

U.S. NUCLEAR REGULATORY COMMISSION FREEDOM OF INFORMATION ACT PROGRAM REVIEW

1. PURPOSE

Review the U.S. Nuclear Regulatory Commission's (NRC) Freedom of Information Act (FOIA) program to improve FOIA services and make them more citizen centered, to identify solutions and a path forward that will enable NRC to reduce its FOIA case backlog, and to identify ways to routinely make more information available to the public without the need for a FOIA request.

2. BACKGROUND

This report details the results of the review of the NRC FOIA program as required by Executive Order (EO) 13392, "Improving Agency Disclosure of Information," dated December 14, 2005. The review examined NRC FOIA business processes for compliance with the spirit and intent of the EO. This report provides a background overview of the NRC FOIA program, explains the review methodology, identifies the requirements of the EO, provides findings of the level of NRC compliance with those requirements, and recommends improvements in processes and ways to reduce the FOIA backlog.

The NRC has five individuals working full-time on FOIA activities—four Government employees in the Office of Information Services (OIS) FOIA/Privacy Team (FPT) and one contractor employee. Additionally, 25 NRC employees serve as part-time FOIA coordinators. These individuals are located in program and regional offices throughout NRC, manage searches for records and provide initial responses to the FPT for their individual program office or region. Based on time and labor reporting, in addition to the five full time individuals, the NRC utilized the equivalent of an additional four full-time employees for FOIA coordination activities in fiscal year (FY) 2005.

The responsibilities of the FPT include the following:

- establishing and implementing policies and procedures for the agency's FOIA program
- receiving and responding to all NRC FOIA requests and appeals
- training NRC employees involved in processing FOIA requests

In FY 2005, commercial requesters submitted almost half (48 percent) of the FOIA requests received by NRC. The commercial requesters are primarily law firms representing clients such as licensees, prospective licensees, parties interested in the purchase of land or buildings of former licensees, or persons engaged in litigation with licensees. Private individuals accounted for 42 percent of the FOIA requests, the media accounted for 9 percent, and educational/nonscientific groups comprised the final 1 percent of requesters.

The types of documents processed by the FPT in response to FOIA requests cover a broad range of information related to NRC operations and functions. For example, requesters asked for information related to (1) the licensing and decommissioning of nuclear reactors, low-level and high-level radioactive waste facilities, storage and use of nuclear materials, safety studies, and incidents; (2) allegations and investigations of alleged wrongdoing on the part of licensees,

employees, or contractors; (3) NRC Inspector General investigations and audits; (4) regulatory decisions; and **(5) general information on** news releases, speeches, fact sheets, and contracts. FOIA requests involving classified national defense information annually average fewer than three.

When NRC receives a FOIA request, the staff enters the pertinent data into FOIAXpress, an automated case tracking system, and assigns a case number. The case is assigned to a FOIA specialist for processing. The FOIA specialist acknowledges receipt of the request in a letter to the requester and forwards the request to the appropriate NRC offices where records may be located. The offices conduct searches, retrieve responsive records, make an initial determination whether the information can be released or should be withheld, and forward the records to the FOIA specialist. The FOIA specialist reviews the records and concurs in the release determinations or contacts the offices and discusses any differences in opinion, ultimately reaching agreement on document release determinations. The FOIA specialist then forwards the records to the Office of the General Counsel (OGC) for legal review, as necessary, and ensures there is no legal objection from the OGC. Once OGC provides its review and returns the records to the FOIA specialist, the FOIA specialist prepares the packet and correspondence for supervisory approval and the final response to the requester. The FOIAXpress administrator enters data about the response into the FOIAXpress database, used in preparing the annual FOIA report, prepares the file for archiving, and, when appropriate, forwards a copy of the records to the NRC Document Processing Center for inclusion in the Agencywide Documents Access and Management System (ADAMS), which is the agency mechanism for public access to NRC documents. A contractor secretary prepares the response packet and correspondence for mailing, ensures that it is mailed, and places the archive file in the FOIA records storage room.

NRC makes information about its FOIA program available in two places on its Web site at <http://www.nrc.gov>. The first location is the link to NRC's FOIA program. From the main NRC home page, select the link to the FOIA page, "FOIA Requests," which is in the left-most navigation menu. Click on "FOIA Requests" to go to the FOIA home page. The FOIA home page has a left-most navigation menu that, when an item is selected, takes the user to a page that provides drill-down access to multiple layers within the FOIA site. The layers include the following components related to FOIA:

- the NRC FOIA Information Guide
- a link to information related to EO 13392
- a link to an explanation of fees associated with FOIA requests
- a list of closed FOIA requests with a link to the ADAMS home page
- a list of recent FOIA requests
- a list of frequently requested FOIA records
- a list of annual FOIA reports

The second location where NRC makes information available on its Web site is the link to NRC's Management Directive (MD) on FOIA. From the "Electronic Reading Room," which provides a list of "All Collections," select "Management Directives," then "Volume 3" for Management Directive 3.1, "Freedom of Information Act," which was revised in March 2006.

When NRC denies access to information in response to a FOIA request, NRC advises the requester of his or her right to appeal and provides information on how to appeal. NRC has designated multiple initial denial and appeal authorities. The office directors, regional administrators, the Assistant Inspector General for Investigations, the Executive Assistant to the Secretary of the Commission, and the General Counsel or their designees are the initial denial authorities for information generated by their office or region and for information related to actions under their purview. The appellate authorities are as follows:

- For agency records to which access is denied by the Assistant Inspector General for Investigations, the appeal authority is the Inspector General.
- For agency records to which access is denied by the Executive Assistant to the Secretary of the Commission, the General Counsel, or an office director reporting to the Commission, the Secretary of the Commission is the appeal authority.
- For agency records to which access is denied by agency officials other than the Assistant Inspector General for Investigations, the Executive Assistant to the Secretary of the Commission, the General Counsel, or other office director reporting to the Commission, the Executive Director for Operations or a Deputy Executive Director is the appeal authority.

3. METHODOLOGY

The review involved a review of the complete life cycle of the NRC FOIA business processes, from receipt of a FOIA request to issuance of a response to the requester, and the timeliness of such processes. The review also compared the response times of simple and complex FOIA requests and weighed the overall benefits of extensive FOIA staff line-by-line review of records received from the offices against accepting the recommendations of the offices without a line-by-line review by the FOIA staff. In addition, the review included identifying the basic causes for delays in responding to requests, assessing opportunities to alleviate delays and streamline the FOIA review process, thereby reducing the FOIA backlog.

Finally, the review specifically examined the following requirements of the EO:

- NRC's administration of the FOIA program, including the expenditure of resources on FOIA compliance and the extent to which NRC has not responded to requested records within the statutory time limit (backlog)
- NRC's processes and practices by which it assists and informs the public regarding the FOIA process
- NRC's use of information technology in responding to FOIA requests and communicating with requesters, including practices with respect to requests for expedited processing and NRC's implementation of multitrack processing
- NRC's policies and practices with respect to making records available through its Web site and other means without a FOIA request

4. FINDINGS

Findings pertaining to NRC's administration of the FOIA program, including the expenditure of resources on FOIA compliance, and the extent to which requested records have not been responded to within the statutory time limit include the following:

- NRC offices are required to provide records and their recommendations for release or denial of information within 10 days of receipt of a FOIA request. In FY 2005, of the 25 offices, the responses for 22 offices averaged 10 days or less, and only 3 offices averaged more than 10 days. The agency average was 8 days. These statistics indicate that, with the exception of the three offices whose average exceeded 10 days, the agency as a whole did a good job of providing records in a reasonable enough time for the FOIA staff to have been able to process them in 20 days.
- In Title 10, Section 9.25, "Initial Disclosure Determination," of the *Code of Federal Regulations* (10 CFR 9.25), NRC describes its use of a three-track processing system. Track A processes requests of simple to moderate complexity to be **dispatched** within 20 working days. Track B handles requests involving "unusual circumstances" to be **dispatched** between 21 and 30 working days. Track C manages requests that, because of the large volume of documents encompassed by the request or other complexities of the response, take more than 30 working days to complete. At the end of FY 2005, NRC had 57 cases in its simple processing track (Track A). However, the median number of pending days for these 57 simple cases was 32. This shows that requests identified as simple are taking longer to complete than estimated.
- At the end of FY 2005, NRC had 23 cases in its complex tracks (Tracks B and C). The median number of pending days for the 23 complex cases was 247. The average number of pending days for the 23 complex cases was 242. The review shows that half of the complex cases were pending for more than 8 months. The median of 247 days response time for pending complex cases reflects, in part, the volume of material contained in their responses and the need for extensive coordination. Upon further analysis, we have determined that a major contributor to NRC delays in responding to FOIA requests is the staffing level within the FPT. NRC continues to experience challenges staffing the FPT and meeting the FOIA timeliness goals due to other higher priority agency work.
- A single FOIA request may task multiple offices to search for responsive records. Each office's staff searches for responsive records within its purview. Then, the records are assigned for expert-level review within each office based on the subject matter and in accordance with procedures established by each office. Multiple subject matter experts (SMEs) may review different documents depending on the types of documents located during the search. The SMEs make recommendations for the release or denial of the information. The office FOIA coordinator collects the records from the SMEs and also reviews the records for proper application of any FOIA exemptions. The office FOIA coordinators and SMEs must resolve any differences of opinion. The office FOIA coordinator forwards the records to the FPT. In most cases, the FPT FOIA specialist assigned to the case conducts a line-by-line review of the records; however, some documents in less complex cases may receive only a cursory review. The FPT FOIA specialist works with the office FOIA coordinators to resolve questions, issues, or disagreements. This coordination often entails meetings between the FPT FOIA specialist, the office FOIA coordinator, and the SMEs. The FPT FOIA specialist also must review and correlate the submissions from multiple offices to ensure continuity and

standardization of the information being released and/or denied. This process is time consuming when multiple offices are involved or the records are voluminous. When submissions of what appear to be the same documents are received from multiple offices, the FPT FOIA specialist must review the submissions line-by-line to ensure consistency. This adds to the processing time and contributes, in some cases, to not meeting the 20-day requirement.

- Another contributing factor to the staff's timeliness in responding to FOIA requests is the knowledge and experience of the staff processing the requests. The FPT staff averages 17 years of experience processing FOIA requests at NRC. They are very knowledgeable regarding FOIA and NRC's structure and mission. They routinely attend training provided by the Department of Justice (DOJ) and the American Society of Access Professionals. They read newsletters and other publications to keep informed of the latest FOIA and Privacy Act court decisions. The office FOIA coordinators perform this function on an ancillary basis and are not as well trained or experienced in FOIA processing. Some of them attend DOJ FOIA training, but the majority of them receive FOIA training provided by the FPT. Very few of the SMEs who review documents for FOIA recommendations have had formal DOJ or FPT FOIA training. They receive a copy of FPT guidance entitled "How to Respond to an Initial FOIA Request" (ADAMS Accession No. ML060590485). They also can use NRC MD 3.1 as a reference and discuss issues with their FOIA coordinator or the FPT FOIA specialist, when necessary.
- A review of the FOIA program business processes revealed that the processes have been streamlined and refined over many years, but NRC has obtained only minor improvements in processing times.
- In FY 2005, NRC's total FOIA processing costs, including staff and contractor resources, were \$1,016,677. In FY 2005, NRC collected \$43,081 in processing fees, which was 4.2 percent of NRC's total FOIA processing costs.

Findings regarding the processes and practices by which NRC assists and informs the public regarding the FOIA process include the following:

- NRC primarily assists and informs the public regarding its FOIA process through its Web site (see background section of this report), which includes the NRC FOIA Guide and NRC annual FOIA reports to DOJ. Other methods of informing the public include 10 CFR Part 9, Subpart A, "Freedom of Information Act Regulations," and the NRC brochure, NUREG/BR-0010, "The Citizen's Guide to U.S. Nuclear Regulatory Commission Information," both of which explain the NRC FOIA program and the process for submitting a FOIA request. NUREG/BR-0010 can be found on the NRC Web site in the "Electronic Reading Room" by selecting the menu option "Document Collections" then selecting "NUREGS." It is also available through the U.S. Government Printing Office and in the NRC Public Document Room. The regulations in 10 CFR Part 9 can be found on the NRC Web Site in the "Electronic Reading Room" by selecting "Regulations (10 CFR)" or via the link to "10 CFR Part 9" in the "Introduction" section on the FOIA Web page. These methods adequately assist and inform the public about the NRC FOIA processes and are within the spirit and intent of the EO.
- Requesters can find concise descriptions of the FOIA exemptions used by NRC in 10 CFR 9.17, "Agency Records Exempt from Public Disclosure." However, 10 CFR 9.17 does not provide examples of agency records to which the exemptions apply. NRC's annual FOIA report also does not contain a concise list of FOIA exemptions or examples

of the types of records to which the exemptions apply. The NRC FOIA Web site contains a very concise list of the FOIA exemptions but does not provide examples of the types of records for which the exemptions apply. Examples of the types of records related to each exemption would help to better inform the public of the NRC FOIA process.

Findings pertaining to the NRC's use of information technology in responding to FOIA requests and communicating with requesters, including practices with respect to requests for expedited processing and multitrack processing, include the following:

- NRC sometimes communicates with requesters via email, but the staff initially responds to all FOIA requests via U.S. mail. When the requester provides a telephone number, the staff will resolve by telephone any questions concerning the request.
- The NRC Web site contains guidance on submitting a FOIA request. The guidance asks requesters to provide an email address and a telephone number. An email address is required for electronically submitted requests. Despite the guidance requesting email addresses and phone numbers, many requesters, predominantly private individuals, do not provide this information. This lack of information requires the NRC to correspond with requesters via U.S. mail. This increases the time needed for requesters to receive their response, even when NRC mails the records within the prescribed FOIA timelines.
- In its final response to FOIA requesters, NRC advises requesters when nonsensitive records are already available to the public electronically in ADAMS, the agency's document management system. The final FOIA response includes an annex with a list of documents and their accession numbers that are publicly available in ADAMS. Information on using ADAMS is located on the NRC Web site; in 10 CFR 9.27, "Form and Content of Responses;" and in NUREG/BR-0010. This advice enables requesters to locate the records they seek and minimizes the processing time for the FOIA staff because the FOIA response does not replicate documents that are already publicly available in ADAMS.
- NRC provides requesters with responses on a CD-ROM when the information requested is available in an electronic format and when the requester has asked for a response in other than paper form. However, NRC mails the CD-ROM to the requester via U.S. mail with the final response letter rather than providing responses via email with the documents attached. No data are available to show how many responses NRC provided in an electronic form.
- NRC does not use software that allows for the onscreen processing or redacting of records. Supplemental software is available for purchase from FOIAXpress, called Redact, that provides the capability to perform onscreen redactions. The NRC staff has been studying the use of this tool for implementation within NRC's FOIA program. NRC staff currently use a variety of methods for redacting exempt information, including using **Xacto knives to cut out exempt information**, blacking out the exempt information with a grease pencil and making a copy, and covering the exempt information with another piece of paper before copying the page containing the information. These methods are time consuming compared to redaction software, even though redaction software requires scanning documents and creating PDF files.

- NRC's guidance for expedited processing is available on its FOIA Web page and in 10 CFR 9.25(e). NRC follows the expedited processing guidelines specified by DOJ in its publication, "Freedom of Information Act Guide & Privacy Act Overview." NRC may place a person's request at the front of the queue for the appropriate track upon receipt of a written request that clearly demonstrates a compelling need for expedited processing. The agency evaluates each request for expedited processing on its own merits and makes a decision by comparing the information submitted by the requester to the criteria for expedited processing.
- NRC has seen an increase in the number of requests for expedited processing from 29 in FY 2004 to 34 in FY 2005. The agency granted 5 requests for expedited processing in FY 2004 and approved 14 in FY 2005. Of the 14 expedited requests granted in FY 2005, 13 were simple requests, and 1 was a complex request. Of the 13 simple expedited requests that were granted, 4 were completed within 9 days or less, 4 were completed between 9 and 20 days, and 5 took between 20 and 81 days. The complex expedited request took 152 days to complete. Almost 40 percent of the simple expedited cases took more than 20 days. Since the FOIA requires agencies to provide records to requesters in 20 days or less for simple cases in normal circumstances, NRC should provide records for expedited simple cases in less than 20 days. The review shows that expedited simple cases were not always expedited or were incorrectly labeled simple when in actuality these cases were complex expedited cases.
- As stated in 10 CFR 9.25, NRC uses a three-track processing system. As discussed above, Track A is for simple requests, and Tracks B and C are for requests of various levels of complexity. In practice, data entries in FOIAXpress rarely indicate a **Track C request**. Most cases not identified as simple were categorized as Track B. NRC's analysis of the elapsed times for closure of simple cases showed that the agency closed 68 percent in 20 days or less. However, FOIAXpress indicates one simple case took 531 days to complete. Five other cases classified as simple took between 234 and 409 days to complete. **The FOIAXpress administrators have not adjusted the data entries to reflect changes when FPT staff have found records that warrant shifting the request to the complex track.** This failure to change the status of cases from simple to complex skews the results when computing end-of-year FOIA reporting.
- The analysis of FOIAXpress data also suggests that NRC receives more requests that are complex than previous annual end-of-year reporting indicates. **If FPT staff** contacted requesters and advised them of changes to the status of their requests, a requester whose request status has changed from simple to complex would have the option of reducing the scope of the request so that it could be processed within the simple request time limits. This contact between the FPT FOIA specialist and the requester would enhance NRC's services by enabling the requester to determine the appropriate track for the purpose of his or her request. Requesters who opt to remain in the complex track would do so with the understanding that it would take longer than 20 days to receive their records.
- The volume of requests is more than NRC's current resources can handle. Without sufficient resources, it is impossible to meet the simple request requirement without lengthening the complex request processing times. The reverse is also true. NRC will need additional resources to meet the President's intent of reducing or eliminating the FOIA backlog.

Findings regarding NRC's policies and practices with respect to making records available through its Web site and other means without a FOIA request include the following:

- It is difficult to quantify whether the amount of information NRC makes available to the public without a FOIA request, through the various methods described below, reduces the number of FOIA requests for that information because there is no way to determine the number of FOIA requests that would be submitted if the NRC did not make information publicly available. However, only 28 percent (98 of 345) of requests closed in FY 2005 contained some already publicly available documents. The annual number of FOIA requests has not decreased since the introduction of ADAMS in November 1999, and actually increased to an average of 442 requests in FY 2002 and FY 2003 before returning to the prior average of approximately 375 requests annually in FY 2004 and FY 2005. NRC receives many FOIA requests for information that is not already publicly available and would not be made publicly available, such as requests related to Inspector General records, allegations, and investigations.
- One of the five NRC Strategic Plan goals is openness, and NRC is very proactive at making information available to the public without a FOIA request. **NRC makes available to the public as much information as possible relating to its mission, in accordance with legal responsibilities to protect some types of information.** It is the intent of NRC to automatically make information publicly available that is anticipated to be of interest to the public without the need to file a FOIA request. NRC provides agency guidance on this subject in MD 3.4, "Release of Information to the Public.". Also, by visiting the NRC Web site and selecting "Electronic Reading Room" at the top of the page, an individual obtains a menu selection that provides access to millions of agency records, including over 2.8 million records in ADAMS, dockets related to NRC adjudications, a high-level waste hearing docket, and links to frequently requested general, administrative, and regulatory reference documents such as NRC regulations, the NRC Strategic Plan, and the NRC Performance and Accountability Report.
- NRC has a Public Document Room located in Rockville, MD, that can be physically visited. Information about the Public Document Room is located on the NRC Web site in the left-most navigation menu under the Electronic Reading Room. The Public Document Room includes a link to "Contact The PDR Staff," which includes the telephone number (including a separate number for the hearing impaired), facsimile number, mailing address, and the visitors location address.
- NRC holds public meetings and encourages public participation. The agency advertises the meetings in its Public Meeting Notice System on the NRC Web site under the link for "Public Meetings." Information about public meetings is also available on the NRC Web site by selecting "Public Involvement" and then "About Public Meetings." Public meeting notices can also be obtained by contacting the NRC Public Document Room staff. Webcasts of live and archived public meetings are available under their respective links in "Public Meetings."
- The NRC Office of Public Affairs at NRC Headquarters and its offices in the four NRC regions provide information on NRC activities to the media and public by issuing news releases, speeches, brochures, fact sheets, and videos; maintaining a current regional Web page; answering questions by telephone and in person at meetings; and responding to both written and electronic correspondence.

- Section 552(a)(2) of the FOIA requires agencies to create electronic reading rooms and make available three categories of records—final opinions and orders rendered in the adjudication of administrative cases, specific agency policy statements, and administrative staff manuals that affect a member of the public. According to Section 552(a)(2), such records must be indexed by these categories in order to facilitate the public's access. The NRC Web site has a link to the agency's Electronic Reading Room, which contains the types of records that are required under Section 552(a)(2). In the Electronic Reading Room, a visitor can search for documents by type using profile fields and perform full-text searches.

5. RECOMMENDATIONS

Based on the NRC's FOIA Program Review, the following recommendations were identified to improve the NRC FOIA business processes, reduce the FOIA backlog, and comply with the spirit and intent of EO 13392:

- Provide enhanced FOIA training to office FOIA coordinators and SMEs through rotational assignments and online FOIA training. The training would increase the staffs' knowledge of FOIA exemptions and improve their ability to determine whether information should be released or denied. This training could result in more consistent record releasability determinations, thus saving processing time.
- Provide customer service training and training on the provisions of EO 13392 to all NRC staff who have contact with the public. This should improve NRC's customer services.
- Update the NRC FOIA Information Guide and the annual FOIA report, and the NRC Web site to include examples of the categories of NRC records for each FOIA exemption used by NRC.
- Upgrade the NRC Web site section on the FOIA homepage entitled "Closed Requests" so that there is a link to the documents in ADAMS of previously closed requests that contain publicly available records released in response to the requests. NRC staff has begun the upgrade for FY 2006 FOIA requests.
- Acknowledge receipt of FOIA requests via email when they are submitted via email. Electronically acknowledging receipt of a request would reduce the amount of paper correspondence, and the requester would receive the acknowledgment response on the same day or the day after submitting the request.
- Update published guidance that describes the process for submitting a FOIA request and explain the importance of providing a telephone number or email address especially when requests are submitted in hard copy.
- Provide records to requesters in electronic form to the greatest extent possible (e.g., PDF files attached to email responses or saved on diskettes or CD-ROM) rather than on paper. Saving data to a CD-ROM would reduce the use of paper and the amount of required storage for FOIA files.
- Utilize available information technology and implement to the greatest extent possible the use of onscreen redactions, with redactions safeguarded electronically.

- Improve expedited processing timeliness by increasing awareness of roles and responsibilities regarding expedited processing. The FOIA staff will work with the offices to establish goals for expediting simple cases within 20 days. Expedited complex cases may still take more than 20 days, but they should receive priority processing ahead of other complex cases by offices and the FPT FOIA staff.
- **Consider increasing resources to process FOIA requests. Additional resources are needed to meet the intent of the EO.** Based on agency decisions on the FY 2008 budget, NRC will finalize the FY 2007 and FY 2008 goals for completing simple and complex requests.
- Change published guidance to indicate NRC has three processing tracks—simple, complex, and expedited. Track A should be simple cases that the agency can complete in 20 days or less. The currently published definitions of Tracks B and C should be combined into a single Track B, identified as complex cases that will take more than 20 days to complete due to unusual circumstances, including the volume of the records or the need for extensive coordination within NRC or with external stakeholders. Re-designate Track C for expedited cases, whether they are simple or complex requests.
- Establish procedures for the FPT FOIA specialist assigned a case to contact the requester when the search results produce records sufficient in volume or complexity to warrant changing the status from simple to complex. Ensure FOIAXpress is annotated to reflect the correct track so that end-of-year and ad hoc reports will reflect accurate statistics pertaining to case types.
- **Continue to emphasize the NRC Strategic Plan goal of openness, and make information available to the public through the various non-FOIA methods.** Ensure the NRC Web site is maintained and the Electronic Reading Room continues to be configured for user-friendly access.