

THE NATIONAL SECURITY ARCHIVE

MAKING FREEDOM OF INFORMATION A REALITY

Founded in 1985 by journalists and scholars to check rising government secrecy and create an institutional memory for government information released under the U.S. Freedom of Information Act (FOIA), **the National Security Archive** has evolved from a Cold War counter-institution into the U.S. outpost of a global freedom of information movement. The Archive combines a unique range of functions: investigative journalism center, international affairs research institute, library and archive of declassified U.S. documents (“the world’s largest nongovernmental collection,” according to the *Los Angeles Times*), leading non-profit user of the U.S. Freedom of Information Act, public interest law firm defending and expanding public access to government information, and indexer and publisher of former secrets.

Based at George Washington University’s Gelman Library, the Archive relies for its budget on publication revenues and grants from foundations and individuals, and receives no government funding. Incorporated as an independent Washington, D.C., non-profit, the Archive is recognized as a tax-exempt public charity.

The Archive’s achievements over more than two decades include:

- More than 35,000 Freedom of Information and declassification requests filing with over 200 offices and agencies of the U.S. government.
- More than 700,000 pages of previously-secret government documents published.
- More than 50 books published by Archive staff and fellows, which have been awarded the 1996 Pulitzer Prize, the 1995 Gelber Prize, the 2003 *Los Angeles Times* Best Non-Fiction award, 1995 National Book Award, 1999 *Boston Globe* Notable Book Award. Archive staff also won the 2005 Emmy for outstanding achievement in News and Documentary Research for *Declassified: Nixon in China*.
- The 1999 George Polk Award, one of U.S. journalism's most prestigious prizes, for—in the words of the citation—“piercing the self-serving veils of government secrecy, guiding journalists in the search for the truth and informing us all.”
- More than 240 electronic briefing books containing newsworthy documents published on the Archive’s Web site, winner of *Forbes* magazine’s 2005 Best of the Web award, CoolSiteoftheDay.com, and 37 citations by the University of Wisconsin’s Internet Scout Report for “the most valuable and authoritative resources online.”
- More than 1 million pages on average per month downloaded from the Archive’s Web site by 2.6 million unique visitors in 2007.
- At least 47 lawsuits featuring the Archive as plaintiff, counsel or amicus against the U.S. government, forcing declassification of documents ranging from the Kennedy-Khrushchev letters during the Cuban missile crisis to the previously-censored photos of flag-draped caskets in homecoming ceremonies for U.S. servicemembers killed in the wars in Iraq and Afghanistan.
- Partnerships in 35 countries with journalists, scholars, truth commissions, human rights monitors, freedom of information campaigns, and openness advocates, including the virtual network *freedominfo.org*.

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AUDITING GOVERNMENT COMPLIANCE WITH THE U.S. FREEDOM OF INFORMATION ACT

After the “Openness Decade” of the 1990s, the U.S. government turned toward greater secrecy, especially after the terrorist attacks of September 11, 2001. In October 2001, Attorney General John Ashcroft abolished the existing policy of a presumption of disclosure under FOIA unless there was a foreseeable harm and replaced it with a policy that encourages denial of records whenever the agency can show a sound legal basis for the withholding. In early 2002, the White House chief of staff instructed agencies to safeguard information related to weapons of mass destruction (WMD) and other “sensitive but unclassified” records. The Archive developed the FOIA audit methodology, which uses FOIA requests to multiple agencies to test FOIA administration, to assess the impact of such policy shifts.

The results of that first audit showed a substantial portion of agencies had changed their disclosure policies. The process of filing requests across the federal government, however, revealed a FOIA system in disarray at many agencies. These concerns led directly to an audit of the oldest requests pending at each agency. The “10 Oldest” audit, which depended directly on agencies’ own disclosures, provide the first empirical evidence of a significant backlog problem in U.S. FOIA processing. Three installments have been published so far. Subsequent audits sought to further evaluate agency compliance with federal policy on information disclosure, namely the protection of sensitive but unclassified and WMD information, as well as compliance with key provisions of the 1996 FOIA Amendments on electronic access to agency records.

The Archive has carried out six government-wide audits of FOIA performance in the last five years, most recently with primary funding from the John S. and James L. Knight Foundation.

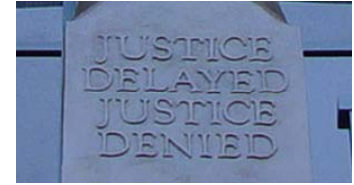
THE ASHCROFT MEMO: “DRASTIC” CHANGE OR “MORE THUNDER THAN LIGHTNING”? (March 14, 2003)

Full report available at: <http://www.gwu.edu/%7Eensarchiv/NSAEBB/NSAEBB84/press.htm>



On October 12, 2001, Attorney General John Ashcroft issued a new Department of Justice FOIA Policy Memorandum to supersede the one issued by Janet Reno in October 1993 (which established a presumption of disclosure for requests under FOIA). The Ashcroft Memorandum highlighted the importance of protecting the deliberative process and other recognized privileges, counseled that any discretionary decision to release information protected under FOIA should fully consider the institutional, commercial and personal privacy interests implicated by disclosure, and established a new “sound legal basis” standard governing the Department of Justice's decisions on whether to defend agency actions under the FOIA. The Archive’s first ever government-wide audit of federal FOIA implementation sought records about the impact of the new Ashcroft guidance on FOIA processing at **35 major federal agencies**. The audit found dramatic variations in agency reactions to Ashcroft’s restrictive FOIA guidance—some thought the guidance dramatically limited FOIA disclosure, others did not even take notice of the guidance, and most made only minor changes to their FOIA programs. But extensive delays in agency responses to what should have been a simple FOIA search sparked the Archive to continue the audit process and look directly at backlogs and delay.

THE TEN OLDEST PENDING FOIA REQUESTS: A SERIES OF THREE FOIA AUDITS



Justice Delayed is Justice Denied (November 17, 2003)

To measure the problem of delay in the federal FOIA system, the Archive filed FOIA requests with the **35 federal agencies** that together handle more than 97% of all FOIA requests seeking copies of each agency's ten oldest pending FOIA requests. The oldest pending request was a **1987** inquiry from *San Francisco Chronicle* reporter Seth Rosenfeld on FBI activities at the University of California at Berkeley.

Full report available at: <http://www.gwu.edu/%7Ensarchiv/NSAEBB/NSAEBB102/press.htm>

A FOIA Request Celebrates Its 17th Birthday (March 12, 2006)

In the second installment of its Ten Oldest Audit, the Archive filed FOIA requests for copies of the "10 oldest open or pending" FOIA requests at **64 federal agencies**. The oldest pending request identified in 2006, filed by a graduate student at the University of Southern California in **1989**, asked the Defense Department for records on the U.S. "freedom of navigation" program.

Full report available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB182/press.htm>

40 Years of FOIA, 20 Years of Delay (July 2, 2007)

In January 2007, the Archive again filed FOIA requests with the leading federal agencies for copies of their ten oldest pending FOIA requests. This request went to **87 individual agencies and components** and the results revealed that serious backlogs and delays persisted. The oldest pending FOIA requests revealed in this survey included one request from **1987**, two from 1988, and three from 1989.

Full report available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB224/index.htm>

Findings of the Ten Oldest Audits:

- Agencies have not established adequate FOIA request tracking systems. In response to the 2005 request, some agencies identified requests that should have been included in their 2003 ten oldest requests response, but were not identified even though their dates indicate they were open and pending in 2003.
- Many of the agencies that did respond to our inquiries are so decentralized that they could not actually identify their oldest pending requests, much less know whether the requests have been fulfilled.
- Agencies' annual FOIA reports to Congress hide the true extent of the delay problem. The median processing times that are reported give no sense of the outer limits (represented by the oldest requests) or even the average time a FOIA requester can expect to wait.
- Agencies are failing to effectively administer their FOIA programs and communicate with requesters. Agency records regarding pending FOIA requests are not consistent with requesters' expectations. Some agencies' 10 oldest requests fail to reflect requests that FOIA requesters believe are open and in process or closed.
- Agencies sometimes lose FOIA requests. For example, 11 out of 64, or 17.2% of initial requests sent by the National Security Archive for the 2005 Audit were reported by agencies as never received.

PSEUDO-SECRETS:

A FREEDOM OF INFORMATION AUDIT OF THE U.S. GOVERNMENT'S POLICIES ON SENSITIVE UNCLASSIFIED INFORMATION (March 14, 2006)

Full report available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB183/press.htm>

In the first-ever government-wide audit of federal agencies' practices of marking and protecting information that is sensitive but unclassified, the Archive sent Freedom of Information requests to more than **40 federal agencies** seeking copies of their policies and guidelines on "sensitive unclassified information." Reviewing a diverse range of agency policies among the agencies and components that together handle the vast majority of FOIA requests in the federal government, the Archive identified 28 distinct policies for protection of sensitive unclassified information and found that, unlike classified records or ordinary agency records subject to FOIA, there is no monitoring of or reporting on the use or impact of protective sensitive unclassified information markings. Nor is there a procedure for the public to challenge protective markings. Some policies conflate information safeguarding markings with FOIA exemptions and some include definitions for protected information ranging from very broad or vague to extremely focused or limited. In the current system, it is unlikely that Congress or the public will be able to assess whether these policies are being used effectively to safeguard the security of the American public, or abused for administrative convenience or for improper secrecy.

FILE NOT FOUND:

AGENCIES VIOLATE LAW ON FREEDOM OF INFORMATION (March 14, 2003)

Full report at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB216/index.htm>

In 1996, Congress sought to revolutionize disclosure of government information to the public by directing federal agencies to use the Internet to make more information publicly available, therefore reducing the time and money spent to process FOIA requests, by passing the Electronic Freedom of Information Act Amendments (E-FOIA). Ten years after E-FOIA came into force, a team of researchers at the National Security Archive surveyed **149 federal agency and component Web sites** to evaluate their compliance with the statute and their usefulness in making government information available to the public. The survey found widespread non-compliance and serious deficiencies:

- Only about one in five (21%) of the agencies reviewed made available on its FOIA Web site all four categories of records that Congress explicitly required agencies to post.
- Only one in sixteen agencies (6%) had on its Web site ten elements of essential FOIA guidance the Archive identified, including details on where to send a request, fees, exemptions, and appeal rights.
- Many agency FOIA Web sites are poorly organized and difficult to navigate.
- Agencies have not incorporated many useful online tools that could ease their processing burden. For example, only about one in four agencies (26%) has developed a Web-based FOIA submission form.

Although the Audit identified several exceptional agencies that have complied with the law and established useful, comprehensive FOIA Web sites, many agencies have failed even to keep their FOIA Web sites on par with their general agency Web sites.



SELECTED PRESS COVERAGE

Journalists Hear Grim News on Accessing Government Information, by Robert B. Bluey, CNSNews.com (March 17, 2003).

“In addition to possessing greater power to monitor the public’s activities, the government has been more selective in the information it gives out under the Freedom of Information Act, said Thomas S. Blanton, director of the National Security Archive. The archive, which collects declassified documents, conducted an assessment of 33 governmental agencies . . . to determine the effects of Justice Department and White House directives on the release of records. Most of the agencies surveyed indicated little change in their freedom of information practices, Blanton said. But he cautioned that some of the responses were unacceptable.”

AP Associated Press **Information requests to feds lag for years**, by Pete Yost (November 18, 2003).
“Despite a law that calls for prompt responses, some information requests to the federal government have been pending since the 1980s, according to a private group that canvassed 35 agencies for their oldest open cases. The FBI, CIA, and the Pentagon have some of the oldest requests, says the National Security Archive.”

The Washington Post **Freedom-of-Information Requests: Still Waiting**, by Christopher Lee (March 16, 2006)

“One can grow old waiting for the federal government to cough up public information. Some people have waited nearly two decades for responses to their requests under the Freedom of Information Act, with no end in sight, according to a new study by the National Security Archive.”

The Atlanta Journal-Constitution **Reports: ‘Secret’ label is overused**, by Rebecca Carr (March 20, 2006)
“Three reports released last week urge oversight of [the “For Official Use Only” designation] – and more than 60 other categories of concealed information. All found a lack of accountability and consistency in the way federal agencies use sensitive information stamps. ‘No one really knows how many records are covered or for how long, and there are practically none of the limits that we do have in the security classification world,’ said Thomas Blanton, director of the National Security Archive.”

AP Associated Press **Online access to federal records lags, study says** (March 12, 2007)
“Federal agencies have dragged their feet on implementing a 10-year-old law that requires them to use the Internet to make government documents easily available, a new study says. The result is that the public is blocked from easier access to information, the report says, and the cost of answering information requests is driven up.”

The Washington Post **Government Sites Aren’t FOIA-Friendly; Study Finds Most Agencies Fall Short of Transparency Mandate** (March 12, 2007)

“Federal agencies helped create the Internet, but most do not use it to inform the public about what they do, a study to be released today shows. . . . [T]he new study by the National Security Archive . . . finds that 10 years after Congress passed ‘E-FOIA,’ agency Web sites distinguish themselves more for cyber-foot-dragging than for streamlined access.”

Federal FOIA in slow motion (editorial), *Post and Courier* (Charleston, SC) (July 9, 2007). “Under the federal Freedom of Information Act, agencies are given 20 business days to respond to requests for public records. Unfortunately, that isn’t being accomplished in many instances, with extensive backlogs at numerous agencies. The National Security Archive . . . found that at least one respondent has been waiting an unbelievable 20 years for the State Department to respond to a request for documents related to the Church of Scientology. Is Rip Van Winkle in charge?”



Our view on your right to know: Endless delays mar requests for government information (editorial) (July 18, 2007).

“Congress passed the Freedom of Information Act in 1966 to give citizens and taxpayers access to government-held records that they've paid to have gathered. But 40 years later, scores of agencies still can't—or won't—get it right. Compliance with the 20-day deadline is ‘an exception rather than a standard practice,’ according to a report this month from the Knight Foundation and the National Security Archive watchdog group.”

The New York Times

The Media Equation: Let the Sun Shine, by David Carr (July 23, 2007)

“Freedom of Information requests have been caught in the gears for decades, and journalists working on timely stories about lead in school lunch boxes, FEMA’s response to Hurricane Katrina and delays in the delivery of veterans’ benefits have all been stymied by agencies that flout the law through recalcitrance or ineptitude. A recent survey by the National Security Archive . . . found that five federal entities—the State Department, the CIA, the criminal division of the Justice Department, the Air Force and the F.B.I., all had some requests that were more than 15 years old.”

ARCHIVE PUBLICATIONS AND ACTIVITIES

The Archive's Director, General Counsel, Staff Counsel, and FOIA Coordinator made presentations on the results of the audits before audiences from the Department of Energy, the Government Accountability Office, the Department of State, the Northern District of California Judicial Conference, the American Society of Access Professionals, the National Press Club, the Freedom Forum's National FOIA Day, and many other governmental and non-governmental organizations.

Publications include:

- Kristin Adair, “Pseudo-secrets threaten the public’s right to know,” *Brechner Report*, June 2006.
- Meredith Fuchs & Kristin Adair, “On the Sidelines of the Information Revolution: How the Freedom of Information Act Amendments of 1996 Failed to Transform Public Access,” *Administrative & Regulatory Law News (American Bar Association)*, Fall 2007.
- Catherine Nielsen, “A decade later, agencies still not in line with E-FOIA,” *Brechner Report (University of Florida, Brechner Center for Freedom of Information)*, May 2007.

INVITED CONGRESSIONAL TESTIMONY

- Testimony of Archive Director Thomas Blanton before the House Committee on Government Reform, Subcommittee on National Security, Emerging Threats, and International Relations, hearing on “Overclassification and Pseudo-classification” (March 2, 2005).
- Testimony of Meredith Fuchs before the Senate Committee on the Judiciary Subcommittee on Terrorism, Technology and Homeland Security, Hearing on “Openness in Government and Freedom of Information: Examining the OPEN Government Act of 2005” (March 15, 2005).
- “Pseudo-Secrets: A Freedom of Information Audit of the U.S. Government's Policies on Sensitive Unclassified Information”; Archive Director Tom Blanton releases audit report at hearing of the House Committee on Government Reform, Subcommittee on Emerging Threats (March 14, 2006).
- Testimony of Meredith Fuchs before the Subcommittee on Information Policy, Census, and National Archives of the House Committee on Oversight and Government Reform, Hearing on: “The State of FOIA: Assessing Agency Efforts to Meet FOIA Requirements” (February 14, 2007).
- Testimony of Meredith Fuchs before the Senate Committee on the Judiciary, Hearing on “Open Government: Reinvigorating the Freedom of Information Act” (March 14, 2007).

- Testimony of Meredith Fuchs before the House Committee on Homeland Security, Subcommittee on Intelligence, Information Sharing, and Terrorism Risk Assessment, “Over-classification and Pseudo-classification: The Impact on Information Sharing” (March 22, 2007).
- Testimony of Meredith Fuchs, National Security Archive General Counsel, before the House of Representatives Permanent Select Committee on Intelligence, Subcommittee on Intelligence Community Management Statement, Hearing on “Classification of National Security Information and its Implications for the Intelligence Community” (July 12, 2007).

IMPACT ON GOVERNMENT POLICY

Executive Order 13,392 on “Improving Agency Disclosure of Information” (December 14, 2005)

The primary motivation of President Bush’s executive order was to preempt and prevent pending legislation to reform FOIA, but the order incorporated a number of the Archive’s recommendations. In particular, it directed agencies to draft and carry out plans to improve FOIA processing, including:

- Backlog reduction and increased efficiency in FOIA processing;
- New FOIA customer service mandates, including a Chief FOIA Officer at each agency to oversee compliance;
- Improvement of dissemination via agency Web sites.

Agency Improvement Plans

Under the new executive order, agencies had to create FOIA improvement plans and 15 of these adopted metrics from the Archive’s audits in the form of goals aimed at closing the ten oldest pending requests or closing all requests pending before a given date. Several of these agencies had been cited in our audits as having some of the oldest requests in the federal government.

Attorney General’s Report to the President pursuant to Executive Order 13,392 (October 16, 2006):

The Archive’s audits were the only outside reporting cited by the Attorney General in his first assessment of agencies’ progress under E.O. 13392: “[I]t should further be pointed out that several agencies have included within their backlog-related plans an emerging area of concern – i.e., particular attention to the longest-pending FOIA requests that they have on hand. Serving as an example, the Department of Justice itself has established backlog-related goals that specifically include ‘clos[ing] the ten oldest FOIA requests pending’ for records of its leadership offices on a regular basis. . . . [T]he three agencies that were identified in March of this year as having one or more of the ‘ten oldest’ FOIA requests governmentwide (according to a report issued by the National Security Archive) have already worked to address them.”

The **OPEN Government Act of 2007** (P.L. 110-175, enacted December 31, 2007), contains the following provisions to address concerns raised in the Archive’s audits:

- Institution of penalties that deny agencies certain processing fees when they fail to respond to requests within the 20-day statutory time limit;
- Requirement that agencies “establish a system to assign an individualized tracking number for each request received” and to provide the tracking number and status information to requesters by telephone or Internet;
- New agency annual reporting requirements, including “data on the 10 active requests with the earliest filing dates pending at each agency” and the average and range in number of days for the agency to process requests;
- Enhancement of existing provisions for disciplinary actions for arbitrary and capricious rejections of requests and a report to examine potential changes to personnel policies that encourage better FOIA compliance;
- Establishment of an Office of Government Information Services to review agency compliance with FOIA obligations and mediate disputes between agencies and requesters regarding pending requests.