



# Department of Homeland Security Office of Inspector General

## The DHS Privacy Office Implementation of the Freedom of Information Act





Homeland  
Security

March 30, 2011

Preface

The Department of Homeland Security (DHS) Office of Inspector General (OIG) was established by the *Homeland Security Act of 2002* (Public Law 107-296) by amendment to the *Inspector General Act of 1978*. This is one of a series of audit, inspection, and special reports prepared as part of our oversight responsibilities to promote economy, efficiency, and effectiveness within the department.

This report addresses the department's *Freedom of Information Act* implementation. The report is based on interviews with employees and officials of relevant agencies and institutions, direct observations, and a review of applicable documents.

The recommendations herein have been developed to the best knowledge available to our office, and have been discussed in draft with those responsible for implementation. We trust this report will result in more effective, efficient, and economical operations. We express our appreciation to all of those who contributed to the preparation of this report.

A handwritten signature in black ink, appearing to read "Carlton I. Mann".

Carlton I. Mann

Assistant Inspector General for Inspections

# Table of Contents/Abbreviations

---

Executive Summary .....	1
Background.....	2
Results of Review .....	4
The Privacy Office FOIA Staff Work Well With DHS Components.....	4
Recommendations.....	11
The Chief FOIA Officer Should Make Regular Use of the Statutory Authority to Advise the Secretary on Program Needs .....	11
Recommendation .....	23
Additional Guidance Is Needed on How DHS Will Make Discretionary Releases Under FOIA .....	23
Recommendation .....	29
Recommendations Under the (k)(3) Authority Are Necessary To Improve DHS FOIA Staffing .....	29
Recommendation .....	30
Management Comments and OIG Analysis .....	30

## Appendices

Appendix A: Purpose, Scope, and Methodology.....	35
Appendix B: Management Comments to the Draft Report .....	36
Appendix C: FOIA Statutory Exemptions and Exclusions .....	43
Appendix D: 2009 Executive Branch Guidance.....	44
Appendix E: Major Contributors to this Report.....	49
Appendix F: Report Distribution .....	50

## Abbreviations

AP	Associated Press
DHS	Department of Homeland Security
DOJ	Department of Justice
FOIA	<i>Freedom of Information Act</i>
FY	fiscal year
OGIS	Office of Government Information Services
OIG	Office of Inspector General
USCIS	United States Citizenship and Immigration Services

# OIG

---

*Department of Homeland Security*  
*Office of Inspector General*

## **Executive Summary**

This report assesses Department of Homeland Security Privacy Office implementation of the *Freedom of Information Act*, a statute designed to grant access to federal records. The Privacy Office advises department components on policies related to the act, although most components process requests independently.

We reviewed how the Privacy Office facilitates compliance with two 2009 executive branch memorandums. In January 2009, the President directed agencies to have a “presumption of openness” on *Freedom of Information Act* releases. The Attorney General supplemented this vision with March 2009 guidance. We interviewed managers in 11 components, analyzed data, and studied policy. Specifically, we sought to determine the effectiveness of the Privacy Office’s work with other components to implement the law.

We determined that the Privacy Office has made important progress in ensuring openness. Components appreciate the collaboration and responsiveness of the *Freedom of Information Act* staff in the Privacy Office. These efforts help the department implement a complicated statute.

We also determined that the Office of the Secretary has had unprecedented involvement in the *Freedom of Information Act* process beginning in 2009. For several hundred requests deemed significant, components were required to provide for headquarters review all the material they intended to release. The department’s review process created inefficiencies that hampered full implementation of the *Freedom of Information Act*. We evaluated a *Freedom of Information Act* release about the review process, and identified some redactions we believe may have been inappropriate. We are making six recommendations to expand the progress that the Privacy Office has made. Three of these recommendations focus on how the Chief Freedom of Information Act Officer can provide more recommendations to the Secretary on ways to improve the department’s *Freedom of Information Act* program.

---

## Background

Department of Homeland Security (DHS) records are subject to release under the *Freedom of Information Act* (FOIA).<sup>1</sup> Enacted in 1966 and amended several times, FOIA mandates that certain executive branch information be accessible to the public. The right to receive records subject to disclosure is enforceable through the judicial process.

The Supreme Court has written that FOIA is a “structural necessity in a real democracy,” because the law facilitates the citizenry’s ability to learn about government activities.<sup>2</sup> Various departments’ FOIA disclosures have exposed a range of improprieties and waste, including health care fraud, misuse of grant funds, and illegitimate law enforcement practices.<sup>3</sup>

FOIA creates a presumption of disclosure. Material must be disclosed unless it comes within one of nine exemptions or three exclusions, summarized in Appendix C, to address instances when the government’s need to protect information may outweigh the public’s right to know. Nonetheless, the law does not require use of exemptions in all applicable situations. In 1965, a Senate committee declared that successful FOIA implementation relies on “a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.”<sup>4</sup> As the Supreme Court has noted, FOIA exemptions “were only meant to permit the agency to withhold certain information, and were not meant to mandate nondisclosure.”<sup>5</sup>

In general, the statute requires agencies to process a FOIA request within 20 business days.<sup>6</sup> Agencies can contact requesters to clarify what is being requested, or to note that the scope of the request is so large as to require additional processing time. When the agency denies the request in full or in part, it must explain why, and inform the requester of the right to appeal.

On January 21, 2009, President Obama issued a memorandum on FOIA implementation that emphasized historical principles of

---

<sup>1</sup> 5 U.S.C. § 552(a).

<sup>2</sup> *Nat’l Archives and Records Admin. v. Favish*, 541 U.S. 157, 171 (2004).

<sup>3</sup> *The Right to Know: Your Guide to Using and Defending Freedom of Information Law in the United States at 94-99* (Santa Barbara, CA: Praeger Press, 2009).

<sup>4</sup> S. Rep. No. 89-813 at 3 (1965).

<sup>5</sup> *Chrysler Corp. v. Brown*, 441 U.S. 281, 294 (1979).

<sup>6</sup> 5 U.S.C. § 552(a)(6).

---

information disclosure. Agencies were directed to make all FOIA decisions under a “presumption in favor of disclosure.” When in doubt, the President wrote, “openness prevails.”

On March 19, 2009, the Attorney General, who provides FOIA policy guidance to federal entities, directed that agencies should not withhold records simply because an exemption may apply. When records cannot be fully disclosed, agencies must consider whether partial disclosure is possible. He added that “unnecessary bureaucratic hurdles” should not exist in a FOIA program. The Attorney General also directed that agencies should expand use of the Internet to post some information before FOIA requests are submitted. Such proactive disclosure requirements were originally added to FOIA in the *Electronic Freedom of Information Act Amendments of 1996*.<sup>7</sup>

This report refers to the memorandums of the President and Attorney General as the 2009 executive branch guidance. These memorandums, attached in Appendix D, reiterated the long-standing FOIA principle that information should not be withheld to protect public officials from embarrassment, to avoid disclosure of errors, or “because of speculative or abstract fears.”

Most of the department’s components process requests for their own records under the guidance of a FOIA officer, while DHS Privacy Office staff processes requests for the Privacy Office and eight headquarters offices.<sup>8</sup> From the Privacy Office, the Chief FOIA Officer, who is also the department’s Chief Privacy Officer, supports component efforts, shares information, and monitors the DHS FOIA program. However, the Privacy Office does not control FOIA processing in other DHS components, and agency FOIA officers are not supervised by the Chief FOIA Officer.

To process requests, FOIA officers work with program experts to determine whether responsive information exists, then consider the possible exemptions or exclusions that would allow the agency to withhold all or part of the information. Experts at the components have the best knowledge about what information is responsive and whether disclosure of certain information could have an operational impact. The Privacy Office offers advice to components on FOIA law and policy, but a component can process

---

<sup>7</sup> P.L. 104-231.

<sup>8</sup> Office of the Secretary, Citizenship and Immigration Services Ombudsman, Office of Counternarcotics Enforcement, Domestic Nuclear Detection Office, Office of the Executive Secretariat, Office of Health Affairs, Office of Legislative Affairs, and Office of Public Affairs.

---

many requests without the intervention of other parts of DHS. Cases also arise that require the input of multiple DHS components, or other federal entities, such as the Department of State or the Federal Bureau of Investigation.

DHS has a substantial FOIA caseload. In fiscal year (FY) 2009, it received 103,093 FOIA requests, or 18% of the federal government's 557,825 total requests. The number of requests rose to 130,098 in FY 2010. United States Citizenship and Immigration Services (USCIS) accounted for 70% of the DHS FY 2010 total. This is because USCIS maintains Alien Files, which are frequently requested records relating to an individual's immigration status.

In addition to the volume of requests, DHS faces a challenge because FOIA requests can be complex. The size of requested documents and the need to consult with other agencies means that some FOIA requests cannot be processed in a timely manner. This is not necessarily indicative of inefficient disclosure procedures. Even though DHS staff may work with requesters to limit the scope of some requests to decrease response time, delays beyond the statutory deadline will occur. For FY 2010, even releases defined as "simple" took an average of 62 days to process.

In March 2009, the U.S. Government Accountability Office reported on the department's overall FOIA program.<sup>9</sup> The review focused on DHS components that had the most pending requests. The report noted that the department has taken important steps to reduce request backlogs, which are FOIA disclosures that have not been released in the allotted timeframe. The report made five recommendations, including improvements in the use of redaction software, expanded training, and backlog monitoring.

## **Results of Review**

### **The Privacy Office FOIA Staff Work Well With DHS Components**

#### **The Privacy Office Helps DHS Implement FOIA**

DHS components have a strong working relationship with the Privacy Office. Component FOIA officials we interviewed praised the Privacy Office's FOIA staff for their approachability and responsiveness to requests for assistance. The Privacy Office

---

<sup>9</sup> U.S. Government Accountability Office, *Freedom of Information Act: DHS Has Taken Steps to Enhance Its Program, but Opportunities Exist to Improve Efficiency and Cost-Effectiveness*, GAO-09-260.

---

administers biweekly DHS FOIA teleconferences, an initiative established in March 2009. These calls help with the sharing of ideas, high-profile requests, litigation, and hot topics.

Components report FOIA request processing statistics to the Privacy Office monthly, and the Privacy Office compiles data from the reports for the department's internal monthly report. The monthly component reports include the number of requests received and processed, the age of requests, and the number of times a component made a discretionary release and proactive disclosure. DHS set a department-wide 15% backlog reduction goal for FY 2010, which is above the 10% reduction goal that the Office of Management and Budget established in December 2009. Each month the Privacy Office calculates components' backlog reduction goal, establishing the number of processed requests that are needed to reduce any existing backlog.

The Privacy Office conducts FOIA training for components. Training can cover FOIA in general or be tailored to specific situations, such as the use of particular exemptions. This training is based on a component's request, rather than a set schedule. When the President and Attorney General issued FOIA memorandums in 2009, the Privacy Office forwarded copies to DHS FOIA officials. Training slides and guidance that the Department of Justice (DOJ) prepared were also sent, as well as additional Privacy Office guidance on implementation of both memoranda.

The Privacy Office has advocated for components that seek managerial support to hire more FOIA staff or to change FOIA operations. Interviewees stated that the Privacy Office successfully advocated for additional FOIA staff in two components and consolidation of one component's multiple FOIA offices. A Privacy Office manager also participated in component FOIA officer hiring panels. The Privacy Office will lend its own staff to components that need processing assistance. One component's FOIA Officer is actually a Privacy Office employee.

### **Progress Has Been Made on Proactive Disclosure**

In March 2009, the Chief FOIA Officer issued guidance to components on the new standard under FOIA. In addition to attaching a copy of the Attorney General's memorandum, the Chief FOIA Officer noted that all DHS employees share the responsibility to ensure transparency and administer FOIA

---

effectively, including an expansion of proactive disclosure through the use of electronic reading rooms available on components' public websites. The following categories of records are subject to proactive disclosure:

1. Final opinions and orders made in the adjudication of cases;
2. Policy statements adopted by the agency;
3. Administrative staff manuals and instructions to staff that affect a member of the public; and
4. Records released in response to a FOIA request that "are likely to become the subject of subsequent requests for substantially the same records."<sup>10</sup>

In May 2009, the Chief FOIA Officer took steps to expand proactive disclosure under FOIA by issuing another memorandum to senior DHS officials. That memorandum emphasized the presumption of disclosure and the need for discretionary release of information. The memorandum emphasized the historical view that exemptions do not apply merely because full or partial disclosure may cause embarrassment or demonstrate an error or failure. Distributing this information demonstrated a respect for the 2009 executive branch guidance and a desire to assist DHS components.

FOIA managers informed us that DHS was the first department to issue its own proactive disclosure memorandum. This August 2009 guidance from the Privacy Office directed components to disclose six categories of records, which expanded on the four types of information listed in FOIA section (a)(2). The following DHS records are subject to this disclosure:

1. Historical daily schedules of the most senior agency officials;
2. Executed contracts and grants;
3. Management directives and instructions;
4. Congressional correspondence;
5. FOIA logs (summaries of cases so the public may understand what is being requested under FOIA); and
6. Records released pursuant to a FOIA request that have been, or are likely to become, the subject of three or more requests.

---

<sup>10</sup> 5 U.S.C. § 552(a)(2).

---

The Chief FOIA Officer provided additional assistance in October 2009, by issuing guidance on formatting the senior officials' historical schedules prior to disclosure. Although the Privacy Office recommended that the department post calendars of officials at the Assistant Secretary (or equivalent) level or higher, components retained the ability to choose which officials' calendars they would disclose. The memorandum recommended that components use a public version of the calendar with the removal of information exempt from FOIA, such as personal appointments. The memorandum also included suggestions for describing events uniformly, such as when officials were on leave.

In March 2010, the Chief FOIA Officer issued a memorandum to component heads reiterating the presumption of disclosure and the proactive disclosure categories. The memorandum included statistics showing that the department had increased the number of records released in full by 46% and the number released in part by 73%.

The DHS website provides a direct link to each major component's electronic reading room. Component FOIA officers appreciated the Privacy Office's efforts to expand the use of electronic reading rooms, but noted that challenges can inhibit this work. These challenges include an unexpected influx of FOIA requests, staffing limitations, and the time required to review documents. It can be time-consuming for busy component FOIA offices to redact calendars, contracts, and other documents subject to the DHS proactive disclosure policy.

The DHS electronic reading room provides a list of frequently requested information, then directs users to which component or directorate will handle requests to locate records. We reviewed component websites to discover the extent to which records are disclosed proactively. FOIA logs, for example, are easily accessible, although the time periods covered vary. The Privacy Office has FOIA logs posted from 2004 to 2010. With few exceptions, component FOIA logs are posted for FY 2009 and 2010.<sup>11</sup>

The DHS electronic reading room posts schedules for Secretary Napolitano. As of March 2011, Secretary Napolitano's calendars for January 2009 through July 2010 are posted. There is inconsistency across components regarding the proactive

---

<sup>11</sup> [http://www.dhs.gov/xfoia/editorial\\_0424.shtm#6](http://www.dhs.gov/xfoia/editorial_0424.shtm#6).

---

disclosure of senior officials' schedules, with limited posting in some components, or even no posting in certain cases. We observed that some of the delay is due to the extensive redaction process necessary to clear privacy-related information, in addition to pending clearance by officials.

The DHS website posts the top five categories of requests that the department receives, along with information on the components to which an individual can send a request. The top five requests of the department are for Alien Files, contracts, disaster relief information, grants, and information on No Fly lists and the Traveler Redress Inquiry Program.<sup>12</sup>

Proactive disclosure of contracts creates challenges for components and the Privacy Office, mainly because of concerns about proprietary information. To speed the proactive disclosure of contracts, the Privacy Office suggests that components begin to identify proprietary information when the contract is signed. However, our interviews with FOIA officers and our observations validate that inconsistencies in proactive disclosure of contracts exist across the department. Several components noted that the length of some contracts makes this process even more difficult. This has diminished the department's ability to achieve the goals of proactive disclosure. DHS receives a substantial number of FOIA requests for contracts, so additional proactive disclosure could serve the public and reduce the number of FOIA requests overall. The Privacy Office has been engaged on this matter, but additional attention is desirable.

### **Clarification of the Public Liaison's Role Would Be Beneficial**

In 2005, Executive Order 13392 established the position of FOIA Public Liaison in federal agencies. The *Openness Promotes Effectiveness in our National (OPEN) Government Act* of 2007 formally codified this position as a way to assist requesters in FOIA disputes with agencies. The Public Liaison, who reports to the DHS Deputy Chief FOIA Officer, serves as a mediator between components and FOIA requesters, but the position does not have control over agency FOIA operations. While DHS has only one Public Liaison, some departments, such as the departments of Defense, Energy, and Interior, have multiple Public Liaisons.

---

<sup>12</sup> [http://www.dhs.gov/xfoia/editorial\\_0579.shtm](http://www.dhs.gov/xfoia/editorial_0579.shtm).

---

FOIA officers and external agencies we interviewed said the DHS Public Liaison has improved the department's disclosure process. Managers at the Office of Government Information Services (OGIS), a FOIA mediation office that is part of the National Archives and Records Administration, said that the DHS Public Liaison is one of the best in the government.<sup>13</sup> The Public Liaison's responsibilities include interaction with outside entities to facilitate FOIA disclosures. OGIS has sought the Public Liaison's assistance in facilitating the resolution of various DHS FOIA cases. Examples of OGIS work with the Public Liaison included two USCIS FOIA requests that were initially delayed or denied. OGIS officials and DHS FOIA Officers said that the Public Liaison is effectively handling the statutory mediation role.

Even with the positive view of the Public Liaison, some departmental confusion exists. Because the statute does not provide extensive guidance, the Public Liaison suggested further development of policy on the mediation process and interaction with components. Confusion in parts of DHS led to the creation of public liaison positions in some components, although the Privacy Office recognizes only one Public Liaison across all of DHS. Additionally, the Public Liaison's ability to make changes to the FOIA requester service centers in components is part of the original role for the position, but the Public Liaison has limited ability to fulfill that function. Although the Privacy Office has helped components on customer service issues, greater clarity concerning the Public Liaison's work would be beneficial, especially regarding how the position can be used to foster any needed change in components' practices.

### **The Privacy Office Can Build on Existing Reviews of Component FOIA Operations**

The Privacy Office should institute an ongoing review process to ensure continuing improvement in component FOIA operations. These regular reviews would allow the Privacy Office to discover problems and ensure ongoing compliance with FOIA and DHS policies. A FOIA manager provided us with a component's release in which redactions, which were made with a magic marker, did not protect the information from disclosure. The component's FOIA Office did not have an opportunity to correct this error before disclosure of the information. A Privacy Office process of

---

<sup>13</sup> OGIS was created to review federal agencies' FOIA policies and procedures, to mediate disputes, and to generally act as a "bridge" between FOIA requesters and federal agencies. 5 U.S.C. § 552(h)(1).

---

regular component reviews may identify such incorrect or inefficient practices.

The Privacy Office has conducted some ad hoc component reviews, which resulted in greater efficiency across DHS. For example, in September 2008, the Privacy Office reviewed a component after receiving complaints from requesters. Components may also request assistance for a particular need, such as staffing problems.

In January 2008, Privacy Office managers visited components to examine files and discuss processing challenges. At one component, incomplete files and inadequate office equipment hindered efficient operations. Privacy Office FOIA staff became involved in processing that component's FOIA requests as a result of this component visit. In another case, the Privacy Office reviewed FOIA operations at the three components with the most backlogs. Work with component staff helped identify and eliminate problems with backlog reduction. These reviews resulted in action to improve operations, such as hiring contractors, centralizing FOIA operations, and hiring a new FOIA officer.

The Chief FOIA Officer suggested that any review process must be collaborative, because component FOIA officers would likely reject a mini-audit as too burdensome—a reasonable concern. We suggest that components have a role in how the review process would operate to ensure that unique statutory issues, such as Office of Inspector General (OIG) independence or other component-specific needs, are fully recognized. Instituting a regular review process should not damage the positive relationship between the Privacy Office and components.

One interviewee suggested that the Privacy Office could institute regular reviews of component FOIA operations via a memorandum from the Chief FOIA Officer. This would be consistent with the Chief FOIA Officer's statutory authority under FOIA subsections (k)(1) and (k)(2) to have agency-wide responsibility for efficient and appropriate program compliance and to monitor implementation of FOIA across the department. Additionally, the newly created Deputy Chief FOIA Officer's position description includes a requirement to develop component reviews and inspections to ensure uniformity and maximum compliance with FOIA. The Privacy Office could further leverage its good working relationship with components through collaborative development of a protocol to review component FOIA operations.

---

## Recommendations

We recommend that the Chief FOIA Officer:

**Recommendation #1:** Develop additional internal policies regarding proactive disclosure to ensure consistency across components and quicker posting of information.

**Recommendation #2:** Formalize the roles and responsibilities of the Public Liaison.

**Recommendation #3:** Implement an internal review function to assess department-wide FOIA operations on a regular basis to maximize efficiencies and improve the administration of the department's FOIA operations.

### **The Chief FOIA Officer Should Make Regular Use of the Statutory Authority to Advise the Secretary on Program Needs**

During our review, we learned that the Office of the Secretary was involved in examining certain FOIA releases prior to disclosure. This process was created so the department would be aware of certain FOIA requests deemed significant. After reviewing information and interviewing DHS FOIA experts, we determined that the significant request review process (hereafter, the review process) did not prohibit the eventual release of information. However, the intervention of the Office of the Secretary created inefficiencies. Although the review process delayed some releases, the Office of the Secretary is responsible to oversee DHS operations. The statute establishes that the Secretary “is the head of the Department and shall have direction, authority, and control over it.”<sup>14</sup> Our concern pertains to the scope of and inefficiency caused by the review process, not to the Secretary's role, as head of DHS, in overseeing the FOIA performance of her subordinates. Although the department redesigned the review process in July 2010, further enhancements can be made to improve FOIA implementation. To that end, the Chief FOIA Officer should use the authority at 5 U.S.C. § 552(k)(3) to make recommendations to the Secretary regarding ways to improve the DHS FOIA enterprise.

---

<sup>14</sup> 6 U.S.C. §102.

---

### **The OPEN Government Act Established That Chief FOIA Officers Should Make Recommendations to the Secretary**

Congress made various changes to FOIA in the OPEN Government Act of 2007. For example, agencies must create individual tracking numbers for requests as a way to improve service provided to FOIA requesters. In addition, public disclosure of various data, such as processing times and use of exemptions, is required.

The OPEN Government Act also created the position of Chief FOIA Officer in federal agencies. The Secretary appoints this individual, who serves at the Assistant Secretary level. The Chief FOIA Officer has agency-wide responsibility for efficient and appropriate compliance with FOIA. To coincide with this responsibility, 5 U.S.C. § 552(k)(3) establishes that the Chief FOIA Officer shall make recommendations to the Secretary for such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve implementation of FOIA. The Attorney General reiterated this requirement in his March 2009 memo. The Attorney General noted that Chief FOIA Officers must recommend such adjustments to agency practices, personnel, and funding as may be necessary.

Components have noted several improvements across the DHS FOIA program since the Chief FOIA Officer's arrival in March 2009.

### **The Office of the Secretary's Review of Significant Requests Was a Missed Opportunity for the Chief FOIA Officer To Use the (k)(3) Authority**

The Office of the Secretary's review of certain significant FOIA requests was the subject of a July 2010 Associated Press (AP) story, which led to concerns that the department was creating a "political filter" to slow the disclosure of DHS records under FOIA.<sup>15</sup> We were not able to substantiate the most serious allegations made in the AP story or subsequent public comments. However, we determined that the review process led to inefficiencies and slower processing of certain FOIA requests.

We could not determine the exact number of FOIA requests that were subject to the review process because the cases were not

---

<sup>15</sup> "A Political Filter for Info Requests," Associated Press, July 21, 2010.

---

tracked consistently. We asked the Chief FOIA Officer for data on the time required to review significant cases. The information had to be collected manually, which took a considerable amount of time. The Chief FOIA Officer suggested that the data were not fully reliable. Even with these limitations, the data and DHS FOIA experts suggested that as many as 610 FOIA releases were identified as being significant, and thus subject to the review process, between late September 2009 and early July 2010. The data and DHS FOIA experts indicate that 150 to 250 FOIA responses were processed and thus part of the review process during this period. We were unable to resolve this discrepancy based on the incomplete data, and we do not estimate the exact number of requests involved. DHS received about 8,500 requests a month during the time the review process was formulated.

The review process was initiated formally in September 2009, even though the Office of the Secretary pursued details about certain requests earlier. The review process was automated in July 2010. Components now place significant releases in SharePoint, a software platform that allows individuals to review and collaborate on documents. This enables interested personnel to review the content of releases to prepare for possible media coverage. After the information has been on SharePoint for 3 days, components may release it to the requester without a formal review process. We were informed in March 2011 that the SharePoint process will be reduced to a 1-day hold. This change will further improve the DHS FOIA program.

### **Advising the Office of the Secretary of Certain FOIA Requests Has Occurred in DHS for Several Years**

We received information from the Office of the Secretary and the Chief FOIA Officer about the origin of the review process. Components have been required to notify the Office of the Secretary of certain FOIA cases since 2005. This policy was designed to provide data on FOIA requests in general, including the identity of some requesters. Information gained is included in the department's weekly report to the White House.

In 2006, the policy was revised to provide more guidance to DHS components on which types of FOIA requests were of interest for weekly reporting purposes. This policy did not require that the Office of the Secretary review the actual FOIA releases. Rather, the process provided information about what was being disclosed.

---

Among other areas, the Office of the Secretary asked for details on FOIA releases that—

1. Related to a presidential or agency priority;
2. Would likely garner media attention;
3. Contained documents related to meetings with prominent elected, business, or community leaders; or
4. Were from the media, Congress, or special interest groups.

This request policy remained in effect after the change of administrations. In 2009, the Office of the Secretary had a heightened interest in several specific FOIA requests. This prompted inquiries to components for more details about the scope of some requests and the individuals who had submitted them. A significant change occurred in September 2009, when components were prohibited from releasing responses to FOIA requests that met the criteria for inclusion in the weekly report until the Office of the Secretary reviewed the material. The inefficiencies we discovered began after the decision to review all significant requests prior to release.

#### **FOIA Disclosures Were Still Made Under the Significant Request Review Process**

We received information from FOIA experts at various DHS components and reviewed documents and communications related to the review process. None of this information demonstrated that the Office of the Secretary prohibited the eventual release of information under FOIA. Information we obtained from the FOIA staff and our review of documents corroborates this assessment.

#### **The Office of the Secretary Was Interested in Certain Requesters' Backgrounds Before the Significant Request Review Process Began**

In May 2009, staff in the Office of the Secretary asked questions about FOIA releases related to the department's work on right-wing extremist groups. A report on the subject was researched during the Bush administration, but not finalized and released until after President Obama's election. DHS received several FOIA requests after initial media stories about DHS' analysis of right-wing extremism. A staff person in the Office of the Secretary asked the Privacy Office why certain FOIA requesters received expedited processing, a process the FOIA statute provides for

---

when a requester demonstrates a “compelling need.”<sup>16</sup> The next day, the Office of the Secretary asked, “Have we actually turned over any documents at this point? If so, when and what, and if not, when do we expect to?” One week later, the Office of the Secretary asked for a list of all 33 organizations that requested the right-wing extremism report. After the list was provided, a further inquiry was made regarding how many of the organizations were media outlets.

Although internal discussions regarding agency actions are appropriate, in this context, these discussions created “unnecessary bureaucratic hurdles” that delayed DHS components’ ability to respond more timely to FOIA requests. For example, why a specific document was requested is insignificant under FOIA, since requesters do not need to justify their interest in desired records. The Supreme Court has established that<sup>17</sup>:

**“citizens should not be required to explain why they seek the information. A person requesting the information needs no preconceived idea of the uses the data might serve. The information belongs to citizens to do with as they choose . . . the disclosure does not depend on the identity of the requester. As a general rule, if the information is subject to disclosure, it belongs to all.”**

Department officials told us that that advance knowledge of significant releases can improve the DHS response to the media inquiries that often follow public release of information about DHS activities. While the department has a legitimate obligation to respond to media inquiries, we are not persuaded that delaying a FOIA release so that officials can prepare for expected inquiries is the best public policy. Again, the problem is that some of these inquiries delayed the final issuance of some FOIA responses.

The department did not violate privacy laws or other rules when the Office of the Secretary gained information about some requesters. Indeed, agencies usually disclose the identities of requesters to the public when posting FOIA logs.

---

<sup>16</sup> 5 U.S.C. § 552(a)(6)(E). DHS regulations set forth standards for evaluating such requests. 6 C.F.R. § 5.5(d).

<sup>17</sup> *National Archives and Records Administration v. Favish*, 541 U.S. 157, 172 (2004).

---

### **Examples Exist of Statutory Noncompliance and Inefficiencies Caused When Some Significant Requests Were Reviewed**

Documents we received demonstrate several cases of releases being delayed because the Office of the Secretary asked basic questions about the FOIA process or for other minor reasons. In many cases, delays under the review process were short. Some releases needed only 1 to 4 days for completion of the review process. These relatively brief delays still caused the temporary withholding of certain documents that a component was prepared to release.

Other releases were delayed longer. In one example, the Office of the Secretary received a component's release on October 16, 2009. The review was delayed at least 10 calendar days because of higher-priority business in the reviewing office. We are not including quotations from this and several other e-mails related to the review process because the statements were redacted in information released to AP. We will discuss the redactions from the release to AP later in this report.

A similar example occurred on November 9, 2009, when the Privacy Office forwarded a FOIA response to the reviewers in the Office of the Secretary. Three days later, a staff person replied, "I have a few questions about this one." On November 17, the Privacy Office asked about the status of the request, since no authorization had been received to permit release of the information. Data we received from the Privacy Office included a range of examples of cases that were under review at the Office of the Secretary for several weeks.

We cannot establish how often the review process caused the delay of FOIA releases to the point of statutory violation (i.e., delays that extended the response time beyond the 20-business-day statutory deadline). Office of the Secretary personnel said that significant releases were not simply stuck in the process waiting for a staff person to review the information. Some proposed releases may have been returned to the component with a question, or sent to the Office of the General Counsel for further legal review or to check the consistency of redactions. Regardless of how the release was handled while in the review process, data suggest, but we cannot confirm with exactness, that dozens of FOIA releases were delayed for weeks while the component waited for approval to disclose the information to the requester. Many of these requests appeared to

---

have been in process for more than 20 business days and thus had already exceeded the statutory deadline before the review process began. The delay of even one FOIA request beyond the statutory deadline creates legal risk, because a requester can file in U.S. district court for judicial review as soon as the statutory time period for responding passes.

Again, in certain cases, review process delays led to violations of the statutory deadline. For example, a component received a FOIA request on March 1, 2010, and completed processing it on March 19. The release could have been made then, which was within the 20 business days required in the statute. However, it was not until March 31—23 business days after the request was made—that an Office of the Secretary staff person submitted minor edits to clarify the component’s response. The original language and suggested edits appear below:

**Original wording in the component’s response letter**

**In responding to a FOIA request, the DHS/Privacy Office will search for responsive documents in its control on the date the search began. We began our search on March 4, 2010.**

**Wording changes that the Office of the Secretary suggested**

**Beginning on March 4, 2010, the DHS/Privacy Office searched for responsive documents in its control on the date the search began.**

The department officials told us that correcting errors in cover letters was necessary, and led component authors to devote more attention to grammar and quality. Letters with errors reflected poorly on the department’s professionalism and service, they added. We agree that certain letters could be improved. The department may wish to remain focused on the quality of FOIA response letters, and the component review process we recommend should facilitate needed improvements without a delay in disclosing information. We do not support delaying FOIA requests beyond the statutory timeframe to make minor edits, which is inconsistent with the purpose of FOIA and the short timeframes established in the statute.

Other cases of delay are evident. In a June 2010 case, a component asked for an update more than 3 weeks after the review process began. In reply, a Privacy Office manager said that the

---

release was still in the review process. The component FOIA expert noted the urgency of the matter, since the review process caused a violation of the 20-business-day response requirement.

Even when the review process did not violate the statutory timeframe, inefficiencies resulted. On several occasions, staff in the Office of the Secretary made basic inquiries about FOIA in general and why records were being sought in particular cases. In most instances, neither FOIA officers nor program experts would have answers to such questions. To the extent the staff was seeking answers to specific operational questions raised by FOIA requesters, the staff should direct such questions to program experts, not FOIA processors. Additionally, FOIA does not require requesters to specify why they want records. Nonetheless, the Privacy Office provided e-mail responses to such questions in some cases. Reviewed materials reflected the frustration of FOIA staff throughout the department regarding the time required to respond to such inquiries.

Inefficiencies were also created when responsive documents were too large to send via e-mail. In certain instances, Privacy Office managers had to hand-carry paper or disk copies of FOIA releases to the Office of the Secretary. These actions did not result in major expenses or extensive processing delays, but the inefficiency involved is at odds with the 2009 Attorney General memorandum, which began by emphasizing “our nation’s fundamental commitment to open government” through implementation of the President’s vision. The memorandum also articulated a view that “timely disclosure of information is an essential component of transparency.” The practices outlined above were contrary to this spirit.

When we interviewed the Chief FOIA Officer and a staff person in the Office of the Secretary, they agreed that the review process introduced some delays and inefficiencies. Both told us that only a few cases were affected in any significant way. We were provided examples where the Office of the Secretary worked with component counsel to improve FOIA responses. In one case, the Office of the Secretary ensured that a component did not prematurely release another department’s records.

The department also informed us that the leadership of the Privacy Office and officials in the Office of the Secretary helped to develop the SharePoint process now used, which facilitates release of information while still providing managers with the awareness

---

they need about cases that will likely cause media interest. We acknowledge that the use of SharePoint is preferable to the abandoned process that delayed dozens of releases for long periods. However, the new process is not required by FOIA and seems inconsistent with the 2009 FOIA guidance prohibition of “unnecessary bureaucratic hurdles.” The department should continually examine how any delay affects statutory compliance and the efficiency of the DHS disclosure program. We do not understand why certain finalized releases, even for “awareness” purposes, must remain in the department’s control for 3 days, effectively trimming to 17 days the amount of time available to FOIA processing officers if the entire process is still to satisfy the 20-day statutory limitation.

### **DHS FOIA Experts Questioned the Utility of the Significant Request Reviews**

We interviewed FOIA experts in the Privacy Office and 10 other DHS components, including those in the Office of Inspector General. These offices received 99% of DHS FOIA requests from October 2008 through June 2010. Generally, the experts had a negative view of the significant review process.

When the Office of the Secretary began to request copies of all significant FOIA disclosures prior to release, the Chief FOIA Officer expressed concern to a senior official in the Office of the Secretary. Under the process, components would send certain FOIA releases to the Privacy Office. Staff there would forward the information to the Office of the Secretary for review. The Chief FOIA Officer suggested that the process could create inefficiencies and burden the components. Although the Office of the Secretary later improved the process through SharePoint, the concerns that the Chief FOIA Officer expressed as the review process was being established were not heeded.

Documents we reviewed indicate that the Chief FOIA Officer’s reservations continued after implementation of the review process. In December 2009 e-mail messages to her staff, the Chief FOIA Officer lamented the level of attention that the Office of the Secretary was giving to significant requests. In that same month, the Chief FOIA Officer informed the DHS Office of the General Counsel that staff involved in the review process had suggested inappropriate edits to FOIA release cover letters—edits that would have altered the information requesters received on appeal rights when FOIA denials were made.

---

Through internal communications, Privacy Office managers shared process concerns on several occasions. In a February 2010 memorandum, one manager wrote that review of requests in the Office of the Secretary is “a significant resource drain” for components, prompting delays in FOIA releases and loss of efficiency. These concerns were reiterated in April 2010: “The front office review process has significantly hampered the ability of DHS and its components to respond promptly to requests.”

Other components did not experience notable delays or were less opposed to the review process. These FOIA officers said the review was designed to improve DHS awareness of major public requests, and added that records were released after review from the Office of the Secretary, although some cases were not released in a timely manner. No FOIA officer said that requesters were disadvantaged because of their political party or particular area of interest. Nonetheless, some FOIA officers who were less critical of the process expressed doubts about significant review, with one suggesting that the Office of the Secretary likely had more important work to do than review FOIA disclosures prior to release.

### **Data From One Component Demonstrate That the Significant Request Review Process Added to FOIA Processing Times**

Components rarely tracked the time requests spent in the review process. The incomplete data we were provided support what component FOIA officers have suggested: There was wide variation in the time required to complete the review process. Staff in the Office of the Secretary assigned to review significant FOIA releases were responsible for various other tasks, which likely explains the inconsistent response time to FOIA cases. Also, some delays developed outside the Office of Secretary, as the Secretary’s Office forwarded certain requests to the Office of the General Counsel for additional review.

For a short period, one component tracked the amount of time involved in the Office of the Secretary review of significant FOIA requests. Of the 53 cases monitored, which covered releases sent for review from March through July 2010, it took the Office of the Secretary an average of 15 business days to complete the review process. The component could not send the information to the requester until this review was completed. However, several cases among the 53 cases monitored were part of the review process for

---

far longer than the 15-day average. Of the 20 significant releases sent in March and April, three took more than 40 business days, with one case taking 46 days. Six other cases were in the review process between 30 and 40 days. Of the 53 cases, 15 spent more than 20 business days in the review process.

In our interviews, several DHS FOIA managers stressed that the process was counter to the statute and the 2009 executive branch guidance. Different component experts declared that the process was “a disservice to the requester” that had “no added value” to DHS FOIA practices.

FOIA officers can be concerned with delays even when only one case is affected, because of potential legal liability and the desire to serve requesters promptly. This was the view of components that had few significant requests during the process. One of these component’s FOIA officers said that the review process took more than 90 days in one case.

### **The Significant Request Review Process Led to Negative Media Attention**

Even if the process had improved the department’s FOIA processing, the delays it caused, the July 2010 AP story, and the subsequent congressional scrutiny led to negative comments from the press and those interested in more disclosure under FOIA. The effort to improve “awareness” of significant requests actually increased negative attention from the media.

We found several examples of media negativity. The review process also prompted a request to Inspectors General from Representative Issa and Senator Grassley to evaluate political appointees’ control over FOIA.<sup>18</sup>

Additionally, an Internet blog associated with a newspaper declared that the review process meant the new administration was “no friend of FOIA,” while an *Arizona Daily Star* editorial stated that DHS actions were contrary to the “bedrock” of public information laws. Another editorial noted that the DHS policy was at odds with open government principles.<sup>19</sup>

---

<sup>18</sup> “House panel expands probe of information requests,” *Washington Post* (February 1, 2011), [http://grassley.senate.gov/news/Article.cfm?customel\\_dataPageID\\_1502=28447](http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=28447).

<sup>19</sup> “Obama administration no friend of FOIA,” *Missoula Editor* (July 22, 2010), <http://missoulaeditor.com/?p=1799>; Editorial, “Freedom of Information is a Public Right,” *The Arizona*

---

Some websites were more negative, even to the point of being inaccurate. One used animation to show the Secretary placing some FOIA requests in the trash.<sup>20</sup> As we have noted, the review process did not lead to the denial of eventual information disclosure.

**Sufficient Concern Existed for the Chief FOIA Officer To Recommend That the Secretary End the Review Process**

The information we received demonstrates that the review process created inefficiencies in the FOIA process. Such inefficient oversight of significant requests before release led to statutory noncompliance or prolonged delays in some cases. Additionally, various individuals who reviewed significant cases, including senior DHS officials, had little to contribute to the department's disclosure program. As cases went unprocessed for weeks, the Chief FOIA Officer could have invoked 5 U.S.C. § 552(k)(3). Recommending changes to DHS FOIA practices would have informed the Secretary of problems related to the review process.

The Chief FOIA Officer has improved the FOIA process at DHS. Components believe the Chief FOIA Officer deserves credit for the positive communication and open dialogue across the department's FOIA offices. Components also believe that the Chief FOIA Officer's staff deserves praise for their roles in improving DHS' FOIA operations. To further improve the DHS FOIA program, the Chief FOIA Officer should develop a policy to use the (k)(3) authority on a regular basis. Doing so would give the Secretary information on what is needed to improve DHS FOIA operations. This is important because of the legal risks that exist under the statute, and because the President has declared that FOIA is "the most prominent expression of a profound national commitment to ensuring an open Government." To support this determination, the Attorney General noted, "Timely disclosure of information is an essential element of transparency."

Based on information we received, the review process is still being used. Inefficiencies and time lags may therefore still exist when a FOIA request falls into that process. Further analysis by the

---

*Daily Star* at A11 (July 23, 2010); "Political Scrutiny Tops at Homeland Security," *Grand Junction Daily Sentinel*, July 22, 2010.

<sup>20</sup> American Thinker (July 23, 2010),

[http://www.americanthinker.com/blog/2010/07/beware\\_if\\_you\\_make\\_an\\_foia\\_req.html](http://www.americanthinker.com/blog/2010/07/beware_if_you_make_an_foia_req.html). .

---

Privacy Office could lead to specific (k)(3) recommendations on the discontinuance of this process, or perhaps changes to the 3- or 1-day hold on issuing the response pending that review.

We requested all documents related to the Chief FOIA Officer's use of the (k)(3) authority. In addition to the DHS proactive disclosure memorandum, we received one July 2010 memorandum, an analysis of the need for additional support to reduce the backlog in FOIA appeals. The Chief FOIA Officer said that an appeals backlog "presents a potential litigation risk and is not in keeping with the Administration's aspirations and directions regarding compliance with FOIA." This exact wording could have been used to recommend an end to the review process.

Because the Chief FOIA Officer holds a vital position as advisor to the Secretary, routine use of (k)(3) reports would empower the Privacy Office and improve FOIA compliance across DHS. Recommendations under (k)(3) should be used to implement the President's vision and reduce the department's exposure to legal risk. Because the need for recommendations may fluctuate over time, a determination on the frequency of reporting should be at the discretion of the Chief FOIA Officer.

## **Recommendation**

We recommend that the Chief FOIA Officer:

**Recommendation #4:** Report as necessary to the Secretary, based on 5 U.S.C. § 552(k)(3), to recommend improvements to the DHS FOIA enterprise.

## **Additional Guidance Is Needed on How DHS Will Make Discretionary Releases Under FOIA**

### **Some Office of the Secretary Personnel Misunderstood FOIA and the 2009 Executive Branch Guidance**

Even though the Office of the Secretary did not deny FOIA requests, legitimate concern exists when any process decreases the efficiency of FOIA processing. Such problems can lead to statutory noncompliance and a disregard of presidential directives. Based on the e-mail messages exchanged between the Privacy Office and the Office of the Secretary, we determined that some

---

staff in the Office of the Secretary involved in the review of significant requests did not have sufficient knowledge of FOIA.

One case involved an individual's interpretation of the Privacy Office's August 2009 proactive disclosure memorandum. As noted previously, the memorandum was a positive step to expand the statutory requirement to make more documents available in DHS electronic reading rooms. Interpretations of this memorandum by personnel in the Office of the Secretary in one case detailed below were at odds with the OIG's view of statutory intent and the 2009 executive branch guidance. [Exact quotation withheld.]

This individual implied that the potential embarrassment of DHS should be considered when making proactive disclosure decisions. The expectation of greater disclosure is clear in the 2009 executive branch guidance, even though it is true that the President's memorandum did not create new rights for persons or prevent the government from asserting necessary exemptions. FOIA is indisputably a disclosure statute, not a means for federal agencies to keep embarrassing information from the public.

In another case, the statements of a senior official in the Office of the Secretary implied an effort to decrease the level of FOIA disclosure. In March 2009, 6 months before the review process began, the official suggested, "Nothing should be released" in a specific request for pre-decisional documents. In another instance, it was suggested that the department should send public information only to a particular requester. Government employees should undoubtedly ask questions and offer suggestions while a course of action is under consideration. This is the "deliberative process" in which government employees must engage in order to make reasoned decisions. Thus, the fact that these suggestions were not adopted as policy is significant. However, a FOIA manager expressed concern that the official's suggestion could have led a component to limit the search for department records because the focus of the analysis was on withholding versus disclosing records.

Other individuals in the Office of the Secretary had an incorrect view of what FOIA required. In the case of a right-wing extremism FOIA request, the DHS Office of Intelligence and Analysis did not redact the draft mission statement for the former Extremism and Radicalization Branch of the Homeland Environment Threat Analysis Division. The inclusion of this

---

information in the component's proposed release raised concern on the part of a staffer reviewing the significant release.

This instance demonstrated further misunderstanding of the FOIA process. Even though program experts and FOIA staff had already determined that the draft mission statement was responsive and that it should be released, there was a suggestion that the draft material should not become public simply because it was a draft document. The fact that a document is a draft is one factor in the deliberative process analysis, but not the only factor. Although we did not find evidence that the material was withheld, FOIA is a disclosure statute that requires release of information unless an exemption authorizes or requires the agency to withhold the records. Also, although agencies may make discretionary disclosures of records that fall under certain exemptions, changes in administrations over the years have resulted in varied applications of this authority. The 2009 executive branch FOIA guidance established that agencies should not withhold records simply because an exemption may apply, as FOIA decisions are to be made under a "presumption in favor of disclosure." Thus, a suggestion to reevaluate a FOIA release in order to find a basis for withholding when the release had already been determined to be required under FOIA, does not appear to be consistent with these guidelines. Again, government employees should freely question proposed decisions as part of the deliberative process. However, doing so without a clear understanding of FOIA adds little to the agency's decision-making process and delays the FOIA response.

**Additional Information May Have Been Appropriate for Release to the AP Regarding the Significant Request Review Process**

In January 2010, the AP submitted a FOIA request for information about the department's FOIA review process. We examined the FOIA release to gain an understanding of how exemptions were applied. While the bulk of the redactions undoubtedly were appropriate, we are concerned that certain statements may have been withheld from the AP release merely to avoid embarrassment to the department, which is not appropriate under FOIA, and certainly not under the 2009 executive branch guidance. The Privacy Office had minimal participation in the AP release, since most of the requested e-mails included Privacy Office staff. Instead, the DHS Office of the General Counsel made the redaction decisions.

---

The redactions we questioned were generally made under FOIA Exemption 5, which covers “memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”<sup>21</sup> The exemption protects information that is normally privileged in civil discovery.<sup>22</sup> Among other privileges, courts have determined that agencies can protect deliberative processes so as not to “stifle honest and frank communication within the agency” and to protect “the consultative functions of government.”<sup>23</sup> Case law suggests that “advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated” can be protected.<sup>24</sup> Exemption 5 can protect agency discussions on pre-decisional matters so that employees can provide advice without concern for public disclosure.

Even before the 2009 executive branch guidance, judicial decisions interpreting deliberative process under Exemption 5 required agencies to evaluate pre-decisional materials under various factors in order to determine whether the privilege applied. In 1975, a U.S. Appeals Court made points that remain valid. “[P]re-decisional materials are not exempt merely because they are pre-decisional,” the court noted. “[T]hey must also be a part of the agency give-and-take of the deliberative process—by which the decision itself is made.”<sup>25</sup> This means that Exemption 5 does not protect all pre-decisional agency documents, and specifically, that the pre-decisional nature of a document alone is not enough to justify withholding release under FOIA.

This is especially important when considering the 2009 executive branch guidance. In the updated version of the *Guide to the Freedom of Information Act*, the Department of Justice wrote, “[I]t is important to first note that the President and Attorney General have issued memoranda to all agencies emphasizing that the FOIA reflects a ‘profound national commitment to ensuring an open Government’ and directing agencies to ‘adopt a presumption in favor of disclosure.’”<sup>26</sup>

---

<sup>21</sup> 5 U.S.C. § 552(b)(5).

<sup>22</sup> *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

<sup>23</sup> *Id.* at 149; *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

<sup>24</sup> *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

<sup>25</sup> *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975).

<sup>26</sup> U.S. Department of Justice *Guide to the Freedom of Information Act* at 357 (Government Printing Office, 2009).

---

In addition to this general advice applicable to all FOIA releases, April 2009 DOJ guidance suggests that pre-decisional material is suitable for discretionary disclosure:

There is no doubt that records protected by Exemption 5 hold the greatest promise for increased discretionary release under the Attorney General's Guidelines. Such releases will be fully consistent with the purpose of the FOIA to make available to the public records which reflect the operations and activities of the government. Records covered by the deliberative process privilege in particular have significant release potential. In addition to the age of the record and the sensitivity of its content, the nature of the decision at issue, the status of the decision, and the personnel involved, are all factors that should be analyzed in determining whether a discretionary release is appropriate.<sup>27</sup>

Public data from the Privacy Office demonstrate that the department's use of Exemption 5 has grown considerably, even though total FOIA requests have declined. In 2006, the department received 137,871 requests, with 33,705 uses of Exemption 5. For 2009, the comparable numbers were 103,093 and 59,510. Thus, while total FOIA requests decreased by 25%, the use of Exemption 5 increased by 77%. In FY 2010, use of the exemption decreased, but remained high compared to historical standards. The department received 130,098 requests, and Exemption 5 was used in 41,828 instances. These numbers in isolation may not be cause for concern, especially since the types of records requested will largely determine whether Exemption 5 applies to particular records. Nevertheless, in the context of the Office of the Secretary's previous involvement in the FOIA process, the numbers help to suggest that additional clarification on the requirements of FOIA is justified.

The DHS release of information to the AP provides examples in which we question whether DHS fully implemented the presidential vision for greater release of deliberative process material. We are not quoting from these materials because the material was redacted. Although there were some efforts to change FOIA responses, we could not substantiate that such changes were made before information was released.

---

<sup>27</sup> <http://www.justice.gov/oip/foiapist/2009foiapist8.htm>.

---

Potentially embarrassing wording was redacted in other cases as well. In November 2009, a senior DHS official suggested limitations on the release of a particular request that a component was processing. Additional redactions were made in some instances where FOIA managers expressed frustration with the review process. The 2009 executive branch guidance could reasonably be interpreted to suggest release of these statements. These comments were made after the Office of the Secretary had already established the review process. Redaction of such statements was not based on an understanding that the purpose of the deliberative process privilege was to “prevent injury to the quality of agency decisions.”<sup>28</sup> These post-decisional comments were not made in a deliberative context to those who could change the policy. Assuming these statements were responsive to the FOIA request, and no other exemption applied, we believe that release of the statements, rather than redaction, would have been more appropriate based on the 2009 executive branch guidance.

Our conclusions about certain AP redactions reflect a difference of opinion with the department on a limited number of choices that were made with this FOIA release. Any statements we make about the AP release do not mean that we have concluded the department acted in an unlawful manner. Nor do we suggest that the use of Exemption 5 across DHS is incorrect or even that every use in the AP release is worrisome. The AP’s FOIA request was not known to us during the planning phase for this inspection. The content of the release is directly relevant to the review process, which became a major focus of this report. Thus, a detailed review of that FOIA release and the hundreds of redactions made therein—in the context of evaluating the FOIA review process—was appropriate.

To ensure the fullest possible respect for the 2009 executive branch guidance, the Chief FOIA Officer should recommend that the Secretary issue instructions on the use of redactions. This guidance should clarify that departmental interests under Exemption 5 must be balanced, and that Exemption 5 is not designed to shield embarrassing or controversial words from public scrutiny. Policy statements such as the 2009 executive branch guidance, in conjunction with established case law, must govern redaction decisions under FOIA. A policy statement from the Secretary would express the sentiment that DHS fully embraces the President’s vision for FOIA releases. We have noted the positive work that the Privacy Office initiated after the 2009

---

<sup>28</sup> *NLRB v. Sears, 421 U.S. 132, 151 (1975).*

---

executive branch guidance, and efforts to enlist the Secretary's support for additional transparency would promote the department's adherence to the new FOIA paradigm.

## **Recommendation**

We recommend that the Chief FOIA Officer:

**Recommendation #5:** Use the authority at 5 U.S.C. § 552(k)(3) to recommend to the Secretary that the Secretary issue written guidance to the department on the President's reiteration that embarrassment, abstract fears, and the exposure of failure are not grounds to exempt information under FOIA.

## **Recommendations Under the (k)(3) Authority Are Necessary To Improve DHS FOIA Staffing**

Some FOIA officers we interviewed expressed concern about inadequate staffing. Even FOIA officers who believed that staffing was sufficient said problems would arise if FOIA requests increased. Several component FOIA officers said that progress with proactive disclosures has suffered because of the need to focus resources on incoming requests. Interviewees suggested that additional FOIA staff would allow for concentration on backlog reduction and more proactive disclosure.

The Privacy Office has detailed staff to other components when staffing needs arose, but this is not a permanent solution to agency staffing concerns. Two interviewees suggested that the department could detail existing FOIA staff to other components that needed assistance. A short-term alternative to additional funding or detailees would be the formation of a task force or working group to address staffing needs and render assistance throughout the department on an as-needed basis.

At 103,093 requests, DHS had the most FOIA requests in the federal government in FY 2009, the last year full data for the entire government are available. Managing the backlog for such a busy FOIA operation can be difficult. In January 2010, the department's backlog was 12,406 requests. The backlog increased to 17,319 requests in June 2010, a 39.6% increase in 6 months. The backlog by the end of FY 2010 fell to 11,383.

---

In March 2010, the White House issued a memorandum to agency and department heads requesting that they take certain steps to implement the President's 2009 FOIA guidance. One of those steps was to assess the level of resources for FOIA processing to ensure prompt responses and cooperation with requesters. We received data that substantiated the department's effort to hire additional FOIA staff. At the end of FY 2010, DHS had 420 full-time FOIA staff, an increase of 40 positions in 1 year. Nonetheless, nine DHS components reported an increase in their FOIA backlog during FY 2010.

Even with the efforts to increase staff and reduce FOIA backlogs, the department's FOIA caseload can still be difficult to manage. In an April 2010 internal memorandum, the Director, Disclosure and FOIA, noted that other departments' staffing resources exceeded those of DHS. This prompted a recommendation that several components should have additional FOIA personnel. The department should ensure that the FOIA staffing issue remains a focused area of study, especially since backlog reductions fluctuate throughout the year. Staff may also be necessary to focus resources on proactive disclosure.

## **Recommendation**

We recommend that the Chief FOIA Officer:

**Recommendation #6:** Study and make recommendations to the Secretary regarding FOIA staffing levels.

## **Management Comments and OIG Analysis**

The Privacy Office and DHS Office of General Counsel submitted a consolidated response to our report. We have made changes to the report where we deemed appropriate. A copy of the department's response, in its entirety, is included as Appendix B. We also received technical comments from the department, and we have made corrections to the report based on these comments.

The department concurred with each of our six recommendations. The formal response to our report included concerns about specific OIG methodologies and conclusions, as well as a management response to each recommendation. Our analysis of the DHS response to the recommendations follows a brief discussion of the department's concerns.

---

Our report fully respects the right of the Secretary to direct and control DHS. Positive change can result when the Office of the Secretary reviews and coordinates component activities. This has been particularly useful to our office when we issue reports that involve multiple parts of DHS.

It is appropriate that the Secretary oversee the DHS FOIA program. It is also appropriate that there be internal debate among DHS employees about DHS programs, and FOIA processing is no exception. We simply determined that the unprecedented scope of the review process, and specifically the 2009 decision to hold releases to requests deemed significant until the review was completed, created various inefficiencies and delayed some releases. Because the department stopped most parts of the process after less than a year of operation, including a change as of March 28, 2011, to reduce the 3-day hold to a 1-day hold, we conclude that the Office of the Secretary agrees that the review process was unworkable as formerly executed.

We also fully respect the intent of FOIA Exemption 5. Case law and the 2009 executive branch guidance have established that a statement is not subject to protection under Exemption 5 simply because it is pre-decisional. Whether a redaction can or should be made are two different analytical questions. The President's January 2009 guidance on FOIA, and DOJ policies issued in response to it, are clear on this. Because the department concurs with each of our recommendations, we believe the difference of opinion is not as serious as one might infer from some parts of the management response. The OIG will continue to seek the most efficient and effective policies across DHS, and we are pleased that the department respects that role.

**Recommendation #1:** That the Chief FOIA Officer develop additional internal policies regarding proactive disclosure to ensure consistency across components and quicker posting of information.

**Management Response:** The department concurred with Recommendation #1. The Privacy Office noted the various enhancements the department has made in proactive disclosure. The department's electronic reading rooms include more than 10,000 pages of documents, and new publications are released every week. Further work to address this important area, through collaboration with component FOIA officers, is ongoing. The Privacy Office anticipates that it will have a department-wide procedure by December 2011.

---

**OIG Analysis:** The department has made progress in proactive disclosure. As noted by the Chief FOIA Officer, the department has continued to improve proactive disclosure, and we determined that the progress is ongoing. We appreciate the past focus on this issue, which is central to an agency's disclosure program. The recommendation is *resolved* and *open*.

**Recommendation #2:** That the Chief FOIA Officer formalize the roles and responsibilities of the Public Liaison.

**Management Response:** The department concurred with Recommendation #2. The Chief FOIA Officer and Deputy Chief FOIA Officer will work with the Public Liaison to further clarify the position's important role. The Chief FOIA Officer and Deputy Chief FOIA Officer, together with the Public Liaison and the component FOIA officers, will review the roles and responsibilities of the Public Liaison. The Privacy Office anticipates that it will accomplish this goal by September 30, 2011.

**OIG Analysis:** As with proactive disclosure, the department will be able to build on past progress and the positive relationships that the Public Liaison has created. The planned study of the position's role is an excellent opportunity to work with components and the public to make the department's use of the public liaison role a model for other federal agencies. The recommendation is *resolved* and *open*.

**Recommendation #3:** That the Chief FOIA Officer implement an internal review function to assess department-wide FOIA operations on a regular basis to maximize efficiencies and improve the administration of the department's FOIA operations.

**Management Response:** The department concurred with Recommendation #3. The Chief FOIA Officer and Deputy Chief FOIA Officer intend to develop a collaborative internal review process over the next several months.

**OIG Analysis:** We are pleased that the Privacy Office views an internal review program as a means to accomplish ongoing FOIA program improvement. Because of the department's positive reputation with components, we share the conclusion that the process will be collaborative and respectful of component equities. We anticipate that the Privacy Office will develop a successful review protocol. A focus on the quality of FOIA response letters is an obvious first area of review. This would allow the department to improve the effectiveness of its disclosure program while

---

gaining further public confidence. The recommendation is *resolved* and *open*.

**Recommendation #4:** That the Chief FOIA Officer report as necessary to the Secretary, based on 5 U.S.C. § 552(k)(3), to recommend improvements to the DHS FOIA enterprise.

**Management Response:** The department concurred with Recommendation #4. The Chief FOIA Officer intends to develop recommendations to the Secretary on an as-needed basis. The specific timing of recommendations has not been determined.

**OIG Analysis:** We are pleased that the department understands the utility of the (k)(3) process. The yet undetermined frequency of the recommendations is appropriate. We suggest that the Chief FOIA Officer develop a formalized policy on use of the authority, even if the timing of particular recommendations is not known. Provision of a new (k)(3) policy under the corrective action process would be sufficient to close the recommendation. The recommendation is *resolved* and *open*.

**Recommendation #5:** That the Chief FOIA Officer use the authority at 5 U.S.C. § 552(k)(3) to recommend to the Secretary that the Secretary issue written guidance to the department on the President's reiteration that embarrassment, abstract fears, and the exposure of failure are not grounds to exempt information under FOIA.

**Management Response:** The department concurred with Recommendation #5. The Privacy Office has issued memorandums on FOIA exemptions and the 2009 executive branch guidance. Further analysis of the need for additional support to DHS components will occur. The Privacy Office also plans a systematic review of Exemption 5 usage.

**OIG Analysis:** During our inspection, we observed several positive efforts that the Privacy Office has made to inform components about FOIA policy. As with the meaningful work in other areas, we foresee potential for additional collaboration across DHS on the important realm of increasing transparency, as mandated by the President. The review of Exemption 5 usage should augment ongoing work on exemption policy development. Further details about new exemption policy guidance, especially the memorandum to the Secretary on the use of (b)(5), would help to close this recommendation. The recommendation is *resolved* and *open*.

---

**Recommendation #6:** That the Chief FOIA Officer study and make recommendations to the Secretary regarding FOIA staffing levels.

**Management Response:** The department concurred with Recommendation #6. The Privacy Office has analyzed FOIA staffing. Future work to evaluate staffing levels will build on previous efforts. New conclusions regarding staffing could then lead to recommendations to the Secretary on FOIA staffing levels across DHS.

**OIG Analysis:** The Privacy Office has outlined a credible approach to this matter. We did not recommend new staff in any component because the Chief FOIA Officer can collaborate with FOIA officers across the department to determine the possible need for and frequency of staffing recommendations to the Secretary. The recommendation is *resolved* and *open*.

## Appendix A

### Purpose, Scope, and Methodology

---

We undertook this review based on our interest in the department's compliance with the *Freedom of Information Act* since the 2009 executive branch guidance was issued. We reviewed presidential directives, information produced by DOJ's Office of Information Policy, legal cases, and DHS policies and data on FOIA implementation. The review focused on how the Privacy Office works on FOIA implementation with components, as well as how the significant request review process affected the DHS FOIA enterprise. We did not examine the FOIA appeals process.

We did not examine component FOIA decisions, except for the redactions made to information that was provided to the Associated Press after a request for e-mail messages related to the review process. Under normal circumstances, our reports might include direct quotations from departmental records. We did not include all quotations that support our findings, however, because some of these statements have been redacted by the department in responding to a FOIA request that is currently pending under the DHS FOIA administrative appeals process.

We conducted 21 interviews, which included discussions with staff from 11 DHS components that process FOIA requests, as well as with FOIA experts inside and outside of the federal government. We selected these interviewees to ensure a range of perspectives based on both the size of the component's FOIA caseload and subject matter expertise. The Office of Inspector General, like other DHS components, responds to FOIA requests. This report describes DHS FOIA policies and procedures with which we also comply.

We conducted this performance inspection between July and September 2010 pursuant to the *Inspector General Act of 1978*, as amended, and according to the *Quality Standards for Inspections* issued by the Council of the Inspectors General on Integrity and Efficiency.

## Appendix B

### Management Comments to the Draft Report

---

U.S. Department of Homeland Security  
Washington, DC 20528



March 26, 2011

MEMORANDUM FOR: Carlton I. Mann  
Assistant Inspector General for Inspections

FROM: Joseph B. Maher  
Deputy General Counsel  
Office of the General Counsel

Mary Ellen Callahan  
Chief Freedom of Information Act Officer

SUBJECT: Report Response  
*The DHS Privacy Office Implementation of the  
Freedom of Information Act  
OIG Project No. 10-151-ISP-PRIV*

The attached documents provide written comments from the Privacy Office to the Office of the Inspector General's *Draft Report: The DHS Privacy Office Implementation of the Freedom of Information Act—For Official Use Only*. The report identified measures that could be taken by the Privacy Office to enhance our office's overall effectiveness.

In the attached documents you will find the Privacy Office's specific responses to each recommendation and agreement or disagreement with each reported finding.

We have reviewed the draft report and do not have any concerns about publicly releasing any information contained herein.

Should you have any questions, please call Joe Maher at (202) 282-8137, or Mary Ellen Callahan at (703) 235-0347.

Attachments

## Appendix B

### Management Comments to the Draft Report

---

March 26, 2011

Carlton I. Mann  
Assistant Inspector General for Inspections  
Office of Inspector General  
U.S. Department of Homeland Security  
Washington, DC 20528

Re: Report Response  
*The DHS Privacy Office Implementation of the  
Freedom of Information Act*  
*OIG Project No. 10-151-ISP-PRIV*

Dear Mr. Mann:

The Department of Homeland Security's Privacy Office and the Office of the General Counsel appreciate the opportunity to review and respond to the Office of Inspector General (OIG) draft report *The DHS Privacy Office Implementation of the Freedom of Information Act*.

The Privacy Office and the Office of the General Counsel are deeply committed to actively resolving the issues identified in the inspection and improving the Department's overall Freedom of Information Act (FOIA) operations.

#### Context

The Department agrees with the most important conclusions of the report by the Office of the Inspector General (OIG): 1) there is no evidence that the review process involving the Office of the Secretary resulted in withholding any information that was otherwise recommended for release by career FOIA specialists; and 2) no FOIA requesters were disadvantaged because of their "political party or particular area of interest." While committed to resolving any issues, the Department is concerned about some aspects of the process OIG utilized in drafting this report and, as noted below, disagrees with several of the conclusions (although has concurred in the Recommendations).

The Report rightfully notes the positive advancements made in proactive disclosure of material to the public under policies pursued by the Chief Freedom of Information Act Officer. The report provides a series of criticisms over incomplete implementation of the Department's position on pro-active disclosure without fully recognizing the systemic changes that must occur within the Department in order to significantly impact the number of FOIAs received. Given that approximately 70 percent of all FOIAs to the Department are Alien Files, the number of FOIAs the Department receives may never decrease significantly; nonetheless the breadth and scope of publicly available information has increased substantially during this Administration. The Privacy Office estimates that over 10,000 pages of federal records have been added to the FOIA Reading Room (also known as the FOIA Library) as part of the pro-active disclosure efforts over the past 18 months.

## Appendix B

### Management Comments to the Draft Report

---

The report also does not properly define how a “significant FOIA” is identified or the procedures for processing FOIAs generally in the Department. Beginning in 2005, the DHS FOIA office began identifying significant FOIA requests pursuant to objective standards<sup>1</sup> and providing notice of them to senior Department management in a weekly report. In 2006, submission guidelines for what constituted a “significant FOIA” request were officially established by the DHS Privacy Office, and the current Administration has basically followed suit.<sup>2</sup> Less than one half of one percent of DHS FOIAs are designated by career FOIA professionals as “significant” FOIAs.

The report further focuses on selected email communications without context, thus critiquing pre-decisional, deliberative communications even when the proposed action was not the final one taken. The Office of General Counsel and the Privacy Office are concerned that this selectivity of critiquing the communications, and the inaccurate conclusions therein, will have a chilling effect in intra-Department communications not just with regard to FOIA processing, but with regard to deliberative communications *writ large*. We discuss below our concerns with these aspects of the Report.

***Criticism of the Time Spent by the Office of the Secretary in Reviewing Official Matters for Public Release is Overstated by any Reasonable Measure.***

When compared with FOIA processing times across the entire Department—and even across the entire federal government—the time that the Office of the Secretary spent with FOIA matters was insignificant. The OIG Report fails to properly frame the context for its anecdotal evidence of review time when it declines to note that the Office of the Secretary reviewed less than half of 1 percent of the FOIA responses processed in the Department. Even in this small percentage of matters reviewed by the Office of the Secretary, the OIG Report, at points, criticizes the Office of the Secretary for taking 1 to 4 days for review.

This criticism is overstated by any reasonable measure when compared with FOIA processing times across the Department and at other federal agencies. In FY 2009, the Department’s average processing time for a FOIA response was 240 days; in FY 2010, the average time 95 days. The Department of Justice—which leads the federal government in FOIA policy—had average processing times of more than 113 days for complex FOIA responses and more than 26 days for “simple” FOIA responses. (*See* U.S. Dept. of Justice Freedom of Information Act Annual Report FY 2010). Even the OIG’s own FOIA responses at times reach beyond the 20

---

<sup>1</sup> All DHS Privacy Office memoranda on significant FOIA requests are available in the DHS FOIA Library at [www.dhs.gov/foia](http://www.dhs.gov/foia).

<sup>2</sup> The 2006 Submission Guidelines are available at: [http://www.dhs.gov/xlibrary/assets/foia/priv\\_foia\\_cabinet\\_report\\_submission\\_guidelines\\_20060804.pdf](http://www.dhs.gov/xlibrary/assets/foia/priv_foia_cabinet_report_submission_guidelines_20060804.pdf). The 2009 guidelines are available at: [http://www.dhs.gov/xlibrary/assets/foia/priv\\_cfoiao\\_memo\\_cabinet\\_report\\_foia\\_guidelines\\_20090707.pdf](http://www.dhs.gov/xlibrary/assets/foia/priv_cfoiao_memo_cabinet_report_foia_guidelines_20090707.pdf).

## Appendix B

### Management Comments to the Draft Report

---

day mark during the period covered by this report, with one OIG FOIA response taking more than 350 days to process.

Given the OIG Report's focus on review by the Office of the Secretary in the context of the overall processing times, the only conclusion one can draw from the OIG Report is that the Inspector General believes that the Office of the Secretary should have no role in the review of any FOIA responses leaving the Department—regardless of how significant the official matters disclosed might be or how sensitive the homeland security information might be.

This conclusion contradicts the legal framework of the Department and the conclusions articulated in the OIG report itself. As the report properly notes, the Secretary and her staff have clear statutory authority to ask questions of, review, and manage the operations of all parts of the Department, including the Privacy Office and its elements that handle the FOIA process. *See* 6 U.S.C. § 102 (“The Secretary is the head of the Department and shall have direction, authority, and control over it”). The regulations that implement FOIA at DHS expressly contemplate a decision-making role for heads of components and thus are consistent on this point as well. *See* 6 C.F.R. § 5.4(b) (“The head of a component ... is authorized to grant or deny any request for a record of that component”). Similarly, the Attorney General's March 2009 guidance memorandum states in relevant part that “responsibility for effective FOIA administration belongs to all of us—it is not merely a task assigned to an agency's FOIA staff.” Accordingly, it is not only legally permissible, but sound managerial practice, for the Office of the Secretary to be informed of and, in coordination with the Chief FOIA Officer, to play a role in overseeing the Department's FOIA processes.

#### *The OIG Report Inexplicably Criticizes Internal Deliberations over FOIA Responses that Did Not Prevent the Release of any Information.*

The OIG's unwarranted criticism of internal discussions involves two circumstances. One involves the deliberations over whether to release a draft mission statement of an intelligence threat division within the Department. The OIG Report criticizes this internal debate as somehow inappropriate because some officials questioned the proposal to release the draft mission statement. This criticism is unfounded because no law or policy prohibits the Secretary's staff from questioning the release of a *draft* mission statement (which may not accurately reflect the *actual* mission) of an office handling sensitive, national security information. Rather than recognize these internal deliberations for what they were—legitimate back-and-forth discussions about disclosure of information—the OIG Report criticizes the mere “suggestion to reevaluate a FOIA release.”

Another example of unwarranted OIG criticism of internal discussions—discussions that did not prevent the release of any information—involved inquiries in which the Office of the Secretary asked about the identity of FOIA requesters. These inquiries were not made for the purpose of determining whether to disclose information; as the OIG Report notes, no rules or privacy laws were violated in asking these questions. But rather than recognize as legitimate the purposes that might underlie such requests (e.g., preparing to have constructive engagement with the media outlet requesting documents through FOIA), the OIG Report notes that these types of inquiries could delay the final issuance of FOIA responses. It is difficult to see, however, how requesting

## Appendix B

### Management Comments to the Draft Report

---

the identity of a requester—or any other information that is readily available to the FOIA specialists handling the FOIA matters—would take any unreasonable amount of time. This criticism appears to simply be a reflection of the OIG’s view that the Office of the Secretary should have no role in the review of any release of information under FOIA.

Further, there is a larger concern with this portion of the Report than these discrete examples. The OIG’s decision to criticize preliminary, internal discussions—rather than the ultimate decisions actually implemented—will certainly send a chill in deliberations within the Department and cause some staff to refrain from asking questions or challenging prevailing views. Everyone is now alerted to the fact that to ask such questions or challenge such views now exposes employees to the possibility of public criticism by the Office of the Inspector General.

*Despite Not Interviewing Witnesses, and Contrary to its Recognition that No Information was Unlawfully Withheld when Releasing Documents to the Associated Press, the Report Criticizes the Department for not Going Above and Beyond what the Law Requires in Disclosing Deliberative Material.*

In a series of statements not pointing to specific documents, the Report states that “certain statements may have been withheld from the AP release merely to avoid embarrassment.” Rather than consulting with the officials that made the decisions on what to produce and what information to redact, however, the OIG makes its criticisms without seeking to confirm the assumptions necessary to form the criticism (e.g., that certain redacted statements were “post-decisional” and that no other exemption applied). Before drawing conclusions, the OIG should confirm its assumptions.

OIG did not interview any of the career attorneys in the Office of the General Counsel who made the substantive redactions to this release. Similarly, OIG did not request an explanation of the legal reasoning that underscored the redactions. Instead, OIG makes assumptions, absent any evidence, regarding these redactions.

Part of the OIG’s misunderstanding in this particular matter may stem from its failure to fully understand the purpose behind FOIA Exemption 5. In its Recommendation #5, the OIG recommends that the Secretary clarify that “Exemption 5 is not designed to shield embarrassing or controversial words from public scrutiny.” OIG Report at 29. But this is clearly inaccurate to the extent it refers to words spoken or written as part of the deliberative process within the government. One of the most important purposes of Exemption 5 is to preserve the robust debate and deliberations that shape and affect final policy and programmatic decisions by the government. See *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975) (“[H]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process. Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions.”) (citations omitted). Many times, arguments or statements made during the process may appear out of context after a full airing of the facts and views leading up to decisions. Those are exactly the words that need protection, so that officials do not fear the 20/20 vision of hindsight that might publicly expose what seemed like a

## Appendix B

### Management Comments to the Draft Report

---

good proposal or view early on in the decision process as a proposal or view that was not workable at all. That is *different than* deciding not to disclose remarks not aimed to affect any decisions of the government. The latter do not deserve any protection under FOIA.

#### **Recommendations for the Chief FOIA Officer**

##### **Recommendation #1: Develop additional internal policies regarding proactive disclosure to ensure consistency across components and quicker posting of information.**

The Privacy Office concurs with Recommendation #1. DHS has made great strides to improve pro-active disclosure in the past 18 months. The Department has pro-actively disclosed over 10,000 pages in its FOIA Libraries, and new publications are being made almost weekly. With this experience and background, and based on input from component FOIA officers on how to fine-tune the system while being as efficient as possible, the Privacy Office is prepared to lead the development of additional policies, procedures and strategies to systematize the Department-wide approach to pro-active disclosure. The Privacy Office anticipates that it will accomplish this goal by December 2011.

##### **Recommendation #2: Formalize the roles and responsibilities of the Public Liaison.**

The Privacy Office concurs with Recommendation #2. We appreciate the Inspector General's observations and compliments for the DHS Public Liaison, but recognize that we may have areas where it is necessary to clarify responsibilities. The Chief FOIA Officer and Deputy Chief FOIA Officer, together with the Public Liaison and the component FOIA Officers, will review the roles and responsibilities of the Public Liaison. The Privacy Office anticipates that it will accomplish this goal by September 30, 2011.

##### **Recommendation #3: Implement an internal review function to assess department-wide FOIA operations on a regular basis to maximize efficiencies and improve the administration of the Department's FOIA operations.**

The Privacy Office concurs with Recommendation #3. The Chief FOIA Officer and Deputy Chief FOIA Officer will design a collaborative, effective internal review process. The Privacy Office anticipates that it will accomplish this goal by September 30, 2011.

##### **Recommendation #4: Report as necessary to the Secretary, based on 5 U.S.C. § 552(k)(3), to recommend improvements to the DHS FOIA enterprise.**

The Privacy Office concurs with Recommendation #4. To the extent it is necessary to report to the Secretary on proposed improvements on the DHS FOIA enterprise, the Chief FOIA Officer will do so. However, given that this recommendation is only "as necessary," the Chief FOIA Officer declines to indicate any timing associated with this recommendation.

## **Appendix B**

### **Management Comments to the Draft Report**

---

**Recommendation #5: Use the authority at 5 U.S.C. § 552(k)(3) to recommend to the Secretary that the Secretary issue written guidance to the department on the President's reiteration that embarrassment, abstract fears, and the exposure of failure are not grounds to exempt information under FOIA.**

The Privacy Office concurs with Recommendation #5, to the extent that embarrassment, abstract fears, and the exposure of failure should not be the sole basis for triggering an exemption under FOIA. As noted in the report, the Chief FOIA Officer has issued several memoranda detailing these aspects of FOIA. The Privacy Office can review current guidance and communications and see if they need to be bolstered by September 30, 2011. The Chief FOIA Officer appreciates the report's highlighting the use of FOIA Exemption 5 in particular, and will review the use of this Exemption on a more systematic level than the OIG did in this report.

**Recommendation #6: Study and make recommendations to the Secretary regarding FOIA staffing levels.**

The Privacy Office concurs with Recommendation #6. The Privacy Office made some preliminary investigation into this issue in response to the then-White House Chief of Staff's March 16, 2010 Memorandum; the Privacy Office will update those figures and seek to reach conclusions on recommendations by July 31, 2011.

#### **Conclusion**

The Office of the General Counsel and the Privacy Office appreciate the Office of the Inspector General's attention on these issues, and values much of the input. However, the portions of the report that focus on the awareness review appear subjective given the repeated conclusions that nothing associated with the awareness review violated any laws, nor were FOIAs modified as a result of the awareness review.

#### **Addendum**

Technical Comments are attached as Addendum 1.

**Appendix C**  
**FOIA's Statutory Exemptions and Exclusions**

---

**Abbreviated Descriptions**

See 5 U.S.C. § 552(b)(1) through (b)(9) for the full text of the exemptions and (c)(1) through (c)(3) for the full text of the exclusions.

<b>Exemption Number</b>	<b>Matters That May Be Exempt From Disclosure Under FOIA</b>
1	Classified national defense and foreign relations information
2	Internal agency personnel rules and practices
3	Information that is prohibited from disclosure by another federal law
4	Trade secrets and other confidential business information
5	Inter-agency or intra-agency communications that are protected by legal privileges
6	Information involving matters of personal privacy
7	Certain information compiled for law enforcement purposes
8	Information relating to the supervision of financial institutions
9	Geological information on wells

<b>Exclusion Number</b>	<b>Matters That May Be Excluded From the Reach of FOIA</b>
1	Authorizes federal law enforcement agencies, under specific circumstances, to shield the very existence of records of ongoing investigations or proceedings by excluding them entirely from FOIA's reach
2	Provides that "whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party..., the agency may treat the records as not subject to the requirements of [FOIA] unless the informant's status as an informant has been officially confirmed"
3	Pertains only to certain law enforcement records that are maintained by the Federal Bureau of Investigation

Figure 1. January 21, 2009, President’s Memorandum on FOIA

	4683
Federal Register Vol. 74, No. 15 Monday, January 26, 2009	<b>Presidential Documents</b>
Title 3—	Memorandum of January 21, 2009
The President	Freedom of Information Act
	<p style="text-align: center;"><b>Memorandum for the Heads of Executive Departments and Agencies</b></p> <p>A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, “sunlight is said to be the best of disinfectants.” In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.</p> <p>The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.</p> <p>All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.</p> <p>The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.</p> <p>I direct the Attorney General to issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the <i>Federal Register</i>. In doing so, the Attorney General should review FOIA reports produced by the agencies under Executive Order 13392 of December 14, 2005. I also direct the Director of the Office of Management and Budget to update guidance to the agencies to increase and improve information dissemination to the public, including through the use of new technologies, and to publish such guidance in the <i>Federal Register</i>.</p> <p>This memorandum does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.</p>

**Appendix D**  
**2009 Executive Branch Guidance**

---

4684 Federal Register / Vol. 74, No. 15 / Monday, January 26, 2009 / Presidential Documents

---

The Director of the Office of Management and Budget is hereby authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,  
Washington, January 21, 2009

[FR Doc. E9-1773  
Filed 1-23-09; 11:15 am]  
Billing code 3110-01-P

[<http://edocket.access.gpo.gov/2009/pdf/E9-1773.pdf>]

**Appendix D**  
**2009 Executive Branch Guidance**

---

**Figure 2. March 19, 2009, Attorney General's Memorandum on FOIA**



**Office of the Attorney General**

Washington, D.C. 20530

March 19, 2009

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM:  THE ATTORNEY GENERAL

SUBJECT: The Freedom of Information Act (FOIA)

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, reflects our nation's fundamental commitment to open government. This memorandum is meant to underscore that commitment and to ensure that it is realized in practice.

A Presumption of Openness

As President Obama instructed in his January 21 FOIA Memorandum, "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails." This presumption has two important implications.

First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.

Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure. Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure.

At the same time, the disclosure obligation under the FOIA is not absolute. The Act provides exemptions to protect, for example, national security, personal privacy, privileged records, and law enforcement interests. But as the President stated in his memorandum, "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

Pursuant to the President's directive that I issue new FOIA guidelines, I hereby rescind the Attorney General's FOIA Memorandum of October 12, 2001, which stated that the Department of Justice would defend decisions to withhold records "unless they lack a sound

## Appendix D

### 2009 Executive Branch Guidance

---

Memorandum for Heads of Executive Departments and Agencies  
Subject: The Freedom of Information Act

Page 2

legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.”

Instead, the Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law. With regard to litigation pending on the date of the issuance of this memorandum, this guidance should be taken into account and applied if practicable when, in the judgment of the Department of Justice lawyers handling the matter and the relevant agency defendants, there is a substantial likelihood that application of the guidance would result in a material disclosure of additional information.

#### FOIA Is Everyone’s Responsibility

Application of the proper disclosure standard is only one part of ensuring transparency. Open government requires not just a presumption of disclosure but also an effective system for responding to FOIA requests. Each agency must be fully accountable for its administration of the FOIA.

I would like to emphasize that responsibility for effective FOIA administration belongs to all of us—it is not merely a task assigned to an agency’s FOIA staff. We all must do our part to ensure open government. In recent reports to the Attorney General, agencies have noted that competing agency priorities and insufficient technological support have hindered their ability to implement fully the FOIA Improvement Plans that they prepared pursuant to Executive Order 13392 of December 14, 2005. To improve FOIA performance, agencies must address the key roles played by a broad spectrum of agency personnel who work with agency FOIA professionals in responding to requests.

Improving FOIA performance requires the active participation of agency Chief FOIA Officers. Each agency is required by law to designate a senior official at the Assistant Secretary level or its equivalent who has direct responsibility for ensuring that the agency efficiently and appropriately complies with the FOIA. That official must recommend adjustments to agency practices, personnel, and funding as may be necessary.

Equally important, of course, are the FOIA professionals in the agency who directly interact with FOIA requesters and are responsible for the day-to-day implementation of the Act. I ask that you transmit this memorandum to all such personnel. Those professionals deserve the full support of the agency’s Chief FOIA Officer to ensure that they have the tools they need to respond promptly and efficiently to FOIA requests. FOIA professionals should be mindful of their obligation to work “in a spirit of cooperation” with FOIA requesters, as President Obama has directed. Unnecessary bureaucratic hurdles have no place in the “new era of open Government” that the President has proclaimed.

## Appendix D

### 2009 Executive Branch Guidance

---

Memorandum for Heads of Executive Departments and Agencies  
Subject: The Freedom of Information Act

Page 3

#### Working Proactively and Promptly

Open government requires agencies to work proactively and respond to requests promptly. The President's memorandum instructs agencies to "use modern technology to inform citizens what is known and done by their Government." Accordingly, agencies should readily and systematically post information online in advance of any public request. Providing more information online reduces the need for individualized requests and may help reduce existing backlogs. When information not previously disclosed is requested, agencies should make it a priority to respond in a timely manner. Timely disclosure of information is an essential component of transparency. Long delays should not be viewed as an inevitable and insurmountable consequence of high demand.

In that regard, I would like to remind you of a new requirement that went into effect on December 31, 2008, pursuant to Section 7 of the OPEN Government Act of 2007, Pub. L. No. 110-175. For all requests filed on or after that date, agencies must assign an individualized tracking number to requests that will take longer than ten days to process, and provide that tracking number to the requester. In addition, agencies must establish a telephone line or Internet service that requesters can use to inquire about the status of their requests using the request's assigned tracking number, including the date on which the agency received the request and an estimated date on which the agency will complete action on the request. Further information on these requirements is available on the Department of Justice's website at [www.usdoj.gov/oip/foiapost/2008foiapost30.htm](http://www.usdoj.gov/oip/foiapost/2008foiapost30.htm).

\*\*\*\*\*

Agency Chief FOIA Officers should review all aspects of their agencies' FOIA administration, with particular focus on the concerns highlighted in this memorandum, and report to the Department of Justice each year on the steps that have been taken to improve FOIA operations and facilitate information disclosure at their agencies. The Department of Justice's Office of Information Policy (OIP) will offer specific guidance on the content and timing of such reports.

I encourage agencies to take advantage of Department of Justice FOIA resources. OIP will provide training and additional guidance on implementing these guidelines. In addition, agencies should feel free to consult with OIP when making difficult FOIA decisions. With regard to specific FOIA litigation, agencies should consult with the relevant Civil Division, Tax Division, or U.S. Attorney's Office lawyer assigned to the case.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees, agents, or any other person.

[<http://www.justice.gov/ag/foia-memo-march2009.pdf>]

**Appendix E**  
**Major Contributors to this Report**

---

Douglas Ellice, Chief Inspector  
Darin Wipperman, Team Lead Inspector  
Traci Quan, Senior Inspector  
Kimberley Cox, Inspector  
Alexis Lavi, Intern Inspector

**Appendix F**  
**Report Distribution**

---

**Department of Homeland Security**

Secretary  
Deputy Secretary  
Chief of Staff  
General Counsel  
Executive Secretariat  
Director, GAO/OIG Liaison Office  
Assistant Secretary for Office of Policy  
Assistant Secretary for Office of Public Affairs  
Assistant Secretary for Office of Legislative Affairs  
Chief FOIA Officer

**Office of Management and Budget**

Chief, Homeland Security Branch  
DHS OIG Budget Examiner

**Congress**

Congressional Oversight and Appropriations Committees, as appropriate



#### ADDITIONAL INFORMATION AND COPIES

To obtain additional copies of this report, please call the Office of Inspector General (OIG) at (202) 254-4100, fax your request to (202) 254-4305, or visit the OIG web site at [www.dhs.gov/oig](http://www.dhs.gov/oig).

#### OIG HOTLINE

To report alleged fraud, waste, abuse or mismanagement, or any other kind of criminal or noncriminal misconduct relative to department programs or operations:

- Call our Hotline at 1-800-323-8603;
- Fax the complaint directly to us at (202) 254-4292;
- Email us at [DHSOIGHOTLINE@dhs.gov](mailto:DHSOIGHOTLINE@dhs.gov); or
- Write to us at:  
DHS Office of Inspector General/MAIL STOP 2600,  
Attention: Office of Investigations - Hotline,  
245 Murray Drive, SW, Building 410,  
Washington, DC 20528.

The OIG seeks to protect the identity of each writer and caller.