

Fossil FOIA requests

At least one records request goes back 20 years ... and counting

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Bill Clinton was three months into his presidency when Monte Finkelstein submitted a federal Freedom of Information Act request to the National Archives and Records Administration for documents relating to records on the movement the Allied troops kept during World War II. Finkelstein is still waiting for the records.

Finkelstein has the fourth oldest pending FOIA request among federal agencies, which he submitted on May 4, 1993. Finkelstein, then a professor of history at Tallahassee Community College, was working on a book about Sicilian separatists in the 1940s, and submitted FOIA requests to several federal agencies, including the FBI and the CIA. He received documents from most of the requests — except for one.

“My book’s been published already, and of course, I’ve moved on — but I would love to see what’s in this request,” Finkelstein said.

Finkelstein is not alone in his wait for requests. According to FOIA.gov, the oldest request on record (also to the National Archives) dates back to September 1992 and is for documents relating to nuclear disarmament policies ranging from 1959 to 1963. All of 10 the oldest pending requests to the National Archives and the Department of Defense date back to the 1990s.

For some, especially journalists, the time spent waiting for information requested through FOIA can render the information almost useless.

Even for historians, who typically work on longer deadlines, response delays pose issues to their work. Finkelstein had almost concluded work on his book — *Separatism, the Allies and the Mafia: The Struggle for Sicilian Independence 1943-1948* — when he received a certified package containing documents from the CIA, without any contact or notification.

“It came to me very unexpectedly,” he said. “I ended up rewriting portions of my text, delaying my publishing date.”

FOIA has been used by journalists, academics and the public as a tool for investigation into government and historical events, including mismanagement of relief funds for Hurricanes Katrina and Rita, FBI surveillance of civil rights movement leaders and environmental and public safety concerns.

Federal agencies require a written request to obtain information under the act. By law, agencies must respond to a request within 20 business days. However, agencies often take much longer to respond.

Delays in processing

For many requesters, it is unclear why their requests are delayed for so long.

Josh Gerstein, a White House reporter specializing in legal and national security issues at Politico, once waited nine years for records from the FBI concerning lobbying efforts in favor of a 2002 Saudi proposed Arab peace plan. Though he said there are some loose ends to the story, the documents are not especially useful to him at the moment.

For Gerstein, this delay in obtaining information makes it difficult to use FOIA for reporting breaking news stories.

“It’s so often that we ask for stuff and don’t get anything for years. That’s the most frustrating thing — when you’re asking for stuff for a story and it may take years,” he said. “The timeline is not conducive for people — it’s barely tolerable. It’s certainly not conducive for reporters.”

Some say the volume of requests received by federal agencies is too much for some agencies to handle. Recent reports have stated that agencies received more requests in 2011 than in previous years. Melanie Ann Pustay, director of the Office of Information Policy of the U.S. Department of Justice, testified before the U.S. House of Representatives Oversight and Government Reform Committee in March that FOIA requests increased by about 46,000 from Fiscal Year 2010 to FY 2011.

In addition some believe a lack of agency communication may contribute to lengthy delays.

Gerstein said he believes FOIA requests were delayed or lost when sent between agencies. In his own experience, Gerstein requested documents from the Director of National Intelligence that were later forwarded to the FBI, the agency that held the records he was seeking. Gerstein said he was not provided any information other than that the requests were transferred between agencies.

“In that process, the records get lost track of,” Gerstein said. “There’s no tracking number for the between-agency requests. I honestly believe that [the agencies] just put [the requests] in a manila envelope and mail them.”

Miriam Nisbet, director of the Office of Government Information Services - an office within the National Archives and Records Administration that mediates FOIA disputes between requesters and agencies, and reviews and makes recommendations on the administration of the FOIA, agreed that transfers between agencies are a major problem facing FOIA processing.

“We know that that can be a real stumbling block for a number of reasons,” she said. “Let’s say the request goes to agency X and they’ve found that the request originates in agency Y, so they send it over. Having that referral and consultation process makes sense, but it can get really complicated when other agencies are involved.”

Finkelstein’s 1992 FOIA request went through several agencies for approval, according to documents

in Finkelstein's possession. The documents he requested — "Sicily-Maffia," "Separatism and Separate Movement in Sicily" and "Sicily Separatism and the Separatist Movement in Sicily" — had to go through a declassification process, which was approved by the National Archives in June 1993. The declassification request was then sent to the Department of the Army.

The next correspondence in Finkelstein's possession is a 1996 letter from the Archives to the Office of the Chief of Naval Operations asking for the chief's approval of the declassification of several documents in its possession relating to Finkelstein's request. According to the letter, the declassification (with some withholding provisions) was approved by the Department of the Army.

In 1998, the last dated correspondence between the agencies, the CIA also approved the declassification of the documents for Finkelstein.

Often requests for material, such as the request for records on nuclear disarmament, must go through a declassification process which can add additional processing time to a request.

"I worry that since Sept. 11, there's been an overuse of the secrecy stamp," Sen. Patrick Leahy (D-Vt.) said at a Senate Judiciary Committee hearing in March. "Secrecy can come at an unacceptable price for the public."

How well do agencies respond?

With the oldest pending FOIA requests dating back 20 years, it is difficult to justify why these requests have taken so long to complete.

The Reporters Committee for Freedom of the Press sent FOIA requests to the 25 federal agencies — 39 agency components in all — with the highest number of pending FOIA requests, as well as the Department of Energy which has some of the oldest pending requests on record. The requests asked for request letters and agency correspondence for the 10 oldest pending requests as reported by the agencies.

Of the requests sent, 34 of the agency components responded that they were processing the request as of the publication of this article. Nine requests were received in full or in part.

Only one of the agencies that provided documents to the Reporters Committee request — the National Labor Relations Board — closed all 10 of its oldest pending requests (though the Food and Drug Administration accidentally reported a filled request as a pending request.)

Most of the agencies contacted by the Reporters Committee responded with a note that the request had been received. However, some of the agencies did not respond at all to requests. As of the date of publication, the Reporters Committee had not heard from five of the contacted agency



Monte Finklestein has the fourth oldest unfulfilled FOIA request among federal agencies. In 1993, history professor submitted a request for Allied troop movements during World War II.

components.

Looking at the correspondence, it becomes clearer why processing is delayed in some cases.

Many of the requests to the National Archives, including Finkelstein's, had to be declassified and required coordination between multiple agencies. For some of the requests, the Archives released records as they were declassified and approved by the coordinating agencies.

For other agencies, including the Pension Benefit Guaranty Corporation, requests become delayed because of issues relating to the Privacy Act. The Pension Benefit Guaranty Corporation does not release information about a participant without a written release by the participant, according to correspondence with requesters.

Though at times delays cannot be avoided, many of the contacted agencies failed to communicate with requesters throughout

the process. In Finkelstein's case, there is no record of correspondence between him and the National Archives regarding his 1993 request until April 2011.

"I am wondering if you are still interested in receiving an answer from us," wrote David Fort, a FOIA specialist at the National Archives, in an email to Finkelstein. "Please let me know how to respond."

"How old is this request?" Finkelstein replied. "I must have made it some time ago when I was working on my book. I would still be interested in seeing the documentation, if only out of personal interest."

Though many agencies work to respond to requesters — the Animal and Plant Health Inspection Service, the Equal Employment Opportunity Commission and the Pension Benefit Guaranty Corporation all contacted the Reporters Committee to inform of the status of the requests — in many cases, information can arrive without any prior

communication from an agency.

Because information may not come in a deadline-friendly time frame, Gerstein — who files at least one FOIA request per month — said he rarely has a concrete story idea when he files a request because of delays in processing requests.

“My hopes of getting stuff are so low that rarely would I have a plan that if I get this, I’ll write this story,” Gerstein said. “It wouldn’t occur to me to move forward with it.”

Future of FOIA

During his first full day in office, President Barack Obama released a memorandum promising his commitment to “an unprecedented level of openness in Government.” However, Sen. Chuck Grassley (R-Iowa) said in March, that there seems to be “a complete disconnect between the president’s grand proclamation and the president’s appointees.”

Gerstein was a bit more optimistic, but agreed that as a whole, the Obama administration has not lived up to its promised changes.

“I think there have been a couple of programs and a couple of specific things they’ve done,” Gerstein said. “I do think that at least some agencies release a bit more information. Beyond that, I see very little evidence the way the dramatic change was supposed to take place.”

In recent years, the government has established new policies to help alleviate long

delays in request processing. The OPEN Government Act of 2007 established a tighter timetable for responding to requests, a numbered tracking system for requests and the Office of Government Information Services (OGIS), which reviews the FOIA policies and procedures and compliance of federal agencies.

OGIS, which opened its doors in 2009, has opened about 900 mediation cases between requesters and agencies. Often disputes relate to issues regarding delays or withholdings of records.

The office operates with a two-pronged function — as a mediator for FOIA-related disputes and as a reviewer for FOIA mandates and compliance — acting as an ombudsman for FOIA processing, according to Nisbet.

“At heart, a lot of it really is trying to be more responsive, more proficient and more customer service oriented,” she said. “We are really changing the culture, particularly in FOIA, making it not adversarial. The information belongs to the public — they shouldn’t have to fight to get it.”

The Obama administration has also increased the number of processed requests. A study by open government advocate group OMB Watch said that federal agencies processed 6 percent more requests in 2011 than in the previous year, and also decreased the number of denials. Agencies including the

State Department and the Department of Health and Human Services have been able to reduce their backlogs by 60 and 32 percent, respectively, according to Pustay.

Many agencies allow requesters to make and track the progress of their requests online. In March, the Environmental Protection Agency, along with the National Archives and the Department of Commerce, announced a plan to release an online portal that will allow requesters to make and track requests to multiple agencies. It is expected to debut in October.

Still, for those still waiting for requests and reporters such as Gerstein, the changes in the handling of FOIA requests are very small.

“I’ve become somewhat pessimistic that it’s really possible for an administration to make a dramatic change,” he said. “There’s such an inherent reluctance in the government to put out information that might make them look bad. It takes a concerted effort from an administration and I haven’t seen that.”

Nisbet said any significant changes to FOIA processing will take some time. “There’s a great diversity across the government in how FOIA requests are handled — we’re trying to be aware of that,” Nisbet said. “I’ve got a great staff of very dedicated and enthusiastic people. But, we really see this as a long-term change.”

Though Finkelstein,

who is now dean of the history department at Tallahassee Community College, is unlikely to use any documents he receives from the National Archives for his research, he said he is interested to see what information the documents contain that may warrant keeping them hidden for nearly 20 years.

“I went ahead with my book without the stuff [from the National Archives],” Finkelstein said. “Maybe I’ll receive another certified package someday.”