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**Pre-Decisional and Deliberative**

Date: July 18, 2019  
To: David Ferriero, Archivist of the United States  
From: Gary M. Stern, General Counsel and Chief FOIA Officer  
Subject: Reducing FOIA Backlogs and Improving FOIA Management Oversight at NARA

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## INTRODUCTION

The Freedom of Information Act establishes that the agency's Chief FOIA Officer shall "recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section."<sup>1</sup> In 2015, the Archivist of the United States charged the Chief FOIA Officer with developing a FOIA backlog reduction plan, to include appropriate recommendations.

In 2017, the NARA Office of Inspector General (OIG) completed its Audit of NARA's Freedom of Information Act (FOIA) Program and issued OIG Audit Report No. 17-AUD-16 (OIG FOIA Audit),<sup>2</sup> which recommended that the Chief FOIA Officer "[f]inalize the agency-wide internal review and needs analysis of the FOIA program to identify all vulnerabilities and resource needs to effectively manage the FOIA program. If needed seek authority to acquire additional resources needed to improve the timeliness of FOIA responses." In response to the OIG audit, the Archivist also "charged the Chief FOIA Officer with developing a plan to increase his active oversight of the agency's FOIA programs."<sup>3</sup>

This memorandum provides recommendations for reducing NARA's FOIA backlog, a description of the Chief FOIA Officer's increased management oversight of NARA's FOIA program, and a corrective action plan that includes periodic monitoring. The appendix contains more detailed background information on NARA's FOIA program and backlog.

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<sup>1</sup> 5 U.S.C. § 552(j)(2)(C).

<sup>2</sup> <https://www.archives.gov/files/oig/reports/audit-report-17-AUD-16.pdf>.

<sup>3</sup> In June 2018, the Government Accountability Office (GAO) issued a report titled, "Freedom of Information Act: Agencies Are Implementing Requirements, but Additional Actions are Needed" (GAO-18-365), which surveyed 18 agencies, including NARA. While noting that "NARA has shown significant progress in reducing its backlog" (p.36), GAO recommended that NARA "should take steps to develop and document a plan that fully addresses best practices with regard to reduction of backlogged FOIA requests" (P.29, recommendation 12).

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### FOIA BACKLOG REDUCTION PLAN

While the ultimate goal of any FOIA program is to meet the statutory 20-day time period for a high percentage of cases, NARA's current focus should be on continuing to reduce the largest end of year backlogs that exist for FOIA requests for archival records processed by the Special Access and FOIA staff, the George W. Bush Presidential Library (Bush 43), and the National Declassification Center (NDC) – which together account for over 80% of NARA's backlog. NARA must also prepare now for the FOIA requests that will commence at the Obama Presidential Library in January 2022, which will likely equal if not surpass the Bush 43 Library backlog.

The Special Access and FOIA staff has 1600 cases in its backlog, totaling approximately 4.5 million pages; in FY 18, it received 1500 new cases, closed 1360 cases, and reviewed 690,000 pages, averaging 62,000 pages per FTE. The Bush 43 Library has 615 cases in its backlog, totaling 158 million equivalent pages; in FY 18, it received 147 new cases, closed 70 cases, and reviewed 650,000 pages, averaging 54,000 pages per FTE. The NDC will be inheriting a significant new FOIA and MDR caseload from the Presidential Libraries. To reduce their FOIA backlog, these offices must increase the volume of records being reviewed.

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### FOIA MANAGEMENT OVERSIGHT

Because FOIA processing was just one aspect of how the FOIA program offices provided access within NARA's decentralized FOIA program, the Chief FOIA Officer has traditionally served to coordinate NARA's FOIA program rather than provide significant oversight authority. The OIG audit highlighted NARA's lack of a centralized FOIA program, and believed this structure to be a contributing factor for many of the issues it identified in its 2017 audit. While the Archivist disagreed with the OIG's belief that there is "a lack of senior management involvement over the FOIA program," he did charge "the Chief FOIA Officer with developing a plan to increase his active oversight of the agency's FOIA programs."

The Chief FOIA Officer increased oversight of NARA's FOIA activities in the following ways:

- Updated NARA's FOIA Directive 1602 (OIG recommendation 14, completed in September 2018) and FOIA Reference Guide (recommendation 3, completed in November 2018) in order that the FOIA Program Offices could correspondingly update their processing guides and standard operating procedures and address the specific OIG administrative recommendations that applied to them (recommendation 15, submitted to OIG in May 2019).
- Included a FOIA module in NARA's new, agency-wide training program, so that all NARA staff will understand the basic requirements of FOIA and what to do if they are called upon to respond to a FOIA request (recommendation 11, completed in May 2019).
- Continued long-standing monthly FOIA Council meetings.
- Conducted on-site FOIA Management Oversight Reviews of the following FOIA program offices in FY 18-19: Clinton Library, NDC, Special Access, NPRC (MPR, CPR, and St. Louis Archives), Reagan Library and George W. Bush Library.
  - In preparation for the meetings, each office completed the OIP FOIA self-assessment toolkit,<sup>11</sup> a FOIA Data Analysis Spreadsheet of their FOIA program – relating to queues, backlog, and processing time by queue and staff – and a FOIA Program Office Review Worksheet.
- Prepared a summary of each meeting, in coordination with the office, and provided the summary to the Archivist, the Deputy Archivist, the Chief Operating Officer, and the supervisory Executive, and periodically met with the Archivist and the Deputy Archivist to report on FOIA issues.

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<sup>11</sup> <https://www.justice.gov/oip/blog/foia-self-assessment-toolkit-now-available>

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### **CORRECTIVE ACTION PLAN AND PERIODIC MONITORING**

The OIG FOIA Audit made a number of recommendations that called on the “NARA Senior Management/Responsible Official” (i.e., the Chief FOIA Officer) to “develop corrective action plans” or “conduct periodic monitoring” of NARA’s FOIA program and the FOIA program offices.<sup>12</sup> Keeping in mind the statement by the DOJ Office of Information Policy that “many agencies reach a point at which, despite their best efforts to streamline processing and leverage technology, their backlog will nevertheless increase,” NARA has generally made its best efforts to streamline processing with the currently available staff and technology. The Chief FOIA Officer has not identified any systematic administrative deficiencies in the way that NARA FOIA program offices currently process FOIA requests.

Accordingly, the Chief FOIA Officer will conduct management oversight on each of the recommendations that warrant such follow up.

- On an annual basis, the Chief FOIA Officer will require that each FOIA program office complete an updated version of the FOIA Data Analysis Spreadsheet and the FOIA Program Office Review Worksheet, which are described in Part II and attached to this memo. The spreadsheet will provide an updated assessment of the backlog, and the worksheet will document each office’s adherence to the OIG recommendations requiring ongoing follow-up, i.e.: recommendation 2, implement quality control systems; recommendation 8, implement time management tracking processes; and recommendation 15, updating processing guides/standard operating procedures. The Chief FOIA Officer will review these forms and provide feedback to each FOIA program office as appropriate to ensure ongoing compliance with these requirements, and will also conduct on-site oversight reviews approximately every 3-5 years.
- In accordance with recommendation 6 of the OIG FOIA Audit Report, to “[e]stablish controls for periodic reviews of the corrective action plan to ensure that the plan is effective and is working as intended,” the Chief FOIA Officer will, on an annual basis, assess the current backlog, based on the FOIA Data Analysis Spreadsheet, in relation to the available funding for staff and technology, and recommend to the Archivist an updated FOIA Backlog Reduction initiative, as necessary and appropriate. The Chief FOIA Officer will also periodically update the Archivist on the status of the corrective action plan and the FOIA processing delays and backlogs.

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<sup>12</sup> See recommendations 2, 4, 5, 6, 8, and 15.

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### APPENDIX

#### FOIA AT NARA

The Freedom of Information Act (FOIA) is an integral aspect of the way in which NARA makes its records (both archival and operational) available to the public – i.e., FOIA helps NARA achieve its core mission to “Make Access Happen.” However, NARA’s holdings are unique among federal agencies in that they contain records from all branches of government along with large collections of donated materials, many of which have been long available to the public under processes that pre-date (or are outside the scope of) the FOIA.

FOIA applies only to records of executive branch agencies, which means that it applies to NARA’s archival holdings from these agencies (“archival records”), as well as to records that NARA itself creates (“operational records,” also referred to as corporate records). FOIA does not apply to legislative and judicial branch agencies or to donated presidential collections, but it does apply (in modified form) to Presidential Libraries whose records are governed by the Presidential Records Act (PRA), beginning with President Reagan. NARA’s National Personnel Records Center (NPRC) also administers FOIA requests for military and civilian personnel records that remain in the legal custody of the military services and the Office of Personnel Management (OPM). Given this landscape, NARA faces various challenges in meeting FOIA’s requirements.

Because of practical and legal differences in the way that FOIA applies to different parts of the agency, NARA has a decentralized FOIA program among five distinct principal FOIA program offices: The Special Access and FOIA Staff of Research Services (RD-F), which focuses principally on unclassified archival records, including law enforcement records; the National Declassification Center of Agency Services (NDC), for classified archival records; the Presidential Libraries subject to the PRA (Reagan, George H.W. Bush, Clinton, George W. Bush, Obama (starting in 2022), and the Presidential Materials Division, for the records of Vice Presidents Gore, Cheney, and Biden (starting in 2022); the National Personnel Records Center of Agency Services (NPRC), for civilian and military personnel records; and the Office of General Counsel (NGC), for NARA’s operational records. Each office has different challenges and backlogs, with varying degrees of severity.<sup>13</sup>

Responding to FOIA requests is essentially the last stage of the lifecycle for providing access to permanent archival records. For executive branch archival records, determining public

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<sup>13</sup> In addition, NARA’s Research Services Field Offices, the Office of the Federal Register, and the Office of Inspector General each respond to a very small volume of FOIA requests (less than 25 per year) for the archival or operational records under their control. Reference divisions within Research Services also respond to FOIA requests for open archival records.

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availability begins at the accessioning stage. At the time of accessioning, the creating agency is supposed to identify which FOIA exemptions apply to any of the records; in the past, this often was not done. For classified or declassified records, the creating agency also documents its review under E.O. 13526 and the Kyl and Lott amendments. Based on that information and its own initial spot checking of the records, NARA makes the series available either in full or in part, reviews the records and withhold pages, folders or boxes from public access, or closes the records until further screening or a FOIA review occurs. Researchers need to file FOIA requests to gain access to closed or restricted records, which often require line-by-line review for possible redaction of exempted information. The NDC oversees the declassification process for archival records, through the 25-year automatic declassification program and for FOIA requests (and will soon take over classified Presidential records as well).

Records in Presidential Libraries that are subject to the PRA, which took effect beginning with President Reagan, are subject to FOIA beginning five years after the end of the administration. Because of the nature of the records, the terms of the PRA, and the fact that the White House does not identify applicable FOIA exemptions before transferring its records to NARA, presidential records must undergo a line-by-line review prior to release. In contrast, the vast majority of materials at Presidential Libraries prior to President Reagan are not subject to FOIA.

Importantly, for the NARA offices with archival records, FOIA is only one aspect of the staff responsibilities – i.e., it is just one of the mechanisms by which NARA provides access to its archival records, which also include systematic processing, mandatory declassification reviews, and special access requests by other governmental entities.

Indeed, the National Archives has been providing public access to records since well before the FOIA was enacted in 1966, principally through systematic processing. Whereas it is more efficient for archivists to make records available in a systematic manner – i.e., by reviewing one series at a time in its entirety – FOIA requires archivists to search for the particular records that are responsive to each request, which can come from multiple and disparate series and record groups. The former, archival approach of systematic processing is generally more efficient and allows for the release of larger amounts of records, but the FOIA approach is dictated by what the individual requester wants. The PRA Presidential Libraries, in particular, have struggled to find the appropriate resource balance between the efficiencies of systematic processing and the legal requirements (and individual demands) of the FOIA as they seek to achieve their processing goals. Moreover, the FOIA has statutorily defined deadlines and judicial enforcement provisions that do not apply to traditional archival processing.

NARA has classified records at the four Presidential Libraries that currently process FOIA requests, which comprise a significant portion of their backlogs and generally represent their oldest cases. NARA now plans to transfer all of the classified records located at the Presidential Libraries to the NDC, which should allow more personnel at each library to focus on unclassified FOIA requests. However, the details concerning how the NDC will coordinate with the Libraries



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to address such things as other PRA and FOIA exemptions, PRA notification requirements, communication with requesters, and related issues have not been worked out, such that the Libraries may still have to devote some resources to FOIA requests for classified records.

For the NPRC, FOIA constitutes less than five percent of the total volume of the 1.2 million requests that it receives every year from veterans and other requesters for military and civilian personnel files. And due to the largely repetitive nature of these requests, the NPRC is able to respond to 99 percent of these requests in less than ten working days. Indeed, because the NPRC receives the vast majority of NARA's FOIA requests – in FY18, 48,332<sup>14</sup> out of a total of 53,850 – and responds to them so quickly and efficiently, NARA as a whole met the FOIA statutory timeline 96 percent of the time.<sup>15</sup>

The ability to complete a high percentage of FOIA requests within 20 working days is largely dependent on the size, frequency, and complexity of each request – i.e., how long it takes to locate the requested volume of potentially responsive records, determine which of them are actually responsive, and then review them for applicable FOIA exemptions. Moreover, because the majority of records at the four PRA Presidential Libraries must go through the mandated 60-90 working day notification period to the representatives of the incumbent and former Presidents so that they can review for executive privilege (44 U.S.C. § 2208), it is impossible for those libraries to close out cases in the FOIA's 20 working day timeframe (except for those FOIA requests that are administratively closed, the records are already processed and available, or the records requested are exempt from the 60-day notification period).

The DOJ annual FOIA report requires all agencies to distinguish between “simple” and “complex” FOIA requests. At NPRC, virtually all requests are considered simple, since they are for the same type of personnel file, each of which can be quickly retrieved from a single, known location, and which generally contain under 100 pages, and also which contain a limited and readily identifiable amount of exempt information – all of which explains why NPRC can respond to 99% of its FOIA requests within ten days. Similarly, 70% of the FOIA requests for NARA's operational records in FY 18 were simple. On the other hand, the majority of FOIA requests for archival records in Research Services, the NDC, and the Presidential Libraries are complex; these requests often involve thousands, tens of thousands, and now even millions of pages of records that have to be searched for in disparate locations and that contain varying types of sensitive information requiring careful line by line review for applicable FOIA exemptions, some of which then require consultation with other agencies.

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<sup>14</sup> Note that through the first half of FY 19, the NPRC has experienced an appreciable decline in the number of FOIA requests it has received related to the Work Opportunity Tax Credit.

<sup>15</sup> In FY18, NARA ranked fourth in the government for total number of FOIA requests. The three agencies that received more were: DHS, 395,751; DOJ, 96,875; and DOD, 57,032; USDA is fifth, with 36,547.

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Responding to FOIA requests is still largely a manual process involving skilled FOIA professionals – at NARA, the work for archival and operational records is done mostly by trained archivists and specialists at the GS 11-14 level, with assistance from archives specialists and technicians, as well as government information specialists.

The core elements of a FOIA case are: searching for potentially responsive records, determining which records are responsive, scanning and reviewing the records for applicable FOIA exemptions (and PRA 12-year restrictions), and communicating with the requester, including preparing the response letter(s).

Each of these steps has the potential to be made more efficient, particularly if they can be automated, but only to a degree and sometimes with unintended consequences. Searching for textual records within a universe of 50 million pages in multiple stack locations is significantly slower than searching an email database, but the volume of potentially responsive records and false positives that are returned on an email search of 220 million emails (each one averaging five pages in length) can be staggering compared with collecting a limited set of boxes based on relevant folder titles. (While technology exists to identify the emails that are actually responsive by de-duplicating, sorting, and clustering by content, it is not currently available to NARA staff in ERA or ERA/EOP.)

Once the responsive set of records is determined, staff must then review the records to determine if any information is subject to a FOIA exemption. This remains largely a manual process, generally requiring a line-by-line review of every page. An annual rate of 60,000 pages means that an archivist is able to review roughly 300 pages per day. Automated tools assist the electronic records review process to the extent that the records are ingested or scanned with optical character recognition (OCR). But these tools are most effective in searching for specific regular expressions, such as social security numbers, dates of birth, and repeats of highlighted text. Development continues on more advanced, machine learning tools to identify narrative content that contains sensitive information – whether classified, law enforcement, or personal privacy – but it is not clear whether any are currently deployable. All of these technologies are under consideration for ERA 2.0, but are dependent on cost, adequate funding, and compatibility with NARA's system.

Below is a brief summary of each of the NARA's principal FOIA program offices.

*Special Access and FOIA Staff (RD-F)*

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NARA's Special Access and FOIA staff (Special Access) processes FOIA requests for closed archival records of Executive branch agencies held in the Washington, D.C. area.<sup>16</sup> In FY 18, the office received roughly 1500 FOIA requests, closed 1360 requests, and had a backlog of 1745 cases totaling 3 million pages. (But at the end of the second quarter of FY 19, its backlog was 1497 requests totaling approximately 4.3 million pages.) Special Access currently has 23 total staff (including three supervisors), although only 11 FTE that work on FOIA requests. In FY 18, the office reviewed a total of approximately 690,000 pages (which is a significant increase from its FY 17 review of 250,000 pages, but includes both review under the FOIA and special access screening and also the pages reviewed in the simple queue, i.e., Triage). Prior to FY 18, Special Access has maintained a general annual goal of 24,000 pages reviewed per FTE, although the average for FY 18 was 62,000 pages, due in part to the factors described above. The time a requester must wait before RD-F can begin to process a Tier 1 request (up to 700 pages) is approximately 30 months; and it can take up to six years for requests in the Tier 2 (up to 3000 pages) and Tier 3 (over 3000 pages) queues. Special Access currently uses the Archival Declassification, Review, and Redaction System (ADRRES) to review and track all FOIA requests; all responsive documents are scanned into the system and then processed electronically.

In FY 19, Special Access engaged in a review of its processing procedures. By changing its queue structure, imposing pass/fail on certain categories in place of agency referrals, and making other procedural changes, the office hopes to achieve at least a 25% improvement in productivity. With a reasonable increase in staff, Special Access and FOIA can significantly decrease its backlog and reach a steady state in managing its FOIA caseload, which is managed by scanning textual records into the Archival Declassification, Review, and Redaction System (ADRRES).

### *National Declassification Center (NDC)*

In addition to overseeing the declassification reviews required under the automatic, systematic, and mandatory declassification review provisions of Executive Order 13526, the NDC also processes most of NARA's non-PRA FOIA requests involving classified information, as well as requests for mandatory declassification review (MDR). The NDC is responsible for NARA's ten oldest FOIA requests, several of which still date from the 1990s, and which are also the oldest requests in the government.

In FY 18, the NDC received approximately 560 new FOIA requests, and has a backlog of approximately 300 FOIA cases, down from 1100 in FY 15; the backlog contains a total of 280,000 pages. The NDC FOIA and MDR Division currently has 13 total staff (including two supervisors). The FOIA unit processed a total of 157,000 pages in FY 18. The current average

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<sup>16</sup> Special Access refers FOIA requests for open records to the Textual (RD-T), Electronic (RD-E), and Special Media (RD-S) Divisions within Research Services.

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backlog time to begin a request is between six and 18 months. In FY 18, the NDC also received 164 MDR requests, and had an MDR backlog of 300 cases.

Unlike the other NARA FOIA program offices, the NDC's primary responsibility is to review records and identify classified equities in the responsive records and then consult with the appropriate agencies for them to conduct the declassification review, which can be an extensive and complex process that often drags on for years, or even decades. Currently the NDC sends consultations by scanning the records to CDs and sending them to the agencies by appropriate mail or courier (depending on the level of classification). This approach can make it difficult to track whether the appropriate agency office has actually received the classified package, and it is not uncommon that the NDC has to resend packages. For other FOIA exemptions, such as privacy or statute, the NDC reviews the records and makes decisions. For complex law enforcement issues, NDC specialists will consult with RD-F. Like Special Access, the NDC uses ADRRES to process and track all of its FOIA cases. NDC scans the responsive records (except for Sensitive Compartmented Information (SCI)) into ADRRES so that the agencies can conduct the declassification review electronically.

Once the agency has completed its declassification review, there is generally very little other sensitive information that needs to be reviewed by NARA. However, the NDC's caseload will increase substantially when it takes over responsibility for declassification of the classified records of the Presidential Libraries – over the next three years, by approximately 500 new FOIA cases and as many as 15,000 MDR requests.

### *Presidential Libraries (LP)*

The vast majority of records at four presidential libraries (Reagan, Bush 41, Clinton, and Bush 43), along with the Presidential Materials Division, are subject to the FOIA (through the Presidential Records Act). FOIA access begins at the PRA Libraries five years after the President leaves office, and a substantial backlog usually materializes within days of that moment. Given the demand that ensues once FOIA access begins, there is little opportunity for the PRA Libraries to engage in systematic processing after the five-year mark, much less even during the first five years. The PRA also requires a 60 working day notification period (with one 30-day extension if requested) prior to the release of Presidential records to and potential review by the representatives of the former and incumbent Presidents. The Presidential Materials Division (LM) is responsible for preparing the notification and, in coordination with NGC, communicating with the representatives of the former and incumbent Presidents should they have questions or concerns.

### *Reagan Library*

In FY 18, the Reagan Library received 28 FOIA requests (averaging 50 for each of the last four years), and had a backlog of approximately 200 requests totaling approximately 1 million pages.

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The library reviewed a total of approximately 645,000 pages in FY 18, which consisted of 77,000 pages for FOIA, 17,000 pages for MDR, and 460,000 pages for systematic review. The Reagan Library currently has seven non-supervisory FTE who review textual records, which means that annual overall processing rate averaged 92,000 pages. The backlog time a requester must wait before the Library can begin to process a non-classified request is approximately six months for simple cases and three years for complex cases; for classified records, it is seven months for simple cases and eight years for complex cases. Roughly 78% of the backlog is for classified records, which means that the backlog will be reduced significantly once the classified records are transferred to the NDC. In FY 17,<sup>17</sup> the Reagan Library received 830 MDR requests, and had an MDR backlog of 7,247 cases.

### *George Bush Library (Bush 41)*

In FY 18, the George Bush Library received 40 FOIA requests, and had a backlog of nine cases, which consisted of 15,000 pages. The library reviewed 428,000 pages in FY 18 (139,000 under FOIA, and the remainder under systematic review). The Bush 41 Library currently has 5.7 non-supervisory FTE who review textual records, which means that annual overall processing rate averaged 75,000 pages. The main reason the FOIA backlog is so small is that most researcher requests are for classified records and are made under the MDR provisions of E.O. 13526 instead of the FOIA. In FY 17, the Bush 41 Library received 857 MDR requests, and had an MDR backlog of 6,741 cases.

### *Clinton Library*

In FY 18, the Clinton Library received 81 FOIA requests, and had a backlog of approximately 106 requests totaling approximately 4.1 million pages and 1.7 million photographs. The Library currently has 14 non-supervisory FTE who review textual records and one non-supervisory FTE reviewing audio/visual records. The library reviewed a total of approximately 1.07 million pages under FOIA in FY 18 (which includes 200,000 pages of systematic review). The FY 18 annual processing rate averaged 76,500 pages per FTE. The backlog time a requester must wait before the Library can begin to process a non-classified request is approximately six to eight months for simple cases and three to four years for complex cases; for classified records, it is 18-24 months for simple cases, 3.5 years for complex cases, and 6-7 years for electronic records. Roughly 75% of the backlog is for classified records, which means that the backlog could be reduced to as low as one million pages once the classified records are transferred to the NDC.<sup>18</sup> In FY 17, the Clinton Library received 58 MDR requests, and had an MDR backlog of 373 cases.

### *George W. Bush Library (Bush 43)*

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<sup>17</sup> FY 17 is the most recent year that the Presidential Libraries reported to ISOO on their MDR caseload.

<sup>18</sup> The decrease in FOIA cases will not necessarily have an equivalent decrease in page volume.

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When the George W. Bush Library became subject to FOIA on January 20, 2014, it received 291 FOIA requests for the equivalent of over 90 million pages of potentially responsive records within four weeks (this figure included over 15 million email messages and electronic files that have been converted to “equivalent” page numbers for accurate comparison – each email averages 5 pages<sup>19</sup>). In FY 18, the Library received 147 FOIA requests, and the current overall backlog is 615 cases totaling approximately 158 million equivalent pages of potentially responsive records and 1.1 million photographs.<sup>20</sup> These numbers for the Bush 43 Library represent an astronomical leap in the volume of potentially responsive pages as compared to prior libraries, which is due both to the massive increase in the volume of electronic records and the increased granularity of electronic searches. In FY 17, the Bush 43 Library received 17 MDR requests, and had an MDR backlog of 235 requests.

The Bush 43 Library has 12 non-supervisory FTE who review records and one non-supervisory FTE reviewing audio/visual material. In FY 18, the Bush Library reviewed approximately 650,000 pages (278,000 textual, 75,000 emails). Therefore, the annual processing rate averaged 54,000 pages per person. The time a requester must wait before the Library can begin to process a request is between three months and 2.2 years, depending on which of the 17 queues the request falls. Roughly 25% of the backlog is for classified records, which means that the backlog could be reduced once the classified records are transferred to the NDC.

### Bush Library Kavanaugh Review

Within this context, in the last quarter of FY 18 the Bush 43 Library was tasked with reviewing 900,000 equivalent pages in response to a special access request by the Senate Judiciary Committee for records concerning Supreme Court nominee Brett Kavanaugh. The Library was able to complete this task by October 31, 2018, but it could not do so alone. Instead, the project required a team of approximately 30 FTE from the Reagan, Bush 41, Clinton, and Obama Libraries and the Presidential Materials Division, who worked with significant amount of overtime (which allowed them to review at an annual rate of 86,000 pages per person). Because the vast majority of the records were emails in the ERA/EOP system, the review could be done remotely from any NARA workstation. Productivity was slower for Bush 41, Clinton, and Obama staff who had no prior experience working in the ERA/EOP system, and also had to learn the Bush 43 PRA review standards.

### *Obama Library*

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<sup>19</sup> The Bush Library has a total of approximately 220 million emails, thus totaling approximately 1.1 billion equivalent pages.

<sup>20</sup> This figure is comprised of 27.6 million email hits, 7.7 million unclassified textual pages, 10.5 million unclassified electronic pages, 2 million classified pages, and 1.1 million photos).

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FOIA processing will not begin for Obama Presidential records until January 2022. The Obama Library has approximately 300 million unclassified emails alone, which is the equivalent of roughly 1.5 billion pages, along with 30 million unclassified textual pages (scheduled to be digitized), nearly 12 million classified pages, and roughly 50 million other electronic files. It is a near certainty that the Obama Library will face the same high volume of requests and potentially responsive records that Bush 43 faces, if not even higher. The Obama Library currently has seven archival staff responsible for access requests.

### *Office of General Counsel*

The Office of General Counsel responds to FOIA requests for NARA's operational records, and prepares the FOIA appeals for the Deputy Archivist of the United States. In FY 18, NGC received 473 FOIA requests, and had a backlog of 127 cases. NGC has four FTE working on FOIA requests and appeals.

### *FOIA Appeals*

In FY 2018, NARA received 76 FOIA Appeals (out of a total of 53,850 FOIA requests received). The backlog of FOIA appeals was 165 at the end of FY 18 (but it has been reduced to 139 cases at the end of the second quarter of FY 19). Although NGC prepares the appeal response for the Deputy Archivist, each case often requires significant coordination with the relevant FOIA program office in order to complete.

### *NARA's Ten Oldest FOIA Requests*

The FOIA statute requires each agency to submit an annual report to the Justice Department outlining various benchmarks, including reporting on the agency's ten oldest active FOIA requests. For the last several years, NARA's ten oldest requests have also been the ten oldest requests for the entire government. For FY 19, the ten oldest dated from between 1992 and 2001. All of these requests are for archival records that contain classified information that require consultation with other agencies for declassification review (and thus are handled by the NDC). The vast majority of the responsive records for each case have been released to the requester over the decades; the requests remain open because a small subset of the records is still pending review at one or more other agencies.

The challenge of closing out these cases has been in following up with the agencies to ensure that they complete their review and make a final decision on the remaining documents. The long delays have occurred because the agencies lost track of the case (if not sometimes the records), and NARA did not consistently follow up to remind the agencies that it was still waiting on their response. The NDC successfully closed its ten oldest FOIA cases in FY 18 and FY 16, but failed to do so in FY 17 because one agency was not able to complete its review of two pending cases.

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In FY 19, the NDC is targeting its 25 oldest cases, which would bring the oldest case up to the year 2005.

## NARA FOIA BACKLOGS

The OIG FOIA Audit reported that “at the conclusion of FY 16 NARA has maintained a case backlog of 4,157 FOIA request [sic] that have yet to be processed.” Two years later, at the end of FY 18, NARA has already reduced its backlog by 27%, to 3,035 cases. Nonetheless, as outlined below, every NARA FOIA program office still has a backlog, and the most significant FOIA backlogs are concentrated in a small number of offices that handle large volumes of archival records that contain high concentrations of sensitive information that require careful review – i.e., Special Access and FOIA, the NDC, and the two most recent PRA Presidential Libraries.

NARA’s FY 18 backlog of 3,035 cases breaks down as follows<sup>21</sup>:

- Special Access: 1600
- NDC: 300
- Reagan Library: 223
- George Bush Library: 9
- Clinton Library: 106
- George W. Bush Library: 615
- NGC: 127

This end of year backlog figure does not represent the rate at which NARA completes FOIA requests within the 20 working day statutory requirement. Overall, NARA responded to 96% of its FOIA requests within 20 working days. However, NPRC accounted for the vast majority of these cases, with a completion rate of 99%. For the other NARA FOIA program offices, the completion rate for FY 18 was as follows:

- Special Access: 45%
- NDC: 31%
- Reagan Library: 1%
- George Bush Library: 8%
- Clinton Library: 18%
- George W. Bush Library: 25%
- NGC: 80%

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<sup>21</sup> These numbers do not include various NARA component offices that receive a very small volume of FOIA requests (under 25 per year), i.e., field sites within Research Services, the Presidential Materials Division, the Office of Inspector General, and the Office of the Federal Register, nor do they include the divisions within Research Services that respond to requests for open records.



## Pre-Decisional and Deliberative

A multitude of factors can contribute to a backlog, which vary among the offices and can change over time.<sup>22</sup> As the DOJ Office of Information Policy noted in 2018:

Although OIP continues to assess agencies on backlog reduction each year, we recognize that agencies' backlogs may increase due to circumstances outside of their control. Many agencies strive to respond to significantly more requests received while relying on the same amount of (or, in some instances, fewer) experienced FOIA staff. As the number of requests received across the government continues its upward trend, many agencies reach a point at which, despite their best efforts to streamline processing and leverage technology, their backlog will nevertheless increase.<sup>23</sup>

Other factors impacting NARA's backlogs include the ratio between simple and complex requests, the volume of potentially responsive records per request, the sensitivity of the responsive records, staff vacancies, experience level of staff, alternative request mechanisms (i.e., Mandatory Declassification Review (MDR) instead of FOIA), and competing review demands (i.e., systematic or special access).

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<sup>22</sup> The different ways that offices process records and track their progress make it difficult to make equal comparisons between all of the offices.

<sup>23</sup> Summary of Agency Chief FOIA Officer Reports for 2018 and Assessment of Agency Progress in FOIA Administration with OIP Guidance for Further Improvement, June 2018, at 13.