



U.S. GENERAL SERVICES ADMINISTRATION
Office of Inspector General

November 20, 2015

The Honorable Ron Johnson
Chairman
Senate Homeland Security & Government Affairs Committee
340 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Johnson:

The Office of Inspector General (OIG) for the General Services Administration (GSA) has completed an inquiry into whether the involvement of non-career personnel in the GSA FOIA process “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.” The results of our inquiry are reported below. The certification the Committee requested from the Chief FOIA Officer also is attached.

Background

In a letter to Senator Charles Grassley and Representative Darrell Issa dated September 17, 2010, the OIG described GSA’s FOIA Program as it existed during 2007-2010. During that time period, GSA FOIA operations were decentralized, and decision-making for initial FOIA requests was assigned to each of the services, staff offices, and regions. Program administration was assigned to the Executive Secretariat Division. A small FOIA staff logged new requests in an Intranet Quorum (IQ) system, provided requestors the tracking number and anticipated response dates, identified the office most likely to have the responsive documents, and assigned that office with the response. At the time of our 2010 letter concerning the FOIA program, the Chief FOIA Officer, seven of the 11 Regional Administrators, and six of the 15 Heads of Services and Staff Offices were non-career.

Starting in 2012, GSA began centralizing the FOIA program. The move to centralization was motivated, at least in part, by the media FOIA requests that followed the OIG’s April 2, 2012, management deficiency report on the

2010 Western Regions Conference (WRC). In mid-March, after OIG provided its draft report, GSA took steps to ensure that FOIA releases to the media were reviewed by GSA public affairs staff before release, and centralized the responses to WRC-related FOIA requests in the Office of Administrative Services (OAS). On November 16, 2012, GSA centralized all FOIA operations under the Chief of Administrative Services, Cynthia Metzler, a career executive who also served as GSA's Chief FOIA Officer. Ms. Metzler delegated authority for the program to Special Advisor Bianca Oden, a non-career employee. All FOIA responses went through Ms. Oden, who reviewed proposed releases and redactions before transmittal to the Office of General Counsel (OGC). In March 2015, a FOIA Director was selected, who has delegated authority for initial FOIA decisions.

Inquiry Methodology

Fact finding: GSA received over 12,000 FOIA requests for the period covered by our inquiry. In conducting this inquiry, the OIG used document requests to the Administrator and General Counsel, database searches, questionnaires, and personal interviews to gather the information for this report. The OIG searched GSA's IQ and FOIAonline databases.¹ The inquiry team employed progressive keyword searches to identify potentially responsive FOIAs. Records searches included over 95,000 email records assigned to 48 selected non-career custodians and emails to or from specific OGC attorneys. In all, the inquiry team interviewed 22 GSA current and former employees.

While not exhaustive, the keyword search fact finding methodology identified several potential responses that fit the Committee's criteria and, upon further investigation, enabled the OIG to identify the media responses we report below.

FOIA Analysis: For guidance on how to determine whether there was "undue delay" and whether information was withheld that would not have been withheld "but for the involvement of the non-career officials," the inquiry looked to the Freedom of Information Act (FOIA statute) and the Department of Justice *Guide to the Freedom of Information Act (FOIA Guide)*. The *FOIA Guide* serves as a "comprehensive legal treatise on the FOIA" that reflects the Department's appraisal of FOIA issues and is available to the public online.

¹ The IQ database typically included unredacted copies of documents released in response to a FOIA request, as well as the final redacted copies. Proposed redactions that might differ from the final redactions were not maintained in the database. FOIAonline was not used for the FOIA responses discussed in this report.

The FOIA statute primarily addresses timeliness in terms of unusual circumstances, exceptional circumstances, and due diligence, rather than undue delay. The statute requires agencies to determine whether to comply with a request for records or determine an appeal “within 20 days (excepting Saturdays, Sundays, and legal public holidays.)” *Id.*, at § 552(a)(6)(A)(i). That time may be extended in “unusual circumstances.” 5 U.S.C. § 552(a)(6)(B)(i). Here, the term

“unusual circumstances” means, but only to the extent reasonably necessary to the proper processing of the particular requests--

- (I) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
- (II) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or
- (III) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

Id., at § 552(a)(6)(B)(iii). An agency also has an opportunity to extend the time limits for up to ten days, by written notice that gives the requestor an opportunity “to arrange with the agency an alternative time frame for processing the request or a modified request.” *Id.*, at § 552(a)(6)(B)(i),(ii). A requestor’s refusal to take this opportunity becomes a factor in determining whether exceptional circumstances exist. *Id.*, at § 552(a)(6)(B)(ii).

The *FOIA Guide* addresses how these provisions operate together in a discussion of *Citizens for Responsibility & Ethics in Washington v. Federal Election Commission*, 711 F. 3d 180, 185-189 (D.C. Cir. 2013); *see also FOIA Guide, Litigation Considerations* 35-36 (discussing). “Within the relevant time period, the agency must at least inform the requestor of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions.” *Id.*, at 186. That “does not require actual production of the records to the requestor at the exact same time that the ‘determination’ is communicated to the requestor.” *Id.*, at 188. But the agency must make the records “‘promptly available’, which

depending on the circumstances typically would mean within days or a few weeks of a ‘determination,’ not months or years.” *Id.*; see also 5 U.S.C. § 552(a)(3)(A) (agencies “shall make the records promptly available”). An agency’s delay in responding to a FOIA request may lead to a civil action. Where an agency “can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.” *Id.*, at § 522 (a)(6)(C)(i).

The OIG’s inquiry into whether GSA delayed process was informed by the legislative, judicial, and executive guidance cited above. Factors considered include the relevant average processing time for other FOIA responses; whether there were intervals during the processing when no or minimal action was taken; the reasons for the intervals, if any; and whether there were other reasons that may explain the length of time taken for a response.

In the absence of a statutory definition for the term “undue delay,” our inquiry sought to determine whether the release of requested information was accomplished promptly and, if not, whether there were “unusual circumstances” for the delay, or whether there were “exceptional circumstances” beyond those encompassed by the “unusual circumstances” rubric and whether GSA acted with “due diligence.”

Inquiry Results

The OIG’s inquiry identified three FOIA requests that are responsive to the Committee’s request. The requests are identified by the tracking number GSA assigned to the request, and discussed below in chronological order.

The FOIA requests are discussed in Part A of this section. Separately discussed in Part B is the Agency certification requested by the Committee.

Part A: Responsive GSA FOIA Requests

1. FOIA No. 252887

Request 252887 was made June 11, 2013 by a news reporter on behalf of Cox Television. The request sought: “Copies of all emails sent or received by employees in the office of the Administrator for GSA in 2013 that include the keyword “Donald Trump” or “Trump.” This was treated as a complex FOIA for tracking purposes.

GSA released the documents February 8, 2014, taking 242 days for a response.ⁱ The response time for this FOIA far exceeded the time GSA reported for FY 2014 responses to other FOIAs in the complex FOIA category:

| 252887 Response Time | GSA FY 2014 Complex FOIA Response Time | |
|-----------------------------|---|---------------------------------|
| | Median Time | Average Time² |
| 242 Days | 23 Days | 47.44 Days |

Our review of the FOIA workflow log shows two weeks were required to retrieve the requested emails and by July 31, 2013, an OAS FOIA analyst had reviewed and forwarded the documents with proposed redactions to Ms. Oden. The log shows Ms. Oden did not complete her review and forward the documents to the Office of General Counsel (OGC) for legal review until January 17, 2014. OGC at that point completed its review and returned the documents within two weeks, January 31, 2014. The documents, with redactions, were released to the requestor February 8, 2014.

Internal FOIA office records and emails reflect that the documents remained with Ms. Oden for review for over six months. She was reminded that 252887 still awaited her review in September 18, 2013, and again provided reminders January 10 and January 16, 2014, after which Ms. Oden forwarded the proposed response to OGC. When asked about the delay, Ms. Oden responded that she must have forgotten about this FOIA and that things were haphazard in the office, with limited staff and new staff lacking FOIA knowledge. Our review did not show any indication of non-career personnel other than Ms. Oden being involved in the delay responding to the requestor or any reason for the delay. Our review additionally did not find that any information withheld from the requestor would have been provided but for Ms. Oden's involvement.

Nonetheless, the log reflects that GSA spent only 64 of the 242 days retrieving records, reviewing the proposed response, and securing review from counsel. Even assuming that the log might not have captured some of the time Ms. Oden spent reviewing the materials, we found none of the statutory "unusual circumstances" that might explain or justify the delay. Instead, Ms.

² See GSA FOIA Annual Report for Fiscal Year 2014 at 20.

Oden only moved the response to OGC when she was reminded that this had not yet been done. In these circumstances, a response time of 242 days, five times the average response time for GSA 2014 complex FOIAs, reflects a lack of due diligence which fairly may be characterized as showing undue delay.

2. FOIA No. 227592

Request 227592 was made August 17, 2012, by an investigative reporter on behalf of the WUSA9 television station. The request sought:

copies of all materials sent to or received by the all [sic] regional and national commissioners and administrators, (including the Acting Administrator), all national communications officers, the chief of staff, the senior counselor and their immediate deputies, including text messages, hand written notes, e-mails, and reports sent or received after July 1, 2012 with any of the following terms:

- 1) "unreported bonuses"
- 2) "\$30M" or "\$30 million" or "\$30,000,000"
- 3) "\$44M" or "\$44 million" or "\$44,000,000"
- 4) "bonuses" or "bonus"
- 5) "award" or "awards"
- 6) "fiscal year 2011"
- 7) "<http://www.wusa9.com/news/database/>"
- 8) "payroll records"

GSA released the documents January 14, 2014, taking 515 days for a response. The response time for this FOIA far exceeded the time GSA reported for FY 2014 responses to other FOIAs in the complex FOIA category:

| 227592 Response Time | GSA FY 2014 Complex FOIA Response Time³ | |
|-----------------------------|---|---------------------|
| | Median Time | Average Time |
| 515 Days | 23 Days | 47.44 Days |

Before the statutory 20 day period expired, the Agency issued a 10 day extension letter August 29, 2012, and the requestor agreed to modify the request to include:

³ See GSA FOIA Annual Report for Fiscal Year 2014 at 20.

copies of all materials sent to or received by the all [sic] regional commissioners and administrators, (including the Acting Administrator), all national communications officers, the chief of staff, the senior counselor and their immediate deputies, including text messages, hand written notes, emails, and reports sent or received after July 1, 2012 with any of the following terms: Unreported bonuses, \$30M or [sic] \$30 million or \$30,000,000, \$44M [sic] or \$44 million or \$44,000,000, bonuses or bonus, award [sic] or awards, fiscal [sic] year 2011, <http://www.wusa9.com/news/database/> and payroll records. ⁴

The FOIA office received the requested documents January 9, 2013. The following month Administrator Tangherlini responded to a weekly action report and asked his communications office to “assess our exposure” with the 227592 FOIA.

By April 2013, Ms. Oden’s status report for 227592 showed the response was “Ready for OGC review,” but documents were not sent to OGC until December 6. “Some documents were identified as having “potential WH equities,” and on January 2, 2014, GSA delivered materials to the White House point of contact so they could be reviewed before the planned January 14, release date, when GSA made its response.

Our review of the FOIA workflow log shows that the requested documents were retrieved by January 9, 2013, but not delivered to OGC for legal review for almost 11 months. When asked about the time gap, Ms. Oden responded that sometimes overdue FOIAs would fall between the cracks.

Even accepting that 1,965 pages of emails for preparation and redaction is a “voluminous amount” that presented an “unusual circumstance[]” (5 U.S.C. § 552(a)(6)(B)(iii)(II)), the amount of time taken was not “necessary to the proper processing of the particular request[].” *Id.*, at § 552(a)(6)(B)(iii). The workflow log indicates conversion and redactions had been completed in order to permit legal review by April 8, but OGC was not sent the documents until eight months later. While recognizing that OAS may not have had the resources to keep up with the work, the Agency had an obligation to commit adequate resources needed to meet its FOIA obligations. In these

⁴ The Requestor later agreed to a further modification that limited the search to 51 mailboxes.

circumstances, a total response time of 515 days, 11 times the average response time for GSA 2014 complex FOIAs, reflects a lack of due diligence which fairly may be characterized as showing undue delay.

The inquiry does not find that the involvement of non-career personnel resulted in information being withheld that otherwise would have been provided the requestor. Redactions were approved by career counsel, and review by non-career personnel, at GSA or the White House, did not alter or expand what was redacted.

3. FOIA No. 223447

Request 223447 was received June 19, 2012, from an attorney on behalf of Judicial Watch, Inc. The request sought:

All videos produced in connection with GSA’s Linking Budget to Performance Initiative. It also includes, but is not limited to, all videos in which GSA employee Ben Kochanski appears. This request also includes, but is not limited to, all videos that have at any time been available on the website of GSA Region 2 within the timeframe of this request.

The requestor also requested a waiver of search and duplication fees as a member of the news media, and represented:

Judicial Watch, Inc. regularly obtains information about the operations and activities of government through FOIA and other means, uses its editorial skills to turn this information into distinct works, and publishes and disseminates these works to the public.

The letter also advised that this is requestor’s intent “with the records it receives in response to this request.”

GSA released the documents June 11, 2013, taking 357 days for a response. The response time for this FOIA far exceeds the time GSA reported for FY 2013 responses to other FOIAs:

| 223447 Response Time | GSA FY 2013 FOIA Response Time⁵ | |
|-----------------------------|---|---------------------|
| | Median Time | Average Time |
| 357 Days | 48 Days | 63.45 Days |

⁵ The GSA FOIA Annual Report for Fiscal Year 2013 at 20.

GSA had granted Judicial Watch press status in the past, most recently for a FOIA request made less than two weeks before requestor submitted 223447. GSA denied the fee waiver request in 223447, however. Judicial Watch appealed the denial November 9, 2012, and GSA denied the appeal on February 5, 2013, although it waived search (but not duplication) fees. Three days after the appeal, the requestor agreed to pay fees and, after initiating a civil action against GSA, received the videos.⁶

The OIG reviewed the Agency's determination because GSA's position on Judicial Watch's request for fee waiver explains more than eight months of the time GSA took to provide the videos, and non-career personnel were involved.

We found that Judicial Watch's status as a media representative was questioned before GSA received request 223477. On June 15, OGC received an email containing guidance for determining Judicial Watch was not a media requestor. In the email, captioned "Judicial Watch Found Not A Media Requester," the sender, Elliot Minberg, advised he had gathered this information at the request of GSA's White House Liaison, Gregory Mecher (non-career) the previous day.⁷

The information provided was a single page of the DOJ *FOIA Guide* that contained a footnote discussing judicial decisions that *predate* the 2007 Open Government Act, which altered the definition of "representative of the media."⁸ We learned that OGC attorneys did not conduct any independent legal research

⁶ *Judicial Watch, Inc. v. United States General Services Administration*, Civil Action No. 1:13-cv-00755-RMC (D.D.C). After suit was filed, GSA waived the remaining fees. The matter was settled, with GSA agreeing to pay Judicial Watch \$750.

⁷ Mr. Minberg came to GSA May 7, 2012, on detail from his senior attorney position at the Department of Housing and Urban Development, to serve as a Special Legislative Counsel. Although assigned to OGC, he worked in the Administrator's suite. Chief of Staff Robertson later the same day notified OGC that Mr. Minberg would share what he had modeled at other agencies to help GSA set up a FOIA group, as part of the efforts to make the FOIA response more efficient and keep response times down. In an email, a senior OGC attorney expressed curiosity as to what process had to be improved since "our delays appear to be due to the same forces that brought Elliot to our office." Later in the evening, the same attorney emailed a colleague that "this will not end well." When asked about these emails, the attorney stated that adding Mr. Minberg to the system would slow down the process and questioned how he could improve the FOIA system if he did not know the system or the management structure of GSA.

⁸The Open Government Act differs from the language used in the OMB Fee Guidelines, 52 Fed. Reg. 100012, 10018 Mar. 27, 1987), used by agencies before the 2007 amendments. For a recent discussion of the difference in language between the 2007 amendments and the OMB guidance, see *Cause of Action v. Federal Trade Commission*, 799 F. 3d 1108, 1123 (D.C. Cir. 2015) (2007 amendments changed OMB standard); see generally, *id.*, at 1118-1125 (applying FOIA fee waiver provisions).

on the fee waiver issue for post-2007 guidance. We found that the Agency's exclusive reliance on judicial decisions that predate – and consequently did not apply – the 2007 amendments to FOIA's fee waiver provisions shows a lack of due diligence in ascertaining and applying the current legal standard.

The agency's initial denial of Judicial Watch's fee waiver also disregarded GSA notice procedures. By June 28, Chief FOIA Officer Metzler, General Counsel Durmer, and two OGC attorneys had met and decided on a new approach for Judicial Watch: the requestor would be asked to provide additional information, and a standard letter template provided in GSA's FOIA Standard Operating Procedures (SOP) would be used. The sample letter referenced in the discussion provided:

GSA will waive or reduce fees for FOIA requests if disclosure will contribute significantly to public understanding of the operations or activities of the Government or agency and will not be primarily in the commercial interest of the requestor. Requests for waivers must explain:

- How the subject matter of the requested information directly and clearly concerns identifiable operations or activities of the Federal Government;
- How disclosure will contribute to the public's understanding of Government operations or activities, including how and in what forum the requestor will publish the information to inform and educate the public;
- How the materials are unique and do not duplicate materials already in the public domain,; and
- What the impact on the commercial interests of the requester will be, if any.

The Agency's procedure was not followed, however. The SOP expressly directs that: "If the information provided [in the request for waiver] is insufficient or unclear, request additional information." This is not how GSA treated Judicial Watch. Instead, Ms. Oden's July 13, 2012 denial letter only stated: "You requested any FOIA processing fees be waived for this request, but your letter failed to adequately justify a fee waiver." GSA's SOP also requires the agency to "fully explain the reasons for the denial." Ms. Oden's conclusory denial letter did not explain the reasons for GSA's action. We learned that OAS staff expressed concern that the decision to question Judicial Watch's media status represented a change in procedure that should have been communicated to other FOIA staff so they would know how to address fee waiver requests.

The agency's denial of Judicial Watch's appeal additionally was procedurally defective. The appeal was decided by Ms. Metzler pursuant to the authority delegated to her as the Chief Administrative Services Officer by GSA Directive ADM 5450.161 (4). Although the initial decision letter is signed by Ms. Oden, the inquiry found that Ms. Metzler made the determination after she and Ms. Oden viewed the Judicial Watch website. Having the same person making both the initial determination and the appeal of that determination is contrary to GSA procedures. Under GSA's Directive, appeal authority cannot be exercised by the Chief Administrative Services Officer if that officer made the initial decision being appealed. Directive ADM 5450.161 (4). In that circumstance, the authority is exercised by the Chief People Officer. *Id.*

We found that a deficient and procedurally flawed decisional process led to undue delay in responding to the request.

PART B: GSA Certification

The Committee additionally asked the OIG to secure a written certification from GSA's chief FOIA officer that:

1) no non-career officials 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 the non-career officials.

The current Chief FOIA Officer, Ms. Metzler, provided the following certification for the period from November 2011 to the present:

During this time period, while non-career officials had been involved in GSA's response to FOIA requests, to the best of my knowledge and recollection, no such involvement has ever resulted in the undue delay of a response to a FOIA request or the provision of less information than would have been provided for the involvement of non-career officials.

The certification is attached.

When interviewed, Ms. Metzler agreed there were delays, but said that because of the circumstances surrounding the time period, she did not consider any delays to be undue. Ms. Metzler stated that she believed an

undue delay is one occurring for no rational reason. She also stated that there was too much work for too few people.

Please do not hesitate to contact Counsel to the Inspector General Larry Gregg with any questions about this letter.

Sincerely,

A handwritten signature in blue ink that reads "Carol F. Ochoa". The signature is written in a cursive style with a large initial "C".

Carol F. Ochoa
Inspector General

Enclosure

cc: The Honorable Thomas Carper
Ranking Member



Office of Administrative Services

August 6, 2015

MEMORANDUM FOR ROBERT C. ERICKSON
DEPUTY INSPECTOR GENERAL (J)

FROM: CYNTHIA A METZLER
CHIEF ADMINISTRATIVE SERVICES OFFICER
CHIEF FOIA OFFICER

A handwritten signature in black ink, appearing to read "C. Metzler", written over the typed name of the sender.

SUBJECT: Certification Regarding Non-Career Officials' Involvement in the FOIA Process

The Freedom of Information Act (FOIA) program for the General Services Administration's (GSA) is currently centralized and has been administered through the Office of Administrative Services (OAS) since November 2011. I have served as the Chief Administrative Services Officer since August 2011. I am also designated as the Agency's Chief FOIA Officer.

During this time period, while non-career officials had been involved in GSA's response to FOIA requests, to the best of my knowledge and recollection, no such involvement has ever 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.

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