

**THE PUBLIC'S RIGHT TO KNOW: FOIA AT THE  
DEPARTMENT OF HOMELAND SECURITY**

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**HEARING**

BEFORE THE

**SUBCOMMITTEE ON  
OVERSIGHT, MANAGEMENT,  
AND ACCOUNTABILITY**

OF THE

**COMMITTEE ON HOMELAND SECURITY  
HOUSE OF REPRESENTATIVES**

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

OCTOBER 17, 2019

**Serial No. 116-43**

Printed for the use of the Committee on Homeland Security



Available via the World Wide Web: <http://www.govinfo.gov>

U.S. GOVERNMENT PUBLISHING OFFICE

40-459 PDF

WASHINGTON : 2020

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## THE PUBLIC'S RIGHT TO KNOW: FOIA AT THE DEPARTMENT OF HOMELAND SECURITY

Thursday, October 17, 2019

U.S. HOUSE OF REPRESENTATIVES,  
COMMITTEE ON HOMELAND SECURITY,  
SUBCOMMITTEE ON OVERSIGHT, MANAGEMENT,  
AND ACCOUNTABILITY,  
*Washington, DC.*

The committee met, pursuant to notice, at 3:09 p.m., in room 310, Cannon House Office Building, Hon. Xochitl Torres Small [Chairwoman of the subcommittee] presiding.

Present: Representatives Torres Small, Titus, Barragán; Crenshaw, Higgins, and Taylor.

Ms. TORRES SMALL. The Subcommittee on Oversight, Management, and Accountability will come to order.

Good afternoon. The subcommittee is meeting today to examine the manner in which the Freedom of Information Act, known as FOIA, is being implemented at the Department of Homeland Security.

FOIA, which was enacted more than 50 years ago, represents a critical aspect of democracy that any citizen, regardless of color, age, race, or creed, can request and receive Government records for any reason. This commitment to transparency and openness gets to the core of our American ideals: An informed electorate is essential to a healthy, functioning democracy.

An effective FOIA process is particularly important at the Department of Homeland Security, which receives nearly half of all requests for information across the entire Federal Government.

Some of the numbers at DHS are astounding. Nearly 400,000 FOIA requests were received in fiscal year 2018, a three-fold increase since 2010. Thirty-five million pages of information were released to the public last year, nearly 60,000 pages per full-time FOIA employee. This is an extremely demanding job that deserves to be recognized. That said, we know that there are more efficiencies to be gained in the FOIA process, and we want to work with the Department leadership to find those efficiencies in an effort to better serve the American public.

Nearly 90 percent of all FOIA requests at DHS come from individuals or their attorneys who are seeking access to information contained in their immigration files. These first-person requests are diverting attention away from more complex record requests, including requests for contracts, communications, and other documents related to the development of certain departmental policies.

U.S. Citizenship and Immigration Services, USCIS, continues to process about half of all FOIA requests the Department receives, about a quarter of the Government-wide total.

Ms. Meckley, I look forward to hearing about the new digital processing system your agency recently stood up. I understand this new system, called FIRST, has shown promise in reducing processing times and cutting into USCIS's FOIA backlog. I applaud these efforts, and would like to learn more about what is being done to make similar improvements across the DHS enterprise.

It is concerning to me, though, that DHS components use different FOIA processing systems, systems that don't always talk to each other.

I am also concerned that the 3 DHS components that field the most FOIA requests—Customs and Border Protection, CBP; Immigration and Customs Enforcement, ICE; and USCIS—aren't always working together in the most efficient and effective manner.

Despite a 2014 GAO recommendation that USCIS and ICE establish a service-level agreement to eliminate duplication, no such agreement exists today. Duplication and other inefficiencies in the FOIA process, unfortunately, have real-world consequences. Attorneys must request continuances in their clients' immigration court proceedings while they wait for basic records to be produced. This contributes to the extensive backlog we have seen in recent years at the Department of Justice.

In other cases, the public remains in the dark about how taxpayer money is being spent, or how DHS policies are being crafted. In my district, for example, the city of Sunland Park is awaiting a response to a FOIA request submitted to FEMA in order to revise flood zoning mapping that is negatively affecting my residents. Slow processing times and extensive backlogs not only strain Government resources, but also cloud public understanding of pressing items of interest.

The FOIA office at DHS headquarters has an important role to play in brokering agreements between component FOIA offices and driving institutional change through Department-wide guidance and instruction.

Dr. Holzer, I hope to hear from you this afternoon on what more could be done to improve coordination and cohesion throughout the Department from a FOIA standpoint.

I believe I speak for all Members of this subcommittee when I say that we stand willing to assist in making DHS a more open, transparent, and responsive Federal agency. Thank you in advance to all of our witnesses, and I look forward to hearing your testimony today.

[The statement of Chairwoman Torres Small follows:]

STATEMENT OF CHAIRWOMAN XOCHITL TORRES SMALL

OCTOBER 17, 2019

The subcommittee is meeting today to examine the manner in which the Freedom of Information Act, known as FOIA, is being implemented at the Department of Homeland Security. FOIA, which was enacted more than 50 years ago, represents a critical aspect of democracy: That any citizen—regardless of age, race, color, or creed—can request and receive Government records for any reason. This commitment to transparency and openness gets to the core of our American ideals. An informed electorate is essential to a healthy, functioning democracy. An effective FOIA

process is particularly important at the Department of Homeland Security, which receives nearly half of all requests for information across the entire Federal Government.

Some of the numbers at DHS are astounding. Nearly 400,000 FOIA requests were received in fiscal year 2018, a three-fold increase since 2010. Thirty-five million pages of information were released to the public last year—nearly 60,000 pages per full-time FOIA employee. This is an extremely demanding job that deserves to be recognized. That said, we know that there are more efficiencies to be gained in the FOIA process, and we want to work with Department leadership to find those efficiencies in an effort to better serve the American public. Nearly 90 percent of all FOIA requests at DHS come from individuals or their attorneys who are seeking access to information contained in their immigration files. These “first-person” requests are diverting attention away from more complex records requests, including requests for contracts, communications, and other documents related to the development of certain departmental policies. U.S. Citizenship and Immigration Services (USCIS) continues to process about half of all FOIA requests the Department receives—and about a quarter of the Government-wide total.

Ms. Meckley, I look forward to hearing about the new digital processing system your agency recently stood up. I understand this new system, called FIRST, has shown promise in reducing processing times and cutting into USCIS’s FOIA backlog. I applaud these efforts and would like to learn more about what is being done to make similar improvements across the DHS enterprise. It’s concerning to me though that DHS components use different FOIA processing systems—systems that don’t always talk to each other. I’m also concerned that the 3 DHS components that field the most FOIA requests—Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and USCIS—aren’t always working together in the most efficient and effective manner. Despite a 2014 GAO recommendation that USCIS and ICE establish a service-level agreement to eliminate duplication, no such agreement exists today. Duplication and other inefficiencies in the FOIA process, unfortunately, have real-world consequences. Attorneys must request continuances in their clients’ immigration court proceedings while they wait for basic records to be produced. This contributes to the extensive backlog we’ve seen in recent years at the Department of Justice.

In other cases, the public remains in the dark about how taxpayer money is being spent or how DHS policies are being crafted. In my district, for example, the city of Sunland Park is awaiting a response to a FOIA request submitted to FEMA in order to revise flood zone mapping that is negatively affecting many residents. Slow processing times and extensive backlogs not only strain Government resources but also cloud public understanding of pressing items of interest. The FOIA Office at DHS Headquarters has an important role to play in brokering agreements between component FOIA offices and driving institutional change through Department-wide guidance and instruction. Dr. Holzer, I hope to hear from you this afternoon on what more could be done to improve coordination and cohesion throughout the Department from a FOIA standpoint. I believe I speak for all Members of this subcommittee when I say that we stand willing to assist in making DHS a more open, transparent, and responsive Federal agency.

Ms. TORRES SMALL. The Chair now recognizes the Ranking Member of the subcommittee, the gentleman from Texas, Mr. Crenshaw, for an opening statement.

Mr. CRENSHAW. Thank you, Chairwoman Torres Small, and thank you to our witnesses for being here. I am pleased that we are holding this hearing today to examine how the Department of Homeland Security complies with the Freedom of Information Act.

The Freedom of Information Act, FOIA, was enacted in 1966 as a tool to provide transparency and accountability into Federal Government operations. The Act has helped to uncover instances of waste, fraud, and abuse, as well as misconduct in Federal Government agencies. It was a FOIA request that uncovered wasteful Government spending in the aftermath of Hurricane Katrina. It was a FOIA request that exposed over \$200 million in wasteful spending at the Department of Defense through a program that allowed vendors to set their own prices, including \$1,000 for toasters.

In 1978 FOIA was used to expose information about the exploding gas tanks on the Ford Pinto, and the car was then recalled.

Since its enactment, FOIA has been used by U.S. citizens, organizations, and journalists to request information about how our Government is operating, and hold the Executive branch accountable to the people it serves. Each year, watchdog groups and reporters do an annual assessment of FOIA and the responsiveness of the administration to FOIA requests.

In 2016 it was reported that the Obama administration received 769,000 requests, and set a record by censoring Government files or denying access to records 77 percent of the time. In 2018 it was reported that the Trump administration did so 78 percent of the time, with 823,000 requests for information. These statistics are troubling for both administrations. We must look at ways to improve the responsiveness to FOIA for our citizens.

DHS, as one of the largest agencies in the Federal Government, is no stranger to FOIA requests. In fact, DHS receives more FOIA requests than any other Federal Government agency. In 2018 DHS received 395,000 requests for information. The next closest agency was the Department of Justice, with almost 100,000 requests. In August 2019 alone, DHS received 39,000 FOIA requests. USCIS is the largest recipient of requests in DHS, with almost 200,000 requests received in 2018.

The Privacy Office of DHS has implemented a FOIA processing and tracking system, providing support to the components in processing backlogs, and issued policy guidance and training related to FOIA.

USCIS has developed and implemented its own electronic FOIA request system called Freedom of Information Act Records System, or FIRST. USCIS deployed FIRST in May 2018 to allow individuals to create an on-line account to electronically submit and track FOIA requests and receive documents to satisfy those requests. DHS has made improvements, but large backlogs in processing remain.

I encourage DHS and USCIS to continue their efforts to improve responsiveness to FOIA requests. I know DHS has sought the advice and assistance of other—of our other 2 witnesses on improving the FOIA process, and I look forward to hearing their assessment of how DHS handles FOIA requests, and how it can improve operations to ensure accountability for U.S. citizens.

I yield back.

[The statement of Ranking Member Crenshaw follows:]

STATEMENT OF RANKING MEMBER DAN CRENSHAW

OCTOBER 17, 2019

I am pleased we are holding this hearing today to examine how the Department of Homeland Security complies with the Freedom of Information Act.

The Freedom of Information Act, FOIA, was enacted in 1966 as a tool to provide transparency and accountability into Federal Government operations. The Act has helped to uncover instances of waste, fraud, and abuse as well as misconduct in Federal Government agencies.

It was a FOIA request that uncovered wasteful Government spending in the aftermath of Hurricane Katrina. It was a FOIA request that exposed over \$200 million in wasteful spending at the Department of Defense through a program that allowed vendors to set their own prices, including \$1,000 for toasters. In 1978, FOIA was



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Since its enactment, FOIA has been used by U.S. citizens, organizations, and journalists to request information about how our Government is operating and hold the Executive branch accountable to the people it serves.

Each year, watchdog groups and reporters do an annual assessment of FOIA and the responsiveness of the administration to FOIA requests. In 2016, it was reported that the Obama administration received 769,903 requests and set a record by censoring Government files or denying access to records 77 percent of the time. In 2018, it was reported that the Trump administration did so 78 percent of the time with 823,222 requests for information. These statistics are troubling for both administrations. We must look at ways to improve the responsiveness to FOIA for our citizens.

DHS, as one of the largest agencies in the Federal Government, is no stranger to FOIA requests. In fact, DHS receives more FOIA requests than any other Federal Government agency. In 2018, DHS received 395,751 requests for information. The next closest agency was the Department of Justice with 96,875 requests. In August 2019 alone, DHS received 39,141 FOIA requests. USCIS is the largest recipient of requests in DHS with 191,804 requests received in fiscal year 2018.

The Privacy Office at DHS has implemented a FOIA processing and tracking system, provided support to the components in processing backlogs, and issued policy guidance and training related to FOIA. USCIS has developed and implemented its own electronic FOIA request system called Freedom of Information Act Records System (FIRST). USCIS deployed FIRST in May 2018 to allow individuals to create an on-line account to electronically submit and track FOIA requests and receive documents to satisfy those requests.

DHS has made improvements, but large backlogs in processing remain. I encourage DHS and USCIS to continue their efforts to improve responsiveness to FOIA requests. I know DHS has sought the advice and assistance of our other 2 witnesses on improving the FOIA process. I look forward to hearing their assessment of how DHS handles FOIA requests and how it can improve operations to ensure accountability for U.S. citizens.

Ms. TORRES SMALL. Other Members of the committee are reminded that, under the committee rules, opening statements may be submitted for the record.

[The statement of Chairman Thompson follows:]

STATEMENT OF CHAIRMAN BENNIE G. THOMPSON

OCTOBER 17, 2019

Congress passed the Freedom of Information Act (FOIA) more than 5 decades ago—recognizing that a government that is truly accountable to its citizens must operate in the open. Prior to FOIA, individuals had to establish a “need to know” in order to access Federal records. Today, they have the “right to know.” The burden of proof has shifted to the Government, which must provide a compelling reason before denying a citizen’s request for public information.

I am concerned that, all too often, public requests for information are being denied by the Department of Homeland Security—and that FOIA’s statutory exemptions are being inconsistently applied. DHS, which receives the vast majority of FOIA requests across the entire Federal Government, only fully granted about 7 percent of requests in fiscal year 2018. This was far less than the Government-wide average of 27 percent. Put another way, the Department partially or fully denied 93 percent of requests it received in 2018. I want to know why the Department’s response rate is much lower than the average. I also want some assurances that information the public is entitled to under the law is not being unduly withheld from the American people. Finally, I want to touch on a disturbing phenomenon we have seen recently at other Federal agencies.

Earlier this year, the Interior Department formally instituted a policy allowing political appointees to review FOIA responses in which they, themselves, are named. Similar changes were made at the Environmental Protection Agency (EPA) in June, giving the EPA administrator and deputy administrator the authority to decide whether or not to release public documents. I want confirmation today that DHS is not following the lead of these agencies and allowing political appointees to undermine the FOIA process.

I also hope to hear about why the Department lacks a centralized system for handling FOIA requests as well as what more can be done at Headquarters to ensure all components’ FOIA offices follow Department-wide guidance.

Ms. TORRES SMALL. I now welcome our panel of witnesses, and thank them for joining us today.

Our first witness is Dr. James Holzer, who has served as the deputy chief FOIA officer at the Department of Homeland Security since 2016. In this role Dr. Holzer is responsible for overseeing and leading FOIA operations across the DHS enterprise. Dr. Holzer previously served as director for the Office of Governmental Information Services, and chairman of the Federal FOIA Advisory Committee. He is an Air Force veteran who began his career at the Department of Homeland Security as a FOIA processor in 2009.

Our second witness is Ms. Tammy Meckley. She leads the immigration records and identity services directorate at U.S. Citizenship and Immigration Services. Her responsibilities include overseeing USCIS FOIA operations at the National Records Center, a 300,000-square-foot facility in suburban Kansas City that stores, manages, and retrieves information contained in more than 20 million immigration files.

Our third witness is Ms. Alina Semo, the director of the Office of Government Information Services at the National Archives and Records Administration. OGIS provides policy guidance and mediation services for FOIA activities across the Federal Government. Prior to her work as OGIS director, Ms. Semo served in the Office of General Counsel at the National Archives, and led the FOIA litigation unit at the FBI.

Our final witness today is Mr. Vijay D'Souza, a director in the information technology and cybersecurity team at the Government Accountability Office. Mr. D'Souza has nearly 2 decades of experience at GAO, and has led multiple efforts to build GAO's analytical capabilities, and assess the performance of Federal programs in the cybersecurity and information technology space.

Without objection, the witnesses' full statements will be inserted in the record.

I now ask each witness to summarize his or her statement for 5 minutes, beginning with Dr. Holzer.

**STATEMENT OF JAMES V.M.L. HOLZER, PHD, DEPUTY CHIEF FOIA OFFICER, PRIVACY OFFICE, U.S. DEPARTMENT OF HOMELAND SECURITY**

Mr. HOLZER. Chairwoman Torres Small, Ranking Member Crenshaw, and distinguished Members of the subcommittee, thank you for the opportunity to appear before you today to discuss the Freedom of Information Act program at DHS.

The Department's FOIA program's mission is to promote transparency by providing records, while also protecting interests identified by 1 of the law's 9 exemptions. Disclosures under FOIA provide the public with a better understanding of and more confidence in the Department's work, and fosters greater public participation in decision making.

The chief privacy officer has been designated the responsibility for oversight of the Department's decentralized FOIA operations. As the deputy chief FOIA officer, it is my responsibility to monitor implementation of the FOIA process across the Department, and to advise DHS leadership on performance and compliance.

Under my leadership the DHS Privacy Office has issued policies that improve FOIA operations, establish FOIA performance metrics, invested in FOIA technology, and assisted in component backlog reduction efforts. The DHS Privacy Office is strengthening the regulatory and FOIA policy framework undergirding the FOIA program's operations.

DHS issued updated FOIA regulations in 2016, and issued a directive clarifying the roles and the responsibilities of key personnel and directing components to comply with the FOIA and DHS policy. The DHS Privacy Office has issued two additional compliance instructions regarding FOIA reporting requirements and employee notification.

The DHS privacy office is also improving performance through the establishment of DHS FOIA compliance and oversight program, which developed the Department's FOIA performance metrics. These metrics set clear goals for the number of requests components are expected to process, and the number of pages they are expected to release. It also encourages components to focus efforts on closing out any request that has been open for more than 200 days.

In fiscal year 2018 DHS received and processed 45 percent of all the FOIA requests, Government-wide. The number of requests received by DHS in fiscal year 2019 increased slightly to more than 400,000 requests. This year our dedicated staff of about 600 full-time FOIA employees across the Department processed an estimated 430,000 FOIA requests, and released more than 40 million pages.

The number of requests processed by DHS increased by approximately 14 percent. This is the fourth consecutive year with increases in—both in the number of requests received and the number processed by the Department. The Department ended fiscal year 2019 with a backlog of about 32,500 requests, a decrease of 40 percent compared to the previous fiscal year.

Notably, DHS has made great strides in driving down the average response times to requests. At the end of the fiscal year preliminary numbers indicate that about 70 percent of open DHS FOIA requests were less than 60 days old. We expect the FOIA performance metrics to further assist us in improving our responsiveness to requesters.

Our experience over the past 5 years has shown the value of investing in technology. Currently, all the HQ offices and 6 of the 9 operational components participate on the Department-wide FOIA tracking and processing solution that enables components to share the costs of storage and information technology support, avoid duplicative data entry, seamlessly transfer requests and records across the Department, and better manage the work force.

DHS continues to modernize the FOIA IT infrastructure. In 2018 the Department's FOIA Technology Working Group recommended scalable requirements for an enterprise FOIA processing and case management system. The solution must, No. 1, allow requesters to submit requests directly into the system and retrieve records electronically. No. 2, it must integrate advanced e-discovery tools, which will enable the de-duplication of records and harness the

power of artificial intelligence. No. 3, it must be interoperable with other FOIA processing solutions in the Department.

In conclusion, DHS is committed to constantly improving public understanding of its mission, creating more confidence in the Department's work through disclosures under FOIA, and fostering greater public participation in agency decision making. The 40 million pages the DHS FOIA program released this year significantly advanced these goals.

The DHS Privacy Office will continue to invest in our work force and create a sound regulatory framework that ensures the reliability and consistency of FOIA processing across the Department, and I will continue to seek new solutions for coordinating our efforts and better managing the backlog.

Thank you for holding this important hearing today, and I look forward to answering your questions.

[The prepared statement of Mr. Holzer follows:]

PREPARED STATEMENT OF JAMES V.M.L. HOLZER

OCTOBER 17, 2019

Chairwoman Torres Small, Ranking Member Crenshaw, and distinguished Members of the subcommittee, thank you for the opportunity to appear before you today to discuss oversight of the Freedom of Information Act (FOIA) process within the U.S. Department of Homeland Security (DHS).

DHS FOIA PROGRAM

DHS has a broad mandate to secure the Nation from threats. The DHS mission is to safeguard the American people, our homeland, and our values with honor and integrity. The Department's FOIA program accomplishes this mission by providing records that promote transparency and demonstrate accountability, while also protecting interests identified by one of the law's 9 exemptions. Disclosures under FOIA provide the public with a better understanding of, and more confidence in, the Department's work and fosters greater public participation in agency decision making. The Department is proud of the investments we have made in our FOIA program and workforce. In fiscal year 2019, our dedicated staff of about 600 full-time FOIA professionals—across all elements of the Department—processed an estimated 430,000 requests and released about 40 million pages of records. Our work not only improves the public's understanding of DHS operations, but also provides a critical service to people seeking their own records.

DHS PRIVACY OFFICE

Under the leadership of the chief privacy officer, who the Secretary also designated the DHS chief FOIA officer, the DHS Privacy Office is responsible for oversight of the Department's decentralized FOIA operations. DHS components are responsible for establishing and maintaining their own FOIA programs. As the deputy chief FOIA officer, it is my duty to monitor implementation of the law across the Department, and to counsel DHS leadership on adjustments to agency practices, policies, personnel, and funding as may be necessary to improve performance. Under my leadership, the DHS Privacy Office has met this mandate through, among other initiatives:

- Issuing policies that improve the reliability and consistency of FOIA operations across the Department;
- Leveraging the Department of Justice (DOJ) Office of Information Policy's (OIP) "Self-Assessment Toolkit," which contains various milestones to help agencies evaluate their FOIA program and identify areas for improvement;
- Providing targeted training opportunities for Department FOIA professionals;
- Establishing robust component FOIA performance metrics that improve responsiveness to requesters;
- Investing in technology that improves workflows and workforce management;
- Centralizing certain FOIA operations at the headquarters level to take advantage of shared resources and create a better-defined career path for DHS FOIA professionals;

- Using staff capabilities and expertise to assist in aggressive component backlog reduction efforts; and
- Creating contract vehicles that enable components to easily access support for surge efforts.

#### DHS FOIA REQUESTS

In fiscal year 2018, DHS received and processed 45 percent of all the FOIA requests Government-wide, and we have every reason to expect that DHS will once again have the largest FOIA workload across the Government in fiscal year 2019. The number of requests received by DHS in fiscal year 2019 increased by approximately 2 percent compared to fiscal year 2018. The number of requests processed by DHS in fiscal year 2019 also increased by roughly 14 percent compared to fiscal year 2018. This is the fourth consecutive year with increases in both the number of requests received and the number processed by the Department.

In addition to receiving and processing more FOIA requests each year, the DHS FOIA program is locating, reviewing, and releasing more pages each year. For example, the average size of an Alien file (A-file) documenting an immigrant's interactions with the Federal Government, which is the most commonly requested type of record from DHS, is growing. Additionally, DHS employees create a significant number of electronic records regarding the Department's activities, and the volume is increasing. Electronic search tools have improved the FOIA program's ability to locate records that may be responsive to a FOIA request, and the number of pages released has increased. Before these pages can be released, a DHS FOIA professional must conduct a thorough line-by-line review of the record to ensure that the public is provided with a maximum level of transparency, while also ensuring no information is released that could be used to attack our Nation's security or put other important interests, including personal privacy, at risk. Between fiscal year 2017 and fiscal year 2019, the average number of pages released in response to a request grew from 87 to almost 95—an increase of 9 percent.

#### REGULATORY FRAMEWORK

As previously noted, the DHS Privacy Office is strengthening the regulatory and FOIA policy framework undergirding the FOIA program's operations. In compliance with the mandate in the FOIA Improvement Act of 2016, DHS issued updated FOIA regulations that incorporate the law's amendments and provide the public with insight into FOIA operations at the agency. The DHS Privacy Office also issued DHS Directive 262–11, Freedom of Information Act Compliance, which describes the responsibilities of the DHS chief FOIA officer, the deputy chief FOIA officer, component FOIA officers, and other key personnel and directs components to comply with FOIA law and DHS policy.<sup>1</sup> The DHS privacy office has issued 2 additional compliance instructions:

- *DHS FOIA Compliance Instruction 262–11–001: Employee Notification Instruction*, which ensures current DHS employees are notified if the FOIA office releases their employment records;<sup>2</sup> and
- *DHS FOIA Compliance Instruction 262–11–002: FOIA Reporting Requirements*, which requires components to regularly report to the DHS Privacy Office statistical information regarding their FOIA operations and information regarding significant requests.<sup>3</sup>

#### PERFORMANCE

The DHS Privacy Office also established a DHS FOIA Compliance and Oversight Program, which leverages the DOJ OIP's "Self-Assessment Toolkit" to identify shared challenges across the Department and best practices to improve the Department's FOIA performance. The results of the initial assessment assisted the DHS Privacy Office in identifying the need for additional training and led to the creation of robust component FOIA performance metrics. These performance metrics set clear goals for the number of requests components are expected to process and the number of pages they are expected to release. It also encourages components to focus efforts on closing out any request that has been open for more than 200 days.

<sup>1</sup> See: <https://www.dhs.gov/publication/freedom-information-act-compliance-directive-04601>.

<sup>2</sup> See: <https://www.dhs.gov/publication/foia-compliance-instruction-262-11-001-employee-notification-instruction>.

<sup>3</sup> See: <https://www.dhs.gov/publication/foia-compliance-instruction-262-11-002-foia-reporting-requirements>.

## BACKLOG

The Department ended fiscal year 2019 with a backlog of about 32,500 requests to which no response had been issued within the law's 20- or 30-day response time, a decrease of 40 percent compared to fiscal year 2018. The number of requests received and DHS's backlog do not include the almost 60,000 referrals from U.S. Citizenship and Immigration Services to U.S. Immigration and Customs Enforcement (ICE) that ICE was not able to log into their FOIA tracking solution before the end of the fiscal year. Since fiscal year 2018, the Department's FOIA backlog has ranged from fewer than 12,000 in 2010 to as many as approximately 103,000 in fiscal year 2014. Notably, DHS has made great strides in driving down the average response times to requests.

At the end of fiscal year 2019, preliminary numbers indicate that about 70 percent of open DHS FOIA requests were less than 60 days old. DHS has also made significant progress in driving down the response time for relatively routine requests. In fiscal year 2018, DHS responses to routine requests averaged less than 30 days, a reduction of more than 10 days compared to fiscal year 2017 figures. DHS has also driven down the response time to complex requests involving voluminous amounts of records or particularly sensitive information. For instance, in fiscal year 2018, DHS responded to complex requests, on average, in less than 100 days, more than 20 days quicker compared to fiscal year 2017. We expect the component FOIA performance metrics to further assist us in improving our responsiveness to requesters.

## TECHNOLOGY

Our experience over the past 5 years has shown the value of investing in technology that eases the FOIA workload and enables process improvements. Efforts to digitize the FOIA process, eliminate paper-based processes, and avoid duplicating efforts have been key to the Department's ability to increase the number of requests processed and pages released. Currently, 10 of 13 components participate in a contracted FOIA tracking and processing solution that enables components to share the costs of storage and Information Technology (IT) support, avoid duplicative data entry, seamlessly transfer requests across components, and better manage the workforce.

Senior Department leadership pushed forward an initiative to address outdated IT systems in the components by approving a list of priority areas for budget and resource planning. In July 2018, the FOIA Technology System Requirements Working Group, under the leadership of the DHS Privacy Office, drafted a Capabilities Analysis Report that recommended scalable requirements for an enterprise-wide FOIA processing and case management system. In a recent report on best practices for leveraging technology to improve FOIA processes, the National Archives and Records Administration's Office of Government Information Services cited the work of the DHS FOIA Technology System Requirements Working Group in writing requirements for a Department-wide FOIA processing and case management system as a best practice.

The Capabilities Analysis Report includes several key requirements that will assist the Department in better serving requesters, strengthening public trust in the Department's actions, and fostering greater public participation in agency decision making. One of the key requirements for this system is a FOIA requester interface, which allows requesters to submit requests directly into the system and retrieve records electronically. That feature alone will significantly reduce the administrative burden associated with FOIA. Including this feature in the Department's enterprise-wide FOIA processing solution will enable DHS FOIA professionals to spend less time on administrative tasks like data entry and devote more of their attention to complex processing issues. These features will also eliminate the need to create CDs to transmit electronic records to requesters.

Another key requirement is integrating advanced e-discovery tools in the DHS enterprise-wide FOIA processing solution, which will enable the de-duplication of records and harness the power of artificial intelligence to detect information that should not be released. Having a tool that highlights sensitive information for DHS FOIA officers will increase the speed and accuracy of processing, enable the Department to release more records that shed a light on our operations, and better protect the critical interests protected by FOIA, including personal privacy. DHS highlighted the successful use of e-discovery tools to improve the FOIA process in its 2019 Chief FOIA Officer Report, which cites the successful use of e-discovery tools by the DHS Privacy Office and several DHS components to cull and de-duplicate records, thread e-mails, and narrow large record sets based on key terms. Currently, the DHS Privacy Office and components use a variety of methods to access these

tools, including purchasing costly licenses and paying for usage by other agencies and offices that have these tools. Incorporating e-discovery tools into the enterprise-wide FOIA processing solution ensures all components that participate in the system have access to these tools when they need it and allows the Department to leverage the tools to assist with other information management needs across the Department.

#### INTEROPERABILITY

The final key requirement is interoperability with other FOIA processing solutions currently in use at the Department. This interoperability will allow the Department to eliminate the duplication of efforts involved with referrals and consultations across the Department—allowing DHS FOIA professionals to focus their efforts on processing requests. The increase in the Department’s backlog at the end of fiscal year 2019 highlights the critical importance of interoperable FOIA processing solutions across the Department. The DHS Privacy Office’s ability to coordinate component-led surge efforts and mitigate the effects of these efforts on other components benefits the Department overall.

#### CONCLUSION

DHS is committed to constantly improving public understanding of its mission, creating more confidence in the Department’s work through disclosures under the FOIA, and fostering greater public participation in agency decision making. The 40 million pages the DHS FOIA program released in fiscal year 2019 significantly advance these goals. These disclosures also feed into a continued public demand for information. DHS received a record-breaking number of requests in fiscal year 2019, and we expect the number of requests we receive in fiscal year 2020 to increase yet again. We also expect the concurrent number of potentially sensitive electronic records that must be reviewed for release in response to requests to continue to grow.

I look forward to working with Members of this subcommittee to ensure that we are appropriately leveraging our resources and technology to make the FOIA process as lean, agile, and effective as possible. The DHS Privacy Office will continue to invest in our workforce and create a sound regulatory framework that ensures the reliability and consistency of FOIA processing across the Department, and I will continue to seek new solutions for coordinating our efforts and better managing the backlog.

Thank you for holding this important hearing today. I appreciate your dedication to ensuring that DHS is meeting its obligations to provide transparency and demonstrate accountability to the public while protecting information that could be used to attack our homeland or otherwise damage sensitive interests like personal privacy. I look forward to answering your questions.

Ms. TORRES SMALL. That was perfectly timed, as well. Thank you for your testimony.

I now recognize Ms. Meckley to summarize her statement for 5 minutes.

#### **STATEMENT OF TAMMY MECKLEY, ASSOCIATE DIRECTOR, IMMIGRATION RECORDS AND IDENTITY SERVICES DIRECTORATE, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY**

Ms. MECKLEY. Chairwomen Torres Small, Ranking Member Crenshaw, Chairman Thompson, Ranking Member Rogers, and distinguished Members of the subcommittee, thank you for the opportunity to testify today regarding U.S. Citizenship and Immigration Services’ procedures for responding to FOIA requirements.

As you know, USCIS administers the Nation’s lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits, while protecting Americans, securing the homeland, and honoring our values.

I currently serve as a senior executive for USCIS, as associate director of the immigration records and identity services directorate, IRIS. I am responsible for providing stakeholders with timely and appropriate access to trusted immigration information services in support of the missions and goals of USCIS and the Department of Homeland Security. I have over 20 years of experience with the U.S. Federal Government in the Departments of Homeland Security and Justice, as well as executive positions in the private sector. Currently I lead nearly 1,000 Federal employees and manage an annual program budget of approximately 450 million across 3 divisions: Verification, identity, and information management, and the National Records Center, NRC.

The NRC manages and operates the USCIS FOIA Privacy Act program. Since 1967, FOIA has provided the public the right to request access to records from the—any Executive branch agency. It is often described as the law that keeps citizens in the Government—in-the-know about Government.

Agencies are required to disclose any information requests under FOIA, unless it falls under 1 of 9 exemptions, which protects interests such as personal privacy, National security, and law enforcement.

FOIA also requires agencies to proactively post on-line certain categories of information, including frequently-requested records.

As Congress, the President, and the Supreme Court have all recognized, FOIA is a vital part of our democracy.

In terms of requests received, the USCIS FOIA program is the largest within the Federal Government. During fiscal year 2019, USCIS received over 200,000 requests. The average number of pages processed in each case is over 260, with a maximum of 50,000 pages for a single request. USCIS has seen and continues to expect the volume of requests to steadily grow at a 5 to 10 percent rate each year. Individuals or the representatives seeking access to immigration records commonly known as alien files, or A-files, file the majority of requests.

USCIS is focused on modernizing and streamlining the way FOIA requests are handled. USCIS is pleased to announce that in July 2019, the launch of its end-to-end digital FOIA immigration records system, known as FIRST. FIRST is the only FOIA system in the Government that currently enables on-line submission, on-line case management, electronic processing, and digital delivery of FOIA responses. Previously, USCIS only accepted FOIA requests by mail, fax, and email, and requesters typically received documents on a compact disc by mail. Now FOIA requesters can create an on-line USCIS account to submit and receive documents digitally, eliminating time and expense associated with receiving and sending requests by mail.

Early indications are that FOIA processors are almost doubling productivity. USCIS is now seeing a reduction in processing times of 22.5 minutes per case. The digital request, management, and delivery process will save time, improve efficiency, and eliminate potential errors that can occur when manually handling paper. Requesters have reported that they can easily create and log into their account, file requests on-line, manage requests, and access responsive documents posted to their account.



Since the initial roll-out of FIRST, over 128,000 accounts have been created, and nearly 26,500 cases have been delivered digitally. These efforts are already showing significant improvement to FOIA operations. The FOIA backlog has been reduced by 64 percent during fiscal year 2019, and it is on schedule to be eliminated by this fiscal year.

USCIS has dedicated employees who work tirelessly to serve this community and deliver accurate and comprehensive responses. I am proud to work with them, and call them my colleagues.

In addition to improving the efficiencies of responding to FOIA requests, USCIS has also expanded and made public data and information about various operations through its electronic reading room, the ERR. Sharing accurate and timely data and information enhances policy making, improves the public's understanding of the Nation's immigration system, and ensures compliance with required reporting mandates.

In accordance with FOIA, USCIS has posted to the ERR over 4,321 administrative appeals and 103 pieces of correspondence between agency leadership and various stakeholders. These actions show USCIS's commitment to increasing the amount of information the agency proactively discloses, and demonstrates transparency, sound stewardship, and the efficient use of Government resources.

Processing information once and releasing it publicly provides a significantly greater benefit to the public without additional expense to the Government.

Thank you again for the opportunity to testify regarding this important matter, and I look forward to answering any questions you may have.

[The prepared statement of Ms. Meckley follows:]

PREPARED STATEMENT OF TAMMY MECKLEY

OCTOBER 17, 2019

INTRODUCTION

Chairwoman Torres Small, Ranking Member Crenshaw, Chairman Thompson, Ranking Member Rogers, and distinguished Members of the subcommittee, thank you for the opportunity to testify today regarding U.S. Citizenship and Immigration Services' (USCIS) procedures for responding to the Freedom of Information Act (FOIA) requirements. As you know, USCIS administers the Nation's lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values.

I currently serve as a senior executive for USCIS as the associate director of the Immigration Records and Identity Services Directorate (IRIS). I am responsible for providing stakeholders with timely and appropriate access to trusted immigration information and services in support of the missions and goals of USCIS and the Department of Homeland Security (DHS). I have over 20 years of experience with the U.S. Federal Government in the Departments of Homeland Security and Justice, as well as key executive positions in the private sector. Currently, I lead nearly 1,000 Federal employees and manage an annual program budget of approximately \$450 million across three divisions: Verification, Identity and Information Management, and the National Records Center (NRC). The NRC manages and operates the USCIS FOIA/Privacy Act (PA) Program.

USCIS FREEDOM OF INFORMATION ACT/PRIVACY ACT OVERVIEW

Since 1967, FOIA has provided the public the right to request access to records from any Executive branch agency. It is often described as the law that keeps citizens in the know about Government. Agencies are required to disclose any information requested under FOIA unless it falls under 1 of 9 exemptions, which protect

interests such as personal privacy, National security, and law enforcement. FOIA also requires agencies to proactively post on-line certain categories of information, including frequently requested records. As Congress, the President, and the Supreme Court have all recognized, FOIA is a vital part of our democracy.

In terms of requests received, the USCIS FOIA/PA Program is the largest within the Federal Government. During fiscal year 2019, USCIS received over 200,000 FOIA/PA requests. The average number of pages processed in each case is over 260, with a maximum of 50,000 pages for a single request. USCIS has seen, and continues to expect, the volume of requests to steadily grow at a 5 to 10 percent rate each year. Individuals or their representatives seeking access to immigration records (commonly known as Alien Files or A-Files) file the majority of these requests.

USCIS is focused on modernizing and streamlining the way FOIA requests are handled. USCIS was pleased to announce, in July 2019, the launch of its end-to-end digital FOIA Immigration Records System, known as "FIRST." FIRST is the only FOIA system in the Government that currently enables on-line submission, on-line case management, electronic processing, and digital delivery of FOIA responses. Previously, USCIS only accepted FOIA requests by mail, fax, and email, and requestors typically received documents on a compact disc by mail. Now, FOIA requestors can create an on-line USCIS account to submit and receive documents digitally, eliminating the time and expense associated with receiving and sending requests by mail.

Early indications are that FOIA processors are almost doubling productivity. USCIS is now seeing a reduction in processing times of 22.5 minutes per case. This digital request, management, and delivery process will save time, improve efficiency, and eliminate potential errors that can occur with manually handling paper.

Requestors report that they can easily create and login to their account; file requests on-line; manage requests; and access responsive documents posted to their account. Since the initial rollout of FIRST, over 128,000 accounts have been created and nearly 26,500 cases have been delivered digitally.

These efforts are already showing significant improvement to FOIA operations. The FOIA backlog was reduced by 64 percent during fiscal year 2019, and is on schedule to be eliminated in fiscal year 2020. USCIS has dedicated employees who work tirelessly to serve this community and deliver accurate and comprehensive responses. I am proud to work with them and call them my colleagues.

#### USCIS ELECTRONIC READING ROOM (ERR)

In addition to improving the efficiencies of responding to FOIA requests, USCIS has also expanded and made public data and information about various operations through its Electronic Reading Room (ERR). Sharing accurate and timely data and information enhances policy making, improves public understanding of the Nation's immigration system, and ensures compliance with required reporting mandates. In accordance with the FOIA statute, USCIS has posted to the ERR records that the agency determined were likely to become the subject of subsequent requests for substantially similar records.

The ERR now contains nearly 50 different categories of documents with wide-ranging topics. In fiscal year 2019, USCIS posted 4,321 Administrative Appeals Decisions and 103 pieces of correspondence between agency leadership and various stakeholders. These actions show USCIS' commitment to increasing the amount of information the agency proactively discloses and demonstrates transparency, sound stewardship, and efficient use of Government resources. Processing information once and releasing it publicly provides a significantly greater benefit to the public without additional expense to the Government.

#### CONCLUSION

Thank you again for the opportunity to testify regarding this important matter. I look forward to answering any questions you may have.

Ms. TORRES SMALL. Thank you.

I now recognize Ms. Semo to summarize her statement for 5 minutes.

**STATEMENT OF ALINA M. SEMO, DIRECTOR, OFFICE OF GOVERNMENT INFORMATION SERVICES, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION**

Ms. SEMO. Good afternoon, Chairwoman Torres Small, Ranking Member Crenshaw, and Members of the subcommittee. I am Alina Semo, and I was appointed as the director of the Office of Government Information Services, OGIS, by the archivist of the United States, David Ferriero, in November 2016. Thank you for the opportunity to appear before you today to discuss OGIS's review of the administration of the FOIA at the Department of Homeland Security.

As the Federal FOIA ombudsman, OGIS resolves Federal FOIA disputes between requesters and agencies; reviews agency FOIA policies, procedures, and compliance; identifies procedures and methods to improve compliance with the FOIA statute; and educates our stakeholders about the FOIA process. My staff of 9 conducts its work as an advocate for the FOIA process itself.

In my time before you today I will highlight our reviews of the FOIA programs at 7 DHS components, as well as our assessment of the DHS Privacy Office.

First, a brief word about our agency compliance assessments. Between September 2015 and February 2018 we published a total of 8 assessment reports on DHS components, all publicly available on our website. It is important to note that the assessments we conduct are snapshots in time, and our findings and recommendations may no longer apply, or may have been addressed subsequently by each DHS component.

In conducting the 8 DHS assessments we surveyed nearly 500 FOIA professionals and reviewed a sample of more than 1,500 FOIA requests that have been processed in the most recent fiscal year prior to each of our assessments. For example, we assessed the FOIA program at TSA, which processed fewer than 1,000 requests in fiscal year 2014, and the Government's largest FOIA program at USCIS, which processed more than 145,000 FOIA requests in fiscal year 2016. We made a total of 86 recommendations in our assessments of FEMA, Coast Guard, TSA, CBP, Secret Service, ICE, and the DHS Privacy Office. And out of those 86 recommendations, we have closed 84, which represents an almost 98 percent rate of closure.

Our agency assessment program recognizes that there is no one-size-fits-all approach to administering FOIA, as each agency's records are unique and their FOIA processes are as diverse as agency's missions. But during the course of 13 agency assessments, including 5 at non-DHS agencies, we have noted some particular trends in our findings.

In the area of management our findings indicate that successful FOIA programs generally have strong leadership support at the most senior levels, and use management techniques that ensure staff have a clear understanding of their roles and responsibilities.

Our findings also show the value of investments in technology, as well as the importance of training FOIA staff to use available technology tools and sufficient IT support.

Finally, we continue to observe that good communication with requesters helps ensure a smooth FOIA process, and helps to prevent disputes that may otherwise lead to litigation.

Our recommendations range from short-term and easily implemented to the long-term and ambitious. For example, we recommended that agencies edit template letters to remove jargon and confusing language, or add to template letters language to explain why certain material is covered by 1 of FOIA's 9 exemptions.

Our larger-scale recommendations have included such actions as developing processes to reduce duplication during processing when a request is—involves records originating from more than 1 DHS component, a recommendation that is mirrored in the GAO's November 2014 report.

Our assessment of the DHS Privacy Office was unique in that we assessed whether the DHS privacy officer, who serves as the chief FOIA officer, fulfills several specific statutory responsibilities. Our recommendation was that the DHS chief FOIA officer adopt a standard procedure and method for issuing guidance, similar to the manner in which the U.S. Department of Justice's Office of Information Policy issues Government-wide FOIA guidance. This would improve DHS components' compliance with FOIA and adherence to DHS FOIA policy.

Moreover, we recommended that issues of non-compliance should be raised up to the Secretary's office when warranted, and that the DHS Privacy Office should issue additional recommendations or corrective actions as necessary to bring components into compliance with law and DHS policy.

I appreciate the opportunity to appear before the subcommittee today. I look forward to answering any questions you may have. Thank you.

[The prepared statement of Ms. Semo follows:]

PREPARED STATEMENT OF ALINA M. SEMO

OCTOBER 17, 2019

Good afternoon Chairwoman Torres Small, Ranking Member Crenshaw, and Members of the subcommittee. I am Alina Semo, and I was appointed as the director of the Office of Government Information (OGIS) by the archivist of the United States, David Ferriero, as of November 2016.

Thank you for the opportunity to appear before you to discuss OGIS's review of the administration of the Freedom of Information Act (FOIA) by the Department of Homeland Security (DHS).

As the Federal FOIA ombudsman, OGIS offers a range of services to help anyone through the FOIA process. My staff of 9 helps to resolve Federal FOIA disputes; educates stakeholders about the FOIA process; reviews agency FOIA policies, procedures, and compliance; and identifies procedures and methods for improving compliance. All of our work is conducted through the lens of advocating for neither the requester nor the agency, but rather for the FOIA process itself.

Earlier this month, we celebrated our 10th anniversary. While we have offered dispute resolution services since 2009, our compliance program is still young—we conducted our first agency assessment in November 2014 by reviewing one of the FOIA programs at our own agency, the National Archives and Records Administration (NARA). Earlier that year, before we even had our compliance program up and running, DHS approached OGIS to request that we review several DHS FOIA programs. We were able to turn our attention to particular DHS FOIA programs in 2015.

Today I will briefly discuss our compliance work generally, and focus more specifically on our assessments of 7 FOIA programs at DHS that we conducted between September 2015 and February 2018. Additionally, I will discuss our December 2016

assessment of DHS's compliance with the responsibilities for chief FOIA officers as mandated in the FOIA statute.

Our agency assessment program is just one piece of a robust FOIA compliance program that also includes assessing FOIA process issues; reviewing agency FOIA regulations; identifying and addressing Government-wide compliance issues using responses to self-assessment questions; and managing the FOIA advisory committee, which I chair, and which brings together FOIA experts from inside and outside of Government appointed by the archivist of the United States to identify solutions to FOIA's biggest challenges.

It is important to note that while we review compliance, we are not the "FOIA police," and as I mentioned earlier, we advocate for the FOIA process to work as Congress intended. It is also important to note that the assessments we conduct are snapshots in time and our findings and recommendations may no longer apply—or have been addressed subsequently by each DHS component. We follow up with agencies 120 days after our assessments are published, and our follow-up track record shows that overall agencies have addressed approximately 98 percent of our recommendations.

Our assessments of agency FOIA programs are based on generally accepted Government auditing standards (GAGAS) and offer agencies a holistic review of their FOIA programs. We rely on our staff's knowledge of the FOIA process and on best practices to identify issues in the administration of FOIA and make tailored recommendations. Our compliance assessment process recognizes that there is no "one-size-fits-all" approach to administering FOIA—each agency's records are unique and FOIA processes are as diverse as agency missions. Nevertheless, we have observed that successful FOIA programs share 3 general characteristics: They manage their resources appropriately; they use technology effectively; and they communicate well with requesters.

The 7 DHS FOIA programs my team reviewed, in the order of our assessment reports, were at (1) Federal Emergency Management Agency (FEMA)—September 18, 2015; (2) United States Coast Guard (Coast Guard)—September 25, 2015; (3) Transportation Security Administration (TSA)—January 11, 2016; (4) Customs and Border Protection (CBP)—March 9, 2016; (5) United States Secret Service (USSS)—July 27, 2016; (6) Immigration and Customs Enforcement (ICE)—October 18, 2016; and (7) U.S. Citizenship and Immigration Services (USCIS)—February 9, 2018.

In assessing these 7 FOIA programs, we surveyed nearly 500 FOIA professionals and reviewed a sampling of more than 1,500 FOIA requests that had been processed in the most recent fiscal year prior to each of our assessments. For example, we assessed the FOIA program at TSA which processed fewer than 1,000 requests in fiscal year 2014 and the Government's largest FOIA program at USCIS which processed 145,470 FOIA requests in fiscal year 2016.

I will discuss the 3 buckets of recommendations that I mentioned earlier—management, technology, and communication—by providing examples from our 7 assessments of DHS components.

#### MANAGEMENT

In reviewing an agency's management of its FOIA program, we evaluate how a FOIA program is managing the resources it is given by the agency. Our assessments show the importance of strong management practices to the success of the program. For example, our assessment of CBP showed that support from leadership and a plan for addressing both the backlog and incoming requests enabled the FOIA program to drive down its backlog by 74 percent in fiscal year 2015—from 34,307 requests to 9,024 requests.

At TSA, we recommended that it create standard operating procedures for the entire FOIA process and that FOIA managers monitor the number of cases closed and volume of pages reviewed by each processor, and set data-driven goals to reduce the backlog and increase timeliness. In response, the agency reported that establishing performance metrics for FOIA analysts and case closure goals for the office helped reduce its backlog in 4 months.

For USSS, we recommended that it create a formal data-driven backlog reduction plan and expand on the work the agency's FOIA program was already engaged in to keep requests out of the backlog by using multi-track processing and focusing on responding to older requests.

#### TECHNOLOGY

We also review how well an agency is using the technology resources it has. At several DHS components, we observed that technology was not being used to its fullest potential to administer FOIA. For example, FEMA had technological tools

but the agency was not fully using the technology to improve FOIA tracking, processing, and proactive disclosure.

In 2016, we observed at TSA a duplication of effort because of a separate review of records containing Sensitive Security Information (SSI). The FOIA tracking and processing system did not communicate with the SSI tracking and processing system. We recommended that the FOIA office work with the SSI office to resolve the duplication and inefficiencies.

In 2016, we also recommended several actions aimed at getting different DHS components to collaborate more efficiently. For example, we recommended that ICE and USCIS explore electronic transmittal of misdirected FOIA requests which arrive at one agency but seek records at the other agency. We recommended that USSS discuss with USCIS a more efficient way to send requests it refers to USSS, possibly electronically.

Finally, in 2018, we recommended that USCIS weigh the costs and benefits of producing digitized version of Alien Files (A-Files) the official Government record that contains information regarding transactions involving individuals as they pass through the U.S. immigration and inspection process. A machine-readable version could enable use of computer-assisted review tools which, in turn, could speed the process. We also recommended that USCIS explore technologies to mark records as processed and enable the FOIA processor to easily access the previously processed version of the record, which could cut down on inefficiencies in a system in which an A-File is often requested several times by a requester and/or their lawyer—but reprocessed each time for each new FOIA request.

#### COMMUNICATION

In reviewing FOIA case files, we look at most—but not all—of an agency’s administrative record. We do not review the underlying records that have been requested and the exemptions applied to those records.

With regard to communication, we often find that more frequent and better communication with requesters in plain language goes far in helping requesters understand the FOIA process. As a result, our recommendations in this area have included providing requesters with additional information about certain records withholdings; updating and correcting FOIA websites and template letters; providing requesters with an estimated date of completion when they ask for one; and removing jargon and legalese in response letters.

Finally, in December 2016 we assessed whether the DHS privacy officer, who serves as the DHS chief FOIA officer, fulfills several specific statutory responsibilities.<sup>1</sup>

FOIA defines several actions that agency chief FOIA officers must take to support agency implementation of the law. The chief FOIA officer is required to:

- support efficient and appropriate compliance with FOIA and make recommendations as necessary to improve implementation;
- provide oversight of FOIA operations by monitoring implementation and reporting to the Attorney General as required;
- support customer service by taking certain steps to improve public understanding of FOIA and by designating one or more FOIA public liaisons; and
- offer training to FOIA staff.

While most of the 16 DHS directorates and components<sup>2</sup> are responsible for processing FOIA requests and appeals for their own records, policy and program oversight is centralized at DHS. In August 2011, the DHS Secretary delegated to the chief privacy officer the responsibility to fulfill duties related to FOIA and Privacy Act programs across the entire Department,<sup>3</sup> and in July 2019, the DHS Secretary designated the chief privacy officer as the chief FOIA officer.<sup>4</sup>

In reviewing DHS Privacy Office’s compliance with chief FOIA officer duties, we did not review FOIA case files as we did at the DHS component assessments nor did we survey DHS Privacy Office FOIA staff. We did review DHS Privacy Office written policies and guidance, strategic and backlog reduction plans, interagency agreements, organizational charts and internal management reports. We also interviewed 7 key FOIA staff members.

<sup>1</sup> 5 U.S.C. § 552(j).

<sup>2</sup> At the time of our assessment, there were 16 DHS directorates and components. There are now 14 directorates and components, accessed October 4, 2019, <https://www.dhs.gov/operational-and-support-components>.

<sup>3</sup> “Department of Homeland Security Delegation No. 13001,” accessed October 2, 2019, [https://www.dhs.gov/sites/default/files/publications/cpo-delegation-letter-for-foia-2011\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/cpo-delegation-letter-for-foia-2011_0.pdf).

<sup>4</sup> “Department of Homeland Security Designation No. 00-13002,” accessed October 9, 2019, <https://www.dhs.gov/publication/designation-chief-foia-officer>.

We found that the DHS Privacy Office met its obligation to support implementation of the FOIA by providing targeted services to components, including the creation of a Department-wide FOIA processing and tracking system; assisting with processing requests from component backlogs; and providing guidance on FOIA policy issues.

The DHS Privacy Office met its responsibility to provide oversight through its reporting program in which it monitored the status of component FOIA programs monthly and raised issues with component chief FOIA officers as necessary. The Privacy Office also prepared annual reports required by the statute.

In addition, the Privacy Office supported customer service by providing requesters with information on its FOIA webpage about how to make a FOIA request that furthers public understanding of FOIA. At the time of our assessment, the Privacy Office had a FOIA Public Liaison whose responsibility was to assist requesters and to resolve disputes. Additionally, the Privacy Office had launched information technology efforts that were intended to improve customer service across the Department.

During our assessments of individual DHS component agencies, we noted several instances in which the DHS Privacy Office provided valuable assistance to DHS component agencies. For example, the Privacy Office's assistance with processing requests was key to reducing CBP's backlog in fiscal year 2015. During our assessments, however, we also observed a large variation in the use of the DHS-wide FOIA system's capabilities by participating component agencies and varying levels of success using technology to process requests by components that opted to not participate in the Department-wide system.

As noted earlier, these assessments represent snapshots in time and our findings and recommendations may no longer apply.

Moreover, during our assessments of DHS components, we observed inconsistency in awareness of—and adherence to—DHS FOIA policies. For example, while we found that most component agencies comply with DHS's "significant requests" policy, the USSS FOIA office did not appear to follow the DHS Privacy Office's policy on "significant requests" that requires components to alert the Privacy Office 24 hours before it responds to significant requests.<sup>5</sup>

We recommended to the DHS Privacy Office that adopting a standard procedure and method for issuing guidance, similar to the way in which the U.S. Department of Justice's Office of Information Policy does in issuing Government-wide FOIA policy, would improve DHS component agencies' compliance with FOIA and adherence to DHS FOIA policy. We recommended that the DHS chief FOIA officer adopt these practices, and, when warranted, issues of non-compliance should be raised to higher levels, including to the Secretary's office. Finally, we recommended that the DHS Privacy Office should also issue additional recommendations or corrective actions as necessary to bring component agencies into compliance with the law and DHS policy.

In response to our assessment of the DHS Privacy Office, the Department took several steps to ensure that its FOIA program operate more efficiently, including issuing a management directive directing components to comply with FOIA law and DHS policy.<sup>6</sup> The DHS Privacy Office also committed to raising issues of non-compliance with component offices and when necessary, the Secretary's office, and issuing recommendations to components as necessary to ensure compliance with the law.

I hope the foregoing information regarding how OGIS conducts its agency assessments, and in particular our assessments of several DHS FOIA programs, has shed some light on how DHS works to administer FOIA. I appreciate the opportunity to appear before this subcommittee. I look forward to answering any questions you may have.

Ms. TORRES SMALL. Thank you, Ms. Semo, for your testimony.

I now recognize Mr. D'Souza to summarize his statement for 5 minutes.

<sup>5</sup>"Guidelines for Reporting on Significant FOIA Activity for Inclusion in the Cabinet Report to the White House, July 7, 2009," accessed October 2, 2019, [http://www.dhs.gov/sites/default/files/publications/priv\\_cfoiao\\_memo\\_cabinet\\_report\\_foia\\_guidelines\\_20090707.pdf](http://www.dhs.gov/sites/default/files/publications/priv_cfoiao_memo_cabinet_report_foia_guidelines_20090707.pdf).

<sup>6</sup>"Freedom of Information Act Compliance," Department of Homeland Security Directive Number 262-11, accessed October 15, 2019, <https://www.dhs.gov/sites/default/files/publications/Directive%2026211%20Freedom%20of%20Information%20Act%20Compliance%20April%202017.pdf>.

**STATEMENT OF VIJAY A. D'SOUZA, DIRECTOR, INFORMATION TECHNOLOGY AND CYBERSECURITY, U.S. GOVERNMENT ACCOUNTABILITY OFFICE**

Mr. D'SOUZA. Charwoman Torres Small, Ranking Member Crenshaw, and Members of the committee, thank you for the opportunity to testify today on GAO's prior work regarding the Freedom of Information Act at today's hearing on FOIA implementation at DHS.

My statement today summarizes 2 reports we issued looking at FOIA DHS. The first, issued in November 2014, was specific to DHS, and the second, issued in June 2018, looked at DHS as part of a broader review of FOIA implementation at multiple agencies.

FOIA establishes a legal right of access to Government information to foster openness and accountability. However, its ability to do this is dependent on agencies successfully implementing it.

DHS continues to receive the largest number of FOIA requests of any Federal department or agency, as several other people here have noted, almost 396,000 requests in fiscal year 2018 alone. This accounts for over 40 percent of all requests within the Federal Government. As of the end of fiscal year 2018, DHS had a backlog of almost 54,000 of these requests.

I would like to highlight a few key points from our work on FOIA at DHS.

First, in 2018, we examined whether DHS and selected other agencies have successfully implemented 6 key requirements to improve FOIA operations. I won't list all of them, but they included things such as implementing a tracking system for FOIA requests, providing training to agency staff, and designating a chief FOIA officer. We found that DHS had successfully implemented all 6 of the requirements we looked at.

However, our 2 reports did identify challenges for DHS in effectively implementing FOIA, and I will discuss 2 of them now.

First, as I mentioned earlier, DHS does have a substantial FOIA backlog. DHS and other agencies that have large FOIA backlogs are supposed to develop plans to address them. In 2018 we did report on several steps DHS had taken to address its backlog, including efforts undertaken by both the Privacy Office, which has overall oversight of the FOIA program, as well as individual DHS components, including CBP, USCIS, and ICE.

However, we reported that DHS did not have an overall plan to address the backlog in a sustainable manner, which is something we think is important in addressing this issue. As of October 2019, DHS reported that it had developed a draft backlog reduction plan that was being reviewed by its components, but it hasn't indicated when the plan would be released. Successful completion of this plan would help DHS address its FOIA backlog.

Second, as others have also noted, our 2014 report identified duplication in DHS's FOIA process for requests involving immigration files, specifically. Immigration files contain information from multiple DHS components and other Federal agencies. Within DHS, USCIS is the custodian for these files and the starting point for processing FOIA requests on them.

However, CBP and ICE also have information in these files and have to review them prior to release. We reported that USCIS was



able to process requests involving both USCIS and CBP documents. However, it couldn't do this for ICE documents. The reason is that ICE didn't have an agreement to let USCIS handle ICE's part of the request. Instead, USCIS provided portions of the file for ICE to review, track, and release separately. This caused unnecessary duplication and delays in the process.

In 2014 we recommended that USCIS and ICE consider re-establishing a previous agreement they had to allow USCIS to process ICE-related FOIA requests. However, as of October 2019, they had not done so.

In conclusion, given the large number of FOIA requests that DHS has and will continue to receive, successful implementation of these 2 recommendations on a backlog plan and reducing duplication, as well as our other FOIA-related recommendations, will help DHS better meet its responsibilities under this important law.

Madam Chairwoman and Mr. Ranking Member, this concludes my statement. I am happy to answer any questions you may have. [The prepared statement of Mr. D'Souza follows:]

PREPARED STATEMENT OF VIJAY A. D'SOUZA

THURSDAY, OCTOBER 17, 2019

GAO HIGHLIGHTS

Highlights of GAO-20-209T, a testimony before the Subcommittee on Oversight, Management and Accountability, Committee on Homeland Security, House of Representatives.

*Why GAO Did This Study*

FOIA requires Federal agencies to provide the public with access to Government records and information based on the principles of openness and accountability in Government. Each year, individuals and entities file hundreds of thousands of FOIA requests. DHS continues to receive and process the largest number of FOIA requests of any Federal department or agency. For fiscal year 2018, over 40 percent of Federal FOIA requests (about 396,000) belonged to DHS.

GAO was asked to summarize its November 2014 and June 2018 reports which addressed, among other things, (1) DHS's methods to reduce backlogged FOIA requests and (2) duplication in DHS's processing of FOIA requests.

In conducting this prior work, GAO evaluated the Department's and components' FOIA policies, procedures, reports, and other documentation; and interviewed agency officials. GAO also followed up on its recommendations to determine their implementation status.

*What GAO Recommends*

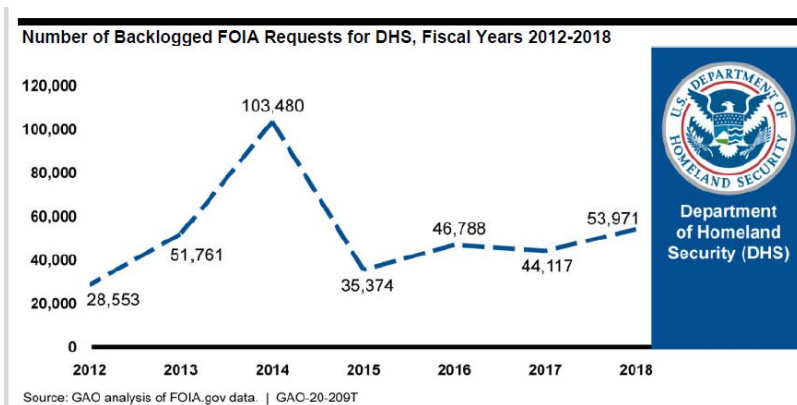
In its prior reports, GAO made 5 recommendations to DHS. These included, among other things, that DHS: (1) Take steps to develop and document a plan that fully addressed best practices with regard to reducing the number of backlogged FOIA requests and (2) eliminate duplicative processing of immigration-related requests. The Department agreed with the recommendations. However, as of October 2019, DHS had not fully implemented all of them.

FREEDOM OF INFORMATION ACT.—DHS NEEDS TO REDUCE BACKLOGGED REQUESTS AND ELIMINATE DUPLICATE PROCESSING

*What GAO Found*

The Department of Homeland Security's (DHS) responsibilities for processing Freedom of Information Act (FOIA) requests are split between the Department's Privacy Office, which acts as its central FOIA office, and FOIA offices in the Department's component agencies, such as U.S. Citizenship and Immigration Services and Immigration and Customs Enforcement. In 2018, GAO reported that DHS had implemented several methods to reduce backlogged FOIA requests, including sending monthly emails to its components on backlog statistics and conducting oversight. In addition, several DHS components, implemented actions to reduce their backlogs. Due to efforts by the Department, the backlog dropped 66 percent in fiscal year

2015, decreasing to 35,374 requests. Although there was initial progress by the end of fiscal year 2015, the number of backlogged requests increased in fiscal years 2016 and 2018 (see figure). One reason DHS was struggling to consistently reduce its backlogs is that it lacked documented, comprehensive plans that would provide a more reliable, sustainable approach to addressing backlogs and describe how it will implement best practices for reducing backlogs over time.



DHS attributed the increase in its FOIA backlogs to several factors, including the increased numbers and complexity of requests received and the volume of responsive records for those requests. Until it develops a plan to implement best practices to reduce its backlogs, DHS will likely continue to struggle to reduce the backlogs to a manageable level.

In addition, in 2014 GAO reported that certain immigration-related requests were processed twice by 2 different DHS components. The duplicate processing of such requests by the 2 components contributed to an increase in the time needed to respond to the requests. GAO continued to report this issue in its 2019 annual product on opportunities to reduce fragmentation, overlap, and duplication.

Chairwoman Torres Small, Ranking Member Crenshaw, and Members of the subcommittee: Thank you for the opportunity to participate in today's hearing regarding Freedom of Information Act (FOIA) implementation at the Department of Homeland Security (DHS). FOIA, which was enacted into law more than 50 years ago, requires Federal agencies to provide the public with access to Government records and information based on the principles of openness and accountability in Government.

Each year, individuals and entities file hundreds of thousands of FOIA requests for information on numerous topics that contribute to the understanding of Government actions. Given the significance of FOIA, Congress has had a longstanding interest in the manner in which the act is being implemented, including the extent to which Federal agencies respond to FOIA requests and the timeliness of the responses.

DHS is one of the many agencies that respond to FOIA requests. DHS continues to receive and process the largest number of these requests of any Federal department or agency—annually receiving and processing over 40 percent of all requests within the Federal Government.

In 2014 and 2018, we issued reports that discussed key aspects of FOIA at DHS. Our work examined, among other things, the Department's implementation of selected FOIA requirements; DHS's methods to reduce backlogged requests; and duplication in the Department's processing of FOIA requests.

At your request, my testimony for this hearing summarizes the results discussed in our prior reports on FOIA implementation at DHS.<sup>1</sup> Detailed information about our objectives, scope, and methodology for that work can be found in the issued reports. In addition, we reviewed information that DHS provided to us on the current

<sup>1</sup> GAO, *Freedom of Information Act: Agencies Are Implementing Requirements, but Additional Actions Are Needed*, GAO-18-365 (Washington, DC: June 25, 2018) and GAO, *Freedom of Information Act: DHS Should Take Steps to Improve Cost Reporting and Eliminate Duplicate Processing*, GAO-15-82 (Washington, DC: Nov. 19, 2014).

status of its efforts to implement recommendations from those reports and its current FOIA workload and backlog.

We conducted the work on which this statement is based in accordance with generally accepted Government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

#### BACKGROUND

The Freedom of Information Act establishes a legal right of access to Government information on the basis of the principles of openness and accountability in Government.<sup>2</sup> Before FOIA's enactment in 1966,<sup>3</sup> an individual seeking access to Federal records faced the burden of establishing a "need to know" before being granted the right to examine a Federal record. FOIA established a "right to know" standard, under which an organization or person could receive access to information held by a Federal agency without demonstrating a need or reason. The "right to know" standard shifted the burden of proof from the individual to a Government agency and required the agency to provide proper justification when denying a request for access to a record.

Any person, defined broadly to include attorneys filing on behalf of an individual, corporations, or organizations, can file a FOIA request. For example, an attorney can request labor-related workers' compensation files on behalf of his or her client, and a commercial requester, such as a data broker who files a request on behalf of another person, may request a copy of a Government contract. In response, an agency is required to provide the relevant record(s) in any readily producible form or format specified by the requester, unless the record falls within a permitted exemption that provides limitations on the disclosure of information.

#### *FOIA Amendments and Guidance Call for Improvements in How Agencies Process Requests*

Various amendments have been enacted and guidance issued to help improve agencies' processing of FOIA requests. For example:

- *The Electronic Freedom of Information Act Amendments of 1996* (1996 FOIA amendment) strengthened the requirement that Federal agencies respond to a request in a timely manner and reduce their backlogged requests.<sup>4</sup>
- *Executive Order 13392*, issued by the President in 2005, directed each agency to designate a senior official as its chief FOIA officer.<sup>5</sup> This official was to be responsible for ensuring agency-wide compliance with the act. The chief FOIA officer was directed to review and report on the agency's performance in chief FOIA officer reports.
- The *OPEN Government Act*, which was enacted in 2007 (2007 FOIA amendment), made the 2005 Executive Order's requirement for agencies to have a chief FOIA officer a statutory requirement.<sup>6</sup> It also required agencies to include additional statistics, such as more details on processing times, in their annual FOIA reports.
- The *FOIA Improvement Act of 2016* (2016 FOIA amendment) addressed procedural issues, including requiring that agencies: (1) Make records available in an electronic format if they have been requested 3 or more times; (2) notify requesters that they have not less than 90 days to file an administrative appeal, and (3) provide dispute resolution services at various times throughout the FOIA process.<sup>7</sup> Further, the act required OMB, in consultation with the Department of Justice, to create a consolidated on-line FOIA request portal that allows the public to submit a request to any agency through a single website.

#### *FOIA Request Process*

The 1996 FOIA amendment required agencies, including DHS, to generally respond to a FOIA request within 20 working days. Once received, the request is to

<sup>2</sup> 5 U.S.C. § 552.

<sup>3</sup> The law was enacted in 1966 and went into effect in 1967.

<sup>4</sup> *Electronic Freedom of Information Act Amendments of 1996*, Pub. L. No. 104–231 (Oct. 2, 1996).

<sup>5</sup> The White House, *Improving Agency Disclosure of Information*, Executive Order 13392 (Washington, DC: Dec. 14, 2005).

<sup>6</sup> *Openness Promotes Effectiveness in our National Government Act of 2007*, Pub. L. No. 110–175 (Dec. 31, 2007).

<sup>7</sup> *FOIA Improvement Act of 2016*, Pub. L. No. 114–185, 130 Stat. 538 (2016) (provisions codified at 5 U.S.C. § 552).

be processed through multiple phases, which include assigning a tracking number, searching for responsive records, and releasing the records to the requester.

In responding to requests, FOIA authorizes agencies to use 9 exemptions to withhold portions of records, or the entire record. These 9 exemptions can be applied by agencies to withhold various types of information, such as information concerning foreign relations, trade secrets, and matters of personal privacy. FOIA allows a requester to challenge an agency's final decision on a request through an administrative appeal or a lawsuit. Agencies generally have 20 working days to respond to an administrative appeal.

#### *DHS Covers Many Areas of Government Information*

Created in 2003, DHS assumed control of about 209,000 civilian and military positions from 22 agencies and offices that specialize in one or more aspects of homeland security. By the nature of its mission and operations, the Department creates and has responsibility for vast and varied amounts of information covering, for example, immigration, border crossings, law enforcement, natural disasters, maritime accidents, and agency management.

According to its 2018 Chief FOIA Officer Report, DHS's organizational structure consists of 24 offices, directorates, and components. FOIA requests are split between the Department's Privacy Office, which acts as its central FOIA office, and FOIA offices in the Department's component agencies.

Three of the major operational components of DHS are:

- U.S. Citizenship and Immigration Services (USCIS) promotes an awareness and understanding of citizenship, and ensures the integrity of the Nation's immigration system. Its records include asylum application files and other immigration-related documents.
- Customs and Border Protection (CBP) secures the border against transnational threats and facilitates trade and travel through the enforcement of Federal laws and regulations relating to immigration, drug enforcement, and other matters. The agency maintains records related to agency operations, activities, and interactions.
- Immigration and Customs Enforcement (ICE) promotes homeland security and public safety through the criminal and civil enforcement of Federal laws governing border control, customs, trade, and immigration. It maintains information related to the law enforcement records of immigrants and detainees, as well as information pertaining to human trafficking/smuggling, gangs, and arrest reports.

According to its 2018 Chief FOIA Officer Report, DHS and its component agencies reported that they processed 374,945 FOIA requests in fiscal year 2018—the most of any Federal Government agency. As of its 2018 report, the Department had a backlog of 53,971 unprocessed requests—the largest backlog of any Federal agency.

#### DHS IMPLEMENTED 6 KEY FOIA REQUIREMENTS TO HELP IMPROVE ITS FOIA OPERATIONS

Amendments and guidance relating to FOIA call for agencies, including DHS, to implement key requirements aimed at improving the processing of requests. Among others, these requirements call for agencies to: (1) Update response letters, (2) implement tracking systems, (3) provide FOIA training, (4) provide records on-line, (5) designate chief FOIA officers, and (6) update and publish timely and comprehensive regulations. As we noted in our June 2018 report, DHS had implemented these 6 FOIA requirements.

*Update response letters.*—The FOIA amendments require that certain information be included in agency response letters. For example, if part of a FOIA request is denied, agencies are required to inform requesters that they may:

- seek assistance from the FOIA public liaison of the agency or the National Archives and Records Administration's Office of Government Information Services (OGIS);<sup>8</sup>
- file an appeal to an adverse determination within a period of time that is not less than 90 days after the date of such adverse determination; and
- seek dispute resolution services from the FOIA public liaison of the agency or OGIS.

DHS had updated its FOIA response letters to include this specific information, as required per the amendments.

*Implement tracking systems.*—DHS used commercial automated systems, as called for by various FOIA amendments and guidance, and had established telephone or

<sup>8</sup>The National Archives and Records Administration's OGIS was established by the OPEN Government Act of 2007 as the Federal FOIA ombudsman tasked with resolving Federal FOIA disputes through mediation as a nonexclusive alternative to litigation.

internet services to assist requesters in tracking the status of a request.<sup>9</sup> The Department used modern technology (e.g., mobile applications) to inform citizens about FOIA. The commercial systems allowed requesters to submit a request and track the status of that request on-line. In addition, DHS developed a mobile application that allowed FOIA requesters to submit a request and check its status. The Department's FOIA tracking systems were compliant with requirements of Section 508 of the Rehabilitation Act of 1973 (as amended), which required Federal agencies to make their electronic information accessible to people with disabilities.

*Provide FOIA training.*—DHS' chief FOIA officer offered FOIA training opportunities to staff in fiscal years 2016 and 2017, as required by the 2016 FOIA amendments. Specifically, the Department provided training in responding to, handling, and processing FOIA requests.

*Provide records on-line.*—DHS posted records on-line for 3 categories of information, agency final opinions and orders, statements of policy, and frequently requested orders as required by 2009 memorandums from both the President and the Attorney General.<sup>10</sup>

*Designate chief FOIA officers.*—DHS designated its chief privacy officer as its chief FOIA officer. This position was a senior official at the assistant secretary or equivalent level, as required by a 2005 Executive Order<sup>11</sup> and the 2007 FOIA amendments.

*Update and publish timely and comprehensive regulations.*—Guidance from the Department of Justice Office of Information Policy (OIP)<sup>12</sup> encourages agencies to, among other things, describe their dispute resolution process; describe their administrative appeals process; notify requesters that they have a minimum of 90 days to file an administrative appeal; include a description of unusual circumstances and restrictions on an agency's ability to charge certain fees when FOIA's times limits are not met;<sup>13</sup> and update agency regulations in a timely manner (i.e., update regulations by 180 days after the enactment of the 2016 FOIA amendment). DHS had addressed these 5 requirements in updating its regulations, as called for in the 2016 FOIA amendment and in related OIP guidance.

#### DHS IDENTIFIED METHODS FOR BACKLOG REDUCTION, BUT STILL HAD FLUCTUATIONS

The Attorney General's March 2009 memorandum called on agency chief FOIA officers to review all aspects of their agencies' FOIA administration and report to Justice on steps that have been taken to improve FOIA operations and disclosure.<sup>14</sup> Subsequent Justice guidance directed agencies that had more than 1,000 backlogged requests in a given year to describe their plans to reduce their backlogs. Beginning in calendar year 2015, these agencies were to describe how they had implemented their plans from the previous year and whether that had resulted in a backlog reduction.

In June 2018, we reported that DHS received about 191,000 to about 326,000 requests per year—the most requests of any agency—for a total of 1,320,283 FOIA requests in fiscal years 2012 through 2016. Further, the Department had a backlog ranging from 28,553 in fiscal year 2012 to 53,971 in fiscal year 2018. The total numbers of these requests and backlogs are shown in table 1.

<sup>9</sup>The *Openness Promotes Effectiveness in our National (OPEN) Government Act of 2007*, Pub. L. No. 110–175 (Dec. 31, 2007).

<sup>10</sup>The Department of Justice, *The Freedom of Information Act*, Attorney General Memorandum (Mar. 19, 2009) and the White House, *Freedom of Information Act*, Presidential Memorandum (Jan. 21, 2009).

<sup>11</sup>The White House, *Improving Agency Disclosure of Information*, Executive Order 13392 (December 19, 2005).

<sup>12</sup>Justice's OIP is responsible for encouraging agencies' compliance with FOIA and overseeing their implementation of the act.

<sup>13</sup>According to Justice guidance, an unusual circumstance is defined as, for example, an agency's need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request. An unusual circumstances fee may be charged if, among other things, a timely notice of unusual circumstances is provided to the requester and a response to the request is made within the 10-day extension.

<sup>14</sup>Department of Justice, *The Freedom of Information Act*, Attorney General Memorandum (Mar. 19, 2009).

TABLE 1.—FREEDOM OF INFORMATION ACT REQUESTS AND BACKLOGS FOR THE DEPARTMENT OF HOMELAND SECURITY, FISCAL YEARS 2012–2018

Number of FOIA Requests Received/Backlog	2012	2013	2014	2015	2016	2017	2018
Requests	190,589	231,534	291,242	281,138	325,780	366,036	395,751
Backlog	28,553	51,761	103,480	35,374	46,788	44,117	53,971

Source: GAO analysis of Department of Homeland Security data./GAO–20–209T.

We also reported that DHS, in its chief FOIA officer reports from fiscal years 2012 to 2016, stated that it had implemented several methods to reduce backlogs. According to the reports, the DHS Privacy Office, which is responsible for oversight of the Department’s FOIA program, worked with components to help address the backlogs. The reports noted that the Privacy Office sent monthly emails to component FOIA officers on FOIA backlog statistics, convened management meetings, conducted oversight, and reviewed workloads. Leadership met weekly to discuss the oldest pending requests, appeals, and consultations, and determined steps needed to process those requests.

In addition, in 2018, we noted that several other DHS components reported implementing actions to reduce backlogs. CBP hired and trained additional staff, encouraged requesters to file requests on-line, established productivity goals, updated guidance, and used better technology. USCIS, the National Protection and Programs Directorate, and ICE increased staffing or developed methods to better forecast future workloads to ensure adequate staffing.<sup>15</sup> ICE also implemented a commercial off-the-shelf web application, awarded a multimillion-dollar contract for backlog reduction, and detailed employees from various other offices to assist in the backlog reduction effort. Due to these efforts by the Privacy Office and other components, the backlog dropped 66 percent in fiscal year 2015, decreasing to 35,374 requests.

Yet, despite the continued efforts, the backlog numbers increased again. According to the 2018 chief FOIA officer’s report, the Department ended 2018 with a backlog of 53,971 requests. DHS attributed these increases to several factors, including an increase in the number of requests received, the increased complexity and volume of responsive records for those requests, and the loss of staff needed to process the requests.

In June 2018, we reported that one reason DHS was struggling to consistently reduce its backlogs is that it lacked documented, comprehensive plans that would provide a more reliable, sustainable approach to addressing backlogs. In particular, it did not have documented plans that described how it intended to implement best practices for reducing backlogs over time. These best practices, as identified by Justice’s OIP, included specifying how DHS would use metrics to assess the effectiveness of backlog reduction efforts and ensuring that senior leadership supports backlog reduction efforts.

In our June 2018 report, we recommended that the Department take steps to develop and document a plan that fully addresses best practices with regard to the reduction of backlogged FOIA requests. In response, DHS reported that it had initiated a Department-wide compliance assessment and stated that it planned to use the results of the assessment to help guide it in identifying best practices and areas of improvement. As of this month (October 2019), the Department stated that the draft plan is currently with the components for review and is pending clearance.

Until it has a final plan that fully addresses best practices, DHS will likely continue to struggle to reduce its backlogs to a manageable level. This is particularly important, as the number and complexity of requests will likely increase over time.

#### DUPLICATION EXISTS IN CERTAIN COMPONENTS’ PROCESSING OF IMMIGRATION FILES

Among the most frequent FOIA requests made to DHS are those for immigration files. These files usually contain various types of information pertaining to immigrants, including asylum applications, law enforcement records, and border crossing documents. As such, they may contain information and records that are generated by various DHS components or other agencies.

<sup>15</sup>The National Protection and Programs Directorate is now known as the Cybersecurity and Infrastructure Security Agency.

In 2014, we reported that within DHS, 3 components—USCIS, CBP, and ICE—created most of the documents included in immigration files. USCIS was the custodian of the files, and all FOIA requests for such files were either initiated with, or referred to, USCIS for processing. Specifically, to process a FOIA request for an immigration file, the USCIS staff to whom the request was assigned first manually entered the requester's data, such as a name and address, into USCIS's FOIA system to establish a record of the request. Next, the staff retrieved and scanned the documents in the requested file and reviewed the documents. If all of the documents were generated by USCIS, the staff made redactions as needed, sent the documents to the requester, and closed out the request.

Further, if the FOIA request covered files containing documents generated by CBP, then USCIS was able to process the request on the basis of an agreement to that effect with CBP. By having USCIS process such requests for CBP documents, the two components avoided duplication in their response to a FOIA request.

In November 2014, however, we reported that USCIS and ICE did not have such an agreement for documents generated by ICE. Thus, the USCIS staff was to identify any such documents and make them available to ICE's FOIA staff for their separate processing.<sup>16</sup> In doing so, we noted that USCIS and ICE engaged in duplicative processing of FOIA requests for those immigration files containing documents related to law enforcement activities that were generated by ICE.<sup>17</sup>

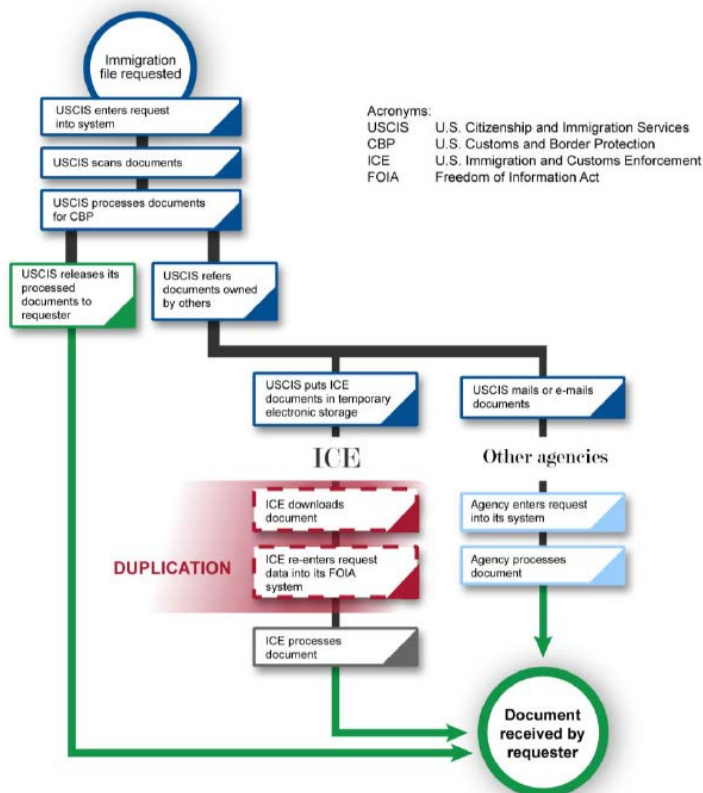
Specifically, to facilitate ICE's review of such files, USCIS staff transferred copies of the ICE-generated documents to a temporary electronic storage drive maintained by USCIS. ICE retrieved the documents, and the ICE staff then re-entered the data to create a new FOIA request in ICE's FOIA processing system. The staff then proceeded with processing the requested documents, and released them to the requester—in essence, undertaking a new, and duplicate, effort to respond to the FOIA request. Figure 1 depicts the duplication that occurred in USCIS's and ICE's downloading and re-entering of data to respond to FOIA requests for immigration files.

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<sup>16</sup>Where applicable, USCIS also refers the immigration file documents to other agencies, such as the Department of State or Federal Bureau of Investigation, for further processing.

<sup>17</sup>These files, which mostly consist of paper documents, contain information regarding an individual's contacts with the U.S. immigration and inspection process—for example, naturalization certificates, records of border crossings, and reports of arrests or investigations.

Figure 1: Duplication in USCIS and ICE FOIA Request Processes for Immigration



Source: GAO analysis of U.S. Department of Homeland Security data. | GAO-20-209T

We noted that, up until April 2012, USCIS and ICE had an agreement whereby USCIS processed ICE's documents contained in an immigration file. However, the components' officials stated that, since that agreement ended, the components had not made plans to enter into another such agreement. According to ICE's FOIA Officer, USCIS's processing of ICE's documents in immigration files was viewed as being too costly. Nonetheless, while there would be costs associated with USCIS processing ICE's documents in immigration files, the potential existed for additional costs to be incurred in the continued duplicate processing of such files.

Our work<sup>18</sup> has noted that duplication exists when 2 or more agencies or programs are engaged in the same activities or provide the same services to the same beneficiaries. We concluded that the duplicate processing of a single FOIA request by USCIS and ICE staff contributed to an increase in the time needed to respond to a FOIA request for immigration files. Because USCIS did not send the immigration file to ICE until it had completed its own processing of the relevant documents—which, according to USCIS, took on average 20 working days—ICE usually did not receive the file to begin its own processing until the 20-day time frame for responding to a request had passed.<sup>19</sup>

<sup>18</sup> GAO, *2013 Annual Report: Actions Needed to Reduce Fragmentation, Overlap, and Duplication and Achieve Other Financial Benefits*, GAO-13-279SP, (Washington, DC: April 2013); *Opportunities to Reduce Potential Duplication in Government Programs, Save Tax Dollars, and Enhance Revenue*, GAO-11-318SP, (Washington, DC: March 2011).

<sup>19</sup> The average time for USCIS to close a request as of fiscal year 2013 was 19.73 days, while the average time for ICE to close a request was 52.79 days.



We pointed out that re-establishing an agreement that allows USCIS to process ICE-generated documents included in requests for immigration files, to the extent that the benefits of doing so would exceed the cost, could enable the 2 components to eliminate duplication in their processes for responding to such a request. Further, it could help reduce the time needed by these components in responding to a request. Therefore, in November 2014, we recommended that DHS direct the chief FOIA officer to determine the viability of re-establishing the service-level agreement between USCIS and ICE to eliminate duplication in the processing of immigration files. We stressed that, if the benefits of doing so would exceed the costs, DHS should re-establish the agreement. We also reported on our finding and recommendation regarding duplicate processing in our reports and updates on fragmentation, overlap, and duplication, issued in 2015 through 2019.<sup>20</sup>

In response, DHS indicated that it was working on a system intended to address the duplication. Specifically, in August 2018, DHS's Privacy Office director of correspondence/executive secretary stated that the Privacy Office was leading a working group in collaboration with the Office of the Chief Information Officer to develop requirements for a single information technology solution for processing incoming FOIA requests. The director added that DHS used 3 disparate systems to track, manage, and process FOIA requests and that moving USCIS and ICE to one processing solution should result in processing benefits and lower overall administrative costs. We have continued to track DHS's progress in implementing this recommendation. However, as of October 2019, DHS's Privacy Office stated that these actions were still in progress.

In conclusion, DHS has implemented a number of key FOIA practices. However, it does not have a comprehensive plan to address its FOIA backlog, nor has it yet addressed duplication in its FOIA process. Addressing both of these issues is important, as the number and complexity of requests will likely increase over time and DHS may be challenged in effectively responding to the needs of requesters and the public.

Chairwoman Torres Small, Ranking Member Crenshaw, and Members of the subcommittee, this completes my prepared statement. I would be pleased to respond to any questions that you may have.

Ms. TORRES SMALL. I thank all of the witnesses for their testimony.

I will remind each Member that he or she will have 5 minutes to question the panel, and I will now recognize myself for questions.

Dr. Holzer, the Department's overall FOIA caseload has tripled since 2010. What is driving this huge uptick in recent record requests?

Mr. HOLZER. Yes, thank you. So it is hard to tell where exactly the increase is at, but the substantial—I mean, as the other witnesses have already stated, the substantial increase is for records where people are seeking immigration-related records for themselves.

Ms. TORRES SMALL. Thanks. I understand that the Privacy Office at DHS headquarters has had to shift staff and resources to the FOIA side of the house to manage the increase in FOIA operations. What impact is this having on the other important functions the Privacy Office carries out, such as responding to data breaches?

Mr. HOLZER. Right. So I am not necessarily certain that there has been a shifting of resources, as far as people. Definitely in the budget. It is clear that the office has both the responsibility for the privacy function, as well as the FOIA function. What is not always clear to us is necessarily Congressional intent on how those resources should be apportioned.

<sup>20</sup> GAO, *2015 Annual Report: Additional Opportunities to Reduce Fragmentation, Overlap, and Duplication and Achieve Other Financial Benefits*, GAO-15-404SP. (Washington, DC: Apr 14, 2015). Information on the current status of GAO recommendations regarding Government duplication can be found at: <https://www.gao.gov/duplication/overview>.

But over the last 3 years, between the chief privacy officer and the two deputies, we have ensured that we are able to meet both missions.

Ms. TORRES SMALL. Thank you. Dr. Holzer, in your opening statement you referenced OGIS's recommendations that the Department's chief FOIA officer issue guidance or corrective actions to bring component FOIA offices into compliance with open records law and DHS policy. OGIS further recommended that, when warranted, issues of non-compliance should be raised to higher levels, including the Secretary's office. What steps has your office taken to address this recommendation, and what has the response been from the component FOIA offices?

Mr. HOLZER. So we regularly report to component leadership, as well as the executive leadership responsible at the component level when the offices are not meeting our performance metrics, or when there is a specific concern that we might have.

I have also met with the Deputy Secretary when she came on board, and had discussions about the program, as well.

Issues of non-compliance, I think we really haven't had anything really egregious, to be honest, where I would need to raise those issues, except for the fact that we have—we struggle with a backlog. But there has not been any real non-compliance that has been brought to my attention that would need me to go to the Secretary.

Ms. TORRES SMALL. OK, so you haven't reported any non-compliance to the Secretary?

Mr. HOLZER. No. We do report regularly to the Secretary, and informing whoever that may be the current status of operations issues that we may have faced throughout the year, as well as any issues that we may be forecasting.

Ms. TORRES SMALL. Do you have the authority you need to issue binding guidance and instruction to component FOIA offices?

Mr. HOLZER. On the issue of that, I think that it is more of a challenge, but we do use the management and director process that is in place in the Department, whereby we are able to issue both directives and guidance and policy for the components to follow.

Ms. TORRES SMALL. Could you use clearer instruction?

Mr. HOLZER. I think that there could be clearer authorities that would allow us to ensure what the proper lanes are, not only for our office, but also where the components might reside.

Ms. TORRES SMALL. Thank you.

For Ms. Meckley and Ms. Semo, would either of you care to respond on what more can be done to improve coordination and cohesion throughout the Department?

Ms. MECKLEY. So I know USCIS's FOIA team, we have regular and often, you know, engagement with the Department. Each component does have vastly different lines of business, and those lines of business do drive how we execute our FOIA program day to day.

For us, the concentration has been, you know, focusing on a technical solution that not only met yesterday's needs, but today's needs and tomorrow's needs. We are in that position now. We are poised to share information about FIRST with other DHS components. I think that solution is one that is scalable. That is one that could be viewed as an enterprise solution. So—

Ms. TORRES SMALL. Ms. Meckley, I apologize. I just want to get one more question in before I run out.

Ms. MECKLEY. Sure.

Ms. TORRES SMALL. So I wanted to talk of the USCIS and ICE agreement, or lack of agreement. Why has there not been an agreement signed?

Ms. MECKLEY. So, again, I think this is where, you know, my colleague from DHS mentioned, you know, we all have equities in how we process FOIA requests within each of the DHS components. Again, vastly different based on the lines of business.

Now, you know, where we stand today, I feel like, you know, USCIS is in a position in poise. We have, you know, 244 very technical, very competent, highly-trained FOIA processors. At the appropriate time, if ICE, you know, wishes to have us, you know, process any ICE documents that are in immigration records, we are happy to do that. We are ready to do that.

Ms. TORRES SMALL. Thank you. The—I now recognize the Ranking Member of the subcommittee, the gentleman from Texas, Mr. Crenshaw, for questions.

Mr. CRENSHAW. Thank you, Madam Chairwoman.

Dr. Holzer, I will start with you. I want to talk about the FOIA Improvement Act of 2016. It requires DoJ to develop a FOIA.gov, and agencies to submit plans in 2019 for interoperability with FOIA.gov by 2023. Has DHS developed a plan for interoperability? Will we be able to meet that 2023 deadline?

Mr. HOLZER. Yes, we have, and we have submitted that to DOJ, as well.

Mr. CRENSHAW. OK. Mr. D'Souza, would GAO deal with that at all? Do you guys look at the general progress toward meeting the deadline of 2023 across the whole Federal Government?

Mr. D'SOUZA. So we—as, you know, Ranking Member, we do our work at the direction of Congress. We actually have received a request to update our prior work on FOIA. So I would imagine, as part of that, we will probably look at on-going efforts in this area.

Mr. CRENSHAW. OK. So DHS is on track. We are not sure where the rest of the Federal Government is.

I have heard from others that we are struggling to meet a 2023 deadline, which is kind of unbelievable. That—is that—have you heard the same? It looked like you wanted to say something.

Mr. HOLZER. Well, I was just going to say, so at the Department we are going to do a phased approach. So some components will come on-board before others. We expect the first portion of those components to come on-board by the end of this fiscal year, and then the other components will come on-board by the end of the deadline.

Mr. CRENSHAW. OK, I had a similar question to the Chairwoman's about the lack of agreement between USCIS and ICE. Ms. Meckley, you have already given your answer to that.

Dr. Holzer, do you have anything to add?

Mr. HOLZER. Yes, well, what I would say is I think that the components are uniquely qualified to determine how their information is handled when they are in other people's records, whether it is in A-file, or whether they are different components.

I will also point out that the second part of the recommendation was that, when it was at a cost or cost savings to the Government, and I don't believe that that has been established, that there would be a significant cost savings to ICE. So, if we were to transfer resources from ICE to pay for CIS to process those records, it could actually impact further operations at ICE.

Mr. CRENSHAW. OK. Ms. Meckley, this question is for you.

Dr. Holzer, if you have anything to add to it, please do.

But I frequently hear from individuals that were denied applications for special immigrant visas. So what I am thinking of in this case is the interpreters that I worked with in Iraq and Afghanistan looking for visas, and they often cite missing or incomplete documents in response to their FOIA requests for information on those cases.

Can you explain the process for compiling the information to respond to these requests, and what issues USCIS might face in fulfilling those kind of FOIA requests?

Ms. MECKLEY. Sure. So the immigration records, the A-files themselves, are contained in individual files. So when a request comes in for a file, we do, you know, essentially digitize or scan that entire paper record into the FOIA processing system.

So everything that the Government has, everything that USCIS has that is contained in that file, is processed, page by page, line by line, by our, you know, highly-skilled FOIA processors. That information, if, you know, redactions are applied, consistent with the exemptions, the applicable exemptions, and then whatever is not exempt is released back to the requester.

Mr. CRENSHAW. OK. Is there any—do you have any recommendations on how to make that faster for—I think what people are complaining about is what they get back—it is unclear why they didn't get something back, or the documents they are receiving are incomplete.

Ms. MECKLEY. Sure. As I mentioned in my opening statement, we have received 200,283 requests. Around 99 percent of those requests are for immigration records. So the vast majority of the population for immigration records. Currently, our average processing times for those records are 45 days.

So again, you know, going from at the beginning of fiscal year 2019, we had a 41,000-case backlog. We ended the year just over 17,000. So a lot of that is attributed to our new FOIA processing system. I do expect our processing times to continue to decrease, but over 2019, just about every one of our processing lines, the times did decrease, and we are committed to continuing that trajectory.

Mr. CRENSHAW. OK. You mentioned the FIRST program is scalable to other components. Are there any plans to do just that?

Ms. MECKLEY. So the way we—you know, when I talked to the DHS CIO about this, you know, this was more of a vision. We were developing requirements and capabilities, and we used the agile methodology to deliver that capability. So my ask was, let us deploy this solution. Let us focus on the core functionality, let us deploy the solution.

Once we essentially got it right, then we could expose—we did this in a—on a cloud-based architecture. It is stored in the Amazon

Web Services Cloud, and it is open source code. So if any DHS component or Government agency wants us to expose that code and allow them to use that, we are ready to have those technical conversations.

Mr. CRENSHAW. Thank you.

Ms. MECKLEY. You are welcome.

Mr. CRENSHAW. I yield back.

Ms. TORRES SMALL. Thank you. I apologize. The Chair will now recognize other Members for questions they may wish to ask the witnesses.

In accordance with our committee rules, I will recognize Members who are present at the start of the hearing, based on seniority on the subcommittee, alternating between Majority and Minority. Those Members coming in later will be recognized in order of their arrival.

The Chair recognizes for 5 minutes the gentlewoman from Nevada, Ms. Titus.

Ms. TITUS. Thank you. Thank you very much. Before I ask questions about FOIA, I just wondered if—does anybody know who is in charge over there at DHS, and who is really making policy, who you all report to on any of the success of these programs, or who is going to be there tomorrow, or anything like that?

That is OK, you don't have to answer that question. But you get the point.

I want to follow up with some of the questions that were just asked about the A-files. I hear a lot about this in my district, too, from immigrants and attorneys, or the organizations that are trying to help them with the paperwork. Because it takes so long, often times they may lose a job, or they may even risk being deported. I understand that this new computer system may try to make that work faster.

But have you considered just taking those A-files out from under FOIA, so you lessen your work, and also speed up that process for people who need this information on themselves?

Ms. MECKLEY. Sure. So, regardless of whether we do the A-file processing under FOIA or some other system, there are a lot of sensitive documents that are contained in immigration records, in immigration files. So we do have to be very careful.

A lot of times we find third-agency information that has to be referred to the Department of State or the FBI or, you know, the appropriate owner of that information. So it is very complex. There are a lot of sensitive documents in those files.

However, with FIRST, the new, scalable, digital, end-to-end FOIA processing system, you know, we are encouraging people to file requests on-line. Create an account, file on-line. That eliminates a lot of the upfront sending us paper, receiving paper, data entry, and to also, you know, opt into receiving the response electronically. Today, for the vast majority of requests, we are still burning content to CDs. We want to get out of that business. So the more people sign up, file electronically, and opt to receive the response electronically, you are cutting time off the process right there.

Ms. TITUS. What kind of outreach have you all done to let people know about this new system and how to use it?

Were any of those people at the table when you designed it?

Ms. MECKLEY. They were, as a matter of fact. We had a lot of our requesters at the table. I held a stakeholder engagement call where, I think, we had over 300 participants, and we actually showed them a video of FIRST, and how to file on-line, how to create an account. So we had a very robust stakeholder engagement call to strongly encourage people to use that FOIA system. If you are going to file a FOIA request, it is far more efficient and far more streamlined to file on-line. That allows us to take advantage of a lot of the automated workflow that we developed.

Ms. TITUS. Would you be willing to work with some of our district staff, come out to the district, try to meet with some people at the local level to get this information out further?

Ms. MECKLEY. I am a huge proponent of talking about how successful this has been. I love doing that. I would be more than happy to.

Ms. TITUS. You would come to Las Vegas?

Ms. MECKLEY. I would come wherever you would like me to go. [Laughter.]

Ms. TITUS. I usually get a yes to that question.

Ms. MECKLEY. Yes, ma'am.

[Laughter.]

Ms. TITUS. Also, the fees. Know that—I think maybe the lowest fee is \$25, but that can be a lot to somebody who doesn't have much, that is just trying to get their papers. Do you have a sliding scale, or any way to maybe consider a waiver of that fee?

Ms. MECKLEY. USCIS is not currently charging fees for FOIA requests.

Ms. TITUS. Oh, OK, well, that is good to hear. One other quick question. I know that Interior has done this, and I think the EPA has done this: Allow political appointees to weigh in on whether information should be released through the FOIA process. Does DHS have any plans to move in that direction?

Mr. HOLZER. So at the Department I am ultimately the deciding official.

Ms. TITUS. OK. So you are not planning on moving to let other people weigh in on whether some information ought to be released or not?

Mr. HOLZER. So we consult with offices that have equity in the record, where they can make recommendations. So, obviously, that may span a whole host of different people. But at the end of the day, the ultimate determination on whether or not a record is releasable falls to the chief FOIA officer of the Department, who has delegated that ultimate responsibility on a day-to-day basis to me.

Ms. TITUS. Have you had any requests like that? Or what would be an example of somebody who might want to intervene?

Mr. HOLZER. I don't—we have not had a request like that in the last 3 years since I have been back. We do consult with folks, various offices, just as we normally would with any other record.

Ms. TITUS. OK. Well, thank you. I yield back.

Ms. TORRES SMALL. Thank you, Ms. Titus. The Chair recognizes for 5 minutes the gentleman from Louisiana, Mr. Higgins.

Mr. HIGGINS. Thank you, Madam Chair. Dr. Holzer, regarding the automated requests, the automatic response to requests, there

has been recommendations made to the agency. Is there any—have you made any progress there? How would that manifest itself exactly?

Mr. HOLZER. I am sorry. The automatic——

Mr. HIGGINS. The status to efforts to automate requests.

Mr. HOLZER. So to automate the requests?

Mr. HIGGINS. If you have, like, a repetitive request, the same request, you have already filled that data——

Mr. HOLZER. Right. So if we had a request for a similar record, we would post that on-line, as long as it wasn't a first-party type of request.

As far as the automation at the Department, we stood up a single enterprise-wide solution at headquarters. As I mentioned, 6 of the 9 operational components are on that solution, which is used to both process and to track FOIA requests in the Department.

Mr. HIGGINS. OK, that—your answer brings me to, I think, a more central question that I have. In this age, where we are dealing with incredible increases in digital communications, social media, et cetera, fake profiles, the weaponization of the digital theater of engagement, shall we say, have you seen or do you track a systematic and repetitive FOIA request?

Has there been chatter within the agency, within the Department that would indicate some effort to actually undermine the services that DHS provides to our Nation by having a dedicated—you say you have 600 dedicated staff members?

Mr. HOLZER. Right. So I think that this is definitely a concern——

Mr. HIGGINS. You do have 600 dedicated staff members?

Mr. HOLZER. We do, across the Department.

Mr. HIGGINS. OK, so that is a lot of men and women dedicated for FOIA requests.

Mr. HOLZER. Absolutely.

Mr. HIGGINS. So my question is are you seeing a pattern that would be indicative of some effort from our citizenry that is less than genuine regarding requests for information?

Mr. HOLZER. No, sir, we don't—I have not seen a pattern of that. But it is also not something that is really tracked. We don't have the technology currently within the FOIA enterprise to kind of see what kind of information is going out. It is something that I think that is one of the requirements for a future solution that we are looking at using artificial intelligence to kind-of scan——

Mr. HIGGINS. If you are not measuring the type of requests and the specifics of the requests that you are receiving, then how could you automate your responses?

Mr. HOLZER. Well, I think when we are talking about the automation of responses, what we are more looking at is being able to respond to the public in a more seamless electronic manner, not necessarily where they would just type in, you know, a FOIA request. We are not going to be Google for FOIA, where they type in the key word and all of a sudden they are going to get, you know, information spit out to them. They are still going to have to make a request to the agency.

What we want to do is make it easier for the public to make those types of requests to us, and we want to make it easier, as

my colleague from CIS said, for the requester to download that information and have access to it.

The information that we are releasing sheds light on operation of the Government.

I think that we are concerned about kind-of what you are alluding to. I think, with the mosaic theory, you know, like if we release this information here and release this information over here, that adversaries could put that together. But again, as you pointed out, we have 600 qualified, dedicated staff that do this every single day that ensure that we are protecting the homeland.

Mr. HIGGINS. It occurs to some of us that that is a tremendous amount of expense to be dedicated for Freedom of Information requests.

Although we certainly support the American people's right to have access to this information that is not Classified, we are also concerned about the efficiency of DHS and how this could potentially be impacted in the—I mean the reality of the world today is that our offices receive automated responses, emails all the time. If you touch a hot button, you are going to get those emails and those phone calls. They are coming, and they disrupt our offices' ability to perform. It is a less than genuine outreach when you get the exact same message from 800 different people across the country.

So I am just wondering how this has impacted DHS's efficiency. Perhaps it is something to consider for another day. Madam Chair, I yield.

Ms. TORRES SMALL. Thank you, Mr. Higgins.

I am going to do another round. I may be the only one who does another round, so I just thank my colleagues, as they are departing, unless they want to stay. I just wanted to do a quick follow-up on a few quick—a few questions.

The first—I have got to return to the A-file and the letter. So I know CBP and USCIS do have an agreement for USCIS to do the full FOIA request. Mr. D'Souza, I appreciate your note in your opening remarks that this is—the lack of one with ICE and USCIS has caused unnecessary delays and duplication.

Dr. Holzer, I recognize your point and concern that, if you are going to make this change, it should be something that saves the agency money. I did note that in the past you have acknowledged that the lack of cooperation between USCIS and DHS has been a barrier to a more efficient FOIA processing. I just wanted to see if you could spend a little more time addressing that.

Mr. HOLZER. Well, so one thing I would also like to point out, if I could just go back a little bit on this, is that that recommendation is fairly old. So the FOIA infrastructure in the Department has changed somewhat.

So, when we had those memorandums of agreements between the components, it was almost necessary, because the components were not able to utilize the technology that we had in place. As I said, we weren't able to shift the records around the Department.

I don't think that is the case anymore. I think that the technology that we currently have in place will allow the record sets to be transferred. I would assume that, with solutions such as FIRST, that we could grant access to other components to be able



to process those records within that solution. If not, then I think that we could work with our colleagues to continue to look at how we can utilize technology.

But again, my big concern is that I do not want to take resources that are limited at ICE and have them shifted over to CIS to find a solution that they are not really interested in participating in.

Ms. TORRES SMALL. OK. So are you saying that, if you can achieve through technology simultaneous processing, then that is—that could work? But if you cannot, a letter might be valid?

Mr. HOLZER. Well, again, I think that the components are best situated to make those determinations. I mean, I think that while CIS does have other agreements with other organizations like CBP—even my office, we have an agreement with them to process some of our records within the A-file.

But again, the component is best situated to determine how their equity is handled, and also what is the best use of their resources.

Ms. TORRES SMALL. Don't you have a role, too, in terms of making sure that the components are working well together?

Mr. HOLZER. Oh, absolutely. I think that we have played a vital role in having those discussions over the years. The information has been provided to me, as far as the amount of cost savings that might be garnered, which is not—in my opinion, it actually would cost ICE more money to enter into such an arrangement. That is really where my concern lies. In discussions with the ICE staff is that it actually would cost more money to have CIS process those records than it would for them to do it themselves, but also that they don't have the same skill set to make sure that their information is being protected.

Ms. TORRES SMALL. Can you supply the information that indicates that it would cost more money for ICE to be processing that?

Mr. HOLZER. I can get that back to you, yes.

Ms. TORRES SMALL. Thank you so much. So is that a change of opinion from earlier this year, when you noted that the—it created—the lack of a letter or memorandum of agreement created barriers to more efficient cooperation?

Mr. HOLZER. No, I think those are two issues. Is it more efficient to have CIS process the records in the A-file? Absolutely. It is more efficient, because you have one processor who has the A-file in front of them. They can redact the information as they are going through it, rather than taking the A-file and transferring it over to ICE.

There is inefficiencies there, absolutely. But at what cost? I think that is part of the question, right? It is part of the equation.

In addition to that I think that ICE has made it pretty clear that they want to ensure that their information is being protected as they have determined that it should be.

Ms. TORRES SMALL. OK. Thank you. I look forward to reviewing the cost estimate concerning that. Thank you.

I also wanted to make a quick question about the OSGIS recommended that USCIS weigh the costs and benefits of producing machine-readable versions of the A-files, which would enable FOIA processors to use computer-assisted review tools, such as text recognition software. Ms. Meckley, could you comment on that, and if you have made any efforts to include that?

Ms. MECKLEY. Sure. So, you know, just alone at the National Record Center, we have over 20 million paper A-files. Those paper A-files are approximately 250 pages each. So they are very voluminous. Those A-files and the content in those A-files only continues to grow over the years.

However, when we do receive a request for an immigration record, an A-file, we do scan that into the system so the FOIA processors can apply the necessary FOIA exemptions and redactions. So it is a scanned image.

You know, our concentration, as I mentioned, was developing an end-to-end, fully digital FOIA solution that would allow us to automate a lot of the processes and work for our FOIA processors so we are more proficient. So we—and like I said, we have increased productivity by almost 50 percent. So we really focused on kind-of using the agile methodology, deliver core functionality first. That is what we are doing, is getting that core functionality built, developed, tested, and deployed.

Then we can start looking things like AI. Is this capability that would continue to streamline and make the FOIA process more efficient? So there is definitely an opportunity here for us to continue to enhance, going forward.

Ms. TORRES SMALL. Thank you, Ms. Meckley.

So we do have time, if you would like, Mr. Taylor, to—no more?

OK. I will recognize myself for one more question, unless you want to. No? OK.

Ms. Meckley, would you just weigh in briefly in terms of the MOU, and USCIS's interest or ability to review those with ICE?

Ms. MECKLEY. Sure. As I said, you know, we have 244 highly-trained, highly-talented FOIA processors that I will put up against any Government FOIA processors in the Federal Government. I do believe that, you know, now that we have a more modern, sophisticated technology that we are using, FIRST, we are probably better-positioned to sit and have conversations around, you know, efficiency, streamlining costs.

Our old processing system, yes, there were inherent and exorbitant costs associated with that, and more people to do, you know, work. Now what we are seeing is we are able to have fewer people producing and processing more requests.

So I do think that it is probably the appropriate time for us to sit down and have those conversations. Like I said, the infrastructure is such that we can develop some interoperability with ICE to where perhaps we could do the processing and they could do the reviewing and approving. I mean, there is all kinds of ideas around what we could potentially do.

We do have 6 agreements with other Government agencies, so we have proven that we are capable of being trained to be able to handle those documents. So it is just a matter, again, of the, you know, ICE's equities, ICE's interest in doing this. But again, we stand ready, capable, able, whenever they are willing to come to the table and have that conversation.

Ms. TORRES SMALL. Thank you, Ms. Meckley.

I want to thank all of the witnesses for their valuable testimony, and to the Members for their questions.

Before adjourning I ask unanimous consent to submit 2 statements for the record.

The first is from Margaret Kwoka, professor of law at the Sturm College of Law, University of Denver.

The second statement is jointly submitted by American Oversight, Demand Progress, Electronic Frontier Foundation, Government Accountability Project, National Freedom of Information Coalition, National Security Archive, Open the Government, and the Project on Government Oversight.

Without objection, so admitted.

[The information referred to follows:]

STATEMENT OF MARGARET B. KWOKA, PROFESSOR OF LAW, UNIVERSITY OF DENVER

OCTOBER 17, 2019

Thank you for the opportunity to submit a written statement. My name is Margaret Kwoka and I am on the faculty at the University of Denver Sturm College of Law. I am submitting this statement in my individual capacity as a researcher who has devoted many years of work to studying open government and FOIA. In 2018, I published a study focused on first-person FOIA requests, or requests individuals make for records and files about themselves. The study was entitled “First-Person FOIA,” and was published in the *Yale Law Journal*.<sup>1</sup> What follows is an excerpted and edited portion of that study as it pertains to DHS.

#### I. FOIA REQUESTS TO DHS

The Department of Homeland Security (DHS) now consistently receives the largest volume of requests in the Federal Government by a staggering margin: In fiscal year 2018, it received 395,751 requests, or 46 percent of the Federal Government’s total 863,729 requests.<sup>2</sup> In fiscal year 2015, the year used in my study, DHS received 281,138 of the Government’s 713,168 requests, or 39 percent.<sup>3</sup> Within DHS, in fiscal year 2015, a full 95 percent of requests were received in just 3 components, namely the 3 principal immigration enforcement agencies: U.S. Immigration and Citizenship Services, Immigration and Customs Enforcement, and Customs and Border Protection.<sup>4</sup> To varying degrees, the FOIA logs published for each of these 3 components shed light on the nature of these hundreds of thousands of FOIA requests.

One thing regarding these 3 agencies is clear: Nearly all requests received are first-person requests. To begin, DHS’s own characterization of the dominant force behind its volume of FOIA requests is that they are first-person in nature. In its fiscal year 2015 annual report to DOJ concerning its FOIA activities, DHS explained that these components “receive the bulk of FOIA requests from individuals seeking immigration related records.”<sup>5</sup> DHS’s FOIA website lists top topics for FOIA requests, the first of which is for “Aliens and Asylees” to request “[d]ocuments in the Alien File,” which is the file kept by USCIS on each noncitizen.<sup>6</sup>

The FOIA logs confirm this account. For example, at ICE, out of 100,762 requests, 98,928 have a redaction for personal privacy in the subject-matter field, indicating

<sup>1</sup>Margaret B. Kwoka, *First-Person FOIA*, 127 *YALE L. J.* 2204 (2018).

<sup>2</sup>*Summary of Annual FOIA Reports for Fiscal Year 2018*, U.S. DEPT OF JUSTICE, available at <https://www.justice.gov/oip/reports-1>.

<sup>3</sup>2015 Freedom of Information Act Report to the Attorney General of the United States, U.S. DEPT OF HOMELAND SEC. 5 (Feb. 2016) [hereinafter DHS 2015 FOIA Report], <http://www.dhs.gov/sites/default/files/publications/dhs-foia-annual-report-fy-2015.pdf> [<http://perma.cc/5RQE-XK4C>]; FOIA Summary 2016, supra note [sic] Error! Bookmark not defined., at 2.

<sup>4</sup>Id. at 6. USCIS received 150,897, ICE received 101,578, and CBP received 77,746, for a total of 330,221 out of DHS’s total 348,878 that year. Id.

<sup>5</sup>DHS, 2015 FOIA REPORT, supra note 3, at ii. To this category of the 3 agencies discussed here, DHS added a fourth, the Office of Biometric Identity Management, contained within the National Protection and Programs Directorate (NPPD). Id The NPPD received 13,781 requests in fiscal year 2015. Id at 5.

<sup>6</sup>*Top FOIA Requests by Topic*, U.S. DEPT HOMELAND SECURITY (June 13, 2017), <http://www.dhs.gov/top-foia-requests-topic> [<http://perma.cc/3ZND-S3PW>].

that a full 98 percent of requests are first-person in nature.<sup>7</sup> Indeed, 88,611 requests have the subject matter listed identically: “records pertaining to (b)(6)(b)(7)(C)” (the two privacy exemptions).<sup>8</sup> Many other formulations of the same statement also appear hundreds of times each, such as “all records pertaining to (b)(6)(b)(7)(C)” or “records relating to (b)(6)(b)(7)(C).”<sup>9</sup> Similarly, at USCIS, out of 165,233 total requests, 163,050 or 99 percent, have subject matters withheld pursuant to the privacy exemptions.<sup>10</sup>

Interestingly, while U.S. Customs and Border Protection (CBP) is the only agency to use the seemingly transparency-promoting FOIA on-line system in which all requests and responses are publicly logged,<sup>11</sup> 52,402 out of 53,917 requests available in the system for fiscal year 2015 have subject matters “under Agency review.” Nonetheless, the presumptive reason that the subject matters of these requests are under review is for a possible (b)(6) or (b)(7)(C) privacy redaction, pegging the percentage of first-person requests at CBP at 97 percent. Also revealing is that lawyers and law firms make up the bulk of requesters at these agencies, and numerous law firms are making over 100 requests per year. At ICE, only 28,684 requests (or 28 percent) were made by individuals with no organizational affiliation.<sup>12</sup> By contrast, an astonishing 67 organizations are responsible for more than 100 requests each. Every one of those organizations appears to be a law firm. The single largest requester, Rudolph, Baker & Associates, rings in at 871 requests in fiscal year 2015. The next most frequent requesters are the Law Office of Manuel E. Solis (691), the Law Office of Robert B. Jobe (545), and Immigration Group, LLC (428).<sup>13</sup> Similarly, at CBP, though a far smaller percentage of organizational affiliations are available in the data, 10 law firms made more than 100 requests in fiscal year 2015, including these top 5: Rudolph, Baker & Associates (607), Law Office of Manuel E. Solis (406), Coghlan Law Office (359), Immigration Group, LLC (328), Law Office of Stephen R. Espinoza (174).<sup>14</sup> At USCIS, the logs do not contain an organizational affiliation of the requester, but the same names appear in their top requester list: James Rudolph (presumably of Rudolph, Baker & Associates) again tops the list at 1,167 requests, Manuel Solis is second with 713 requests, followed by Robert Jobe at 586, and Stephen Coghlan at 518.<sup>15</sup> And again, like at ICE, 72 requesters at USCIS are responsible for more than 100 requests each in fiscal year 2015.<sup>16</sup>

These top requesters are all relatively small law firms focusing on immigration representation. For example, Rudolph, Baker & Associates appears to have only 2 partners and 3 office locations, and bills itself in its banner as “Immigration Lawyers.” The firm lists its first 3 specialties as “Deportation Defense,” “Work and Family Visas,” and “Citizenship & Naturalization.”<sup>17</sup> The Law Office of Robert B. Jobe lists 12 total attorneys at 1 office location, and all of its practice areas focus on immigration.<sup>18</sup> The Law Office of Manuel E. Solis boasts 7 locations (Chicago, Los Angeles, and 5 cities in Texas), but still lists only 8 attorneys and describes itself primarily as “helping clients achieve the best possible result in all kinds of immigra-

<sup>7</sup> FOIA Library, U.S. IMMIGR. & CUSTOMS ENF'T (Oct. 3, 2017) [hereinafter ICE Data], <http://www.ice.gov/foia/library> [<http://perma.cc/UT5A-2XG9>] (follow “ICE FOIA Logs” tab). The dataset compiled included the months between October 2014 and September 2015, representing fiscal year 2015.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Electronic Reading Room, U.S. CITIZENSHIP & IMMIGR. SERVS. [hereinafter USCIS Data], <http://www.uscis.gov/about-us/electronic-reading-room> [<http://perma.cc/L9GW-2PK4>] (filter by “FOIA Logs”). The dataset compiled includes the months between October 2014 and September 2015, representing fiscal year 2015.

<sup>11</sup> FOIA ONLINE [hereinafter CBP Data], <http://foiaonline.regulations.gov> [<http://perma.cc/67E8-ANAS>] (follow “Search” tab, then select “U.S. Customs and Border Protection”). A dataset was compiled covering all available information from October 1, 2014, to September 30, 2015, representing fiscal year 2015.

<sup>12</sup> ICE Data, supra note 7. Despite not coming from law firms, the nature of the individual requests appears to be the same. Of those requests without an organizational affiliation, 27,632 have a (b)(6) designation in the subject matter of the request, indicating that 96 percent of these requests are first-person. Id.

<sup>13</sup> Id.

<sup>14</sup> CBP Data, supra note 11.

<sup>15</sup> USCIS Data, supra note 10.

<sup>16</sup> Id.

<sup>17</sup> Our Services, RUDOLPH, BAKER & ASSOCIATES (2017), <http://www.rudolphbaker.com> [<http://perma.cc/2NVV-EUTK>].

<sup>18</sup> LAW OFF. ROBERT B. JOBE, <http://jobelaw.com> [<http://perma.cc/G5Q2-2GK9>].

tion matters.<sup>19</sup> Immigration Group, LLC,<sup>20</sup> Bay Area Immigration,<sup>21</sup> and the Law Offices of Stephen R. Espinoza<sup>22</sup> are all similar.

To understand why non-citizens and their lawyers are requesting records about themselves from USCIS, ICE, and CBP, I interviewed a group of immigration attorneys. Four attorneys agreed to participate after I contacted several top-requesting law firms. Another 3 attorneys that I interviewed are full-time practitioners holding themselves out as immigration-law specialists, who submit a more moderate number of requests. Among the interviewees were partners (including founding partners), senior attorneys, and associates. This approach provided a range of perspectives on how immigration lawyers use FOIA to advance their clients' interests. They are identified in the citations by pseudonyms to protect their privacy.

The Government has a variety of information on noncitizens, most of which is contained in what is described as the "Alien File" or "A-File."<sup>23</sup> This file can include prior visa applications, registration with the Government, notes from in-person interviews the client may have given with immigration officials, records documenting a prior ICE apprehension, and data on entries into and exits from the country.<sup>24</sup> Uniformly, the lawyers with whom I spoke used FOIA to request their clients' A-Files or all records about their clients; they sometimes also requested records about clients' family members.<sup>25</sup> This account corroborates the indications from the data that first-person requesting drives FOIA use at these agencies.

The lawyers with whom I spoke identified several categories of immigration work for which FOIA is an essential tool, removal defense first among them. Professor Geoffrey Heeren has documented the utility of access to the A-File in representing clients facing possible removal (also known as deportation).<sup>26</sup> A client's prior statements, for example, can help a lawyer prepare the client to testify and for cross examination that may occur based on any inconsistencies.<sup>27</sup> Some lawyers who represent clients in removal proceedings, which occur in an administrative immigration court, said they file a FOIA request as to each and every client.<sup>28</sup> One lawyer explained that the charging documents are sometimes wrong and that the individual immigration officers often "don't understand the nuances of individual State statutes" under which a noncitizen might have a previous conviction; thus the records received under FOIA are crucial to defending against removal.<sup>29</sup> One lawyer even said that immigration judges typically ask him if he filed a FOIA request.<sup>30</sup>

Clients in removal proceedings are not the only ones for whom lawyers avail themselves of FOIA. Other clients may seek some sort of affirmative benefit, such as adjustment of status (typically a person already present changing from a non-immigrant visa—such as a student visa—to an immigrant visa),<sup>31</sup> an affirmative claim for asylum,<sup>32</sup> or a petition for an immigrant visa from abroad.<sup>33</sup> In these instances, FOIA requests can serve two different purposes.

First, FOIA requests can provide details about the applicant's immigration history to ensure consistency in the new application and confirm that there are no unexpected problems in their immigration history that would prevent the client from obtaining the benefit sought. For example, one interviewee explained that if he is representing a client who is seeking to change a visa status from one non-immigrant

<sup>19</sup> *About the Firm*, MANUEL SOLIS L. FIRM, <http://www.manuelsolis.com/about/?lang=en> [<http://perma.cc/8TDK-JNEW>].

<sup>20</sup> IMMIGR. L. GROUP, LLC, <http://www.immigration-group.com/services.html> [<http://perma.cc/27DL-H833>].

<sup>21</sup> BAY AREA IMMIGR., <http://www.bay-area-immigration.com> [<http://perma.cc/TAM5-KGTV>]. This firm is also referred to as "Coughlan Law Office."

<sup>22</sup> LAW OFFS. STEVEN R. ESPINOZA, <http://srelaw.com> [<http://perma.cc/9BNM-YSUA>].

<sup>23</sup> U.S. Citizenship & Immigration Servs., *A-Files Numbered Below 8 Million*, DEPT. HOME-LAND SECURITY (Feb. 9, 2016), <http://www.uscis.gov/history-and-genealogy/genealogy/files-numbered-below-8-million> [<http://perma.cc/XF4C-2QEV>].

<sup>24</sup> Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 BROOK. L. REV. 1569, 1604–07 (2014).

<sup>25</sup> Telephone Interview with Peggy Brewer, Attorney, Law Firm 3 (May 19, 2017); Telephone Interview with Robert Blackshear, Attorney, Law Firm 2 (Apr. 19, 2017); Telephone Interview with Russell Flores, Attorney, Law Firm 1 (Apr. 14, 2017); Telephone Interview with Gloria Glen, Attorney, Law Firm 1 (May 1, 2017); Telephone Interview with Elizabeth Hilton, Attorney, Law Firm 1 (May 2, 2017).

<sup>26</sup> Heeren, *supra* note 24, at 1622–24.

<sup>27</sup> *Id.* at 1622.

<sup>28</sup> Telephone Interview with Robert Blackshear, *supra* note 25, Telephone Interview with Russell Flores, *supra* note 25; Telephone Interview with Gloria Glen, *supra* note 25.

<sup>29</sup> Telephone Interview with Robert Blackshear, *supra* note 25.

<sup>30</sup> Telephone Interview with Russell Flores, *supra* note 25.

<sup>31</sup> Immigration and Nationality Act § 245(a), 8 U.S.C. § 1255(a) (2012).

<sup>32</sup> *Id.* § 208, 8 U.S.C. § 1158.

<sup>33</sup> *Id.* §§ 203, 204, 8 U.S.C. §§ 1153, 1154.

visa to another, “you want to make sure your declarations are correct [in that application] and in subsequent visa applications[, s]o you need a record of what was submitted . . . .”<sup>34</sup> That same attorney explained that his law firm has a policy not to “submit an [application to become a naturalized citizen] without the FBI and FOIA results unless the client signs a waiver” because of the risk that there is some undisclosed or overlooked immigration or criminal history that would jeopardize the application.<sup>35</sup>

Another example occurs when someone who is undocumented and who entered the country clandestinely (rather than, say, on a tourist visa) wants to apply for permanent residence (i.e., a green card). In this situation, the individual is required to leave the United States before submitting that application.<sup>36</sup> Multiple interviewees cited the crucial role of FOIA. One said directly that, “before they leave the U.S., we prioritize FOIA.”<sup>37</sup> Another explained that many clients seeking such a visa have had a prior apprehension at or near the border in which they were taken back across, but may not be sure what legal process was used; for example, it could have been either a voluntary return<sup>38</sup> or an expedited removal.<sup>39</sup> If the prior encounter resulted in an expedited removal, they would be ineligible to seek a green card even from outside the United States,<sup>40</sup> whereas a client with a prior voluntary return would still be eligible. Because of the severity of the consequences—leaving the country and potentially not having a way to return to the United States—“it’s very important for me to decide whether to put them in the limelight of immigration . . . .”<sup>41</sup>

Second, FOIA requests can be used to obtain documentation the client needs to submit with the application but which is no longer in their possession. For example, someone who is applying for a green card from within the United States must produce proof of lawful entry with their application, but they may no longer possess the documentation.<sup>42</sup> Lawyers will use FOIA to get the record from the agency to include in the application.<sup>43</sup> Similarly, a previous family-based petition that was filed years ago may be needed to support an application to adjust status,<sup>44</sup> and FOIA may be the only way to obtain the original petition.<sup>45</sup>

While the public data does not allow for identification of all news media requesters, and as such, no aggregate number can be reported, the number is necessarily small given the volume of first-person requests. A survey of major media outlets that cover immigration matters corroborates as much. For example, in the ICE FOIA logs for fiscal year 2015, the *New York Times*, the *Nation*, the *Washington Post*, the *Marshall Project* (an investigative journalism organization focused on criminal justice), *Fusion* (associated with Univision), *Buzz Feed*, and *ProPublica*, each made precisely 1 request. The *Boston Globe* and *LA Times* each made 2. And the *Houston Chronicle* hit 5 requests that year, with *Associated Press* ringing in at 8. These numbers, of course, are minuscule in comparison with the more than 100,000 requests ICE received during that time period.

## II. PROBLEMS WITH FIRST-PERSON FOIA USE AT DHS

### a. FOIA Serves First-Person Requesters Poorly

A significant amount of first-person FOIA requesting serves as a means for private individuals to arm themselves when they are subject to Governmental enforce-

<sup>34</sup>Telephone Interview with Robert Blackshear, supra note 25.

<sup>35</sup>Id.

<sup>36</sup>Immigration and Nationality Act §§ 203,204, 8 U.S.C. §§ 1153, 1154 (2012); see also id. § 245, 8 U.S.C. § 1255 (allowing persons to apply from within the United States if admitted at entry).

<sup>37</sup>Telephone Interview with Peggy Brewer, supra note 25.

<sup>38</sup>Voluntary Departure, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/tools/glossary/voluntary-departure> [<http://perma.cc/S8HR-NXSZ>] (describing a less formal process that is not enumerated in the INA).

<sup>39</sup>Immigration and Nationality Act § 235(b)(1), 8 U.S.C. § 1225(b) (2012).

<sup>40</sup>See id. § 212(a)(9)(C)(i), 8 U.S.C. § 1182(a)(9)(C)(i) (2012) (barring permanently from obtaining admission to the United States, including on a green card, anyone who has previously been removed after being unlawfully present for more than a year).

<sup>41</sup>Telephone Interview with Russell Flores, supra note 25.

<sup>42</sup>*Official Site for Travelers Visiting the United States: Apply for or Retrieve Form I-94, Request Travel History and Check Travel Compliance*, U.S. CUSTOMS & BORDER PROTECTION (2017), <http://i94.cbp.dhs.gov/194/#/home> [<http://perma.cc/79F4-NXWF>].

<sup>43</sup>Telephone Interview with Peggy Brewer, supra note 25.

<sup>44</sup>I-130, *Petition for Alien Relative*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/i-130> [<http://perma.cc/D723-XDRN>].

<sup>45</sup>Telephone Interview with Peggy Brewer, supra note 25; Telephone Interview with John Rivera, Attorney, Law Firm 5 (June 1, 2017) (explaining that “a lot of people lose paperwork over the course of the 20 years that they’re waiting for their petition to become current”).

ment actions or seek to make their best case for a Government benefit. Access to information in these instances, where no other mechanism for discovery exists, can promote fairness and accuracy in the proceedings. These are vitally important interests to the individual and to society as a whole. Even if not formally constitutionalized, they represent a due process type of benefit.<sup>46</sup> But the evidence assembled in this study shows that FOIA is serving those interests poorly.

To begin, information typically only promotes fairness and accuracy insofar as it is timely. The process of requesting records under FOIA is not tied to whatever process the agency uses to determine the underlying matter, and as previously discussed, responses to FOIA requests can take months, sometimes years. Thus, records may not arrive in time to be used in the underlying agency process or may delay—sometimes greatly a person’s access to a Government benefit to which they are entitled.<sup>47</sup>

Indeed, every immigration lawyer interviewed said they had been in situations where the response to their FOIA request came too late to help in the client’s case.<sup>48</sup> In fact, lawyers representing individuals in removal proceedings who are detained pending the resolution of their case almost never get a response to their FOIA requests before their clients’ cases are over, because the cases are on an expedited schedule.<sup>49</sup> One lawyer explained that “there . . . [have] been times where guys have been removed and then a FOIA result comes back and my strategy would have been different.”<sup>50</sup> In fact, this lawyer regularly has clients who decide not to fight their removal cases because they do not want to wait in detention, even though there—may be relief available—but that relief cannot be ascertained without the response to the FOIA request.<sup>51</sup>

Timing is an issue not only in removal cases, but also for noncitizens seeking to adjust their status to become permanent residents or to become naturalized citizens. One lawyer cited an example where an undocumented client believed she was eligible for a U visa, a special visa available for victims of crime, and the client did not want to wait for the response to a FOIA request before applying for the visa. When the results did come back, it showed that the client had previously been deported.<sup>52</sup> Had the lawyer known, she would have asked for a waiver of the consequences of that prior deportation in conjunction with the initial visa application.<sup>53</sup> Another lawyer explained that his clients have to remain “without papers” just to wait for the response to their FOIA request, because the response will include documents they need for an application to regularize their status.<sup>54</sup> A third lawyer cited naturalization as an area of frustration, because clients want to naturalize as soon as possible and do not want to wait for responses to FOIA requests.<sup>55</sup> The intervening time is obviously risky for the clients in any of these situations. In fact, a class-action lawsuit was brought to systematically challenge CBP’s FOIA response times precisely for this reason: “Individuals and attorneys desperately need responses to these FOIA requests. They are essential to determining whether a person is eligible to remain in the country with family or to apply for a visa to reunite with their family . . .”<sup>56</sup>

Other aspects of the FOIA process also hinder the full potential of information to improve accuracy and fairness, largely because features of FOIA processing result

<sup>46</sup> Id at 1138.

<sup>47</sup> See id.

<sup>48</sup> Telephone Interview with William Yates, Attorney, Law Firm 4 (May 24, 2017); Telephone Interview with Peggy Brewer, supra note 25; Telephone Interview with Robert Blackshear, supra note 25; Telephone Interview with Russell Flores, supra note 25; Telephone Interview with Gloria Glen, supra note 25, Telephone Interview with Elizabeth Hilton, supra note 25; Telephone Interview with John Rivera, supra note 45.

<sup>49</sup> Telephone Interview with Robert Blackshear, supra note 25; Telephone Interview with Gloria Glen, supra note 25; Telephone Interview with John Rivera, supra note 45; Telephone Interview with William Yates, supra note 48.

<sup>50</sup> Telephone Interview with Robert Blackshear, supra note 25.

<sup>51</sup> Id. One attorney explained how the records that he gets in response to a FOIA request would be useful right away for detained clients in their bond hearing, because a judge often wants to know if there is any possible meritorious defense before deciding if a detainee is a flight risk, or because the FOIA response may provide a way to dispute the accuracy of the criminal history of the client. Telephone Interview with William Yates, supra note 48.

<sup>52</sup> Telephone Interview with Peggy Brewer, supra note 25.

<sup>53</sup> Id.

<sup>54</sup> Telephone Interview with Russell Flores, supra note 25.

<sup>55</sup> Telephone Interview with Robert Blackshear, supra note 25.

<sup>56</sup> *Groups File Lawsuit Challenging Failures of CBP To Respond to FOIA Requests*, AM. IMMIGR. COUNCIL (Mar. 13, 2015), <http://www.americanimmigrationcouncil.org/news/groups-file-lawsuit-challenging-failures-cbp-respond-foia-requests> [<http://perma.cc/XXM9-ZSJS>] (quoting Trina Realmuto, litigation director at the National Immigration Project of the National Lawyers Guild).

in incomplete information. To begin, the FOIA process is generally unlikely to result in the release of all information that could or should be released. Over-withholding under FOIA is pervasive across the Federal Government,<sup>57</sup> and there is no reason to believe this context is any different. One lawyer reported routinely getting no records in response to requests, only to later find out that his clients had previous interactions with immigration enforcement, which resulted in their removal from the country.<sup>58</sup> More than one lawyer asserted that their clients' previous statements to immigration officials were "always" or routinely redacted, making it impossible for lawyers to adequately prepare their clients.<sup>59</sup> One lawyer explained that the names of immigration officials who interacted with his client are almost always redacted.<sup>60</sup> He finds this frustrating because on the few occasions in which he was able to learn the officer's identity, he was able to subpoena the officer about the interaction and attempt to impeach him, just like a criminal defendant can cross-examine an arresting law enforcement officer.<sup>61</sup>

Whether or not these particular withholdings are proper under FOIA, every lawyer interviewed agreed that it was either never or hardly ever worth fighting the denial of information under FOIA by administratively appealing or filing a FOIA lawsuit.<sup>62</sup> The clients or the law firms simply didn't have the resources for a collateral proceeding about information access.<sup>63</sup> One lawyer explained that she could not justify charging her hourly fee to file and manage FOIA requests, and thus she directed clients to manage the process on their own and return when they had the results.<sup>64</sup> Another lawyer lamented, "In 7 years I've never filed an administrative appeal or gone to Federal court on a FOIA case . . . [T]here's technically a remedy but the reality is most people can't access it because lawyers can't afford to take the time and energy to litigate those issues."<sup>65</sup> Thus, when information is withheld, those withholdings will likely go unchallenged.

Finally, certain subsets of requesters may have limited rights under FOIA. For example, the fugitive disentitlement doctrine is an equitable doctrine originally crafted to allow courts of appeals to dismiss the appeal of someone convicted of a crime so long as that person remained a "fugitive."<sup>66</sup> DHS has adopted this doctrine and applied it to reject FOIA requests because of its determination that the requester is a "fugitive." For example, in fiscal year 2015, ICE denied requests based on the fugitive disentitlement doctrine 4,053 times.<sup>67</sup> Very few cases address the question of whether such a use is appropriate,<sup>68</sup> but because responses are so sel-

<sup>57</sup> These problems are well-documented in administrations of both parties. See, e.g., Ted Bridis, Associated Press, *Obama Administration Sets New Record for Withholding FOIA Requests*, PBS (Mar. 18, 2015), <http://www.pbs.org/newshour/rundown/obama-administration-sets-new-record-withholding-foia-requests> [<http://perma.cc/TRF5-H9TB>].

<sup>58</sup> Telephone Interview with Russell Flores, supra note 25 ("I'd say almost half the time I get nothing even though they've [had previous contact with] CBP and USCIS.").

<sup>59</sup> Id. (asserting that "they don't give you the interview"); Telephone Interview with Robert Blackshear, supra note 25 ("So how can I properly represent them if the only thing I have that they've said was now redacted? How do I properly prepare them for a direct and cross examination?").

<sup>60</sup> Telephone Interview with William Yates, supra note 48.

<sup>61</sup> Id.

<sup>62</sup> Telephone Interview with Robert Blackshear, supra note 25; Telephone Interview with Peggy Brewer, supra note 25; Telephone Interview with Russell Flores, supra note 25; Telephone Interview with Gloria Glen, supra note 25; Telephone Interview with Elizabeth Hilton, supra note 25; Telephone Interview with John Rivera, supra note 45; Telephone Interview with William Yates, supra note 48.

<sup>63</sup> See Telephone Interview with Robert Blackshear, supra note 25 (explaining that the firm "[r]arely" appeals a FOIA denial because "[t]he problem is time and money"); Telephone Interview with Russell Flores, supra note 25 ("[M]y clients, quite frankly, can't even pay me for an appeal to the FOIA, let alone going to [court]."); [sic] 25 Telephone Interview with Gloria Glen, supra note 25 ("We haven't [appealed a FOIA denial] because A, we don't have the time, and B, I've never been paid to do that."). But see Telephone Interview with William Yates, supra note 48 ("We've done some [FOIA appeals], but . . . they're not too successful.").

<sup>64</sup> Telephone Interview with Peggy Brewer, supra note 25.

<sup>65</sup> Telephone Interview with John Rivera, supra note 45.

<sup>66</sup> See *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239–40 (1993).

<sup>67</sup> *DHS 2015 FOIA Report*, supra note 3, at 7.

<sup>68</sup> See *Maydak v. U.S. Dep't of Educ.*, 150 F. App'x 136, 137 (3d Cir. 2005) (affirming a decision to dismiss a FOIA complaint under the doctrine); *Doyle v. U.S. Dep't of Justice*, 668 F.2d 1365, 1365 (D.C. Cir. 1981) (affirming the dismissal of a FOIA complaint under the doctrine), abrogated by *Ortega-Rodriguez*, 507 U.S. 234; *Meddah v. Reno*, No. 98–1444, 1998 U.S. Dist. LEXIS 23620, at \*2 n. 1 (E.D. Pa. Dec. 8, 1998) (applying the doctrine to dismiss a FOIA complaint). See generally Emily Creighton, *The Fugitive Disentitlement Doctrine: FOIA and Petitions for Review*, AM. IMMIG. COUNCIL (Apr. 29, 2013), [http://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/fugitive\\_disenti-](http://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/fugitive_disenti-)



dom challenged, DHS's interpretation acts as a practical barrier for a non-trivial number of requesters. Moreover, the Privacy Act, by its own terms, applies only to "a citizen of the United States or an alien lawfully admitted for permanent residence."<sup>69</sup> And the Privacy Act does not allow an individual to request information about himself that is contained in the file of another individual (such as a relative).<sup>70</sup> Thus, certain groups of individuals have limited access under either or both statutes.

*b. First-Person FOIA Requests Create Agency Inefficiencies*

Even from DHS's perspective, many kinds of first-person FOIA are likely to present significant inefficiencies. Because immigration lawyers have no other way to obtain Government-held information about their clients, immigration lawyers file FOIA requests in every case or nearly all cases they handle.<sup>71</sup> In addition, these attorneys regularly file FOIA requests at 2, 3, or sometimes more agencies to increase their chances of obtaining the relevant information.<sup>72</sup> Immigration-related documents pertaining to their clients could be located not only at USCIS, ICE, and CBP, as discussed above, but also at DHS's Office of Biometric Identity Management;<sup>73</sup> the Department of Justice's Executive Office for Immigration Review,<sup>74</sup> which runs the administrative immigration courts; the Federal Bureau of Investigation,<sup>75</sup> which houses criminal background information; the Department of State,<sup>76</sup> which processes visas; the Department of Labor's Employment and Training Administration,<sup>77</sup> which issues labor certifications required for certain visa applications; and the Department of Health and Human Services' Administration for Children and Families, which houses the Office of Refugee Resettlement. Certainly, not every agency will be implicated in any one case, but attorneys routinely file a handful of requests to ensure they have uncovered all the relevant documents.

Yet, in many immigration cases, the Government will have gone through the same effort behind the scenes to cull the information necessary to make a determination about either a removal case or an application for an immigration benefit. The FOIA process invokes an entire second set of actors—FOIA officers at each agency—to duplicate that effort to produce a record for public consumption. Moreover, the FOIA officer is unfamiliar with the records at issue, and thus may not be equally well-

*tlement doctrine foia and petitions for review 4-29-13 fin.pdf* [<http://perma.cc/KX5V-QNQN>] (surveying cases applying the doctrine).

<sup>69</sup> 5 U.S.C. § 552a(a)(2) (2012). Next of kin also cannot make a Privacy Act request about a deceased individual. Privacy Act Implementation, 40 Fed. Reg. 28,948, 28,951 (July 9, 1975).

<sup>70</sup> *Warren v. Colvin*, 744 F.Jd 841, 843–44 (2d Cir. 2014).

<sup>71</sup> One lawyer files a FOIA request "[f]or each client, we file one for every client." Telephone Interview with Robert Blackshear, *supra* note 25. Another reported filing FOIA requests for "all clients." Telephone Interview with Gloria Glen, *supra* note 25. A third said she used FOIA "[m]ost of the time." Telephone Interview with Elizabeth Hilton, *supra* note 25. A fourth said he used FOIA "70 to 80 percent of the time." Telephone Interview with John Rivera, *supra* note 48. Of the interviewees, only Brewer reported much less use of FOIA, noting that she files a FOIA request only about 25 percent of the time. This difference appears to be attributable to two different factors. One is that Brewer does a wider variety of immigration work, including business immigration, in which clients have often had less previous interaction with immigration authorities. In addition, even among family-based petitions, it appears Brewer is more judicious about her use of FOIA, only filing a request when she has a reason to believe records exist. See Telephone Interview with Peggy Brewer, *supra* note 25.

<sup>72</sup> For example, Flores said he "automatically do[es] CBP, and USCIS." Telephone Interview with Russell Flores, *supra* note 25; see also Telephone Interview with Gloria Glen, *supra* note 25 (explaining that she typically files multiple FOIA requests, usually at CBP and ICE); Telephone Interview with Elizabeth Hilton, *supra* note 25 (explaining that she files a request with USCIS if the client has ever submitted a previous application for any immigration benefit, a request with ICE if they have ever been removed, and a request with CBP if they have ever had any interaction at a port of entry); Telephone Interview with John Rivera, *supra* note 45 (saying that he typically files a USCIS FOIA request and an OBIM request with fingerprints); Telephone Interview with William Yates, *supra* note 48 (explaining that he typically files FOIA requests at USCIS, ICE, CBP, and the Department of State, because "I'm looking for anything or any hit that I can get on my client"). But see Telephone Interview with Robert Blackshear, *supra* note 25 (asserting that now that OBIM processes requests with fingerprints, better results come from that one request and less often are multiple requests needed).

<sup>73</sup> *Office of Biometric Identity Management* DEPT HOMELAND SECURITY (Oct. 4, 2016), <http://www.dhs.gov/obim> [<https://perma.cc/L6E4-MK9K>].

<sup>74</sup> *Executive Office for Immigration Review: Freedom of Information Act*, U.S. DEPT JUST., <http://www.justice.gov/eoir/freedom-of-information-act> [<https://perma.cc/S6SH-ZVBL>].

<sup>75</sup> *Freedom of Information/Privacy Act*, FED. BUREAU INVESTIGATION, <http://www.fbi.gov/services/records-management/foipa> [<https://perma.cc/AV6Y-LUY5>].

<sup>76</sup> *About Us*, DEPT ST., <https://travel.state.gov/content/visas/en/about.html> [<https://perma.cc/4M7Z-FSYX>].

<sup>77</sup> U.S. DEPT LAB. EMP. & TRAINING ADMIN., <http://www.foreignlaborcert.doleta.gov> [<https://perma.cc/2F6Y-7ZRN>].

positioned to make determinations about releasing records as the official in charge of the underlying case.

For example, the Trial Attorney who prosecutes a removal case is the person most familiar with the case and with whom the collected documents reside in immigration court.<sup>78</sup> Similarly, a USCIS official is responsible for processing applications for adjustments of status or naturalization and interviewing each applicant, and will have gathered the documents necessary for each determination.<sup>79</sup> Thus, the FOIA process duplicates the agency's effort, and the person with the most personal knowledge of the records does not make decisions about the release of documents to the requester, presenting inefficiencies for the agency.

Finally, as to removal cases that are pending in immigration court, many attorneys noted that when they have not received the response to a FOIA request, they will use that as the basis to request a continuance, thereby potentially holding up the proceedings and using greater agency resources in that regard as well.<sup>80</sup> Each appearance at which attorneys must seek a continuance costs the court and the agency attorney time and effort. Moreover, courts sometimes hold an inquiry about the need for a continuance,<sup>81</sup> thus necessitating arguments from the parties and the further investment of agency resources.

In the isolated instances when FOIA denials are challenged, the duplicative nature of the proceedings is only exacerbated. For example, in *Martins v. United States Citizenship & Immigration Services*, an attorney for noncitizens in removal proceedings who were seeking asylum brought a separate lawsuit under FOIA for access to agency officials' notes on his clients' asylum interviews.<sup>82</sup> Then, because pending removal proceedings were at stake, the immigration court issued a preliminary injunction to expedite the FOIA case on the basis that the attorney's clients would suffer irreparable injury in moving forward with the removal cases without the disputed documents.<sup>83</sup> Thus, an entirely separate judicial proceeding was required, and in fact expedited, to facilitate the resolution of underlying administrative processes.

### c. First-Person Requesters May Crowd Out Oversight Requesters

If the news media were intended to be the principal beneficiaries of FOIA, they are also now among its harshest critics. And delay is among the most prominent critiques journalists and legislators offer of the law. A 2016 U.S. House Committee on Oversight and Government Reform report entitled "FOIA Is Broken" features a section that is headed: "The Biggest Barrier of All: Delay, Delay, Delay."<sup>84</sup> As one journalist lamenting his 4-year wait for records regarding FEMA's response to Hurricane Sandy wrote:

"Incredibly, it took my ProPublica colleague Michael Grabell more than 7 years to get records about air marshal misconduct from the Transportation Security Administration. As he pointed out, his latest contact in the FOIA office was still in high school when Grabell filed his initial request."<sup>85</sup>

Delay is such a problem that a team of developers created an algorithm for predicting whether a FOIA request will be successful based on its brevity, specificity, and other factors.<sup>86</sup> As the developers explain, "[w]riting a Freedom of Information

<sup>78</sup> See Telephone Interview with John Rivera, *supra* note 45; Telephone Interview with William Yates, *supra* note 48.

<sup>79</sup> See Telephone Interview with Elizabeth Hilton, *supra* note 25.

<sup>80</sup> See, e.g., Telephone Interview with Peggy Brewer, *supra* note 25; Telephone Interview with Russell Flores, *supra* note 25.

<sup>81</sup> Telephone Interview with Russell Flores, *supra* note 25 (explaining that now they are "not accepting continuances" unless the attorney can show that there is relief available); Telephone Interview with John Rivera, *supra* note 45 (asserting that immigration judges are requiring the client to show prejudice from not having received the response to their FOIA request before granting a continuance).

<sup>82</sup> 962 F. Supp. 2d 1106, 1110 (N.D. Cal. 2013).

<sup>83</sup> *Id.* at 1126, 1128–30.

<sup>84</sup> STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 114TH CONG., FOIA IS BROKEN: A REPORT (2016).

<sup>85</sup> Justin Elliott, *Trying (and Trying) To Get Records From the 'Most Transparent Administration' Ever*, PROPUBLICA (Mar. 11, 2016, 8 o'clock AM), <http://www.propublica.org/article/trying-to-get-records-from-most-transparent-administration-ever> [<http://perma.cc/L3Q2-QTDP>].

<sup>86</sup> *Predict Your FOIA Request Success*, DATA.WORLD, [http://datadotworld.shinyapps.io/foia\\_shiny\\_app](http://datadotworld.shinyapps.io/foia_shiny_app) [<http://perma.cc/984W-LJY2>]; see also data.world, *Predict if Your FOIA Request Will Succeed*, JOURNALIST'S RESOURCE (July 10, 2017), <http://journalistsresource.org/tip-sheets/predict-foia-request-will-succeed> [<http://perma.cc/H9CG-VTZ3>] (describing the motivations behind the project).

Act (FOIA) request can be frustrating, largely because it's hard to know what the government agency receiving the request will do: respond, delay, ignore."<sup>87</sup>

These are not just anecdotes. Though FOIA requires agencies to respond to requests within 20 business days,<sup>88</sup> in fiscal year 2016 the average processing time across all Government agencies even for requests designated as "simple" exceeded that time frame (28.04 days), and for those requests designated as "complex," the average processing time was 128.47 days.<sup>89</sup> These are, of course, averages, which means that particular agencies' averages and particular requests can greatly exceed these time frames. For example, the longest time it took to answer a simple request at DHS was 1,202 days, and a complex request 1,770.<sup>90</sup> Meanwhile, examples abound of agencies battling substantial backlogs, including DHS components.<sup>91</sup>

Alongside this backdrop, as documented here, DHS is receiving hundreds of thousands of first-person FOIA requests. These requests may serve many valuable functions but do not serve FOIA's primary goal of informing the public about matters of concern for democratic oversight. Comparatively, news media, nonprofit watchdog groups, and other public interest requesters whose requests are much more likely to advance the primary objective of FOIA are few and far between.

Elsewhere I have made the case that at some agencies, a glut of commercial requesters has, in effect, "crowded out" the news media and other public-interest requesters.<sup>92</sup> In other words, the deluge of requests that advance private interests necessarily drains agency resources, increases response times, and reduces agency attention to public-interest requesters. Of course, no definitive causal link can be tested.

But the same logical inference can be drawn here as to first-person requesters, who likewise largely advance private interests. First-person FOIA requests, which constitute up to 98 percent of requests at some DHS components, necessarily tax the system and leave fewer resources for FOIA activities that advance public, rather than private, interests. One way in which this is likely to happen is FOIA officer specialization. When FOIA officers are tasked with fulfilling routine first-person requests day in and day out, they are likely to become quite skilled at searching for, reviewing, and redacting those records. They know what systems of records to search, how to contact the program offices responsible for those systems, and what kinds of exempt information is likely to be contained in those records. When the odd media request comes in, typically for something newsworthy, a FOIA officer is much less likely to have the skillset to handle it adeptly, because it is not the bulk of work that they perform. As a result, media requesters may in fact even get lower-quality service than first-person requesters at some agencies. At the very least, responses to their requests, even if substantively the same, are likely to be hugely delayed by the glut of first-person requesters.

### III. ADDRESSING FIRST-PERSON INFORMATION NEEDS OUTSIDE OF FOIA

For noncitizens who want their own files that are stashed in DHS offices, FOIA undoubtedly serves a valuable purpose. For these requesters without other options, FOIA serves as stopgap that allows at least some way to obtain information that may be critical to securing relief from immigration enforcement or an affirmative immigration benefit to which they are entitled. But as described above, FOIA is often serving those interests poorly, duplicating agency efforts, and hindering FOIA's oversight mission.

Despite these problems, we should not endeavor to curtail FOIA rights available to the public. Indeed, we have had little past success trying to limit or condition access to records based on motivations or likely public interest. For example, prior to FOIA's enactment in 1966, the Administrative Procedure Act (APA) had a records access provision that supposedly restricted access to Government records to

<sup>87</sup> Id.

<sup>88</sup> 5 U.S.C. § 552(a)(6)(A)(i) (2012).

<sup>89</sup> FOIA SUMMARY 2016, *supra* note 3, at 13.

<sup>90</sup> Privacy Office, 2016 Freedom of Information Act Report to the Attorney General of the United States, DEPT OF HOMELAND SECURITY 11 (Feb. 2017), <http://www.dhs.gov/sites/default/files/publications/FY%202016%20DHS%20FOIA%20Annual%20Report.pdf> [<http://perma.cc/LAP3-QCEG>].

<sup>91</sup> See, e.g., *FOIA Backlog Skyrockets at US Citizenship and Immigration Services*, THE FOIA PROJECT (May 8, 2017), <http://foiaproject.org/2017/05/08/uscis-backlog-skyrockets/> [<https://perma.cc/D64W-DWBQ>] (noting that "the backlog of unanswered FOIA requests has tripled, climbing from 17,998 at the end of December 2014 to 46,550 at the end of December 2016").

<sup>92</sup> Margaret B. Kwoka, FOIA, Inc., 65 Duke L. J. 1361, 1422–24 (2016).

“persons properly and directly concerned” with the information.<sup>93</sup> FOIA was enacted expressly to disavow any restriction based on identity or purpose, precisely because this limitation operated so poorly that agencies used it as an excuse to deny access arbitrarily.<sup>94</sup> And any shift toward a litmus test for a requester’s purpose or identity will simply embroil agencies in more battles over who is entitled to submit a FOIA request, draining more resources and potentially giving agencies tools to hide the very kinds of Government conduct FOIA was designed to bring into the light.

Instead, examination of first-person FOIA reveals opportunities for agencies to better tailor the provision of information to individuals whom the files concern, obviating the need to file a first-person FOIA request without limiting anyone’s right to do so. Alternative mechanisms would both remove the pressure on FOIA to fill the void where no other access is provided and better meet the needs of the persons seeking access to their own files. Evidence from other agencies shows that where members of the public have specific information needs that agencies are meeting well through mechanisms outside of FOIA, they avail themselves of those tailored alternatives. At DHS, there are several promising methods that might reduce the need for individuals to rely on FOIA.

#### *a. Administrative Discovery*

If eliminating the need for such a substantial volume of first-person FOIA requests is a laudable goal, as I think it is, one of the most apparent opportunities arises when requesters seek information relating to a pending administrative proceeding. In these cases, expanded administrative discovery may prevent the need for the flood of FOIA requests and better serve the litigants, the proceeding, and even the agency.

To be clear, courts have never found a categorical Constitutional right to pre-hearing discovery in administrative proceedings.<sup>95</sup> Moreover, the Administrative Procedure Act, which provides a baseline set of procedures that apply to all agency proceedings, enumerates procedures for subpoenas only to the extent the subpoenas are “authorized by law,” meaning they would have to be provided for in a particular context by statute or agency regulation.<sup>96</sup>

Nonetheless, discovery in administrative proceedings has long been favored. Early in the history of the APA, the Administrative Conference of the United States (ACUS) recommended “that agencies adopt rules providing for discovery against the parties and against the agency to the extent and in the manner appropriate to their respective proceedings.”<sup>97</sup> In 1993, ACUS issued model adjudication rules which adopted extensive discovery procedures akin to those available under the Federal Rules of Civil Procedure.<sup>98</sup> In fact, agencies like the SEC that have not adopted broad discovery rights in administrative proceedings have come under heavy attack.<sup>99</sup> As a result, many agencies have adopted broad discovery rights, including those that adopt the ACUS-recommended model of following Federal court discovery practices.<sup>100</sup>

But in other proceedings, discovery rights are all but nonexistent, and first-person FOIA requesting serves as a stand-in. Removal proceedings are a prime example. In immigration court—an administrative adjudicatory body run by the Executive Office of Immigration Review—the only discovery available is by applying for a sub-

<sup>93</sup> 5 U.S.C. § 1002(c) (1964).

<sup>94</sup> See Kwoka, *supra* note [sic] Error! Bookmark not defined., at 197 (detailing FOIA’s break from the previous APA so-called disclosure regime).

<sup>95</sup> See *Kelly v. EPA*, 203 F.3d 519, 523 (7th Cir. 2000); *Alexander v. Pathfinder, Inc.*, 189 F.3d 735, 741 (8th Cir. 1999); *NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 857–58 (2d Cir. 1970); *Chafian v. Ala. Bd. of Chiropractic Exam’rs*, 647 So. 2d 759, 762 (Ala. Civ. App. 1994); *Pet v. Dep’t of Health Servs.*, 542 A.2d 672,677 (Conn. 1988); *In re Herndon*, 596 A.2d 592, 595 (D.C. 1991); *In re Tobin*, 628 N.E.2d 1268, 1271 (Mass. 1994); *State ex rel. Hoover v. Smith* 1482 S.E.2d 124, 129 (W. Va. 1997).

<sup>96</sup> 5 U.S.C. § 555(d) (2012) (“Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought.”).

<sup>97</sup> SELECTED REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, S. Doc. No. 88–24, at 12 (1963).

<sup>98</sup> See MODEL ADJUDICATION RULES WORKING GRP., ADMIN. CONFERENCE OF THE U.S., MODEL ADJUDICATION RULES (1993), <http://www.acus.gov/sites/default/files/documents/1993-model-adjudication-rules.pdf> [<http://perma.cc/2G7D-EYK3>].

<sup>99</sup> See, e.g., David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1169 (2016) (noting that limited SEC administrative discovery leads litigants to choose actions in Federal court over actions before an agency administrative law judge).

<sup>100</sup> For example, in 2009, the Federal Trade Commission adopted administrative procedures for ALJ proceedings with broad, Federal-court-style discovery rights. See 16 C.F.R. § 3.31 (2016).

poena, which requires a motion and various justifications.<sup>101</sup> Geoffrey Heeren has documented that requests for subpoenas and related depositions were routinely denied early on, and litigants apparently stopped even trying to use them after some time because attempts were futile.<sup>102</sup> In a 2010 decision, the Court of Appeals for the Ninth Circuit ruled that the Government has an obligation to provide helpful information from a noncitizen's file in the course of removal proceedings, at least in circumstances in which the file would demonstrate non-removability, such as when those records would prove the individual is actually a citizen.<sup>103</sup> But because a showing of prejudice is required to make out such a claim,<sup>104</sup> the Government has read the decision narrowly and, even in the Ninth Circuit, has not followed its mandate strictly.<sup>105</sup>

Interviews with immigration attorneys confirm that, in practice, formal discovery as of right [sic] is not available in immigration court and that trial attorneys prosecuting immigration cases on behalf of DHS, even those located within the Ninth Circuit, are not providing access to discovery materials through immigration court proceedings.<sup>106</sup> Attorneys also largely agreed that when documents were provided by the trial attorney to immigration defense counsel, it was typically through the informal practice of a particular trial attorney or office or as a result of a relationship with the particular attorney.<sup>107</sup>

Discovery in immigration court could improve efficiency at the administrative level. To begin, attorneys are nearly always seeking the very records in the possession of the trial attorney in the proceeding.<sup>108</sup> Making a FOIA request, however, requires the individual or their attorney to file with the main FOIA office, which then has to assign the request to a FOIA officer to process. That FOIA officer will almost inevitably come back around to looking at the same file that the trial attorney has on his desk. Involving another person in the process who has no local or personal connection with the proceeding seems inevitably inefficient for the agency. To be fair, at users, the only agency that separately tracks FOIA requests related to a pending removal proceeding, only 3 percent of requests fall in that category.<sup>109</sup> But because of the volume of requests at that agency, that still translates to over 5,000 requests a year at users alone.<sup>110</sup>

Beyond mere resources, however, proceedings would become fairer. If the Government attempts to inappropriately withhold or redact certain records in the course

<sup>101</sup> Office of the Chief Immigration Judge, *Immigration Court Practice Manual*, U.S. DEP'T JUSTICE 93 (May 15, 2017), [http://www.justice.gov/sites/default/files/pages/attachments/2017/05/26/practice\\_manual1.pdf](http://www.justice.gov/sites/default/files/pages/attachments/2017/05/26/practice_manual1.pdf) [<http://perma.cc/9K67-JU4D>].

<sup>102</sup> Heeren, *supra* note 24, at 1583.

<sup>103</sup> *Dent v. Holder*, 627 F.3d 365, 374–75 (9th Cir. 2010).

<sup>104</sup> *Jd.*, at 373–74; *DaSilva v. U.S. Att'y Gen.*, No. 13–13, 2013 U.S. Dist. LEXIS 56507, at \*5–6 (E.D. La. Apr. 19, 2013) (requiring a robust showing of prejudice to make out a due process claim based on withheld records).

<sup>105</sup> Heeren, *supra* note 24, at 1586.

<sup>106</sup> Telephone Interview with Robert Blackshear, *supra* note 25; Telephone Interview with Peggy Brewer, *supra* note 25; Telephone Interview with Russell Flores, *supra* note 25; Telephone Interview with Gloria Glen, *supra* note 25; Telephone Interview with Elizabeth Hilton, *supra* note 35; Telephone Interview with John Rivera, *supra* note 45; Telephone Interview with William Yates, *supra* note 48.

<sup>107</sup> See, e.g., Telephone Interview with Robert Blackshear, *supra* note 25 (“It varies widely between the field offices . . . Sometimes some offices will provide you with the I-213, the NTA, anything you need. Especially ones that you’re cool with, that you work with all the time. They’ll give you what you want and what you need in order to properly represent the guy. Other field offices are like, ‘No file FOIA.’”); Telephone Interview with Peggy Brewer, *supra* note 25 (noting that while sometimes a court will order a document to be produced, most of the time as to the most important documents, the attorney will provide them voluntarily); Telephone Interview with William Yates, *supra* note 48 (“Some [trial attorneys] that I[] have some kind of relationship with D, they’ll tell me like ‘Hey, you know what? We have this,’ and they’ll give [the documents] to me.”). But see Telephone Interview with Gloria Glen, *supra* note 25 (“[Y]ou can contact government counsel and ask them for whatever specific document you’re looking for, but you’re almost never going to get it.”); Telephone Interview with John Rivera, *supra* note 45 (“[V]ery rarely have I had anybody be cooperative” about discovery.).

<sup>108</sup> See, e.g., Telephone Interview with John Rivera, *supra* note 45 (“It’s [] absurd that the government will run fingerprints and not provide the respondent and their attorney with the results. It doesn’t make any sense from anybody’s perspective. They’re already doing it anyway. They’re already getting that information. They already have that and that would dispose of a lot of things like are you eligible for cancellation? Are you eligible for a bond?”).

<sup>109</sup> See users data, *supra* note 10. In fiscal year 2015, users started tracking those requests related to pending removal proceedings as “track 3” in April of that year. Thus, only 5 months of data are included for these purposes, which show 2,599 track 3 requests out of 82,402, or 3 percent. Extrapolating that percentage to the full 165,233 requests that year, that would be the equivalent of approximately 5,211 requests. *Id.*

<sup>110</sup> *Id.*

of a discovery process, the immigration judge would be empowered to adjudicate the rights of the individual to access the records and ensure the Government does not over-withhold. This would reduce the chances that barriers to information foil a valid defense or claim the individual might otherwise make. It would also ensure that individuals do not give up their otherwise potentially meritorious claims or defenses simply because they are unwilling to wait for the FOIA process to run its course. In this way, both individuals and the agency might be better served.

Discovery would also improve a potentially much larger group of noncitizens' matters before DHS: Applications by noncitizens for affirmative benefits, such as an adjustment of status from a non-immigrant visa to an immigrant visa (green card holder) or naturalization. There, once a facially adequate application is submitted, there is typically an interview with a users official if the government has any doubt about the merit.<sup>111</sup> However, those interviews can end in surprise revelations about evidence relied on by the Government, which may or may not be accurate.<sup>112</sup> One attorney I spoke to suggested that it would be easy for the Government to disclose, in advance of the interview, evidence on which it planned to rely in making its decision, so that the noncitizen could bring any additional evidence that might bear on its authenticity or relevance.<sup>113</sup>

*b. Eliminate Request and Return*

Another group of first-person FOIA requesters uses FOIA to obtain documents needed to demonstrate entitlement to a Government benefit. That is, a requester receives a document under FOIA from the Government only to return it to the Government with an application or submission connected with another agency proceeding.

DHS may have opportunities to eliminate this practice of requesting and returning the record. In many cases where noncitizens apply for affirmative immigration benefits, they are required to submit proof of certain past immigration actions, such as lawful entry into the country on a visa, or a prior petition for benefits that was filed on their behalf. If long periods time have passed, applicants may have lost these documents, but the Government retains copies. One attorney explained:

“[O]ne example is if someone enters lawfully but they have no proof of it, right, you're required to get—they request an I-94 [a form documenting arrivals to the United States]. Oftentimes USCIS has that record, so why do we have to do a FOIA to produce that record? . . . Can you provide us with this proof of entry if we know it exists?”<sup>114</sup>

Accordingly, eliminating request-and-return may realize significant benefits for both the individual and the Government. The process can delay the requester's application for a benefit for which they qualify, and it requires the agency to engage in two separate processes—one under FOIA and one to determine the benefit.

*c. On-line Access*

Another promising avenue for meeting the needs of first-person FOIA requesters are on-line platforms for access. On-line access may seem like an odd suggestion given that first-person requesting is typically targeted at information that poses privacy concerns. Yet we all routinely access our private information through logins or other verification mechanisms, and we typically accept the host's best efforts at protecting data privacy. Of course, whenever the Government considers on-line access, it should consider those risks, the sensitivity of the information, and the necessary measures to guard against any risk. But these risks should not prevent consideration of on-line access as an overall positive move in some cases.

Indeed, at least one DHS component has tried on-line access initiatives to obviate the need for categories of FOIA requests, even when individual information was at issue. In 2014, CBP launched a website that would allow noncitizen visitors to the United States who are not Green Card holders to access their arrival and departure

<sup>111</sup> Telephone Interview with Elizabeth Hilton, *supra* note 25.

<sup>112</sup> *Id.* (“I’ll go to an interview—just recently an officer will say, oh, well—to the client, you made a false claim of citizenship at the port of entry in 2006, and the client will say, ‘no, I didn’t do that.’ ‘Well, we have a record that you did,’ and they’ll deny the case. But what are they talking about? Is it the right person? Because a lot of our clients have the same names as their siblings or, you know, is there a—based on those facts, would there be an exception to the false claim of citizenship? Well, I don’t know because I don’t have the facts, the officer does and this happens all the time. And when I say can I get a copy of that . . . a lot of times they’ll say, ‘no, you could see it through a FOIA request.’”)

<sup>113</sup> *Id.*

<sup>114</sup> Telephone Interview with Peggy Brewer, *supra* note 25.

records for the past 5 years.<sup>115</sup> As the agency explained at the time, “[t]his electronic travel-history function means that travelers may no longer need to file Freedom of Information Act requests to receive their arrival/departure history, greatly speeding their process.”<sup>116</sup> CBP simply required the individual to enter their name, date of birth, and passport information to retrieve the records from its database.<sup>117</sup> Basic verification may well be sufficient for access to these records, since the underlying data is, although personal, not the most sensitive.

#### IV. CONCLUSION

DHS has strong leadership in the Privacy Office and in the FOIA offices of the components. It has an opportunity to craft solutions for noncitizens seeking their own immigration records outside of FOIA that will make the volume of FOIA requests unnecessary. These other mechanisms also should be designed to best serve the members of the public whose interest in these records is nothing short of critical. Creative alternatives to FOIA will improve the relationship between the public and the agencies, and between oversight requesters and FOIA offices.

STATEMENT SUBMITTED BY CHAIRWOMAN KOCHITL TORRES SMALL

OCTOBER 17, 2019

We, the undersigned organizations, thank the Oversight, Management, and Accountability Subcommittee of the Committee on Homeland Security for scheduling this important hearing on improving public access to critical records at the Department of Homeland Security. We write to recommend that the committee expand its oversight of the Department’s implementation of the Freedom of Information Act (FOIA) and ensure its compliance with the statute as enacted by Congress.

The Department of Homeland Security faces a significant challenge as it and its component agencies respond to approximately 40 percent of all Freedom of Information Act requests sent to the Federal Government in 2018.<sup>1</sup> It also has a significant backlog of requests and responds to a range of topics including everything from immigration files to complex cases involving transnational crime. There is a crucial public interest at stake in ensuring the public can exercise its right to access Government information, it is therefore critical that the agency significantly improve both its records management and its processes for complying with FOIA.

#### RECOMMENDATION: REMOVE ALIEN FILES REQUESTS FROM THE FOIA PROCESS

Requests related to individuals who are dealing with an immigration enforcement action against them consume a disproportionate amount of the Department’s limited FOIA resources. This imbalance results in duplication of work, unnecessary delays in immigration courts, and a distorted public view of the FOIA statute, the purpose of which is to provide access to information about Government, not as a vehicle for individuals to access information about themselves.

In a recent presentation to the FOIA advisory committee, Professor Margaret Kwoka stated:<sup>2</sup>

“The person who is in removal proceeding has to file a FOIA request with the main FOIA office which then has to assign that request to a FOIA officer for processing. That person (the FOIA officer) will inevitably come back around and look to—and find—the same sets of records that the trial attorney has on their desk in immigration court. So this not only duplicates work in some sense but also means the judge in immigration proceedings—in immigration court—can’t resolve any disputes that

<sup>115</sup>Arrival/Departure History Now Available on I-94 Webpage, U.S. CUSTOMS & BORDER PROTECTION (Apr. 30, 2014), <http://www.cbp.gov/newsroom/spotlights/arrival-departure-history-now-available-i-94-webpage> [<http://perma.cc/C9B3-R2BH>].

<sup>116</sup>Id.

<sup>117</sup>Id.; see also *View Travel History*, U.S. CUSTOMS & BORDER PROTECTION, <http://i94.cbp.dhs.gov/l94/#/history-search> [<http://perma.cc/HX95-3F85>] (providing form for non-resident visitors to access their records). For reasons that have not been publicly explained, the agency has asserted that “the I-94 search tool has not eliminated FOIA requests for the records.” Compliance Review of Customs and Border Protection Freedom of Information Act Program, OFF. GOV’T INFO. SERVS. 16, <http://www.archives.gov/files/ogis/assets/cbp-foia-compliance-report.pdf> [<http://perma.cc/UEU8-F77A>].

<sup>1</sup>Department of Homeland Security, *FOIA Annual Report for 2018*, [https://www.dhs.gov/sites/default/files/publications/dhs\\_fy2018\\_foia\\_report\\_updated.pdf](https://www.dhs.gov/sites/default/files/publications/dhs_fy2018_foia_report_updated.pdf).

<sup>2</sup>Professor Margaret Kwoka, *FOIA Advisory Committee at the National Archive*, June 6, 2019 <https://www.archives.gov/ogis/foia-advisory-committee/2018-2020-term/meetings>.

arise over the records. Many attorneys noted that when they hadn't received a response to their FOIA request, they will use that as a basis for continuance in immigration court so thereby potentially holding up the underlying proceedings and using greater agency resources in that regard as well (emphasis added)."

There is no statutory requirement that immigrants must request their Alien Files (A-files) through the Freedom of Information Act; instead, the requirement comes from DHS regulations. Moreover, in *Dent v Holder*, the 9th Circuit held that immigrants have a right to proactive disclosure of their records and are not required to seek them using the FOIA process.<sup>3</sup> To preserve limited resources and streamline the process for both requestors and FOIA officers, DHS must enact new regulations under the Administrative Procedures Act or create a new system for processing of A-files that doesn't rely on the Freedom of Information Act. We encourage the committee to direct DHS to update its regulations and reform its internal policies to separate this process from FOIA.

#### RECOMMENDATION: ALLOCATE FUNDING FOR DIGITIZING RECORDS

The Department of Homeland Security spends a significant portion of its FOIA resources processing immigration-related files; a burden that could be reduced by modernizing the process. The committee should allocate funding for technology that allows the various components to more quickly share records as needed for the purposes of FOIA. A recent report by the Office of Government Information Services recommended, in part, that USCIS and DHS:<sup>4</sup>

"Weigh the costs and benefits of producing machine-readable digitized versions of A-Files that will enable the use of computer assisted review tools; [and] explore how technology can be used to ensure that records do not need to be re-processed multiple times."

Given the scale of DHS FOIA operations, allocation of funding for such technology could result in reduced spending in the long-term by reducing duplicative work and making it easier to process requests.

#### RECOMMENDATION: EXPAND FEE WAIVERS AND EXPEDITED PROCESSING

The committee should call on the Department of Homeland Security to expand the use of fee waivers and expedited processing under FOIA. In 2018, DHS received 4,103 requests for expedited processing and granted it in only 588 cases; approximately 14 percent of the time.<sup>5</sup> Expedited processing is crucial to the public's right to know information of critical public interest, to ensure timely research by academics, and to uphold the due process rights of immigrants. The committee should further direct the agency to expand the use of fee waivers, in particular by the U.S. Coast Guard, which accounts for 80 percent of FOIA fee requests for the entire Department. Requiring the public to pay fees to access public documents is detrimental to the right to information, sometimes limiting access to those who are able to pay exorbitant fees. In fiscal year 2018, DHS collected \$18,518 in fees which amounts to approximately 0.03 percent of the entire FOIA budget of DHS, demonstrating that FOIA fees are not crucial to funding the FOIA office.

#### RECOMMENDATION: EXPAND COOPERATION BETWEEN COMPONENTS

Given the size of DHS, and the overlapping missions of many of its components, the committee should direct DHS to expand cooperation between its offices under FOIA. It is common for DHS to receive a FOIA request and redirect the request to one of its components for processing. While it is encouraging that these organizations communicate with each other to fulfill requests, this process can also cause unnecessary delays. For the purposes of FOIA, the committee should expand, through legislation if necessary, the access of FOIA officers to electronic records. Currently, many FOIA officers do not have direct access to the records that have been requested and must retrieve records from other agency employees. Expanding the access of FOIA officers within and between agencies would minimize delays and expand cooperation between components.

<sup>3</sup>National Immigration Council. "*Dent v. Holder* Strategies for Obtaining Documents from the Government during Removal Proceedings." June 12, 2012, [https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/dent\\_practice\\_advisory\\_6-8-12.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/dent_practice_advisory_6-8-12.pdf).

<sup>4</sup>Office of Government Information Service. *Compliance Review of U.S. Citizenship and Immigration Services*. February 9, 2018, <https://www.archives.gov/files/uscis-foia-compliance-assessment-report.pdf>.

<sup>5</sup>Department of Homeland Security *supra* (n 1) 18.



## RECOMMENDATION: DIRECT DHS TO REDUCE ITS RELIANCE ON EXEMPTIONS

FOIA officers at the Department of Homeland Security have a pattern of over-use of FOIA exemptions. In 2018, DHS received 395,751 FOIA requests and applied a redaction more than 400,000 times. In particular, the Department relies heavily on FOIA's Exemption 7, which allows the Government to withhold documents that are law enforcement-sensitive.<sup>6</sup> In almost half of requests for documents, the Department argued that redacted information, if released, "could reasonably be expected to risk circumvention of the law," a rate of use that clearly suggests excessive redactions. The committee should therefore direct DHS and its components to review their pattern and practice related to the use of exemptions.

## CONTINUING OVERSIGHT AS A CHECK AGAINST POTENTIAL DHS ABUSES

Freedom of Information Act requests are a critical tool used to uncover evidence of potential rights abuses by the Department of Homeland Security. For example, following reports of mistreatment of at-risk detainees in Federal detention centers, American Oversight is suing under FOIA to obtain records on the treatment of transgender, pregnant, and juvenile detainees. Records recently obtained by the Project On Government Oversight shed light on ICE's use of solitary confinement for detainees with mental illnesses.

Examples such as these demonstrate that not only is it necessary for the committee to direct DHS to reform its FOIA practices in the ways recommended above, but the committee must also continue its vigorous oversight of DHS's compliance with FOIA as a way to protect against potential civil and human rights violations by the Department.

AMERICAN OVERSIGHT  
 DEMAND PROGRESS  
 ELECTRONIC FRONTIER FOUNDATION  
 GOVERNMENT ACCOUNTABILITY PROJECT  
 NATIONAL FREEDOM OF INFORMATION COALITION  
 NATIONAL SECURITY ARCHIVE  
 OPEN THE GOVERNMENT  
 PROJECT ON GOVERNMENT OVERSIGHT

Ms. TORRES SMALL. The Members of the subcommittee may have additional questions for the witnesses, and we ask that you respond expeditiously in writing to those questions.

Without objection, the committee record shall be kept open for 10 days.

Hearing no further business, the subcommittee stands adjourned.  
 [Whereupon, at 4:06 p.m., the subcommittee was adjourned.]

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<sup>6</sup> *infra*.



## APPENDIX I

### LETTER FROM THE ELECTRONIC PRIVACY INFORMATION CENTER

October 18, 2019.

The Honorable XOCHITL TORRES SMALL, Chairwoman,  
The Honorable DAN CRENSHAW, Ranking Member,  
U.S. House Committee on Homeland Security, Subcommittee on Oversight, Management, and Accountability, H2-176 Ford House Office Building, Washington, DC 20515.

DEAR CHAIRWOMAN SMALL AND RANKING MEMBER CRENSHAW: We write to you in regarding your hearing on “The Public’s Right to Know: FOIA at the Department of Homeland Security”<sup>1</sup> to share our perspective and Freedom of Information Act (“FOIA”) work. The Electronic Privacy Information Center (“EPIC”) is a nonpartisan research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.<sup>2</sup> EPIC is a leading advocate for open government and democratic values in the information age. We value FOIA and the work of this committee to promote open government.

#### IMPORTANCE OF FOIA

The FOIA is critical for the functioning of democratic government because it helps ensure that the public is informed about matters of public concern. Public awareness of our Government’s activity through the FOIA not only allows for a more informed public debate over the activities of Government, but also ensures accountability for Government officials. Public debate fosters the development of more robust security systems and leads to solutions that better respect the Nation’s democratic values. EPIC’s FOIA litigation has resulted in disclosure of critical information about the activities of the Government. Our litigation has also generated case law that benefits the FOIA requesters and the open Government community across the country.

This is particularly true in matters concerning privacy and civil liberties. Among EPIC’s most significant undertakings in our 25 years was the litigation against DHS that led to the removal the backscatter X-ray devices from U.S. airports. Those devices were ineffective, invasive, and unlawful. In *EPIC v. DHS*, 653 F.3d 1 (D.C. Cir. 2011), the DC Circuit Court of Appeals held that the agency failed to conduct a public rulemaking as required by law and must also ensure that passengers are given the opportunity to opt-out if they so choose. We are now litigating similar regarding DHS’s use of facial recognition technology, uncovering similar problems with the technology and the agency’s failure to undertake a rulemaking prior to deployment.<sup>3</sup>

In *EPIC v. DHS*, 18–1268 (D.D.C. filed May 30, 2018), EPIC sued to obtain records about—and to block the development of—a DHS system designed to monitor journalists, news outlets, and social media accounts. This “Media Monitoring Service” platform would have included an “unlimited” database of personal information from journalists and media influencers, including location data, contact information, employer affiliation, and past content. Because of EPIC’s lawsuit, the DHS suspended the controversial program. In a settlement with EPIC, the agency acknowl-

<sup>1</sup>The Public’s Right to Know: FOIA at the Department of Homeland Security, House Comm. on Homeland Security, Subcomm. on Oversight, Management, and Accountability, 116th Cong. (Oct. 17, 2019), <https://homeland.house.gov/the-publics-right-to-know-foia-at-the-department-of-homeland-security>.

<sup>2</sup>See EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

<sup>3</sup>*EPIC v. CBP (Biometric, Entry/Exit Program)*, No. 17–1438 (D.D.C. filed July 19, 2017), See <https://epic.org/foia/dhs/cbp/biometric-entry-exit/>; *EPIC v. CBP (Alternative Screening Procedures)*, No. 19–cv–689 (D.D.C. filed Mar. 12, 2019); See <https://epic.org/foia/dhs/cbp/alt-screening-procedures>.

edged that it would discontinue use of the system and agreed to complete the required Privacy Impact Assessments before restarting the program. EPIC also obtained records through the lawsuit showing that the DHS ignored the harms that media monitoring would have caused to privacy and press freedom.<sup>4</sup> In an earlier FOIA lawsuit, *EPIC v. DHS*, 11–2261 (D.D.C. filed Dec. 20, 2011), EPIC obtained documents that revealed that the DHS is monitoring social networks and media organizations for criticism of the agency. EPIC also obtained a list of very broad search terms used by the agency to monitor social media. As a result of EPIC’s findings, Congress held a hearing on “DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy.”<sup>5</sup>

And in response to a FOIA request to Customs and Border Protection, CBP released documents detailing the agency’s scramble to implement the flawed Biometric Entry-Exit system, a system that employs facial recognition technology on travelers entering and exiting the country.<sup>6</sup> The documents describe the administration’s plan to extend the faulty pilot program to the Transportation Security Administration, Immigration and Customs Enforcement, and the Coast Guard. The released information also includes a memorandum of understanding that shows there are no limitations on how partnering airlines can use the facial recognition data collected at airports. The documents obtained by EPIC were covered in-depth by Buzzfeed News<sup>7</sup> and cited by Members of Congress commenting on their concerns of facial recognition.

These are just 3 examples of the many FOIA cases EPIC has pursued with DHS over the years. They demonstrate the importance of the Freedom of Information Act and the oversight like the subcommittee is conducting today.

#### EPIC’S PREVIOUS FOIA REFORM EFFORTS AT DHS

##### (1) *Political Review of FOIA Requests*

In 2011, EPIC testified before the House Oversight Committee regarding Homeland Security’s political review of FOIA requests and the effects of the agency’s policies on requesters.<sup>8</sup> The hearing arose after reports that DHS career staff repeatedly questioned the political review policy.<sup>9</sup> The hearing followed an earlier release of 1,000 agency documents revealing the long-standing process of vetting FOIA requests by political appointees. In a previous letter to the committee, EPIC and a coalition of open Government groups wrote that FOIA does not permit agencies to select requests for political scrutiny.<sup>10</sup> Thanks to the bipartisan work at the time of the House Oversight Committee, that practice was suspended.

##### (2) *FOIA and Fee Waivers*

Beginning in 2012, EPIC led an effort to reform the DHS practice of unnecessarily failing to grant fee waivers. As we explained “the DHS and its components routinely deny fee waiver requests to individuals and groups. This practice is harmful to requesters and contravenes the purpose of FOIA and the specific reason for the fee waiver provision.”<sup>11</sup> In the letter to the Office of Government Information Services, the FOIA Ombudsman, EPIC urged an investigation to assess the impact of this agency practice. EPIC asked: How often does the DHS deny a FOIA requesters’ request for a blanket fee waiver? What percentage of FOIA requesters in receipt of a constructive denial follow up with the agency and, when they do not, has the fee

<sup>4</sup> EPIC, *EPIC v. DHS (Media Monitoring Services)*, <https://epic.org/foia/dhs/media-monitoring-services/>.

<sup>5</sup> *DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy*, H. Comm. on Homeland Security, Subcomm. on Counterterrorism and Intelligence, 112th Cong. (2012).

<sup>6</sup> EPIC, *EPIC v. CBP (Biometric Entry/Exit Program)*, <https://epic.org/foia/dhs/cbp/biometric-entry-exit/>.

<sup>7</sup> Davey Alba, *The U.S. Government Will Be Scanning Your Face At 20 Top Airports, Documents Show* (Mar. 11, 2019), <https://www.buzzfeednews.com/article/daveyalba/these-documents-reveal-the-governments-detailed-plan-for>.

<sup>8</sup> Testimony and Statement for the Record of John Verdi, Senior Counsel, EPIC: Before the House Committee on Oversight and Government Reform (Mar. 31, 2011), [https://republicans-oversight.house.gov/wp-content/uploads/2012/01/Verdi\\_Testimony.pdf](https://republicans-oversight.house.gov/wp-content/uploads/2012/01/Verdi_Testimony.pdf).

<sup>9</sup> See Jake Sherman, *Probe Reviews Tensions at DHS*, Politico (Mar. 29, 2011), <https://www.politico.com/story/2011/03/probe-reveals-tensions-at-dhs-052114>.

<sup>10</sup> Letter from Marc Rotenberg, et al. to Darrell Issa, Chairman and Elijah Cummings, Ranking Member, House Comm. on Oversight and Gov’t Reform (Feb. 15, 2011), [https://epic.org/open\\_gov/foia/Issa\\_FOIA\\_Oversight\\_Ltr\\_02\\_15\\_11.pdf](https://epic.org/open_gov/foia/Issa_FOIA_Oversight_Ltr_02_15_11.pdf).

<sup>11</sup> Letter from EPIC to Miriam Nisbet, Director, Office of Gov’t Info. Serv. (June 1, 2012), <https://epic.org/foia/dhs/EPIC-DHS-FOIA-OGIS-Ltr-06-01-12.pdf>.

waiver request ever been deemed abandoned? Has a FOIA requester who requester a blanket fee waiver ever had fees assessed against them?

The OGIS investigated and the DHS reformed its practices regarding fee waivers. As the OGIS explained later that year, the DHS implemented a new Department-wide policy where the agency conditionally grants fee waiver requests if the request meets the 6 analytical factors required under DOJ guidelines for a fee waiver and that the requester cannot appeal a conditional fee waiver grant because it is not a final decision.<sup>12</sup> OGIS also told EPIC that DHS will start informing non-commercial requesters who chose not to pay fees that they are entitled to 2 free hours of search time and 100 free pages of duplication. DHS also agreed to provide requesters with an itemized breakdown of fees—an action the agency previously did not undertake.

### (3) Reforming Impermissible Administrative Closures

In 2014, EPIC and a coalition of open Government groups wrote to OGIS to investigate the Transportation Security Agency and other agencies impermissibly closing FOIA requests and breaching their FOIA obligations.<sup>13</sup> Through “still interested” letters, some Federal agencies notify FOIA requesters that unprocessed requests will be closed by the agency if there is no further communication. In the letter, EPIC and the open Government groups objected to the practice and reminded OGIS that “no provision in the [FOIA] allows for administrative closures.”

OGIS undertook an investigation in the FOIA practices of 6 DHS component agencies later that year.<sup>14</sup> The OGIS director also directed the OGIS Compliance Team to review the use of “still interested” letters Government-wide. In its findings, OGIS found that “there is no guidance or standard for reporting requests that agencies close using still interested letters.”<sup>15</sup> OGIS recommended better reporting on these letters and that the agencies regularly communicate with requesters about the status of their request without having to resort to using still interested letters.<sup>16</sup>

### (4) Improvement of Processing FOIA Requests

In 2016, the DHS released revised FOIA regulations that implemented some of EPIC’s recommendations to revise the agency’s regulation and incorporate new procedures that would ease the public’s efforts to learn about the activities of the Government.<sup>17</sup> EPIC had submitted extensive comments on the proposed changes to the agency’s open Government practices.<sup>18</sup> The DHS agreed to make some changes that improved the processing of FOIA requests. The agency maintained a broad definition of “education institutions” so individual researchers can access Government records at minimal cost, and clarified steps that could be taken to delay “administrative closure,” a controversial agency practice.

EPIC offers further recommendations to improve transparency at the agency.

### DHS Needs to Improve the Processing of FOIA Requests

The Department is one of the largest Federal agencies, with an annual budget of \$92.1 billion for fiscal year 2020.<sup>19</sup> The agency now has 14 components.<sup>20</sup> The annual budget for the Transportation Security Agency alone is \$7.8 billion for fiscal year 2020.<sup>21</sup> Yet the agency has one of the worst FOIA processing records in the Federal Government. According to the Summary of Annual FOIA Reports for Fiscal Year 2018, DHS is responsible for 41 percent of backlogged FOIA requests across

<sup>12</sup>Letter from Miriam Nisbet, Director, Office of Gov’t Info. Serv., to Amie Stepanovich, EPIC (Oct. 12, 2012), [https://epic.org/open\\_gov/foia/OGIS-to-EPIC-re-DHS-10-19-12.pdf](https://epic.org/open_gov/foia/OGIS-to-EPIC-re-DHS-10-19-12.pdf).

<sup>13</sup>Letter from EPIC et al., to Miriam Nisbet, Director, Office of Gov’t Info. Serv. (Oct. 30, 2014), [https://foia.rocks/OGIS\\_Letter\\_final.pdf](https://foia.rocks/OGIS_Letter_final.pdf).

<sup>14</sup>Letter from James Holzer, Director, Office of Gov’t Info. Serv., to EPIC et al. (Aug. 27, 2015), <https://epic.org/foia/ogis/OGIS-Letter-20150828-Administrative-Closures.pdf>.

<sup>15</sup>Office of Gov’t Info. Serv., Nat’l Archives and Records Admin., *Compliance Review of the Use of “Still Interested” Letters Part 1* (May 11, 2016), <https://www.archives.gov/files/ogis/assets/still-interested-part-1-final.pdf>.

<sup>16</sup>Office of Gov’t Info. Serv., Nat’l Archives and Records Admin., *Compliance Review of the Use of “Still Interested” Letters Part 3* (May 11, 2016), <https://www.archives.gov/files/ogis/assets/still-interested-part-3-final.pdf>.

<sup>17</sup>Freedom of Information Act Regulations, 6 C.F.R. Part 5 (2016).

<sup>18</sup>Comments of EPIC to the Dept. of Homeland Sec.: Freedom of Information Regulations 6 CFR Part 5, Docket No. DHS–2009–0036, Notice of Proposed Rulemaking (Sept. 28, 2015), <https://epic.org/apa/comments/EPIC-DHS-FOIA-Comments-Final.pdf>.

<sup>19</sup>Dept. of Homeland Sec., *Fiscal Year 2020 Budget in Brief* 1, [https://www.dhs.gov/sites/default/files/publications/19\\_0318\\_MGMT\\_FY-2020-Budget-In-Brief.pdf](https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_FY-2020-Budget-In-Brief.pdf).

<sup>20</sup>*Operational and Support Components*, Dept. of Homeland Sec. (Nov. 20, 2018), <https://www.dhs.gov/operational-and-support-components>.

<sup>21</sup>Dept. of Homeland Sec., *Fiscal Year 2020 Budget in Brief*, at 30.

the entire Federal Government.<sup>22</sup> Far behind at No. 2 is the Department of Justice with 13 percent of backlogged requests.<sup>23</sup> And significantly, DHS was asked by other agencies for consultations on FOIA requests less frequently than the DOD, the DOJ, or the CIA.<sup>24</sup> That means the backlog problem at the DHS is even higher than the raw numbers suggest.

In past years, the DHS's Chief FOIA Officer Reports describe instances where the DHS Privacy Office partnered with other sub-components to assist in reducing its backlog. For instance, the DHS achieved a backlog reduction fiscal year 2018 when the DHS Privacy Office partnered with OBIM, CBP, and ICE to reduce the backlogs by 12,000 requests.<sup>25</sup> The DHS should continue these partnerships to reduce the agency's backlogs. But the agency must also prioritize the processing of new FOIA requests.

The DOJ *Assessment of Agency Progress in FOIA Administration* clarifies the problem at DHS.<sup>26</sup> According to the DOJ report, the average number of days to process a FOIA request for expedited processing was 13.05, far over other Federal agencies, and earning the lowest rating from the DOJ review.<sup>27</sup> The DHS, as compared with other Federal agencies, also received low marks for several other indicators of FOIA compliance, as determined by the Department of Justice:

- The DHS takes far more time to process simple track FOIA requests (39.11 days) than other Federal agencies;<sup>28</sup>
- At a time when other agencies are making progress reducing FOIA backlogs, the DHS backlog for FOIA appeals increased over 2018;<sup>29</sup> and
- The agency also received low marks for consultations about the processing of the 10 oldest requests.<sup>30</sup>

#### DHS MUST RESPOND TO APPEAL AUTHORITIES

The DHS should respond to appeal authorities when it remands a request back down to an agency for additional information. Otherwise, the agency's inaction is considered a final agency action where the only recourse is for a requester to seek redress through the United States District Court. Not all requesters, however, have the resources to litigate and DHS's inaction constructively exhausts a requester's administrative remedies.

As an example, EPIC submitted a FOIA request to the DHS Office of Intelligence and Analysis.<sup>31</sup> The DHS improperly closed EPIC's request stating that the request did not adequately describe the records sought. EPIC appealed the agency decision and the administrative law judge remanded the request back to the Office of Intelligence and Analysis for further clarification. The DHS failed to provide additional information within the deadline and the appeal authority issued a letter constituting a final agency action. This is not how the FOIA is supposed to work.

#### CONTINUED OVERSIGHT IS CRUCIAL

Oversight of DHS's FOIA implementation is critical because watchdog groups such as EPIC utilize FOIA to keep the DHS accountable. No Federal agency has greater budget authority to develop systems of surveillance directed toward U.S. residents.

We ask that our statement be entered into the hearing record. Please contact us if you would like additional information about EPIC's FOIA matters. We look for-

<sup>22</sup> Dept. of Justice, *Summary of Annual FOIA Reports for Fiscal Year 2018* 10, <https://www.justice.gov/oip/page/file/1170146/download#FY18>.

<sup>23</sup> Id.

<sup>24</sup> Id. at 14.

<sup>25</sup> Dep't of Homeland Security, *2019 Chief Freedom of Information Act Officer Report* 38 (Apr. 2019), [https://www.dhs.gov/sites/default/files/publications/2019\\_chief\\_foia\\_officer\\_report\\_april\\_2019.pdf](https://www.dhs.gov/sites/default/files/publications/2019_chief_foia_officer_report_april_2019.pdf).

<sup>26</sup> Dept. of Justice, *Summary of Agency Chief FOIA Officer Reports for 2018 and Assessment of Agency Progress in FOIA Administration with OIP Guidance for Further Improvement* (June 2018), <https://www.justice.gov/OIP/Reports/2018Summary&Assessment/download#2018>.

<sup>27</sup> Id. at 33.

<sup>28</sup> Id. at 35.

<sup>29</sup> Id.

<sup>30</sup> Id.

<sup>31</sup> Freedom of Info. Act Request from EPIC to Dept. of Homeland Sec. (June 14, 2016), <http://epic.org/foia/dhs/EPIC-16-06-14-DHS-FOIA-20160614-Request.pdf>.

ward to working with the subcommittee on open Government issues of vital importance to the public.  
Sincerely,

MARC ROTENBERG,  
*EPIC President.*  
ENID ZHOU,  
*EPIC Open Government Counsel.*  
CAITRIONA FITZGERALD,  
*EPIC Policy Director.*





## APPENDIX II

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### QUESTIONS FROM CHAIRMAN XOCHITL TORRES SMALL FOR JAMES V.M.L. HOLZER

*Question 1.* During your testimony, you indicated that it would cost Immigration and Customs Enforcement (ICE) more money to have U.S. Citizenship and Immigration Services (USCIS) process FOIA requests on its behalf than if ICE were to process the requests itself. What evidence did you rely upon to reach this conclusion?

Answer. Response was not received at the time of publication.

*Question 2a.* Which DHS components have access to and are already using technology-assisted review (TAR) to facilitate FOIA processing?

Answer. Response was not received at the time of publication.

*Question 2b.* Are there plans to increase that capacity across the Department? If so, how and on what time line?

Answer. Response was not received at the time of publication.

*Question 2b.* How does the Department inform FOIA requesters about the use of TAR so that requesters can assess the adequacy of a search?

Answer. Response was not received at the time of publication.

### QUESTION FROM CHAIRMAN XOCHITL TORRES SMALL FOR TAMMY MECKLEY

*Question.* Do you agree with the assessment that it would cost ICE more to have USCIS process ICE's FOIA requests? Please explain.

Answer. Response was not received at the time of publication.

### QUESTIONS FROM CHAIRMAN XOCHITL TORRES SMALL FOR ALINA M. SEMO

*Question 1a.* What recommendations do you have for ways in which the DHS Privacy Office can better oversee and ensure compliance with FOIA across the Department?

Answer. Response was not received at the time of publication.

*Question 1b.* Does the DHS Privacy Office require any additional authorities to achieve these goals?

Answer. Response was not received at the time of publication.

*Question 2.* What actions should DHS take to reduce its backlog and respond more quickly to complex requests?

Answer. Response was not received at the time of publication.

