

On behalf of the Society for Historians of American Foreign Relations (SHAFR), we have gathered on FOIA implementation as it affects research in foreign relations history. We also searched for FOIA in the responses to the 2014 SHAFR survey on archival experiences. Here are our findings and some suggestions.

Importance of a working FOIA process:

Foreign relations historians value the FOIA process for their research. Historians working as far back as the 1920s rely on FOIA to access information – in some cases, to obtain particular documents, in others to prod agencies to transfer entire record groups to NARA. Our survey respondents also regard FOIA as fundamentally important for democratic governance. For both these reasons, foreign relations historians have a lot at stake in your committee's efforts to improve FOIA implementation.

General declassification issues with bearing on FOIA:

Although FOIA and declassification issues may seem to be separate, they are not. Many FOIA requests stem from the backlog in declassification. Much of the time and money spent on FOIA requests could be saved if there was not such a backlog in declassification.

Not only do researchers experience FOIA and declassification as interrelated issues, but they also appear to be administratively connected as well insofar as archivists and information managers administer FOIA responses alongside Mandatory Declassification Reviews, general declassification, and public information provisioning.

Researchers often do not know what kinds of records have been withheld from declassification. They thus do not know that they can submit FOIA requests for those records.

Due to sketchy or nonexistent inventories, finding guides, and descriptions of withdrawn documents, researchers have to cast a large net in making FOIA requests. Such blanket requests are likely to add to the wait times for researchers in the queue with more targeted requests.

FOIA-specific issues:

Researchers report long lag times for obtaining documents through the FOIA process. At best, they report an eight month to one year wait, but delays also range from two to four years, five to seven years, and longer. Some researchers report that requests are still pending after a decade or more. This has caused some researchers to give up, since they have finished their dissertations and books while still waiting for FOIA requests to be processed. As one respondent put it: "At one of my research trips as a graduate student, I was advised by the archivist that the MDR/FOIA requests should be filled and will be available (if I am lucky) by the time third edition of my book (hypothetical) would come out."

Researchers report that some denials seemed unreasonable and capricious and that some documents appear to have been subjected to excessive redaction: “I have received documents - in some instances covering material from sixty, seventy, or eighty years ago - where almost all of the text is redacted. This is absurd.” In some cases, researchers have realized upon receiving redacted FOIA documents that their contents have been published in full already.

Researchers object to the b-5 (predecisional) exemption for keeping governmental records out of the public domain.

Researchers are sometimes left in the dark about the status of their FOIA requests, due to a lack of updates from and poor communication by caseworkers.

Researchers note that practices vary across institutions and presidential libraries. Some presidential libraries process requests more efficiently than others. Some agencies, such as the CIA, DOD, and FBI have FOIA reading rooms; others (State) do not. The sense that documents access problems extend beyond Executive Branch records is captured by the respondent who wrote that greater records access would not be “feasible without an act of Congress--including releasing their own documents and having them subject to FOIA requests.”

Due to the delays in the FOIA process and the redactions and refusals, researchers are reporting piecing together histories of U.S. foreign relations from collections in other national archives. This results in an incomplete account and one that may misinterpret U.S. policymaking or provide less balanced views.

There is some concern that FOIA is being used to restrict documents access as well as to enable it. Unsavvy researchers who make the mistake of requesting documents by the name of an official (to take one example) rather than by the act or event may find their requests denied, whereas an experienced researcher requesting the same document with a different search term or justification may find the request granted.

According to one respondent, the current policies for missed payments on a request are punitive – cancellation of *all* FOIA requests in progress, including those that have been fully and promptly paid.

It appears that most SHAFR members do not take advantage of the current appeals processes, which involve the Justice Department's Office of Information and Privacy and federal district courts. Rather than launch expensive and time-consuming appeals, they are more likely to give up, perhaps due to the time and budgetary constraints that they operate under.

In this regard, few SHAFR members appear to be familiar with the appeals process, available legal recourse, or FOIA's fee structures.

Proposals:

Fix the problems with declassification:

There must be better resourcing for declassification. Agencies need to be reined in on “re-classification.”

To prevent declassification backlogs and expenditures down the road, Executive Order 13526 (<http://www.whitehouse.gov/the-press-office/executive-order-classified-national-security-information>) should be followed and enforced. This stipulates that at the time of original classification, the classification authority shall establish a specific date or event for declassification. Upon reaching the date or event, the information shall be automatically declassified. Automatic declassification should happen after 25 years.

Better inventories are needed so that researchers can file FOIA requests and so that their requests will be more precise.

Improving the CIA’s CREST search engine, a primary means by which researchers identify gaps in the extant archival record, will increase efficiencies by facilitating researchers’ capability to identify more precisely the origin and location of documents for which they seek to file FOIA requests.

Technological investments:

NARA and U.S. government agencies cannot keep up with declassification imperatives and FOIA/MDR requests without better technological tools. The gap between the government record and documents available to researchers will only increase without technological innovation. Currently, most reviews are conducted by individuals, who must pore through page after page of government documents. There is some key word searching, but such searches cannot adequately identify security issues, which are often imbedded in implicit phrases or sentences. These limitations prevent reviewers from relying more heavily on technology.

New technologies using natural language processing and other methods now enable computers to go far beyond key word searches. Congress needs to allocate the necessary funds to upgrade archival technology so as to keep up with the expanding documentary record.

Managing risk:

No review system is 100% fool proof. NARA must balance the risks that come from releasing information against the benefits of a transparent and open society. As it stands now, there are no incentives for being forward leaning in making documents available. There are only punishments, real and imagined, for making a mistake. Until FOIA processors embrace risk management principles, the process will remain slow, cumbersome, and skewed toward excessive governmental secrecy.

Replace the b-5 exemption:

Replace the b-5 (pre-decisional) exemption with a ten year exemption after which “pre-decisional” documents would be treated like other government documents.

Fix the equities issue:

The equities issue (in which one agency can delay the release of information that circulated across agencies) must be fixed. There should be a set time period beyond which a third party agency loses its voice if it does not respond, the establishment of explicit and specific rules about what can be “equity” information, strictures as to how long a third party agency can hang onto its interests, and guidelines as to whether particular agency interests can impede the general move to declassification. There should also be an efficient and effective adjudication process to resolve conflicts among agencies.

Organizational change:

There should be a more uniform and centralized review and release process, so that copies of documents publicly available in one agency will be available in others as well. (This will help solve the equities issue). The National Declassification Center should be empowered in the declassification process and funded adequately for this work.

There should be a central digital registry through which researchers can locate declassified documents.

One concern that has been expressed about changes in FOIA implementation is that centralization or changed procedures might slow down or otherwise impede the agencies that currently process FOIA requests quickly and amply. The FOIA Implementation Committee needs to be careful to ensure that best practice institutions do not get pulled down to the level of the slower, less forthcoming institutions.

Shared training:

There needs to be more joint training between declassifiers and FOIA officers from the different agencies. One of the problems that exacerbates the equities issue is that declassifiers from various agencies do not trust each other. Because the personnel charged with declassification often changes, each agency with an equity stake continually and repeatedly wants to review decisions. FOIA officers should be trained jointly, should not rotate as frequently, and should be trusted by outside agencies as well as their home agencies.

Ease up on the application of the Privacy Act:

The FOIA Implementation Committee should consider whether the Privacy Act (<http://www.justice.gov/opcl/privacyact1974.htm>) is being over-enforced in the case of public figures. To quote one researcher: “Declassified documents can lose their value when names cited solely in a professional context of people who are in fact public figures are redacted. As one example of many, the name of a long-time

director of the RFE Polish Service and national hero in Poland was redacted by CIA in some of my MDR requests. That person is deceased. The same happened with the name of the first Director of RFE. These names appear unredacted in multiple documents at NARA.” Another researcher noted how ridiculous some redactions are: the elision of a prominent official’s name for privacy reasons but no redaction of the position (e.g. Director of the FBI).

Tracking ability:

There should be a website that will enable researchers who have placed a FOIA request to track the progress of their request as it wends its way through the system. This will help address the problem of researchers having to wait years for news on the status of requests.

Clearer explanation of FOIA appeals processes:

Each agency should post its guidelines for the challenge process, given that they vary substantially. Such postings should also include information on researchers’ rights and the role of offices such as the Office of Government Information Services. (<https://ogis.archives.gov/>).

More user-friendly appeals process:

There should be a streamlined and user-friendly appeals process for individual researchers, with the courts as a last resort.

More transparent fee structure

Each agency should post its fee structure for FOIA requests from beginning to the end of the process.

Elimination of blanket penalties:

Blanket penalties – meaning the cancellation of all FOIA requests if the payment for one is late -- should be ended.

Accountability:

There should be accountability policies in place for officials who act irresponsibly or in bad faith on FOIA. One possible means for evaluating FOIA implementation is to grant the Information Security Oversight Office (<http://www.archives.gov/isoo/>) greater authority to intervene in cases in which an agency appears either derelict or obstructionist.

Best Practices recommended by the Center for Effective Government:

You will see that many of our suggestions line up with those recommended by the Center for Effective Government, as listed below and found on their website (<http://www.foreffectivegov.org/foia-best-practices-guide>).

- I. **Expand proactive online disclosures:** Agencies should proactively post information online to make it easily accessible, avoiding the need for FOIA

requests. The Department of the Interior proactively identifies records of interest to the public and posts such records online, which increases transparency.

II. Use the Internet to process requests more efficiently: Agencies should allow requesters to submit requests and appeals online, provide online tracking, and use e-mail as a default way of communicating. The U.S. Environmental Protection Agency allows people to submit requests by e-mail or through the agency website, which is faster than by regular mail. Agencies should use existing technology to provide more efficient service to requesters.

III. Acknowledge and track FOIA requests promptly: Agencies should promptly acknowledge that they have received requests and make it easy to track the progress of a request. The Consumer Financial Protection Bureau provides all requesters with a tracking number in order to more easily track their requests.

IV. Clearly and proactively communicate with requesters: Agencies should proactively communicate with requesters and be certain that agency staff understand what information is being requested if there is any confusion. The National Labor Relations Board contacts requesters before denying access. The Departments of Justice and Homeland Security notify requesters if processing will be delayed.

V. Apply a presumption of disclosure and prevent the destruction of records: Agencies should adopt a foreseeable harm standard for withholding information. The National Archives and Records Administration requires agency reviewers to foresee specific harm from the disclosure of records, to ensure that the agency does not withhold information unnecessarily.

VI. Limit and streamline confidential business information claims: Confidential business information claims should be narrowly interpreted to ensure that claims of confidentiality are reasonably limited. The Department of Health and Human Services requires companies with trade secrets concerns to promptly object to disclosure of claimed confidential information.

VII. Clarify fees and waiver procedures: Agencies should adopt clear procedures for fees and fee waivers. The Department of the Interior has adopted a reasonable threshold for minimum fee charges in order to prevent delays and disputes over small amounts of money.

VIII. Improve administrative appeals and dispute resolution: Agencies should also provide adequate procedures for appealing agency decisions and resolving disputes with requesters. The Office of the U.S. Trade Representative provides 60 days for appeals to be submitted to ensure that those who wish to dispute decisions are not prevented from doing so because of unreasonably short deadlines.

Please let us know if you have any questions. Thank you for your service on behalf of historical research and the governmental transparency that is essential to a sound democracy.

Sincerely yours,
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