



U.S. Department of Energy
Office of Inspector General
Office of Audits and Inspections

SPECIAL REPORT

The Department of Energy's Freedom of
Information Act Process

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Department of Energy
Washington, DC 20585

September 18, 2015

MEMORANDUM FOR THE DIRECTOR, OFFICE OF MANAGEMENT

FROM: 
Gregory H. Friedman
Inspector General

SUBJECT: INFORMATION: Special Report: "The Department of Energy's
Freedom of Information Act Process"

BACKGROUND

The *Freedom of Information Act* (FOIA or the Act) (5 U.S.C. 552) provides an individual the right to obtain Federal agency records unless the records (or parts of the records) are protected from disclosure by any of the nine exemptions contained in the law. The Act, as it is applicable to the Department of Energy, is presented in 10 CFR 1004, *Freedom of Information Act (FOIA)*. According to the Department's most recent Annual FOIA Report, in fiscal year (FY) 2014, 2,219 FOIA requests were received. Of these, 898 remained at Department Headquarters for processing, with the remainder being processed by various field organizations or the National Nuclear Security Administration (NNSA). The Department has established a FOIA Office to effectively respond to information requests received at Headquarters. Once a request has been validated by that Office, it is forwarded to the appropriate program office or field site for fulfillment. The Office of General Counsel reviews all Headquarters FOIA cases, regardless of whether the processing organization proposes to withhold information.¹

Recently, the Chairman of the Senate Committee on Homeland Security and Governmental Affairs (Committee) requested that the Office of Inspector General (OIG) perform an inquiry to determine the involvement of noncareer officials in the FOIA response process for the period of January 1, 2007, to the present. Additionally, the Chairman requested a certification from the Department's Chief FOIA Officer regarding the involvement of noncareer officials in the Department's response to FOIA requests. In response to the Congressional request, we initiated this special review. We also performed a limited review of efficiency issues that came to our attention during the course of the inquiry, the results of which are described in this report.

OBSERVATIONS AND CONCLUSIONS

To accomplish our objective, we reviewed 55 FOIA cases and 10 appeal cases, and we conducted interviews with more than 20 Department FOIA officers and related staff. Based on

¹ The General Counsel review excludes cases that are the responsibility of the NNSA and the Office of Inspector General. These offices have their own parallel processes.

this examination, nothing came to our attention to indicate that noncareer personnel (political appointees) interfered with or intervened during the FOIA process. In certain cases, we did find limited White House participation. This is described more fully later in this report.

While noncareer personnel, in a few instances, may have been involved in FOIA requests, we were unable to identify any cases where involvement of these individuals resulted in withholding any document or portions of any document that could have otherwise been released or resulted in any undue delay of a response to FOIA requests. Specifically, we observed that FOIA requests were processed as they were received by the Headquarters FOIA Office and the program- and field-level FOIA officers, all career Federal employees. The Chief FOIA Officer told us that there has been no inappropriate influence or delay by noncareer officials in the Department's response to any FOIA request. However, a written certification to this effect was not provided as the Department concluded it was not required by statute or regulation.

Overall, the Department had a defined process for working FOIA requests. However, opportunities for improvement remain to ensure consistency in the documentation and administration of processing requests. Specifically, we observed the FOIA Manual had not been updated or formalized in a Department Order, as suggested in the last OIG review conducted in September 2010, entitled *Department's Freedom of Information Act Request Process* (OAS-SR-10-03). The absence of an updated manual as guidance likely contributed to relatively minor disparities in documentation and the administration of FOIA requests we reviewed across the Department.

All documents subject to FOIA at Department Headquarters are processed by either the FOIA Office or the responsible program office. The Office of General Counsel reviews for legal sufficiency all Headquarters FOIA cases, excluding NNSA and OIG cases, regardless of whether the processing organization proposed to redact information. Generally, Departmental field locations, as defined in 10 CFR 1004.2, *Definitions*, receive and process FOIA requests directly. Our review of a sample of FOIA cases found relatively minor issues related to documentation and administration within the FOIA process. We found a few instances where administrative documents were either not completed or not included in the case file and where administrative language was not included in final determination letters. Without full retention of case documentation, it may be more difficult to defend a FOIA appeal should one arise in the future.

Finally, we reviewed 10 FOIA appeal cases for the period of FYs 2007 through 2014. Only one of these appeals was partially granted. That particular case was remanded to the responsible office to issue a new determination on either releasing the requested information or withholding it based on a different exemption. Overall, we found that the documentation in the appeals case files corresponded with requirements in the CFR. The Office of Hearings and Appeals (OHA) has a manual, updated in 2011, that outlines their process for processing appeals related to FOIA requests. Additionally, OHA hosted bimonthly calls with FOIA officers in the field to share information.

White House Review

We found that an April 2009 memorandum to all Executive Department and Agency General Counsels required Departments and Agencies to consult with the White House Counsel's Office on all document requests that may involve White House equities, including FOIA requests.² Our review disclosed that the Department complied with this memorandum and that it coordinated with the White House when a FOIA request involved White House policies or personnel. According to Department officials, the Department's Office of General Counsel coordinates any relevant cases with the White House. In instances where responsive documents include White House equities, the Department's FOIA Office and General Counsel will suggest any appropriate redactions before sharing the document with the White House. Officials in the Office of General Counsel stated this is the identical process they would use for responsive documents related to any other government entity.

In 4 of the 55 FOIA cases we sampled, the Department's Office of General Counsel provided the proposed FOIA response to the White House for review. We found that in these cases the FOIA case file was, in our view, incomplete and did not contain all of the documents related to the FOIA response. The lack of complete document files may have occurred because comprehensive, Department-wide requirements or guidance had not been issued from the Headquarters FOIA Office on the type and extent of documentation and correspondence required to be kept in the official FOIA case file. Although the Department's FOIA system, referred to as FOIAXpress, has the functionality to retain all documents related to the FOIA request, we found not all correspondence or attachments to correspondence were maintained. Without full retention of case documentation, particularly documents showing changes to redactions or exemptions used, it was impossible to know with certainty what changes were made when the documents went outside the Department for review. Further, the lack of case documents potentially makes it much more difficult to defend FOIA appeals.

To be specific, pertinent FOIA-related correspondence between the Department and the White House was not retained in the FOIA files for the four cases. In all four cases, the responsive documents were released with some withholdings (such as email addresses). We were able to obtain the responsive documents with proposed redactions that were intended for White House review. We compared these documents to the final release and found no difference in the redactions in two cases. We found differences in redactions in the two remaining cases. However, absent additional documentation, we could not ascertain the reason for differences in redactions in those cases.

SUGGESTED ACTION

To address the issues we identified in this report and increase the overall efficiency of the information request process, we suggest that the Director, Office of Management, in conjunction with program officials, ensure that the current manual is revised to reflect any updated policies and procedures related to the FOIA process and that guidance is issued relating to documentation requirements.

² The White House also issued various memorandums to agencies expressing full support of the FOIA program and directing agencies to administer FOIA with a "presumption in favor of disclosure."

MANAGEMENT RESPONSE

Management provided informal comments on the report. The Office of Management appreciates our suggestions and is working to ensure the FOIA guidance is up-to-date. The Office of General Counsel informed us that to ensure the FOIA records are complete, they are assessing options for improving the document control process for FOIA documents with White House equities.

cc: Deputy Secretary
Deputy Under Secretary for Management and Performance
Administrator, National Nuclear Security Administration
Chief of Staff

OBJECTIVE, SCOPE, AND METHODOLOGY

OBJECTIVE

To examine the Department of Energy's (Department's) Freedom of Information Act (FOIA) process with respect to undue influence of noncareer officials.

SCOPE

The review was conducted between July 2015 and September 2015 at Department Headquarters. Field sites were contacted, as necessary. The scope of the review included the FOIA process at the Department from January 1, 2007, to August 21, 2015. This review was conducted under Office of Inspector General (OIG) project number S15IS018.

METHODOLOGY

To accomplish the objective, we:

- Reviewed laws, regulations, policies, procedures, and guidance applicable to FOIA;
- Reviewed prior OIG assessments and reports related to FOIA;
- Obtained a listing of all noncareer employees in the Department;
- Obtained a listing of all FOIAs closed by the Department and National Nuclear Security Administration (NNSA) from January 1, 2007, to September 30, 2009, and select program offices and NNSA from October 1, 2009, to July 8, 2015;
- Obtained a listing of all FOIA appeals processed by the Office of Hearings and Appeals from January 1, 2007, to the present;
- Interviewed key Department personnel including FOIA officers at five judgmentally selected FOIA field offices;
- Reviewed a judgmental sample of 10 FOIA requests received on or after January 1, 2007, by the Office of the Executive Secretariat and their corresponding responses;
- Reviewed a random sample of 10 FOIA requests in calendar years 2007–2009 that were initiated prior to the use of FOIAXpress;
- Judgmentally selected five program offices: the Loan Programs Office, Environmental Management, Congressional and Intergovernmental Affairs, Advanced Research Projects Agency-Energy, and the Energy Information Administration, and reviewed a judgmental sample of five FOIA requests received on or after January 1, 2007, and their corresponding responses from each of the five selected program offices;

- Reviewed a random sample of 10 NNSA FOIA requests received by the NNSA on or after January 1, 2007, and their corresponding responses;
- Reviewed a sample of 10 FOIA appeals processed by the Office of Hearings and Appeals on or after January 1, 2007; and
- Requested that the Chief FOIA Officer provide a written certification stating that there is no undue influence by noncareer officials in the FOIA process.

This review was conducted in accordance with the Council of the Inspectors General on Integrity and Efficiency's *Quality Standards for Inspection and Evaluation*, dated January 2012. We planned and performed the review to obtain sufficient, appropriate evidence to provide a reasonable basis for our conclusions and observations based on our review objective. We believe the evidence obtained provides a reasonable basis for our conclusions and observations based on our review objective. Accordingly, the review included tests of compliance with laws and regulations to the extent necessary to satisfy the review objective. As our review was limited, it would not necessarily have disclosed all internal control deficiencies that may have existed at the time of our review.

Management waived an exit conference.

FEEDBACK

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