

# SUNSHINE AND SHADOWS

## THE CLEAR OBAMA MESSAGE FOR FREEDOM OF INFORMATION MEETS MIXED RESULTS



President Obama signs his Freedom of Information Act Memo on January 21, 2009.

## THE NATIONAL SECURITY ARCHIVE FOIA AUDIT

A KNIGHT OPEN GOVERNMENT SURVEY  
CONDUCTED BY  
THE NATIONAL SECURITY ARCHIVE  
THE GEORGE WASHINGTON UNIVERSITY

[WWW.NSARCHIVE.ORG](http://WWW.NSARCHIVE.ORG)

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Previous National Security Archive FOIA Audits and Knight Open Government Surveys include:

- Mixed Signals, Mixed Results: How President Bush’s Executive Order on FOIA Failed to Deliver (March 16, 2008)  
<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB246/index.htm>
- 40 Years of FOIA, 20 Years of Delay (July 2, 2007)  
<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB224/index.htm>
- File Not Found: 10 Years After E-FOIA, Most Federal Agencies are Delinquent (March 12, 2007)  
<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB216/index.htm>
- Pseudo-Secrets: A Freedom of Information Audit of the U.S. Government’s Policies on Sensitive Unclassified Information (March 14, 2006)  
<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB183/press.htm>
- A FOIA Request Celebrates Its 17th Birthday: A Report on Federal Agency FOIA Backlog (March 12, 2006) <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB182/press.htm>
- Justice Delayed is Justice Denied: The Ten Oldest Pending FOIA Requests (November 17, 2003)  
<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB102/press.htm>
- The Ashcroft Memo: “Drastic” Change or “More Thunder Than Lightning”? (March 14, 2003)  
<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB84/press.htm>



## INTRODUCTION

On his first full day in office, President Barack Obama issued a series of memoranda designed to usher in a “new era of open government.” The President’s memorandum on the Freedom of Information Act (FOIA) (the “Obama Memo”) called on all government agencies to adopt a “presumption of disclosure” when administering the FOIA. The Obama Memo directed Attorney General Eric Holder to issue new FOIA guidelines to agency heads. An Executive Order issued on January 21, 2009, repealed an Executive Order issued by George W. Bush and replaced it with new rules implementing the Presidential Records Act (Executive Order 13489).

Attorney General Holder issued FOIA guidelines on March 19, 2009 (the “Holder Memo”), which rescinded former Attorney General John Ashcroft’s 2001 pledge to defend agency FOIA withholdings “unless they lack a sound legal basis.” Instead, Holder stated the Department of Justice would now defend withholdings only if the law prohibits release of the information or if the release would result in foreseeable harm to a government interest protected by one of the statutory exemptions in the FOIA. The Holder Memo holds each agency responsible for annually reviewing its FOIA administration and reporting its progress to the Department of Justice in reports from its Chief FOIA Officers.

In reacting to the Obama Administration’s open government initiatives, freedom of information advocates and the media were hopeful, yet hesitant to declare a new era of government openness before seeing concrete changes. A *New York Times* editorial lauded the Obama directives as “a burst of executive sunshine that Washington badly needs” but noted that the country would be tracking the fulfillment of the memo’s goals.<sup>1</sup>

To test agency responsiveness to the Obama initiative, the National Security Archive employed the methodology it originated in 2002 and used in seven prior FOIA audits—FOIA requests to agencies and analysis of agencies’ mandatory annual FOIA reports. The Archive looked at three primary metrics: each agency’s own records demonstrating how it implemented the Obama Memo; data on the number of records released and records denied because of FOIA exemptions; and data on each agency’s ten oldest pending FOIA requests, along with those requests themselves. In addition, the Archive examined data on the oldest pending requests at each presidential library from the John F. Kennedy Presidential Library to the William J. Clinton Presidential Library.

The Archive’s 2010 Audit finds that the Obama Administration—which the President pledged would be “the most open and transparent administration in history”—has clearly stated a new policy direction for open government but has not conquered the challenge of communicating and enforcing that message throughout the Executive Branch. The Audit finds:

- Ancient requests—as old as 18 years—still persist in the FOIA system.
- A minority of agencies have responded to the Obama and Holder Memos with concrete changes in their FOIA practices.
- Only four agencies, including Holder’s own Justice Department, show both increases in releases and decreases in denials under the FOIA.

One year is too early to render a final judgment on how far President Obama can move the government toward openness, but this Audit finds that much more pressure and leadership will be necessary.

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<sup>1</sup> *New York Times* (Late Edition (East Coast)), New York, NY: Jan 23, 2009, p. A.26.



## KEY FINDINGS

### IMPLEMENTATION OF OBAMA FOIA POLICY: CLEAR MESSAGE, MIXED RESULTS

The National Security Archive asked federal agencies in 2002 to provide evidence of their concrete changes in FOIA processing in response to the widely criticized FOIA policy memorandum from then-Attorney General John Ashcroft. A handful of agencies interpreted the Ashcroft Memo as the end of FOIA, but most agencies just circulated the memo without changing any FOIA practices. A few agencies even responded by asking “What Ashcroft Memo?” This audit of the response to the Obama and Holder Memos shows that all agencies have at least gotten the word that FOIA policies are changing. But, the evidence of concrete changes in practice is almost as mixed as under the Ashcroft Memo.

- Only 13 out of 90 agencies provided documentation of concrete changes to their FOIA practices; an additional 14 agencies provided evidence of enhanced training on the presumption of disclosure directed by President Obama.
- Thirty-five agencies responded that they have no records about implementation of the Obama FOIA policies, and 11 agencies responded with evidence that they circulated the memos with some commentary that suggests a change in tone, but provided no documentation of concrete changes.
- Thirteen agencies have not responded to the Archive’s FOIA requests five months after it was filed, and four agencies withheld records under the deliberative process or attorney–client privileges.
- While many of the no-change agencies were small agencies that do not process a significant number of FOIA requests, there were some notable exceptions including the Central Intelligence Agency, the Department of Treasury, and the Securities and Exchange Commission, each of which processes large numbers of FOIA requests.
- The Chief FOIA Officer Reports scheduled to be issued on March 15 may provide additional information beyond what was given to the Archive in response to its FOIA requests. The contrast between that information and what was provided to the Archive may itself be informative about the state of federal records and administration of the FOIA.

### RELEASE AND DENIAL DECISIONS: NO CLEAR UPWARD TREND IN DISCLOSURE RESULTING FROM AGENCY DISCRETIONARY RELEASE

The Department of Justice has cited increases in the number of pages released under FOIA as evidence of progress towards greater transparency. Indeed, the data in agency reports shows that Justice improved its release rate and decreased its withholdings. But, only three other agencies also had statistics aligned in a manner that clearly increased releases to the public (Department of Agriculture, Office of Management and Budget, and Small Business Administration). Five agencies actually raised red flags by releasing less and withholding more than they did last year (Department of State, Department of Transportation, National Aeronautics and Space Administration, National Reconnaissance Office, and Department of the Treasury). And, the record for most agencies is mixed; 18 of the 28 agencies that handle more than 90 percent of FOIA requests governmentwide had a mix of increased or decreased releases and withholding.

- Four agencies appear to be releasing more and withholding less. (green)
- Eighteen agencies have mixed release and denial results. (yellow and orange)
- Five agencies appear to be releasing less and withholding more. (red)
- One agency’s annual report data is still not available to the public.

## **THE TEN OLDEST PENDING FOIA REQUESTS: SLOW PROGRESS ON THE OLDEST FOIA REQUESTS LEAVES SOME BEHIND, FAR BEHIND**

The National Security Archive first asked federal agencies for copies of their “ten oldest still pending FOIA requests” in 2002 and found requests that had been pending for 20 years. Attorney General Alberto Gonzales adopted the “Ten Oldest FOIA Request” metric in 2006 to enforce President Bush’s Executive Order on FOIA, as did Congress in 2007 when it mandated reporting on the metric in the OPEN Government Act of 2007. Despite those years of pressure on agencies to deal with their oldest requests, this Audit finds requests as old as 18 years still pending. The following list shows the ten agencies with the oldest requests and the date range of their oldest still-pending FOIA requests:

- National Archives and Records Administration: September 21, 1992–March 14, 1994
- Department of Defense: December 1, 1992–February 16, 1994
- Central Intelligence Agency: October 7, 1998–January 9, 2003
- Department of the Treasury: September 9, 1999–April 17, 2002
- Department of Energy: February 7, 2000–August 5, 2005
- Department of the Interior: August 14, 2000–August 26, 2002
- Department of Justice: August 18, 2000–March 28, 2002
- Department of State: February 8, 2001–June 5, 2003
- Environmental Protection Agency: May 17, 2004–March 8, 2005
- Department of Transportation: June 14, 2004–November 26, 2005

There has been some modest improvement since 2002. At that time, the average age of the oldest request across the 28 agencies that were audited was 78 months—the average age of those same agencies’ oldest requests at the end of FY 2009 was 70 months. Those 28 agencies handle more than 90 percent of FOIA requests governmentwide. Nonetheless, many agencies continue to carry their oldest requests from year to year. In fact 33 agencies out of all 90 agencies reported oldest requests for FY 2009 that are older than the requests they reported in FY 2008.

## **TEN OLDEST PENDING REQUESTS AT PRESIDENTIAL LIBRARIES: IS ACCESS TO PRESIDENTIAL RECORDS AN OXYMORON?**

Presidential records are some of the most historically significant government records, and yet researchers will largely not have access to them until decades after the administration that created them is over.

The three most recent presidential libraries all have requests pending that were filed in the year in which they first began accepting records requests from the public: Reagan (1994), Bush 41 (1998), and Clinton (2006). The estimated response time from the Reagan Presidential Library has grown from 18 months in May 2001 to 77 months in March 2007. In 2008 and 2009, the Reagan Presidential Library stopped stating an estimated response time in its acknowledgment letters.

There are many reasons for the backlog, although one primary reason appears to be that the National Archives and Records Administration is mandated to make records available, but does not have the authority to do so in a timely manner. Release of records are delayed by several factors including:

- Statutory notification of planned releases to former and incumbent presidents,
- Application of presidential restrictive categories to records,
- Mandatory originating agency review of any records containing classified material,
- Growing volumes of textual and electronic records, and
- Extensive requests for extremely historically significant records.

Despite this bleak picture, there are several signs of potential progress. President Obama’s Executive Order on the Presidential Records Act addressed one of the causes for delay, namely a burdensome and time-consuming notification process. The National Archives and Records Administration (NARA) was granted long-needed budgetary resources in FY 2009 to hire additional staff for all three of the most recent presidential libraries. In addition, NARA has suggested several strategies from improved finding aids, to partial releases, to altered queue management, that NARA anticipates will improve its ability to fulfill the responsibility of making presidential records available to the public. The current data is insufficient for the Archive to assess whether these steps will be adequate or whether more significant changes are warranted, such as greater centralization of presidential records processing or statutory changes that directly address some of the causes of delay.

## IMPLEMENTATION OF OBAMA FREEDOM OF INFORMATION ACT POLICY: CLEAR MESSAGE, MIXED RESULTS

The National Security Archive asked federal agencies in 2002 to provide evidence of their concrete changes in FOIA processing in response to the widely criticized FOIA policy memorandum from then-Attorney General John Ashcroft. A handful of agencies interpreted the Ashcroft Memo as the end of FOIA, but most agencies just circulated the memo without changing any FOIA practices. A few agencies even responded by asking “What Ashcroft Memo?”

In September 2009, the National Security Archive set out to measure agencies’ implementation of the Obama and Holder Memos to see whether word of the President’s new policies had reached the agencies. Among other specifics, the memos directed agencies to adopt a presumption in favor of disclosure, use modern technology to make records available in advance of FOIA requests, and review and improve their FOIA practices. The Archive filed FOIA requests with 90 agencies that have Chief FOIA Officers and submit annual FOIA reports to the Attorney General.<sup>2</sup> The FOIA request sought:

**All records, including but not limited to guidance or directives, memoranda, training materials, or legal analyses, concerning the implementation of President Barack Obama’s January 21, 2009, memorandum on the Freedom of Information Act and/or Attorney General Eric Holder’s memorandum of March 19, 2009, on the Freedom of Information Act.**

The Archive’s requests asked that agencies not respond with copies of the memos that were circulated without commentary. Instead, we sought evidence in the agencies’ own records of actual change. The federal government operates according to rules and obligations; simply circulating a memorandum is unlikely to cause change.

Of those requests, 13 agencies have not responded five months later.<sup>3</sup> Four agencies withheld documents, claiming they fall under the deliberative process privilege or the attorney–client privilege exemptions allowed for in the FOIA.<sup>4</sup> The remaining 73 agencies had a range of responses to the Obama and Holder Memos, but their reactions can be separated into four categories that are summarized below: Concrete Changes in Practice, Changes in Training, Changes in Tone, and No Changes Reported.<sup>5</sup>

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<sup>2</sup> The 90 agencies were drawn from a list on the Department of Justice Office of Information Policy Web site, available at <http://www.justice.gov/oip/foiacontacts.htm>.

<sup>3</sup> The agencies that have not responded to the request are the Agency for International Development; Consumer Product Safety Commission; Court Services and Offender Supervision Agency; Department of Agriculture; Department of Labor; Department of State; Department of Education; Export-Import Bank; Legal Services Corporation; Merit Systems Protection Board; National Aeronautics and Space Administration; Office of the U.S. Trade Representative; and Selective Service System.

<sup>4</sup> The Tennessee Valley Authority withheld its one responsive document under the attorney–client privilege. The Federal Election Commission; Federal Housing Finance Board; and Office of Federal Housing Enterprise Oversight withheld their responsive documents under the deliberative process privilege.

<sup>5</sup> On March 15, 2010, each agency’s Chief FOIA Officer is supposed to submit a Chief FOIA Officer Report to the Department of Justice that asks for details of, among other things, “Steps Taken to Apply the Presumption of Disclosure.” “Guidelines for Chief FOIA Officer Reports to the Department of Justice Pursuant to Attorney General Holder’s FOIA Guidelines,” <http://www.justice.gov/oip/foiapost/2009foiapost18.htm>. Given the wide range of responses that the Archive received to its FOIA requests concerning implementation of the Obama policies, a comparison of the agencies’ responses to the Archive and Chief FOIA Officer reports may help uncover how well agencies’ FOIA programs are working.

## CONCRETE CHANGES RESULTING FROM THE MEMOS

**13 out of 90 agencies surveyed (14%) produced documentation showing that the Obama and Holder Memos were widely distributed and that they resulted in concrete changes in guidance, training materials, or practices.**

<b>Department of Commerce</b>
<ul style="list-style-type: none"> <li>• Staff will now receive regular requests from management to post information online.</li> <li>• Will now use a revised form requiring FOIA processors to certify that they applied the foreseeable harm analysis to the request.</li> <li>• Each component within the agency is now required to develop and circulate procedures for posting frequently requested documents online.</li> <li>• Changes to training that emphasize new policies.</li> </ul>
<b>Department of Defense</b>
<ul style="list-style-type: none"> <li>• Will no longer use FOIA's "low" (b)(2) exemption.</li> <li>• Will post online all requested documents unless they are first-party documents containing private information.</li> <li>• Changes to training that emphasize new policies.</li> </ul>
<b>Department of Energy</b>
<ul style="list-style-type: none"> <li>• Staff will now receive bi-weekly status reports on pending FOIA requests to "ensure accountability and timeliness."</li> <li>• Chief FOIA Officer is now responsible for updating Secretary on the agency's improvement of its FOIA process.</li> </ul>
<b>Department of Health and Human Services</b>
<ul style="list-style-type: none"> <li>• Low (b)(2) exemption will now "rarely, if ever" be used.</li> <li>• Foreseeable harm forms that require a written justification now must be filled out to show the standard has been applied when the agency decides to withhold a record that it has discretionary authority to release.</li> <li>• Changes to training that emphasize new policies.</li> </ul>
<b>Department of the Interior</b>
<ul style="list-style-type: none"> <li>• Office of the Chief Information Officer will now team up with the Office of Communication to systematically identify and post documents of interest online.</li> <li>• Bureaus and offices may now make discretionary releases of exempt material after consulting with their designated FOIA attorneys.</li> <li>• Changes to training that emphasize new policies.</li> </ul>
<b>Environmental Protection Agency</b>
<ul style="list-style-type: none"> <li>• Draft documents and e-mails will now be withheld only when a foreseeable harm will result from the disclosure.</li> <li>• Office "chit chat" appearing in documents will now always be disclosed.</li> <li>• Names of employees working in the Office of the Inspector General will now be released with certain exceptions.</li> <li>• Changes to training that emphasize new policies.</li> </ul>
<b>Federal Energy Regulatory Commission</b>
<p>NOTE: FERC provided records evidencing several proposed changes, although it is not clear whether they have been implemented at this time.</p> <ul style="list-style-type: none"> <li>• Contacting requesters to discuss scope and nature of a request that is not for a specific document.</li> <li>• Determining at the time a request is made whether the response should be posted online.</li> </ul>

<ul style="list-style-type: none"> <li>Releasing more readily drafts of documents, e-mails on rulemaking proceedings, and older documents related to investigations.</li> </ul>
<b>National Transportation Safety Board</b>
<ul style="list-style-type: none"> <li>Accident dockets will now be posted online.</li> </ul>
<b>Nuclear Regulatory Commission</b>
<ul style="list-style-type: none"> <li>Amended an online training quiz to include questions about the foreseeable harm standard and other topics discussed in the Obama and Holder Memos.</li> <li>An explanation of the foreseeable harm must now accompany decisions to withhold based on exemptions high (b)(2) and (b)(5).</li> <li>The low (b)(2) exemption will generally no longer be used.</li> </ul>
<b>Occupational Safety and Health Review Commission</b>
<ul style="list-style-type: none"> <li>Administrative Law Judge decisions under review will now be posted online.</li> <li>Obama and Holder Memos were referenced in intra-office correspondence when determining whether to release requested information.</li> <li>Changes to training that emphasize new policies.</li> </ul>
<b>Postal Regulatory Commission</b>
<ul style="list-style-type: none"> <li>Incorporated principles from the Obama and Holder Memos into its revised FOIA rules.</li> </ul>
<b>Social Security Administration</b>
<ul style="list-style-type: none"> <li>Office of the General Counsel will work with each office's FOIA contact to identify frequently requested documents to post online.</li> <li>Changes to training that emphasize new policies.</li> </ul>
<b>Surface Transportation Board</b>
<ul style="list-style-type: none"> <li>Referenced the Obama and Holder Memos in intra-office correspondence when determining whether to release requested information.</li> </ul>

Some of the concrete changes made by agencies may have a large impact upon access to information. Two agencies instituted a revised FOIA processing form that requires staff to certify that a foreseeable harm standard is used for every request; by requiring a FOIA processor to record the foreseeable harm that was relied upon to withhold records under a discretionary exemption, these agencies reinforce the proper standard each time a withholding decision is made.

Several agencies crafted new policies aimed at increasing the amount of material posted online in advance of FOIA requests. The National Transportation Safety Board began uploading accident dockets to its Web site in June 2009, and the Occupational Safety and Health Review Commission (OSHRC) now posts Administrative Law Judge decisions before appeal rights are exhausted (with a disclaimer that they may not be final). The Department of Defense will post all documents released under the FOIA unless they are first-party documents containing private information, a common-sense step that would dramatically increase access to government records and fulfill the goals of the E-FOIA Amendments of 1996 if it were adopted governmentwide.

Other changes, such as limiting the use of the FOIA's "Low" (b)(2) exemption, which allows agencies to withhold documents on internal matters that are trivial in nature, may speed processing and minimize disputes and requester frustration. The Environmental Protection Agency also reversed its policy of withholding e-mails on the grounds that they constituted internal deliberations. Documents from the OSHRC and the Surface Transportation Board indicate that both agencies' staff members have expressly taken the Obama and Holder Memos into consideration when they respond to FOIA requests. The changes adopted by these thirteen agencies would have an impact if they were adopted and implemented across the entire executive branch, and the administration should push agencies to do so.

## CHANGES IN TRAINING RESULTING FROM THE MEMOS

**14 out of 90 (16%) agencies surveyed provided documentation showing that the Obama and Holder Memos played a prominent role in agency training sessions, but did not provide documentation of concrete changes in practice.**

About one-sixth of the agencies surveyed appeared to integrate the Obama and Holder Memos into training materials such as slideshows, but the documents provided do not indicate any concrete changes in practice as a result of the memos. Instead, records from these 14 agencies show proactive efforts to inform staff about the memos and to explain their meaning.

- Amtrak
- Department of Homeland Security
- Department of Housing and Urban Development
- Department of Justice
- Department of Transportation
- Department of Veterans Affairs
- Equal Employment Opportunity Commission
- Federal Communications Commission
- Federal Trade Commission
- National Archives and Records Administration
- Office of Government Ethics
- Office of Management and Budget
- Office of Special Counsel
- Postal Service

For example, most of these agencies prepared powerpoint presentations that included key points from the memos. Several agencies explained the Department of Justice's new positions on defending agency withholdings in court, the presumption of disclosure, and the foreseeable harm standard. The Department of Justice held several training sessions during 2009 with "keynote" talks on the Obama and Holder Memos, and the Department of Justice is the source of both the Obama Memo and follow-up guidelines from its Office of Information Policy about how to implement the memo.

A few agencies also told staff members that they would review current FOIA procedures and

implement changes at a later date.<sup>6</sup> A Federal Communications Commission official stated in an e-mail that she expected the Obama Memo would "cause some changes in our FOIA practices." The documents we received from these agencies do not indicate that any changes in practice were actually put into place, but it is possible that changes were made at these agencies after they had replied to our FOIA requests.

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<sup>6</sup> Department of Homeland Security; Federal Communications Commission; and Federal Trade Commission.

## CHANGES IN TONE RESULTING FROM THE MEMOS

**11 out of 90 (12%) agencies surveyed provided documentation showing that the Obama and Holder Memos were circulated and discussed through e-mail, but did not provide documentation of concrete changes in practice or enhanced training.**

About one-tenth of the agencies surveyed appeared to have done more than merely circulate the Obama and Holder Memos to staff members, but the documents provided do not indicate any concrete changes in practice as a result of the memos. Instead, records from these 11 agencies mostly stated in general terms that they would adopt the presumption of disclosure laid out in the memos, without a clear indication that the change in mindset would translate into a change in FOIA procedures or practices.

All of the agencies in this category circulated the memos as well as a brief summary of the memos' key points. However, these 11 agencies did not provide documentation showing face-to-face discussions or show that training sessions were held to address the memos. Documents from some agencies indicate that they did not think any concrete changes in policy were necessary to comply with the memos. For example, the Commission on Civil Rights and the Office of Personnel Management noted that their FOIA procedures were already consistent with the principles set out in the Obama Memo.

- Commission on Civil Rights
- Committee for Purchase from People Who Are Blind or Severely Disabled
- Federal Deposit Insurance Corporation
- Federal Labor Relations Authority
- General Services Administration
- International Boundary and Water Commission
- National Labor Relations Board
- Office of Personnel Management
- Office of Science and Technology Policy
- Peace Corps
- Small Business Administration

## NO CHANGES REPORTED RESULTING FROM THE MEMOS

**35 out of 90 (39%) agencies surveyed responded that there were no responsive records concerning the implementation of the Obama and Holder Memos.**

- American Battle Monuments Commission
- Broadcasting Board of Governors
- Central Intelligence Agency
- Chemical Safety and Hazard Investigation Board
- Commodity Futures Trading Commission
- Copyright Office
- Corporation for National and Community Service
- Council on Environmental Quality
- Defense Nuclear Facilities Safety Board
- Department of Treasury
- Farm Credit System Insurance Corporation
- Federal Maritime Commission
- Federal Mediation and Conciliation Service
- Federal Mine Safety and Health Review Commission
- Federal Open Market Committee
- Federal Reserve System
- Federal Retirement Thrift Investment Board
- Institute of Museum and Library Services
- Inter-American Foundation
- International Trade Commission
- Millennium Challenge Corporation
- National Capital Planning Commission
- National Credit Union Administration
- National Endowment for the Arts
- National Endowment for the Humanities
- National Indian Gaming Commission
- National Mediation Board
- National Science Foundation
- Office of the Director of National Intelligence
- Office of National Drug Control Policy
- Overseas Private Investment Corporation
- Pension Benefit Guaranty Corporation
- Railroad Retirement Board
- Securities and Exchange Commission
- Trade and Development Agency

Just over one-third of the agencies surveyed produced no documents showing implementation of the Obama and Holder Memos. Because the Archive asked all agencies not to include the memos themselves as part of their responses to the FOIA requests, it is unknown whether these agencies circulated the memos at all. But their “no records” responses suggest that at the most, these agencies distributed the memos with no commentary or discussion of their impact on the agency’s FOIA practices.

Many of the agencies in this category are ones that do not field many FOIA requests on a regular basis. However, there are some notable exceptions such as the Central Intelligence Agency, the Department of Treasury, and the Securities and Exchange Commission, each of which receives a large number of FOIA requests.

## NON-RESPONDERS

**An additional 17 out of 90 (19%) of agencies surveyed did not respond to the Archive's FOIA request despite the passage of five months from its submission.**

- Agency for International Development
- Consumer Product Safety Commission
- Court Services and Offender Supervision Agency
- Department of Agriculture
- Department of Labor
- Department of State
- Department of Education
- Export-Import Bank
- Legal Services Corporation
- Merit Systems Protection Board
- National Aeronautics and Space Administration
- Office of the U.S. Trade Representative
- Selective Service System

The failure of these agencies to respond to the FOIA requests raises serious concerns given that the FOIA requires a response within 20 business days. The records sought by the Archive should be in the agencies' FOIA service centers' own files or should be easily accessible to the agencies' FOIA staff. There should be limited or no need to search for the records in component offices. Indeed, one would expect that the relevant materials are referred to on a regular basis by the agencies' FOIA offices.



## RELEASE AND DENIAL DECISIONS: NO CLEAR UPWARD TREND IN AGENCY DISCRETIONARY DISCLOSURES

Assessing the direct impact of President Obama’s discretionary release policy is a challenging exercise. Some FOIA requests ask for information that an agency is required by law to withhold, but a policy shift toward increased discretionary releases should have an impact on records that include deliberative process matters, as well as decisions to rely on exemptions 2 (internal matters), 5 (inter- and intra-agency memoranda), 6 (personal privacy), 7 (law enforcement records), 8 (records of financial institutions), and 9 (oil well data) in some instances.

In a recent *Washington Post* article about the continued prevalence of FOIA litigation, the Department of Justice pointed to an increase in its releases of records in full to demonstrate that it had embraced the Obama and Holder FOIA policies.<sup>7</sup> While an increase in releases in full and in part does signal that more information is reaching the public, those data points on their own do not necessarily mean the agency is using its discretion to release material it would not have released in the past. The increase could simply mean that the agency is processing more requests than in the past (which is also a good thing). If an increase in releases is coupled with a decrease in denials, the statistics suggest that the agency may be looking at the records with a fresh perspective. Here again, the data for FY 2009 show extremely mixed results.

AGENCY	% Change: Released in Full	% Change: Released in Part	% Change: Denied in Full
DOA	0.2	21.9	-18.2
DOJ	5.1	13.0	-4.1
OMB	6.3	84.6	-56.7
SBA	42.4	40.9	-45.5
CIA	53.2	72.6	54.4
DHS	46.2	73.2	51.7
DOC	19.9	-24.6	-22.7
DOD	-7.5	9.2	-17.5
DOI	16.1	-3.8	-1.8
EDU	11.8	-16.5	18.0
EPA	-13.1	9.6	-1.4
GSA	0.8	25.4	88.9
HHS	-21.2	49.4	-17.5
VET	-53.9	37.2	-17.4
DOE	-5.5	-2.0	-38.6
DOL	-0.5	-14.0	-12.8
HUD	-8.8	63.3	122.4
NAR	-15.0	-28.9	-72.0
NSF	141.7	-14.9	112.5
OPM	-55.0	-36.7	-7.5
SEC	-21.8	-17.4	-11.1
SSA	-21.1	840.5	214.6
DOS	-38.94	-7.6	129.4
DOT	-0.7	-9.9	83.0
NAS	-9.8	-4.0	11.9
NRC	-23.5	-9.3	35.7
TRE	-12.0	-0.4	24.2
AID	Did not submit data*		

\*As of March 10, 2010, the US Agency for International Development had not posted its Annual FOIA Report online. The FOIA requires the report be submitted to the Department of Justice by February 1, 2010.

<sup>7</sup> Carol D. Leonnig, “More than 300 public-record lawsuits filed in Obama’s first year,” *The Washington Post*, Jan. 27, 2010.

As reflected above, there is a wide variety of change in each agency's release and denial statistics.<sup>8</sup> Agencies that released more documents and denied fewer documents are highlighted in green because they are getting more records to the public. Agencies that reduced their releases and increased their denials have been highlighted in red because they are sharing fewer records.<sup>9</sup> The yellow and orange categories are more ambiguous, with one (orange) or two (yellow) of the data points moving in a direction that suggests greater release or lower withholding, and the other data points suggesting the opposite conclusion. The picture is decidedly mixed and does not yet show a trend toward greater releases of records across government. Ultimately, it will take more time and at least another year of data on releases and denials to determine how successfully agencies have implemented President Obama's FOIA policy.

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<sup>8</sup> A complete chart of all 90 agencies is included in Appendix 4.

<sup>9</sup> When an agency denies a document in full, it is often because of procedural reasons rather than based on exemptions of the FOIA. Procedural reasons for denying a document in full include: no records could be found, a request has been withdrawn by the requestor, a fee-related reason, and records not reasonably described, among others. It is difficult to discern all of the contributing factors behind a rise in denials in full because of procedural reasons, but an increase in such denials warrants attention. In general, rising numbers of denials in full based on procedural reasons could indicate a systemic problem. For example, if the instructions on how to send a request are unclear, there could be a high number of errors in the language of the request, or how and where the request is sent. One of the most frequent procedural reasons for denying a document in full is that no records could be found. A high number of these types of denials can indicate that either the agency is conducting inadequate searches, or requesters are unaware of what type of documents the agency is supposed to have. In some instances agencies have a significant number of requests closed because the researcher has withdrawn the request. This basis for a procedural denial also can be the sign of a problem. Agencies occasionally have waited out the request and then asked for its closure. Data on changes in denials in full for procedural reasons is located in Appendix 4.

## **THE TEN OLDEST PENDING FOIA REQUESTS: SLOW PROGRESS ON THE OLDEST FOIA REQUESTS STILL LEAVES SOME BEHIND, FAR BEHIND**

Despite President Obama's pledge of a "new era of open Government" and Attorney General Holder's pronouncement that, "[l]ong delays should not be viewed as an inevitable and insurmountable consequence of high demand[.]" executive agencies have shown only mixed success during Obama's first year in closing their oldest open requests.

The FOIA requires agencies to process and respond to FOIA requests within 20 business days, with the possibility of a 10-day extension in "unusual circumstances" and a tolling of the time limit if the agency is awaiting information from the requester. In 2003, the National Security Archive had many FOIA requests that had been pending for many years beyond 20 or 30 business days yet the agencies' statutorily mandated annual FOIA reports did not appear to reflect the tremendous backlog of requests, some decades old. Thus, in 2003 the Archive developed the "Ten Oldest FOIA Request" metric to illustrate the quantity of unfulfilled FOIA requests held by executive agencies. In 2006, the Department of Justice directed all agencies to include the date of their oldest pending perfected FOIA request in their annual FOIA report. Then, the OPEN Government Act of 2007 codified the requirement that agencies report their oldest open requests. This "Ten Oldest" statistic remains an important facet in the agencies' Fiscal Year 2009 FOIA reports.

As of September 30, 2009, the oldest unfulfilled FOIA request in the federal government was filed with the National Archives and Records Administration on September 21, 1992. The request was made by the National Security Archive for files of the White House Office of Science and Technology from the early 1960s, relating to nuclear arms control and nuclear test issues from 1959 to 1961. This request was likely referred to the Department of Energy, the Department of Defense, and the Air Force Technical Application Center for review, where it continues to languish.

NARA has a particular challenge fulfilling FOIA requests. Each of NARA's ten oldest requests requires consultation because none of the requested records originated at NARA. Instead they are historical records that have been accessioned to NARA for permanent preservation consistent with the Federal Records Act. The records that are transferred to NARA for permanent preservation represent only approximately 3 percent of federal agency (non-White House) records and are comprised only of those records found to have legal, financial, evidentiary, and historical significance.

Typically, however, NARA does not have authority to declassify records that originated at another agency but that NARA holds. Accordingly, requests made to NARA frequently are referred back to the originating agency for a consultation on the release decision. Data shows that this interagency process is often a black hole, in which requests are lost for years at a time. It may be particularly challenging to NARA because it cannot offer a *quid pro quo* to other agencies (that if they process the NARA consultation, then NARA will process their consultation).

One solution for NARA may be to institutionalize its FOIA processing into the newly created National Declassification Center (NDC) authorized by President Obama's Executive Order 13526 on Classified National Security Information. The NDC will be specifically designed to handle interagency processing of classified materials and will be managed by NARA. Most records requested under FOIA from NARA should be sufficiently old to qualify for the NDC's processes.

The ten agencies with the oldest pending requests in the federal government as of the end of FY 2009 are:

- National Archives and Records Administration: September 21, 1992–March 14, 1994

### ***Still Pending at the National Archives and Records Administration***

- Independent counsel report on Iran-Contra
- Information about Robert Earl, who destroyed Oliver North's records
- Reagan's consideration of judicial nominees
- DOD's October 1969 "World-Wide Increased Readiness Posture"

- Department of Defense: December 1, 1992–February 16, 1994
- Central Intelligence Agency: October 7, 1998–January 9, 2003
- Department of the Treasury: September 9, 1999–April 17, 2002
- Department of Energy: February 7, 2000–August 5, 2005
- Department of the Interior: August 14, 2000–August 26, 2002
- Department of Justice: August 18, 2000–March 28, 2002
- Department of State: February 8, 2001–June 5, 2003
- Environmental Protection Agency: May 17, 2004–March 8, 2005
- Department of Transportation: June 14, 2004–November 26, 2005

Notably, in 2003 the average age of the oldest requests across the 28 agencies that responded to the National Security Archive’s original survey seeking the ten oldest pending requests was 78 months; the average age of those

***Still Pending at the Department of Defense***

- U.S. military’s 1961 reaction to the construction of the (now-demolished) Berlin Wall
- U.S. export policy to Iraq in the 1980s
- A full set of the “Pentagon Papers,” which has been public since 1971
- Reykjavik summit in 1986 between the U.S. and USSR

same agencies’ oldest requests at the end of FY 2009 was 70 months. Those 28 agencies handle over 90 percent of FOIA requests governmentwide. However, according to their own data, 33 out of all 90 agencies now have an older request than they did at the end of FY 2008. This means that if the agencies keep their current pace, *they will never eliminate their backlog*. However, analysis of the agencies’ “Ten Oldest” also presents some positive news. Twenty agencies out of ninety have improved the date of their oldest open request from 2008 by more than one month. The CIA was able to improve the date of its oldest open request by *65 months* (although its oldest remains 131 months old).<sup>10</sup>

The “Ten Oldest” figures show executive agencies have not met the challenge to close their oldest requests. The success of some agencies has been offset by the continued failure of others. Many agencies that reduced their backlogs still have a tremendous amount of work to do to ensure the public’s speedy access to information. President Obama’s declaration that “disclosure should be timely” remains unfulfilled. No FOIA request should be left behind.

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<sup>10</sup> This data is available in Appendix 2.

## THE TEN OLDEST PENDING FOIA REQUESTS: IS ACCESS TO PRESIDENTIAL RECORDS AN OXYMORON?

### *Requests of Historic Importance*

- Johnson's surveillance of civil rights groups
- Johnson's policy toward the Congo
- Johnson's funding of Bolivia when it targeted Che Guevara
- Minutes of Nixon's National Security Council meetings
- Nixon's policy toward Israel
- Reagan's deliberations about judicial appointees
- 1983 invasion of Grenada
- Status of missing POWs and MIAs in Southeast Asia
- US bombing of Libya known as Operation El Dorado Canyon
- Reagan's South Africa policy during apartheid
- Bush 41's education policy
- Role of the Chief of Staff in the Bush 41 White House
- Bombing of Pan Am Flight 103
- Clinton policy toward Rwanda
- Clinton policy toward Haiti

Presidential records are some of the most valuable U.S. government records to historians, researchers, and analysts trying to understand American history. Moreover, in the U.S.'s democratic system, presidential records offer the possibility to judge a president and for future presidents to learn from the past as they make decisions affecting millions of people. Because of their historical significance, collections of presidential records are of urgent interest to historians. In part because of the growth of e-mail and other electronic records, however, collections of presidential records have grown enormously, and the nature of the review of electronic records differs from review of textual records. The Clinton administration transferred approximately 20 million presidential record e-mails to NARA. The George W. Bush administration transferred over 150 million presidential record e-mails. At the same time, the high prevalence of classified material and the frequency with which records from all agencies in the federal government are sent to the White House make their review challenging.

NARA has estimated that it will take "many decades" to complete the processing of presidential records from the Reagan, Bush 41, and Clinton administrations.<sup>11</sup> Yet, presidential library FOIA request backlogs have not received the same level of scrutiny and attention as FOIA backlogs at Executive Branch agencies. Accordingly, the Archive requested copies of the ten oldest pending requests at every presidential library from the Lyndon Baines Johnson Library through the William Jefferson Clinton Library. These requests went to both PRA libraries and deed of gift libraries.

### THE SYSTEM FOR PRESERVING AND ACCESSING PRESIDENTIAL RECORDS

Just over 70 years ago, President Franklin D. Roosevelt proposed creating the first presidential library to house the papers and artifacts accumulated during his presidency, which he then donated to the National Archives to be operated as a government facility. As subsequent presidents followed that model, Congress enacted the Presidential Libraries Act of 1955, which outlined the legal authority of the Archivist of the United States to accept gifts of presidential records.

The records of presidents who served between 1929 and 1981 (Presidents Hoover through Carter) are governed by the Presidential Libraries Act of 1955, as amended, which allowed great discretion to former presidents

regarding their records and are based upon a deed of gift by the former president. The Presidential Recordings and Materials Preservation Act of 1974 applies to the records of Richard M. Nixon's administration, which were seized and entrusted to the National Archives' custody and control. The Presidential Records Act of 1978 (PRA) governs the official records of U.S. presidents created or received after January 20, 1981, making the records of the administration of President Ronald Reagan the first subject to the PRA.<sup>12</sup> The PRA established public ownership of

<sup>11</sup> "Report on Alternative Models for Presidential Libraries Issued in Response to the Requirements of PL 110-404," ("NARA Report") National Archives and Records Administration (September 2009), 27.

<sup>12</sup> Presidential records include all records created by the president, his immediate staff, or any "unit or individual of the Executive Office" who advises or assists the president. Personal records, including diaries and journals "not utilized for... government business," are exempt from the act. See Presidential Records Act of 1974,

presidential records. The Act provides that presidential records must be turned over to the Archivist of the United States at the end of the president’s term, and the Archivist becomes responsible for “custody, control, . . . preservation of, and access to” the records.

Although the PRA does not provide any public access to records for the first five years after the end of the presidency—in order to permit NARA time to preserve, process, and organize the materials—the act stipulates that the public may access presidential records “through” the Freedom of Information Act five years after the end of the administration. The outgoing president also has the right to invoke any of six presidential restrictions on disclosure to last for up to twelve years after the president leaves office.<sup>13</sup>

After the requisite time period has passed, any researcher may request access to unprocessed documents from the presidential libraries by submitting a Freedom of Information Act request or a Mandatory Declassification Review request. According to a 2001 statement to Congress by the Archivist of the United States, “PRA Libraries open records almost exclusively in response to FOIA requests [and MDR requests], and have very little opportunity to conduct systematic processing of records after the first five years.”<sup>14</sup> Indeed, to date, at the point when presidential records become subject to FOIA requests, only a minute portion of the records have been reviewed and publicly released.

### **BACKLOGS AT PRESIDENTIAL LIBRARIES**

The responses that the Archive received to its requests for the ten oldest pending FOIA requests at each presidential library confirm what many researchers are experiencing—long delays that severely undermine the accessibility of records for the public:

<b>Library</b>	<b>Date Open for Requests</b>	<b>Oldest</b>	<b>10th Oldest</b>	<b>Backlog in Months</b>
Kennedy	(not available)	3/19/1998	1/23/2001	More than 138 months
Johnson	(not available)	3/10/2003	10/25/2009	More than 78 months
Nixon	(not available)	12/18/2004	1/14/2008	More than 57 months
Ford	(not available)	10/30/2001		More than 95 months

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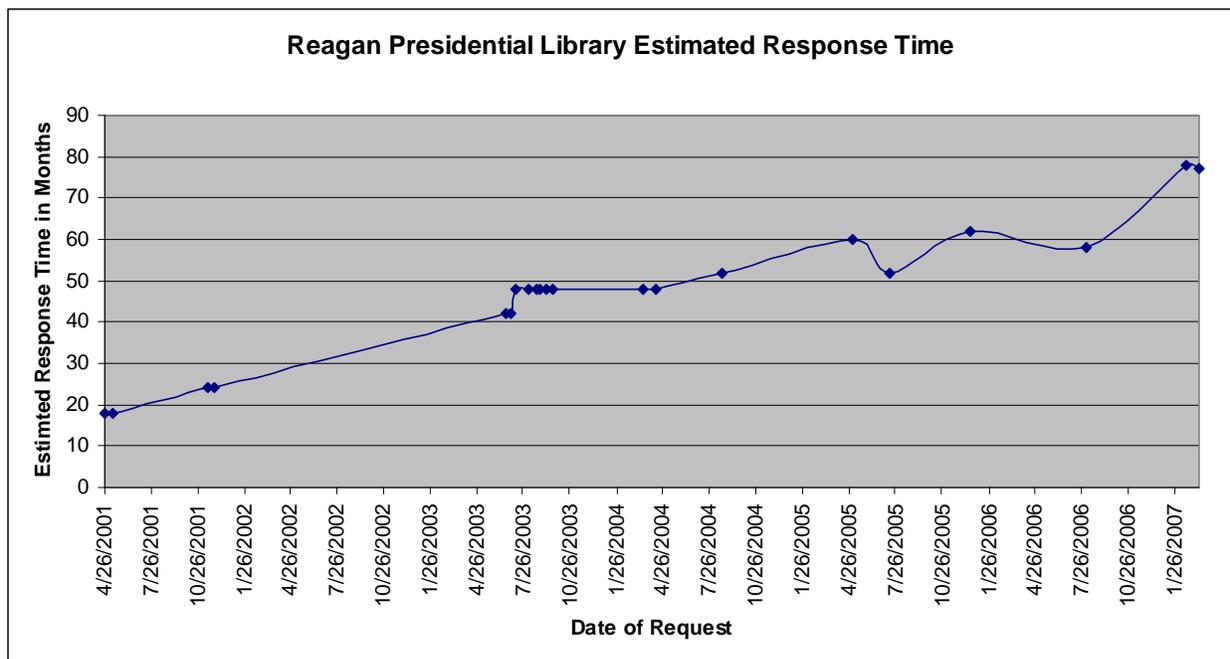
<http://www.archives.gov/presidential-libraries/laws/1978-act.html>; President Obama’s Executive Order 13489, <http://edocket.access.gpo.gov/2009/pdf/E9-1712.pdf>.

<sup>13</sup> The presidential restrictions known P1, P3, P4, and P6 mirror FOIA restrictions (b)(1) (classified national security), (b)(3) (required by statute), (b)(4)(trade secrets and confidential business information), and (b)(6) (clearly unwarranted invasion of personal privacy). The P2 restriction relates to information concerning appointments to federal office, and the P5 restriction applies to confidential communications requesting or submitting advice between the president and his advisors, or between such advisors. The P5 restriction expires after 12 years, and FOIA’s (b)(5) restriction is not applicable. So, as of the 12-year mark, confidential advice records may be released unless a former or incumbent president raises a claim of executive privilege.

<sup>14</sup> “On the Implementation and Effectiveness of the Presidential Records Act of 1978,” 2001 Statement by Archivist of the United States John Carlin to the House Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations of the Committee on Government Reform, [http://www.fas.org/sgp/congress/2001/110601\\_carlin.html](http://www.fas.org/sgp/congress/2001/110601_carlin.html).

Carter	(not available)	10/19/2001		More than 95 months
Reagan <sup>15</sup>	1/20/1994	3/5/1994	12/19/1996	More than 186 months
Bush	1/20/1998	1/13/1998	1/21/1998	More than 140 months
Clinton	1/20/2006	1/20/2006	1/23/2006	More than 44 months

The growth of processing estimates and backlogs at the Ronald Reagan Library demonstrates how serious the problem is and how little progress has been made at solving the challenge of providing access to the records for the public.



In September 2009, NARA released a “Report on Alternative Models for Presidential Libraries Issued in Response to the Requirements of PL 110-404.” This report acknowledges the general problem of delay and points to several explanations for the problem:

- The sheer size and complexity of the collections, coupled with the numerous special access requests by the incumbent and former Presidents, the Courts and the Congress, have made it unrealistic to believe NARA can process the majority of the records within five years after the end of an administration (p. 23);
- The volume of FOIA requests, along with the administrative and archival requirements of processing records in response to FOIA requests as opposed to systematic review and release (p. 24);

<sup>15</sup> The Reagan Library has indicated that it is employing a partial release strategy for its oldest requests that has provided some records to many of the requesters who submitted the oldest requests. The requests remain open for eventual complete fulfillment.

- The complicated challenge of applying the presidential restrictive categories and eight of the nine FOIA exemptions, including, in particular, the need to protect personally identifiable information (PII) (p. 24); and
- The “explosive growth in the volume of electronic records, especially White House e-mail,” for example, the 20 million presidential record e-mails from the Clinton administration and the 150 million presidential e-mails in the George W. Bush administration (p. 25).

In addition to these problems, there are other explanations for the backlogs at the presidential libraries. For many years, despite the challenges outlined above, there were not significant increases in resources to increase staff at the presidential libraries. In the FY 2009 budget, however, NARA received funding for several additional staff at each of the three most recent presidential libraries. Another major cause of delay is the extended period taken by the intelligence community to conduct classification reviews on presidential materials.

In its report and other statements, NARA has outlined several new strategies to address the problem, including:

- Providing partial releases to many requesters;
- Changing its queue structure to encourage narrower requests and separately handle textual and electronic records requests;
- Processing and posting online folder titles to improve the finding aids and the focus of the requests
- Separate out classified material and using withdrawal sheets rather than automatically referring the materials for declassification;
- Bunching overlapping requests for processing;
- Better queue management;
- Simultaneous systematic review of historically significant files; and
- Routine disclosure of less sensitive series of records (p. 26).

NARA explains that these improvements and additional funding granted by Congress in FY 2009 will increase the libraries’ rate of processing, although it will still take many decades to complete the processing of materials at the PRA libraries (p. 27). NARA also suggested one statutory change: a 25-year cut off in the notice to former and incumbent presidents of NARA’s intent to open records (p. 26).

These new strategies are quite recent, but appear promising. Nonetheless, it is hard to imagine that these new strategies will be enough, given the quantity of the records that the presidential library system is receiving, the high value of the records, and the volume and breadth of the FOIA requests that are submitted to the presidential libraries. The reforms should not end there. Several other possible steps include:

- Narrowing or limiting the application of the presidential restrictive categories;
- Limiting privacy review when it relates to political appointees;
- Involving NARA earlier in presidential records management during the administration so that records will be better organized and searchable;
- Using technology and streamlining processes to improve review and avoid line-by-line review, including the Remote Archives Capture Program (RAC); and
- Changing the standards for the release of 25-year-old records by enacting an historical records act.<sup>16</sup>

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<sup>16</sup> See Testimony of Meredith Fuchs before the House Permanent Select Committee on Intelligence, Subcommittee on Intelligence Community Management, July 12, 2007, at 6, available at [http://www.gwu.edu/~nsarchiv/news/20070712/fuchs\\_testimony.pdf](http://www.gwu.edu/~nsarchiv/news/20070712/fuchs_testimony.pdf).

## **METHODOLOGY**

### **IMPLEMENTATION OF THE OBAMA AND HOLDER MEMORANDA**

To assess what concrete changes agencies made to their FOIA policies in response to the Obama and Holder Memos, the Archive submitted FOIA requests to 90 federal agencies on September 15, 2009. The Archive's Freedom of Information Act request asked for: "All records, including but not limited to guidance or directives, memoranda, training materials, or legal analyses, concerning the implementation of President Barack Obama's January 21, 2009 memorandum on the Freedom of Information Act and/or Attorney General Eric Holder's memorandum of March 19, 2009, on the Freedom of Information Act." The Archive's requests asked agencies not to respond with copies of the memos that were circulated without commentary. The requests were sent to the central FOIA processing office of each agency. After the statutory 20-business day limit had expired, the Archive contacted each tardy agency by telephone.

Of those requests, 13 are still pending five months later: Agency for International Development; Consumer Product Safety Commission; Court Services and Offender Supervision Agency; Department of Agriculture; Department of Labor; Department of State; Department of Education; Export-Import Bank; Legal Services Corporation; Merit Systems Protection Board; National Aeronautics and Space Administration; Office of the U.S. Trade Representative; and Selective Service System.

### **CHANGE IN RELEASE AND DENIAL STATISTICS**

Data on the number of records released in full, released in part, and denied in full were derived from each agency's Annual FOIA Report for FY 2008 and FY 2009. Annual reports are required by the FOIA to be submitted to the Department of Justice by February 1st each year. In the cases where the Annual FOIA Report was on neither the Department of Justice Web site, nor the respective agency Web site, an indication of "no data" is used.

Using the data in the reports, the Archive calculated the percent increase or decrease from FY 2008 to FY 2009 in records released in full, released in part, and denied in full because of exemptions. Agencies with decreases in denials and increases in records released in full and in part are highlighted in green, which indicates overall improvement in releases by the agencies. Agencies with increases in denials and decreases in records released in full and in part are highlighted in red, which indicates those agencies are sharing fewer records.

Agencies whose data were more ambiguous are highlighted in yellow and orange. For agencies in these categories, the Archive measured each agency's positive indicators, which are defined as an increase in records released in full, an increase in records released in part, or a decrease in denial of records. If two of these positive indicators were present in an agency's data, that agency is highlighted in yellow, which indicates that two of the agency's data points show improvement while one data point suggests the opposite. If only one positive indicator is present in an agency's data, that agency is highlighted in orange, which indicates that one of the agency's data points shows improvement while two data points suggest the opposite.

### **TEN OLDEST PENDING FOIA REQUESTS**

To analyze the data on agencies' oldest requests and rates of denial, the Archive relied upon the agencies' published FY 2009 Annual FOIA Reports, which are required by law to be submitted to the Department of Justice by February 1, 2010. Because the data in the reports relates to FY 2009, which ended on September 30, 2009, it is possible that some of the requests that the agencies reported as their oldest have now been fulfilled.

Some agencies released their ten oldest requests to the Archive through FOIA requests asking for: "Copies of the ten oldest pending perfected FOIA requests for FY 2009 (October 1, 2008 through September 30, 2009) at your department or agency overall.... The requests are the basis for data that the agency is required to report in its Fiscal Year 2009 FOIA Annual Report, which should be published in early 2010...."

## PRESENTATION OF THE DATA

In the sections on change in release and denial data and ten oldest pending requests, the text of the Audit includes data on 28 agencies that process over 90 percent of FOIA requests governmentwide. The complete data on all 90 agencies are included in Appendices 2 and 4.

The 28 agencies are Agency for International Development; Central Intelligence Agency; Department of Agriculture; Department of Commerce; Department of Defense; Department of Education; Department of Energy; Department of Health and Human Services; Department of Homeland Security; Department of Housing and Urban Development; Department of the Interior; Department of Justice; Department of Labor; Department of State; Department of Transportation; Department of Treasury; Department of Veterans Affairs; Environmental Protection Agency; General Services Administration; National Aeronautics and Space Administration; National Archives and Records Administration; National Science Foundation; Nuclear Regulatory Commission; Office of Management and Budget; Office of Personnel Management; Securities and Exchange Commission; Small Business Administration; Social Security Administration. This list includes the 25 agencies that have been examined by the Government Accountability Office in its reports on FOIA from 2002–2008 and the National Archives and Records Administration, Office of Management and Budget, and Securities and Exchange Commission.

## MISSING DATA

As of March 11, 2010, eleven agencies have failed to publish their Fiscal Year 2009 FOIA report:

- Agency for International Development
- Broadcasting Board of Governors
- Chemical Safety and Hazard Investigation Board
- Court Services and Offender Supervision Agency
- Department of State
- Office of Federal Housing Enterprise Oversight
- Department of Housing and Urban Development
- Inter-American Foundation
- Legal Services Corporation
- Office of Special Counsel
- Office of Science and Technology Policy

Agencies that failed to respond to the Archive's implementation FOIA requests are the Agency for International Development; Consumer Product Safety Commission; Court Services and Offender Supervision Agency; Department of Agriculture; Department of Labor; Department of State; Department of Education; Export-Import Bank; Legal Services Corporation; Merit Systems Protection Board; National Aeronautics and Space Administration; Office of the U.S. Trade Representative; and Selective Service System.