

A FOIA REQUEST CELEBRATES ITS 17th BIRTHDAY



A Report on Federal Agency FOIA Backlog: Oldest Unanswered Freedom of Information Act Requests Were Filed in 1989

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Executive Summary

In an effort to identify the oldest unanswered Freedom of Information Act (FOIA) requests in the federal government, the National Security Archive used the FOIA itself to ask more than 60 federal agencies for copies of their ten oldest pending FOIA requests. The results are astonishing—requests as old as 17 years remain unanswered, some agencies are unable even to identify their oldest requests, and agency backlogs are significantly more chronic and extensive than the agencies' annual reports to Congress indicate.

The oldest FOIA request unearthed by the Archive's Audit was submitted in March 1989 to the Department of Defense by a graduate student at the University of Southern California, asking for records on the U.S. "freedom of navigation" program. So much time has elapsed since the initial submission of that request that the requester, William Aceves, is now a tenured professor at California Western School of Law. Other agencies that have requests more than 15 years old include the Central Intelligence Agency, the U.S. Air Force, the National Archives and Records Administration, and the Department of Energy. The CIA claims four of the oldest ten pending FOIA requests in the government—from November 1989, May 1987 (Received at the CIA 1990), January 1991, and February 1991.

These results are even more shocking because many of the same ancient requests had turned up in the Archive's 2003 Freedom of Information Act Audit. [LINK TO 2003 Audit] The 2005 Audit reveals that 60 requests identified by agencies as their oldest pending requests in 2003 still have not been answered. Although the 2003 Audit called attention to certain agencies' shameful processing failures, many of these FOIA offices continue to let their oldest requests linger.

The oldest request uncovered in the Archive's 2003 Audit, a 1987 letter from San Francisco Chronicle reporter Seth Rosenfeld on FBI activities in Berkeley, California, was not provided by the FBI in their latest list of oldest pending requests, indicating that the FBI now considers this request closed. According to Mr. Rosenfeld, the November 1987 request, which clarified an earlier 1981 request, has not yet completely been fulfilled. The FBI has provided Mr. Rosenfeld more than 200,000 pages over the past 25 years, and provided responsive documents as recently January 31, 2006, but has not completed processing.

Another request designated in 2003 as one of the oldest in the federal government was an October 1989 request to the CIA, submitted by Lancaster Pennsylvania's *Intelligencer Journal* for documents related to James Howard Guerin and his business ventures. According to James Bamford's bestselling book *Body of Secrets*, Guerin ran a company in the 1970s and '80s that served as a cover between the National Security Agency (NSA) and South African intelligence services that allowed the NSA to monitor Soviet naval activity off the Cape of Good Hope, while overriding official U.S. sanctions on South Africa's apartheid government. Bobby Ray Inman, head of NSA from 1977-1981 and Deputy Director of the CIA from 1981-1982, served on the board of Guerin's company in 1982. In August 2004, almost a year after the Archive published its 2003 Audit and almost fifteen years after the *Intelligencer Journal's* initial request

to the CIA, the newspaper received a final response from the CIA saying the agency *had not found any documents* and was closing the request.

In some situations, agencies can reasonably justify a processing delay by citing interagency coordination and security review backlogs. In the case of the *Intelligencer Journal's* request for information pertaining to James Howard Guerin, however, no explanation was offered to justify the need for fifteen years to conduct an unsuccessful initial search for such a clear FOIA request. Additionally, it seems likely that the CIA would have documents on Guerin, a man convicted of smuggling \$50 million in arms into South Africa and a total \$1.4 billion in international fraud. Guerin was directly tied to U.S. intelligence agencies and maintained a longstanding relationship with the former head of the NSA.

Overall, four of the ten oldest pending FOIA requests in the federal government identified in the 2003 Audit were identified as still currently pending. This figure does not include several 1987-89 requests that were provided by agencies in both 2003 and 2005 as among their oldest requests, but were either requests received on referral from other agencies or requests suspended for several years in litigation. Such requests, despite their age, are counted in the Archive's audits from the date the requests were received by the agency that provided the requests to the Archive, not the date of the initial request letter. The inter-agency referral system is a significant source of delay, but the Archive chose not to attribute such delays to the agency ultimately responsible for processing the request. As for legal battles, the length and reason for the delays is fact-specific and not necessarily a sign of agency non-responsiveness. It is also important to keep in mind, though, that these 1987-1989 requests asked the government for documents before the collapse of the Soviet Union, and the requesters are still waiting for a response.

The data generally shows that the FOIA backlog problem has not improved over the past three years. Most agencies have a similar backlog today as they did in 2003. By analyzing the age and date range of the ten oldest requests provided, the Archive ranked agencies that have reduced their backlog, maintained the same backlog, or increased their backlog. The data shows that some agencies successfully processed all of their oldest requests since the Archive's initial Audit and maintain a less significant backlog. Most agencies, however, maintain a backlog similar to or older than in 2003, and several continue to fail at processing their oldest requests, some of which date back ten or fifteen years.

Other highlights of the Archive's 2005 FOIA Audit include:

- **Six agencies or components have the same single oldest request today that they had in 2003:** Air Force Education and Training (Oldest request from June 1994), Air Force Materiel Command (May 1999), Central Intelligence Agency (May 1987), Department of Defense (January 1987), DOT/Federal Aviation Authority (February 1997), and the National Archives and Records Administration (March 1990).
- **Agencies have not established adequate FOIA request tracking systems.** In their latest responses, some agencies identified requests that should have been included in their 2003 ten oldest requests response, but for unknown reasons such requests were not identified as pending even though their dates indicate they were open and pending in 2003. For example, the Defense Intelligence Agency's current ten oldest included requests dated October 19, 1995, March 18, 1996, June 4, 7, 8 and June 12 1996. These requests were pending in 2003 and should have been considered as some of the oldest requests at the agency in 2003, but were not provided to the Archive in 2003 as part of the DIA's 10 oldest requests. The DIA provided other younger requests in 2003, including an August 1, 1996 letter. Similarly, the Department of Energy reported its oldest request in 2005 was a July 16, 1990 request, but in 2003 it reported its oldest was dated May 14, 1991. A similar situation is reflected in the

National Archives, FBI and Securities and Exchange Commission responses, which in 2005 included requests that should have been, but were not, part of their 2003 responses. All of these requests referenced in this paragraph were sent directly to the agency and were not held up in an interagency referral system. These disparities between the 2003 and latest response may reflect improved agency FOIA recordkeeping or may indicate that agencies are generally failing to adequately and consistently track their FOIA requests.

- **Agencies are failing to effectively administer their FOIA programs and communicate with requesters.** Agency records regarding pending FOIA requests are not consistent with requesters' expectations. Some agencies' ten oldest requests fail to reflect requests that FOIA requesters believe are open and being processed. For example, the Archive never received a response from the DOT/Federal Railroad Administration (FRA) in response to its request for the oldest pending requests at FRA in 2003. A new request was filed with FRA in 2005 for copies of their oldest requests as of 2005, but FRA's response did not include the Archive's pending 2003 request, which would have been its oldest request. Additionally, Army Intelligence and Security Command, one of the agencies that showed the greatest backlog reduction between 2003 and 2005, according to their responses to the Archive's Audit requests (from October 1989 – October 1999 in 2003 to December 1996 – April 2005 in 2005), did not include several requests the National Security Archive believes are still open and pending. National Security Archive records indicate that over 30 requests are pending with Army Intelligence and Security Command that pre-date April 2005 and thus should be part of the response. Discrepancies between agency data and requester data supports the conclusions that the tracking and monitoring of FOIA administration is not being adequately conducted at certain agencies and that there is not enough communication between requesters and agencies over aging FOIA requests.
- **Withholding information under the FOIA is a subjective process and the Audit revealed a rise in secrecy from 2003 to 2005.** In several cases the same requests were released in 2003 and again in 2005 with different excisions. Where the same records were released during both surveys, they often contained more information in their 2003 form. The 2005 responses brought not just different excisions, but also more extensive withholding claims. This is the case with records released by the National Archives, Air Force Materiel Command, the Securities and Exchange Commission, and the FBI. These differences highlight both the inherent subjectivity in the review and redaction process, and suggest a greater tendency to withholding information from the public in 2005 than in 2003.
- **Agencies lose FOIA requests.** Eleven out of 64, or 17.2 percent of initial requests sent by the National Security Archive for the 2005 Audit were reported by agencies as never received. The Archive sent these requests via fax or e-mail and always used the FOIA contact information provided by the agency on their website. In spite of confirming that the Archive had the correct contact information and had followed agency instructions regarding submitting a FOIA request, a remarkably high percentage of agencies – 17.2 showed no record of ever receiving the initial request.
- **Despite the passage of eleven months, several agencies failed to respond to the Archive's request for copies of their ten oldest pending FOIA requests.** Furthermore, several of these agencies are the same agencies that failed to process the same Archive FOIA request in 2003. These include the Department of State, the U.S. Coast Guard, and the Department of Labor. Agencies that were able to respond in 2003, but failed to fulfill the Archive's 2005 request in spite of the passage of a comparable timeframe, include the Agency for International Development, U.S. Central Command, Health and Human Services, and the Office of Personnel Management. The Archive has not been able to determine whether these agencies are incapable of identifying their ten oldest requests or if these agencies are so under-resourced that they cannot even come close to meeting the FOIA's time limits.

In the two years since the Archive's 2003 report, there have been several hearings in Congress about FOIA and various proposals for FOIA reform. Most recently, on December 14, 2005 President George W. Bush issued Executive Order 13392, "Improving Agency Disclosure of Information." In the Executive Order, the President ordered agencies to implement citizen-centered FOIA operations and sought to ensure senior official oversight of FOIA processing by ordering the appointment of a Chief FOIA Officer at the Assistant Secretary or equivalent level. The Executive Order has been greeted with a mixed reaction by the public, in part because the Administration's only other broad guidance on FOIA was Attorney General Ashcroft's October 2001 Memorandum encouraging greater use of FOIA exemptions and reduction in discretionary releases. Because the Executive Order strongly suggests that agencies will not be given additional resources to solve the problems they have been unable to solve over the FOIA's 40-year history, it is hard to imagine that dramatic changes will result. Moreover, because the Executive Order keeps the entire process of identifying problems and setting milestones for improvement within the agencies, it is hard to imagine the resulting goals will be very ambitious. As Senator John Cornyn (R-TX) stated, the Executive Order should not be seen as anything more than a "first step."

The Archive's Audit reveals problems far more systemic and extensive than the customer service concerns that E.O. 13392 addresses. Although it certainly is important to have the President reaffirm the government's commitment to transparency and responsiveness to Freedom of Information Act requests, a more fundamental change to FOIA administration may be needed than what is provided in the Executive Order. Based on these FOIA Audits the National Security Archive makes five general recommendations regarding FOIA processing.

FOIA Backlog Audit Findings and Recommendations

The Archive's Audit supports the need for additional steps forward to ensure that agencies comply with their obligations to the American public. Without real consequences, agencies have been allowed to let requests languish for over a decade, maintain faulty FOIA tracking systems, and at times simply be unresponsive and unhelpful to legitimate requests for information. The Archive's primary recommendations include:

Recommendation 1: Government agencies should consider FOIA processing as central to their mission and as a duty to the American democracy. FOIA program functioning should be considered a factor in personnel performance reviews in order to compel government agencies to recognize the FOIA's importance to the functioning of the agency and the U.S. government.

Background: There is a Need for High-Level Endorsement of the FOIA and Recognition of FOIA Programs in Personnel Performance Reviews – Currently, too many agencies consider the FOIA a distraction from their missions and underfund or even marginalize the work of their FOIA personnel. The Executive Order begins to address this issue by making top agency officials responsible for FOIA performance. However, those senior agency officials need to recognize the importance of the Freedom of Information Act and endorse comprehensive and efficient FOIA processing by their agencies. Adopting Senators Cornyn and Leahy's amendment to the FOIA proposed in the drafted February 2005 Open the Government Act, which "requires the Office of Personnel Management to examine how FOIA can be better implemented at the agency level, including an assessment of whether FOIA

performance should be considered as a factor in personnel performance reviews, whether a job classification series specific to FOIA and the Privacy Act should be considered, and whether FOIA awareness training should be provided to federal employees,” would emphasize the importance of the FOIA within agencies.

Recommendation 2: The new Agency Chief FOIA Officer should implement a comprehensive FOIA tracking system and insist that agency FOIA personnel be vigilant about tracking and systematically processing all FOIA requests.

Background: The Quality of Handling, Tracking and Monitoring FOIA Requests Varies Immensely – Over 17% of agencies included in this Audit reported they never received the original April 2005 FOIA request, although the Archive had confirmed that the request was sent to the right e-mail address or fax number, and contained the correct information necessary for processing. This indicates that as many as one in six FOIA requests is never properly received and processed by agencies. Additionally, some requests were processed in two days, while others remain pending over 200 days later. This discrepancy in response times illustrates how disparate the quality of FOIA service can be for requesters.

Recommendation 3: Congress should require agencies to report average processing times and provide a date range from the oldest pending request to youngest, in addition to median processing statistics in order to provide a more representative picture of agency backlogs for Congress and the public.

Background: The Annual FOIA Reports Mask the Seriousness of the FOIA Backlogs – Because the annual reports only require agencies to provide the median age of their pending requests, their oldest requests are masked by numerous newly-received requests. The Archive found that the ten oldest FOIA requests were often far older than would be imagined from the reported agency statistic for "Median Days To Process." Furthermore, FOIA officers are trained to process as many requests as possible as fast as possible. Complex requests, which may contain valuable information, can be pushed aside for years.

Recommendation 4: The current FOIA monitoring systems set up by Congress and most agencies emphasize quantity over quality. FOIA offices are not rewarded or recognized for processing time-intensive requests. Agencies should be recognized for processing complex requests, not rewarded for putting difficult requests aside indefinitely. Congress should assign penalties for extraordinary processing delays.

Background: Agencies Are Rewarded for Quantity, Not Quality –FOIA officers are trained to process as many requests as possible, as quickly as possible. Although the Archive supports multi-track processing in which simple requests can be processed ahead of complex ones, agencies have been allowed to exploit

the system and can indefinitely delay processing certain complex requests for five, ten or more than fifteen years.

Recommendation 5: Spending on Freedom of Information Act programs at federal agencies should be directly tied to budgets for public affairs offices and spending on public relations campaigns. Agencies spend significantly more money marketing their own messages than they invest in processing public requests for information regarding the activities of the agency. Congress needs to mandate that a sizable percentage of the public affairs budget (30-40%) be spent on FOIA programs. It is clear from this Audit that current public demand for information is exceeding processing capacity.

Background: Most Agency FOIA Programs Lack the Resources to Respond in a Timely Manner to Requests – It is clear that many agency FOIA programs are not adequately funded. The data collected in this Audit illustrates how these agencies are unable to process their oldest pending requests, in some cases even after nearly two decades has passed. The public need for information from these agencies exceeds their processing capabilities. On the other hand, government Public Affairs Offices and public relations campaigns are well-funded and fully supported by the agency to publicly disseminate official agency information.

Exact government expenditures on public affairs activities are unavailable because agencies do not traditionally calculate the total costs of these programs in annual budgets.¹ In 2005, the Congressional Research Service roughly estimated the government's annual spending on advertising, "a subset of public relations and communications," at over \$1 billion. A recent study conducted by the United States Government Accountability Office (GAO) found that seven federal agencies² collectively spent more than \$1.6 billion on contracts with public relations firms, advertising agencies and other media entities over two and a half years between 2003 and 2005.³ This figure only estimates what a few agencies have spend on outside media contracts and does not include internal agency expenditures on public affairs and media activities. On the other hand, the entire federal government spends between \$300-400 million annually processing Freedom of Information Act requests.⁴ The total government expenditure on the FOIA for the past two and a half years is less than what seven agencies spent on contracts to public relations firms distributing official government information and improving agency images.

¹ Kevin P. Kosar, "Public Relations and Propaganda: Restrictions on Executive Agency Activities," Congressional Research Service, RL32750 (Updated March 21, 2005)

² GAO surveyed the Departments of Commerce, Defense, Health and Human Services, Homeland Security, Interior, Treasury, and Veteran's Affairs.

³ "Media Contracts – Activities and Financial Obligations for Seven Federal Departments," United States Government Accountability Office, GAO-06-305 (January 2006)

⁴ See "Summary of Annual FOIA Reports for Fiscal Year 2003," U.S. Department of Justice Office of Information and Privacy (July 29, 2004). Available at <http://www.usdoj.gov/oip/foiapost/2004foiapost22.htm> and "Summary of Annual FOIA Reports for Fiscal Year 2002," U.S. Department of Justice Office of Information and Privacy (September 3, 2003). Available at <http://www.usdoj.gov/oip/foiapost/2003foiapost31.htm>