



Assessment of the National Archives and Records Administration's FOIA Program  
Phase I: Operational Records  
September 25, 2014  
Observations and Recommendations<sup>1</sup>

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 reviewing sources including, but not limited to, agency FOIA regulations and internal guidance for processing requests; 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; and agency visits.

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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.

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 are dividing into two phases. It is important to point out that although NARA has a decentralized FOIA initial request process it has a centralized FOIA appeals process. Moreover, the nature of NARA's mission results in a unique intersection of access rules with regard to archival federal records, archival presidential records, non-accessioned personnel records (both military and civilian), and operational agency records. Specifically, for Phase I we started with NARA's Office of General Counsel, which processes about 300 FOIA requests a year for operational records created or received in carrying out NARA's mission and responsibilities, including records created by OGIS. The Office of General Counsel administers and processes all FOIA appeals for final adjudication and approval by the Deputy Archivist of the United States. (NARA's Office of Inspector General (OIG) operates its own FOIA program and its appeal authority is the Archivist of the United States.)

For Phase II, in the first quarter of FY 2015, we plan to assess NARA's Special Access and FOIA Program, which processes FOIA requests for archival federal records in the Washington, D.C., area. We will not assess the FOIA programs at any of the other NARA entities.

OGIS Review Team Lead Kirsten Mitchell and Jim Clemmens, on detail to OGIS from the U.S. Department of Education's Office of Management, assessed the Office of General Counsel's program for processing initial requests for operational records and appeals from all the offices in NARA other than the OIG.

This report addresses the Office of General Counsel's FOIA implementation. Interviews with FOIA officials and staff; direct observations; review of written regulations, the FOIA website and other written material; and survey results inform this report.

Before visiting the Office of General Counsel, the Review Team sent an online survey to four Office of General Counsel FOIA professionals. The survey, designed not to duplicate questions asked in Annual FOIA and Chief FOIA Officer reports submitted to the DOJ, sought to supplement already existing resources and inform our visit.

OGIS Deputy Director Nikki Gramian accompanied us on August 27, 2014 for an interview with NARA General Counsel Gary M. Stern, who is both the agency's Chief FOIA Officer and the FOIA Public Liaison for Operational Records. We also met with FOIA and Privacy Act Officer Joseph Scanlon and NARA's Director of Litigation Alina Semo. Finally, the Office of General Counsel gave us full access to all 268 FOIA request and 67 appeal files processed between October 17, 2013 (the first day of FY 2014 given the government shutdown) and August 26, 2014. Although the Office of General Counsel is a partner in the multi-agency FOIA portal *FOIAonline*, the office keeps paper copies of its request and appeal files, which we reviewed. Of the 335 files, we used categories including but not limited to exemptions, fees, referrals, appeals and other topics that would give us a broad view of the FOIA program, to sample 20 files for review. We randomly selected files by category.

We note that NARA as an agency faces a significant backlog of requests, most of which deal with classified information, as reflected in low marks from open government groups. For example, the nonpartisan Center for Effective Government (CEG) gave NARA a failing grade for backlogs in its "Making the Grade: Access to Information Scorecard 2014." However, none of the requests in NARA's 10 oldest request backlog seeks operational records. While there are exceptions, the Office of General Counsel processes a majority of requests for operational records within the 20-day statutory deadline – roughly 80% in FY14. (We also note that CEG gave NARA high marks for its website and use of *FOIAonline*.)

What follows are our observations and recommendations.

**Topic: FOIA Regulation, 36 C.F.R. Part 1250**

**Observation:** NARA published its final updated FOIA regulation in the *Federal Register* on September 22, 2014. Starting in the spring of 2013, OGIS worked closely with the Office of General Counsel to update the NARA regulation. The Office of General Counsel adopted most of our recommendations, including expanding the time for filing an appeal from 35 days to 60 days; providing the agency with the administrative discretion to waive fees for operational records; and clearly presenting information on accessing operational versus archival records.

**Topic: Request and Appeals Processing**

**Observation:** The Office of General Counsel's two-person FOIA team consists of a FOIA/Privacy Officer and a Deputy FOIA Officer/Archivist, who appear to have a good working relationship. For example, an unwritten agreement provides that the FOIA/Privacy Officer will process any appeals of requests that the Deputy FOIA Officer/Archivist processed and vice-versa. (Deputy Archivist Debra Steidel Wall approves and signs all NARA FOIA appeals, except those from the OIG.) Similarly, when an issue arises, it appears that both team members discuss the issue and agree on a way forward. The Office of General Counsel stated that there are no written processing policies or procedures now in place. However, we note that one respondent to the OGIS survey said that the Office has written internal policies or procedures for processing a FOIA request; one responded that the Office does not; and one respondent did not know whether the Office has written internal FOIA processing policies or procedures. (At the same time, the survey showed that all three respondents are "extremely confident" that they know the correct legal procedures for processing FOIA requests.)

**Recommendation:** We suggest that the Office of General Counsel write policies and procedures in the event that someone without the institutional knowledge of the two team members processes FOIA requests and appeals either on an emergency or a permanent basis. Such policies and procedures would help ensure compliance with the law. We understand that the Office of General Counsel has already begun this process and expects to have written internal FOIA processing guidelines by the end of FY 2015. We recommend that the Office write its policies in plain language.

**Observation/Best Practice:** In several FOIA response letters, the agency provided appeal rights to requesters in cases of full release or in cases in which the agency determined that the record sought by the requester was not an agency record. (Not all agencies provide appeal rights in such situations although requesters have the right to appeal *any* adverse determination, including search, as per 5 U.S.C. § 552(a)(6)(A).)

**Observation:** Regarding the above best practice, we note that in several other cases Special Access and FOIA or a Presidential Library gave requesters appeal rights and the requesters appealed, but the Office of General Counsel later found the appeals to be premature and did not process the appeals. Specifically, in a letter in Request No. 2014-0479-F, the George W. Bush Presidential Library informed the requester that it located 150 pages and 107 electronic files of potentially responsive records that needed processing under FOIA and the Presidential Records Act. The Library then provided the request's place in the queue along with appeal rights. The requester appealed and the Office of General Counsel informed the requester that the appeal, No. NGC14-051A, was premature and that he would be given appeal rights once the Library completed the processing of his request. In Request No. NW 37812, FOIA and Special Access informed the requester of his new estimated date of completion and that if he was dissatisfied with the way FOIA and Special Access handled his request, his only course of action was to file an appeal. He did and the Office of General Counsel informed the requester in response to Appeal No. NGC 14-055A, that there was no adverse action to consider on appeal but once his request had been processed at the initial stage, he was welcome to submit an appeal.

**Recommendation:** To avoid confusing requesters, we suggest that the Office of General Counsel provides training to NARA FOIA professionals on *when* to provide appeal rights. Alternately—or in addition to—we suggest creating a checklist for processors to use so they have clear guidance on when to provide appeal rights to requesters. This would avoid situations in which the agency provides a requester with appeal rights and the agency later declines to process the appeal.

**Topic:** FOIA website <http://www.archives.gov/foia/>

**Observation/Best Practice:** We applaud several best practices with regard to the agency’s FOIA website including providing requesters with a sample FOIA letter and explaining what types of confidential commercial information NARA generally withholds from release.

**Observation:** NARA’s website prominently references its FOIA regulation in the form of a link to e-CFR, the electronic Code of Federal Regulations, which requires a search to locate NARA’s FOIA regulation.

**Recommendation:** We suggest that NARA post a searchable PDF version of its updated FOIA regulation to allow requesters to search the entire document, for example, for “expedited processing” or “appeals” in the regulation’s text. The e-CFR version links only to individual subparts of the regulation, making it difficult to search the entire regulation.

**Observation:** NARA’s Annual FOIA Reports to the Department of Justice, required by statute, are available on NARA’s FOIA webpage from 1996 to the present. The data in xml or csv format are available from 2009 to present. The document version of the report on FY 2013 is missing several pages. Also, the link to the NARA FY 2013 Sequestration Report is broken.

**Recommendation:** We suggest posting a complete version of the FY 2013 report as is available for previous years.

**Observation:** The NARA FOIA Reference Guide at <http://www.archives.gov/foia/foia-guide.html> contains no reference to *FOIAonline* or to OGIS as a non-exclusive alternative to litigation.

**Recommendation:** In Section XI, Judicial Review, we suggest inserting a sentence regarding a requester’s right to come to OGIS as a non-exclusive alternative to litigation and providing a link to the OGIS site. We also suggest including information about *FOIAonline*, including how one can access the portal.

### **Topic: Proactive Disclosures**

**Observation:** We note that records that the Office of General Counsel previously released under FOIA are available in two places: on the Electronic Reading Room at

<http://www.archives.gov/foia/electronic-reading-room.html> and on *FOIAonline*.

The Electronic Reading Room includes FOIA logs for the previous fiscal year for operational records and the presidential libraries; a list of Visa credit card holders at NARA; the deed of gift for the pink Chanel dress worn by Jacqueline Kennedy on November 22, 1963; and a letter from the 9/11 Commission regarding the Review and Eventual Release of Commission Records.

Records posted on *FOIAonline* in response to FOIA requests include Architectural and Design Standards for Presidential Libraries; NARA operating expenses for FY 2012; and the State Department's response to the Presidential Memorandum on Managing Court Records.

**Recommendation:** We recommend that the Office of General Counsel specifically state in the agency's Electronic Reading Room that additional records released under FOIA are available on *FOIAonline* and that the Office provide a link to *FOIAonline* so that requesters have a full picture of the types of records that are available without having to file a FOIA request.

**Observation:** While the Office of General Counsel uses *FOIAonline* to post records that are likely to become the subject of subsequent requests for substantially the same records, there are no policies or procedures in place regarding identifying other records for proactive disclosure.

**Recommendation:** We recommend that the Office of General Counsel work with NARA offices to regularly identify records to release proactively, particularly specific agency policy statements and certain administrative staff manuals "that affect a member of the public" as required by the statute, 5 U.S.C. § 552(a)(2). We understand that the Office of General Counsel will begin posting in the online reading room a majority of NARA's directives as well as congressional testimony.

### **Topic: Communication and Customer Service**

**Observation/Best Practice:** We note that when requests are for both operational and archival records, the Office of General Counsel generally explains to the requester how the agency will split the request and what to expect next.

**Observation/Best Practice:** Many of the acknowledgment letters we saw provided requesters

with a telephone number and email address to check status updates of their requests.

**Recommendation:** OGIS recommends that the Office of General Counsel consider creating a way for requesters to check the status of their appeals.

**Observation:** In processing an appeal of a request to Special Access and FOIA in which it used Exemption 7(C) to protect the identities of individuals in law enforcement records, the Deputy FOIA Officer checked the Social Security Death Index (SSDI) and determined that two of the individuals are dead and as such, NARA could release information pertaining to those two individuals. The appeal response letter also explained that the FBI protects the identity of confidential informants as long as 150 years. This is an example of excellent customer service as it generally rests with the requester, not the agency, to provide consent of an individual or proof of that individual's death (or demonstrate an overriding public interest).

**Observation:** Several response letters we reviewed explained NARA's fee schedule and the intersection of the Presidential Records Act and FOIA in a manner that might not be clear to the average reader.

**Recommendation:** We suggest that the Office of General Counsel create a standard language bank to explain some of NARA's FOIA and other related processes in plain language, particularly given that NARA's FOIA fee schedule differs from its fee schedule for archival records. We have observed through our casework that the agency's two fee schedules confuse some requesters.

### **Topic: Explanation of Exemptions**

**Observation:** The response letters we reviewed included jargon and information that could be presented more clearly and concisely. For example, one response letter informs a requester the agency is withholding information "pursuant to 5 U.S.C. § 552 (b)(3), with 50 U.S.C. § 403(g) as the appropriate statute" (although it does mention, subsequently, the CIA Act of 1949). Another letter informs a requester of "redactions pursuant to 5 U.S.C. § 552(b)(5), the deliberative

process privilege.” And another letter notes redactions “pursuant to 5 U.S.C. § (b)(4), confidential commercial information.”

**Recommendation:** Although FOIA does not require agencies to explain exemptions, 5 U.S.C. § 552(a)(6)(A)(i), we suggest creating a standard language bank of paragraphs that explain the exemptions in plain language and that can be used in response letters. The Office of General Counsel may wish to focus on the exemptions used the most: Exemption 1 (281 times in FY 2013), Exemption 6 (265 times in FY 2013), and Exemption 3 (237 times in FY 2013). We have observed that requesters are less confused by the FOIA process when agencies explain exemptions in plain language.

**Observation/Best Practice:** In response to an appeal of a response from Special Access and FOIA, the Office of General Counsel thoroughly explains exemptions and informs the requester that the information withheld from release “concerns names of American embassy employees and codes for foreign nationals who provided information during the investigation.” We applaud providing to requesters, when possible, the types of information withheld under a particular exemption.

### **Topic: Technology**

**Observation:** The Office of General Counsel is a partner in *FOIAonline*, a multi-agency FOIA portal that allows requesters to submit FOIA requests and appeals, track their progress and search other requests, and provides NARA a secure website to receive and store requests, post responses, generate metrics and manage records electronically. *FOIAonline* automatically generates data for the FOIA Annual Report; however, the data is limited to FOIA requests for operational records.

NARA’s other FOIA programs use the Unclassified Redaction and Tracking System (URTS) and the Archival Declassification, Review and Redaction System (ADRRES) to track FOIA requests.

The Office of General Counsel is aware of the challenges presented by these disparate systems, particularly when the agency collects data for reporting purposes, and has a goal of ensuring that the databases and the data within them is reconciled.

**Recommendation:** We recommend that the Office of General Counsel consider convening a multi-disciplinary task force with representatives from all of NARA's FOIA programs as well as from Information Technology (IT) and the Office of Innovation to tackle the issue, which we recognize includes classified and unclassified systems and other issues and which appears too large for one office to solve alone. We recognize that past budgetary and logistical constraints have made this a challenge.

### **Summary of OGIS Recommendations**

- Write policies and procedures for processing FOIA requests and appeals
- Provide training or printed material to Special Access and FOIA and Presidential Library FOIA professionals on *when* to provide appeal rights
- Post a searchable PDF version of NARA's updated FOIA regulation
- Post a complete version of the FY 2013 FOIA Report
- Include in the FOIA Reference Guide information about OGIS and a requester's right to come to OGIS as a non-exclusive alternative to litigation and about *FOIAonline*
- State in the Electronic Reading Room that additional records released under FOIA are available on *FOIAonline*
- Write a policy or procedure to identify, regularly, records that that should be released proactively
- Consider creating a way for requesters to check the status of their appeals.
- Continue to work on creating a standard language bank to explain, in plain language, some of NARA's FOIA and other related processes as well as exemptions
- Consider convening a multi-disciplinary task force within the agency to address disparate technology used by the various FOIA programs