

STATEMENT

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Accountability
Committee on Government Reform
House of Representatives**

**“Information Policy in the 21st Century: A Review of the
Freedom of Information Act”**

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Good afternoon Mr. Chairman and Members of the Subcommittee. I am Professor Allen Weinstein, Archivist of the United States, and it is my distinct pleasure to be with you this afternoon. I am accompanied today by Dr. Michael Kurtz, Assistant Archivist for Records Programs, Washington, DC. Dr. Kurtz has responsibility for managing the bulk of our FOIA operations and will be happy to answer any operational questions that you might have regarding our FOIA implementation.

INTRODUCTION

The National Archives and Records Administration (NARA) is our nation’s record keeper. NARA is an independent agency created by statute in 1934, to safeguard records of all three branches of the Federal Government. NARA's mission is to ensure that Federal officials and the American public have ready access to essential evidence — records that document the rights of citizens, the actions of government officials, and the national experience. Indeed, the National Archives has been making records available to public requesters long before the FOIA was even enacted.

NARA carries out this mission through a national network of archives and records services facilities stretching from Washington, DC, to the West Coast, including Presidential libraries documenting administrations of Presidents back to Herbert Hoover. Additionally, NARA publishes the *Federal Register*, administers the Information Security Oversight Office, and makes grants for historical documentation through the National Historical Publications and Records Commission. NARA meets thousands of information needs daily, ensuring access to records on which the entitlements of citizens, the credibility of government, and the accuracy of history depend. We work to preserve and provide access to the records of our Government, whether those records are the Declaration of Independence, service records of military veterans, electronic cables from the State Department, or documentation on homeland security issues.

NARA acquires, preserves, and makes available for research records of permanent value created or received by organizations of the Federal Government. Dispersed among our records are billions of pages of textual documents, still and motion pictures, maps and drawings, audio and video recordings, and electronic records. Generally, historical records do not come into our custody until they are 20-30 years old. The major exception is Presidential records, which come to us immediately upon the end of a President's term of office. Because of their age or subject matter, most records in NARA's holdings are unrestricted and are available for research without filing a Freedom of Information Act (FOIA) request. Among the publicly available records are: genealogical and family history materials; court records (except grand jury materials and sealed court records); records that do not contain national security classified information or other information subject to access restrictions; and records comprising the John F. Kennedy Assassination Records Collection. In fiscal year 2004, NARA provided access to 141,345 items (boxes of textual records or items in other media types) to researchers visiting our facilities across the country.

NARA'S RESPONSIBILITIES UNDER THE FOIA

When NARA receives records from Executive branch agencies that have access restrictions, those records are processed for public disclosure in accordance with the provisions of the FOIA. NARA accepts FOIA requests for the Executive branch agency records in its legal custody and the operational records that NARA creates while conducting government business. NARA also accepts FOIA requests for Presidential and Vice Presidential records, beginning with the presidential papers of the Reagan administration, pursuant to the provisions of the Presidential Records Act (PRA). Judicial branch records, records of the Congress and Legislative branch agencies, donated historical materials, and Nixon Presidential Historical Materials among NARA's holdings are not subject to the provisions of the FOIA. NARA is not responsible for responding to FOIA request for records solely in our physical custody, such as records that we store for federal agencies at our regional records centers. Note, moreover, that FOIA requests comprise less than 1% of the requests received and/or processed by NARA in any given fiscal year.

When records are accessioned into the National Archives (i.e., transferred into NARA's legal custody), these records become a permanent part of the history of this nation. They are no longer working papers of the agency that created them but are transformed into historically valuable records necessary for understanding the policies, programs, and actions of the various departments and agencies of the Executive branch of the Federal government. At the time of transfer, it becomes NARA's responsibility to make access determinations consistent with the provisions of the FOIA. This is very important because the passage of time has often diminished the need to restrict certain types of information, such as policy deliberations, certain law enforcement information, or records containing information regarding personal privacy which is over 75 years old or relates to individuals who are deceased. Information that may be sensitive at the earlier stages of the records life cycle when the records were still with the originating agency has often lost its sensitivity once it is among the holdings at NARA. We make access

determinations based on this changed status. This approach is standard archival policy that NARA has employed for many years. It goes without saying, however, that records of very recent origin, such as the records of closed Independent Counsels and independent commissions, Presidential records subject to the provisions of the PRA, and contemporary electronic records are subject to a more stringent review than the older records in our custody.

While it is NARA's responsibility to make access determinations on the records subject to the FOIA in our legal custody, NARA may consult with the originating agencies concerning particularly sensitive records which are not classified. There are two areas, however, where we have no discretion to make the access decisions. The first exception is for national security information that is properly classified pursuant to the executive order. The current order, Executive Order 12958, as amended, and all previous orders state that only the agency that classified the information under review may declassify that information. This requirement means that all classified information in our custody must be referred to the original classifying agency for declassification review. In the past as required under the executive orders, some agencies have provided us with guidelines for use in declassifying older records. We still apply these guidelines unless the originating agency has rescinded them in writing. If the information cannot be declassified using the guidelines, the information is referred to the original classifying agency. If referral is necessary, NARA must await the determination of the originating agency prior to disclosing a record containing classified equities. The review process often takes months or years to complete.

The second exception is for information that is prohibited from disclosure under another statute passed by Congress, as incorporated into exemption (b)(3) of the FOIA. There are many statutes that have provisions proscribing the disclosure of information. Mainly, these statutes apply to specific types of information wherever it occurs, including grand jury information, atomic energy information, census information, electronic surveillance information, information on intelligence sources and methods, and income tax return information. As NARA has no discretion to disclose information protected by statute, we must protect the information no matter where it appears among the records in our holdings.

While we believe that the need to restrict certain types of information has been lessened by the passage of time, we certainly accept that some information continues to be sensitive even after many years. We apply the provisions of the FOIA to identify and withdraw such records. We conduct line-by-line reviews of previously unopened records that are requested under the provisions of the FOIA. As mentioned previously, we withdraw information as required for reasons of national security or under statute. We also withdraw some law enforcement information, private information concerning individuals, and information subject to other FOIA exemptions if the information requires protection. Only a very small percentage of our holdings have been withdrawn from disclosure under FOIA.

STRENGTHS IN PROCESSING FOIA REQUESTS

Perhaps NARA's greatest strength when it comes to processing FOIA requests is that the spirit of the FOIA is consistent with NARA's core mission and function. The FOIA is a disclosure statute enacted to ensure a right of access to records created by the executive branch agencies. Likewise, NARA ensures ready access to the essential evidence that documents the rights of American citizens, the actions of Federal officials, and the national experience. We strive to make it easy for citizens to access the historically valuable records among our holdings. The provisions of the FOIA provide the guidance that helps us fulfill our mission.

NARA is fortunate to have an extremely knowledgeable FOIA staff. We have a diverse group of staff, with years of experience in FOIA review and declassification, who are familiar with the records among our holdings. Many have advanced degrees in history or a related discipline, which helps our processors put the records in their proper historical context and make connections between major government initiatives and activities. This proves to be of great assistance when making access determinations on archival records. Supervisors are extremely supportive in ensuring that staff with regular or recurring FOIA duties are properly trained and mentored. Our FOIA staff is afforded the opportunity to expand their FOIA experience by attending both internal and external training on the FOIA and related access topics. That training is reinforced by the internal oversight process, which ensures that newer FOIA staff members are comfortable with making access determinations.

NARA staff members who process FOIA requests conduct extensive research to assist in making appropriate access determinations. We refer to government publications, the social security death index, related open records, and works by notable scholars when making access determinations on historical records. In every instance we employ the appropriate oversight to ensure that we are making only authorized disclosures. To assist the agency in this endeavor, NARA organized a specialized staff, which I will discuss in more detail shortly, with our most experienced reviewers. This staff, in conjunction with NARA's Office of General Counsel, is instrumental in the formulation of policy and procedural guidance on FOIA processing and other access issues for NARA staffs across the agency.

NARA has also made an investment in FOIA processing equipment that has streamlined our FOIA process and cut down on processing times. NARA has procured two FOIA processing systems that not only support our FOIA program specifically, but also address a goal in our strategic plan to ensure that essential evidence will be easy to access regardless of where it is or where users are for as long as needed: the Archives Declassification and Redaction System (ADRRES) and the Unclassified Records Tracking System (URTS). These systems are used to track requests for access to records, process both textual and electronic records under the FOIA, produce redacted copies of documents, and track declassification decisions. These systems also serve as electronic

repositories for scanned textual records as well as on-line redaction systems. The availability of this technology has transformed the way our staffs perform FOIA review.

The administrative processing of FOIA requests at NARA involves only the review of sensitive materials for exempt information. While NARA must maintain an accurate administrative record documenting the FOIA requests we process and the determinations we make, NARA does not generally have to implement the fee waiver provisions of the statute. This is because under 5 U.S.C. 552(a)(4)(A)(vi), the FOIA fee system does not apply when a separate statutory system for collecting fees exists; NARA has such authority for charging fees for its archival records under 44 U.S.C. 2116(c). Fee waivers are considered for "JFK assassination records," because of the specific provisions of the John F. Kennedy Assassination Records Collection Act. NARA also considers fee waivers for its own agency operational records, which are not governed by 44 U.S.C. 2116(c), if the requester meets the criteria outlined in the FOIA's fee waiver guidance and our implementing regulations 36 CFR 1250.60.

Agency records pertaining to an identifiable individual which are transferred to NARA as a record which has sufficient historical value for permanent retention are exempt from the provisions of the Privacy Act. Accordingly, NARA is not required to apply the routine use, storage, publication, or access requirements of the Privacy Act to our permanent archival records. Records containing information on identifiable individuals are protected under the privacy provisions of FOIA exemptions (b)(6) and (b)(7)(C).

ELECTRONIC RECORDS

The FOIA presents NARA with many challenges. One of the most difficult issues we face is the review of electronic records. Within the last few years, we have accessioned an increasing volume of electronic records, including the records of the Special Counsel on Waco, the records of the Assassination Records Review Board, the records of the Whitewater Independent Counsel (the Fiske/Starr/Ray investigations), State Department cable traffic for the years 1973-1974, and the federal and Presidential records of the Executive Office of the President from the administration of President Clinton. All of these accessions include substantial electronic records which present us with access problems. These records were created and maintained in different systems that stored the data in different ways. Searching, reviewing, redacting, and providing access copies of the records from these divergent offices has been and will continue to be a serious issue for us. NARA is developing new technology that will enable us to share access to electronic information across space and time. However, until that system comes on-line, NARA must continue to deal with the challenges raised by the increase in permanently valuable electronic records.

TIMELINESS

A second issue regarding FOIA implementation is responding to requests in a timely manner. NARA is reasonably successful in responding to FOIA requests within the 20-day period allowed under the law. It is an unfortunate fact, however, that requests for

classified records law enforcement records, and requests for large, complex files can rarely be completed within the 20-day period. When requests are received, we divide them into simple and complex request queues and these designations are entered into our tracking system. Simple requests consist primarily of two types: 1) requests for records that are already open and available for research; and 2) requests for individual documents or small files that have not been opened for research and can be easily reviewed within the 20-day period. All remaining requests are designated as complex requests. These requests include requests for classified information, law enforcement files (such as FBI records, Department of Justice case files, and records of closed Independent or Special Counsels), and records that contain sensitive privacy information. As was mentioned earlier, NARA is not authorized under Executive Order 12958 to make declassification decisions on classified information (except for the information subject to agency guidelines), and all classified documents responsive to FOIA requests must be referred to the agency of origin or an agency with a subject matter interest in the documents. Once these documents are referred to other agencies, NARA must wait for all agencies that received the referral to respond with a declassification determination before NARA can respond to the requester. Due to backlogs, the wait for responses is often quite lengthy.

THE PRESIDENTIAL RECORDS ACT (PRA)

Another factor that delays processing at NARA are FOIA requests for records subject to the provisions of the PRA. When FOIA requests are submitted for those Presidential records that are subject to both the PRA and the FOIA, the PRA requires that NARA must inform both the current and the former Presidents that we propose to open requested records and then allow the Presidents an opportunity to review the records prior to release. Executive Order 13233 on Further Implementation of the Presidential Records Act specifies that the former President has 90 days to review such documents, and the incumbent President has no time limit. Since we are bound by the provisions of the PRA and EO 13233, it is virtually impossible to meet the 20-day time limit provisions for access to records falling under the provisions of both the FOIA and the PRA.

PROCESSING ISSUES

The time necessary to respond to requests for unclassified information is not as long. However, a request for a large file of law enforcement records or a large case file pertaining to an individual presents many problems for staff reviewing the file. The reviewer must look for information exempt from disclosure by statute, such as grand jury information or tax return information, information that may invade the privacy of the individuals discussed in the file, or law enforcement information. This process can be time consuming, usually in direct proportion to the size of the file or the complexity of the issues involved. For example, a Department of Justice file on the kidnapping of a foreign national that occurred in the 1950s contained a variety of information that required careful screening. While the vast majority of the documents were released, this file of approximately 10,000 pages took the experienced staff member several months to review. The requestor was extremely happy with the results of this process despite the need to wait several months for the process to be completed.

It has been our experience that discussions with requesters to explain the review process and the steps necessary to review the requested records will mitigate the frustration and anger that researchers often experience. Ultimately, however, the process cannot proceed any faster than the ability of the reviewer to conduct the careful review that these records require. The privacy rights of the individuals that are the subjects of these records and the protection of other sensitive information demand this careful review.

As noted above, the concerns surrounding compliance with the FOIA led NARA to create a unit to process all FOIA requests for Executive branch records in our Washington DC facilities. The Special Access/FOIA Branch, established in 1997, is responsible for responding to all requests received for records held in the Washington Metropolitan area, made under the FOIA as well as responding to mandatory declassification requests made under the current Executive Order. The ADRRES and URTS systems were developed in order to streamline the review process as much as possible. The staff of the Special Access/FOIA Branch also conducts special reviews for records that have not been previously reviewed under the FOIA for researchers who are working in our buildings. If a researcher wants access to records that have not been previously reviewed under the FOIA, the Special Access staff will review the requested boxes, if feasible, to see if the records contain any sensitive information. These special reviews often result in the determination that the records do not contain any information that requires withholding and the records can be released for research. Occasionally, a portion of the requested records can be provided to the researcher while the remaining boxes must be requested under the FOIA.

Let me say that these special reviews are conducted by our most experienced reviewers. We are very careful to make sure that the boxes released for review under these special reviews do not contain any information the disclosure of which would not be authorized under the FOIA. This process was developed to assist researchers who have often traveled long distances to do research in our research room and to prevent the need for unnecessary FOIA requests. This policy has been successful and has provided access to records for many researchers without the use of the formal FOIA process. In that regard, it has had the effect of preventing additional delays in gaining access to information in our custody and has facilitated expedited access of records to researchers who visit our facility.

Again, thank you Mr. Chairman for the invitation today and your understanding regarding my schedule. Dr. Kurtz would be happy to answer any questions that the subcommittee might have.