



**OFFICE OF GOVERNMENT INFORMATION SERVICES
COMPLIANCE REVIEW OF THE
FEDERAL EMERGENCY MANAGEMENT AGENCY'S
FREEDOM OF INFORMATION ACT PROGRAM**

**MANAGEMENT CONTROLS, BETTER USE OF TECHNOLOGY, AND IMPROVED
COMMUNICATION WITH REQUESTERS NEEDED**

A Message from the Director

The OPEN Government Act of 2007 established the Office of Government Information Services (OGIS), codified at 5 U.S.C. 552(h), and mandated the office with reviewing agencies' Freedom of Information Act (FOIA) policies, procedures and compliance. This report is one of six reviews we are completing of components of the Department of Homeland Security (DHS). At the completion of our reviews, we will also release a set of agency-wide recommendations.

Since OGIS opened in 2009, we have been a resource for both FOIA requesters and federal agencies. This assessment of the Federal Emergency Management Agency's (FEMA) FOIA program is in line with this purpose.

This report addresses FEMA's compliance with FOIA and is based on interviews with employees and officials of the agency, direct observation of FEMA's FOIA case files, and a review of applicable documents.

The recommendations herein have been developed using our office's knowledge of the statute and best practices, and have been discussed in draft with those responsible for the program. We hope this report and our recommendations will assist FEMA in fulfilling 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 recent years the Federal Emergency Management Agency (FEMA) has made several investments that will help the agency streamline the Freedom of Information Act (FOIA) process and improve timeliness. These investments include moving onto a unified FOIA processing system and purchasing a license to improve the agency's ability to process requests for email. FEMA has also taken steps to improve its responsiveness to requesters.

Despite these advances, in Fiscal Year (FY) 2014 FEMA reported having several of the oldest pending requests at DHS, including the third oldest request across the Department of Homeland Security (DHS)—while receiving less than one-half of one percent of requests sent to DHS. During the same reporting period, FEMA also reported having the third highest average processing time for complex requests among DHS components (213.82 days).

While FEMA has put in place a system to improve responsiveness to requesters, we observed that it often takes FEMA a year or more to respond to simple FOIA requests. Lack of a response was a factor in all 16 FOIA lawsuits filed against FEMA since 2009, costing the agency more than \$364,000 in litigation expenses. FEMA is also not using its FOIA processing software to its fullest capacity, and is not using multi-track processing to process simple requests in a timely manner.

OGIS's three primary findings are:

- FEMA's FOIA Office needs to improve management and oversight controls;
- Additional steps are needed to fully benefit from investments in technology to improve tracking, processing, and proactive disclosure; and
- Further steps are needed to improve communication.

What OGIS Recommends

Among other things, OGIS recommends that FEMA use its FOIA processing system to track the volume of records processed as a management and oversight control tool. FEMA should also create a triage process so that relatively simple requests can move through the process in a more timely fashion, and should proactively communicate with requesters to let them know where they are in the queue and provide reasonable estimated dates of completion.

Introduction

The Freedom of Information Act (FOIA) directs the Office of Government Information Services (OGIS) to review agency FOIA policies, procedures and compliance, 5 U.S.C. §§ 552(h)(2)(A) and (B). We assess individual agency FOIA programs by visiting agencies and reviewing regulations, internal guidance for processing requests as well as the process itself, 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.¹

Background

The Department of Homeland Security (DHS) receives the largest number of FOIA requests of any federal department or agency—291,242 requests in FY 2014—and also had the largest backlog of FOIA requests as of September 30, 2014: 103,480. FEMA processed 508 FOIA requests in FY 2014 and ended the fiscal year with a backlog of 709 requests.² DHS components vary greatly in size and mission, and most components operate their FOIA programs independent of DHS' Privacy Office,³ which provides guidance on FOIA issues to the components and is responsible for annual reporting on DHS' FOIA programs to the Attorney General. OGIS consulted with the DHS Privacy Office to identify six operational components to review. In addition to the Federal Emergency Management Agency (FEMA), OGIS will review the United States Coast Guard (USCG), the Transportation Security Administration (TSA), Customs and Border Protection (CBP), the U.S. Secret Service (USSS), and Immigration and Customs Enforcement (ICE). We will issue separate reports on each component and subsequently, a report on DHS' FOIA operations based on our review of the six components.

FEMA's mission is to “support our citizens and first responders to ensure that as a nation we work together to build, sustain, and improve our capability to prepare for, protect against, respond to, recover from, and mitigate all hazards.”⁴ Frequently requested records sought from FEMA relate to disasters, individual assistance, and grants and contracts.

The FEMA FOIA program is part of the Disclosure Branch, which falls under the Records Management Division of the Mission Support Bureau. The Disclosure Branch administers and processes all FOIA requests and appeals for final response and approval by the Director of the Records Management Division.

¹ The Freedom of Information Act, U.S.C. § 552(h)(2)(B).

² DHS "2014 Freedom of Information Act Report to the Attorney General of the United States," February 2015, pages ii and 19, accessed August 10, 2015, http://www.dhs.gov/sites/default/files/publications/dhs-foia-annual-reports-fy-2014_0.pdf.

³ This office has responsibility for both the Privacy Act and FOIA, according to its website, accessed August 10, 2015, <http://www.dhs.gov/privacy-office>.

⁴ “About FEMA,” accessed July 30, 2015, www.fema.gov/about-agency.

FEMA's FOIA program is the central processing point for all FOIA requests to FEMA, including those to the 10 FEMA regions. Intake is handled by an administrative team that logs requests into the FOIA processing system, makes sure the request is perfected, reviews requests for expedited processing and fee waivers, and tasks program offices to search for records.

What We Reviewed

This report is the result of interviews with FOIA officials and staff; direct observations of initial request and appeal case files; results of an online survey; and a review of DHS FOIA regulations,⁵ FEMA's FOIA website,⁶ and other written material including agency FOIA litigation since 2009. On June 2, 2015, we interviewed the Director of the Records Management Division, the Disclosure Branch Chief, and the Special Assistant to the Director of Records Management Division. OGIS also spoke to the lead intake process employee and one of two processing team leads.

FEMA granted us access to its case files and allowed us to view the system the agency uses to track processing of requests and appeals. Before our visit, FEMA provided us with a list of FOIA cases it closed in FY 2014. Using data from the Department of Homeland Security 2014 FOIA Report,⁷ we chose a non-generalizable sample of 50 case files to review, selecting cases based on the frequency of exemption use, fees issues, referrals, appeals and other topics that would give us a broad view of the FEMA FOIA program. We reviewed the case files on June 2-3, 2015.

Finding 1: FEMA's FOIA Office needs to improve management and oversight controls

FEMA's FOIA management has made progress updating procedures and putting in place quality control measures. However, we found that FEMA is not using its FOIA tracking software to its fullest capacity. FEMA is not using simple and complex queues to effectively manage requests. FEMA's FOIA staff is not receiving adequate training. We also found that FEMA does not have a plan to effectively manage its FOIA caseload when disasters occur and employees are deployed to assist with disaster recovery.

Current Staffing

FEMA's FOIA staff includes two GS-13 team leads, three GS-12s and three administrative specialists at the GS-9/12 level. The staff's leadership is the Director of the Records Management Division, the Disclosure Branch Chief, and the Special Assistant to the Director of Records Management Division. At the time of OGIS' review, eight additional positions were vacant and had been open for about a year. The vacancies were primarily the result of employees retiring from federal service or moving outside of

⁵ 5 U.S.C. § 552(6)(D)(i) & (ii) and DHS Freedom of Information Act and Privacy Act Procedures; Interim Final Rule, 6 CFR § 5.5(b), accessed July 9, 2015, http://www.dhs.gov/xlibrary/assets/FOIA_FedReg_Notice.pdf. (Note that DHS on July 29, 2015, published in the Federal Register a Notice of Proposed Rulemaking, Freedom of Information Act Regulations.)

⁶ "FEMA Freedom of Information Act website," accessed July 9, 2015, <https://www.fema.gov/freedom-information-act>.

⁷ DHS 2014 Freedom of Information Act Report to the Attorney General.

the agency. FEMA informed us that a DHS-wide hiring freeze in the wake of sequestration prevented the FOIA Office from filling the positions. However, FEMA informed us that it recently received authorization to fill the positions and, barring any unforeseen delays, the positions could be filled as early as Fall 2015.

Management Controls and Oversight

FEMA processes a relatively small number of requests compared to other DHS components. FEMA started FY 2014 with 560 requests pending. During FY 2014 FEMA received 772 requests and processed 508 requests.⁸ The volume of requests FEMA has received in the last six years has been stable—ranging from 760 requests a year to 820 requests a year between FY 2009 and FY 2014. During that same period, the request backlog has been as low as 306 requests in FY 2012 to as high as 810 requests in FY 2010 when the agency reported its highest staffing level of the six years: 32 full-time staff.⁹ The Government Accountability Office noted in November 2014 that FEMA had unusually high reported costs for the number of requests processed as compared to other DHS components.¹⁰ FEMA informed us that one of the biggest challenges the office faces in responding to requests is reviewing voluminous records; after a disaster, FEMA receives requests about that disaster that correspond to a large number of responsive documents. However, FEMA does not collect any data on the number of responsive pages processed during the fiscal year, making it difficult to quantify the impact of processing voluminous records.

We recommend that FEMA track the number of pages processed. This data would help FEMA better manage its resources and track employee performance. As FEMA brings on new FOIA professionals, it is important that FEMA FOIA managers are able to assess the office's productivity; this measurement could be combined with a quality-control mechanism such as spot-checks by a senior processor to ensure quality as well as quantity are being measured. Collecting and tracking this data could also help FEMA evaluate how many additional staff members, if any, are needed to reduce the agency's backlog.

Multi-track Processing

FEMA logs the vast majority of requests as complex requests; only requests for individual assistance claim files that result in fewer than 100 pages of responsive documents are considered simple at the time of intake. When the office receives records (or a no-records response) from a program office, the request is returned to FEMA's queue for processing in the order in which it was received. The office processes requests on a first-in first-out basis in a single queue. For annual reporting purposes, FEMA assigns which cases are simple and which are complex at the end of processing based solely on the time it took

⁸ DHS 2014 Freedom of Information Act Report, page 4.

⁹ Data on FEMA FOIA backlog, accessed August 10, 2015, www.foia.gov, and DHS 2010 Freedom of Information Act Report, page 14.

¹⁰ 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>.

to respond to those requests. During FY 2014, FEMA reported that it closed 21 out of the 508 requests processed—about 4 percent—within the 20-day time limit.¹¹

We observed that it often takes FEMA a year or more to respond to relatively simple FOIA requests, including for records that had previously been released or are already available on FEMA’s website. As a result of this system, simple requests can sit behind complex cases for long periods.

We recommend that FEMA create a triage process that would queue simple and complex requests based on the number of responsive pages, the topic of the request or particular type of record sought. FOIA and DHS regulations¹² state that agencies may provide for multi-track processing of requests for records based on the amount of work or time (or both) involved in processing requests. We recommend that in instituting multi-tracking processing, simple cases could be handled by less-experienced employees while more experienced processors handle complex cases. Thirty-seven percent of OGIS survey respondents at FEMA said they had worked as a FOIA professional for fewer than five years. Another suggestion is for staff to have certain days devoted to processing either simple or complex requests.

Changes in Available Staff during Disasters

During and after a disaster, FEMA relies in part on what it calls “Cadre of On-Call Response/ Recovery Employees,” or CORE employees. CORE employees sign two-year agreements with FEMA; their positions are associated with FEMA’s core mission of disaster response and they can be deployed to disaster locations to assist with the federal government’s response and recovery efforts. CORE employees account for about half of FEMA’s FOIA staff.

FEMA FOIA leaders informed us that after Hurricane Sandy in 2012, four FEMA FOIA processors deployed to New York and New Jersey for one to two months and several non-CORE employees also deployed. As discussed, it is difficult to quantify how CORE deployments affect processing. According to the office’s leadership, it is easier to receive funding for CORE positions in part because of the direct connection to the agency’s mission. We recommend that FEMA FOIA officials work with FEMA leadership to ensure that the distribution of non-CORE and CORE employees allows the office to continue processing and responding to requests if FOIA employees are deployed to a disaster. We further recommend that the office discuss these challenges with FEMA leadership and that the office work with DHS’ Privacy Office to craft a contingency plan to assist FEMA with FOIA processing during emergency responses in which CORE employees are deployed.

¹¹ DHS 2014 Freedom of Information Act Report, pages 4 & 12.

¹² 5 U.S.C. § 552(6)(D)(i) & (ii) and DHS Freedom of Information Act and Privacy Act Procedures; Interim Final Rule, 6 CFR § 5.5(b), accessed July 9, 2015, http://www.dhs.gov/xlibrary/assets/FOIA_FedReg_Notice.pdf. (Note that DHS on July 29, 2015, published in the Federal Register a Notice of Proposed Rulemaking, Freedom of Information Act Regulations.)

Training

FEMA's FOIA leadership informed us that employees annually attend DOJ's Office of Information Policy's "FOIA for Attorneys and Access Professionals" training and receive ad hoc training from the Branch Chief on topics such as appeals processing, recent case law, and litigation. Several staff members have received training on making electronic documents accessible to persons with disabilities.¹³

However, we observed a lack of knowledge about the Attorney General's FOIA Guidelines, specifically on conducting an analysis of the harm that would be caused if information is released that might otherwise be withheld under an exemption. For example, Exemption 5, which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," requires such an analysis.¹⁴ We note that 62 percent of OGIS survey respondents say they do not know of, or the agency does not have, a process in place for conducting a step-by-step harm analysis.

We observed that FEMA FOIA processors keep records in both the agency's case management system and on a shared drive as a result of a physical move and the switch from one case management system to another. In our evaluation of cases in the case management system, it was clear that records are not kept consistently in either system and processors rely on both places to store records, resulting on an incomplete administrative record in one place. Fifty percent of respondents to OGIS's survey said they were slightly or somewhat familiar with FEMA's records schedules. FEMA FOIA leaders informed us that they are working to correct these deficiencies by instituting the new Quality Assurance checklist that is discussed above; however, we recommend training and establishing a standard operating procedure so all processors keep records consistently.

We recommend that the agency expand its training to include other OIP training opportunities such as best practices workshops and FOIA trainings, seminars, and conferences provided by other agencies, universities, professional organizations, and others. We also recommend records management training for FEMA's FOIA staff.

Quality Control and Standard Operating Procedures

One quarter of OGIS survey respondents said they are dissatisfied with the organization's policies and procedures on how to process a FOIA request. We note that FEMA recently finalized standard operating procedures (SOPs) for FOIA appeals and is in the process of finalizing updated SOPs for the Disclosure Branch. We recognize that FEMA has made several changes to its process in the last few years, including the move to a new software program to manage the case load and process records. One notable

¹³ Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. §794d).

¹⁴ 5 U.S.C. § 552(b)(5). Courts have interpreted Exemption 5 to incorporate three privileges: the attorney work-product privilege, the attorney-client privilege and the deliberative process privilege.

improvement is the new “Quality Assurance” checklist to help make sure that each case has a complete administrative file.

Appeals Processing

FEMA’s FOIA processors work both on initial responses and appeals; steps are taken to ensure that the same processor who processed an initial request does not handle the appeal. Prior to FY 2013, FEMA had a Memorandum of Understanding (MOU) with the United States Coast Guard Administrative Law Judge (ALJ) program to process appeals on a reimbursable basis.¹⁵ FEMA opted not to renew the MOU in 2012.¹⁶ Since FEMA began processing its own appeals in FY 2013, the office has received about 16 appeals per year and, according to the latest annual FOIA report, had 31 appeals pending at the end of FY 2014.¹⁷

FEMA’s FOIA leadership expressed a desire to have a position dedicated to processing appeals. While dedicating a FOIA professional to focus on appeals would help ensure confidence and efficiency in the administrative process, we recommend that FEMA re-consider working through the DHS Privacy Office with the ALJ program to process appeals, particularly given that the agency receives about 16 appeals a year.

Finding 2: Additional steps are needed to fully benefit from investments in technology to improve tracking, processing, and proactive disclosure

In recent years FEMA has taken a number of steps to use technology to improve FOIA processing. However, FEMA is not using the technology to its fullest potential.

FOIA Tracking and Processing Software

FEMA began using a new case management and processing system in April 2013; the DHS Privacy Office currently pays for the system and manages the contract with the software provider on behalf of FEMA and other DHS components.¹⁸ Before using the DHS enterprise-wide system, the staff used a

¹⁵ “Chief FOIA Officer and General Counsel Memorandum, “Reassignment of Certain Freedom of Information Act (FOIA) Appeals to the United States Coast Guard Administrative Law Judges, July 8, 2011,”” accessed September 4, 2015.

<http://www.dhs.gov/sites/default/files/publications/reassignment-of-pending-and-future-ogc-foia-appeals-to-uscg-administrative-law-judges.pdf>.

¹⁶ DHS 2014 Chief FOIA Officer Report, page 3.

¹⁷ DHS 2014 Freedom of Information Act Report, page 7.

¹⁸ The 14 other DHS components using the system are the Office of Civil Rights and Civil Liberties; Headquarters; the Office of Intelligence and Analysis; Immigration and Customs Enforcement; the Management Directorate; the National Protection and Programs Directorate; the Office of Biometric Identity Management; the Office of Inspector General; the Office of Operations Coordination; the Office of Policy; the Privacy Office; the Science and Technology Directorate; the

combination of three systems for capturing data and reporting. FEMA's staff noted some efficiency in using the new software. During our review, we learned that FEMA had recently purchased a supplemental license for the FOIA tracking system that will improve processing requests for email records by automating de-duplication. Most email programs thread previous messages in each response, creating duplicate records that must be reviewed and processed; this can increase processing time for records of this type. Previously, FEMA's FOIA staff had to manually search for and remove duplicate pages and/or make sure any exempt information was redacted from any place the information was duplicated. New software licenses purchased by FEMA will enable the office to automatically de-duplicate the responsive pages, which should help improve FEMA's ability to respond in a timelier manner by shortening the review time.

However, FEMA staff informed us that the software allows records to be released only in PDF format, which creates a particular challenge when the processor is working with spreadsheets or database records. PDF is an image format; converting a spreadsheet or other database into a PDF can be thought of as 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 utility to the public, because the data in the record cannot be sorted or combined with other sources.

We recommend that FEMA work with the DHS Privacy Office to discuss how records can be processed and released in their native format. The statute requires agencies to provide records in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”¹⁹

FEMA FOIA Website

FEMA is planning to take control of the agency's FOIA website,²⁰ which is now hosted by the DHS Privacy Office. At the time of our review, there was little information posted on FEMA's FOIA website, although the agency has since updated it;²¹ much of the content still is hosted on DHS's central FOIA page.²² It can be difficult for website visitors to know where or how to find FEMA's FOIA information and resources.

We recommend that as FEMA takes ownership of its FOIA website, the agency overhaul the site to make it more user-friendly and to add information useful to requesters. For example, in FEMA's FOIA case files, the intake team frequently explained to requesters asking for records about themselves that

Transportation Security Administration; and the United States Coast Guard. The U.S. Secret Service is expected to start using the enterprise-wide system in FY 2016.

¹⁹ 5 U.S.C. § 552(a)(3)(B).

²⁰ FEMA Freedom of Information Act website.

²¹ FEMA Freedom of Information Act website.

²² “DHS Freedom of Information Act website,” accessed August 11, 2015, <http://www.dhs.gov/freedom-information-act-foia>.

they needed to fill out, sign and return a form certifying their identity. However, DHS FOIA regulations do not require such a form.²³ Putting a clear explanation of what should be submitted along with any request for records about oneself on FEMA's website could help reduce the administrative burden of perfecting such requests. We also observed requests in which the requester appeared not to be aware of the requirements for expedited processing or fee waivers. Website visitors are directed to a link for the agency's FOIA regulation to learn about expedited processing; to learn about fee waivers, requesters are directed to a link to the main DHS FOIA page, which includes a link to the regulations. Putting the information directly on the website in plain language would improve requesters' understanding of the law's requirements and improve FEMA's efficiency. Other information that would be useful to include on FEMA's FOIA website includes a description of the types of records FEMA holds and a link to the online FOIA tracking page. One user-friendly way to display the information might be to have a Frequently Asked Questions (FAQ) page.

Proactive Disclosure

We noted similar requests for a number of records, including a list of underground storage tanks owned by FEMA. FEMA's FOIA leaders explained that they have an informal system for following guidance from DOJ that records be placed online after they have been requested three or more times plans are also in place for a more formal system to decide what records should be posted to the website.

FEMA also regularly receives requests for contracts. When FOIA requesters seek such records, the entity that submitted the contract—the submitter—is notified and given an opportunity to review the information requested to determine whether any harm would occur if particular information is released.²⁴ This back-and-forth consumes time.

We recommend that the FEMA FOIA Office engage FEMA leadership to consider proactively releasing contracts and/or finding ways to identify possibly exempt information in contracts before a request comes in. We recognize that this is not a step the Disclosure Branch can take on its own; the discussion should involve FOIA professionals, FEMA's budget office and others. We have observed, for example, instances in which an agency proactively states at the time the contract is awarded that the non-proprietary information in the contract is releasable under FOIA. Contractors could also be required at the time of the contract to provide the agency a redacted copy of a contract so the contractor has considered the issues up front; such a practice would give the agency a head start when processing a FOIA request for those contracts.

FEMA's FOIA leaders informed us that the office has already begun training employees on how to make all released records that are posted to the website accessible to individuals with disabilities. Under

²³ DHS Freedom of Information Act and Privacy Act Procedures; Interim Final Rule, 6 CFR § 5.5(b), accessed, July 9, 2015, http://www.dhs.gov/xlibrary/assets/FOIA_FedReg_Notice.pdf.

²⁴ Executive Order 12600 Predisclosure notification procedures for confidential commercial information, accessed September 3, 2015, <http://www.archives.gov/federal-register/codification/executive-order/12600.html>.

Section 508 of the Rehabilitation Act,²⁵ all information that is posted to a government website must be accessible to individuals with disabilities; this requirement is often referred to as Section 508. Providing employees with this training is a good step towards making sure that FEMA's FOIA unit continues to be a good example of how agencies can make records released under FOIA available to the broader public; most recently FEMA posted more than 3.5 million pages of records about individual and public assistance claims paid from 1998 to 2011.²⁶

To be compliant with FOIA, we recommend that FEMA establish a process to regularly identify both frequently requested records and records of interest to the public.²⁷ FEMA might consider a system that allows FOIA staff to nominate records to be placed on the website; we also recommend that the FOIA staff seek input from other FEMA offices, including the legislative and public affairs offices. FEMA may also want to consider other data sources like search terms used on FEMA's website and site analytics to determine what kinds of records the public would like to see posted.

In addition to posting more frequently requested records, FEMA could use its FOIA logs and other data sources to be better prepared to respond to requests for information in the wake of future disasters. For example, we recommend that FEMA develop a list of the types of records that are generally requested after particular types of disasters. FEMA could use these lists along with its records schedules as a guide to the type of records that FEMA should prioritize posting online as soon as possible after a disaster. We also recommend that the FOIA office work with the records management and program offices to discuss how information can be collected and stored in ways that make public release of the records more efficient.

Finding 3: Further Steps Needed to Improve Communication

FEMA has some notable practices in its communication with requesters and has taken steps toward increasing responsiveness. FEMA also improved its practices with respect to the use of "still interested" letters. However, we observed that FEMA does not regularly communicate with requesters and that failure to respond was a factor in all 16 FOIA lawsuits filed against FEMA between January 1, 2009, and June 18, 2015, costing the agency more than \$364,000 in litigation-related costs through September 30, 2014.²⁸ We also observed that FOIA correspondence can be unclear and confusing.

²⁵ Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. §794d).

²⁶ "FEMA Individual and Public Assistance Claims Paid for Flood Disasters from 1998 to 2011," last modified April 22, 2015, 2015, <http://www.dhs.gov/fema-individual-and-public-assistance-claims-paid-flood-disasters-1998-2011>.

²⁷ 5 U.S.C. § 552(a)(2)(D). See also <http://www.justice.gov/oip/oip-guidance-5>.

²⁸ OGIS reviewed FEMA's FOIA lawsuits using information compiled by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, accessed August 10, 2015, <http://foiaproject.org/about/data/>, and the U.S. Courts' Public Access to Court Electronic Records (PACER), accessed August 10, 2015. OGIS compiled FEMA's FOIA litigation costs using DHS' 2009-2014 Annual Reports, accessed August 31, 2015, <http://www.dhs.gov/foia-annual-reports>.

Responding to Requesters

FEMA has a team of three administrative specialists tasked with perfecting and entering new requests into the FEMA case management system in a timely manner. This team is the first line of communication for the requester. The intake team reviews FOIA requests to see if the request asks for expedited processing or fee waivers and contacts the requester if more information is needed to justify expedited processing or fee waivers. Processers analyze what the requester is asking for and contact the requester if they identify issues with the request or need to clarify and possibly discuss narrowing the scope of the request. FEMA has one employee from the intake team who is responsible for answering the hotline, a telephone number that requesters can call to ask FOIA-related questions or to check on the status of their requests. When the employee tasked with answering the hotline is out of the office, the calls are transferred to another employee to ensure the hotline remains staffed. When a requester calls, the FEMA employee receiving the call researches the status of the request and alerts the FOIA processor responsible for that case about the inquiry. The FOIA processor is expected to call the requester back within 24 to 48 hours.

The head of FEMA's intake team said providing requesters with an estimated date of completion as required by the statute is a challenge.²⁹ Seventy-two percent of respondents to OGIS's survey responded that FEMA rarely or never provides an estimated date of completion when asked. In line with OGIS's best practices, we recommend that to calculate estimated dates of completion, the FEMA FOIA office begins using the agency's average processing time for complex requests that it includes in its annual report to DHS for the DHS Annual FOIA report. We further recommend that FEMA alert requesters that the date is an estimate, and that FEMA might complete work on the request before or after the estimated date based on the complexity of requests in the queue and the number of pages responsive to the request.

During our review, we noted that unless a requester contacts FEMA, the requester could wait up to a year or more before they hear from FEMA again. Our review of FEMA's FOIA litigation shows that FEMA's lack of response was a factor in all 16 FOIA lawsuits filed against the component since 2009, costing more than \$364,000.³⁰ Proactively communicating with requesters might have helped FEMA avoid these lawsuits. We recommend updating requesters about their requests on a regular basis by informing them of the status of their requests in the queue, providing updated estimated dates of completion, encouraging them to narrow the scope of their requests, if applicable, and asking them to provide the agency with any address changes. Regular updates to the requester would also help ensure FEMA is able to keep up with requesters affected by disasters whose addresses may change. These updates should be considered different from "still interested" letters and should not be used to administratively close requests if the agency does not hear back from the requester.

²⁹ 5 U.S.C. § 552(a)(7)(B)(ii).

³⁰ TRAC, PACER, and DHS Annual Reports.

Use of Still Interested Letters

In 2013 the agency sent several letters to requesters saying that if the requester did not let FEMA know they were still interested in having their request processed within a certain time, the request would be administratively closed: initially, FEMA gave requesters five to seven days to respond. Later in the year, FEMA changed its practice to allow requesters 30 days to respond. Providing requesters with more time to respond, particularly when the agency has not had contact with the requester for a particularly long time, is good customer service. Providing 30 days to respond is also in line with current guidance from DOJ on the use of “still interested” letters.³¹

During our interviews, we also learned that rather than sending out these “still interested” letters, some of FEMA’s processors will call requesters who have had requests pending for a long time to discuss the request; the phone calls give requesters a chance to tell the agency they are no longer interested in the records.

We recommend that FEMA limit the use of still interested letters in accordance with DOJ guidance and continue to call requesters to discuss their requests.

Plain Language

During our review of FEMA’s written communication with requesters, we observed several notable practices. In initial acknowledgement letters FEMA provides requesters with information about the position of their requests in the queue, an OGIS best practice. FEMA also gives requesters appeal rights on each interim release; this practice is good customer service and provides a way for FEMA to correct any issues on future interim releases. We also note that FEMA informs requesters about the search terms used during the search for records, which is good customer service; however, this practice appears sporadic.

We recommend that FEMA revises its template letters so that requesters are given more helpful information. For example, the acknowledgement and final response letters should provide requesters with a brief description of the request or include a copy of the request. This practice is particularly useful when the requester has multiple pending requests. The acknowledgement letter should also include a link to the DHS FOIA tracking website to track FOIA requests online.

We also recommend that FEMA edit its template letters using plain language to help improve communication and requesters’ understanding of the FOIA statute, in accordance with the Plain Language Act.³² In particular, we recommend removing citations to the Code of Federal Regulations, and when referencing the DHS FOIA regulation, either describe in plain language what the regulation says or include a link to the regulation and a citation to a specific section. The language informing

³¹ “OIP Releases New Guidance for Agency Still-interested Inquiries,” last modified July 5, 2015, <http://www.justice.gov/oip/blog/oip-releases-new-guidance-agency-still-interested-inquiries>.

³² Plain Writing Act of 2010, (5 USC 301 note).

requesters about the requirements to be granted expedited processing should also be updated to reflect that according to FOIA and DHS' current FOIA regulation, requesters must send the agency certification that all of the statements in the request for expedited processing are true and correct;³³ including this language would assist requesters who are unaware of this requirement and help prevent unnecessary administrative closures.

We also recommend providing requesters with appeal rights in full release responses. When an agency provides a requester with a full release, the requester still has the right under the law to appeal the adequacy of the search.

³³ 5 U.S.C. § 552(a)(6)(E)(vi) and DHS Freedom of Information Act and Privacy Act Procedures.

Checklist of OGIS Recommendations for FEMA's FOIA Program

Management

- Track volume of records processed and use volume as a management and oversight control tool
- Create a triage process that queues complex and simple requests based on the number of responsive pages or the topic of the request
- Consider reinstating a memorandum of understanding with the United States Coast Guard Administrative Law Judge program to process FOIA appeals
- Discuss with FEMA leadership and DHS Privacy Office staffing challenges during disaster responses and create a contingency plan for meeting those challenges
- Expand training opportunities to include more DOJ workshops and conferences, seminars, and trainings by other agencies, professional organizations, educational institutions, and non-profit organizations; a particular emphasis should be on the Attorney General Guidelines for FOIA, specifically the harm analysis for Exemption 5
- Improve records management practices in regard to storage of FOIA documents and ensure the agency has a complete administrative record for each FOIA case

Technology and Proactive Disclosure

- Use technology to track volume of records processed
- Overhaul the agency's FOIA website to help reduce the office's administrative burden and increase requester knowledge about FOIA
- Create a policy or procedure to regularly identify records to be posted to the FEMA FOIA website
- Consider streamlining contractor notice procedures to make FOIA processing of contracts more efficient
- Engage FEMA leadership to consider proactively releasing contracts and/or finding ways to identify possibly exempt information in contracts before a request comes in
- Discuss with DHS Privacy Office how records can be processed and released in their native formats using the existing case management software

Communication

- Provide requesters with an estimated date of completion based on FEMA’s annual statistics
- Communicate regularly with requesters to update them on estimated dates of completion, status in the queue, and ask for change in address, if applicable (These are not “still interested” letters)
- Include a description of the request and tracking website link in acknowledgement letters
- Revise final response template to
 - Include appeal rights when request granted in full
 - Remove CFR references
 - Edit descriptions of regulations so they are in plain language
 - Include search terms when applicable

Scope and methodology³⁴

OGIS Review Team Lead Kirsten Mitchell along with Team members Amy Bennett and Kate Gastner assessed FEMA's FOIA program. This report is the result of interviews with FEMA FOIA officials and staff; direct observations of initial request and appeal case files; results of an online OGIS survey completed by the FEMA FOIA office; and a review of DHS FOIA regulations, which govern FEMA, the FOIA website and other written material including agency FOIA litigation. On June 2, 2015, we interviewed the Director of the Records Management Division, the Disclosure Branch Chief, and the Special Assistant to the Director of Records Management Division. OGIS also spoke to the lead intake process employee, and one of the team leads for processing. FEMA 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, FEMA provided us with a list of its FOIA cases closed in FY 2014. We reviewed the list to determine categories of cases including but not limited to exemptions, fees, referrals, appeals and other topics that would give us a broad view of the FEMA FOIA program and, based on data from the agency's Annual FOIA Report to DOJ, chose a non-generalizable sample of 50 case files to review. We reviewed the case files on June 2-3, 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.

³⁴ Please direct questions to OGIS at ogis@nara.gov or 202-741-5770.