

# **FOIA Advisory Committee**

## **Subcommittee on Oversight and Accountability**



### **White Paper**

### **FOIA Program Review**

**April 2016**

## FOIA Program Review

April 8, 2016

As part of the Federal Freedom of Information Act Advisory Committee's charter "to foster dialog between the Administration and the requester community, solicit public comments, and develop consensus recommendations for improving FOIA administration and proactive disclosures<sup>1</sup>," the FOIA Oversight and Accountability Subcommittee<sup>2</sup> has collected previously released reports on agencies' compliance with the FOIA. The focus of this review was to learn from past successes and challenges to forge a more effective collaboration between federal agencies and the FOIA requester community.

The FOIA Oversight and Accountability Subcommittee compiled more than 80 previously released Inspector General, Government Accountability Office, and other reports on agencies' compliance with the FOIA. Collectively, there were positive findings in the reports, but the reports show there are persistent challenges in implementing FOIA across the federal government. Additionally, the reports indicate that these challenges have not been effectively addressed in a systematic fashion, but rather with a "one agency at a time" approach. While challenges of resources, jurisdiction, and management make it difficult to propose specific solutions to address the issues documented in these reports, it is clear that improvements are necessary regarding the oversight and accountability of FOIA administration.

The positives gleaned from the reports include the following:

### **Good Communication With Requesters**

In its review of the National Archives and Record Administration's (NARA) FOIA program, the Office of Government Information Services (OGIS)<sup>3</sup> found that NARA provided good customer service regarding FOIA matters. Namely, "Special Access and FOIA employees generally provide great customer service. Each day a Special Access and FOIA employee is on-call at the Archives facility in College Park, MD, to assist researchers who visit the facility. The on-call employee is available to provide on-demand screening allowing in many, but not all, cases records that were flagged as possibly restricted when they were accessioned by NARA to be released without a

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<sup>1</sup> [Freedom of Information Act \(FOIA\) Advisory Committee](#)

<sup>2</sup> [FOIA Advisory Committee, Oversight and Accountability Subcommittee](#)

<sup>3</sup> [Assessment of the National Archives and Records Administration's FOIA Program \(2015\)](#)

FOIA request. The on-call employee also is available to help requesters with filling out standard FOIA request forms and to answer other FOIA-related questions.” In addition to this finding, NARA consistently provides contact information to FOIA requesters in all of its written communications that include both a phone number and an email.

### **Using Technology to Improve the FOIA Process**

A March 9, 2016, Office of Government Information Services (OGIS) compliance report<sup>4</sup> found that Customs and Border Protection (CBP) adopted *FOIAonline* to help manage its FOIA requests. OGIS recommends, however, that CBP must “regularly post released records into *FOIAonline*’s records repository,” going on to note that “CBP’s website does not help requesters understand the FOIA process or how to use *FOIAonline*.”

### **Improved Management Practices**

The March 9, 2016 OGIS report found that CBP corrected errors in its FOIA program and improved management practices. The improvement steps taken by CBP included hiring additional FOIA staff and shifting resources to address critical issues when needed for “triage”. Additionally, the majority of CBP’s FOIA-related litigation between FY 2009 and 2015 cited “CBP’s lack of response and/or delay as a reason for suing,” costing the agency \$1.2 million. To help address this issue, CBP FOIA managers requested 20 new positions for the FOIA branch; a good step. However, FOIA managers learned in January 2016 that funding was not approved for those positions. This decision will likely hamper CBP’s efforts to improve processing times and reduce costly litigation.

### **Taking Advice from OGIS**

In September 2015, OGIS posted its FOIA compliance assessment of the Coast Guard’s FOIA program<sup>5</sup>. OGIS found that, among other things, the Coast Guard needed to improve its communication with requesters and harness the

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<sup>4</sup> [Office of Government Information Services Compliance Review of Customer and Border Protection FOIA Program \(2016\)](#)

<sup>5</sup> [Office of Government Information Services Compliance Review of the United States Coast Guard’s FOIA Program \(2015\)](#)

power of technology. The Coast Guard responded to the OGIS assessment<sup>6</sup> by updating its FOIA Manual to improve processing, researching FOIA software systems “that could help [the Coast Guard] become more efficient and streamline [its] FOIA process,” and overhauled its FOIA webpage to improve the user experience.

While there were positives found in the reports that were reviewed by the subcommittee, there were challenges identified too. A sampling of the challenges that were identified in the reports include the following:

### **Not Posting Enough Documents Online in Accordance with the 1996 E-FOIA Amendments**

A March 23, 2015 Office of Personnel Management (OPM) Inspector General (IG) report<sup>7</sup> identified that OPM needs to improve its compliance with the E-FOIA amendments of 1996. This amendment mandates that agencies post key sets of records online, provide citizens with detailed guidance on making FOIA requests, and utilize new information technology to proactively post records online that would become of significant public interest, including those already processed in response to FOIA requests and “likely to become the subject of subsequent requests.” According to OPM’s IG report, as of 2015, OPM does not have a formal policy addressing “the requirement to post FOIA information online that has been requested multiple times (three or more requests). Additionally, OPM’s request tracking system does not identify the type of information requested. Consequently, OPM’s FOIA Office cannot identify multiple requests that should be posted.”

OPM fails to populate its FOIA reading room, which the E-FOIA requires agencies to maintain with, among other things, frequently requested records or records likely to be the subject of FOIA requests.

In 2015, the Department of Justice Office of Information Policy (OIP) issued guidance<sup>8</sup> encouraging federal agencies to proactively post information.

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<sup>6</sup> [Follow-up to Compliance Assessment of FOIA Program at the United States Cost Guard, Department of Homeland Security \(2016\)](#)

<sup>7</sup> [Final Report on the Review of the U.S. Office of Personnel Management’s Compliance with the FOIA \(2015\)](#)

<sup>8</sup> [Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request](#)

Additionally, OIP distributed a checklist<sup>9</sup> to help agencies determine when records should be proactively posted. While the guidance is beneficial, there is no evidence that agencies are following it and the [small increase in proactive posting government-wide](#) indicates that more oversight may be necessary.

### **Not Making Discretionary Releases in Accordance with 2009 Presidential Memorandum**

A March 30, 2011 Department of Homeland Security (DHS) Inspector General (IG) report<sup>10</sup> identified multiple instances in which the DHS's Office of the Secretary staff did not have sufficient knowledge of the FOIA, to the extent that it compromised the agency's ability to make discretionary releases.

The report indicates that in one instance, the staff "implied that the potential embarrassment of DHS should be considered when making proactive disclosure decisions" despite clear guidance to the contrary. Furthermore, the report documents instances of other senior DHS officials cautioning against making discretionary releases and instructing staff to send only public information in response to a records requests.

### **Backlogs and Inadequate Searches**

A Treasury Inspector General (IG) for Tax Administration report<sup>11</sup> dated September 17, 2014 determined that the Internal Revenue Service (IRS) needed to continue to reduce its backlog of FOIA requests. The report also found that the IRS failed to adequately search for and provide information in 15 percent of its FOIA responses.

A previous IG report<sup>12</sup> dated September 20, 2013 identifies a challenge of not adequately searching for information in response to records requests to be one that is declining. This report determined that the IRS failed to adequately search for and provide information in 5.6 percent of its responses.

### **Not Reporting FOIA Abuses**

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<sup>9</sup> [Implementation Checklist for OIP Guidance on Proactive Disclosures of Non-Exempt Agency Information](#)

<sup>10</sup> [The DHS Privacy Office Implementation of the Freedom of Information Act \(2011\)](#)

<sup>11</sup> [Fiscal Year 2014 Statutory Review of Compliance With the Freedom of Information Act \(2014\)](#)

<sup>12</sup> [Fiscal Year 2013 Statutory Review of Compliance With the Freedom of Information Act \(2013\)](#)

The State Department Inspector General (IG) recently published highlights<sup>13</sup> showing that systemic FOIA issues are compounded when people don't speak out when they know FOIA procedures are not being properly followed. The IG noted that State's FOIA office gave an "inaccurate and incomplete" no documents response to a FOIA request concerning Hillary Clinton's email usage even though employees within the Department of State knew both of Clinton's personal email account and the FOIA request. Additionally, the report determined that the secretary's office lacked written procedures for handling FOIA requests and that some requests lingered in a queue for more than 500 days without a reply. These findings speak to the importance of an oversight mechanism to address these FOIA failures before they compound into the current crisis facing State's FOIA Office.

### **Unclear Fee Waiver Requirements**

An Environmental Protection Agency (EPA) Inspector General (IG) report<sup>14</sup> determined that the agency should clarify fee waiver requirements and standardize processing time to reduce concerns of differential treatment among requesters. The IG report urges the agency to "clarify what requesters must demonstrate under the six review factors and when to obtain additional justification from requesters to lessen any perception of potential differential treatment when evaluating fee waiver requests."

### **Not Using Technology to Improve FOIA Training Process**

A Nuclear Regulatory Commission (NRC) Inspector General (IG) report<sup>15</sup> dated June 14, 2014 determined that NRC management has not utilized effective internal controls to take advantage of FOIA training and available technology. "As a result, the NRC's FOIA processing costs are high and the timeliness requirements are not consistently met."

### **Not Properly Reviewing FOIA Releases for Segregability**

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<sup>13</sup> [Evaluation of the Department of State's FOIA Processes for Requests Involving the Office of the Secretary \(2016\)](#)

<sup>14</sup> [No Indications of Bias Found in a Sample of Freedom of Information Act Fee Waiver Decisions \(2014\)](#)

<sup>15</sup> [Audit of NRC's Freedom of Information Act Processes \(2014\)](#)

A Securities and Exchange Commission (SEC) Inspector General (IG) report<sup>16</sup> dated September 25, 2009 found that the manner that the Commission's Chief FOIA Officer functioned was not in compliance with the requirements of Executive Order 13392 or the OPEN Government Act.

This report identifies a number of areas where the SEC's FOIA process needed improvement, not least of which is when the agency conducts review for segregability. The IG specifies "There is not a well-documented process for reviewing documents to segregate potentially responsive documents that can be disclosed and, thus, the search may not be sufficient" despite the FOIA's instruction that "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." Indeed, the IG indicates that in many instances no effort was made to segregate records.

The House Oversight and Government Reform Committee [released a report](#) on January 11, 2016 that re-identified many of these challenges. The Committee identified a myriad of FOIA failures across the government including:

- The improper application of FOIA exemptions at the Federal Communications Commission, which redacted the Chairman's name and initials in official, work related emails
- Roadblocks and poor communication with requesters at the Customs and Border Patrol, which only responded to a requester in one instance after Congress inquired about the status of the request
- Refusing to provide all responsive records at the General Services Administration, which failed to provide a requester with responsive records, despite the requester's conveyed desire for the documents, by erroneously stating it did not want to charge the requester for non-responsive records
- Excessive fees "that appear to be designed to deter requesters from pursuing requests and create barriers to accessing records" including at the Drug Enforcement Agency (DEA). The DEA charged a FOIA requester nearly \$1.5 million for one request for records on "El Chapo" Guzman.

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<sup>16</sup> [Review of the SEC's Compliance with the Freedom of Information Act \(2009\)](#)

While the Congressional Committee proposes legislative resolutions to these ongoing challenges, this Subcommittee believes that without more effective oversight or compliance mechanisms, the FOIA challenges may continue to occur, even if forbidden by statute.

The Office of Government Information Services (OGIS) has begun issuing assessments of federal agency FOIA programs. To date, OGIS has published [assessments](#) of the Customs and Border Protection, the Transportation Security Administration, the U.S. Coast Guard, the Federal Emergency Management Agency, and the National Archives and Records Administration. These assessments are a positive step, but agency participation is voluntary and may take decades for OGIS to review each agency subject to FOIA.

The previously released Inspector General and Government Accountability Office reports and the dozens of others compiled by the Subcommittee demonstrate that the current oversight approaches are insufficient and not improving the FOIA programs throughout the federal government. The first step to improving FOIA oversight and compliance is acknowledging that the current oversight methods are not sufficient. After this acknowledgement, we can begin to endeavor to create a regime that efficiently and comprehensively ensures oversight of the Freedom of Information Act is being correctly administered with a “presumption of disclosure” as instructed by President Obama and Attorney General Holder and holds accountable those who fail to do this.