%20Appeals%20under%20the%20FOIA>).

⁷ OGIS Advisory Opinion No. 2020-01, Agencies Must Provide Estimated Dates of Completion upon Request (published March 31, 2020), <https://www.archives.gov/files/ogis/assets/ogis-advis-op-2020-01.pdf>.

⁸ FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538.

frequently contact OGIS for assistance. Likewise, frustrated FOIA processors have told us about the challenges of providing requesters with EDCs, particularly when faced with backlogs.

OGIS has heard from requesters:

- “I have been chasing [the agency] for over 2 months now JUST FOR THE STATUS.” (emphasis in original).
- “I wrote to you on [date] asking for an estimated date of completion for my [date] FOIA request, which remains outstanding. I haven't received any estimated date of completion, however, despite being told that there would be demonstrable progress on the processing of this request by [date] (more than two months ago, now).” (email to an agency on which OGIS was copied).
- “To say that I have lost patience with [the agency] over this FOIA request is a major understatement. Not surprisingly, the [date] estimated completion date provided by [the agency] has come and long gone. In the meantime, I have called the [agency's] FOIA office on numerous occasions ... to inquire about the status of my [agency] FOIA request [tracking number]. The case manager [name] was optimistic because the case was on his desk and undergoing final review. He said I should hear from the agency very soon. Nothing came in the mail so I called again on [date].”
- “I submitted [a] FOIA with [the agency on a particular date] and I still have not received the requested information on a date when I can expect the information. I emailed [FOIA staff] on [five separate dates] requesting either the information or a date when I can expect the information I requested and I have not received either.”

OGIS has also heard from agency FOIA professionals:

- “Unfortunately, we do not have a specific completion time available.” (The agency instead provided requesters with general information—*e.g.*, that it was still searching for records—and directed requesters to monitor the status of their request via the agency's FOIA web page.)
- “To give a very specific date is not in our best interest, or yours, for unforeseen circumstances to include a possible additional review may not allow for [agency FOIA office] to meet a specific date.”
- “[T]here is no present estimated date of completion Please be advised that the requests in question are not the oldest requests of the assigned [FOIA professional].”

- “I do not have an estimated date of completion right now but can advise once I do. We have a large backlog (as most do) and we are trying our best. It is just me processing requests and handling the litigation.”

Additionally, we have learned that more than half of FOIA professionals surveyed as part of eight OGIS assessments of agency FOIA programs said they “sometimes” or “rarely or never” provided EDCs when requested.⁹

What We Reviewed

OGIS hears every day from requesters seeking EDCs or status information for delayed requests and appeals.¹⁰ When OGIS receives a request for assistance from a requester who does not appear to have contacted the agency for an EDC, OGIS provides the requester with the contact information for the agency’s FOIA Requester Service Center or FOIA Public Liaison and, if applicable, a link to the agency’s online system for checking FOIA request status.

When requesters contact OGIS after unsuccessfully contacting the agency to request an EDC, OGIS contacts the agency on the requester’s behalf. If OGIS receives no response from the agency, we generally provide the requester with the average processing times for perfected simple and complex requests, information that is available from the agency’s Annual FOIA Report and on [FOIA.gov](https://www.foia.gov). It is important to note that agencies calculate processing times in work days since the statute excludes Saturdays, Sundays, and legal public holidays.¹¹ Between July 1, 2016 and December 31, 2018, OGIS received and logged in 830 requests for assistance as “delay” cases. For this issue assessment, we examined a statistically significant random sample of 349 cases files involving FOIA requests submitted to all of the 15 Cabinet-level departments and 17 independent agencies.¹²

⁹ See OGIS FOIA Compliance Assessment Reports for: Federal Emergency Management Agency (FEMA) (September 2015); U.S. Coast Guard (USCG) (September 2015); Transportation Security Administration (TSA) (January 2016); Customs and Border Protection (CBP) (March 2016); U.S. Secret Service (USSS) (July 2016); Immigration and Customs Enforcement (ICE) (October 2016); U.S. Citizenship and Immigration Services (USCIS) (February 2018); and U.S. Department of Education (September 2019), <https://www.archives.gov/ogis/foia-compliance-program>.

¹⁰ Although FOIA does not require agencies to provide requesters with EDCs for FOIA administrative appeals upon request, OGIS receives requests for assistance from requesters seeking EDCs and/or information on the status of their appeals. Seven percent of OGIS case files we reviewed came from requesters seeking EDCs or status information for their appeals.

¹¹ 5 U.S.C. §§ 552(a)(6)(A)(i)-(ii).

¹² The methodology allows us to apply the findings and analysis to the entire population of 830 cases we logged in as “delay” cases during that time frame. An online sample size calculator (<https://www.surveysystem.com/sscalc.htm>) revealed that we needed to review 349 case files for a confidence level of 95 percent and a margin of error of +/- 4 percent. We used Excel to assign sequential numbers to each of the 830 cases and then to generate the random sample of 349 cases.

For each case in the sample, we assessed whether:

- the requester sought assistance in obtaining an EDC for a request or an appeal;
- the requester had tried to contact the agency directly to request an EDC before requesting OGIS assistance;
- the agency had previously provided the requester with an EDC before the requester contacted OGIS for assistance; and
- the agency provided OGIS with an EDC to share with the requester.

When agencies did not provide OGIS with EDCs, the agencies sometimes offered explanations as to why they could not provide estimates.¹³

As part of our compliance assessments of agency FOIA programs, we typically survey agency FOIA professionals about a range of FOIA processes, including how often their agencies provide requesters with EDCs. For this EDC issue assessment, we reviewed the results of the surveys we administered to a total of 258 FOIA professionals at Federal Emergency Management Agency (FEMA); U.S. Coast Guard (USCG), Transportation Security Administration (TSA); Customs and Border Protection (CBP); U.S. Secret Service (USSS); Immigration and Customs Enforcement (ICE); U.S. Citizenship and Immigration Services (USCIS); and U.S. Department of Education between 2015 and 2018 as part of our agency FOIA program assessments. In addition, we reviewed OIP guidance and agency FOIA regulations.

Finding 1: Agency Response to Requests for EDCs is Mixed

More than half of FOIA professionals surveyed by OGIS as part of eight agency assessments said they “rarely or never” or “sometimes” provided EDCs when requested. Federal courts have ruled that agencies that have a pattern or practice of not providing EDCs are in violation of FOIA.¹⁴

The results of OGIS’s online survey of 258 FOIA professionals at eight agencies between 2015 and 2018 showed that 28 percent of respondents “rarely or never” provided EDCs when requested, while 24 percent “sometimes” provided estimates when asked.¹⁵

Those survey responses, in part, resulted in recommendations regarding EDCs to four of the

¹³ Individual OGIS case files, which we have not made public under the Administrative Dispute Resolution Act 5 U.S.C. §§ 571-581, typically contain information about the FOIA issue or dispute and may contain copies of correspondence between the requester and the agency.

¹⁴ See OGIS Advisory Opinion No. 2020-01, Agencies Must Provide Estimated Dates of Completion upon Request (published March 31, 2020), <https://www.archives.gov/files/ogis/assets/ogis-advis-op-2020-01.pdf>.

¹⁵ See OGIS FOIA Compliance Assessment Reports for FEMA, USCG, TSA, CPB, USSS, ICE, USCIS, and Education, <https://www.archives.gov/ogis/foia-compliance-program>.

agencies OGIS assessed during that time period. We recommended in September 2019 that the U.S. Department of Education comply with FOIA by providing EDCs to requesters who seek such information.¹⁶ In response to OGIS recommendations, FEMA in 2016 added language to its acknowledgement letters directing requesters to a DHS webpage that, at the time, allowed requesters to track the status of their FEMA requests, including EDCs. In 2016, TSA reported

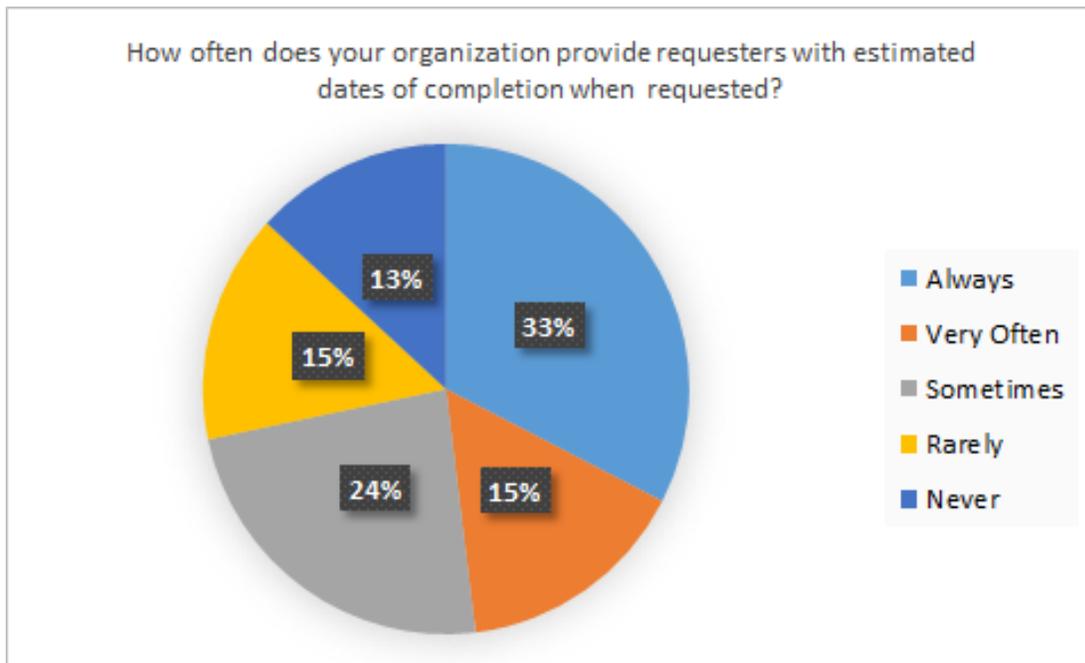


Figure 1: OGIS’s Online Survey Responses of 258 FOIA professionals at eight agencies between 2015 and 2018.

that updates to the DHS online FOIA request tracking tool increased the accuracy of EDCs. In 2015, USCG removed language from its template letters informing requesters that the agency could not provide EDCs for appeals.¹⁷ In more than one-quarter of the cases we reviewed in our case sample, agencies did not provide OGIS with an EDC to share with requesters. In 102 cases, agencies provided OGIS with EDCs while in an additional 102 cases agencies did not provide OGIS with EDCs. The EDC issue was not applicable for 157 cases in the sample.¹⁸

¹⁶ Review of U.S. Department of Education Freedom of Information Act Program, published September 25, 2019, <https://www.archives.gov/ogis/foia-compliance-program/agency-compliance-reports/education>. We conducted our on-site visit at the Department of Education in August 2018. We will follow up with the Department in late January 2020, 120 days after publication of our report, to learn what steps it has taken in response to our recommendations.

¹⁷ Our agency assessments are snapshots in time and our findings and recommendations may no longer apply—or have been addressed by the agency.

¹⁸ Examples of cases where the EDC issue was “not applicable” include cases where the agencies had responded to the requests before the requesters had contacted OGIS or while the requesters’ OGIS cases were pending; cases where OGIS did not contact the agency to request an EDC; and cases that were initially logged in as delay/status cases, but OGIS handled them in a different manner.

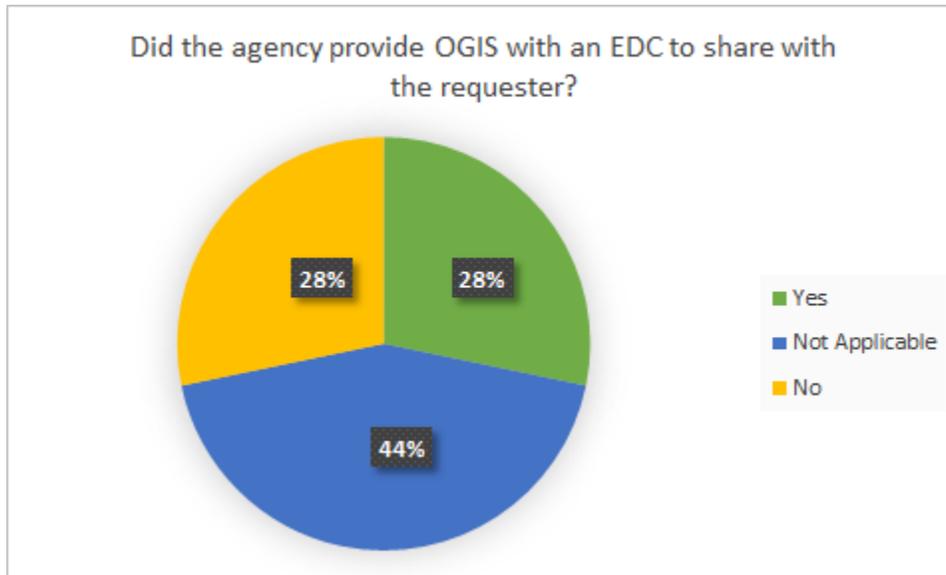


Figure 2: OGIS Case Sample Responses - Did the agency provide OGIS with an EDC to share with the requester?

Recommendation 1: Provide EDCs to requesters upon request to comply with the FOIA statute.

Best Practice: Remind requesters that an EDC is just that, an estimate, and not a guarantee that the agency will have responded to the request by that date.

Best Practice: Provide EDCs in acknowledgment letters and interim responses, if possible. If not possible at that time, explain that the agency will provide an EDC upon request and include information on how requesters can ask for an EDC.

Best Practice: In communications with requesters, provide the telephone number, email address and link to a portal or website for the FOIA Requester Service Center and FOIA Public Liaison so requesters know how to contact the agency for status information.

Best Practice: When a requester asks for an EDC, use it as an opportunity to discuss the scope of the request with the requester and how narrowing the scope could result in an earlier EDC.

Best Practice: Provide requesters with EDCs for appeals upon request.

**Finding 2: Agency Use of Online Tools to Provide Requesters with EDCs
and Status Information is Mixed**

Technology can improve FOIA administration and play an important role in communicating with requesters about EDCs; however, there are challenges associated with technology and it is not the solution for every agency.

OIP recommended in 2017 that agency FOIA websites provide instructions as to “how the requester can obtain status information and an estimated date of completion for their request.”¹⁹ Some agency websites allow requesters to check the status of requests and obtain EDCs. Other agencies provide requesters with online access to general information about their requests, including status, processing queues, and/or average processing times.

In the OGIS case files we reviewed for our case sample, requesters reported that the status information available to them via agency FOIA web pages and FOIA portals can be difficult to understand, inaccurate, or incomplete. Among the concerns OGIS observed in the case sample were that EDCs were automatically generated and updated, regardless of the actual status of the request; that EDCs had passed and had not been updated; and that the online mechanism for checking the EDC did not work.

Some requesters noted that status terms used on FOIA status and web pages were not clear. For example, does “under agency review” mean that the agency completed the search and the request had been assigned to a processor for review? What does it mean if the status of a request is listed as “new” even though the requester submitted it months ago?

Recommendation 2: Ensure that online tools that provide EDCs function properly, provide the most up-to-date information possible, and provide contact information for the FOIA program.

Best Practice: Clearly define the terms used in any online tool that provides status information.

Best Practice: Agencies that do not have online tools for looking up EDCs should include on their FOIA websites contact information for the FOIA Requester Service Center and FOIA Public Liaison so requesters can contact the agency to request an EDC.

¹⁹ OIP Guidance: Agency FOIA Websites 2.0 (posted November 30, 2017), <https://www.justice.gov/oip/oip-guidance/OIP%20Guidance%3A%20%20Agency%20FOIA%20Websites%202.0>.

Finding 3: Agencies are Challenged by EDCs and Some Use Data to Provide Status Information but Not EDCs

For 28 percent of the cases in our case sample, agencies did not provide OGIS with a specific EDC to share with the requester. Rather than providing OGIS with EDCs, in most instances, agencies provided general status information for OGIS to share with requesters.

Some agencies are providing requesters with information about the status of a request, but do not provide EDCs. Of the cases in the sample where agencies did not provide OGIS with specific EDCs, we observed that agency FOIA professionals cited issues such as agency backlogs, the increased volume and complexity of incoming requests and appeals, staffing levels, and litigation as reasons for not providing EDCs.

OGIS and OIP recognize the challenges that agencies face when trying to calculate EDCs. For agencies that use multi-track processing, OIP recommends that they consider their average processing times for various tracks such as simple and complex.²⁰ To help set expectations with requesters, each agency's contact information on [FOIA.gov](https://www.foia.gov) now provides the average number of working days for simple and complex requests based on annual reporting data.²¹ In cases in which the search for responsive records is not yet complete, some agencies inform their requesters that an updated EDC will be calculated upon completion of the search.

FOIA Requester Service Centers and FOIA Public Liaisons play an important role in EDC compliance as they are in the best position to discuss with requesters the processing of their requests.

FOIA tasks FOIA Public Liaisons with “increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.”²² Additionally, OIP guidance notes that an agency's “FOIA Requester Service Center must be ready to assist the public in understanding all aspects of the FOIA and how it works at their agency.”²³

FOIA professionals who are tasked with monitoring and responding to requests, appeals, and communications from FOIA requesters often handle a high volume of requests with constrained

²⁰ OIP Guidance: Assigning Tracking Numbers and Providing Status Information for Requests (updated August 22, 2014), <https://www.justice.gov/oip/oip-guidance-1>.

²¹ We note that the data provided at [FOIA.gov](https://www.foia.gov) is at least one year old – i.e., the most recent data is from Fiscal Year (FY) 2018; agencies are currently in the process of gathering data and submitting their FY 19 reports.

²² 5 U.S.C. § 552(l).

²³ OIP Guidance: The Importance of Quality Requester Services: Role and Responsibilities of FOIA Requesters Service Centers and FOIA Public Liaisons (updated June 12, 2018), <https://www.justice.gov/oip/oip-guidance-5>.

resources. Support from agency leadership is crucial to their success in meeting FOIA's statutory requirements, including providing EDCs upon request. Chief FOIA Officers, who are required under FOIA to support efficient and appropriate compliance with FOIA and recommend improvements to implementation, are in the best position to ensure such support.

Recommendation 3: Use the agency's average processing times for simple and complex requests to help determine EDCs.

Recommendation 4: Agency Chief FOIA Officers should ensure that FOIA professionals have the necessary resources to provide EDCs to FOIA requesters. If necessary, Chief FOIA Officers should use their statutory authority to recommend to the head of the agency adjustments to agency FOIA practices, policies, personnel, technology, and funding.

Best Practice: If the date for an EDC has passed and the requester asks for a new EDC, agencies should consider using other data to determine the new EDC and/or put into context the agency's delay in responding. Other data available include the median number of days it took the agency to process requests in a particular queue; the median age of requests in a particular queue; the range in the number of days it took to the agency to respond to requests in a particular queue; and the range in the number of days requests have been pending.

Best Practice: In processing FOIA requests requiring consultation with another government agency, agencies should ask the other agency for an EDC. Calculate the EDC for a request requiring consultation by combining your agency's own processing time estimate with the consulted agency's time estimate. If the consulted agency does not provide an EDC, provide one to the requester based on your agency's general experience working with that agency and the types and volumes of records at issue.²⁴

²⁴ NARA Records Subject to FOIA, 36 CFR § 1250.27(b).