



OFFICE OF GOVERNMENT INFORMATION SERVICES

COMPLIANCE REVIEW OF

CUSTOMS AND BORDER PROTECTION

FREEDOM OF INFORMATION ACT PROGRAM

**GOOD MANAGEMENT PRACTICES IN PLACE; CLEAR COMMUNICATION AND
INCREASED TECHNOLOGY USE NEEDED**

A Message from the Director

OGIS periodically conducts independent, systematic reviews of agencies to evaluate their compliance with the Freedom of Information Act (FOIA). See 5 U.S.C. §§ 552(h)(2)(A) and (B). These reviews assess the agency's FOIA operations, programs, and policies, and may include aspects such as program design, implementation, and results. An OGIS review may result in a report that we provide to the agency and release publicly, and may include recommended improvements and administrative actions. This assessment of the FOIA program at Customs and Border Protection (CBP) is in line with this purpose.

This report addresses the CBP's compliance with FOIA and is based on interviews with agency employees and officials, direct observation of the CBP's FOIA case files, a review of applicable documents and a survey of FOIA staff. This report is the fourth of six reviews we are conducting of the components of the Department of Homeland Security (DHS). At the completion of our reviews, we will also release a final report to DHS with findings and recommendations.

We developed the recommendations herein to the best knowledge available to our office, and we discussed the recommendation in draft with those responsible for the program. We hope this report and our recommendations will assist CBP in its continued efforts to fulfill its FOIA responsibilities. We will follow up with appropriate individuals about the status of these recommendations in 120 days.

JAMES V.M.L. HOLZER
Director

Executive Summary

What OGIS Found

In Fiscal Year 2015, Customs and Border Protection (CBP) reduced its Freedom of Information Act (FOIA) request backlog by 74 percent—from 34,307 requests to 9,024 requests. CBP reduced its FOIA request backlog despite an increase in the number of requests made to the agency. The FOIA office received an average of about 140 requests per day in FY 2015, compared to about 130 requests per day in FY 2014. The timeliness of CBP's responses to FOIA requests also gradually improved during the last three years: CBP reported the second-longest average processing time for simple requests of all 22 DHS components in FY 2012 and FY 2013, yet responded to most simple requests made during FY 2015 within the 20 days allowed under the law.

CBP uses a multi-track system in which FOIA requests for traveler records, which document a traveler's arrival to and departure from the U.S., are placed in the simple track. Requests for all other non-traveler records are placed in the complex track. Requests for traveler records, needed for immigration purposes, comprise between 80 and 90 percent of the request volume.

Changes in personnel and process management during the last three years; increased interest in the FOIA program from CBP leaders; and adopting *FOIAonline* to better manage the volume of requests contributed to the improvement in CBP's FOIA program. Specific management changes include instituting a second-day triage system, and using and shifting resources to better manage the FOIA process.

OGIS's three primary findings are:

- Improved management practices corrected deficiencies in CBP's FOIA program;
- CBP's FOIA program uses technology to increase efficiencies, but opportunities exist to strengthen its use; and
- CBP's FOIA program improved interaction with requesters, but could better communicate with requesters.

What OGIS Recommends

OGIS recommends that CBP continue to streamline its processes to increase the timeliness of its responses. Specifically, OGIS recommends that CBP continue to monitor its processes for bottlenecks and adjust resources as needed, continue to work with its leadership to ensure the FOIA office has enough resources to manage the volume of requests without the backlog increasing, and continue checking for duplicate requests during the triage process. OGIS recommends that CBP develop a training schedule to ensure that FOIA processors have the skills they need to handle additional responsibilities.

Introduction

The Freedom of Information Act (FOIA)¹ directs OGIS to review agency FOIA policies, procedures and compliance, 5 U.S.C. §§ 552(h)(2)(A) and (B). OGIS compliance assessments are independent and systematic evaluations of an agency's compliance with the FOIA, and include the design, implementation, and results of an agency's FOIA operations, programs, and policies. The assessments provide 1) factual and analytical information; 2) review compliance with the law, regulation, and policy; and 3) share best practices. The assessments also include recommendations for improvement.

We conduct compliance assessments of individual agency FOIA programs by visiting agencies and reviewing regulations, internal guidance for processing requests, agency request and appeal files, annual reports to the U.S. Department of Justice (DOJ), and litigation, among other sources. Our mandate is to determine compliance with FOIA.²

OGIS's formal assessment program identifies weaknesses in FOIA programs and provides recommendations to correct deficiencies. The assessment process involves five steps: 1) use last year's FOIA data only as a starting point; 2) inventory FOIA program activity; 3) flag areas of potential noncompliance or risk; 4) consider outside factors that may contribute to noncompliance; and 5) reporting.

Background

Customs and Border Protection's (CBP's) mission is "to safeguard America's borders thereby protecting the public from dangerous people and materials while enhancing the Nation's global economic competitiveness by enabling legitimate trade and travel."³ CBP's FOIA program is part of the Privacy and Diversity Office,⁴ which is responsible for, among other things, "[c]reat[ing] a culture of privacy by ensuring and safeguarding all personally identifiable information (PII) pursuant to the Privacy Act; [and] processing Freedom of Information Act (FOIA) requests."⁵ CBP's FOIA Officer reports to the Executive Director of the Privacy and Diversity Office, who reports to the CBP Commissioner.

CBP's FOIA office consists of 50 employees: one FOIA Officer, three branch chiefs, 27 processors and 19 student employees. Eight CBP employees were detailed to the office in FY 2015 and returned to their permanent positions at the agency at the end of the fiscal year. All CBP non-student FOIA processors are Government Information Specialists, the Office of Personnel Management occupational series 0306.

¹ The Freedom of Information Act (FOIA) requires Federal Government agencies to make records available to the public upon request, unless specifically exempted. 5 U.S.C. § 552.

² 5 U.S.C. § 552(h)(2)(B).

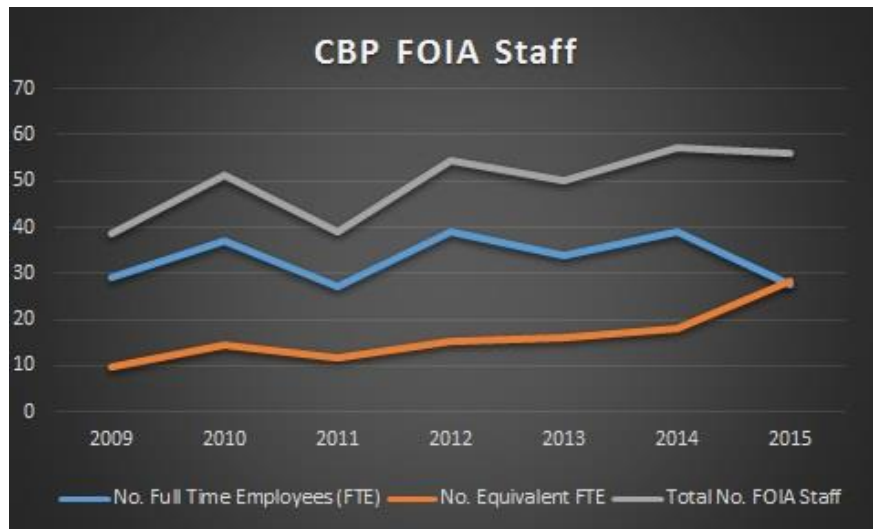
³ "About CBP," accessed December 23, 2015, <http://www.cbp.gov/about>.

⁴ To assist with reducing its backlog, CBP developed a management plan for Fiscal Year (FY) 2013 and FY 2014 that included moving the FOIA function organizationally from its Office of International Trade to the Privacy and Diversity Office; hiring new permanent staff to help process requests; using temporary staff; and extending the agreement that allows USCIS to process its documents. (See <http://www.gao.gov/assets/670/667052.pdf>)

⁵ "Commissioner's Staff Offices," accessed December 23, 2015, <https://www.cbp.gov/about/leadership/commissioners-staff-offices>.

On the General Schedule (GS) grading system that determines most Federal salary ranges, the FOIA Officer is a GS-15, the branch chiefs are GS-14s and the FOIA processors range from GS-5 to GS-13. Four GS-5 FOIA processors are students who have been accepted to the Pathways Program, designed to attract students and recent graduates to careers in Federal Service. The 19 non-Pathways students range from GS-2 to GS-4 and are under OPM’s Administration and Office Support Student Trainee Series 0399. Three-quarters—73 percent—of respondents to OGIS’s survey of CBP FOIA staff said that they have worked as FOIA professionals for five or fewer years.

Figure 1, CBP FOIA Staff ⁶



At the time of our review, the office did not have vacant positions, but was reviewing applications for two detail positions from internal candidates to work on processing records related to FOIA litigation against the agency. The CBP FOIA office does not use contracted support.⁷ In FY 2015, CBP reported a FOIA budget totaling \$7.1 million including litigation costs.

What We Reviewed

This report is the result of a review of DHS FOIA regulations, the CBP FOIA website, and other written material such as CBP’s standard operating procedures and FOIA Reports to the Attorney General of the United States; interviews with CBP FOIA officials and staff; direct observations of initial request and appeal case files; results of an online staff survey; and agency FOIA litigation since 2009.

CBP provided us with a list of FOIA request and appeal files closed in FY 2015. OGIS reviewed a random sample totaling 388 FOIA requests. This methodology allowed OGIS to generalize to the population of the 75,618 FOIA requests processed in FY 2015.

⁶ Report on CBP FOIA Backlogs FY 2009- FY 2014, accessed December 23, 2015, www.foia.gov. Department of Homeland Security Freedom of Information Act Monthly Report September 2015.

⁷ Some CBP program offices might use contract support to carry out FOIA duties.

CBP Processing and Reporting of FOIA Requests

CBP's FOIA process is mostly centralized, with CBP field offices conducting records searches and sometimes suggesting redactions for final approval by the CBP FOIA branch. CBP accepts requests via U.S. mail or fax but prefers to receive requests through *FOIAonline*. *FOIAonline* is a FOIA case management system developed by several agencies that allows users to submit FOIA requests to any participating agency, track the status of requests, search for requests submitted by others, access previously released records, and generate agency-specific FOIA processing reports.⁸ CBP moved from its previous case management system to *FOIAonline* in FY 2014. CBP does not accept FOIA requests via email; in response to an emailed FOIA request, CBP alerts the requester of this policy and explains to them that the request has not been logged in and that all electronic requests must be made via *FOIAonline*. Requesters do not have to have a *FOIAonline* account to receive a FOIA response through the system.

CBP has two processing queues: simple, made up largely of requests seeking records regarding a traveler's U.S. border crossings, and complex, comprised of requests seeking non-traveler related records, such as contracts and records pertaining to border apprehension or personnel matters. In FY 2015, CBP's 19 non-Pathways student employees conducted all searches for records related to traveler requests. For FOIA requests that do not involve traveler records, the program office responsible for the records conducts the search and provides any records to the CBP FOIA office for processing. Once the responsive documents are loaded into *FOIAonline*, one of the branch chiefs assigns the cases to processors. FOIA processors at the GS-5 to GS-13 level are responsible for reviewing and processing responsive records. The FOIA branch managers and GS-13 level FOIA processors conduct a quality control check by reviewing responses before release to the requester. CBP used *FOIAonline* to document each stage of the process.

CBP FOIA responses go through two to three layers of review before records are released, depending on the processor's experience level and/or the nature of the records. (See Figure 5, page 13.) The FOIA branch chiefs review all releases from lower-level FOIA processors at the GS-5, GS-7 and GS-9 levels, and occasionally review the work of GS-11, GS-12, and GS-13 level processors if the processor requests a second review or if the request involves an issue that is in the news. Prior to response, a subject matter expert in the program office that submitted the records to the FOIA office reviews non-traveler records responses to determine what interests, including law enforcement techniques, would be circumvented by release of the records. The DHS Privacy Office requires that CBP notify headquarters about any

⁸ "*FOIAonline*," accessed December 28, 2015, <https://FOIAonline.regulations.gov/foia/action/public/home>. *FOIAonline* follows 13 best practices recommended by the Department of Commerce, the Environmental Protection Agency, and the National Archives and Records Administration to enhance FOIA processing and address Section 508 requirements. DHS GAO Report- GAO-15-82, Freedom of Information Act, DHS Should Take Steps to Improve Cost Reporting and Eliminate Duplicate Processing, November 2014, page 35, accessed August 10, 2015, <http://www.gao.gov/products/GAO-15-82>.

responses to significant requests 24 hours before release. CBP releases the documents in accordance with DHS policy if it does not receive comments from headquarters within 24 hours.⁹

In FY 2015, CBP released records in full in response to 771 requests; released records in part in response to 30,932 requests; and withheld records in their entirety in response to 117 requests.¹⁰ When CBP withholds records in part or in full, it most frequently invokes FOIA Exemptions 6, 7(C) and 7(E). Exemptions 6 and 7(C) protect personal information, the release of which would invade the privacy interests of individuals, the latter specifically in law enforcement records. Exemption 7(E) protects information in law enforcement records that, if released, “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.

Finding 1: Improved Management Practices Corrected Deficiencies in CBP’s FOIA Program

CBP reduced its backlog and improved the time in which it responded to requests in FY 2015, despite an increased number of requests to the FOIA Office. Senior CBP leadership drove improvements to CBP’s FOIA processes, including its triage process, increased staffing for FOIA, and the FOIA Office’s shifting of resources to address issues as they arose in the process. Although there were notable improvements in the CBP FOIA program in FY 2015, the majority of FOIA-related litigation complaints against CBP between FY 2009 and FY 2015 cite a lack of response and timeliness, costing the agency nearly \$1.2 million.

Increase in Requests, Backlog & Delay

During the period from FY 2009 and FY 2013, the number of requests submitted to CBP jumped from 15,000 a year to 40,000 a year, respectively. CBP had the second-longest average processing time for simple requests of all DHS components (107 working days—or about five months—in FY 2012 and 142 working days—or about seven months—in FY 2013), according to DHS’s FY 2012¹¹ and FY 2013 Annual FOIA reports.¹² After growing at a fairly steady rate from FY 2009 through FY 2012, CBP’s backlog spiked in FY 2013 to 37,848 requests; in FY 2013, CBP’s backlog accounted for about 73

⁹ Chief Privacy Officer to DHS FOIA Officers, July 7, 2009, “Guidelines for Reporting on Significant FOIA Activity for Inclusion in the Cabinet Report to the White House,” accessed December 28, 2015,

http://www.dhs.gov/sites/default/files/publications/priv_cfoiao_memo_cabinet_report_foia_guidelines_20090707.pdf

¹⁰ CBP closed about 39,000 requests for reasons other than exemptions, including “no records” “request withdrawn” and request not made in accordance with DHS FOIA regulations, according to a FY 2015 FOIA request spreadsheet provided by the agency.

¹¹ DHS “2012 Freedom of Information Act Report to the Attorney General of the United States,” February 2013, page 20, accessed December 23, 2015, http://www.dhs.gov/sites/default/files/publications/privacy-foia-annual-report-fy-2012-dhs_0.pdf

¹² DHS “2013 Freedom of Information Act Report to the Attorney General of the United States,” February 2014, page 20, accessed December 23, 2015, http://www.dhs.gov/sites/default/files/publications/privacy-foia-annual-report-fy-2013-dhs_2_0.pdf

percent of DHS's total backlog.¹³ The delays largely affected people who needed records of their border crossings as part of the immigration process.

Our review of CBP's FOIA litigation from FY 2009 to FY 2015 showed that a majority of the plaintiffs cited CBP's lack of response and/or delay as a reason for suing. CBP reported spending nearly \$1.2 million in FOIA litigation-related expenses between FY 2009 and FY 2014.¹⁴

CBP developed a management plan for Fiscal Years 2013-2014 that included moving the FOIA office organizationally from its Office of International Trade to the Privacy and Diversity Office;¹⁵ hiring new permanent staff to help process requests; using temporary staff; and extending an inter-agency agreement that allows U.S. Citizenship and Immigration Services (USCIS) to process CBP documents that are contained in Alien, or A-, Files. In addition, CBP moved from its previous case management system to *FOIAonline* in FY 2014.

The move to the Privacy and Diversity Office raised the FOIA Office's profile within the agency and allowed the office to expand the resources devoted to processing FOIA requests. CBP's FOIA managers also re-engineered their business processes, created standard operating procedures, and established targets for processing incoming requests while working to process backlogged requests.

CBP reduced its backlog by about 9 percent between FY 2013 and FY 2014. In FY 2014, CBP reported a lower average processing time for simple requests—seven days as compared to previous fiscal years. According to CBP, during FY 2015, most traveler requests were closed within the 20 working days mandated by FOIA.

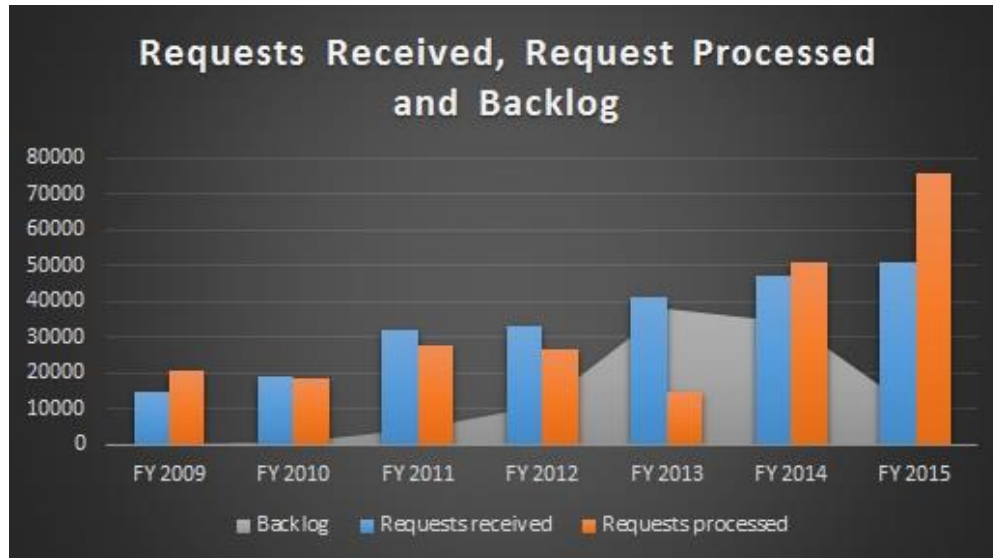
¹³ CBP officials told the Government Accountability Office (GAO) in 2014 that “two problems, in particular, contributed to the higher numbers. First, approximately 11,000 FOIA cases that were improperly closed in 2012 had to be reopened and reprocessed. Second, after its reorganization, a new manager found a stack of boxes containing 12,000 paper requests from 2012 that had never been entered into their processing system. The officials stated that CBP subsequently cleared all of these requests.” Freedom of Information Act: DHS Should Take Steps to Improve Cost Reporting and Eliminate Duplicate Processing, GAO 15-82, published November 2014.

¹⁴ Families for Freedom et al. v. Customs and Border Protection, et al, 1:2010-cv-02705, S.D.N.Y.; Naji Awdat Hamdan, et al. v. US DOJ, et al, 2:2010-cv-06149, C.C.D.C.; Hasbrouck v. CBP, 2010-03793, N.C.D.C.; Navarro Hernandez v. CBP, 2:2010-cv-04602, E.D.La.; Marchelletta, et. al v. Immigration and Customs Enforcement et al, 1:2010-cv-03280, G.N.D.C.; Buen Pastor Church et al v. CBP et al, 5:2011-cv-83, E.D.N.C.; National Immigration Project of the National Lawyers Guild v. DHS, 1:15-cv-11583, D. Mass; American Immigration Council v. DHS 1:2011-cv-1971, D.D.C.; Boice-Durant v. Louisiana Ethics Board, et al 2:12-cv-00603, E.D.La.; Dr. Abbas Ali Etemadi v. Janet Napolitano, et al., 8:2013-cv-00393, C.D. Cal.; Stevens v. Executive Office of Immigration Review et al, 1:2013-cv-05546, N.D. Ill.; Chan v. DHS, 2:2013-cv-01792, W.D. Wash.; Patel et al v. Johnson et al, 1:2015-cv-00486, N.D. Ill.; ACLU San Diego and Imperial Counties et al v. DHS, 8:2015-cv-00229, C.D. Cal.; Angeles-Badillo v. CBP, 3:2013-cv-02958, S.D.Cal.; Cuautli Flores et al. v. Johnson et al., 1:2014-cv-00258, W.D. Tex.; Americans for Immigrant Justice v. CBP, 1:2014-cv-20945, S. D. Fla.; Matthews v. CBP, 4:2014-cv-11150, E.D. Mich.; EPIC v. CBP, 2015-cv-01217, D.D.C.; Botein v. CBP, 1:2014-cv-10405, D. Mass.; Posner v. Johnson, et al., 1:2014-cv-07184, S.D.N.Y.; Lamatina v. CBP, 1:2014-cv-01923, S.D.N.Y.; Santos v. Johnson, et al., 5:2014-cv-04545, E.D.Pa.; Brown et al v. CBP, 2015-cv-01181, N.D.Cal.; Hugo Benjamin Osorio v. CBP, 8:2014-cv-01758, C.D.Cal.; Gahagan v. CBP, 2:2014-cv-02619, E.D.La.; Etessami v. CBP, 1:2014-cv-24370, S.D.Fla.; Goudkov v. CBP, 1:2105-cv-00125, D.D.C.; Mazinda v. DHS, 1:2105-cv-00752, S.D. Ind.; Ohio State Moritz Co of Law Civil Clinic v. CBP, 2:2014-cv-2329, S.D.Ohio; Ferreira Ream et al v. CBP, 1:2015-cv-00642, W.D. Mich.; Gelb v. DHS, 1:2015-cv-06495, S.D.N.Y.

¹⁵ The CBP FOIA Appeals Office was not part of this move and remains in the Office of International Trade.

The oldest pending cases at the close of FY 2015 were for non-traveler records; CBP reported having a little more than 68 pending requests from FY 2013 and about 400 pending requests from FY 2014. During FY 2015, CBP’s backlog dropped from 34,307 requests to 9,024 requests—a 74-percent reduction. CBP reduced its backlog in FY 2014 and FY 2015 despite a steady increase in the number of requests received by the FOIA office. As noted previously, CBP received an average of about 140 requests per day in FY 2015—about 80 to 90 percent of which were for traveler records.

Figure 2, CBP Requests Received, Requests Processed, and Backlog¹⁶



Without buy-in from leadership and a plan for addressing both the backlog and incoming requests, the reduction in the backlog and the increase in response time could not have occurred over the last three years. The CBP FOIA Office continues to closely monitor its backlog and timeliness, and reports this data weekly to the Executive Director of the Privacy and Diversity Office, and the CBP Commissioner, and monthly to DHS.

As previously mentioned, CBP also relied on non-Pathways students it hired to conduct searches for traveler records and upload records into CBP’s FOIA tracking and processing system. Additionally, as a result of a management directive issued during FY 2015, CBP was able to use eight employees detailed from other program offices to work on both the search and review steps of the FOIA process. Once CBP reduced the backlog of cases in which the agency had yet to complete its searches, CBP shifted some of its more senior student workforce to proposing redactions. CBP also had the authority near the end of FY 2015 to pay FOIA staff overtime and provide compensatory time. The extra hours allowed FOIA staff to process, in the last four weeks of FY 2015, about 20 percent of all of the cases CBP processed during FY 2015.

¹⁶ Report on CBP FOIA Backlogs FY 2009- FY 2014, accessed December 23, 2015, www.foia.gov. Department of Homeland Security Freedom of Information Act Monthly Report September 2015.

A key to CBP's success in reducing its backlog and improving timeliness was the office's ability to shift resources to address problems as they occurred at different points in the process. CBP entered into an agreement with the DHS Privacy Office to process cases pending from FY 2013. Under the agreement, CBP paid the DHS Privacy Office \$284,998.50 to process between 8,000 and 9,000 cases; two contractors and six members of the Privacy Office staff completed the work.

CBP also signed a multi-year inter-agency agreement with U.S. Citizenship and Immigration Services (USCIS) in FY 2011 that allows USCIS to process CBP records in a non-citizen's Alien File, commonly referred to as an A-File; under the agreement, CBP paid USCIS \$150,000 during FY 2015 to process any CBP records found within an A-File without sending the records to CBP for processing.¹⁷ USCIS informed OGIS that it processed an estimated 1 million pages of CBP records in FY 2015.¹⁸

CBP also cited its decision to switch to *FOIAonline* for FOIA tracking and processing in FY 2014 as a reason for its success in reducing the backlog. CBP accepts requests by mail and fax, but encourages requesters to create a *FOIAonline* account, which helps CBP respond to requests more efficiently than it previously did; currently, requesters who wish to make a request to CBP electronically must use *FOIAonline*.

Managing Resources

Effectively managing resources contributed to CBP's success in reducing the agency's backlog in FY 2015. CBP FOIA managers set goals for the number of cases processors should close in a week, based on the processor's grade level, with some room to accommodate for the complexity of requests handled by more experienced processors. CBP FOIA managers explained that *FOIAonline* does not easily allow CBP to track the number of pages processed by each employee. Each FOIA processor has 50 to 100 requests in their processing queue at a time. We recommend that CBP continue managing its resources by developing a method for monitoring the number of pages processed and ensuring more timely processing of complex requests.

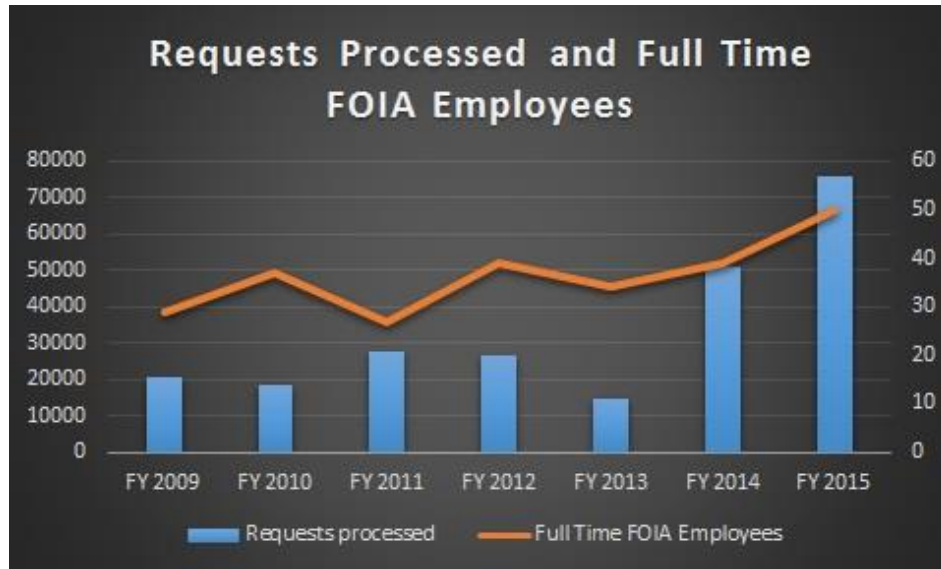
Processors at a GS-5 level handle mostly requests for records documenting an individual's arrival to and/or departure from the country; senior GS-5 and GS-7 processors have more complex records to process, such as border apprehension files. In addition to entry/exit and border apprehension records, processors at the GS-9/11/12 levels process requests for some personnel records. GS-13 level processors

¹⁷ Agencies are encouraged to eliminate the need for consultations by establishing agreements pertaining to regularly occurring records in their files. "Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them," last updated August 15, 2014, <http://www.justice.gov/oip/blog/foia-guidance-13>.

¹⁸ The Assistant Director of USCIS National Records Center informed OGIS that USCIS calculated that number based on a Department of Homeland Security study of A-Files which determined that about 5 percent of the pages within an A-File originate with CBP. USCIS reported processing 20,978,501 A-File pages under FOIA in FY 2015. Using the 5-percent figure, USCIS estimates that 1,048,925 of those nearly 21 million pages originated with CBP.

are considered subject matter experts and handle the agency’s most complex cases, such as consultations with other agencies, media-related requests, and requests for contracts and other non-traveler records.¹⁹

Figure 3 CBP Requests Processed and Full Time FOIA Employees²⁰



CBP FOIA managers requested 20 new positions for the FOIA branch but learned in January 2016 that funding was not approved for those positions. The 19 non-Pathways student positions are funded through FY 2016.²¹ Without the students and CBP employees detailed in the FOIA Office, the agency’s backlog could grow. We recommend that the FOIA Office discuss with the Privacy and Diversity Office options for managing both the backlog and incoming requests and ensuring the office maintains proper staffing levels in the coming years. We also note that the CBP-USCIS agreement continues in FY 2016, and recommend that it continue.

Intake, Triage, Search, Processing and Release

CBP accepts requests via U.S. mail, fax, or *FOIAonline*. CBP started a second-day triage system in FY 2014 in which non-Pathways students create requests in *FOIAonline* based upon requests received by mail the previous day. This process also involves checking whether duplicate requests exist—one submitted by mail and another submitted electronically. When the backlog was at its largest, requesters who did not receive a timely response sometimes submitted three or four identical requests; CBP did not discover these duplicates until well into processing the backlogged requests. The FOIA staff review all

¹⁹ A consultation most commonly arises when an agency locates records in response to a request that originated with the agency, but which contains within them information of interest to another agency or another component. In those situations, the agency processing the request should consult with that other agency, or equity holder, to obtain its views prior to disclosure of the records. “Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them,” last updated August 15, 2014, <http://www.justice.gov/oip/blog/foia-guidance-13>.

²⁰Report on CBP FOIA Backlogs FY 2009- FY 2014, accessed December 23, 2015, www.foia.gov. Department of Homeland Security Freedom of Information Act Monthly Report September 2015.

²¹ CBP informed us on March 9, 2016, that the FOIA Office has funding for as many as 26 non-Pathways student positions.

requests submitted the previous day to *FOIAonline* and determine if the requests are properly made, i.e., meet the requirements in DHS's FOIA regulations. CBP acknowledges all requests and if the requests are not made in accordance with the regulations, CBP provides the requester through *FOIAonline* or by U.S. mail a checklist informing them of the necessary components of a properly made FOIA request and closes the request.

CBP's standard operating procedure (SOP) for processing requests states that when closing an imperfect request, the processor should "Bold and Underline the reason their FOIA request is insufficient. If the reason is not one of the five listed, please add the reason in bold and underline it."²² We noticed several instances that this type of formatting does not always appear in the responses sent via *FOIAonline*, meaning the requester received a list of five potential reasons their FOIA request was closed without the specific reason identified.

If a request is considered properly made, it goes into one of two queues. As previously described, the simple queue is for requests for traveler records, such as border crossing records. The complex queue is for requests for non-traveler records, such as contracts; records about fines, penalties and forfeitures/seizures; human resources records; and import/export records.

CBP FOIA managers informed us that when a requester asks for expedited processing, a special task is created in *FOIAonline*. A branch chief must clear the "task" before the case can be closed. CBP informed us that in FY 2015, it considered moot most requests for expedited processing for traveler records because the agency processed the requests in fewer than the 20 days required by the statute. However, DHS's FOIA regulation requires CBP to decide whether to grant a request for expedited processing within 10 days.²³ CBP reported processing 25 expedited requests during FY 2014; CBP processed most of these cases within 20 days.

Requests for a fee waiver also create a special task in *FOIAonline* that must be cleared by the branch chief before the case can be closed. CBP informed us that it considers requests for fee waivers as similarly moot for most traveler records because they fall under 100 pages and the office's \$25 threshold for charging fees. DHS's FOIA regulation states that components should not charge fees if the total amount calculated is \$14 or less.²⁴

We recommend that CBP ensure that requests for fee waivers and expedited requests are reviewed and responded to as required by DHS FOIA regulations: 20 working days for fee waivers and 10 working days for expedited processing.

During FY 2015, non-Pathways students conducted searches for traveler records for the FOIA office. One student employee created a software tool to automate the search for travel records. This new tool allowed the agency complete all FOIA searches for traveler requests in the backlog by July 2015. The agency searches for the subject of the requester's name, date of birth, and Alien Number or passport

²² "U.S. Customs and Border Protection: Triage Processing Instructions."

²³ DHS FOIA Regulations, 6 C.F.R. § 5.5(d)(4).

²⁴ DHS FOIA Regulations, 6 C.F.R. § 5.3(c).

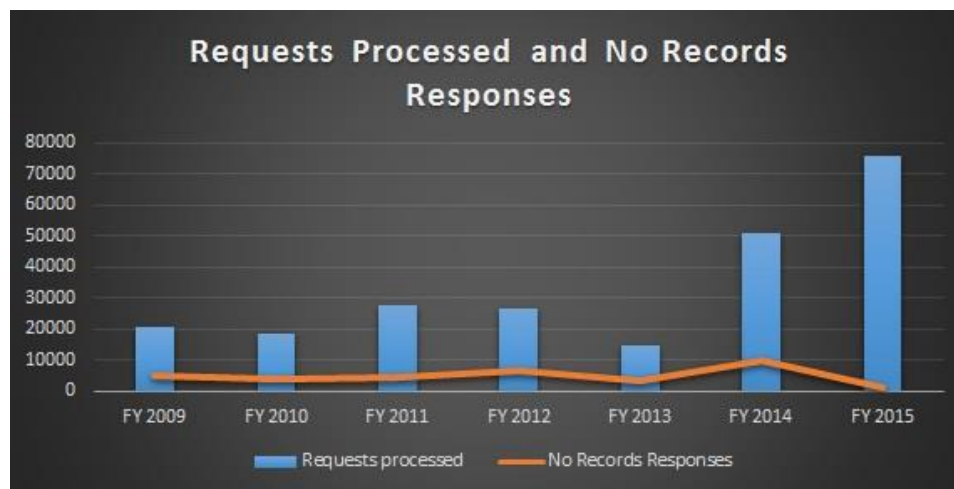
number. If the subject of the request has a common name, and the agency is unable to determine if potentially responsive records are in fact the subject of the request, the request is closed and CBP suggests that the requester resubmit their request with more information.²⁵ If the request is a duplicate the agency notifies the requester and closes the duplicate request.

As previously noted, program offices search for non-traveler records. The FOIA Office creates a search task using *FOIAonline*; the system automatically generates an email to the program office, alerting the office of the task. The FOIA Office generally does not supply search terms to the program office, unless the request is sent to the Office of Information Technology (OIT), which handles FOIA requests for CBP email. OIT asks requesters to provide search terms or additional limiting information like a date span. The Office of Field Operations and the Office of Border Patrol receive most of the search requests. CBP was working toward making program offices responsible for all FOIA searches, both traveler and non-traveler; however, CBP managers informed us that the program officers have not been able to keep up with the volume of incoming requests so students are helping conduct those searches.

To ensure accountability and timeliness, the FOIA Office creates and sends to the Assistant Commissioners every two weeks a report of pending searches at each program office. CBP FOIA managers informed us the program offices generally respond in a timely manner.

Overall there were fewer “No Records” responses in FY 2015 than in previous fiscal years (See Figure 4). CBP FOIA managers informed us that the decrease might be related to improved searches; use of the new search scripting tool for traveler records; and records searches by subject matter experts.

Figure 4, CBP Requests Processed and No Records Responses²⁶



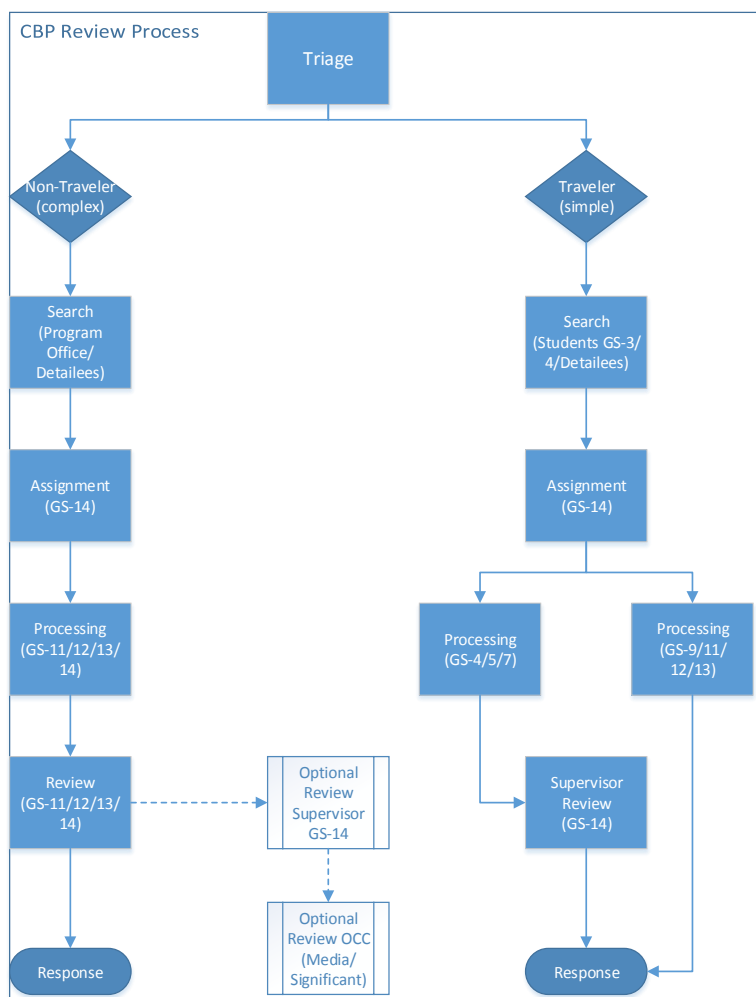
²⁵ CBP informed us on March 7, 2016, that in cases in which the subject of a request has a common name, CBP contacts the requester in writing asking for additional information. The requester is provided 10 business days to respond. If a response is not received or the agency is still unable to determine if the records are in fact the subject of the request, CBP closes the request.

²⁶ Report on CBP FOIA Backlogs FY 2009- FY 2014, accessed December 23, 2015, www.foia.gov. Department of Homeland Security Freedom of Information Act Monthly Report September 2015.

In addition to searching for responsive non-traveler records, the program office uploads all responsive documents to the non-public section of *FOIAonline*, and suggests any part of the record that it thinks should not be released under FOIA. A FOIA branch chief assigns the request to a FOIA processor or detailee, according to their expertise level, who reviews the documents and applies redactions. The processed records are returned to subject-matter experts in the program office for final review.

The particular processor’s experience level and capability determines if they make release determinations. A branch chief always reviews redactions by GS-7 and GS-9 level employees and sometimes reviews redaction by GS-11, GS-12, and GS-13 employees who processed records in high-profile or media requests or if the processor requests a second review. The FOIA Office works with CBP’s Office of Chief Counsel (OCC) to process records when the request is in litigation or if the request is identified as a significant request submitted by an advocacy organization or the media. (OCC does not otherwise review processed records before release.) The review of significant requests is not part of the standard operating procedure, but CBP managers said the significant request review process is being evaluated and the SOP will be updated accordingly in FY 2016.

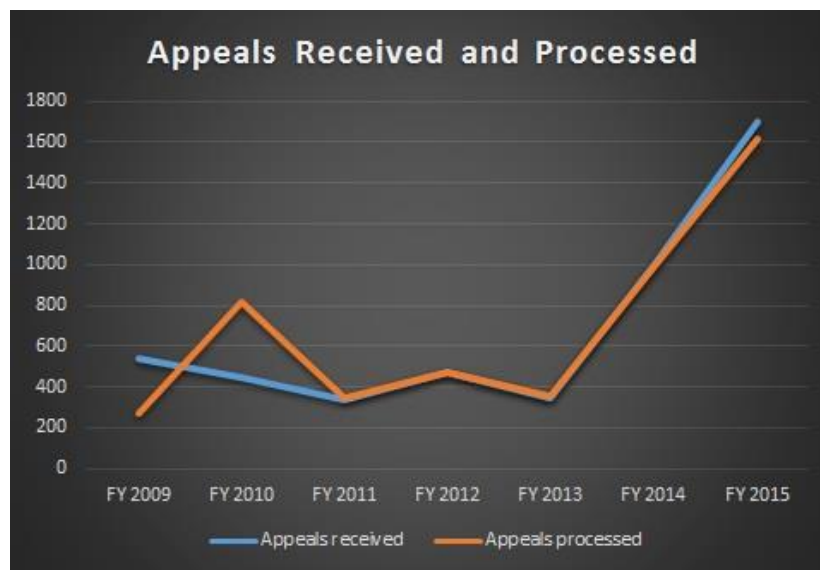
Figure 5, CBP FOIA Process



Appeals

CBP's FOIA Appeals, Policy and Litigation Branch is in the Office of International Trade within the Office of Chief Counsel and is staffed by 16 full-time equivalent employees, 13 of whom are attorneys. The FOIA Office used to be in the Office of International Trade before its move to the Privacy and Diversity Office. Between FY 2009 and FY 2015, CBP Appeals received an average of almost 700 appeals per year, ranging from about 300 in FY 2011 to slightly more than 1,500 in FY 2015. The staff in CBP's appeals office are generally able to keep up with the number of appeals submitted each year; the appeals office reported having 16 backlogged appeals at the end of FY 2015. Two of the attorneys work full-time on FOIA litigation.

Figure 6, CBP Appeals Received and Processed²⁷



CBP's Appeals Office evaluates appeals of CBP's initial FOIA responses and generally re-processes requests that the attorneys determine require re-processing. The appeals staff does not process the FOIA request if the appeal is of a delay in initial processing; in such cases, the appeals staff returns to request to the FOIA office to process. Records related to FOIA litigation are processed by either the Appeals Office or the FOIA Office, depending on where in the process the request was at the time of litigation.

Our review of CBP case files indicates that a significant number of CBP appeals challenge the adequacy of the agency's search for border crossing records. In eight of nine appeals cases that were part of our random sample, the appeals staff found responsive records after an initial "no records" response from the FOIA unit; in the ninth appeal we reviewed, the appeals staff found more responsive records than what the FOIA unit had produced.

²⁷ Report on CBP FOIA Backlogs FY 2009- FY 2014, accessed December 23, 2015, www.foia.gov. Department of Homeland Security Freedom of Information Act Monthly Report September 2015.

Our review of CBP case files and of OGIS case files involving the agency shows that CBP's appeals letters explain in detail the agency's administrative process; exemptions the agency cited in withholding part of or all of the records; categories of withheld information; and case law.

As previously noted, the FOIA Office is part of the Privacy and Diversity Office, and the FOIA Appeals, Policy and Litigation Branch is part of the Office of International Trade. The Appeals Branch manager informed us that Appeals attorneys occasionally contact the FOIA Office to discuss a trend observed at the initial processing stage but generally there is no routine communication between the two offices. The Appeals Branch manager also informed us that she used to conduct FOIA training for subject matter experts in program offices that have some FOIA responsibilities but the budget no longer allows her to do so. We recommend that CBP leaders develop a strategy to improve communication and promote cross-training between CBP FOIA and the Appeals offices to possibly lessen the number of requests that are appealed.

Training

The CBP FOIA program provides annual training for staff.²⁸ CBP's FOIA managers informed us that the office provided staff with a two-day training and a one-day training session during FY 2015, and that staff members are welcome to attend any free training sessions. If there is a need for someone on the FOIA staff to receive specialized training, the office's managers will nominate candidates. For example, recently some of CBP's FOIA staff attended training for compliance with Section 508 of the Rehabilitation Act, which requires that all information that is posted to a government website is accessible to individuals with disabilities. The Privacy and Diversity Office approves requests for specialized training or for training that costs money.

CBP's FOIA managers noted that providing FOIA training for staff outside of DC is difficult because CBP's workforce is spread across the country. The head of the CBP FOIA Appeals Office used to visit CBP locations across the country to provide training on the law's requirements and use of exemptions. Such training is no longer offered.

Given that most of CBP's staff are relatively new to FOIA,²⁹ we recommend that CBP develop a training schedule that helps ensure the staff has appropriate training as they gain additional responsibilities. This training schedule should take into consideration the processor's seniority and the level of FOIA analysis needed. We also recommend that CBP add the FOIA learning modules released by the Department of Justice in March 2015 to CBP's online employee training hub as soon as DHS approves the material.

²⁸ Ninety-three percent of respondents to OGIS's online survey responded that the organization offers training or guidance on how to properly process a FOIA request and 85 percent of respondents reported being either confident or extremely confident in knowing the correct legal procedures for how to properly process a FOIA request.

²⁹ A majority—73 percent—of respondents to OGIS's online survey said that they have worked as a FOIA professionals for five or fewer years.

Finding 2: CBP’s FOIA Program Uses Technology to Increase Efficiencies, But Opportunities Exist to Strengthen its Use

*CBP adopted FOIAonline to help the agency better manage the volume of requests it receives. CBP does not regularly post released records into FOIAonline’s records repository. CBP’s website does not help requesters understand the FOIA process, or how to use FOIAonline.*³⁰

FOIA Tracking and Processing System

CBP uses *FOIAonline* to accept and manage FOIA requests and appeals and to communicate with requesters. CBP began using *FOIAonline* in FY 2014. CBP managers informed us that *FOIAonline* is able to store all communications about a request and to document the agency’s process. CBP is the only DHS component using the system. Because immigration files include information from several DHS components, it is not unusual for CBP to refer requests, or for the office to receive referred records. The electronic tracking systems used by offices that process immigration records have limited capability to interact electronically with each other.³¹ A member of the CBP staff must manually upload any referrals from other DHS offices into *FOIAonline*.

We observed that several case files in *FOIAonline* were incomplete because the FOIA processor did not upload files into the system or document certain steps. The cases that we reviewed that were logged later in FY 2015 were more likely to have the associated files stored in the system than those that were logged in early part of FY 2015.

I-94 search tool

CBP created an online tool that foreign travelers can use to access their arrival and departure records, known as Form I-94.³² In order for a foreign national to access their records, they must have precise pieces of information. If the traveler does not have one of the required pieces of information, he or she must file a FOIA request for the records.

CBP hoped that making the records available online would eliminate the need for the CBP FOIA Office to process some requests. However, according to CBP’s FOIA managers, the I-94 search tool has not eliminated FOIA requests for the records.

Native Formats

CBP converts all records into a PDF format prior to processing, making it difficult for CBP to meet FOIA’s requirement that agencies provide records “in any form or format requested by the person if the

³⁰ CBP informed us on March 7, 2016, that the agency’s website explains the FOIA process under the Frequently Asked Questions link: <http://www.cbp.gov/site-policy-notices/foia>. The agency also informed us that the *FOIAonline* website provides information under Resources and that there is a toll-free contact number for requesters who need help using *FOIAonline*.

³¹ Freedom of Information Act: DHS Should Take Steps to Improve Cost Reporting and Eliminate Duplicate Processing, GAO 15-82, published November 2014.

³² “Get I-94 Information,” <https://i94.cbp.dhs.gov/I94/consent.html>, visited January 29, 2016.

record is readily reproducible by the agency in that form or format.”³³ A PDF is an image format; converting a spreadsheet or information from a database into a PDF is akin to taking a page-sized picture of the information. In order for all of the information in the record to be seen in the PDF, the FOIA processor must make sure that text is not hidden by another cell and that the text fits within the page’s margins. Converting databases into PDFs also limits their use to the public, because the data in the record cannot be sorted or combined with other sources. The FOIA Appeals, Policy and Litigation Branch, on the other hand, is more willing than the FOIA Office to consider releasing data in a more open format as long as it does not burden the agency.

We recommend that CBP look into how records can be processed and released in their native formats when requested and incorporate any new processes into its standard operating procedure.

FOIA Library/ Web page

CBP’s FOIA web page includes links to answers to frequently asked questions; a chart explaining the types of immigration records held by CBP and other Federal agencies; a link to CBP’s FOIA logs; and several links to portions of *FOIAonline*. The page also directs foreign nationals to the I-94 search tool for arrival and departure records. We observed that some of the links to *FOIAonline* could confuse someone who is not familiar with *FOIAonline*. For example, clicking the “Check Status of a FOIA Request” and “Search CBP Library” takes users to a basic search page on *FOIAonline* that users can use to access requests and released records. We recommend that CBP explain on its website how users can use the search tool and the potential advantages of creating an account on *FOIAonline* to request CBP records.

CBP FOIA managers informed us that the office regularly adds statistics regarding the FOIA program and records that have been released to the media to the repository of records on *FOIAonline*. CBP FOIA managers informed us more released records are not added to the repository because of the volume of requests handled by CBP. We downloaded a few records from the repository, including records labeled as belonging to the CBP FOIA Library, and note that very few included information in the document’s metadata indicating that the documents were released under FOIA, as suggested by guidance from the Office of Information Policy (OIP).³⁴

We recommend that CBP begin using the “FOIA” metadata tag for records released under FOIA, and that the office work with its processors to create a system to ensure that records that are of interest to the public are placed in the public repository after the records have been released.

³³ 5 U.S.C. § 552(a)(3)(B).

³⁴ Using Metadata in FOIA Documents Posted Online to Lay the Foundation for Building a Government-Wide FOIA Library,” last modified July 16, 2015, <http://www.justice.gov/oip/blog/foia-guidance-11> -

Finding 3: CBP's FOIA Program Improved Interaction with Requesters but Could Better Communicate with Requesters

Requesters report having trouble contacting CBP by telephone or email. CBP's communication with requesters is not always clear nor does it always contain information that would help improve understanding of the FOIA process. Since FY 2012, CBP has not sent requesters letters asking if they are "still interested" in the records prior to processing the request.

Customer Service

FOIAonline allows requesters to check the status of their request online. CBP does not include contact information for the FOIA office on its website or in communication with requesters.³⁵ If CBP receives a phone call regarding a FOIA request, non-FOIA staff in the CBP Privacy and Diversity Office are responsible for answering the call. The FOIA Office provided to the Privacy and Diversity Office answers that allow the Office's non-FOIA staff to answer basic FOIA questions. Calls seeking more specific information are forwarded to the FOIA Office. However, we understand that the FOIA Office is not always able to answer the phone at the time of the call. Through our mediation work, we also know that requesters are often not able to leave a message because the voice mail box associated with the line given to requesters is often full.

We suggest that FOIA managers work to improve the agency's ability to communicate with requesters by phone. Tracking the volume of FOIA calls to the agency could help determine what resources would be required to have the calls handled directly by the FOIA office.

To handle the volume of requests CBP receives, the agency uses template letters to answer both traveler (simple) and non-traveler (complex) FOIA requests. We noticed that responses both to non-traveler and traveler requests do not contain much information that helps the requester understand the agency's process, such as the search that the agency conducted for records. Letters responding to requests for traveler records are particularly devoid of this information: while non-traveler letters list the exemptions the agency applied with explanations of those exemptions and the number of pages partially or fully withheld, traveler letters do not list this information. We recommend that CBP improve the quality of its template letters to ensure consistency. Specifically, we recommend that CBP include in all final release letters information about the agency's search for records, any exemptions used, an explanation of the exemption, and a page count of material reviewed, released or withheld.

Plain Language

CBP's FOIA customer base is largely a non-native English-speaking population. To improve requester understanding of the FOIA process, we recommend that CBP review its forms and work on a method to ensure requesters understand what deficiencies cause a request not to be processed. We also recommend

³⁵ CBP informed us on March 7, 2016, that the main FOIA number is on the agency's FOIA website under FAQ: <http://www.cbp.gov/site-policy-notice/foia/faq-foia#>.

that both the FOIA Office and Appeals Office review all of their standard templates and correspondence to ensure they use the plainest language possible. Finally, we recommend that CBP consider adding to its helpspanish.cbp.gov webpage information about the FOIA program in Spanish.

“Still Interested” Letters

An agency sometimes sends letters asking a requesters whether they are “still interested” in a request before they begin processing; sometimes when agencies send these letters, it is the first communication that they have had with a requester. In 2012, CBP administratively closed 11,000 FOIA requests and sent letters to the requesters informing them of the closure and that they should contact the agency if they were still interested in the agency processing the request; the agency had to re-open the requests and process them.³⁶ CBP FOIA managers informed us that the FOIA Office has not used “still interested” letters since FY 2012.

³⁶ Freedom of Information Act: DHS Should Take Steps to Improve Cost Reporting and Eliminate Duplicate Processing, GAO 15-82, published November 2014; “Why customs officials struggle to fulfill Obama’s open-government promise,” Robert O’Harrow, Jr., the Washington Post, March 13, 2015, https://www.washingtonpost.com/investigations/why-customs-officials-struggle-to-fulfill-obamas-open-government-promise/2015/03/12/27ee9b44-c12b-11e4-9271-610273846239_story.html

Checklist of OGIS Recommendations for CBP'S FOIA Program Management

- Continue managing resources by developing a method for monitoring the number of pages processed and ensuring more timely processing of complex requests.
- Discuss with the Privacy and Diversity Office options for managing both the backlog and incoming requests and ensuring proper staffing levels in the coming years
- Continue beyond FY 2016 the inter-agency agreement in which USCIS processes CBP records contained in Alien, or A-, Files
- Ensure all requests for fee waivers and expedited processing are in accordance with DHS regulations
- Continue to streamline FOIA processes and add quality control measures to further improve the program:
 - Check all requests for duplicates at the triage stage
 - Evaluate processes for emerging bottlenecks
 - Continue to redirect resources as necessary
- Develop a strategy to improve communication and promote cross-training between CBP FOIA and the Appeals offices
- Develop a training schedule to ensure the staff has appropriate training as they gain additional responsibilities
- Add the FOIA learning modules released by the DOJ in March 2015 to the CBP's online employee training hub

Technology

- Look at how records can be processed and released in their native formats when requested and incorporate any new processes into standard operating procedures
- Explain on the CBP website:

- How users can use the search tool
- The advantages of creating an account on *FOIAonline* to request CBP records
- Use the “FOIA” metadata tag for records released under FOIA
- Create a system to ensure that released records that are of interest to the public are placed in the public repository

Communication

- Edit template letters to include:
 - An explanation of deficiencies that cause a request not be processed
 - Information about the search
 - Information about exemptions, including what they mean
 - A page count of material released or withheld
- Review CBP forms and templates for plain language
- Consider adding to helpspanish.cbp.gov webpage information about the FOIA program in Spanish.

Scope and methodology³⁷

OGIS Review Team Lead Kirsten Mitchell along with Team members Amy Bennett and Kate Gastner assessed the CBP's FOIA program. This report is the result of interviews with CBP FOIA officials and staff; direct observations of initial request and appeal case files; results of an online OGIS survey completed by CBP FOIA processors; and a review of DHS FOIA regulations, the agency's FOIA website and other written material including agency FOIA litigation. On July 23, 2015, we interviewed two CBP FOIA Branch Chiefs, a FOIA Subject Matter Expert, and a FOIA processor. We also conducted follow-up interviews with a third FOIA Branch Chief and the Chief of the CBP FOIA Appeals, Policy & Litigation Branch on August 10, 2015. On December 8, 2015, we had a follow-up discussion with the CBP FOIA Officer and two FOIA Branch Chiefs. CBP granted us access to its case files and allowed us to view the system the agency uses to process requests and appeals. Before our visit, CBP provided us with a list of its FOIA cases closed in FY 2015. We chose a randomized generalizable sample of 388 case files to review. We finished reviewing the case files on December 4, 2015, and based our findings on OGIS's Elements of an Effective FOIA Program, based on

- the FOIA statute;
- Office of Management and Budget Guidelines for Fees;
- Presidential Memorandums;
- Attorney General Memorandums;
- Guidance from the Department of Justice's Office of Information Policy, including DOJ's Guide to the Freedom of Information Act;
- OGIS Best Practices; and
- Inconsistencies and non-compliance observed during OGIS's mediation services.

³⁷ Please direct questions to OGIS at ogis@nara.gov or 202-741-5770.