OFFICE OF THE INSPECTOR GENERAL OF THE INTELLIGENCE COMMUNITY

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(U) Assessment of IC Freedom of Information Act (FOIA) Programs

September 28, 2018   **Report INS-2018-001**

TABLE OF CONTENTS

(U) EXECUTIVE SUMMARY

(U) *The Freedom of Information Act* (FOIA) is the primary means for the public to access federal executive branch records.[1] The Inspector General of the Intelligence Community (IC IG) Inspections & Evaluations Division (I&E) reviewed FOIA programs of the Central Intelligence Agency (CIA), Defense Intelligence Agency (DIA), National Geospatial-Intelligence Agency (NGA), National Reconnaissance Office (NRO), National Security Agency (NSA), and Office of the Director of National Intelligence (ODNI). We also reviewed ODNI's role as an IC-wide integrator. We initiated this assessment after determining that ODNI Information Management Division raised IC FOIA program concerns to the Executive Committee, its senior governance forum.

(U) I&E examined the effectiveness of the six IC elements' efforts to manage FOIA requests, with a focus on how programs prioritize, coordinate, and process requests to meet statutory requirements, including response timeliness and communications with requesters. We found that while CIA, DIA, and NSA receive more FOIA requests than ODNI, NGA, and NRO, all face similar challenges. Many common issues affecting these programs are outside the IC's control, such as increased volume and complexity of incoming requests, as well as demands from FOIA litigation. Internally, the IC's approach is inefficient. The programs are not supported by adequate technology, and there is a lack of structured processes for coordination of requests across agencies.

(U) We found that ODNI could do more to lead the collective IC FOIA enterprise. The statute gives responsibility to heads of departments and agencies to manage their own FOIA programs, so ODNI's IC-wide authority is limited. However, to date ODNI has not fully exercised its significant integration role, despite shared challenges. In particular, ODNI has not resolved persistent issues related to coordination of FOIA requests across IC elements. In addition, ODNI could improve planning of IC transparency initiated declassification reviews that have implications on FOIA programs across IC elements. In addition, ODNI has a responsibility to interact more with the key external governance organizations that publish guidance and make recommendations to Congress to increase their understanding of IC FOIA challenges.

(U) We also examined the conditions that contribute to inconsistent FOIA release determinations and the mechanisms to prevent inconsistent releases. We determined the IC has mechanisms in place to reduce the chance of inconsistent release decisions. Implementation of the recommendations in this report should mitigate the likelihood of inconsistent release decisions.

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[1] (U) 5 U.S.C. § 552, as amended.

(U) INTRODUCTION

(U) The Inspector General of the Intelligence Community (IC IG) reviewed *Freedom of Information Act* programs of the following six Intelligence Community (IC) elements: Central Intelligence Agency (CIA); Defense Intelligence Agency (DIA); National Geospatial-Intelligence Agency (NGA); National Reconnaissance Office (NRO); National Security Agency (NSA); and the Office of the Director of National Intelligence (ODNI), collectively, the IC elements. We also reviewed ODNI's role as an IC-wide integrator. In this report, references to "IC FOIA programs" relate only to the six elements within the scope of this assessment.

(U) The *Freedom of Information Act* (hereafter "FOIA" or "the Act") is the primary means for the public to access federal executive branch records.[2] The Act allows any person, broadly defined to include attorneys filing on behalf of an individual, corporation, or organization, to file a request for records. Any member of the public may request access to information held by federal agencies without showing a need or reason for seeking the information.[3] Agencies within the Executive Branch of the federal government, independent regulatory agencies, and some components within the Executive Office of the President are subject to the Act. It is one of the most important means for citizens to obtain information about government activities.

(U) The objectives of this assessment were to:

- (U) Assess the effectiveness of each IC element's efforts to manage FOIA requests;

- (U) Describe the conditions that contribute to inconsistent FOIA release decisions and identify IC elements' mechanisms to help prevent or lessen the likelihood of inconsistent releases; and

- (U) Describe the conditions that contribute to inconsistent FOIA release decisions across the IC and identify IC-wide mechanisms to help ensure or strengthen consistent release decisions.[4]

(U) Our assessment covered Fiscal Years (FY) 2016 and 2017. The assessment did not address IC elements' application of particular FOIA exemptions in specific cases. Instead, we examined FOIA processes aimed at providing timely responses to requests. We also reviewed IC element mechanisms to ensure that release determinations for the same information are consistent. We identified mechanisms for ensuring consistent responses to FOIA requests within each IC element and across IC elements. We did not examine processes related to Privacy Act (PA) requests. We did not interview members of the public who are FOIA requesters, primarily due to concerns about interfering with FOIA cases that are in the process of ongoing litigation. However, we did review publicly available information related to our objectives, some of which was from the websites of FOIA requesters.

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[2] (U) 5 U.S.C. § 552, as amended.

[3] (U) Requesters seeking a preferential FOIA fee category or expedited processing are asked to show a need or reason for seeking the records.

[4] (U) IC IG initially announced that objective 2 would focus on the effectiveness of each IC element's mechanisms to prevent inconsistent FOIA release determinations and objective 3 would assess the effectiveness of IC-wide mechanisms to ensure consistent FOIA release determinations across the IC. We revised objectives 2 and 3 when we learned through our field work that IC elements do not have the capability to identify all previous official releases that have occurred across the IC and that IC elements do not have their own measures of effectiveness related to consistent release determinations.

(U) METHODOLOGY

(U) To conduct this assessment, the IC IG interviewed officials from each of the six IC elements, including Chief FOIA Officers, FOIA Public Liaisons, FOIA professionals, transparency officers, and representatives from Offices of General Counsel. We also interviewed Department of Justice (DOJ) Office of Information Policy (OIP) and the National Archives and Records Administration (NARA) Office of Government Information Services (OGIS) officials. In addition, we spoke with Department of State (DOS) and Department of Homeland Security (DHS) FOIA officials. We reviewed IC element Office of Inspector General (OIG) reports on FOIA programs and discussed the status of recommendations with OIGs. We also reviewed each IC element's FOIA program annual reports and Chief FOIA Officer's report to OIP. We obtained a demonstration of the tools used to process FOIA requests.

(U) We asked IC element FOIA professionals to provide examples of what they considered inconsistent release determinations provided to FOIA requesters. Specifically, we requested examples of all documents programs had knowledge of that reflected an inconsistent FOIA release determination for the same information (e.g., information was withheld, same information was released). If programs were unable to locate the documents, but were aware of these instances, we asked that they provide a brief description. We also conducted open source research and if we uncovered examples of inconsistent release decisions, we discussed those examples with FOIA professionals in the IC FOIA programs.

(U) We conducted this assessment from February to September 2018 in accordance with the Council of the Inspectors General on Integrity and Efficiency 2012 Quality Standards for Inspection and Evaluation. We provided a draft of this report to each IC element. See Appendix 2 for official comments.

(U) This report includes 9 findings with 10 recommendations, 9 observations, and 1 commendable. Findings identify areas where we recommend action. Each finding has at least one recommendation the IC IG will monitor through completion. Observations are provided for situational awareness.

(U) ROLES AND RESPONSIBILITIES

(U) DEPARTMENT OF JUSTICE, OFFICE OF INFORMATION POLICY

(U) The OIP has government-wide statutory responsibility to encourage and oversee agency compliance with FOIA.[5] OIP develops and issues legal and policy guidance on FOIA implementation. All agencies are required to report to the Attorney General each year on their performance in implementing the FOIA and DOJ FOIA Guidelines.[6] [7] OIP establishes reporting requirements and assesses agency progress under FOIA. OIP also adjudicates administrative appeals of FOIA requests made to DOJ and handles the defense of certain FOIA litigation cases.[8]

(U) NATIONAL ARCHIVES AND RECORDS ADMINISTRATION OFFICE, OFFICE OF GOVERNMENT INFORMATION SERVICES

(U) The *OPEN Government Act of 2007* created OGIS to review FOIA policies and agency compliance as well as to recommend ways to improve FOIA.[9] The Act requires OGIS to mediate disputes between FOIA requesters and federal agencies, review policies and procedures of administrative agencies under FOIA, review agency compliance with FOIA, and identify procedures and methods for improving compliance, including through legislative and regulatory recommendations. In addition, OGIS provides administrative and logistical support for the FOIA Advisory Committee (FAC). The FAC advises on improvements to the administration of FOIA and makes recommendations to the Archivist of the United States.

(U) CHIEF FOIA OFFICERS COUNCIL

(U) The *FOIA Improvement Act of 2016* established the Chief FOIA Officers Council, which is composed of all agency Chief FOIA Officers, the Directors of OIP and OGIS, and the Deputy Director for Management from the Office of Management and Budget.[10] The council is tasked with developing recommendations for increasing FOIA compliance and efficiency; disseminating information about agency experiences, ideas, best practices, and innovative approaches related to FOIA; identifying, developing, and coordinating initiatives to increase transparency and FOIA compliance; and promoting the development and use of common performance measures for agency compliance with FOIA.

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[5] (U) Office of Information Policy, *About the Office*, February 15, 2017.

[6] U) 5 U.S.C. § 552 (e)(i).

[7] (U) Office of the Attorney General Memorandum for Heads of Executive Departments and Agencies, *Freedom of Information Act,* March 19, 2009.

[8] (U) Office of Information Policy, *Organization, Mission, and Functions Manual*, September 9, 2014.

[9] (U) *Openness Promotes Effectiveness in Our National Government Act of 2007* (The *OPEN Government Act of 2007*) Pub. L. 110-175 (December 31, 2007).

[10] (U) *The Freedom of Information Act Improvement Act of 2016*, Pub. L.114-185 (June 30, 2016).

(U) INTELLIGENCE COMMUNITY

(U) ODNI's Strategy and Engagement, Information and Data, Information Management Division (IMD) manages ODNI's FOIA program and has an IC-wide role in FOIA integration. IMD develops, implements, and manages programs that provide guidance for the IC's records, classification, declassification, public release, and FOIA officers.[11]

(U) Each of the IC elements responds individually to FOIA requests received by their element. Each Non-Department of Defense (DoD) IC element has its own Chief FOIA Officer. DIA, NGA, NRO, and NSA are both IC elements and Defense Intelligence Components.[12] As such, these IC elements are subject to both IC and DoD FOIA guidance. These elements do not have a Chief FOIA Officer, but instead a single DoD Chief FOIA Officer serves them all.

(U) SIMPLIFIED OVERVIEW OF FOIA PROCESSING

(U) Requesters submit FOIA requests to agencies via email, mail, website, or electronic portals. When an agency receives a request, FOIA professionals generally log it into the agency's tracking system, assign a tracking number, and review the request for complexity. The agency sends acknowledgment of receipt to the requester. FOIA professionals then route the request to the appropriate record owner or subject matter expert (SME) to conduct a search for responsive records or conduct a search themselves. Next, FOIA professionals review the responsive records and determine whether the agency should withhold all or part of a record based on the Act's exemptions.

(U) The Act provides nine categories of information that are exempt from disclosure, such as information properly classified by Executive Order or personnel and medical files. See Appendix C for a list of the nine exemptions. FOIA professionals may consult with or refer records to other agencies when the records are the responsibility or contain the equities of another agency. After processing the records, applying appropriate FOIA exemptions, and redacting information accordingly, the agency releases the documents to the requester, or notifies the requester of the agency's inability to locate the requested records, or the agency's decision to withhold the requested records. The requester may then challenge an agency's final decision on a request through an administrative appeal or lawsuit. A requester has the right to file an administrative appeal and agencies have twenty working days to respond to an administrative appeal.

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[11] (U) ODNI Instruction 80.06 *The ODNI Information Management Program*, Rev 1, March 1, 2017.

[12] (U) DoD Directive 5143.01, Under Secretary of Defense for Intelligence (USD)(I)), Change 1 Effective April 22, 2015.

(U) ASSESSMENT RESULTS

(U) In FYs 16 and 17, FOIA requesters submitted a total of 11,804 requests to the IC elements we reviewed. Each individual case may generate one document that is responsive to the request or entire repositories of documents that require review, or may necessitate an exhaustive search that yields no responsive documents. Total FOIA costs during this time for these IC elements was over $51 million. Figure 1 illustrates the rise in FOIA costs since 2005. In FY17, these IC elements employed 164 FOIA professionals to process FOIA cases. IC elements collectively acknowledge that FOIA processes have not matured to keep pace with the increase in the complexity of requests. Factors that contribute to the complexity of a FOIA case include the volume of the information requiring review, the extent to which the information is technical or difficult to comprehend, the number of different offices that may have responsive documents, and the need to consult with other agencies. Although complexity of requests has grown, the IC elements' processes have not advanced to meet the demands. Further, ODNI has not taken a comprehensive strategic approach to address persistent FOIA challenges shared across the IC.

(U) Figure 1: The Rising Cost of FOIA

Figure 1: The Rising Cost of FOIA
2005 compared with 2017
Source: IC Element Annual Reports to OIP
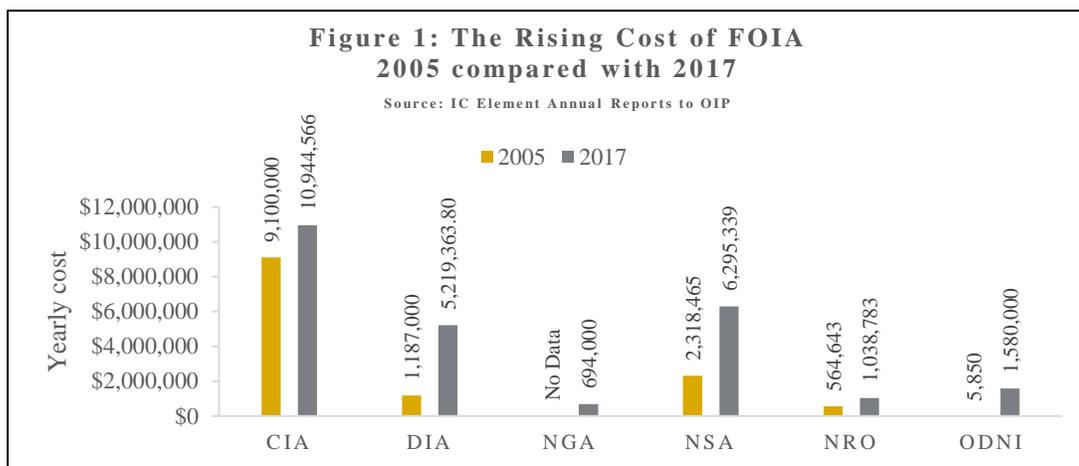
Figure 1 – Unclassified

> (U) **Finding 1: ODNI has not fully exercised its leadership responsibility to foster integration and collaboration to improve IC execution of FOIA.**

(U) In its official mission and vision statements, ODNI identifies that a key component of its mission is to unify, meaning ODNI fully leverages the IC's diverse expertise by planning and acting together. However, with regard to the FOIA discipline, IC FOIA programs currently operate independently with minimal information sharing regarding FOIA management. While the statute gives each individual agency responsibility to manage its own program, the ODNI, because of its mission to integrate the IC, has a responsibility to address common IC FOIA issues. We assess that ODNI/IMD is in a unique position, and has an opportunity to influence the community in the interest of greater FOIA integration and collaboration. Throughout our review, FOIA professionals in all of the IC elements called for ODNI to do more to lead FOIA efforts in the IC. Specifically, FOIA professionals requested that ODNI establish more avenues for information sharing and provide guidance and a technical solution for consultations. Consultations occur when an agency coordinates with another organization that has

equities in the records being reviewed. Director, IMD, agreed that ODNI could assume more of a leadership role in the IC.

> **(U) Finding 1.1: ODNI IMD did not implement the FOIA improvement plan briefed to the EXCOM in 2016.**

(U) In 2015, ODNI's Director, IMD, briefed ODNI's Executive Committee (EXCOM), its senior governance forum, that there was a burdensome and inefficient process for coordinating and responding within the IC to FOIA requests. The IC EXCOM then charged ODNI's IMD with leading a working group to develop an IC FOIA Improvement Plan. The working group, composed of FOIA and transparency professionals across the IC, explored challenges faced by IC elements. The resulting plan, briefed to the EXCOM in October 2016, featured recommendations to improve IC execution of FOIA as an enterprise. In the briefing, then-Director, IMD, said that if approved, IMD would begin to implement the recommendations and provide an annual update.

(U) The recommendations focused on four themes: rules of the road; connectivity and the use of technology; training/personnel; and templates.

- (U) Rules of the road highlighted that the IC FOIA community must find the balance between openness and protecting what really matters.

- (U) For technology, the working group agreed to continue to explore development of collaborative space, with each agency participating to help define rule sets. Agencies should update the collaborative space with points of contact and post their FOIA logs. The IC should have the capability to analyze the FOIA logs on the site to find similar requests. Agencies with an IC element should ensure that their FOIA office has access to at least one Joint Worldwide Intelligence Communications Systems (JWICS) terminal and secure communication system.[13]

- (U) For training, ODNI IMD agreed to create a training section on the site and make existing training available, as well as expand one of the IC FOIA Days into a substantive training session.[14]

- (U) Regarding templates for consistency, the group agreed the IC should implement a standard policy to address the minimum requirements for the referral or coordination of requests. The group also agreed to continue to develop templates.

(U) Although the IC elements agreed with the plan, ODNI disbanded the working group and did not implement the plan. IMD officials at the time of the briefing indicated the EXCOM agreed in principle with the recommendations; the EXCOM may not have given specific direction to move forward, but expected IMD to continue to work with the IC on the issues. The current Director IMD attributes the delay in pursuing improvements to uncertainty about EXCOM approval, conflicting priorities, and high personnel turnover within her organization. Without implementation of the plan, FOIA within the IC will remain disjointed and unable to make essential progress.

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[13] (U) JWICS is a network connecting IC members.

[14] (U) ODNI periodically hosts an IC FOIA Officers' Information Day with sessions for IC FOIA professionals that include inside and outside speakers.

(U) Recommendation 1: For ODNI Director, IMD – Update, obtain EXCOM approval, and begin implementation of the recommendations of the 2016 FOIA Improvement Plan.

(U) ODNI concurred with Recommendation 1.

(U//FOUO) Finding 1.2: The IC is not making use of all available technology to support FOIA programs, and there is no consolidated IC-wide approach to technology application.

(U) In 2009, the President issued a FOIA memorandum that states, "All agencies should use modern technology to inform citizens about what is known and done by their Government."[15] OIP consistently requires agencies to include descriptions of the steps taken to greater utilize technology in their Chief FOIA Officer reports.

(U) The aforementioned 2016 FOIA Improvement Plan featured multiple connectivity and technology-related solutions, including use of IntelShare, IntelDocs and IC ITE Apps Mall-hosted tools to facilitate the referral and consultation process, develop a collaboration space, and provide all agencies with an IC element the JWICS connectivity and secure communications needed to enable effective FOIA referrals and consultations.

(U//~~FOUO~~) The DNI/USDI's *Consolidated Intelligence Guidance (CIG): Fiscal Years 2020–2024* is "the first step of a multi-year transformational effort to re-set and strengthen intelligence capabilities." The CIG is meant to "reinforce intelligence integration and unity of effort, ensuring the IC operates as an efficient and effectives enterprise."[16] Two of the CIG strategies have particular impact for leveraging technology on behalf of IC FOIA processes and procedures, "Augmenting Intelligence Using Machines" and "Modernization of Data Management and Infrastructure." Both priorities set strategic outcomes and prescribe programmatic actions relevant to developing and sustaining enterprise-level improvements to IC FOIA activities.

(U) IC elements identified several common areas for applying technological solutions to their organizations' FOIA processes. Most describe challenges from a lack of or an ad-hoc combination of systems and software applications that do not meet full requirements for effective FOIA functioning, including: enterprise search, de-duplication, document review, redaction, internal coordination, and inter-agency referral/consultation. Figure 2 shows the key areas where IC elements are pursuing new technology or updating technology to enhance FOIA programs.

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[15] (U) White House Memorandum for the Heads of Executive Departments and agencies, *Freedom of Information Act,* January 21, 2009.

[16] (U) The DNI/USDI's Consolidated Intelligence Guidance (CIG); Fiscal Years 2020-2024.

(U) Figure 2: Technology to Support FOIA Programs

Areas of Effort or Interest: Technology Assistance to FOIA	CIA	DIA	NGA	NRO	NSA	ODNI
Case Management	●		●	●	●	●
Archive & Retrieval of Prior Releases	●			●	●	
Search	●	●	●	●	●	●
De-duplication	●	●	●	●	●	
Document Conversion/Preparation (e.g., text or PDF to OCR)	●			●	●	
Document review	●		●		●	●
Redaction	●	●	●	●	●	●
Internal coordination	●		●	●	●	
Inter-agency referral/consultation	●	●	●	●	●	●
Public access	●	●	●	●		●

Figure 2 – Unclassified

(U) Challenges to more strategic application of technology are rooted in a range of circumstances. In some IC elements, the key FOIA-related business lines of records management, information systems technology, and disclosure/release reside in different offices, with little sustained focus on integrating their activities to enhance FOIA processing. At DIA and NGA, in particular, the end-of-year unfunded requirement process is the single source of funding for system improvements/upgrades to their FOIA programs.

(U) Within the IC elements, we characterize the execution of FOIA responsibilities as an industrial age process applied to a digital age challenge. The most profound outcome of this mismatch is inefficiency that affects ability to meet statutory deadlines. Challenges include duplication of effort as requests move between offices for review; multiple transformations of documents from soft-to-hard copy and back to soft; or re-entering redactions of information made on one system into records on another. These inefficiencies extend overall processing time and increase opportunities for human error and inconsistencies. Cumbersome data transfer and collaboration methods between IC elements further delay critical consultations and referrals. Without a strategic approach, the IC will continue to struggle to comply with statutory deadlines and the resulting litigation.

(U) Recommendation 2: For ODNI Director, IMD – Revise the 2016 FOIA Improvement Plan to align the IT recommendation to appropriate IC strategic priorities (e.g., within the *CIG; Fiscal Years 2020–2024,* and other relevant strategic documents).

(U) ODNI concurred with Recommendation 2.

(U) Finding 1.3: ODNI's Difficult Issues Forum has not met since 2015 and there is no regular IC-wide group to address ongoing IC FOIA issues.

(U) According to the Government Accountability Office, interagency groups are an effective mechanism to facilitate collaboration among agencies to address policy development, program implementation, and information sharing challenges.[17] The ODNI FOIA program sponsors an IC FOIA Officer's Information Day that as many as 120 officers attend. This event was previously held twice a year, but was only held once in 2017 and will be held only once in 2018. Until early 2015, the ODNI FOIA program also led the Difficult Issues Forum (DIF), a smaller IC-wide working group, as needed, to address common FOIA challenges. During our review, FOIA professionals spoke to the forum's value as a venue for FOIA programs to collaborate and address IC-specific issues. FOIA professionals agree there are FOIA issues unique to the IC that ODNI is better suited to address than OIP. One program said the forum maximized exposure to IC-wide challenges and work solutions, activities that had an impact on their ability to improve processes. Agenda topics included consultations, using technology, and narrowing the scope of requests. The DIF held its last meeting in early 2015. Some of the DIF members continued to meet for several months as part of the working group for FOIA improvement, but larger DIF meetings were not held. Chief of ODNI's FOIA program has not held the DIF since then because of the demands on ODNI's internal FOIA program. Without a collaborative forum, IC FOIA professionals miss the opportunity to address common FOIA challenges.

(U) Recommendation 3: For ODNI Director, IMD – Reestablish the Difficult Issues Forum or another IC body for IC element FOIA programs to collaborate.

(U) ODNI concurred with Recommendation 3.

(U) Finding 1.4: ODNI has not engaged with OIP on IC-wide FOIA issues.

(U) All of the IC FOIA programs interact with OIP, one of the two organizations with Government-wide FOIA responsibilities, but interaction has not been focused on strategic IC-wide issues. OIP provides government-wide FOIA guidance. IC FOIA programs look to OIP for FOIA best practices guidance and reach out to OIP for clarification on that guidance. IC FOIA professionals also incorporate OIP guidance into their programs. In FYs 2016 and 2017, IC FOIA programs submitted 16 inquiries to OIP's FOIA counselor service, which is available to answer questions from agencies on FOIA issues. Each of the IC FOIA programs, with the exception of NGA, requested assistance through the service. OIP addressed topics related to policy or compliance with the Act such as questions on procedural provisions and the exemptions.[18] Given OIP's substantial role in the government-wide FOIA enterprise, it is important for the IC to ensure OIP understands the IC's unique issues with regard to FOIA implementation.

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[17] (U) Government Accountability Office, *Managing for Results: Key Considerations for Implementing Collaborative Mechanisms,* September 27, 2012.

[18] (U) OIP provided IC IG with these general topic areas. Specific queries to OIP's Counselor Service are attorney-client privileged communications.

(U) OIP has provided training to IC elements and has participated in ODNI's Annual FOIA Information Days, but indicates it would welcome more interaction with ODNI. As of July 2018, ODNI/IMD leadership had not spoken with OIP on IC-wide issues, but recognized that more interaction could be valuable. OIP, as the government-wide FOIA interlocutor, could better assist IC FOIA programs and be more informed as it prepares government-wide guidance, if it gains a greater understanding of the IC from ODNI engagement. Therefore, ODNI/IMD leadership should initiate discussions with OIP.

(U) Recommendation 4: For ODNI Director, IMD – Initiate discussions with OIP on IC-wide FOIA issues.

(U) ODNI concurred with Recommendation 4.

(U) Finding 1.5: ODNI has not had discussions with OGIS on strategic IC-wide FOIA issues, access concerns, or challenges with the Act.

(U) One of ODNI's strategic goals for the IC is to integrate the collective capabilities, data, expertise, and insights of partners, consistent with law and policy. IC element FOIA programs work with OGIS when OGIS is mediating disputes with FOIA requesters. OGIS provides mediation as a non-exclusive alternative to litigation. Once a requester has gone to court, the requester cannot come to OGIS for mediation. Typically, OGIS will explain exemptions and help the requester through the FOIA process. OGIS also performs reviews of agency FOIA programs to determine compliance and conducts assessments of FOIA-specific issues. However, IC elements' systems of records notice do not allow OGIS access to IC FOIA files. For both its mediation and compliance roles, OGIS cannot review FOIA records without the individual requester's consent in each case OGIS has to review. Due to this lack of access, a sponsor introduced a bill in the House of Representatives in March 2018 that would allow OGIS access to agencies' FOIA records, but it has not advanced to a vote.[19]

(U) Between October 1, 2017 and May 1, 2018, nearly 200 FOIA requesters sought assistance from OGIS involving the six IC elements within the scope of this assessment. Sixty-six percent of these inquiries were general ombuds cases in which OGIS provided general assistance with the FOIA process. Thirty-three percent of the inquiries related to delays in responding to FOIA requests and denials of information under various FOIA exemptions, including "Glomar" responses.[20] The number of inquiries OGIS received from requesters during this time-period per IC FOIA program is as follows: CIA: 121, NSA: 42, DIA: 19, ODNI: 8, NRO: 2, NGA: 1.

(U//~~FOUO~~) OGIS officials indicate they have limited visibility into the IC and do not have access to internal IC FOIA policies or procedures. OGIS believes it could help educate requesters if it had more information from the IC, but acknowledges it has yet to engage with the IC on this issue. ODNI's IMD leadership agrees that more communication with OGIS would better inform the public, but as of July 2018, they had not reached out to OGIS.

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[19] (U) H.R. 5253 *Office of Government Information Services Empowerment Act of 2018.*

[20] (U) A Glomar response is one in which an agency refuses to confirm or deny the existence of responsive records.

(U) OGIS is responsible for recommending legislative and regulatory changes to Congress and the President to improve the administration of the FOIA. During our review, FOIA professionals highlighted the need for statutory change and debated the merits of possible amendments to the FOIA law.[21] IC FOIA professionals suggested OGIS consider the following when proposing changes to the law:

- (U) the effectiveness of the fee structure;

- (U) data that demonstrates the required response times are unattainable;

- (U) allowing response times to vary by additional request queues beyond simple and complex;

- (U) the uniqueness of the IC, given the volume of classified and highly sensitive records;

- (U) a limit to the number of requests an individual requester may submit in a given time period;

- (U) restricting record requests to those that are focused on an agency's mission so that requests for cafeteria menus, number of geese on facilities, and similar such requests are not accepted;

- (U) greater flexibility for the government to argue that some requests are arbitrary and capricious; and

- (U) the concern that commercial requesters who request records and sell them for profit are using the FOIA system for business purposes and, as a result, the Act may not be serving the public as intended.

(U) OGIS will continue to have partial knowledge of IC-unique FOIA issues and limited ability to inform and educate requesters on IC FOIA cases and processes until the IC collaborates with them more fully. Furthermore, without a full understanding of IC challenges with the statute and the potential impact to the IC of proposed changes, OGIS may not consider all IC equities when making recommendations to Congress.

(U) Recommendation 5: For ODNI Director, IMD – Initiate discussions with OGIS regarding strategic IC-wide FOIA issues, access concerns, and the IC's perspective on the FOIA statute.

(U) ODNI concurred with Recommendation 5.

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[21] (U) 5 U.S.C. § 552, as amended.

(U) Finding 2: IC Element FOIA programs are pursuing initiatives to improve effectiveness but are not consistently meeting statutory response deadlines.

(U) The Act requires that agencies reply to requesters within 20 working days of receipt of a perfected request with responsive documents unless there are unusual circumstances as defined by the Act.[22] [23] A perfected request reasonably describes the records requested and is made in accordance with published rules. In "unusual circumstances," as defined within the Act, the agency may extend the response time by written notice to the requester, setting forth the reasons for the extension and a date when the determination is expected.[24] [25] The agency may provide the requester with an opportunity to limit the scope of the request or arrange with the agency an alternative timeframe for processing the request.

(U) Each IC FOIA program is pursuing initiatives to improve its ability to comply with the Act. However, all of the programs are not consistently meeting the 20-day response time requirement. Figure 3 illustrates the percentage of initial cases closed within 1–20 working days in FY17. In FY17, each IC FOIA program closed less than 60 percent of all initial cases within 20 working days. Only NSA and ODNI closed more than 50 percent of all initial cases, with NSA reporting 55 percent closure and ODNI reporting 59 percent closure.

(U) A number of factors contribute to the inability of IC FOIA programs to meet the response timeline. Factors include complexity of records requested, resource challenges, personnel turnover, the process for locating and processing records, consultations that involve extensive coordination with other agencies that have equities in the review, competing demands of litigation and other document declassification reviews, and inadequate information technology (IT).

(U) Some IC FOIA programs receive requests for large volumes of files or entire repositories of records. In addition, within the IC, certain classified documents require additional scrutiny and levels of review. Many IC FOIA programs also receive broad requests for "any and all" documents related to a topic, such as, "all agreements with foreign governments," or "all communications" to or from a senator over a ten-year period. These kinds of broad requests add to the complexity of a request because it is more difficult for FOIA professionals to identify the correct office to search for potentially responsive material, and because searches for such requests may yield high volumes of potentially responsive records that must be reviewed.

(U//~~FOUO~~) Litigation demands are noteworthy. OGIS and OIP recognize that FOIA litigation cases can easily overtake a FOIA program by usurping resources available to address the rest of the workload. In both documentation and in interviews during this review, four of the six IC FOIA programs (CIA, DIA, NSA, and ODNI) report that litigation has a profound impact on their programs. All four describe litigation actions as disruptive to processing new requests and clearing existing backlogs because

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[22] (U) 5 U.S.C. § 552 (a)(6)(A)(i).

[23] (U) In 1996, pursuant to the *Electronic Freedom of Information Act Amendments of 1996,* Pub L. No 104-231 (October 2, 1996), Congress amended the Act to, among other things, increase the legal response period from ten working days to the current response period of twenty working days.

[24] (U) 5 U.S.C. § 552 (a)(6)(B)(i).

[25] (U) Unusual circumstances include the need to search for records from facilities separate from the office processing the request, the need to search for, collect, and examine a voluminous amount of separate and distinct records, or the need for consultation with another agency.

programs must redirect resources to address litigation related requirements. FOIA litigations have tremendous production deadlines; judges are giving disclosure orders and processing schedules that programs must meet. For example, programs may need to revisit all actions taken on a case and prepare declarations to explain how and why the program applied exemptions in a given response. One official described litigation so complex that it took a senior official a week to prepare one declaration. Many officials cited the concern that some requesters immediately seek litigation when the 20-day response window expires before programs have a chance to complete initial processing. NRO and NGA did not identify litigation as a significant impact on their FOIA programs.

(U) Figure 3: Percent of Initial Cases Closed in 1–20 days. (Source: IC elements annual reports to OIP).
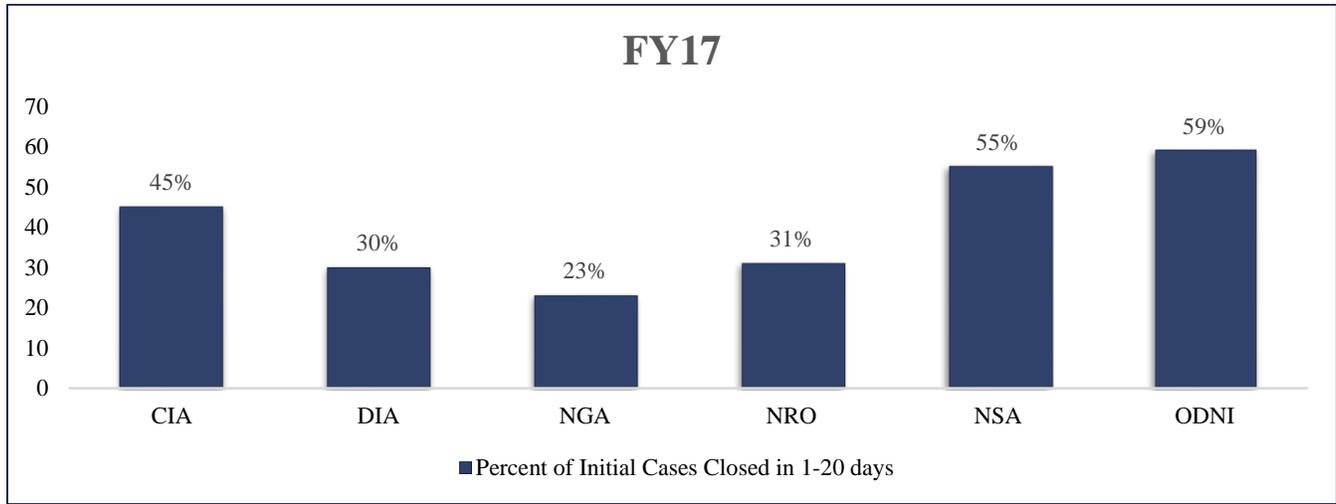
Figure 3 – Unclassified

> **(U) Observation 2.1: Between FY16 and FY17 all IC Element FOIA programs reduced average processing times for simple requests, while changes in processing times for complex cases varied.**

(U) The 1996 amendment to the Act authorized agencies to multi-track requests. Multiple tracks allow an agency to process simple and complex requests concurrently on separate tracks to facilitate responding to relatively simple requests more quickly.[26] [27] We found that IC FOIA programs are following multi-track processing, using primarily a first in, first out methodology for each queue. NSA's system includes six queues including one labeled "super easy," addressing requests that produce no records or that require minimal specialized review. NRO includes a queue for consultations with other agencies. 2017 OIP guidance states that agencies should focus on ensuring that their simple track requests are responded to within an average of twenty days.[28] Figure 4 illustrates FY16 and FY17 average processing times for simple and complex requests. All programs reported a decrease in processing times for simple requests between FY16 and FY17. For complex requests, CIA and DIA saw increases in processing times, while

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[26] (U) *Electronic Freedom of Information Act Amendments of 1996*, PL 104-231.

[27] (U) A simple request is a request that an agency using multi-track processing places in its fastest (non-expedited) track based on the low volume and/or simplicity of the records requested. A complex request is one that an agency places in a slower track based on the high volume or complexity of the records requested.

[28] (U) OIP Guidance for Further Improvement Based on 2017 Chief FOIA Officer Report Review and Assessment (Updated June 15, 2017).

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ODNI and NRO experienced decreased times. NSA's processing time for complex cases remained relatively the same over the two years.

(U) Figure 4: Average Days to Process Simple and Complex Requests (Source IC elements' annual reports to OIP).

FY16/FY17

Legend: ■ Simple FY16 ■ Complex FY16 ■ Simple FY17 ■ Complex FY17

Agency	Simple FY16	Complex FY16	Simple FY17	Complex FY17
CIA	39	252	29	319
DIA	11	551	8	575
NGA	5	166	3	63
NRO	25	224	14	188
NSA	51	509	50	508
ODNI	47	290	24	236
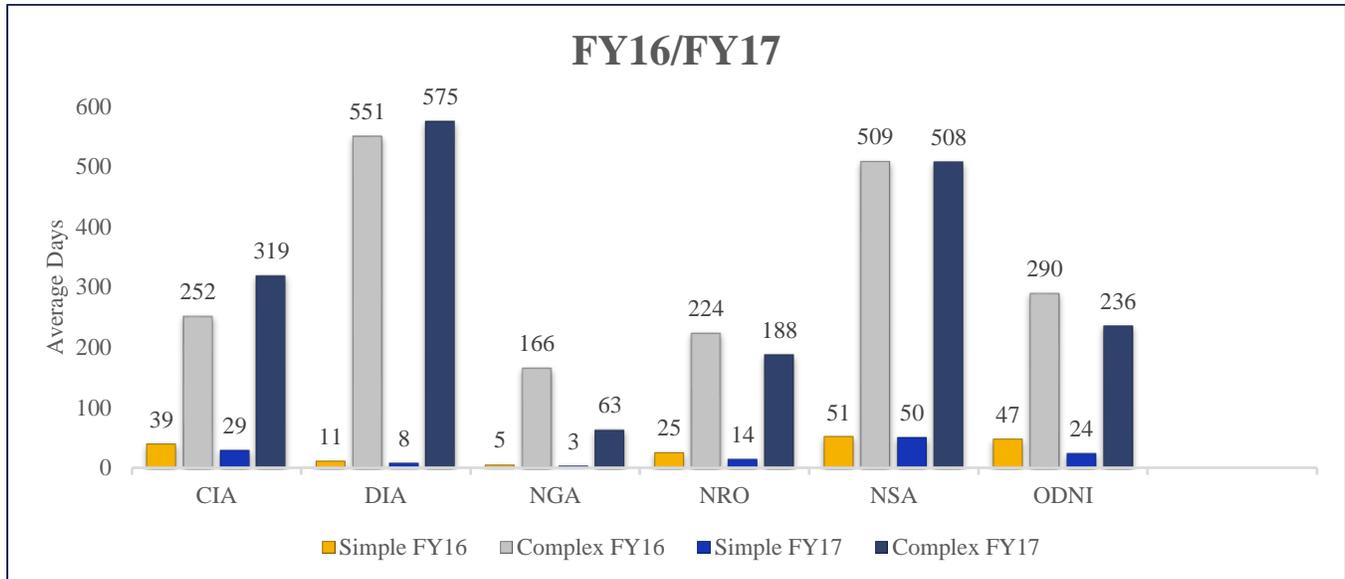
Figure 4 – Unclassified

(U) In addition to simple and complex requests, an agency may process requests on an expedited basis in cases in which the requester demonstrates a compelling need and in other cases determined by the agency. The Act requires agencies to determine within 10 calendar days whether a request meets the standards for expedited processing.[29] For FYs 16 and 17, not all IC FOIA programs reported expedited request determinations, but those that did made them in an average of less than 10 days. An agency that grants expedited processing must process the request "as soon as practicable."[30] However, some expedited processing requests are taking over a year to complete. For example, in FY17, ODNI reported an average of 565 days to process expedited requests and NSA reported 937 days. Reasons for delays in responding to expedited requests are the same as those cited for delays in processing all other types of FOIA requests.

(U) Observation 2.2: IC Element FOIA programs have focused efforts to close their oldest cases.

(U) OIP advises that a critical element to improving timeliness is closing the oldest pending requests each year. OIP guidance states that agencies should focus on prioritizing their oldest requests to ensure that the age of pending requests continues to improve. It also states agencies that do not close their ten oldest cases should implement best practices such as actively tracking the status of the oldest requests.[31]

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[29] (U) 5 U.S.C. § 552 (a)(6)(E)(ii).

[30] (U) 5 U.S.C. § 552 (a)(6)(E)(iii).

[31] (U) OIP Guidance, *Closing the Ten Oldest Pending Requests and Consultations*, August 21, 2014.

(U) We found that all of the IC FOIA programs placed priority emphasis on their ten oldest cases. NSA assigns senior reviewers to work the second level review of these cases. NGA assigns these cases to staff during weekly meetings based on caseload. CIA adds emphasis to their ten oldest cases and reviews them at a monthly panel. In FY17, ODNI assigned one FOIA professional to focus on its ten oldest cases. DIA refocuses staff on the ten oldest cases annually and meets monthly to discuss top ten case reduction efforts. NRO implemented a focused plan to close its ten oldest cases. NRO closed all of the ten oldest cases in FY16 that had been pending the prior FY. ODNI and DIA closed all of their ten oldest cases in FY17 that had been pending in FY16.

(U) Figure 5 illustrates the three oldest cases for each IC element. Across all six, the oldest cases are January 10, 2001, September 23, 2004, and February 16, 2007, respectively. The IC elements collectively acknowledge that these cases are normally the most complex, require more follow up, and involve the equities of numerous agencies. IC elements should continue to focus on their oldest cases.

(U) Figure 5: FY17 Three Oldest Requests by Months in Process (Source: IC elements' annual reports to OIP).
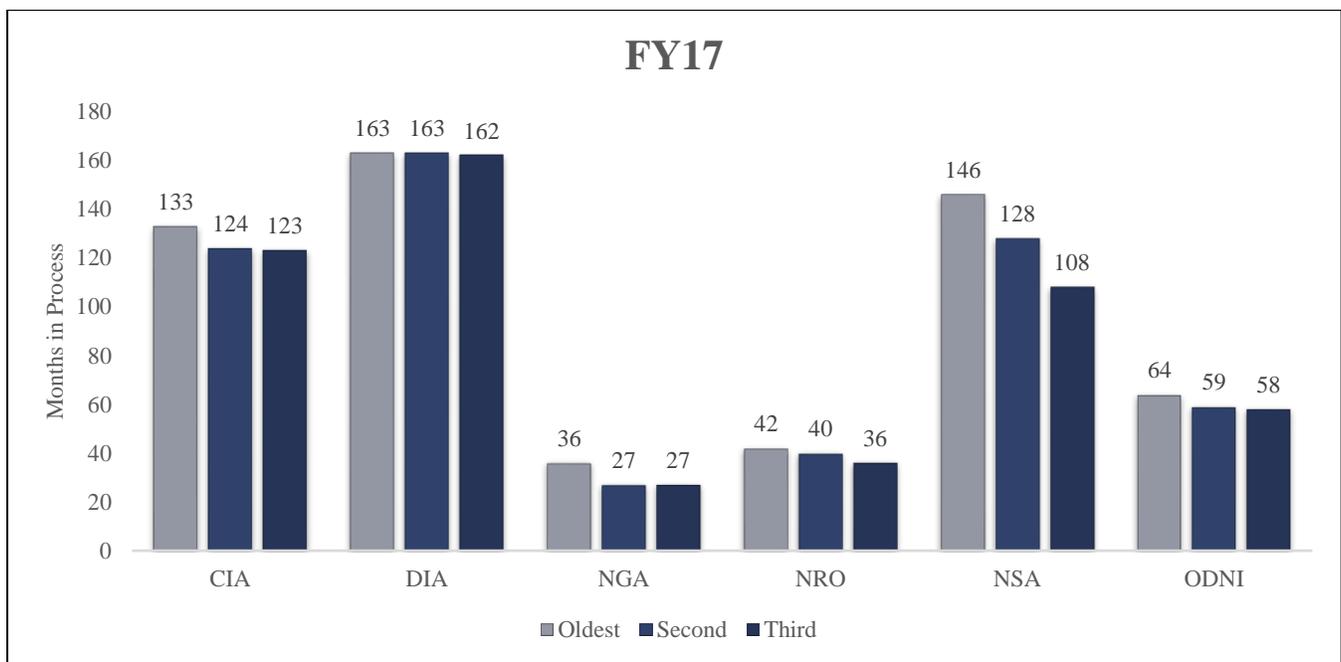
Figure 5 – Unclassified

(U) Finding 2.1: All IC FOIA programs report backlogs but not all have current backlog plans.

(U) FOIA professionals consider a request part of the "backlog" when it has been at any agency longer than the statutory time-period of twenty working days, or if unusual circumstances are present, up to thirty days. In 2008, the Attorney General required that each agency that had not reduced its backlog over the last two years prepare a backlog reduction plan.[32] In subsequent guidance, OIP identified a change to

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[32] (U) OIP Guidance, *Guidance on Preparing Backlog Reduction Plans*, updated August 22, 2014.

that requirement and indicated that only agencies with more than 1,000 backlogged requests in a year were required to describe their plans to reduce their backlogs.[33]

(U//~~FOUO~~) Each of the IC elements has backlogs. CIA, NSA, and DIA received the most requests and have higher backlogs (over 1000 cases). ODNI, NRO, and NGA received fewer requests and have smaller backlogs. IC FOIA programs attribute their inability to reduce backlog to increases in request volume and complexity as well as litigation demands. There was also concern among some FOIA professionals that programs worked special declassification review projects without the benefit of additional resources and redirected focus away from processing routine FOIA requests, ultimately adding to backlogs. Figure 6 illustrates processed and pending requests.

(U) Figure 6: FY16/17 Requests Processed and Pending (Source IC elements' annual reports to OIP).
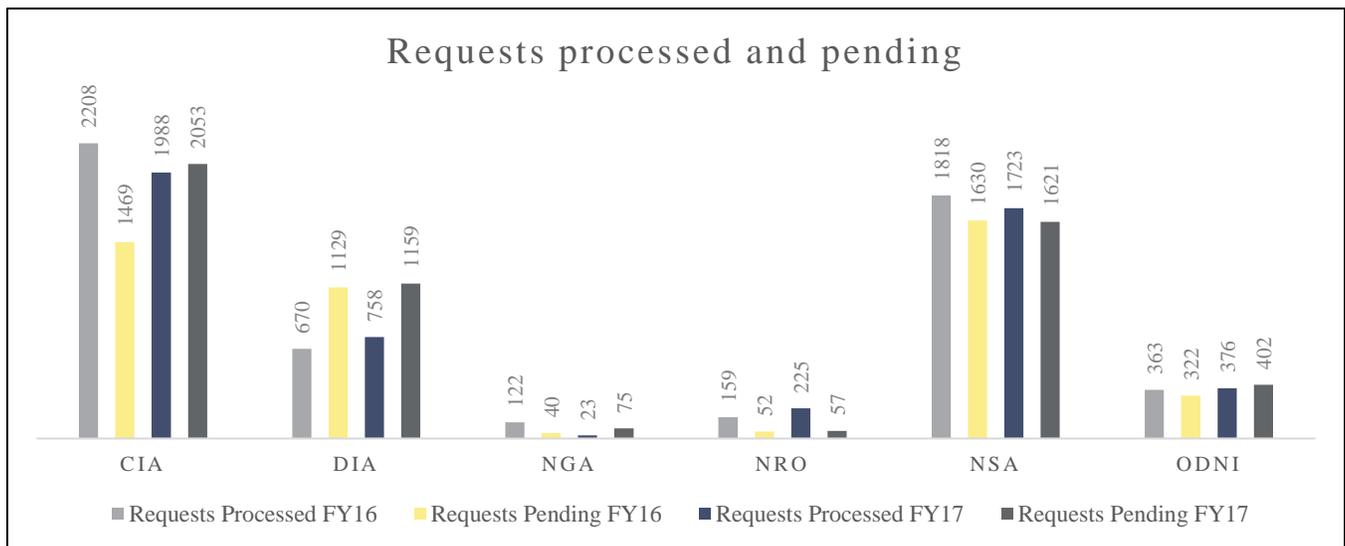
Figure 6 – Unclassified

(U//~~FOUO~~) Although all of the IC FOIA programs are undertaking efforts to reduce backlogs, four of the six IC elements had increases in backlogs between FY16 and FY17. Figure 7 illustrates backlogs. In FYs 16 and 17, CIA, NSA, and DIA had backlogs that exceeded 1000 requests and therefore were required to have backlog reduction plans, but only CIA and NSA had a backlog plan. CIA's plan streamlines levels of review for simple tasks and cases and implements improvements to workflows and coordination with other offices and agencies. NSA's plan outlines personnel increases, process improvement initiatives, and plans to create additional queues. NSA also plans to update website information and has identified IT requirements that would improve FOIA processing efficiency. NSA reports that significant increases in requests following the 2013 unauthorized disclosures had a substantial impact on their program.

(U//~~FOUO~~) DIA's FOIA Chief meets with staff monthly to monitor progress on backlog cases. DIA does not have a current backlog reduction plan, however. It is considering updating a legacy plan, but provided no period for the update. DIA advises that one reason for its backlog is that it is still recovering from a loss of contractors in 2015. Without a recent comprehensive plan to address backlog, DIA is unlikely to see sustained progress with backlog reduction.

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[33] (U) OIP Guidance, *Guidelines for 2015 Chief FOIA Officer Reports*, updated December 11, 2014.

(U) Figure 7: FY16/17 Backlog Request Data (IC elements' annual reports to OIP).
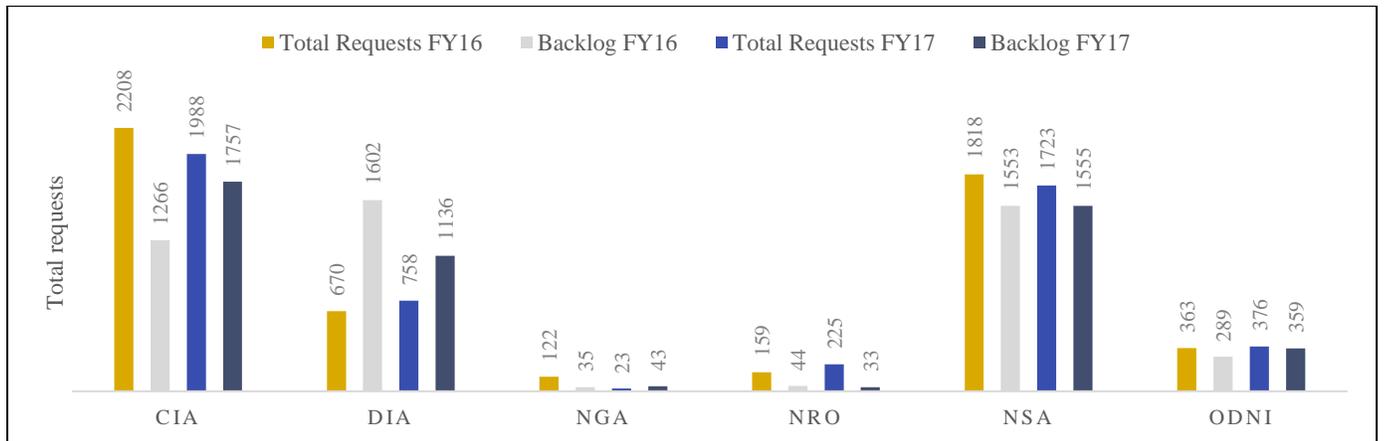
Figure 7 – Unclassified

(U) Recommendation 6: For DIA – Complete and begin implementation of a formal backlog plan.[34]

(U) DIA concurred with Recommendation 6.

(U) Finding 2.2: Consultations are a significant cause of processing delays and the IC does not have an established process or guidance for consultations.

(U//~~FOUO~~) The Act states that programs should conduct consultations with other agencies with all practicable speed. When a program locates responsive records, it should determine whether another agency has a substantial interest in the records and consult with the other agency. In these consultations, a FOIA program responding to a request first forwards a record to another agency or component within the same agency for its review. Once the agency in receipt finishes its review, it responds back to the agency that forwarded it, who then responds to the requester. Within the IC, it is common to process requests with records involving joint reports or other documents that contain information originating from or of interest to several agencies. For example, intelligence assessments may rely on more than one source of intelligence and often include sources originating from multiple agencies and containing multiple equities. OIP identifies CIA as one of the three agencies that account for nearly 70 percent of all consultations processed government-wide with CIA processing 14 percent or 819 consultations in FY17.[35]

(U) We found that consultations take extensive time to complete and can cause significant delays in overall processing. There are a number of contributing factors to consultation lags within the IC. Several agencies that have IC components, including DHS and DOS, do not have JWICS terminals in their FOIA offices. As a result, there is no easy method to transfer documents from one agency to another due to system incompatibility. FOIA professionals often print documents, scan them, and upload to a different

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[34] (U) IC IG initially addressed this recommendation to, "DIA, Chief FOIA and Declassification Services Branch." DIA's official concurrence requested this recommendation be addressed to "DIA," and provided IC IG with a point of contact for action related to this recommendation.

[35] (U) OIP Summary of Annual FOIA Reports for Fiscal Year 2017, undated.

system or send via postal mail. For those that use email, file size of the records is an issue and can result in programs sending multiple emails to transmit one case. Further, programs do not always follow up to check on the status of consultations and in some instances, the receiving organization is unable to locate the case, requiring the process to restart. Programs that have success closing consultations report regular and persistent follow up. Figure 8 provides FY17 consultations data.

(U) Figure 8: FY16/17 Consultations Received/Processed, and Pending (IC elements' annual reports to OIP).

FY 16/17 Consultations Received/Processed and Pending
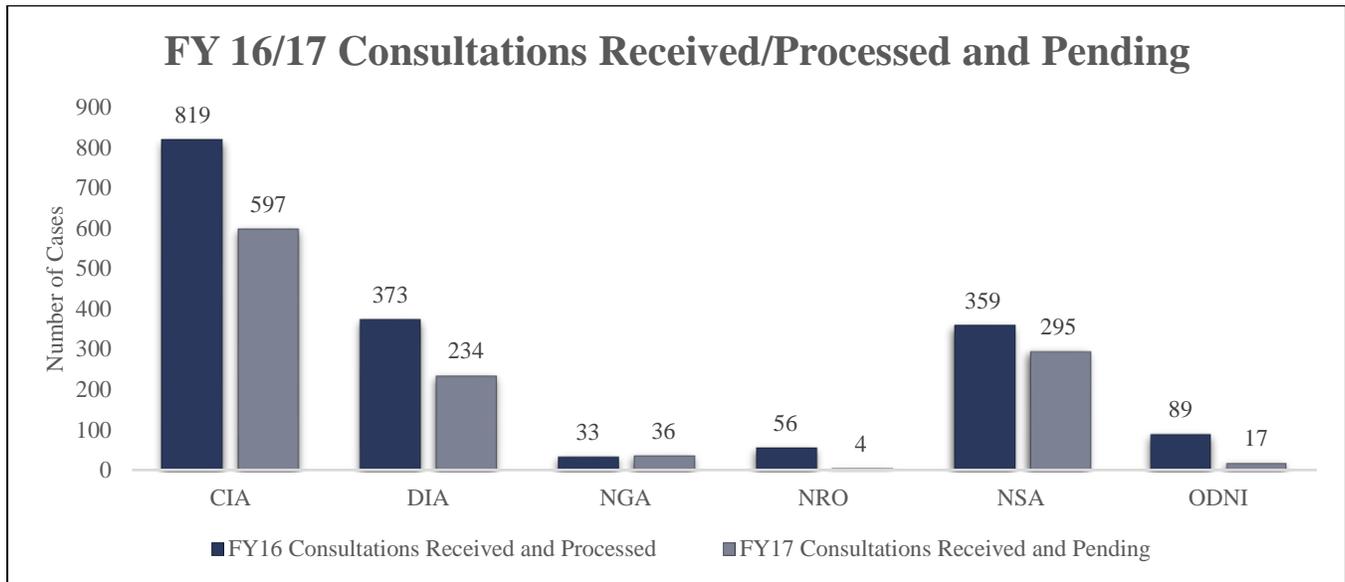
Figure 8 – Unclassified

(U//~~FOUO~~) OIP guidance states that when agencies routinely locate the same or similar types of documents or information that originated with another agency, or when agencies find that they routinely receive for consultation or referral the same type of record or information from another agency, they should look for ways to collaborate to see if they can adopt standard processing procedures to reduce the number of referrals or consultations that need to be made.[36] We found that a few agreements exist between some IC FOIA programs that describe how to handle each other's information or provide authority to make decisions. These agreements, if implemented properly, result in efficiencies because the program processing the case is empowered to make redactions and does not need to create a referral memorandum to the other organization. IC FOIA programs' greatest concern with these agreements is that the parties will go beyond their agreed upon authority to redact specific information, make a mistake, or inadvertently release classified or sensitive information.

(U) Apart from these unilateral agreements, the IC lacks guidance for consultations and there is no consistent approach. The aforementioned 2016 FOIA Improvement Plan includes one recommendation that called for agencies to include specific language in the memos used during the referral and consultation process. Agencies were to include language that explains how they plan to treat the document, and when possible which other agencies are consulted. During our review, we found that the IC has not implemented this recommendation or issued any guidance for consultations because ODNI

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[36] (U) OIP Guidance, *Referral, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them*, August 15, 2014.

IMD leadership focused on its own FOIA program and not the working group recommendations. FOIA professionals agree that IC-wide guidance for consultations would help address areas of common concern across the IC and provide visibility into cross-IC cases. Several officials acknowledged that the Act gives authority for management of FOIA programs to heads of departments and agencies and as a result, ODNI is not likely to issue a formal policy document, such as an Intelligence Community Directive. However, the Director, IMD agreed that in its integrator role, ODNI has the authority to prepare guidance specific to common IC FOIA issues. The IMD website indicates IMD's role is to provide "light guidance" to ensure consistent information management practices across the IC. In the absence of guidance, IC programs are likely to continue to follow existing burdensome and inconsistent consultation processes.

(U) Recommendation 7: For ODNI Director, IMD – In coordination with the CIA Chief FOIA Officer; the DNI Chief FOIA Officer; the DIA Chief FOIA and Declassification Services Branch; NGA Branch Chief, Declassification/FOIA/Privacy Act Branch; NRO Chief Information Review and Release Group; NSA Chief FOIA Privacy Act Division; and the DoD Chief FOIA Officer, develop IC guidance to address consultations.

(U) ODNI concurred with Recommendation 7.

(U) Finding 2.3: Chief FOIA Officers are reviewing programs annually but have not made recommendations for improvements to IC FOIA programs to the heads of their agencies.

(U) The *FOIA Improvement Act of 2016* requires that the Chief FOIA Officer of each agency review, not less frequently than annually, all aspects of FOIA administration by the agency, including: agency regulations, disclosure of records required under paragraphs (a)(2) [proactive disclosure provision] and (a)(8) [foreseeable harm standard], assessment of fees and determination of eligibility for fee waivers, the timely processing of requests, and the use of exemptions and dispute resolution services with the assistance of OGIS or the FOIA Public Liaison.[37] The Act also requires that the Chief FOIA Officer 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 the Act.[38]

(U//~~FOUO~~) IC FOIA programs reported that their Chief FOIA Officers are not performing comprehensive reviews of their programs. Each of the IC elements are reviewing their programs annually and submitting a Chief FOIA Officer report to the Attorney General as required. However, the involvement of the Chief FOIA Officers in these reviews is limited. In addition, we could not find evidence that the Chief FOIA Officers had made any recommendations to their agency heads for improvements to IC FOIA programs in FYs 16 or 17. CIA's Chief FOIA Officer reviews CIA's annual report and provides guidance but does not conduct a formal review of their program and/or processes. CIA advises that the Director, Agency Data Office, fulfills those functions on a daily basis in his management and oversight of all information management programs to include FOIA, and keeps the Chief FOIA Officer informed as appropriate. DoD includes DoD IC element data in their annual Chief FOIA Officer report to the Attorney General and in their annual report for the Secretary of Defense. The most recent DoD Chief FOIA Officer report to the Secretary of Defense, dated January 17, 2018, addressed ,among other items, the FOIA processing backlog and specifically mentioned DIA's backlog. However, the report covered the entire DoD and while it identified areas for improvement for the

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[37] (U) 5 U.S.C. § 552 (a)(8)(j)(3), as amended by Public Law 114-185—June 30, 2016, *FOIA Improvement Act of 2016*.

[38] (U) 5 U.S.C. § 552 (a)(8)(j)(2)(C), as amended by Public Law 114-185 – June 30, 2016, *FOIA Improvement Act of 2016*.

Department, it did not speak to any improvements specific to DIA, NGA, NRO, or NSA. In addition, while the annual reports and Secretary of Defense reports are available for DoD IC FOIA programs to review, there is no formal feedback process to provide the four DoD IC FOIA programs with review findings and recommendations for improvement.

(U//~~FOUO~~) Further, DoD IC element FOIA programs do not consider the annual data gathering by the DoD Chief FOIA Officer to constitute a review. DIA, NGA, NRO, and NSA FOIA programs all reported regular communication with the Directorate for Oversight and Compliance, Office of the Chief Management Officer (CMO) of the DoD, Office of the Secretary of Defense, but each acknowledged that CMO had not conducted formal program reviews. The Directorate of Oversight and Compliance assists the CMO in the fulfillment of Agency Chief FOIA Officer statutory responsibilities and considers both the DoD Annual FOIA report to the Attorney General and the DoD Chief FOIA Officer's report to meet statutory requirements of review of the DoD FOIA program. ODNI's Chief FOIA Officer (ODNI's Chief Operating Officer) is new to her role and stated that once she has greater familiarity with the ODNI FOIA program, she plans to review the programmatic effectiveness of ODNI's program. However, as of June 2018, the ODNI Chief FOIA Officer had not conducted reviews of the ODNI FOIA program.

(U//~~FOUO~~) Comprehensive FOIA program reviews provide Chief FOIA Officers an opportunity to identify areas for FOIA program improvement and develop recommendations for increasing FOIA compliance and efficiencies. Data in the Chief FOIA Officer reports covering 2016 and 2017 illustrate how the FOIA programs struggle to keep pace with the growth of FOIA. Chief FOIA Officers, due to their senior placement within each organization, are uniquely positioned to have visibility into the complexity of the FOIA enterprise. Although Chief FOIA Officers are overseeing their programs' progress with meeting statutory requirements through annual reviews and reporting, it was not evident that they are advocating for their FOIA programs to their agency head.

(U) Recommendation 8: For CIA and ODNI Chief FOIA Officers – Actively participate in the annual review of your FOIA program and make recommendations, as necessary, for improvements to the FOIA program to D/CIA and DNI, respectively.

(U) CIA and ODNI concurred with Recommendation 8.

(U) Recommendation 9: For DIA, NGA Branch Chief, Declassification/FOIA/Privacy Act Branch, NRO Chief Information Review and Release Group, and NSA Chief FOIA Privacy Act Division – Contact the DoD Chief FOIA Officer to collaborate on how best to conduct the annual review and establish a feedback mechanism to ensure your program receives results of annual reviews.[39]

(U) DIA, NGA, NRO, and NSA concurred with Recommendation 9.

(U) Finding 3: IC Element FOIA programs have various approaches to communicating with requesters but could further increase transparency.

(U) Improving communication and working cooperatively with FOIA requesters are essential parts of implementing an efficient and effective FOIA system. The Act outlines procedures for an agency to

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[39] (U) IC IG initially addressed this recommendation to, "DIA, Chief FOIA and Declassification Services Branch." DIA's official concurrence requested this recommendation be addressed to "DIA," and provided IC IG with a point of contact for action related to this recommendation.

discuss with requesters ways of tailoring large requests to improve responsiveness, recognizing that FOIA works best when agencies and requesters work together. In addition, according to OIP guidance, establishing good communication with FOIA requesters is an "essential element to ensuring that each agency's FOIA process is working in accordance with the President's and Attorney General's directives."[40] Additional OIP guidance states that agency FOIA offices "must be ready to assist the public in understanding all aspects of the FOIA and how it works at their agency" and "should be able to assist members of the public" by:

- (U) identifying sources of information that are already posted and available, thereby potentially obviating the need to make a FOIA request in the first instance;

- (U) informing potential requesters about the types of records maintained by the agency (or agency component) and providing suggestions for formulating requests; and

- (U) describing the agency's various processing tracks and providing the average processing times.[41]

(U) Proactively communicating with requesters may help avoid lawsuits. According to an OGIS official, personal contact is important and may prevent litigation. One IC official provided an example where engagement with the requester prevented a litigation action. We determined that all of the IC FOIA programs are communicating with requesters, but could make greater use of their websites to further share information.

(U) Observation 3.1: IC FOIA programs are proactively engaging with requesters by telephone, email, or letter.

(U) During our review, we found that all of the IC FOIA programs are communicating with FOIA requesters by telephone, email, or letter to acknowledge FOIA requests, clarify, and properly scope requests, thereby increasing the quality of the documents disseminated to requesters, and to relay anticipated response times. Of the IC elements reviewed, NRO appeared to have the most proactive relationship with its requesters. NRO's FOIA program reported that it acknowledges requester inquiries within 24 business hours, and provides the requester with a case number (if applicable) and hotline number. IC elements reported that engaging regularly with requesters has improved their FOIA request processing timelines. NGA's FOIA program provided an example of such engagement citing a case in which a requester initially asked for all records NGA possessed on Syria for the entirety of 2017. However, through negotiation with the requester, the FOIA staff was able to narrow the scope to months, thus facilitating a faster response.

(U) In one CIA example, in FY 2017, FOIA professionals had several discussions with an academic who requested all records on a specific political party in a specific country for a 16–year period. After FOIA professionals discussed his specific interest, the requester agreed to revise his request to documents about official corruption within the country's government, and documents about seven companies that were involved in those activities during the 16–year period. Through these negotiations, CIA was able to tailor

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[40] (U) OIP Guidance, *The Importance of Good Communication with FOIA Requesters,* August 21, 2014.

[41] (U) OIP Guidance, *The Importance of Quality Requester Services: Roles and Responsibilities of FOIA Requester Service Centers and FOIA Public Liaisons*, June 12, 2018.

the request to what the academic was actually interested in and identify specific search parameters to locate the appropriate responsive material.

(U) Similarly, ODNI's Civil Liberties, Privacy & Transparency (CLPT) office reported that they spoke with a FOIA requester who initially requested "all documents" related to a particular topic, or "a conversation." By engaging in discussions with the requester, CLPT was able to provide the requester what he needed without FOIA processing. A reduced, well-defined scope can result in faster response times, but FOIA requesters are not always willing to adjust the scope of requests. IC elements should continue to engage with requesters.

(U) Observation 3.2: IC Element FOIA programs are not routinely providing information to the public about the types of records they maintain on their website in part due to national security restrictions.

(U) Many requesters lack knowledge of the types of records the IC maintains. According to the OGIS, both IC FOIA programs and requesters could benefit if IC elements educate requesters on their missions. FOIA Advisory Committee (FAC) discussions note that if requesters knew the types of records agencies had, they could make more informed requests, rather than "any and all" requests, but many times they do not know what they should be asking for, because they do not know what records exist and how they are maintained. Education of requesters plays an important role in reducing inadequate searches, and more informed requests allow the agencies to conduct adequate searches. The 2016–2018 FAC, in its Final Report, for example, recommended that agencies disclose all unclassified reports agencies provided to Congress, with any necessary privacy redactions and all unclassified testimony submitted to Congress, making reports that are already the subject of many requests proactively available.[42] In addition, the FAC recommended posting an agency's organization chart and a directory listing contact information for all offices to ensure that the public can identify and contact federal offices for assistance.

(U//~~FOUO~~) IC elements face challenges that other US government agencies may not in determining what information to post on their public websites due to the classified and sensitive nature of the intelligence mission. Classification guides typically do not specifically stipulate what aspects of an IC element's mission may be shared with the public. IC elements are permitted by statute to withhold from the public information such as intelligence sources and methods, and information pertaining to agency employees, specifically: the organization, functions, names, official titles, salaries, or numbers of personnel employed. Therefore, if IC FOIA programs decide to share more on their websites, they must consider national security limitations.

(U) Observation 3.3: NGA has posted few frequently requested documents to its public website.

(U) The *FOIA Improvement Act of 2016* requires agencies make available for public inspection in an electronic format, records that have been requested three or more times. OIP guidance states that FOIA websites "should include a link to the FOIA Library (formerly called electronic reading rooms)" and that an agency's FOIA website and Reading Room can be a vital resource for users to find information that is

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[42] (U) *Report to the Archivist of the United States, Freedom of Information Act Federal Advisory Committee, Final Report and Recommendations 2016-2018 Committee Term,* April 17, 2018.

already publicly available.[43] OIP's 2017 guidance on proactive disclosures provides additional information and guidance on the content of FOIA Libraries.[44] In its 2017 DoD Chief FOIA Officer Report, NGA reported experiencing technical issues with the FOIA Library and that its system administration team was coordinating with technical support to improve functionalities. Several officials noted that NGA complies with the requirement to post records that have been requested three or more times, but that NGA does not often receive requests for the same document. All of the IC electronic FOIA Libraries we reviewed contained several released records, with the exception of NGA. A spot-check of NGA's FOIA webpage (https://www.nga.mil/ About/Pages/FOIA.aspx) in July 2018 revealed that NGA has a FOIA Library, but the Library contains only one FOIA document and three annual reports. NGA reported in August 2018 that it is planning to post more documents.

(U) Observation 3.4: The IC FOIA programs are proactively disclosing information to the public, but implementation challenges exist to routine posting of FOIA released documents to websites.

(U) The IC Principles of Transparency Implementation Plan states that the IC should follow the practice of publishing FOIA released information on its public websites.[45] Further, 2017 OIP guidance states that agencies should, as a matter of discretion, be routinely posting material that is of interest to the public.[46] IC FOIA professionals and transparency officials recognize the importance of proactive releases to inform the public. Members of the public post FOIA released documents on their blogs and websites and provide narratives about intelligence activities that often lack context and reflect an incomplete or erroneous understanding of the IC. Although not required by law, when the IC proactively releases documents on their IC websites, it is an opportunity for the government to provide context to information and share the official story with the public. IC FOIA programs continue to pursue proactive disclosures but have identified several factors that limit full implementation including litigation workload, a lack of funding, personnel shortfalls, technical issues, and dependencies on other components responsible for management of the website. IC FOIA programs should continue to work to post items of interest to the public.

(U) Observation 3.5: Some IC FOIA programs have implemented the Release to One, Release to All draft policy.

(U) In July 2015, OIP launched a pilot program with the participation of seven volunteer agencies that sought to assess the viability of a FOIA policy that would entail the routine online posting of records processed for release under FOIA.[47] The draft policy, "Release to One, Release to All," would result in access by all citizens to information released under FOIA, not just those making a request.[48] The pilot

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[43] (U) OIP Guidance, *Agency FOIA Websites 2.0,* November 30, 2017.

[44] (U) OIP Guidance, *Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request*, January 17, 2017.

[45] (U) *The Implementation Plan for the Principles of Intelligence Transparency*, October 27, 2015.

[46] (U) OIP Guidance, *Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request*, January 11, 2017.

[47] (U) OIP Proactive Disclosure Pilot Assessment, June 2016.

[48] (U) 24 C.F.R. Part 50, Request for Public Comment on Draft "Release to One, Release to All" Presumption, December 9, 2016.

identified metrics regarding the time and resources associated with implementing this policy. ODNI participated in the pilot and has continued to post all documents released under their FOIA program.

(U) During our review, IC FOIA programs reported a correlation between release of FOIA records to the public at large via website posting, and the subsequent influx of FOIA requests related to the same topic. However, the OIP pilot drew no conclusion as to whether the routine posting of FOIA processed records would result in an increase in requests. OIP has solicited input from and engaged with the public and other stakeholders on the draft policy, and is currently evaluating how to move forward in consultation with the Chief FOIA Officer Council. OIP acknowledges the resource implications of any new requirement to post additional records online.

(U) We found that several IC FOIA programs are releasing to the larger public records that they have released through FOIA processing. Figure 9 provides the status of IC FOIA program's implementation of proactive disclosure of records released under FOIA.

(U) Figure 9: Implementation of proactive disclosure of records released under FOIA.

IC Element	Status	Description of Implementation
CIA	Partial	During our review, CIA indicates they intend to post records with priority given to frequently requested records.
DIA	Full	Posts all releases on a monthly basis. Working with Public Affairs to market information placed on FOIA website.
NGA	Partial	Considering whether to incorporate this practice into policy. Will re-evaluate when their website has been reconstructed.
NRO	Full	Posts all releases on a quarterly basis, but in FY17 noted they had a break in posting records when funding was not available.
NSA	Partial	Reports proactive releases during 2017 but notes NSA's website was recently reorganized and they are working to establish an office presence on the website.
ODNI	Full	Since August 2015 has posted all FOIA responses. During this review, indicated they post all releases within two weeks, but have not had many records to post lately because not many initial FOIA cases have been completed due to focus on litigation.

Figure 9 – Unclassified

(U) Observation 3.6: IC FOIA programs could more effectively use their websites to educate the public by providing a description of their various FOIA processing tracks and average response times.

(U) Processing time varies depending on whether the FOIA request is a simple request, a complex request, or a request requiring expedited processing. Processing times also vary depending on the FOIA program officers' workload and other factors. While DIA provides requesters with a queue number for their request in correspondence, a review of the six IC element FOIA websites as of July 2018 revealed that none is currently providing information to the public about average processing times. Providing requesters with more visibility into FOIA processes and processing times can help manage requester expectations. Therefore, IC FOIA programs should consider providing a description of their processing tracks and average response times on their websites.

(U) Commendable 1: NRO conducted a survey of its FOIA requesters to solicit feedback.

(U) NRO recently conducted an online survey of its frequent requester community in order to better assess and understand satisfaction with FOIA processes and response letters. The survey included a section in which requesters provided input on the type of information that is most desired under the agency's proactive release program. While IC elements have various initiatives through transparency and historical declassification programs to seek public input, NRO was the only program we found that had a survey to seek input on the FOIA program. Surveying FOIA requesters can be an effective method for soliciting customer feedback on agency FOIA processes and requester document needs. IC FOIA programs should consider conducting a survey of their requesters.

(U) Finding 3.1: The IC has not strategically evaluated the effect of IC initiated proactive review and release initiatives on FOIA programs.

(U) The ODNI CLPT focuses on high-priority intelligence and national security initiatives to help the IC protect civil liberties and privacy as it pursues its intelligence objectives. CLPT also has a mission to ensure the IC provides appropriate transparency to the public. In 2014, CLPT led the Intelligence Transparency Working Group (ITWG) that identified a need for guidance on how offices such as FOIA, general counsel, civil liberties and privacy, public affairs, and information management should interact to integrate transparency within and across the IC. On April 4, 2016, then DNI Clapper formalized the transition of the ITWG into a permanent IC Transparency Council (ITC) with his signature on the Council Charter. IC FOIA professionals have varying levels of interaction with transparency, historical program, and declassification review officials. Recently, the IC has undertaken a number of historical declassification and transparency efforts to release information to the public. The IC delivered records on topics related to the John F. Kennedy assassination, the Vietnam War TET offensive, the White House directed review on Argentina, and Section 702 of the Foreign Intelligence Surveillance Act, among others.[49]

(U) In some IC elements, FOIA programs must shift resources away from FOIA processing to search for records or perform document reviews in support of these efforts, resulting in longer processing times for FOIA cases. We found that FOIA professionals were not always knowledgeable about recent transparency or historical review efforts and officials leading these efforts were not aware of the impact on FOIA programs. Further, in some cases, FOIA professionals were processing FOIA cases and making redactions of information when they learned the same information had just been officially released by a proactive declassification review. Knowledge of the other information review and release effort could have informed the FOIA program's approach in the FOIA processing. Although CLPT has provided informal guidance and shared best practices through the ITC, the IC has not developed formal written guidance to address integration between these offices. In the absence of formal written guidance, there is a risk that these declassification reviews may not be properly coordinated and will continue to require redirection of FOIA program resources without adequate planning.

(U) Recommendation 10: For ODNI's CLPT Officer, in coordination with ODNI/IMD, IC FOIA programs, and appropriate information management professionals – Develop overarching written

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[49] (U) Section 702 refers to the *FISA Amendments Act* that prescribes procedures for targeting certain persons outside the U.S. other than U.S. persons.

guidance that specifies roles, responsibilities, and processes for coordinating IC-wide transparency initiated declassification review and release projects.

(U) ODNI concurred with Recommendation 10.

(U//~~FOUO~~) Finding 4: The IC has mechanisms in place to reduce the likelihood of inconsistent FOIA release determinations.

(U//~~FOUO~~) The aforementioned 2015 initial briefing to the EXCOM on FOIA challenges spoke of inadequate insight into how other agencies are responding to the same or similar requests. In the briefing, the former Director, IMD noted this lack of insight has sometimes led to the same information processed differently or inconsistently redacted across agencies. The briefing highlighted the need for overarching guidance for releasable information when FOIA requests have equities originating in or across multiple agencies.

(U) For purposes of this assessment, we defined an inconsistent FOIA release determination as a decision to withhold information when in the past a decision had been made to officially release the same information or vice versa. As noted in the introduction and methodology sections of this report, IC IG asked IC elements for examples of inconsistent FOIA release determinations and performed open source research to locate examples; however, we did not address IC elements' application of particular FOIA exemptions in specific cases. We determined in some cases what appears to be an inconsistent release is actually the proper application of an IC element's statutory authority that allows one IC element to withhold information that another IC element may release such as an employee's official email address. Further, events may have transpired since the original release decision, such as a subsequent declassification of the same or similar information, which may legitimately result in a different decision on the same information upon a later review.

(U//~~FOUO~~) None of the IC FOIA program officials nor the current Director, IMD identified inconsistencies as a prevalent problem. In addition, our open source research did not yield information to suggest that inconsistencies were a significant issue. Further, we found IC FOIA programs practice a number of approaches to reduce the chance that inconsistent release decisions occur. Although there is no data available to perform a statistical analysis to measure occurrence of inconsistent decisions as a percentage of overall releases, several officials cite the large volume of pages released and the relatively small number of errors discovered. Nonetheless, we identified examples of different decisions on the same information. In April 2016, at ODNI's FOIA Officers' Information Day, a speaker, who was a frequent FOIA requester, provided examples of requesting information at separate times where the same documents were redacted differently. CIA shared a couple of examples in which there was a denial of information by a Glomar decision in one case and not in another for the same information. NSA reported a similar case in which DoD released a document containing NSA's information that should have been a Glomar decision, but NSA learned of it after the release. We also found an instance where redaction actions applied by multiple IC elements were not de-conflicted prior to release. NRO acknowledged a case in which they redacted a few words that had been previously released. In some cases, requesters brought these inconsistencies to the IC's attention and they were corrected.

(U) Factors that contribute to inconsistent FOIA release determinations include:

- (U//~~FOUO~~) Failure to conduct consultations with all organizations that have equities in the information being reviewed;

- (U//~~FOUO~~) No visibility across IC FOIA programs regarding requests for the same or similar information;

- (U//~~FOUO~~) Human error, primarily related to the volume of pages being reviewed and the manual nature of the review process;

- (U//~~FOUO~~) Inadequate research or limited search capability to determine if the information being reviewed was previously officially released; and

- (U//~~FOUO~~) A time gap between when the IC or other agencies officially release information and classification guides FOIA professionals use are updated to reflect a new classification or declassification decision.

(U) Observation 4.1: ODNI's 2016 FOIA Improvement Plan includes recommendations that should mitigate the chances inconsistent FOIA release determinations occur.

(U//~~FOUO~~) Although IC FOIA programs practice a number of approaches to reduce the chance that inconsistent release decisions occur, there are opportunities to improve these efforts. IC FOIA programs use a two or more person review of documents prior to release and employ senior reviewers. To be successful in minimizing inconsistencies, reviewers need expertise and longevity in their positions. IC FOIA programs also conduct research to locate previously released documents, but several identified inadequate enterprise wide systems to perform these searches. Several IC FOIA programs employ redaction software that uses code to identify words, but there is no common redaction software for the IC.

(U//~~FOUO~~) IC FOIA programs offer equities recognition training to reduce the chance that programs will mistakenly make a decision on information that belongs to another organization, which may be inconsistent with past decisions. We found this training raises FOIA professionals' awareness of organizational specific sensitivities to prevent inappropriate release of classified information. Several IC elements and the ODNI have hosted equities recognition sessions, but IC professionals believe the IC should sponsor more of this training.

(U//~~FOUO~~) In addition, when FOIA requesters submit requests for the same or similar information to multiple organizations, requesters are not required to notify each organization of the other's requests and the IC does not have a mechanism or IT tool that records FOIA requests received across the IC. As a result, the potential exists that IC FOIA programs could make different decisions on the same information if these requests are not properly coordinated through the consultation process. However, if ODNI implements Recommendation 1 of this report to execute its 2016 FOIA Improvement Plan, which is focused on greater collaboration, consultations, guidance, a collaborative site, and training, the IC should have a stronger framework to reduce inconsistent release determinations.

(U) APPENDIX A: ACRONYMS LIST

CIA	Central Intelligence Agency
CIG	Consolidated Intelligence Guidance
CLPT	Civil Liberties, Privacy and Transparency
DHS	Department of Homeland Security
DIA	Defense Intelligence Agency
DIF	Difficult Issues Forum
DoD	Department of Defense
DOJ	Department of Justice
DOS	Department of State
E.O.	Executive Order
EXCOM	Executive Committee
FAC	FOIA Advisory Council
FOIA	Freedom of Information Act
FY	Fiscal Year
IC	Intelligence Community
IC IG	Intelligence Community Inspector General
I&E	Inspections and Evaluations Division
IMD	Information Management Division
IT	Information Technology
ITWG	Intelligence Transparency Working Group
JWICS	Joint Worldwide Intelligence Communications System
NARA	National Archives and Records Administration
NGA	National Geospatial-Intelligence Agency
NRO	National Reconnaissance Office
NSA	National Security Agency
ODNI	Office of the Director of National Intelligence
OGC	Office of General Counsel

(U) APPENDIX A: ACRONYMS LIST CONTINUED

OGIS	Office of Government Information Services
OIG	Office of Inspector General
OIP	Office of Information Policy
PA	Privacy Act
SME	Subject Matter Expert
USDI	Under Secretary of Defense for Intelligence

(U) APPENDIX B: COMMENTS

(U) ODNI concurred with Recommendations 1, 2, 3, 4, 5, 7, 8, 9, and 10. DIA concurred with Recommendation 6. CIA concurred with Recommendation 8. DIA, NGA, NRO, NSA concurred with Recommendation 9.

(U) CIA Comments

(U) CIA concurred with no comment.

(U) DIA Comments

(U) DIA concurred with no comment.

(U) NGA Comments

(U) NGA concurred with no comment.

(U) NRO Comments

(U) NRO concurred with no comment.

(U) NSA Comments

(U) NSA concurred with no comment.

(U) ODNI Comments

(U//~~FOUO~~) The Office of the Director of National Intelligence (ODNI) appreciates the opportunity to comment on the draft IC IG assessment. ODNI recognizes the need for improved FOIA processing and coordination within the IC, as well as its unique role in supporting such progress. ODNI will endeavor to implement the recommendations provided by the assessment in a manner that respects and adheres to ODNI's authorities, and as can be realistically achieved with the available resources. ODNI also recognizes that implementation of the IC IG recommendations may take time.

(U//~~FOUO~~) As such, ODNI concurs with the ICIG assessment with the following comments/recommendations:

- (U//~~FOUO~~) Recommended changes to references to Intelligence Transparency Working Group – The Intelligence Transparency Working Group (ITWG) was formalized into the Intelligence Transparency Council by a charter signed by then-DNI Clapper in April of 2016 and posted publicly. Accordingly, suggest, in the first paragraph under Finding 3.1, add a new sentence after the existing third sentence, as follows: "On April 4, 2016, then DNI Clapper formalized the transition of the ITWG into a permanent IC Transparency Council (ITC) with his signature on the Council Charter." In the second paragraph, replace "ITWG" with "ITC." (CLPT).

(U) IC IG made this change prior to publication.

- (U//~~FOUO~~) Adjust Updated Recommendation 1 to add EXCOM approval of the updated plan – Once ODNI updates the FOIA Improvement Plan, approval by the EXCOM would be necessary to elicit IC-wide commitment, and to enable IMD to implement the updated plan in successful collaboration with the IC elements.

(U) IC IG made this change prior to publication.

(U) APPENDIX C: SUMMARY OF FOIA EXEMPTIONS

(U) This appendix provides a summary of the FOIA exemptions. For the full statutory language, see 5 U.S.C. § 552 (b).

(b)(1) Records are currently and properly classified in the interest of national security.

(b)(2) Records that relate solely to the internal rules and practices of an agency.

(b)(3) Records that are protected by another law that specifically exempts the information from public release.

(b)(4) Trade secrets and commercial or financial information obtained from an individual or business which would cause substantial competitive harm to the submitter if disclosed.

(b)(5) Inter-agency or intra-agency documents which would not be available by law to a party in litigation with the agency (e.g., records protected by the deliberative process, attorney-client or attorney-work product privileges).

(b)(6) Records which if released would result in a clearly unwarranted invasion of personal privacy.

(b)(7) Investigatory records or information compiled for law enforcement purposes.

(b)(8) Records used by agencies responsible for the regulation or supervision of financial institutions.

(b)(9) Records containing geological and geophysical information regarding wells.

(U) APPENDIX D: SUMMARY OF RECOMMENDATIONS

(U) **Recommendation 1:** For ODNI Director, IMD – Update, obtain EXCOM approval, and begin implementation of the recommendations of the 2016 FOIA Improvement Plan.

(U) **Recommendation 2:** For ODNI Director, IMD – Revise the 2016 FOIA Improvement Plan to align the IT recommendation to the appropriate IC strategic priorities (e.g., within the *CIG: Fiscal Year 2020–2024* and other relevant strategic documents).

(U) **Recommendation 3:** For ODNI Director, IMD – Reestablish the Difficult Issues Forum or another IC body for IC element FOIA programs to collaborate.

(U) **Recommendation 4:** For ODNI Director, IMD – Initiate discussions with OIP on IC-wide FOIA issues.

(U) **Recommendation 5:** For ODNI Director, IMD – Initiate discussions with OGIS regarding strategic IC-wide FOIA issues, access concerns, and the IC's perspective on the FOIA statute.

(U) **Recommendation 6:** For DIA – Complete and begin implementation of a formal backlog plan.[50]

(U) **Recommendation 7:** For ODNI Director IMD – In coordination with the CIA Chief FOIA Officer, the DNI Chief FOIA Officer, the DIA, Chief FOIA and Declassification Services Branch, NGA Branch Chief, Declassification/FOIA/Privacy Act Branch, NRO Chief Information Review and Release Group, NSA Chief FOIA Privacy Act Division, and the DoD Chief FOIA Officer develop IC guidance to address consultations.

(U) **Recommendation 8:** For CIA and ODNI Chief FOIA Officers – Actively participate in the annual review of your FOIA program and make recommendations, as necessary, for improvements to the FOIA program to D/CIA and DNI, respectively.

(U) **Recommendation 9:** For DIA, NGA Branch Chief, Declassification/FOIA/Privacy Act Branch, NRO Chief Information Review and Release Group, and NSA Chief FOIA Privacy Act Division – Contact the DoD Chief FOIA Officer to collaborate on how best to conduct the annual review and establish a feedback mechanism to ensure your program receives results of annual reviews.

(U) **Recommendation 10**: For ODNI's CLPT Officer – In coordination with ODNI/IMD, IC FOIA programs, and appropriate information management officials – Develop overarching written guidance that specifies roles, responsibilities and processes for coordinating IC-wide transparency initiated declassification review and release projects.

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[50] (U) IC IG initially addressed recommendations 6 and 9 to, "DIA, Chief FOIA and Declassification Services Branch." DIA's official concurrence requested this recommendation be addressed to "DIA," and provided IC IG with a point of contact for action related to this recommendation.

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37

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