



**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF INSPECTOR GENERAL**

THE INSPECTOR GENERAL

October 16, 2015

The Honorable Ron Johnson
Chairman, Homeland Security and Governmental Affairs Committee
United States Senate
2157 Rayburn House Office Building
Washington, D.C. 20510

Dear Chairman Johnson:

Thank you for your June 23, 2015, letter requesting that the U.S. Department of Education (Department) Office of Inspector General (OIG) analyze the involvement of non-career officials in the Department's Freedom of Information Act (FOIA) process, if any, for the period January 1, 2007, to the present. Enclosed with this letter you will find the results of our analysis.

Based on the results of this review, the OIG will consider conducting an audit of the Department's FOIA processes when resources are available.

If you have any questions or if you need any additional information, please do not hesitate to contact me directly at (202) 245-6900 or have a member of your staff contact our Congressional Liaison, Catherine Grant, at (202) 245-7023.

Sincerely,

Kathleen S. Tighe
Inspector General

Enclosures

cc: The Honorable Tom Carper, Ranking Member, Homeland Security and Governmental Affairs Committee, U.S. Senate
The Honorable Arne Duncan, Secretary, U.S. Department of Education

U.S. Department of Education Office of Inspector General
Response to Request for Information from
Chairman Johnson, Homeland Security and Governmental Affairs Committee
United States Senate
October 16, 2015

On June 23, 2015, U.S. Senate Homeland Security and Government Affairs Committee Chairman Ron Johnson requested that the U.S. Department of Education (Department) Office of Inspector General (OIG) analyze the involvement of non-career officials in the Freedom of Information Act (FOIA) response process at the Department, if any, for the period of January 1, 2007, to the present. If our analysis found that non-career officials were involved in the FOIA response process, the OIG was asked to analyze whether their involvement resulted in any undue delay of a response to any FOIA request or the withholding of any document or portion of any document that would have otherwise been released but for the non-career official's involvement in the process. If our analysis showed such a result, the OIG would provide the following information about each FOIA request:

- a. Contents of the FOIA request;
- b. Recommendation by the Department's FOIA officer as to what information should be disclosed in response to the request;
- c. Name(s) and position(s) of non-career personnel who were involved with the response process;
- d. Details and supporting documentation related to the processing of the response to the FOIA request;
- e. Documents that were ultimately disclosed in response to the request; and
- f. Documents or information that would have been disclosed in response to the FOIA request absent the involvement of the non-career department or agency personnel.

The request also asked that we seek a written certification from the Department's chief FOIA officer that 1) no non-career officials were involved in the Department's response to any FOIA request or 2) if such involvement occurred, the involvement of non-career officials never resulted in the undue delay of a response to a FOIA request or the provision of less information than would have been provided but for the involvement of the non-career officials.

Summary of Analysis

We found that non-career officials at the Department are involved in the FOIA response process in three ways: (1) as FOIA Coordinators for certain Principal Operating Components (POCs), (2) as attorneys in the Office of General Counsel (OGC) reviewing FOIA requests and documents for release, and (3) as custodians of records providing responsive documents. We did not identify any cases where the involvement of the non-career officials resulted in undue delay. We did identify two FOIA cases where a non-career OGC attorney made redactions of information that we believe should have been released. In one instance, the redaction was reviewed and

approved by a career employee and in the other instance actual withholding did not occur due to an error by the Department in not including with its response all of the records that had been gathered and redacted. Regarding the first instance, the Department stands by the redaction. However, after we identified the error in the second instance, the Chief FOIA Officer informed us on October 14, 2015, that the Department, after review by career staff, is releasing as a “discretionary” disclosure some of the information that the non-career attorney had previously indicated should be withheld. We provide more information on these cases below.

We also located within one FOIA case file two email messages with attachments that a former Deputy Secretary (non-career) sent to the FOIA Coordinator for the Office of the Deputy Secretary (ODS) (career) with the subject lines, “FOIA – Exemption 5, Attorney-Client Privilege” and “FOIA – Exemption 5, Deliberative Process.” Our review of the attachments indicated that they did not relate to the FOIA case we reviewed in our sample; rather, they were apparently misfiled in that FOIA case file. Although our review determined that some of the records seemed properly exempt from disclosure, others did not appear exempt. We discuss these documents further below.

On October 14, 2015, the Department provided a written certification from its Chief FOIA Officer that acknowledged the involvement of non-career officials in the FOIA response process and certified that the Department has established a FOIA process that requires review and approval from career personnel of all Department FOIA releases, including proposed redactions. The Department did not certify that the involvement of non-career officials has never resulted in undue delay or provision of less information than would have been provided but for the involvement of non-career officials. The certification letter is included with this report as Attachment A (without enclosures).

How We Conducted our Analysis

To perform this review, we relied on the records of the Department’s FOIA Service Center (FSC). We interviewed all members of the FSC (six career staff and a career supervisor) and their second line supervisor (career). We also interviewed two career and one non-career attorney in OGC, two career FOIA Coordinators in the Office of the Secretary (OS), and a former career FOIA Coordinator in ODS.

We reviewed 45 files and over 11,000 pages of records from a judgmental sample of FOIA cases, which was selected based on the offices involved and other factors that we believed would increase the likelihood of non-career officials’ involvement in the FOIA response process. The results of our review are not projectable to the entire universe of FOIA cases.

We searched for and examined email related to some of the cases in our sample in an effort to determine whether non-career official involvement led to undue delay or improper withholding. We also reviewed the results of a review we performed in 2010 in response to a similar request from Senator Charles E. Grassley and Representative Darrell Issa. We have included a copy of that response with this report as Attachment B.

Department's FOIA Process

The FSC, a component of the Department's Office of Management, has the delegated authority to sign FOIA final determination letters and processes most of the FOIA requests submitted to the Department. The Assistant Secretary for Management (non-career) serves as the Department's Chief FOIA Officer. Each of the Department's 20 POCs has at least 1 dedicated FOIA Coordinator who handles requests and coordinates FOIA responses.

The FSC logs in all FOIA requests, which may be submitted directly to the FSC or to a POC. The FSC identifies the POC with custody of responsive documents and sends the request to the POC with a response deadline. The POC FOIA Coordinators are responsible for locating responsive documents and initially identifying any information to be withheld. Non-career officials may be custodians of records that must be located and reviewed. Any proposed withholding of documents or redactions of information must be submitted to the FSC for review by career employees. With two exceptions,¹ only the FSC has authority to withhold information and sign final determination letters. The Department's OGC reviews FOIA requests and responses upon request of a POC or the FSC, or when OGC determines legal review is appropriate. If there is disagreement between the FSC, a POC, or OGC regarding appropriate withholding or redaction, the offices engage in further discussion to reach a final determination.

In two POCs, non-career officials currently serve as FOIA Coordinators. Those POCs are ODS and the Office of the Under Secretary (OUS). As noted, these officials are responsible for searching for records and proposing redactions. Two other POCs with career FOIA Coordinators have non-career officials as additional FOIA contacts: the Office of Program Evaluation and Program Development (OPEPD) and the Office of Postsecondary Education (OPE).

OS is involved in FOIA processing only when requests seek records from that office. The FOIA Coordinator for OS has been a career official throughout our review period.

In 2012, the Department created a FOIA Oversight Committee to improve the sharing of information and coordination of FOIA response efforts. The Committee meets regularly to review FOIA requests and coordinates information on searches and responses, particularly as to complex requests that may seek information from multiple POCs. The Committee includes team leaders and supervisors of the FSC, OGC attorneys, POC FOIA Coordinators, and a representative of the Office of Communications and Outreach (OCO). The OGC attorneys include career attorneys from the Division of Business and Administrative Law responsible for advising the Department on FOIA matters. These attorneys are supervised by a career Assistant General Counsel, who is in turn supervised by a non-career Deputy General Counsel. In addition to the career attorneys, the Committee also includes a non-career OGC attorney who reports directly to the non-career General Counsel. As part of the Committee's coordination efforts,

¹ Career officials in the regional offices of the Office for Civil Rights have authority to respond to requests to those offices. OIG also responds to requests to it.

any of the OGC attorneys can designate a FOIA request as subject to an “OGC Hold” requiring OGC review before a response can be sent. Review and approval of FOIA responses can be handled by either a career or non-career OGC attorney. The OCO representative is a career employee who participates so that OCO is aware of requests and responses that may generate media interest.

In our interviews with the staff of the FSC and their supervisors, the career FOIA Coordinators from OS, and the career OGC attorneys, none identified any situation where the involvement of non-career staff in the FOIA response process resulted in undue delay or withholding of information with which they disagreed. Some of the FSC staff and one of their supervisors have served throughout the review period. Regarding the involvement of a non-career OGC attorney, some of the FSC staff were unaware of the attorney’s non-career status and did not see his role as different from that of the career attorneys. A career Deputy General Counsel also told us that the non-career attorney consults weekly with him on FOIA requests.

Review of FOIA Cases

Because we determined that non-career officials were involved in the Department’s FOIA response process, we developed a sampling plan to identify FOIA requests that may have been more likely to have non-career officials involved to identify circumstances where involvement may have resulted in undue delay or withholding of information that would otherwise have been released. When developing our sampling plan, we considered the following case characteristics from the FSC records: indication of potential non-career OGC attorney involvement based on comments in the FOIA case file, the POC listed as the action office, the presence of an “OGC Hold” in the case comments or review status, the extent to which documents were withheld, and timeliness of the FOIA case request response. We considered POCs that would be involved in policy initiatives or have non-career officials that would be likely to attract FOIA requests and that our interviews revealed had non-career officials involved in response processing. Based on these considerations, we included OS, ODS, OUS, OPEPD, and OGC in the sampling plan.

Using the records of the FSC, we identified and reviewed a total of 45 cases from the universe of 13,542 FOIA cases closed between January 1, 2007, and June 30, 2015.² We selected cases from two groups we viewed as having potential for non-career official involvement. For the first group, we selected and reviewed all eight cases where the FSC record comments identified non-career OGC attorneys by name. For the second group, we randomly selected 27 cases (3 from each year of the review period) out of 384 FSC cases where the request was not granted in full and was assigned to OS, ODS, OUS, OPEPD, or listed “OGC Hold” in comments or review status. To include coverage of POCs not included in the second group, we randomly selected 9 cases (1 per year of the review period) out of 1,510 cases other than the second group where the FSC record indicated the response was at least 60 days late and the request was not granted in full. Additionally, we judgmentally selected one case from OS that was the first and

² We excluded from the universe cases handled by OIG.

oldest case from the review period where the FSC record indicated that OS did not provide records after the request had been open for 4 years. We selected no other cases from the remainder of the universe. For the 45 cases, we reviewed over 11,000 pages of records. Based on our review, we found:

- For 40 of the 45 cases, there was no evidence of involvement of non-career officials that resulted in undue delay or inappropriate withholding of information.
- For three of the remaining five cases, while considered closed in the FSC's records, the files did not include final FOIA determinations that we could review:
 - One case was merged with a related FOIA case that is still being processed.
 - For the second case, an administrative appeal is pending before the Department.
 - In the third case, the requester sued the Department before processing could be completed and the final decision rendered.
- For the remaining two cases, we found involvement of a non-career OGC attorney who made redactions of information that we believe should have been released. In both of the cases, the non-career OGC attorney provided both the redactions and the OGC approval of the redactions. In the first case, a career employee at FSC reviewed and approved the redaction, while in the other case the redactions were not reviewed or incorporated in the FOIA response due to an error in handling. Additional detail related to these two cases follows.

Details of Two Cases Involving a Non-Career OGC Attorney

1. FOIA Request 15-01234
April 8, 2015
Charles Ross, Daily Caller

This was a FOIA request for copies of all emails sent to or from Catherine Lhamon and Helen Boyer that mentioned University of Virginia employee Emily Renda and Rolling Stone reporter Sabrina Rubin Erdely between April 1, 2014, and the present.

Principal Deputy Assistant Secretary Seth Galanter of the Office for Civil Rights (OCR) (non-career) provided 99 pages of records (emails) for FOIA review by May 18, 2015. OGC Special Counsel Jay Chen (non-career) reviewed the documents, applied FOIA redactions, and sent his redactions to Mr. Galanter, Helen Boyer, Special Assistant (non-career) to OCR Assistant Secretary Catherine Lhamon (non-career), and Dorie Nolt, Press Secretary (OCO) (non-career) for review on June 3, 2015. Ms. Boyer provided technical comments and Ms. Nolt had no objection to the redactions. Mr. Galanter reviewed the documents and made additional redactions by June 5, 2015. Jay Chen completed his review and informed the FSC that the case was "cleared" for release with the provided redactions on June 9, 2015.

An FSC career employee reviewed the redactions and sent a determination letter on June 18, 2015, providing the 99 pages of responsive emails, citing for the redactions FOIA exemptions (b)(5)(deliberative process), (b)(6) and (b)(7)(C)(personal privacy), and exemption (b)(7)(A)(records compiled for law enforcement purpose), and non-responsiveness. All of the redactions were made by either Mr. Galanter or Mr. Chen.

All of Mr. Galanter's redactions under FOIA seemed permissible. We found that was not the case with one of Mr. Chen's redactions: Mr. Chen redacted, under exemption (b)(5), a portion of a one-sentence description of a request from staff of the Senate Committee on Health, Education, Labor and Pensions for assistance in identifying a potential hearing witness contained in an email from Jodie Fingland, Deputy Assistant Secretary for the Office of Legislative and Congressional Affairs (non-career), to Ms. Boyer and Mr. Galanter. We did not view the redacted portion as deliberative under exemption (b)(5), particularly in light of the fact that the remainder of the description of the witness request was disclosed. The other redactions made by Mr. Chen in this case appeared permissible, although he mistakenly applied exemption (b)(7)(A) in one instance. In that instance, Mr. Chen also applied exemption (b)(5) to the same information, which provided a permissible basis to withhold the information in any event.

Regarding the redaction we questioned, the Department's Chief FOIA Officer in his written certification stated: "In my opinion, and the opinion of our career FOIA leaders and attorneys, the redacted phrase is internal and deliberative in nature, as it identifies proposed internal criteria to identify a witness to testify before a Senate committee. This proposed redaction, although suggested by a non-career attorney, was created under the guidance and periodic review of a career attorney."

We briefed the Department's Chief FOIA Officer, other FOIA officials, a career Deputy Counsel, and the career OGC attorney responsible for FOIA issues on the results of our review on October 9, 2015. The career Deputy General Counsel indicated that he spoke weekly with Mr. Chen regarding FOIA requests. However, neither the Deputy General Counsel nor the career OGC attorney specifically recalled reviewing the redaction at issue with Mr. Chen. The Deputy General Counsel and career OGC attorney also said that Mr. Chen could only propose redactions and does not "clear" documents for release. However, in this particular case, Mr. Chen's message to the FSC did in fact use the word "cleared."

In the written certification, the Chief FOIA Officer also stated that a checklist indicated that a career FSC staff had reviewed and approved the redaction. In that checklist, the career FSC staff had checked a box that "All redactions have been reviewed and are appropriate."

We continue to believe that the redacted information should have been released as we viewed the entire sentence was descriptive of the information request from the Senate committee staff.

2. FOIA Request 15-00544-F
December 19, 2014
Scott MacFarlane, NBC4, Washington, DC

This was a FOIA request for copies of all emails with the keywords “Rolling Stone” sent or received between November 18, 2014, and December 18, 2014, by Arne Duncan, Massie Ritsch, Catherine Lhamon, Seth Galanter, Sandra Battle, Robert Kim, Margaret Olmos, Tim Blanchard, and Debbie Osgood.

OCR collected records and provided redactions made by Principal Deputy Assistant Secretary Seth Galanter by February 2, 2015.

Special Counsel Jay Chen completed a search for additional records, including records of OS, and provided 611 pages with redactions by May 26, 2015.

The FSC sent a determination letter June 4, 2015, which provided 1,303 pages, with redactions based on FOIA exemptions (b)(5)(deliberative process), (b)(6) and (b)(7)(C)(personal privacy), (b)(7)(A)(records compiled for law enforcement purpose), (b)(7)(E)(law enforcement techniques), and non-responsiveness. All of the redactions were suggested by Mr. Galanter.

None of Mr. Galanter’s redactions appeared objectionable. Due to an error in handling, the FSC did not incorporate into the determination letter the 611 pages reviewed by Mr. Chen. As a result, none of the 611 pages was sent to the requester, nor did the FSC review the redactions. On 11 of the 611 pages, Mr. Chen redacted, under exemption (b)(5), the text of emails that contained daily agendas of the Office of Communications and Outreach and summaries of press interviews. The redacted information did not appear to be deliberative to us.

As a result of our review, the FSC re-examined the 611 pages to determine what information should be released. In his written certification, the Chief FOIA Officer indicated that after review by career staff, the Department released information to the requester on a “discretionary” basis, including some of the information that Mr. Chen had redacted. We did not review this final release of information.

Regarding the case that we judgmentally selected from OS, the FSC records and our interview with the career OS FOIA Coordinator indicated that the 4-year delay and eventual closure of the case with no response was not due to involvement of non-career officials.³ This case involved a January 2005 request that sought all correspondence between the White House and the Department’s White House Liaison Office. According to the career OS FOIA Coordinator, a significant volume of documents was “dutifully” collected by non-career officials; however, because the records included extensive personnel records related to political appointees, there

³ This case is included in the group of 40 cases described above.

was disagreement between the career OS FOIA Coordinator and the FSC over proper handling of the request. Eventually, the FSC closed the request in January 2009 without a response to the requester because it had received no records from OS.

In 1 of the 45 case files, we located two email messages (with other attached email messages and documents) that a former Deputy Secretary (a non-career official) sent to a career ODS FOIA Coordinator in 2009 with the subject lines, "FOIA – Exemption 5, Attorney-Client Privilege" and "FOIA – Exemption 5, Deliberative Process." Our review indicated that (1) the attachments did not relate to the FOIA case and (2) while some of the attachments were exempt from disclosure under FOIA, others did not appear exempt to us. We could not determine from the case file or otherwise the FOIA request to which these misfiled documents pertained. Upon our inquiry, the FSC was also unable to determine the correct FOIA case for these documents. As a result, we could not determine if any of these documents were actually withheld in response to a FOIA request.

Attachment A

October 14, 2015, Written Certification from Department's Chief FOIA Officer

Attachment B

September 17, 2010, OIG Letter to Senator Grassley and Representative Issa

Attachment A



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

OCT 14 2015

Kathleen Tighe
Inspector General
U.S. Department of Education
550 2nd Street S.W.
Washington DC 20024

Re: FOIA Certification

Dear Kathy:

This letter responds to Senator Johnson's June 23, 2015 letter requesting a certification from the Department's Chief FOIA Officer that "1) no non-career individuals were involved in the department or agency's response to any FOIA request or 2) if such involvement occurred, the involvement of non-career officials has never resulted in the undue delay of a response to a FOIA request or the provision of less information than would have been provided but for the involvement of non-career officials."

I hereby certify that the Department has established a FOIA process that requires review and approval from career personnel in the FOIA Service Center of all Departmental FOIA releases, including proposed redactions. This process is designed to provide quality assurance, and to ensure that the involvement of non-career personnel does not result in undue delay, or the provision of less information than would have been provided but for the involvement of non-career officials.

In answering this question, it is important to understand how FOIA requests are processed at the Department. While the process is well described in your September 17, 2010 letter to Senator Grassley and Congressman Issa on this same topic, I would also add that non-career employees are involved in FOIA in three ways that are not described in your 2010 letter:

1. I am a political appointee, and the Department's Chief FOIA Officer. Executive Order 13392 requires that the Chief FOIA Officer be at the Assistant Secretary level. In the Department, as in other agencies, Assistant Secretaries are often political appointees. The intent for this requirement was to ensure that FOIA processing receives proper attention and resources, which is better accomplished at more senior levels. My involvement as a political Chief FOIA Officer has, in fact, resulted in additional resources being brought to FOIA operations, to speed responses and reduce backlogs.
2. The Department's FOIA process is premised on having a FOIA Coordinator in each principal office who is responsible for collecting and processing FOIA responses for that office. Several of

400 MARYLAND AVE. S.W., WASHINGTON, DC 20202-4500
www.ed.gov

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

the FOIA Coordinators at the Department are non-career employees. This involvement does not result in undue delay or the provision of less information; on the contrary, the involvement of these knowledgeable individuals results in more timely and complete production of documents. As with all releases, the career FOIA staff review proposed responses prior to release to verify accuracy and completeness.

3. Non-career employees in the Office of the General Counsel work side-by-side with career attorneys to provide legal advice on some FOIA matters, particularly on matters that involve coordination with several offices on complex issues or complex litigation matters. In a few of these cases, attorneys reviewing or coordinating these matters, may make the appropriate FOIA redactions to expedite the process and check these with appropriate FOIA coordinators and career attorneys or other staff. Following our established Departmental delegations and directive, however, career FOIA service center staff are directed to review these redactions, and have the ultimate authority on whether exemptions should be asserted prior to release.

You identified roughly 12 pages of responsive records from your sample that you assert demonstrate that a non-career OGC attorney's involvement resulted in the production of less information. I respectfully disagree.

1. Regarding FOIA Request #15-01234-F, the OGC attorney redacted a phrase in an internal email chain in which staff were discussing who should testify at a coming hearing. In my opinion, and the opinion of our career FOIA leaders and attorneys, the redacted phrase is internal and deliberative in nature, as it identifies proposed internal criteria to identify a witness to testify before a Senate committee. This proposed redaction, although suggested by a non-career attorney, was created under the guidance and periodic review of a career attorney. Further, as memorialized in the "Processing Closeout Checklist" for this request (attached), the proposed redactions were reviewed by career staff in the FOIA Service Center and found appropriate for release with appropriate redactions. We would be happy to brief the staff of the Committee on Homeland Security and Governmental Affairs on the redactions in question.
2. In FOIA Request #15-00544-F, the OGC attorney proposed redacting portions of internal emails that identified particular press events and items of potential importance, in some cases, providing summaries, opinions, and analyses of these items. In my opinion, in the opinion of our career FOIA leaders, and consistent with Department of Justice Guidance, Government-wide practice, and case law, such information is generally considered deliberative in nature. As above, the redactions were created under the guidance and periodic review of a career attorney. After the OGC attorney suggested the redactions, the request was referred back to the career staff in the FOIA Service Center for review and release. As verified on the attached "Processing Closeout Checklist", FOIA Service Center career staff then reviewed two of the four files of responsive records, including the proposed redactions, and found them appropriate for release. However, a career staff person inadvertently did not review or release the remaining two files of responsive documents, including the records identified by the OIG. The FSC has since completed its review of the remaining responsive records, and we are today releasing the appropriate records to the requester. After review by the career staff, and consultation with the affected office, we have elected to use the Department's discretion to release some of the information identified as (b)(5), Deliberative Process Privileged. While we agree that the

information in question is deliberative and predecisional in nature, the Department has determined to release this portion of the material in question.

While I am satisfied that our processes are well-designed to ensure that non-career staff do not impair the FOIA process but to improve it, I have determined that transparency and efficiency would be better served were we to document and publicize how our process works, and how our non-career participate in the FOIA process. Accordingly, I am directing our FOIA Service Center to work with other offices, and produce written Standard Operating Procedures describing these processes. These procedures should be finalized and shared with all Departmental FOIA Staff in the near future.

I appreciate your interest in this matter and trust this answers this inquiry. Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew Jackson", written in a cursive style.

Andrew Jackson
Assistant Secretary for Management

Enclosures

Attachment B



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF INSPECTOR GENERAL

THE INSPECTOR GENERAL

September 17, 2010

The Honorable Charles E. Grassley
Ranking Member, Committee on Finance
United States Senate
219 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Darrell Issa
Ranking Member, Committee on
Oversight and Government Reform
United States House of Representatives
B350A Rayburn House Office Building
Washington, D.C. 20515

Dear Senator Grassley and Representative Issa:

Thank you for your August 23, 2010, letter asking the U.S. Department of Education (Department) Office of Inspector General (OIG) to conduct an inquiry into the Department's Freedom of Information Act (FOIA) Office to determine whether and to what extent political appointees are made aware of information requests and have a role in request reviews or decisionmaking. Below you will find the results of our review.

To complete this assignment, OIG staff reviewed the Department's FOIA procedures and practices, which involved interviewing key personnel, reviewing the Department's FOIA policies, and examining a sample of FOIA requests and the Department's responses. We did not find that political appointees review FOIA responses before they are issued, probe for information about requesters, or delay or otherwise impede disclosure of politically-sensitive information. We did find that political appointees are often made aware of FOIA requests for informational purposes, but not for decisionmaking purposes.

Department's FOIA Procedures

The Department's FOIA Service Center (FSC) has delegated authority to sign FOIA final determination letters, and processes most of the FOIA requests that are submitted to the Department. The 12 regional Offices for Civil Rights (OCR) also have delegated authority to sign FOIA final determination letters and, unlike other Principal Operating Components (POCs) within the Department, responses from the regional OCRs are not routed through FSC. Each of the Department's POCs has at least one dedicated FOIA Coordinator who handles FOIA requests

and coordinates FOIA responses. In addition, the Department's Office of General Counsel (OGC) reviews certain FOIA requests and responses upon a POC's request.¹

The Department receives a FOIA request in two ways: it is either submitted directly to FSC or it is submitted directly to a POC. POCs are required to submit to FSC all FOIA requests they receive from an outside source. FSC logs incoming FOIA requests into a database and assigns a tracking number to them. FSC then identifies the POC that has custody of responsive documents and sends the request to the POC with a response deadline. If a response is fully releasable (i.e., not redacted), the POC sends the response directly to the requester. Otherwise, the POC sends the response to FSC by the stated deadline, and FSC forwards the response to the requester.

OIG Review Process

In preparing this response, we reviewed Departmental Directive OCIO: 1-102, Freedom of Information Act (FOIA) Policies and Procedures: Release or Denial of Department of Education Records Responsive to FOIA Requests (July 7, 2004) (Directive). We also reviewed a draft revised Directive, dated September 13, 2010.

We interviewed personnel in seven POCs who are responsible for receiving, reviewing, and/or responding to FOIA requests. We interviewed personnel in the Office of Management (where FSC is located), the Office of the General Counsel, the Office of the Secretary, the Office of Communications and Outreach, the Office of Legislation and Congressional Affairs, Federal Student Aid, and the Office for Civil Rights because of their size or because they are the POCs most likely to receive requests for politically-sensitive information.

We reviewed a random sample of 31 FOIA responses closed by the Department between June 8, 2010, and September 8, 2010, to determine whether the responses were consistent with FOIA. We looked for overly broad redactions or failures to release information that should have been released, either of which might possibly suggest political influence over the FOIA process.

Findings from Interviews

None of the interviewees reported knowing or being aware of any Department directives that required them to submit FOIA responses to political appointees for mandatory review. That was consistent with our review of the Department's existing Directive and the draft Directive, which do not require personnel to make political appointees aware of FOIA requests or have political appointees review FOIA responses before they are submitted to the requester.

However, interviewees reported three instances in which political appointees could become aware of FOIA requests or responses. First, a political appointee could have custody of

¹ OGC advised us that at the White House Counsel Office's request, OGC developed draft procedures requiring OGC legal sufficiency determinations of FOIA responses involving the White House, Congressional communications, interagency communications, or FOIA requests made to several agencies. OGC further advised us that those procedures are still in draft and have not been implemented, and should they go forward, likely will be reevaluated.

documents that are responsive to a FOIA request. In this case, the FOIA Coordinator is obligated to contact the appointee to obtain these documents. Thus, a political appointee could be one of several recipients of a general email message requesting responsive documents.

Second, the majority of interviewees reported notifying political appointees of FOIA requests and certain responses for informational purposes. The interviewees who reported providing “FYI” notices to political appointees told us that these political appointees did not play a role in reviewing the request or in making decisions about the substance of the response.

Third, one interviewee reported that political appointees and career employees participated in discussions about responding to two separate FOIA requests for data that were preliminary. This interviewee provided two examples in which political appointees and career employees discussed factual information regarding the data in order to allow FOIA personnel to make legally sufficient response determinations. In both instances, the decision was made to release the data.

None of the interviewees reported being asked to provide political appointees with information about people who requested records (e.g., information about where they lived, whether they were associated with the media, or details about their organizations). Some interviewees reported asking for such information when it was relevant to determining their legal obligations under FOIA. For example, FOIA personnel may ask requesters for an address to which to send responsive documents if the requester did not provide an address in their FOIA request. Similarly, FOIA personnel may ask whether the requester is a member of the press or a private citizen in order to determine the appropriate fees to assess for providing responsive documents.

Findings from Review of Sample FOIA Responses

Of the 31 FOIA responses we reviewed, 14 contained redactions or did not provide all the information requested. In most instances, the redactions were of personal information regarding non-Department individuals, which complied with FOIA. We asked Department personnel about their reasons for other particular redactions and non-releases and concluded that the reasons did not relate to interference by political appointees.

Conclusion

The Department has not issued any directives that instruct FOIA personnel to submit responses to political appointees for review. While political appointees are sometimes made aware of FOIA requests if they have custody of responsive documents or for informational purposes, political appointees in the Department do not play a role in determining the substance of FOIA responses.

If you have any questions, or if you require any additional information, please contact me directly at (202) 245-6900, or have a member of your staff contact our Congressional Liaison, Ms. Catherine Grant, at (202) 245-7023.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathleen S. Tighe". The signature is fluid and cursive, with the first name "Kathleen" written in a larger, more prominent script than the last name "S. Tighe".

Kathleen S. Tighe
Inspector General

cc: The Honorable Max Baucus, Chairman, Committee on Finance, U.S. Senate
The Honorable Edolphus Towns, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives
The Honorable Gabriella Gomez, Assistant Secretary, Office of Legislation and Congressional Affairs, U.S. Department of Education