



## Review of U.S. Nuclear Regulatory Commission Freedom of Information Act (FOIA) Program

What OGIS Found	What OGIS Recommends
<ol style="list-style-type: none"> <li>1. NRC’s FOIA administrative appeals process does not follow U.S. Department of Justice (DOJ) guidance. <i>(Recommendations 1 &amp; 2)</i></li> <li>2. NRC’s regulations and official guidance for administering the FOIA are out of date and do not consistently or accurately reflect the agency’s practices for implementing the statute. <i>(Recommendation 3)</i></li> <li>3. NRC’s FOIA program lacks management and oversight controls. <i>(Recommendations 4 &amp; 5)</i></li> <li>4. Technology and records management challenges limit the FOIA program’s effectiveness. <i>(Recommendation 6)</i></li> <li>5. Communication between NRC’s FOIA program and requesters could be clearer and more consistent. <i>(Recommendations 7 &amp; 8)</i></li> <li>6. Training for NRC employees with FOIA duties needs improvement. <i>(Recommendations 9 &amp; 10)</i></li> </ol>	<ol style="list-style-type: none"> <li>1. NRC should reform its administrative appeals process to conform with DOJ guidance.</li> <li>2. NRC should provide requesters with appeal rights in full release responses.</li> <li>3. NRC should update its FOIA regulations, FOIA Management Directive, and FOIA Desk Guide to ensure they are plainly written and reflect current processes and statutory requirements.</li> <li>4. NRC should establish a process to respond more quickly to simple requests such as those that might be answered with publicly available records and those that may result in “no records” responses.</li> <li>5. NRC should use data to develop individual performance standards and metrics and goals for each processor (<i>e.g.</i>, numbers of cases closed and pages reviewed) to reduce the backlog and improve timeliness. The agency should also consider incorporating FOIA performance standards into performance plans for all employees, including subject-matter experts, with FOIA responsibilities.</li> <li>6. NRC should assess its FOIA technology and records management needs and establish a plan to develop a more seamless approach to processing records responsive to FOIA.</li> <li>7. NRC should review and update its communications with requesters, including its acknowledgements, responses, FOIA Desk Guide, and FOIA website to ensure they are up-to-date, written in plain language and include all relevant information so that requesters can more easily understand the agency’s FOIA process and actions on requests.</li> <li>8. NRC must comply with FOIA’s statutory mandate by providing estimated dates of completion to requesters upon request.</li> <li>9. NRC should assess and meet the training needs of staff with FOIA duties.</li> <li>10. NRC should train staff on records management procedures for FOIA case files and update its FOIA Desk Guide to include such procedures.</li> </ol>

What OGIS Reviewed
<p>OGIS reviewed written materials including the agency’s FOIA regulations, standard operating procedures, management reports, FOIA Annual Reports, and organizational charts, among other materials. OGIS conducted 11 interviews of NRC FOIA professionals and reviewed a statistically significant random sample of 217 initial request files processed in Fiscal Year (FY) 2018, the most recent available at the time of our review in late 2019.</p>

## **Introduction**

The Freedom of Information Act (FOIA) mandates that the Office of Government Information Services (OGIS) review FOIA policies, procedures and compliance, and identify procedures and methods for improving FOIA compliance.<sup>1</sup> OGIS periodically conducts independent, systematic reviews of agencies' FOIA programs to evaluate their compliance with FOIA. As part of an effort to improve its administration of FOIA, the U.S. Nuclear Regulatory Commission (NRC) requested that OGIS review its FOIA program.

While our compliance assessment process recognizes that there is no one-size-fits-all approach to administering FOIA — each agency's records are unique and as such, management of the FOIA process differs — we have observed that successful FOIA programs share three general characteristics: they manage their resources appropriately; they use technology effectively; and they communicate well with requesters. To that end, our compliance assessment program, the first of its kind in the administration of FOIA, reviews and issues findings regarding a FOIA program's management, technology and communication.

This report and our recommendations, which the NRC had the opportunity to review prior to publication, is intended to assist the agency in fulfilling its FOIA responsibilities. OGIS will follow up with the NRC regarding the status of these recommendations in 120 calendar days.

### **What We Reviewed**

This report is the result of direct observation and review of initial FOIA request case files; a review of the NRC's FOIA regulations, FOIA web page, and other written material such as the NRC's FOIA Management Directive, standard operating procedures, policies, Annual FOIA Reports, and organizational chart; interviews with FOIA officials and staff; and a review of the NRC's FOIA litigation since 2009.

NRC provided us with data about FOIA case files closed in Fiscal Year (FY) 2018, the most recent available at the time of our review.<sup>2</sup> OGIS reviewed 217 initial FOIA request files, a statistically significant random sample of the 496 requests the agency processed in FY 2018. That allowed us to generalize to the population of FOIA requests the program processed in FY 2018.<sup>3</sup>

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<sup>1</sup> See 5 U.S.C. § 552 (h)(2).

<sup>2</sup> We launched our review in September 2019.

<sup>3</sup> See Methodology on page 22.

## **Background**

Congress created the NRC in 1974 to carry out the former U.S. Atomic Energy Commission's mission to ensure the safe use of radioactive materials while protecting public health and safety. The NRC is an independent agency that regulates commercial nuclear power plants and other uses of nuclear materials (such as in nuclear medicine) through licensing, inspection and enforcement. A five-member Commission, appointed by the President and confirmed by the Senate, heads the NRC.

The NRC has 22 offices and four advisory committees and boards, located in its Rockville, MD, headquarters and its four regions. NRC also has an Office of the Inspector General (OIG), which operates separately from the rest of the agency. The OIG has independent denial authority for FOIA requests they receive for their records, although the tracking and administration of OIG FOIA requests are handled by the FOIA program.

The NRC's centralized FOIA program operates within the Office of the Chief Information Officer (OCIO). The agency's Chief Information Officer (CIO) also serves as the agency's Chief FOIA Officer, and acts as the deciding official on FOIA administrative appeals. The CIO has delegated oversight of the FOIA program to the OCIO's Director of the Governance and Enterprise Management Services Division within the OCIO. The Chief of the FOIA, Library, and Information Collections Branch and the agency's FOIA Officer oversee and manage the FOIA staff's daily activities.

### ***FOIA Program Administration***

NRC's budget affects the agency's administration of FOIA in a unique way. Through FY 2020, the Omnibus Budget Reconciliation Act of 1990<sup>4</sup> required NRC to recover approximately 90 percent of its annual budget through fees paid by license applicants and license holders. From FY 2005 to FY 2010, NRC's budget and workforce increased by about 59 percent and about 27 percent, respectively, in anticipation of growth in the commercial nuclear industry. The growth did not occur and in recent years, NRC has reduced its budget and staffing.<sup>5</sup> The budget reductions occurred at the same time the number of FOIA requests to the agency increased.

In addition, the Nuclear Energy Innovation and Modernization Act<sup>6</sup> requires the NRC to limit its request for its "Corporate Support" budget, which funds the agency's FOIA program among other activities, to no more than 30 percent of its total requested budget authority in FY 2021 and

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<sup>4</sup> See Pub. L. 101-508, 104 Stat. 1388.

<sup>5</sup> U.S. Nuclear Commission, Office of the Inspector General. [Inspector General's Assessment of the Most Serious Management and Performance Challenges Facing the Nuclear Regulatory Commission in Fiscal Year 2020](#). OIG-20-A-01. October 29, 2019.

<sup>6</sup> See [Nuclear Energy Innovation and Modernization Act](#), S. 512, 115th Cong. (2017)

FY 2022, declining thereafter to no more than 28 percent for FY 2025 and beyond.<sup>7</sup> These budget limitations are in effect regardless of the FOIA backlog or the number of requests the agency receives, according to the Director of Governance and Enterprise Management Services Division.

**Requests and Backlog**

Between FY 2008 and FY 2018, NRC received an average of 471 FOIA requests per fiscal year, according to data reported in the NRC’s Annual FOIA Reports. During that same period, NRC responded to an average of 454 requests per fiscal year. As shown in figure 1 below, the backlog (the number of requests that are pending at an agency at the end of the fiscal year that are beyond the statutory response time) ranged from a low of five requests in FY 2009 to 122 requests in FY 2018. Between FY 2016 and FY 2018, the backlog jumped 481 percent — from 21 requests in FY 2016 to 122 requests in FY 2018. During that same period, the number of requests NRC processed per fiscal year decreased by 34 percent.

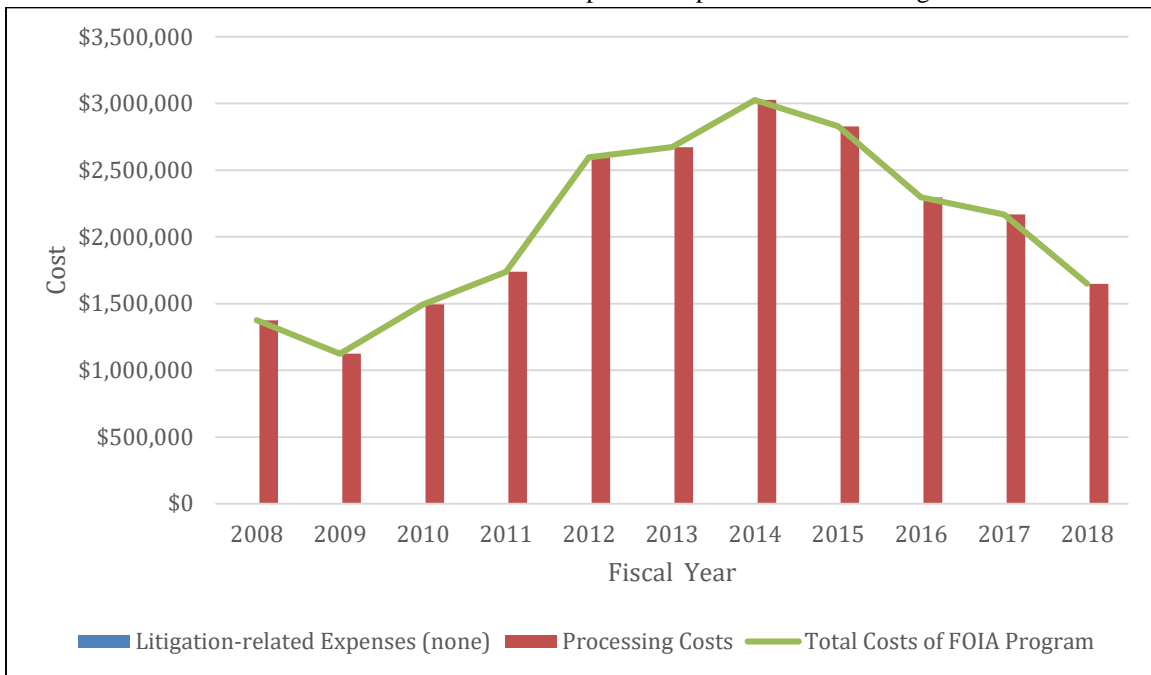
Figure 1: NRC FOIA Requests Received, Processed and Backlogged, FY 2008-2018  
 Source: Data from NRC Annual Reports as reported on www.foia.gov.



Between FY 2008 and FY 2018, the FOIA program’s costs have ranged from a high of \$3 million in FY 2014 to low of \$1.1 million in FY 2018, with an average annual cost of \$2.1 million. During that decade, the FOIA program’s total cost decreased by 45 percent, from \$3 million to \$1.6 million.

<sup>7</sup> U.S. Government Accountability Office. [Nuclear Regulatory Commission: Changes Planned to Budget Structure and Justification](#). GAO-17-294, Washington, DC, March 2017.

Figure 2: Total Costs of NRC FOIA Program, FY 2008-2018  
 Source: Data from NRC Annual Reports as reported on www.foia.gov



NRC reported that litigation-related costs accounted for none of the total cost of the FOIA program from FY 2008 to FY 2018.

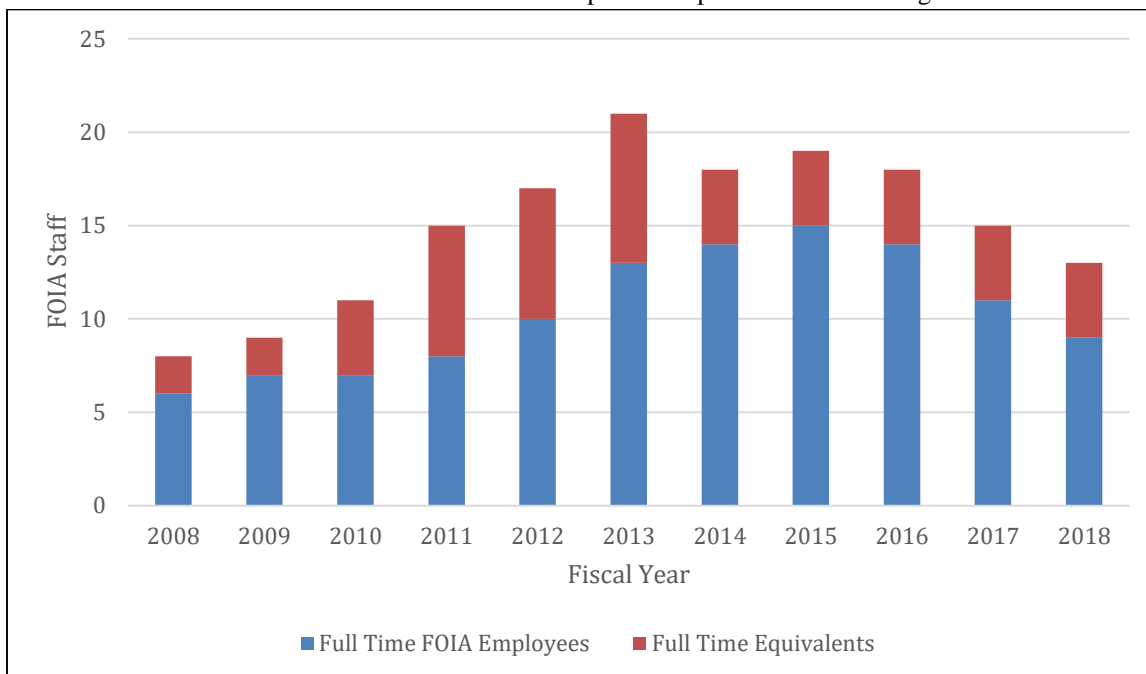
### ***Staffing***

According to NRC’s Annual FOIA reports, the number of full-time FOIA staff between FY 2008 and FY 2018 averaged 15 employees. The total number of full-time FOIA staff throughout the agency ranged from a low of eight employees in FY 2008 to a high of 21 employees in FY 2013. Between FY 2013 and FY 2018, the total number of full-time FOIA staff decreased from 21 employees to 13 employees, a 38-percent decrease. During the same period, the number of requests that NRC received increased from 357 requests in FY 2013 to 643 requests in FY 2018, an 80-percent increase.

At the time of our assessment, NRC’s FOIA Section consisted of one FOIA Team Branch Chief at the General Schedule (GS) 15 level; a GS-14 Government Information Specialist (GIS) FOIA Officer; and two GS-13 GIS analysts overseeing initial processing and appeals. The FOIA Section also employed a team of three contractors — a team lead and two processors. The FOIA Officer was also in the process of advertising for an additional GS-13 processor at the time of our visit. There is a FOIA coordinator in each of the NRC’s 22 program offices in the four regions. Ten attorneys in the agency’s Office of General Counsel spend approximately 10 to 15 percent of their time advising on FOIA issues in any given fiscal year.

Figure 3: NRC FOIA Staff, FY 2008-2018

Source: Data from NRC Annual Reports as reported on [www.foia.gov](http://www.foia.gov)



### ***FOIA Process***

NRC’s FOIA Section manages and tracks all of the FOIA requests and appeals through *FOIAonline*. Although the Office of the Secretary (SECY), the Office of the General Counsel (OGC), and the Office of the Inspector General (OIG) have their own independent denial authority, the tracking and administering of FOIA requests for SECY, OGC, and OIG records is generally the same as for other NRC records for which the initial denial authority is the Executive Director for Operations (EDO).

In addition to *FOIAonline*, requesters may also submit requests by mail, fax, or email, which NRC FOIA staff manually enter into *FOIAonline*. The FOIA Section staff review every request to determine which program offices may have responsive records. FOIA staff then task the FOIA Coordinators in the program offices with providing an estimate of the search, review, and duplication effort required to respond to the request. Based on the program offices’ estimates of the time it will take to respond to a request, the agency assigns the request to the simple or the complex processing queue.

If a requester seeks placement in a particular fee category, requests a fee waiver, or requests expedited processing, the FOIA Officer reviews and determines whether to grant or deny the request in full or in part.

If a requester clearly demonstrates a compelling need for expedited processing, NRC places the

request at the front of the appropriate queue for processing. NRC does not have a separate track for requests that the agency processes on an expedited basis.

In acknowledgement letters to requesters, NRC provides the FOIA tracking number, a description of the request, the request track, estimated date of completion, fee status, contact information for the FOIA analyst handling the request, and an enclosure describing the fees that may apply to the processing of the request. If applicable, the agency also informs the requester whether it granted a request for a fee waiver and/or expedited processing. In cases in which the agency expects to charge processing fees, the FOIA Section staff provide the requesters with fee estimates.

Once a request is perfected, the FOIA Coordinators task the search for responsive records to the likely record holder who may or may not be a subject matter expert (SME). If possible, the record holder/SME sends the responsive records to the FOIA Coordinators as Portable Document Format (PDF) files. If the record holders/SMEs are unable to provide the responsive records as PDF files, the FOIA Coordinators may guide the record holders/SMEs through the process of saving or converting the records to PDF files and/or may manually create and save PDFs of the responsive paper records for review.

Program office staff review any potentially responsive records and provide the FOIA Section with recommendations on what information to release or withhold.

Some program offices, such as the Office of Investigations (OI) and the Office of Enforcement (OE), remain paper-based and may send paper copies of potentially responsive documents to the FOIA Section for scanning.

The FOIA GIS assigned to the request processes, manually de-duplicates the responsive records based on the information provided by the FOIA Coordinators, and may consult with the record holders/SMEs and/or the OGC. The FOIA GIS handling the request drafts a final response and creates a “signature package” which the GIS may send to OE/OI, the OIG or OGC for a concurrence review. After obtaining the necessary concurrences, the FOIA Officer reviews the signature package and signs the final response unless there is another initial denial authority for the records.

SECY, the OGC, and the OIG have independent authority to deny access to their records. NRC issues interim and final responses to requesters via one of two form letters, *NRC 464* (Response to Freedom of Information Act (FOIA) Request) or *NRC 464-OIG* (Response to Freedom of Information Act (FOIA) Request). The forms are nearly identical, with the exception that the agency uses *NRC-464-OIG* in situations where the responsive records are solely OIG

records and do not involve equities from other program offices.

*NRC 464* and *NRC-464-OIG* provide requesters with information concerning the information released in response to the request, the applicable FOIA fees, the information not located or withheld from disclosure, the agency's comments about the processing of the request, the applicable exemptions, and information about the denying officials.

### ***Appeals and Litigation***

NRC accepts FOIA appeals via email, mail, fax, and *FOIAonline*. The FOIA Section logs each appeal not submitted via *FOIAonline* and upon receipt of the appeal, sends the requester an appeal acknowledgement letter that provides the appeal's tracking number and the name and telephone number of the GIS who will serve as NRC's point of contact for the appeal.

The GIS who initially processed the request handles the appeal and works with the program office(s) that originally processed the request to review and consider whether to take corrective actions to address any deficiencies in the agency's initial response.

Based on the collaboration between the GIS and the program office(s), the GIS drafts an appeal response for the CIO's signature. The FOIA Officer reviews the draft and, if applicable, the relevant records and background information concerning the administrative history of the request. Once the FOIA Officer concurs with the draft appeal response, the GIS assigned to the appeal sends the "appeal signature package" — the draft appeal response and background information on the appeal — to the appropriate Director/Regional Administrator and OGC for concurrence. Once OGC concurs, the appeal signature package goes to the CIO's office for review and the CIO's signature.

If the CIO determines that the program office(s) initial search for records was inadequate, or that the agency should release previously withheld information, the CIO remands the request to the FOIA Section for further action.

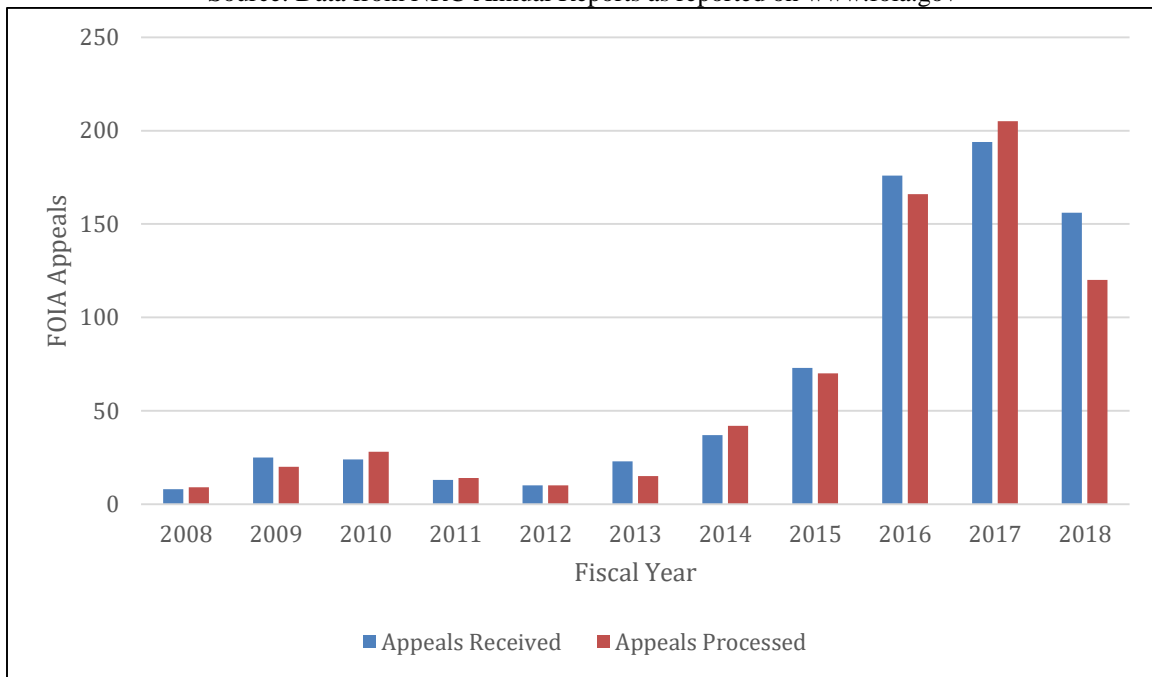
The CIO/Chief FOIA Officer makes final determinations on behalf of the EDO on appeals of initial denials of FOIA requests in whole or in part involving records denied by an office director who reports to the EDO and on appeals of a denial for a waiver or a reduction of fees or a denial of a request for expedited processing.

The number of appeals NRC processed ranged from a low of nine in FY 2008 to a high of 205 in FY 2017. Between FY 2008 and FY 2018, NRC affirmed 61 percent of initial FOIA actions reviewed during the appeals process. Requesters sued NRC in connection with FOIA requests



five times between 2009 and 2019.<sup>8</sup>

Figure 4: NRC FOIA Appeals Received and Processed, FY 2008-2018  
Source: Data from NRC Annual Reports as reported on [www.foia.gov](http://www.foia.gov)



### **Training**

The FOIA Improvement Act of 2016 requires agencies' Chief FOIA Officers, subject to the authority of the head of the agency, to offer training to agency staff regarding their responsibilities under FOIA. In addition, the U.S. Department of Justice (DOJ), Office of Information Policy (OIP), advises each agency to make such training available to all of their FOIA staff at least once each year.<sup>9</sup>

In its 2019 Chief FOIA Officer Report, NRC estimated that at least 85 percent of FOIA

<sup>8</sup> *Aguirre v. United States Nuclear Regulatory Comm'n*, 19-01102 (S.D. Cal. May 1, 2020) (granting agency's motion to dismiss with prejudice), appeal filed, Case No. 20-55487 (9th Cir. May 5, 2020); *Aguirre v. United States Nuclear Regulatory Comm'n*, 19-00587 (S.D. Cal. Feb. 18, 2020) (granting agency's motion for summary judgment), appeal filed, Case No. 20-55179 (9th Cir. Feb. 20, 2020); *Aguirre v. United States Nuclear Regulatory Comm'n*, 19-00495 (S.D. Cal. Feb. 19, 2020) (granting agency's motion for summary judgment), appeal filed, Case No. 20-55177 (9th Cir. Feb. 20, 2020); *Public Employees for Environmental Responsibility v. United States Nuclear Regulatory Comm'n*, 13-01248 (D.D.C. Nov. 25, 2013) (settled and dismissed with prejudice by joint stipulation); *Criscione v. United States Nuclear Regulatory Comm'n*, Civ No. 13-00942 (D.D.C. Nov. 1, 2013) (settled and dismissed with prejudice by joint stipulation).

<sup>9</sup> OIP Guidance: [Guidance for Further Improvement Based on 2013 Chief FOIA Officer Report Review and Assessment](#) (updated August 14, 2014).

professionals and staff with FOIA responsibilities attended training during FY 2018.<sup>10</sup>

### ***Proactive Disclosures***

Since 1999, NRC has made documents publicly available online in its electronic recordkeeping system, Agencywide Documents Access and Management System (ADAMS). Documents posted to ADAMS include records regarding the 2011 Fukushima Daiichi nuclear disaster in Japan, investigation and enforcement actions, reactor regulation, nuclear material safety, licensing, environmental safety, nuclear security, nuclear research, and agency financial accountability. Documents posted in ADAMS, including some spreadsheets, are available as PDF files regardless of their native file formats. OGIS notes that not posting documents in their native file format limits their usefulness for requesters who prefer to work in native file formats.

NRC makes its responses to FOIA requests and appeals (including released records) publicly available in ADAMS unless the records should be disclosed only to the requester (*i.e.*, contain personal information about a first-party requester); contain privileged or confidential information; or involve matters that are not likely to be of public interest.<sup>11</sup>

### **Finding 1: NRC's FOIA administrative appeals process does not follow U.S. Department of Justice (DOJ) guidance.**

NRC's administrative appeals process does not adhere to DOJ guidance or sound administrative practice. Appeals of initial FOIA requests are typically processed by the same FOIA processor who made the initial determinations on the requests. In addition, NRC does not offer requesters the opportunity to appeal the initial determinations until the agency has issued all its releases in response to a request.

FOIA gives requesters the right to administratively appeal any adverse determination by an agency.<sup>12</sup> The appeal is an important part of the FOIA administrative process. By filing an appeal, requesters preserve their administrative rights and the agency has the chance to conduct a *de novo* review — looking at the request separately and anew and reviewing and reconsidering every part of the initial response, from the search the agency conducted to any decision the agency made to withhold records. The appeals process allows an agency to take any necessary corrective actions, and it increases requesters' confidence in the FOIA process.

DOJ guidance states that when agencies undertake the responsibility to correct mistakes made at

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<sup>10</sup> [2019 U.S. Nuclear Regulatory Commission Chief FOIA Officer Report.](#)

<sup>11</sup> See 10 C.F.R. § 9.27(a).

<sup>12</sup> See 5 U.S.C. § 552(a)(6)(A).

lower levels, they “should ensure that administrative review is conducted by an appeal authority that is *separate and distinct* from the office that makes the initial determination on the request.” (emphasis added) OIP’s guidance on adjudicating FOIA administrative appeals further states that using such a standard of review at the administrative level “helps ensure that the agency is making a fully considered decision on appeal.”<sup>13</sup>

DOJ encourages agencies to offer requesters the opportunity to appeal the determinations on interim responses rather than waiting until all releases are made and giving requesters one opportunity to file an appeal. NRC does not follow this practice. NRC’s response letters for interim responses include a checkbox that the agency checks, “because this is an interim response to your request, you may not appeal at this time. We will notify you of your right to appeal any of the responses we have issued in response to your request when we issue our final determination.”

Of the 217 case files we reviewed, we observed 11 cases where NRC issued interim responses but did not offer requesters the right to appeal until the agency had issued its final release determination. Of those 11 instances, in five of the cases NRC did not check the appeal rights box in the final response advising requesters. In one case, NRC provided appeal rights; however, the appeal information provided the requester with an outdated 30-day deadline rather than a 90-day deadline for submitting an appeal.

Finally, we observed that in 54 percent of the cases we reviewed for our case sample, NRC did not check the box in its final response form advising requesters of their appeal rights. When an agency provides a requester with a full release, the requester still has the right under the law to appeal whether the agency conducted an adequate search and whether it provided a full and complete response. |

**Recommendation 1:** NRC should reform its administrative appeals process to conform with DOJ guidance.

**Recommendation 2:** NRC should provide requesters with appeal rights in full release responses.

**Finding 2: NRC’s regulations and official guidance for administering the FOIA are out-of-date and do not consistently or accurately reflect the agency’s practices for implementing the statute.**

NRC’s official guidance for implementing FOIA is incomplete, inconsistent and out-of-date and

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<sup>13</sup> OIP Guidance: [Adjudicating Administrative Appeals under the FOIA](#) (posted February 14, 2019).

makes it difficult for the agency to effectively oversee and manage the FOIA process and ensure that its responses to requests are timely, accurate, and complete.

NRC's FOIA regulations also are outdated. Well-crafted FOIA regulations offer both FOIA requesters and processors a tool for understanding and navigating the process. FOIA requires agencies to publish regulations regarding time and place to make requests; expedited processing of requests; fees and fee waivers; and procedures for engaging in dispute resolution through the FOIA Public Liaison and OGIS.<sup>14</sup> In addition, Executive Order 12600 requires agencies to include in their FOIA regulations procedures for notifying submitters of records containing "confidential commercial information" when the agencies receive FOIA requests for the records and determine the records may be released in response to a FOIA request.<sup>15</sup>

NRC's FOIA regulations include procedures as required by the statute. The Commission updated its FOIA regulations most recently in December 2018 to revise fees charged for search and review of agency records, and in December 2016 to reflect a 90-day window for filing an administrative appeal, among other changes mandated by the FOIA Improvement Act of 2016. However, while the NRC has made multiple revisions to its regulations to keep them in compliance with the statute, the regulations are not well-organized or written in easy-to-understand language.

To assist agencies in writing FOIA regulations OIP in March 2016 issued a "Template for Agency FOIA Regulations" as well as guidance suggesting that agencies should follow the template as closely as possible.<sup>16</sup>

Management Directive and Handbook (MD) 3.1, *Freedom of Information Act*, is NRC's primary guidance to define responsibilities and authorities for the review and processing of FOIA and Privacy Act initial requests and appeals in keeping with the requirements of the FOIA and the agency's FOIA and Privacy Act regulations specified in 10 CFR Part 9, Subparts A and B.

NRC "Management Directive and Handbook 3.1, Freedom of Information Act is dated June 6, 2011 and expired in June 2016.<sup>17</sup> Since then, Congress has amended FOIA in ways that are not reflected in the directive. For example, the FOIA Improvement Act of 2016 requires agencies to alert requesters to dispute resolution services offered by the FOIA Public Liaison and OGIS at

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<sup>14</sup> See 5 U.S.C. §§ 552(a)(4)(A)(i) - 552(a)(4)(A)(viii) and 552(a)(6).

<sup>15</sup> See [Exec. Order No. 12,600](#), 52 Fed. Reg. 23,781 (June 23,1987).

<sup>16</sup> [OIP Guidance: Guidance for Agency FOIA Regulations \(updated September 8, 2016\)](#).

<sup>17</sup> [U.S. Nuclear Regulatory Commission Management Directive 3.1, Freedom of Information Act](#).

various points in the FOIA process. The Management Directive does not reference the important role that dispute resolution plays in the FOIA process.

The FOIA Improvement Act of 2016 also codified the “foreseeable harm” standard and requires agencies to withhold information under FOIA “only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.” The Management Directive notes in several places that “[a] foreseeable harm statement is not required unless it is not obvious why the agency is citing this exemption,” language that appears outdated.

According to the current FOIA Officer, NRC’s previous FOIA Officer revised the Management Directive after the FOIA Improvement Act of 2016. After pending for more than a year with the team responsible for management directives, the FOIA Officer recently added more updates regarding a memorandum of understanding the NRC has with the Federal Energy Regulatory Commission regarding FOIA processing and a 2019 ruling by the U.S. Supreme Court regarding commercial and financial information covered by FOIA Exemption 4.<sup>18</sup> The proposed revisions remain with the management directive team.

NRC’s FOIA Desk Guide also is outdated. For example, it includes appeal information from a previous version of the FOIA regulations and reflects how the agency processed requests when it used a prior FOIA tracking system. In addition, it does not provide guidance to staff on processing FOIA requests using *FOIAonline*, its case management system since November 2017.

An opportunity exists for the Chief FOIA Officer to fulfill the statutory requirement to “review, not less frequently than annually, all aspects” of their agency’s administration of FOIA “to ensure compliance” with FOIA.<sup>19</sup>

**Recommendation 3:** NRC should update its FOIA regulations, FOIA Management Directive, and FOIA Desk Guide to ensure they are plainly written and reflect current processes and statutory requirements.

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<sup>18</sup> See *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 915 (2019).

<sup>19</sup> See 5 U.S.C. § 552(j)(3).

Table 1: Extent to Which Selected NRC Regulations and Guidance Reflect 2016 Freedom of Information Act (FOIA) Requirements

Requirement	FOIA Regulations 10 CFR Part 9	Management Directive and Handbook (MD) 3.1, Freedom of Information Act	Freedom of Information Act (FOIA) Processing at the NRC Desk Guide
Describes proactive disclosure "rule of 3" requirement	✓	●	●
Describes codification of foreseeable harm standard	✓	●	●
Describes sunset on Exemption 5 deliberative process privilege	✓	●	●
Describes new requirement when extending deadline beyond an additional ten working days to notify requesters of their right to seek dispute resolution services from the Office of Government Information Services.	✓	●	●
Describes limitation on assessing search fees (or, for requesters with preferred fee status, duplication fees) if response time is delayed	✓	●	●
Describes new requirement to notify requesters of their right to seek assistance from the agency's FOIA Public Liaison	✓	●	●
Describes new requirement to notify requesters of their to appeal in 90 days	✓	●	●
Describes new requirement to notify requesters of their right to seek dispute resolution services from the OGIS or the FOIA Public Liaison	✓	●	●
Describes new duties for Chief FOIA Officers	●	●	●
Describes new additions to agency reporting requirements for Annual FOIA Reports	✓	●	●
Describes new requirement for agencies to make Agency FOIA Reference Guides available in electronic formats	●	●	●
Describes requirement for proactive disclosures through records management	●	●	●

✓ Accurately Describes ● Does Not Describe or Description is out of date

### **Finding 3: NRC’s FOIA program lacks management and oversight controls.**

While NRC has some internal controls, the agency could do more to ensure efficient and effective administration of FOIA.

#### **Internal Reporting and Performance Metrics**

NRC’s FOIA Officer informed us that the agency uses a quarterly “report card” to track program offices’ response times against the agency’s goal for program offices to provide the FOIA Section with responsive records within 10 working days. The FOIA Section grades program offices on a “pass or fail” basis and provides the quarterly reports to the heads of each program office. NRC measures or manages the performance of program offices by tracking the amount of time the offices spend processing requests.

Although NRC tracks data related to its FOIA program, at the time of our assessment, it lacked performance metrics and goals for individual employees with FOIA responsibilities.

According to the FOIA Officer, at the time of our review the NRC did not set individual goals or branch-wide goals for case closures or the number of pages reviewed or processed. The FOIA Officer noted that not all FOIA cases are the same.

#### **Quality Control**

NRC does not appear to have a quality control review process in place for reviewing the quality of its responses to requesters or the completeness of administrative records for individual requests. Because NRC’s FOIA process does not have any quality control measures in place designed to identify errors or correct deficiencies in the processing of requests, NRC does not have a formal mechanism for ensuring that its responses to requesters are accurate or timely. In addition, the lack of quality control measures means that the agency does not have a means to establish performance quality standards for its FOIA staff or track the knowledge gaps in staff to develop targeted training.

In our case review, we observed instances where staff sent final responses on outdated NRC 464 (Response to Freedom of Information Act (FOIA) Request) forms, did not check the appeal rights box in denial responses, did not check the relevant fees box in its NRC 464 responses, did not check the box with the appropriate exemption language or checked the incorrect box.

#### **No records responses**

The number of “no records” responses reported by NRC has increased since 2008; on average, NRC issued 70 “no records” responses per fiscal year between FY 2008 and FY 2018 — accounting for 15 percent of the requests that NRC processed on average over the same period. In FY 2018, “no records” accounted for 23 percent of the cases that NRC processed.

In our review of a sample of NRC’s FOIA case files from FY 2018, 33 percent resulted in “No Records,” “Not Agency Records,” “Records Not Reasonably Described,” or “Improper FOIA Request” responses to requesters.

**Recommendation 4:** NRC should establish a process to respond more quickly to simple requests such as those that might be answered with publicly available records and those that may result in “no records” responses.

**Recommendation 5:** NRC should use data to develop individual performance standards and metrics and goals for each processor (*e.g.*, numbers of cases closed and pages reviewed) to reduce the backlog and improve timeliness. The agency should also consider incorporating FOIA performance standards into performance plans for all employees, including subject-matter experts, with FOIA responsibilities.

**Finding 4: Technology and records management challenges limit the FOIA program’s effectiveness.**

The limitations of the NRC’s FOIA tracking and processing system and records management practices impedes NRC’s ability to process requests in a timely manner.

To reduce costs, NRC moved to a new case management and processing system, *FOIAonline*, in November 2017. *FOIAonline* is a multi-agency portal that allows requesters to submit FOIA requests and appeals, track their progress and search other requests and records released under FOIA. It also provides NRC with a secure website to receive and store requests, post responses, generate metrics and manage records electronically. The agency uses separate commercial off-the-shelf software for reviewing, redacting, and processing responsive records.

The move to *FOIAonline* has presented challenges. The transition involved a significant investment of staff time for training and administrative support. A *FOIAonline* upgrade resulted in intermittent usage, requests not migrating from the old system to the new system, and FOIA staff being unable to locate and properly close requests. In its Chief FOIA Officer Report for 2019, NRC cited the transition to *FOIAonline* as a factor contributing to the increase in the amount of time the agency has taken to respond to requests.

During our interviews with FOIA Section staff, we heard that *FOIAonline* and redaction software have reduced NRC’s productivity and created inefficiencies.

The FOIA Coordinators in program offices do not have a uniform way to manage their FOIA work. Without access to *FOIAonline*, FOIA coordinators create their own spreadsheets to track



and manage the FOIA requests tasked to them by the FOIA Section. FOIA Coordinators in some NRC program offices use a web-based collaborative platform to coordinate the searches and reviews tasked to their offices. This platform gives staff the ability to review documents in one central location rather than distributing them amongst staff.

NRC's FOIA Officer noted that the FOIA Section probably is not using all of *FOIAonline*'s capabilities. There are bugs still being worked out in the latest version, the FOIA Officer said. For example, she said that if a processor accidentally closes a case or accidentally tasks the wrong program office with a search, they must call the *FOIAonline* help desk.

NRC uses a different processing tool to redact documents. The agency's previous FOIA system was able to de-duplicate documents and apply redactions to multiple pages of documents at a time; however, the current redaction software does not have these capabilities. Instead, staff must manually search for and remove duplicate pages and manually apply redactions to any place the exempt information is duplicated.

Coupled with the loss of de-duplication capabilities the FOIA staff is faced with records management challenges. Several NRC offices, including three Commissioners' offices and the Office of Investigations, provide paper-based records to the FOIA Office, we learned from our interviews of the FOIA Officer and several processors.

**Recommendation 6:** NRC should assess its FOIA technology and records management needs and establish a plan to develop a more seamless approach to processing records responsive to FOIA.

**Finding 5: Communication with requesters is sometimes unclear  
about the FOIA process.**

NRC's written communication with requesters is sometimes confusing and could be clearer and more consistent.

**Estimated Dates of Completion**

Under FOIA, agencies must provide requesters with estimated dates of completion (EDC) upon request. Based on our case sample, NRC's responses to requesters who asked for an EDC were mixed. In some instances, NRC provided specific EDCs while in other cases, the agency provided general information about the status of the requests and the reason for the delay but not a specific EDC.

### **Fee Waiver Denials and Expedited Processing Denials**

For some requests, NRC acknowledgement letters included language denying requesters' requests for fee waivers and/or expedited processing. The denial language explains that requesters may appeal the determinations in writing within 90 calendar days by addressing the appeals to the agency's Executive Director for Operations (EDO); however, the language does not include the EDO's contact information, nor does it include contact information for the FOIA Public Liaison or OGIS.

In some instances, NRC's fee waiver denials did not explain the factors the agency considered when determining whether to grant requests for fee waivers or merely cited the relevant regulation without explaining it.<sup>20</sup> In some cases, NRC's fee waiver denial letters included a "Fee Waiver Justification Requirements" enclosure containing an outdated copy of the agency's FOIA regulations that direct requesters to appeal fee waivers or fee reduction denials to the Secretary of the Commission within 30 days from the date of the denial. Requesters have 90 days to appeal under the FOIA Improvement Act of 2016.

The NRC's expedited processing denial language does not explain that FOIA<sup>21</sup> and NRC's FOIA regulation require requesters who seek expedited processing to send the agency certification that all of the statements in the request for expedited processing are true and correct. Omitting this explanatory language in denials of expedited processing may confuse requesters who are unaware of this requirement; inclusion of this language could help both requesters and the agency avoid unnecessary appeals and administrative closures.

### **Plain Language**

The Plain Writing Act of 2010 requires Federal agencies to use clear government communication that the public can understand and use.<sup>22</sup>

NRC uses templates for its acknowledgement letters; and forms — NRC 464 (Response to Freedom of Information Act (FOIA) Request) and NRC 464-OIG (Response to Freedom of Information Act (FOIA) Request) to respond to requests. NRC's response forms do not typically include the date that NRC received the request, explain the methods NRC used to search for responsive records or why a certain exemption is claimed. Initial responses include a list of FOIA and Privacy Act exemptions at the bottom of the form with the box checked next to any exemption claimed by the agency. NRC's responses do not inform requesters of the number of pages the agency located, withheld in part, withheld in full, and released in full. FOIA requires agencies to "make a reasonable effort to estimate the volume" of any information withheld and

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<sup>20</sup> See 10 CFR § 9.41 (requests for waiver or reduction of fees).

<sup>21</sup> See 5 U.S.C. § 552(a)(6)(E)(vi).

<sup>22</sup> Plain Writing Act of 2010, 124 Stat. 2861.

should inform the requester of that estimate, unless doing so would harm an interest protected by an applied exemption.<sup>23</sup>

We observed that NRC’s website and responses to requests notify requesters of their right to seek assistance from the agency’s FOIA Public Liaison (FOIA Public Liaison); however, we also noted that NRC’s communications do not explain the role of the FOIA Public Liaison in the FOIA process or clarify how the FOIA Public Liaison assists requesters. We also note that NRC’s responses provide a URL to a “Contact Us About FOIA/Privacy Act, FOIA Team, and Public Liaison” web page — which may not be particularly helpful if a requester is receiving a hard copy of the response and/or does not have access to the Internet or a telephone.

DOJ also encourages agencies to make their FOIA Public Liaison available to requesters to assist them in formulating their request or locating documents that the agency has already proactively disclosed. By including such provisions, agencies can forestall more FOIA requests, formalize best practices, strengthen quality customer service, and further promote open government. We observed a general lack of clarity and plain language in written communications with requesters, particularly with regard to the agency’s rationale for denying requests that were not reasonably described or administrative closures of requests for fee-related reasons. Including brief, easy-to-understand descriptions of the information that a requester must provide to perfect a request or the agency’s FOIA fee policy would provide requesters with a better understanding of the agency’s FOIA process and the agency’s action on requests. Clear descriptions of the exemptions the agency uses to withhold material also would shed light on the process.

### **NRC FOIA Website**

NRC’s FOIA Website contains information about the agency’s operations and administration of FOIA; however, the site is text-heavy and not user-friendly. We observed that some of the links on the website were broken or linked to out-of-date content; for example, one link is to an outdated version of the FOIA statute. A visually inviting, logically organized, and plainly written FOIA website would help improve the public’s understanding of NRC’s implementation of FOIA.

The “Access to Records Without a FOIA Request [5 U.S.C 552(a)(1) & (2)]” and the “What to include in a FOIA request, how to submit the request, and how NRC will process the request” links on NRC’s FOIA homepage link to its FOIA guide for requesters which needs updating; however, there is no link on the homepage clearly labeled “FOIA Guide” or “Freedom of Information Act Guide.”

NRC’s FOIA Guide web page includes links to the Amendments to the FOIA “OPEN Government Act of 2007,” a broken link to the FOIA statute, the Attorney General’s 2009 FOIA

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<sup>23</sup> See 5 U.S.C. § 552(a)(6)(F).

Guidelines, FOIAs Related to Japan's 2011 Emergency, Frequently Requested Records, Privacy Act Systems of Records, and Annual and Quarterly FOIA Reports, Annual Chief FOIA Officer Reports, and Contact Us web page.

We note that the NRC posts its FOIA logs and reports to its website as PDF or HTML files, although the 2016-2018 FOIA Advisory Committee recommends that agencies post FOIA logs in Excel or CSV format. NRC makes FOIA reports available in a variety of formats including PDF, XML, and JSON.

**Recommendation 7:** NRC should review and update its communications with requesters, including its acknowledgements, responses, FOIA Desk Guide, and FOIA website to ensure they are up-to-date, written in plain language and include all relevant information so that requesters can more easily understand the agency's FOIA process and actions on requests.

**Recommendation 8:** NRC must comply with FOIA's statutory mandate by providing estimated dates of completion to requesters upon request.

#### **Finding 6: Training for NRC FOIA staff needs improvement.**

During our assessment, we found that NRC's FOIA Management Directive and FOIA Desk Guide do not address the FOIA's requirement for the Chief FOIA Officer to offer training to agency staff regarding their responsibilities under the statute. NRC does not have standardized training for its FOIA Professionals or its employees with FOIA duties.

To effectively and efficiently administer the FOIA, the NRC professionals responsible for implementing the statute must have sufficient training in the statute and the systems and tools the agency uses to process requests and appeals.

From our interviews with NRC staff, we heard that the FOIA program had provided quarterly FOIA Coordinator training in the past. However, the agency now only offers this type of training twice a year. We also learned that FOIA training is only mandatory for FOIA staff.

We observed in our case review that several NRC case files in *FOIAonline* were incomplete because the FOIA processors did not upload files into the system or document certain steps. We also observed that processors keep records concerning the processing of FOIA requests in both *FOIAonline* and a shared drive. From our review, it was clear that records are not kept consistently in either system and processors rely on both places to store records, resulting in an incomplete administrative record in one place. NRC should address this issue through training and updated written guidance on records management procedures for FOIA case files that reflect

the agency's transition to and use of *FOIAonline*.

**Recommendation 9:** NRC should assess and meet the training needs of staff with FOIA duties.

**Recommendation 10:** NRC should train staff on records management procedures for FOIA case files and update its FOIA Desk Guide to include such procedures.

### **Scope and methodology**

OGIS Compliance Team Lead Kirsten Mitchell and Compliance Team member Christa Lemelin conducted the assessment of the NRC FOIA program. This report is based on first-hand review of NRC FOIA initial request files; analysis of applicable data and documents including NRC FOIA regulations, management directives, NRC's FOIA website and other written material; and interviews with NRC FOIA officials and staff.

On October 8, 2019, we visited NRC and interviewed the following people:

- Chief Information Officer/Chief FOIA Officer
- Director of the Governance and Enterprise Management Services Division/FOIA Public Liaison
- FOIA Team Branch Chief
- FOIA Officer/GIS
- Two federal employee GISs
- Two contract GIS employees
- Two FOIA Coordinators

We did not interview an additional contract processor, who started the job the day before our visit. We re-interviewed the FOIA Officer by telephone on March 23, 2020.

We reviewed a “statistically significant sample” of FOIA case files NRC processed in FY 2018 — in this case 217 initial request files — which allows us to say that the findings and analysis apply to the entire population of 496 cases NRC processed in FY 2018. The NRC provided us with a spreadsheet of the FOIA cases it closed in FY 2018. An online sample size calculator (<https://www.surveysystem.com/sscalc.htm>) revealed that we needed to review 217 case files for a confidence level of 95 percent. We used Excel to assign sequential numbers to each of the 2,574 cases and the random number generator to select the sample of 217 cases. NRC provided us with access to *FOIAonline* to conduct our case file review. We finished our review of the case files in early March 2020 before the move to maximum telework amidst the COVID-19 pandemic. Please direct questions to OGIS at [ogis@nara.gov](mailto:ogis@nara.gov) or 202-741-5770.

## Appendix A

### Abbreviations and Acronyms

Term	Meaning
10 CFR	Title 10 of the Code of Federal Regulations
ADAMS	Agencywide Documents Access and Management System
EDO	Executive Director for Operations
FOIA	Freedom of Information Act
FY	Fiscal Year
GIS	Government Information Specialist
NRC	Nuclear Regulatory Commission
OCIO	Office of the Chief Information Officer
OE	Office of Enforcement
OGIS	Office of Government Information Services, National Archives and Records Administration
OI	Office of Investigations
OIP	Office of Information Policy, Department of Justice
OGC	Office of the General Counsel
OIG	Office of the Inspector General
SECY	Office of the Secretary
SME	Subject Matter Expert