

DHS Review of Responses to Significant Freedom of Information Act Requests





OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

September 29, 2017

MEMORANDUM FOR: Sam Kaplan
Chief FOIA Officer
Privacy Office

FROM: Jennifer L. Costello 
Assistant Inspector General for Inspections and
Evaluations

SUBJECT: *DHS Review of Responses to Significant Freedom of
Information Act Requests*

For your action is our final report, *DHS Review of Responses to Significant Freedom of Information Act Requests (16-081-ISP-DHS-FOIA)*. We incorporated changes as a result of the formal comments provided by your office.

The report contains one recommendation aimed at improving the processing of responses to significant requests for information under the *Freedom of Information Act*. Your office concurred with the recommendation. Based on information provided in your response to the draft report, we consider the recommendation open and resolved. Once your office has fully implemented the corrective actions, please submit a formal closeout letter to us within 30 days so that we may close the recommendation. The memorandum should be accompanied by evidence of completion of agreed-upon corrective actions and of the disposition of any monetary amounts.

Please send your response or closure request to
OIGInspectionsFollowup@oig.dhs.gov.

Consistent with our responsibility under the *Inspector General Act*, we will provide copies of our report to congressional committees with oversight and appropriation responsibility over the Department of Homeland Security. We will post the report on our website for public dissemination.

Please call me with any questions, or your staff may contact Angela Garvin, Deputy Assistant Inspector General, at (202) 254-4100.



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Background

Department of Homeland Security records are subject to release under the *Freedom of Information Act* (FOIA).¹ Enacted in 1966 and amended several times, FOIA mandates that Federal executive branch agencies release certain information to the public upon request, unless the information falls within one of nine exemptions which protect certain interests, such as personal privacy or national security. The act also includes timetables within which Federal agencies must respond to FOIA requests. Generally, agencies must release responses to FOIA requests within 20 days, unless certain specific circumstances allow for an extension. In addition, the Department of Justice has interpreted the statute to mean that agencies may not prevent release of information simply because it is embarrassing.

We conducted this review in response to a June 2015 request from the Senate Committee on Homeland Security and Governmental Affairs that we determine whether political appointees were involved in DHS' FOIA response process and delayed FOIA releases or inappropriately withheld information.

In March 2011, the DHS Office of Inspector General issued a report, *The DHS Privacy Office Implementation of the Freedom of Information Act* (OIG-11-67), which addressed similar concerns. The report concluded that political appointees in DHS headquarters might have improperly delayed or withheld releases of information from responses to significant FOIA requests.²

Since our 2011 review, DHS has revised its process for reviewing significant FOIA requests. In 2011, the Department reduced the number of days that political appointees and other officials have to review releases from 3 days to 1 day. Later, DHS changed the name of this process from the Significant Request Review Process to the "1-Day Awareness Notification Process." Under the new process, FOIA processors no longer wait for approval before releasing responses to significant FOIA requests. The process is informally documented in a 2012 email sent to DHS component FOIA offices and subsequent 2015 draft guidance.

Results of Inspection

We determined that under the 1-Day Awareness Notification Process, political appointees do not improperly influence FOIA processors to delay or withhold the release of information in response to significant FOIA requests. The

¹ 5 U.S.C. § 552

² A 2006 DHS memorandum defined significant FOIA requests as those that may garner media interest, arise from Congress or special interest groups, are related to the President's or agency's priorities, or are for communications with prominent elected, business, or community leaders.



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purpose of the new process is to notify high-ranking DHS officials that the Department will release a significant FOIA response shortly, so those offices can prepare for media inquiries or possible litigation. Political appointees who receive the notification include an advisor to the DHS Secretary, an official in the Office of Public Affairs, and the Chief FOIA Officer.

Because FOIA processors are not required to wait for approval before releasing the information, the 1-Day Awareness Notification Process does not give political appointees an opportunity to delay release of FOIA responses. Draft FOIA guidance instructs FOIA processors to release responses to significant FOIA requests within a specific period of time, usually 1 day, of notifying headquarters' political appointees. The period is extended to 48 hours if officials receive notice after 4:00 p.m.

To ensure that the process outlined in the guidance is followed, we reviewed every significant FOIA request from March, April, and May 2016.³ Of the 57 significant requests DHS processed during those months, none was delayed by political appointees or others in headquarters. However, 9 of the 57 responses were delayed by the FOIA offices themselves because of FOIA employees' errors or absences.

Similarly, the 1-Day Awareness Notification Process does not provide opportunities for political appointees in headquarters to direct FOIA staff to modify FOIA releases and withhold additional information. We also reviewed the only documented procedures for the process—an email and draft guidance—to assess whether they gave political appointees authority or a means to approve, reject, or modify responses to significant FOIA requests. Neither the draft guidance nor the email mentions the possibility of political appointees responding to notification of releases.

We also interviewed FOIA staff and officials who had handled significant FOIA requests in the 1-Day Awareness Notification Process to determine whether political appointees followed the guidance or ever directed FOIA staff to improperly withhold information from or modify FOIA releases. None of the officials or staff we interviewed said they had received a request from a political

³ We reviewed March, April, and May 2016 data because 2016 was an election year, and political appointees may have started leaving DHS later in the year.



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appointee in headquarters to inappropriately withhold information or modify a FOIA release.

Although DHS is using the 1-Day Awareness Notification Process appropriately to notify political appointees in headquarters of possible impending media requests or litigation related to release of information, the process could be vulnerable to misuse because guidance has not been finalized or formalized. Additionally, the draft guidance does not explicitly state that the 1-Day Awareness Notification Process is solely to notify political appointees and not to allow political appointees to approve, modify, or delay significant FOIA releases.

Privacy Office FOIA officials are drafting a formal instruction that will describe and define the 1-Day Awareness Notification Process. Issuing such an instruction and publishing it on the DHS intranet with other FOIA-related instructions would ensure guidance is readily available to all DHS employees who process significant FOIA requests.

Recommendation 1

We recommend that the Chief FOIA Officer finalize and issue the instruction on the 1-Day Awareness Notification Process, ensuring it states that:

- (1) the purpose of the process is solely to inform senior officials about the imminent release of information that may raise public interest or litigation; and
- (2) FOIA staff, not political appointees, determine whether information should be released or withheld under FOIA's exemptions.

Privacy Office Comments and OIG Analysis

We evaluated the Privacy Office's formal written response, including technical comments, and made changes, as appropriate. A copy of the Privacy Office's management comments in their entirety is included as appendix A. The Privacy Office concurred with the recommendation and is taking steps to address it.

Privacy Office Response to Recommendation 1: In its response, the Privacy Office stated they have begun drafting an instruction on the 1-Day Awareness Notification Process. The instruction will outline the purpose of the process and include specific language regarding the responsibility of the FOIA staff, not political appointees, to make determinations to release or withhold information in accordance with FOIA's exemptions. The Privacy Office estimates a finalized instruction by December 31, 2017.



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OIG Analysis: The Privacy Office's planned actions are responsive to the recommendation. We consider the recommendation resolved and open. In its corrective action plan and subsequent updates, the Privacy Office should inform the OIG of its progress in finalizing the 1-Day Awareness Notification Process instruction.

Objective, Scope, and Methodology

The Department of Homeland Security (DHS) Office of Inspector General (OIG) was established by the *Homeland Security Act of 2002* (Public Law 107-296) by amendment to the *Inspector General Act of 1978*.

We reviewed documents and data sets, including annual DHS FOIA reports, Office of Government Information Services' DHS FOIA compliance reports, congressional reports, and the Privacy Office's draft FOIA Standard Operating Procedures.

We evaluated 4 months of significant FOIA requests reports to identify FOIA processors to interview. We interviewed DHS employees from seven offices including the FOIA Branch of the Privacy Office, Federal Emergency Management Agency, Immigration and Customs Enforcement, U.S. Citizenship and Immigration Services, Customs and Border Protection, Transportation Security Administration, U.S. Coast Guard, and the Science and Technology Directorate. We asked all these employees whether political appointees in the 1-Day Awareness Notification Process inappropriately delayed FOIA releases or requested that information be withheld from FOIA requests.

To determine whether the 1-Day Awareness Notification Process delayed FOIA releases, we analyzed the handling of all significant FOIA requests from March 1, 2016, through May 31, 2016.

We conducted this review between December 2016 and April 2017 under the authority of the *Inspector General Act of 1978*, as amended, and according to the Quality Standards for Inspection and Evaluation issued by the Council of the Inspectors General on Integrity and Efficiency.



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Appendix A
Privacy Office Comments to the Draft Report

Privacy Office
U.S. Department of Homeland Security
Washington, DC 20528



**Homeland
Security**

August 11, 2017

MEMORANDUM FOR: Laurel Loomis Rimón
Acting Assistant Inspector General for Inspections and Evaluations

FROM: Sam Kaplan 
Chief FOIA Officer
Privacy Office

SUBJECT: Privacy Office's Response to OIG Draft Report: "*DHS Review of Responses to Significant Freedom of Information Act Requests*"
(Project No. 16-081-ISP-DHS-FOIA)

Thank you for the opportunity to review and comment on this draft report. The Department of Homeland Security (DHS) Privacy Office appreciates the work of the Office of Inspector General (OIG) in planning and conducting its review and issuing this report.

The Privacy Office is pleased to note the OIG's positive recognition regarding the processing of responses to significant requests for information under the *Freedom of Information Act* (FOIA). In the report, the OIG noted that the Department has improved its process since its last review in 2011. Specifically, the Department reduced the number of days that political appointees and other officials have to review releases, from three days to one day. Additionally, the OIG concluded no political appointees in Headquarters inappropriately withheld or modified a FOIA release.

The Privacy Office remains committed to actively resolving the issues identified in the inspection and improving the Department's FOIA operations. The Privacy Office will continue to use FOIA to ensure openness, transparency, and collaboration.

The draft report contained one recommendation with which the Privacy Office concurs. Please see the attached for our detailed response to the recommendation.

Again, thank you for the opportunity to review and comment on this draft report. Technical comments were previously provided under separate cover. Please feel free to contact me if you have any questions. We look forward to working with you in the future.

**Attachment: Privacy Office's Response to Recommendation
Contained in OIG 16-081-ISP-DHS-FOIA**

Recommendation: The Chief FOIA Officer finalize and issue the instruction on the 1-Day Awareness Notification Process, ensuring it states that:

- (1) the purpose of the process is solely to inform senior officials about the imminent release of information that may raise public interest or litigation;
- and
- (2) FOIA staff, not political appointees, determine whether information should be released or withheld under FOIA's exemptions.

Response: Concur. The Privacy Office has begun drafting an instruction on the 1-Day Awareness Notification Process. The instruction will outline the purpose of the notification process, and include specific language regarding the responsibility of the FOIA staff, not political appointees, to make determinations to release or withhold information in accordance with FOIA's exemptions. Estimated Completion Date (ECD): December 31, 2017.

ADDITIONAL INFORMATION AND COPIES

To view this and any of our other reports, please visit our website at: www.oig.dhs.gov.

For further information or questions, please contact Office of Inspector General Public Affairs at: DHS-OIG.OfficePublicAffairs@oig.dhs.gov. Follow us on Twitter at: @dhsoig.



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