MEMORANDUM

TO: Alina M. Semo, Director
Office of Government Information Services

FROM: Tracey St.Pierre, Chief FOIA Officer
U.S. Department of Education

DATE: April 06, 2020

SUBJECT: Response to OGIS Compliance Review of the Department of
Education's Freedom of Information Act Program

This memorandum serves as the Department of Education's (ED) response to the
National Archives' Office of Government Information Services (OGIS) report of
September 25, 2019, regarding the results of OGIS' Compliance Assessment of ED's Freedom
of Information Act (FOIA) program.

ED is committed to fulfilling our responsibilities under FOIA. Therefore, ED made a
special request to have OGIS review our FOIA program and make recommendations for
improvement as an added effort to ensure our compliance with FOIA. We appreciate OGIS'
efforts and the opportunity to respond to the findings and recommendations.

As part of OGIS' Compliance Assessment, OGIS follows up with agencies 120 days later
to understand the actions that the agency took and/or plans to take to address their
recommendations for improving the administration of FOIA.

ED has paid special attention to the four findings and accompanying seven
recommendation OGIS identified in the report and is using the assessment results to further
strengthen ED's FOIA program.

ED's response to the OGIS Findings and Recommendations is included below.

GUIDANCE

> **Finding 1: Education's FOIA Regulation is Out of Compliance**
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> **Education's FOIA regulation has not been updated since 2010 and is out of compliance with changes to the law and related guidance that have occurred since then. The regulation, which governs how the Department administers FOIA, provides an incorrect deadline for filing an administrative appeal, provides incorrect information regarding certain fee assessments, and does not provide procedures for engaging in dispute resolution.**

Recommendation 1: Education must update its FOIA regulation to reflect the amendments to FOIA as well as the Department's processes for implementing the substantive and procedural changes it has made. We recommend using the OIP regulation template.

Agency Response:

This recommendation has been implemented. The Department's regulation for processing records under the Freedom of Information Act has been revised and was published in the *Federal Register* on December 12, 2019. The FOIA regulation has been revised to comply with changes to the law and related guidance, including the FOIA Improvement Act of 2016.

COMMUNICATION

> **Finding 2: Communication with Requesters Not in Compliance and Could Be Clearer**
>
> **There is a lack of consistency in providing estimated dates of completion and in response letters issued by the FOIA Service Center and the regional Office for Civil Rights (OCR) offices. Lack of consistency also exists regarding notifying requesters about services offered by the FOIA Public Liaison and OGIS. Requesters seeking records from the 12 regional OCR offices are not consistently directed to the same office when seeking information about the FOIA process. FOIA jargon, legal citations and a lack of explanation of the FOIA process in some response letters may confuse requesters.**

Recommendation 2: Education must comply with FOIA's statutory mandate by providing estimated dates of completion to requesters who seek such information.

Agency Response:

This recommendation has been implemented. ED's FOIA Service Center (FSC) has implemented a process to ensure requests for estimated dates of completion are appropriately addressed in a timely manner. ED has streamlined this process so that the requests are forwarded to ED's FOIA Public Liaison (FPL) for direct response. The FPL works closely with the program office(s) assigned to the FOIA request to provide an estimated date of completion. ED is incorporating suggested language from the OGIS "Best Practices" into our communication.

To address the inconsistencies regarding notifying requesters about services offered by the FPL and OGIS, ED is including such language in all response letters regardless of the request final disposition.

Recommendation 3: Education must update its template letters to comply with the statute. OGIS recommends that Education write its template letters in plain language so that requesters can more easily understand the Department's FOIA process and actions

Agency Response:

This recommendation is being implemented. In response to OGIS' Finding 2, the FOIA Service Center performed a review of all letters included in the assessment and noted inconsistences between the letters from the FSC and various Office for Civil Rights (OCR) regions. Therefore, ED has modified template letters used by the FSC in accordance with the FOIA statute and recommendations from the Department of Justice Office of Information Policy.

In addition, ED has been working with offices across the Department, including the Office for Civil Rights, to ensure letters sent from principal offices and the 12 OCR regional offices are compliant with the statute. To support this effort, the Chief FOIA Officer shared the OGIS findings and recommendations with OCR's leadership and requested OCR regions utilize the updated FSC template letters. The FSC has also provided updated templates through FOIAXpress (the software used by the Department to process and track Freedom of Information

Act/Privacy Act requests) that can be utilized by all Principal Offices and the OCR regional offices to promote consistency across offices.

The FSC has determined that use of the modified template letters will resolve the issues of non-compliance in this area.

TECHNOLOGY

Finding 3: Technology Not Seamless or Being Used to its Fullest Extent

Education has several technology platforms at its disposal to help administer the FOIA process. In some cases, the platforms cannot operate in tandem with other platforms, creating inefficiencies. In other cases, a platform is not being used to its fullest extent.

Recommendation 4: The FOIA Service Center should partner with the Department's Customer Service and Technology Team to analyze the costs and benefits of moving to a Department-wide system and leverage technology to improve and streamline Education's FOIA process.

Agency Response:

This recommendation has been implemented. ED recently completed an upgrade to its entire IT infrastructure that improves overall performance of its IT system and offers opportunities for exploring additional administrative search tools, such as Microsoft 365. At the same time, FSC staff has worked with Office of Chief Information Officer staff to identify and overcome challenges related to the use of the legacy administrative search tool, Clearwell, and is adding FSC staff dedicated to overseeing the Department's FOIA administrative searches.

ED also expanded the use of technology by upgrading and completing a migration and roll-out of FOIAXpress to the cloud, which included integrating the FOIAXpress Public Access Link (PAL, a secure public-facing web portal that connects agencies with requesters); adding an Electronic Document Review (EDR) module to enable users to quickly filter, deduplicate, rank, and sort documents; providing Department-wide training on FOIAXpress, and increasing the number of licenses for access to FOIAXpress. FSC staff has also reached out to other federal agencies to identify what technology they utilize for administrative searches and processing FOIAs and to help identify best practices.

<u>MANAGEMENT</u>

> **Finding 4: Management Controls & Decentralized FOIA Program Challenge Effectiveness & Efficiency**
>
> **Education tracks data related to its FOIA program, but, at the time of our assessment, lacked performance metrics and goals for program offices tasked with responding to searches, and individual employees with FOIA responsibilities. The decentralized nature of the Department's FOIA program creates inefficiencies in the process including untimely search results, in some cases, inconsistencies in program offices' recommended redactions.**

Recommendation 5: The FOIA Service Center should track the time it takes Department program offices to respond to search requests, and establish performance standards and protocols for handling overdue search responses.

Agency Response:

<u>ED agrees with this recommendation but has not yet fully implemented it</u>. ED developed and rolled out a new FOIA Dashboard in April 2019. The Dashboard data is generated directly from FOIAXpress.

ED's Deputy Secretary has utilized this tool to increase visibility for FOIA at the most senior levels and to foster more accountability for ED Principal Offices responding to document requests. The Dashboard provides more detailed performance metrics, along with a list of pending requests for each Principal Office. It is also intended to be used as a management tool to identify trends over time in caseload fluctuations, processing productivity, staffing decisions based on workload and age of cases, etc. FSC utilizes this data to follow up with program offices to request the status of overdue items and to identify and prioritize Principal Offices to provide outreach and targeted assistance in backlog reduction efforts. In addition to the above, ED is working to establish human capital performance standards and documented protocols for handling overdue search responses. <u>See</u> ED's response below to recommendations 6 and 7**.**

Recommendation 6: The FOIA Service Center should work with human capital staff to use data to develop individual performance metrics and goals for each processor (e.g., numbers of cases closed, and pages reviewed) to reduce the backlog and improve timeliness.

Agency Response:

<u>ED agrees with this recommendation but has not yet fully implemented it</u>. ED's FOIA Service Center (FSC) uses data to set goals for the numbers of cases processed by its staff. The Chief FOIA Officer consulted with the Department's Performance Improvement Officer and the Chief Human Capital Officer (CHCO) on this issue, and CHCO staff will assist the FSC in developing a plan to implement the recommendation across the Department for each processor outside of the FSC to the extent necessary.

In addition, at the recommendation of OGIS, ED's Chief FOIA Officer and FOIA Service Center staff met with staff from the U.S. Department of State (i.e., Office of Information Programs and Services) and with staff from the U.S. Department of Homeland Security (i.e., U.S. Citizenship and Immigration Services' National Records Center) to discuss their FOIA programs and share best practices with regard to FOIA processor metrics, page counts, performance plans, etc. ED found the discussions and the information shared by the U.S. Department of State, as well as by the U.S. Department of Homeland Security to be invaluable.

Recommendation 7: The FOIA Service Center should work with human capital staff to incorporate FOIA performance standards into performance plans for all employees with FOIA responsibilities.

Agency Response:

<u>ED agrees with this recommendation but has not yet fully implemented it</u>. Though ED's FSC tasks and tracks FOIA requests across the Department, each Principal Office has staff responsible for processing FOIA requests. Some Principal Offices have dedicated FOIA staff, but for many, processing FOIA requests is a shared responsibility and collateral duty which makes performance measurement challenging. Additionally, FOIAXpress does not automatically track pages processed by employee or POC. Regardless, the FSC and some Principal Offices have incorporated FOIA performance standards in employee performance plans.

Response to OGIS Compliance Review

The CHCO has committed to working with the FSC to develop and implement a plan to address recommendation 7, including incorporating performance standards into performance plans for all employees with FOIA responsibilities to the extent necessary.

In addition, at the recommendation of OGIS, ED's Chief FOIA Officer and FOIA Service Center staff met with staff from the U.S. Department of State (i.e., Office of Information Programs and Services) and staff from the U.S. Department of Homeland Security (i.e., U.S. Citizenship and Immigration Services' National Records Center) to discuss their FOIA programs and share best practices with regard to FOIA processor metrics, page counts, performance plans, etc. ED found the discussions and the information shared by the U.S. Department of State, as well as by the U.S. Department of Homeland Security to be invaluable.

Finally, ED appreciates the efforts of OGIS in reviewing our agency's FOIA policies, procedures, and compliance and is confident our attention to the issues reported following the OGIS Compliance Review will enhance our FOIA program overall.