U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL

No Indications of Bias Found in a Sample of Freedom of Information Act Fee Waiver Decisions But the EPA Could Improve Its Process

Report No. 14-P-0319 **July 16, 2014**

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Abbreviations

CFR	Code of Federal Regulations
DOJ	U.S. Department of Justice
EPA	U.S. Environmental Protection Agency
FOIA	Freedom of Information Act
OEI	Office of Environmental Information
OGC	Office of General Counsel
OIG	Office of Inspector General
OMB	Office of Management and Budget

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U.S. Environmental Protection Agency
Office of Inspector General

14-P-0319
July 16, 2014

At a Glance

Why We Did This Review

The Deputy Administrator of the U.S. Environmental Protection Agency (EPA) requested a review to determine whether the EPA fee waiver determinations under the Freedom of Information Act (FOIA) were completed in a timely and unbiased manner. Specifically, we evaluated whether the EPA implements the FOIA fee waiver provisions in accordance with regulations; adheres to timely and unbiased treatment of requests for fee waivers; and tracks the elements of fee waiver requests to demonstrate timely and unbiased treatment.
We reviewed 1,077 EPA FOIA fee waiver denials issued between October 1, 2009, and June 19, 2013. We also reviewed 475 fee waiver requests from 21 organizations to determine whether the EPA appropriately applied criteria (i.e., six factors in the agency's regulations to evaluate fee waiver requests).

This report addresses the following EPA goal or cross-agency strategy:

- *Embracing EPA as a high-performing organization.*

For further information, contact our public affairs office at (202) 566-2391.

The full report is at:
www.epa.gov/oig/reports/2014/20140716-14-P-0319.pdf

No Indications of Bias Found in a Sample of Freedom of Information Act Fee Waiver Decisions But the EPA Could Improve Its Process

What We Found

We found that the EPA responded to fee waiver requests, on average, within 12 business days, although we noted wide variation in response times among the sample we reviewed. We found that 47 percent of the EPA's responses to fee waiver requests we reviewed exceeded the agency's 10-business-day goal. The time it takes the EPA to respond to fee waiver requests has remained fairly consistent over time. On fee waiver appeals, we found that over 71 percent of decisions we reviewed exceeded the EPA's processing goal of 20 business days.

To improve customer service and lessen any perception of differential treatment, the EPA should address variability in time to respond to FOIA fee waiver requests and should clarify what requesters must demonstrate to receive a fee waiver.

The factor most frequently cited by the EPA when it denied fee waiver requests was the requester not adequately describing how disclosure of the requested information would contribute to public understanding. The EPA cited this factor in more than half of the denials we reviewed (585 out of 1,062).

We found no indications of bias in the fee waiver decisions we reviewed. We agreed with how the EPA applied the six factors when deciding 452 of the 475 fee waiver requests we reviewed from 21 different organizations. Of the 475, our decisions differed from the agency's in 23 instances (approximately 5 percent). Among these 23 disagreements, we would have denied 17 that were granted due to our opinion that request letters lacked discussion on one or more factors. We also would have granted six that were denied. The EPA should clarify what requesters must demonstrate under the six review factors and when to obtain additional justification from requesters to lessen any perception of potential differential treatment when evaluating fee waiver requests.

Recommendations and Planned Corrective Actions

We recommended that the Acting Assistant Administrator for Environmental Information and the General Counsel examine and address the reasons for variability in response times for FOIA fee waiver decisions and appeals. We also recommended that the Assistant Administrator for Environmental Information clarify what requesters must demonstrate under each factor to receive a fee waiver, clarify the EPA's approach on when to request additional justification, and inform the public of enhancements to the agency's FOIA website and other efforts to explain what must be demonstrated under each factor. The EPA agreed with our recommendations and developed or completed acceptable corrective actions. All recommendations are resolved. Recommendations 1 through 3 are open and recommendation 4 is closed.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

THE INSPECTOR GENERAL

July 16, 2014

MEMORANDUM

SUBJECT: No Indications of Bias Found in a Sample of Freedom of Information Act Fee Waiver Decisions But the EPA Could Improve Its Process
Report No. 14-P-0319

FROM: Arthur A. Elkins Jr.

TO: Renee Wynn, Acting Assistant Administrator and Chief Information Officer
Office of Environmental Information

Avi Garbow, General Counsel
Office of General Counsel

This is our report on the subject evaluation conducted by the Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA). This report contains findings that describe the problems the OIG has identified and corrective actions the OIG recommends. This report represents the opinion of the OIG and does not necessarily represent the final EPA position. Final determinations on matters in this report will be made by EPA managers in accordance with established audit resolution procedures.

Action Required

You are not required to provide a written response to this final report because you provided agreed-to corrective actions and planned completion dates for the report recommendations. The OIG may make periodic inquiries on your progress in implementing these corrective actions. Please update the EPA's Management Audit Tracking System as you complete planned corrective actions. Should you choose to provide a final response, we will post your response on the OIG's public website, along with our memorandum commenting on your response. You should provide your response as an Adobe PDF file that complies with the accessibility requirements of Section 508 of the Rehabilitation Act of 1973, as amended. We have no objections to the further release of this report to the public.

We will post this report to our website at http://www.epa.gov/oig.

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Chapter 1
Introduction

Purpose

We conducted this evaluation in response to a request from the U.S. Environmental Protection Agency (EPA) Deputy Administrator. We were asked to assess whether the agency evaluated Freedom of Information Act (FOIA) fee waiver requests in a timely and unbiased manner. Specifically, we sought to determine whether the EPA:

- Implements the FOIA fee waiver provisions in accordance with the EPA's regulations in the Code of Federal Regulations (CFR) at 40 CFR § 2.107 and policies and procedures.
- Adheres to timely and unbiased treatment of fee waiver requests.
- Tracks the elements of fee waiver requests to demonstrate timely and unbiased treatment.

Background

The Freedom of Information Act and Fee Categories

FOIA,[1] enacted in 1966, provides the public a right to obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exemptions or by one of three law enforcement record exclusions. FOIA states that agency records will be furnished without any charge or at a reduced charge if disclosure of the information:

(1) Is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities; and
(2) Is not primarily in the commercial interest of the requester.

The Act also states that, upon any request of records, each federal agency shall determine within 20 days (excepting weekends and legal public holidays) after the receipt of any request whether to comply with the request for records.[2] Under FOIA, federal agencies are required to promulgate regulations on processing requests for records and establishing procedures for determining when to waive or reduce fees to produce records. FOIA designated three categories of requesters and prescribes fees for processing requests, by requestor category:[3]

(1) Commercial use.

[1] 5 U.S.C. § 552.
[2] The 20-working-day processing time can be extended by the agency under provisions of the FOIA to account for complex requests and unusual or exceptional circumstances. See 5 U.S.C. § 552(a)(6)(B) & (D).
[3] For category definitions, see Office of Management and Budget (OMB) *Uniform Freedom of Information Act Fee Schedule and Guidelines* (March 27, 1987). Except for commercial use requests, an agency must provide without charge the first 2 hours of search time and the first 100 pages of duplication.

(2) Educational or non-commercial scientific institution, news media.
(3) Other.

FOIA does not include time frames for making decisions on fee waiver requests. FOIA states that an agency shall not assess certain fees if it fails to comply with the 20-day time limit (absent unusual or exceptional circumstances).

The EPA's FOIA Regulations on Fees and Fee Waivers

The EPA's FOIA regulations (40 CFR §§ 2.100-2.108) cover the different categories of requesters[4] and fee charges based on category, and states that no fees will be charged for a request where a fee waiver is granted or if the total fee under any category is $14 or less. According to the EPA, the agency's FOIA regulations are consistent with OMB Fee Guidance of 1987, the U.S. Department of Justice (DOJ) FOIA regulations, and the regulations of nearly all other federal agencies.

Requesting a Fee Waiver

Any FOIA requester may ask that the EPA waive all fees associated with a request. The fee waiver request must be submitted with the FOIA request for records. Upon receiving a fee waiver request, the EPA FOIA office will determine whether a fee waiver request meets the six factors listed in table 1.[5]

Table 1: Factors the EPA must consider in evaluating fee waiver requests

1	Whether the subject of the requested records concerns "the operations or activities of the government."
2	Whether the disclosure is "likely to contribute" to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities.
3	Whether disclosure of the requested information will contribute to "public understanding." The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester (presumption for news media).
4	Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.
5	Whether the requester has a commercial interest that would be furthered by the requested disclosure.
6	Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester." FOIA offices ordinarily will presume that when a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.

Source: 40 CFR § 2.107.

[4] The EPA's FOIA regulations state that there are four categories of requests: (1) commercial use, (2) educational or non-commercial scientific requests, (3) news media and (4) all other requests.
[5] In 1987, DOJ issued fee waiver policy guidance recommending that federal agencies use six analytical factors for determining when fees should be waived or reduced. The six factors considered by the EPA (listed above) are consistent with the factors identified in this guidance.

When the EPA denies a fee waiver request, the requester will be notified of that determination in writing. A requester may appeal any fee waiver denial in writing no later than 30 calendar days from the date of the letter denying the request. The EPA's decision on appeal will be made in writing, normally within 20 working days of receipt of the appeal request.[6] An appeal decision upholding the denial in whole or in part will contain the reason for the EPA's decision.

The EPA's FOIA website includes a reference guide with general information on fee waiver requests, contact information for agency FOIA staff, and links to the agency's regulations and website to electronically submit both FOIA and fee waiver requests.

Responsible Offices

The EPA has 11 FOIA offices—one in headquarters and one in each of its 10 regions. The headquarters office is located in the Office of Information Collection in the Office of Environmental Information (OEI). The EPA's Office of General Counsel (OGC), through its general law office, handles all appeals of fee waiver denials. The headquarters office also reviews fee waiver requests made to the OIG and any appeals of those determinations would be reviewed by OGC.

FOIA Operations, Procedures and Data Systems

On September 30, 2013, the agency issued Interim Procedures for Responding to Freedom of Information Act (FOIA) Requests.[7] According to these procedures, all fee waiver requests are processed by the headquarters FOIA office. The agency FOIA Officer makes the initial decision whether to grant or deny a fee waiver based on recommendations from three FOIA Specialists who are also in headquarters. According to the agency FOIA Officer, in February 2011 the agency decided to centralize the fee waiver determination process in the headquarters office to provide for more consistency in decision making. Prior to this, each region had its own procedures for processing FOIA requests and making fee waiver decisions.

In 2005, the EPA deployed FOIAXpress as an enterprise FOIA management system. The agency FOIA Officer explained that FOIAXpress was a tracking system for the agency but was not an official record keeping system (hard copy files were still considered the official records). To improve FOIA management and process, the agency—along with several other federal agencies—deployed FOIAonline on October 1, 2012. The FOIAonline system is a multi-tenant, online FOIA repository and secure agency processing system used by partner agencies across the federal government. FOIAonline is the agency's official record keeping system for FOIA requests.

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[6] The FOIA requires that each agency "shall make a determination with respect to any appeal within 20 days."
[7] The EPA issued earlier drafts of the interim procedures in March and July of 2013.

Scope and Methodology

We conducted our review from June 2013 to March 2014. We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. Appendix A provides additional details on our sample selection methodology, summarized below.

To determine whether the EPA implements the FOIA fee waiver provisions in accordance with regulations, policies and procedures, we reviewed relevant laws including the FOIA. We also reviewed the EPA's regulations (40 CFR §§ 2.100-2.108) as well as the agency's September 30, 2013, Interim Procedures for Responding to Freedom of Information Act (FOIA) Requests and earlier iterations of these procedures. We consulted OMB and DOJ guidance and training, as well as training provided by the American Society of Access Professionals. We interviewed agency FOIA staff on the EPA's process for determining and documenting fee waiver decisions. Interviewees included headquarters FOIA Specialists, the agency FOIA Officer, and a supervisor within OEI's Office of Information Collection, Collection Strategies Division. We also interviewed the EPA's lead FOIA attorney in OGC on the fee waiver determination appeals process.

To address our remaining objectives on timely and unbiased treatment of fee waiver requests, we obtained access to FOIAXpress and FOIAonline. We ran reports to generate a list of FOIA fee waiver requests from October 1, 2009, to June 19, 2013. After working to eliminate duplicates, we identified 1,077 denied fee waiver requests in this time period.[8] We reviewed all 1,077 denials to determine the:

- Individual and/or organization making each fee waiver request.
- Date of the fee waiver request.
- EPA's decision date and outcome of the request (i.e., granted or denied).
- Factor(s) cited as the basis for each fee waiver denial.
- Dates of appeals of fee waiver denials, if appealed.
- OGC's appeal decision date and outcome.
- Factor(s) cited in appeal decisions.

We also reviewed a subset of 475 fee waiver requests from 21 separate organizations to determine whether the EPA appropriately applied its fee waiver

[8] In his request, the Deputy Administrator asked us to review at least the last five full fiscal years and to begin with fiscal year 2006. Due to resource and time constraints, we selected a smaller range, specifically fiscal years 2010 through June 19, 2013—the date we announced this review to EPA.

evaluation criteria and whether organizations asking for waivers appropriately justified their requests.[9] For the subset of 475, we reviewed both the agency's initial fee waiver determination and its decision on appeals of any denials, if applicable. After completing our review, we met with the agency FOIA Officer and the OGC's lead FOIA attorney to discuss questions we had on individual files. We also interviewed individuals from five of the 21 organizations for their perspectives on the EPA's fee waiver process and whether they had any suggested areas for improvement.

We did not perform data quality testing on the reports we obtained from the EPA's FOIAXpress and FOIAonline systems. We relied on data we obtained from these reports and verified other data through additional documentation. For example, we obtained copies of letters for information that we could not locate in data system reports.

Prior Audit Coverage

Our office issued two prior reports on FOIA:

***EPA Has Improved Its Response to Freedom of Information Act Requests But Further Improvement Is Needed* (March 25, 2009), Report No. 09-P-0127**

- At the time of this report, the agency processed fee waiver requests in either headquarters or the region that received the FOIA request. As a result, our office found that it was possible for a requester to submit multiple fee waiver requests to different regions simultaneously and receive different results. Our office recommended that the EPA standardize FOIA procedures at a national level, and it was shortly after this report that the agency decided to centralize all fee waiver determinations in the agency FOIA office in headquarters.

***Congressionally Requested Inquiry Into EPA's Handling of Freedom of Information Act Requests* (January 10, 2011), Report No. 11-P-0063**

- This report did not include any findings or recommendations related to fee waivers and, rather, responded to a congressional request on whether political appointees were made aware of information requests and had a role in reviews and decision making.

Additionally, the Government Accountability Office issued a report[10] on the Office of Government Information Services, within the National Archives and Records Administration, and recommendations that office makes to assist agencies implementing FOIA. The report noted that the Office of Government Information Services planned to enhance its role in administering FOIA by

[9] See the "File Review" section of appendix A for a description of how we selected the 475 fee waiver decisions.
[10] *Office of Government Information Services Has Begun Implementing Its Responsibilities, but Further Actions Are Needed* (September 10, 2013), GAO-13-650.

working “with stakeholders from both inside and outside government to review the issues surrounding FOIA fees and fee waivers, which remains a persistent point of contention administratively and in litigation.” The report also noted that the office recommends as a communications best practice that agencies should post in plain language information about fees, fee categories and fee waivers.

Chapter 2
The EPA Should Address Variability in Response Times for Fee Waiver Requests and Appeals

The EPA met its goal of responding to fee waiver requests within 10 business days in 567 out of 1,062 denials we reviewed, or 53 percent. On average it took the EPA 12 business days to deny fee waiver requests although there was considerable variability in the amount of time it took in the sample we reviewed. It took the EPA more than 10 business days to deny fee waiver requests in 495 instances (one of which took 157 days and another took 542 days). Additionally, it took the EPA, on average, more than double the 20-day regulatory requirement to decide appeals. Over 70 percent of appeal decisions took 20 or more business days, and there was variability in response time. For both the initial and the appeals process the standard deviation was about twice the goal, showing high variability in the process time to deny the fee waiver request or appeal. The EPA should assess both processes to identify appropriate improvements to help meet stated goals.

Timeliness of Responses to Fee Waiver Requests and Appeals

Timeliness of the EPA's Responses to Fee Waiver Requests

FOIA states that an agency shall not assess certain fees if it fails to comply with the 20-day time limit to respond to a request for records (absent unusual or exceptional circumstances). However, neither the FOIA nor the EPA's FOIA regulations specify a time limit for responding to fee waiver requests. Nonetheless, the agency FOIA Officer said that the EPA has an internal goal to make fee waiver decisions within 10 business days of receipt of the request. In our review of 1,077 fee waiver denials, we obtained documentation on 1,062 entries.[11] Table 2 summarizes timeliness data from our review of 1,062 fee waiver requests the EPA denied.

Table 2: Median and mean EPA response time to deny fee waiver requests

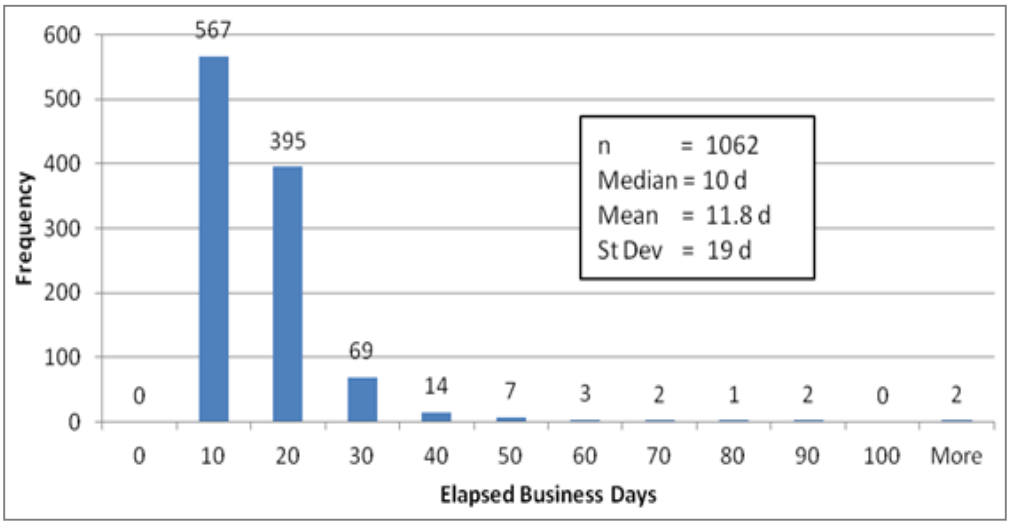
Data system	Number reviewed	Median (mean) duration in business days
FOIAXpress	572	10 (12.42) days
FOIAonline	490	9 (11.24) days
Totals and overall duration	**1,062**	**10 (11.88) days**

Source: OIG data analysis for 1,062 fee waiver requests submitted from October 1, 2009, through June 19, 2013.

[11] The EPA could not provide us copies of 15 denial letters the agency sent fee waiver requesters.

The data shows that the mean time to respond to a fee waiver request for our sample is about 12 business days. Figure 1 shows that the EPA was within its goal of 10 business days in 567 out of 1,062 instances, or 53 percent.

Figure 1: Elapsed days to deny fee waiver requests



Source: OIG data analysis for 1,062 fee waiver requests.

Figure 1 illustrates variability in the amount of time it took the EPA to deny the fee waiver requests in the sample we reviewed. For example, we found that it took the EPA more than 10 business days to deny fee waiver requests in 495 instances, and two responses extended to more than 100 days (one took 157 days and another took 542 days).

Timeliness of the EPA's Decisions on Fee Waiver Appeals

The EPA's FOIA regulations at 40 CFR § 2.104(k) state that the agency will make decisions on appeals in writing normally within 20 working days of receipt by the headquarters FOIA staff. Of the 1,077 fee waiver denials we reviewed, there were 118 appeals. At the time of our review, four of the 118 appeals were still pending an EPA decision, and requesters withdrew an additional four prior to the EPA making its decision. Table 3 summarizes timeliness data from our review of 110 denied fee waiver requests for which requesters appealed and for which we had documentation of an EPA decision. Table 3 illustrates that it took the EPA, on average, more than double the agency's 20-day goal to decide appeals.

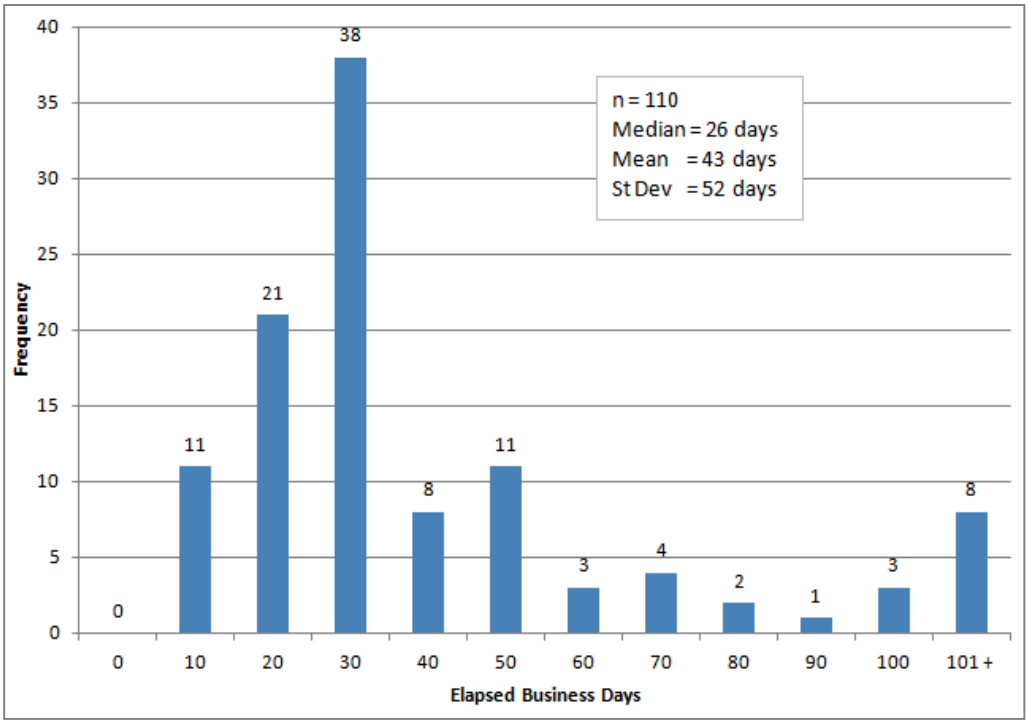
Table 3: Median and mean time for EPA to respond to fee waiver appeals

Data system	Number reviewed	Median (mean) duration in calendar days
FOIAXpress	50	21 (20.38) days
FOIAonline	60	39.5 (61.43) days
Totals and overall duration	**110**	**26 (42.77) days**

Source: OIG data analysis for 110 fee waiver appeal decisions using the date listed on the requester's appeal letter as the start date, and the date listed on the appeal determination letter sent by the EPA as the end date.

Figure 2 shows that over 71 percent of appeal decisions took more than 20 business days, and also illustrates variation in response time.

Figure 2: Elapsed days for the EPA to decide appeals



Source: OIG analysis of the 110 fee waiver denials where requesters appealed.

Information the EPA Needs to Track Timeliness and Assess Trends

To assess trends over time, we created table 4 to show the average business days to deny requests by quarter for our sample period (October 2009 to June 2013).

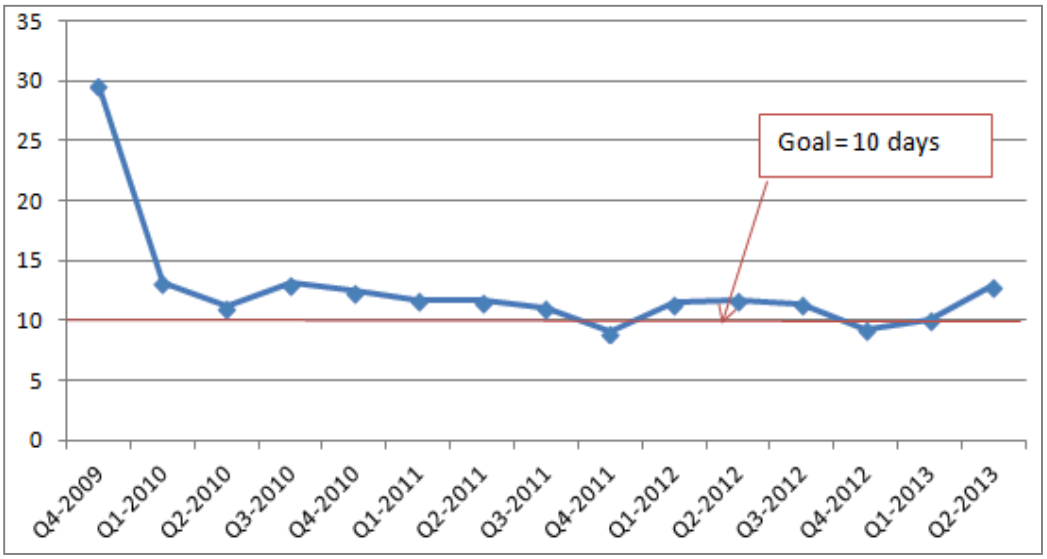
Table 4: Quarterly average business days to deny fee waiver requests

Quarter	Average business days to deny request
Q4-2009	29.59
Q1-2010	13.16
Q2-2010	11.15
Q3-2010	13.12
Q4-2010	12.45
Q1-2011	11.75
Q2-2011	11.63
Q3-2011	11.11
Q4-2011	9.00
Q1-2012	11.46
Q2-2012	11.69
Q3-2012	11.42
Q4-2012	9.27
Q1-2013	10.11
Q2-2013	12.92

Source: OIG data analysis for 1,062 fee waiver denials.

Aside from an initial drop during the first two quarters of our scope period, data shows that the EPA's response time has remained constant over time (October 2009 through June 2013) with no noteworthy trends (see figure 3).

Figure 3: Timeliness trends for EPA to deny fee waiver requests



Source: OIG data analysis (red line denotes the EPA's 10-business day goal).

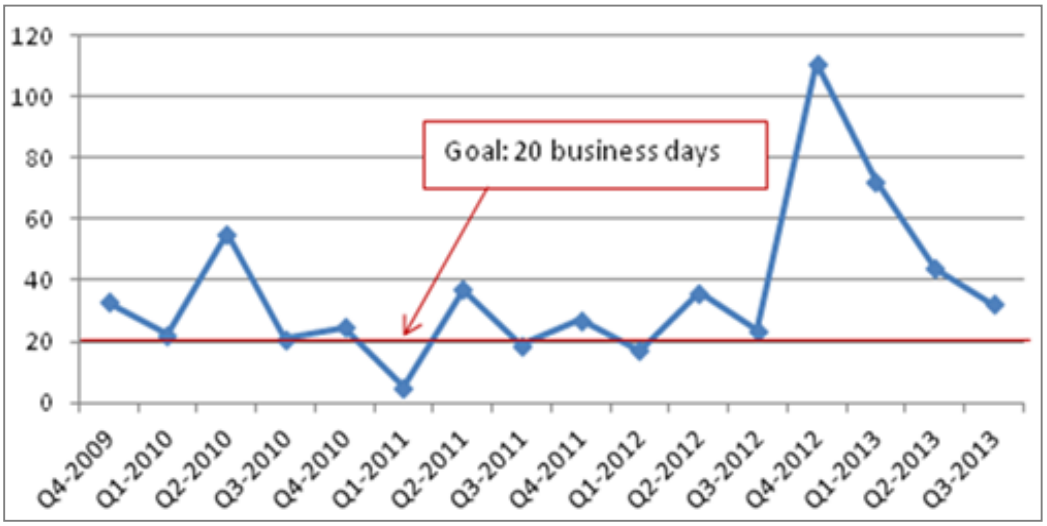
In contrast, data in table 5 and figure 4 illustrate greater variability in the time it takes the EPA to make appeals decisions, particularly given the agency's 20-business-day goal.

Table 5: Quarterly average business days to deny fee waiver appeals

Quarter	Average business days to deny request
Q4-2009	33.00
Q1-2010	22.33
Q2-2010	55.33
Q3-2010	20.88
Q4-2010	24.71
Q1-2011	5.00
Q2-2011	36.89
Q3-2011	18.71
Q4-2011	27.20
Q1-2012	17.25
Q2-2012	36.17
Q3-2012	23.80
Q4-2012	110.71
Q1-2013	72.35
Q2-2013	43.94
Q3-2013	32.33

Source: OIG data analysis for 110 fee waiver denials where requesters appealed. Q3-2013 includes information on only three appeal decisions within our scope.

Figure 4: Timeliness trends for responses to appeals of fee waiver denials



Source: OIG data analysis on appeal decisions (red line denotes the EPA's 20-business day goal).

The EPA attributed the higher-than-average business days to deny requests for Q4-2012 and Q1-2013 to the deployment and implementation of the new FOIAonline system and the learning curve associated with any major new system deployment.

Our review found that the EPA has all of the information it needs to evaluate the agency's response timeliness for fee waiver requests and appeals. Using information from the EPA's FOIA data system, as we did, the agency can do trend analysis.

Factors Three and Four Most Often Cited for Denying Fee Waivers, and Factors Two, Three and Four in Appeal Decisions

The agency FOIA Officer makes determinations on all fee waiver requests, relying on recommendations from three FOIA Specialists. The agency FOIA Officer and the FOIA Specialists said that each decision is made on a case-by-case basis based on the information submitted with the fee waiver request. The EPA uses the six factors listed in 40 CFR § 2.107 on:

1	Whether the subject of the requested records concerns the operations or activities of the government.
2	Whether the disclosure is likely to contribute to an understanding of government operations or activities.
3	Whether disclosure of the requested information will contribute to public understanding.
4	Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities.

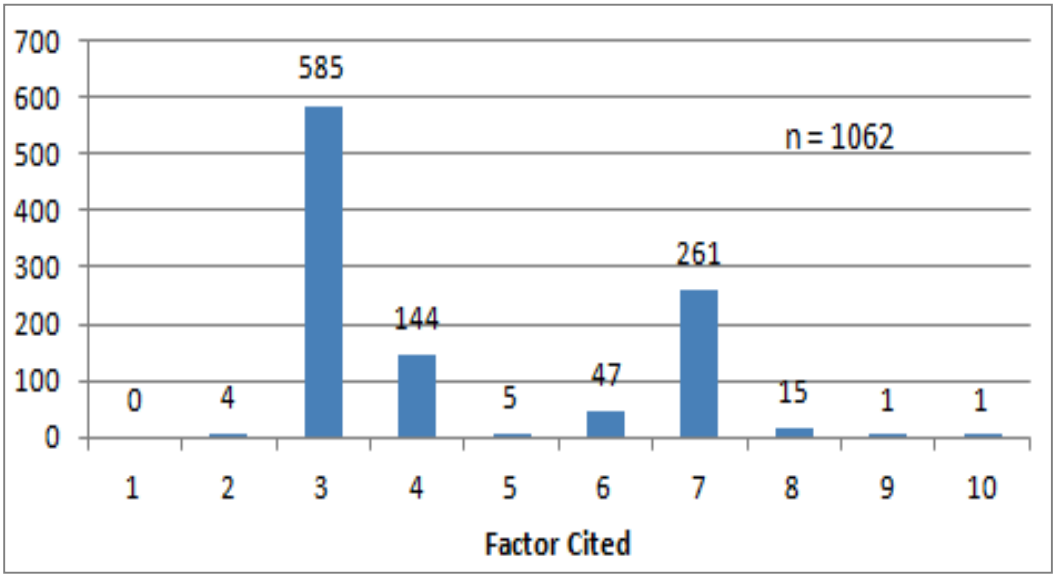
5	Whether the requester has a commercial interest that would be furthered by the requested disclosure.
6	Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

When the EPA determines that a request does not meet one of the six factors, the EPA does not evaluate the request under the remaining factors. In addition to the six factors, we identified four other factors (unrelated to the six regulatory factors) that account for denials the EPA made:

7	The original request failed to meet one or more of the factors. However, the FOIA specialist provided an opportunity for the requester to submit additional information and, absent a response, denied the fee waiver.
8	Requester did not submit the fee waiver request with the original FOIA request as stated in regulations (40 CFR § 2.107(l)(5)).
9	Not a formal FOIA request because request was made by another agency in the executive branch of the federal government. A federal agency does not meet the FOIA's definition of 'person' entitled to make a request.[12]
10	None of the other nine factors were cited in the denial letter.[13]

Figure 5 summarizes the regulatory and other factors cited by the EPA as the basis for denying fee waivers in the letters we reviewed.

Figure 5: Regulatory and other factors cited by the EPA in fee waiver denials



Source: OIG analysis of data for 1,062 fee waiver denials (note that columns total 1,063 because one denial letter cited two factors).

[12] Per 5 USC § 551(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency.
[13] As shown in Figure 5, we observed one letter that did not cite any of the factors as the basis for denial.

On factor #3, the DOJ's Guide to the Freedom of Information Act (2009) states that "[r]equesters who make no showing of how the information would be disseminated, other than through passively making it available to anyone who might seek access to it, do not meet the burden of demonstrating with particularity that the information will be communicated to the public." On factor #7, the EPA asked for more information to make its decision and, absent receiving additional information, denied the fee waiver request.

As explained in Chapter 1, the FOIA designated three categories of requesters and prescribes fees for processing requests, by category: (1) commercial use; (2) educational or non-commercial scientific institution, news media; and (3) other. Table 6 shows—by fee category—the regulatory and other factors cited by the EPA as the basis for denial:

Table 6: Regulatory or other denial factor by fee category

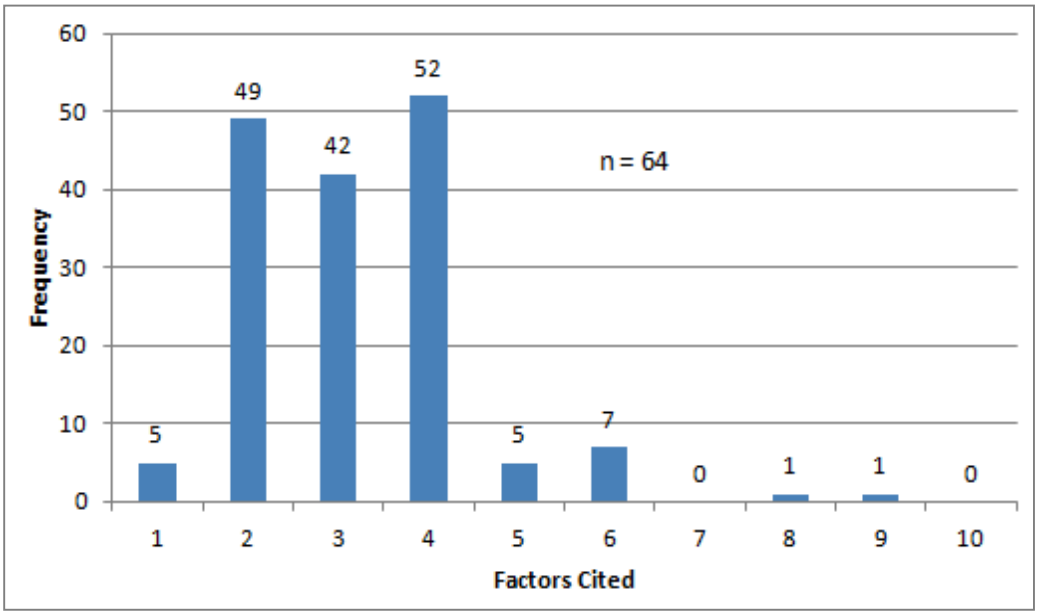
Combined	Row subtotals	Factors									
		1	2	3	4	5	6	7	8	9	10
Commercial use	255	0	1	120	25	5	43	56	4	0	1
News media educational & scientific	79	0	1	32	7	0	1	33	5	0	0
Other	724	0	2	430	112	0	3	170	6	1	0
Null category	5	0	0	3	0	0	0	2	0	0	0
	1,063										

Source: OIG analysis of fee waiver denial data. When added, the table totals 1,063 because one letter cited two factors.

Where requesters appealed fee waiver denials, we found that OGC reversed the denial and granted the fee waiver in 12 of 110 instances (or more than 10 percent of the time). We also found that OGC determined that the fee waiver was "moot" in 34 of 110 instances (or approximately 31 percent of the time) because the majority (30 of the 34) had not reached the minimum billable amount of $14, making a fee waiver unnecessary.[14] For the balance of appeal decisions, OGC cited the regulatory or other factors listed in figure 6 to uphold denials or partial denials.

[14] The remaining four of the 34 were determined to not be proper requests under FOIA.

Figure 6: Regulatory or other factors cited by OGC to uphold denials



Source: OIG analysis of data on 64 appeal denials. Column totals, when added together, exceed 64 as some appeal decision letters cited more than one factor.

Information the EPA Needs to Track Factors and Assess Trends

The EPA does not track the factor cited as the basis for denial in FOIAonline but can, as we did, pull the factors cited from denial letters to assess trends. Tracking denial factors would inform the agency of the frequency of factors cited and would, through the agency's analysis, identify any difficult factors for requesters to address that the EPA could mitigate through process improvement.

Conclusion

Data we reviewed shows that neither the EPA's FOIA fee waiver determination process nor the appeals determination process met the respective goals of 10 and 20 business days. On average, it took the EPA approximately 12 business days to deny fee waiver requests and approximately 43 business days to decide appeals. The data we reviewed displays a large amount of variability in both processes, with the standard deviations being around twice the stated goal in each process. While the quarterly process performance data for fee waiver decisions shows a generally flat trend with no significant change over the past 3 years, the data also contain outliers and other markers that require management attention. The quarterly averages for appeal decisions show trends for increasing time to decide appeals and increasing process variability. The EPA should assess both processes to identify appropriate improvements to help the agency meet its stated goals.

Recommendation

We recommend that the Assistant Administrator for Environmental Information and the General Counsel:

1. Examine and address the reasons for variability in response times for FOIA fee waiver decisions and appeals.

Agency Comments and OIG Evaluation

After reviewing our preliminary findings and recommendation, OEI and OGC requested that we provide the tracking numbers associated with the two 100-plus-day outliers in figure 1 and for the appeal timeliness spike in figure 4 so they could begin to examine response-time variability. We provided the requested information in advance of issuing our official draft to the agency for comment.

The EPA responded to our official draft report that it had established an internal goal of 10 days but will now follow the 20-day time limit that applies to the FOIA request for records. The EPA agreed with our recommendation and noted that it will complete corrective actions during the second quarter of fiscal year 2015.

Chapter 3
The EPA Applied the Regulatory Standard Without Bias But Should Clarify Its Review Process

The EPA consistently applied the six factors used for determining whether fee waiver requirements were met in a sample of 475 requests that we reviewed from 21 different organizations. Of the 475, our decisions differed from the agency's in 23 instances (approximately 5 percent). Based on our sample review, the EPA reviewed each fee waiver request on a case-by-case basis and did not give automatic grants based on a requester's past success. While we found no indications of bias in the sample we reviewed, the EPA could better clarify what requesters must demonstrate under each factor as requester interviewees expressed confusion on the distinctions among the six factors and what information they should provide for the EPA to evaluate each factor. Additionally, we found that the EPA took an extra step not required by FOIA or the EPA's regulations to request additional justification from requesters. Clarifying both what requesters must demonstrate for the six review factors and the EPA's approach on when to request additional justification could strengthen the consistency of the EPA's process and lessen any potential perception of differential treatment of FOIA requesters in the future.

The EPA Consistently Applied the Regulatory Standard to a Sample of Fee Waiver Decisions

Our review of a sample of 475 fee waiver requests showed that the EPA consistently evaluated requests on a case-by-case basis against the six factors. Using the six factors, we agreed with 452 out of 475 fee waiver decisions. This includes our agreement on the factor cited by the EPA as the basis for any denials.

Our decisions differed from the agency's in 23 instances (approximately 5 percent). These differences spanned nearly half of the 21 organizations we reviewed. Among these 23, we would have denied 17 that were granted due to our opinion that request letters lacked discussion on one or more factors.

We also would have granted six that were denied. Among the six denials, requesters appealed the agency's decision in five instances. In each appeal, the requester provided additional supporting information not included in the original request. OGC upheld two denials, issued two partial grants, and overturned one denial (i.e., granted the request on appeal).

In most cases, our decisions differing from the agency's could be attributed to the subjectivity of some of the six factors themselves. For example, factor #4 requires that the information requested "significantly" contribute to public understanding. Since what is considered by the agency to be "significant" is not described, this

could lead to differing opinions on whether a request meets this factor. For factor #3, DOJ guidance specifies that requesters must actively disseminate the information to the public. The EPA's regulations consider intention of a requester to effectively convey the information to the public. However, the regulations do not direct a requester to specifically state how it will actively distribute the requested information. As a result, some requests only implied how the FOIA information would be disseminated.

We met with the agency FOIA Officer and the OGC's lead FOIA attorney to discuss our differences and they noted nuances under each factor. The agency FOIA Officer also said that previous fee waiver grants have no bearing on future success, which means that new and "seasoned" requesters alike must address the six factors *in each request*. We describe below how the EPA could clarify what requesters must demonstrate under the factors.

Additional Clarity Would Be Helpful on Factors the EPA Uses to Decide Fee Waiver Requests

Of the 475 files we reviewed, the EPA made initial determinations to deny fee waiver requests in 110 instances (23 percent). We found varying degrees to which requesters addressed the six factors in their fee waiver requests. Individuals we interviewed from two organizations said "many of the factors are the same" and tend to merge or blend together. For example, we found that many requesters used similar language to address factors #2 and #4 which, respectively, ask (emphasis added):

2	Whether the disclosure is **likely to contribute** to an understanding of government operations or activities.
4	Whether the disclosure is likely to contribute **significantly** to public understanding of government operations or activities.

The following illustrate two requests that used similar language for factors #2 and #4 (emphasis added to show similarities):

Example 1	***Factor #2***
	Second, **the public does not currently possess any information** about the supplemental data submitted by registrants… **the disclosure of these records would therefore be meaningfully informative**….
	Factor #4
	The public does not have access to these data. Disclosure of the requested records will contribute significantly to the public's understanding…
Example 2	***Factor #2***
	This will contribute significantly to the public's understanding of **EPA's oversight role in Texas air permitting** and enforcement activities.
	Factor #4
	The requested documents will reveal **EPA's role in the Texas PSD and Title V permitting process**, and therefore will allow the public to understand **how EPA oversees state implementation of federal laws**.

Other requesters addressed factors #2 and #4 together, making distinctions on how the requester addressed each factor all the more difficult to parse:

Example 3	***Factors #2 and #4***
	Disclosure of the requested documents, accordingly, will primarily **benefit the general public and will contribute to public understanding** of government operations.

Individuals from four organizations we interviewed described their confusion:

> The part where you have to contribute to the greater understanding of government (i.e., factor #4), that one is a little difficult, mainly because I don't know what I am going to get so it is hard to talk about it.
>
> We treat factor #4 as part of factor #2. All of these factors tend to blend together.
>
> [After querying others in my office] When they were denied, everybody had always been denied for the same reason, factor #4. … We read the denials but we don't understand what we can do to fix it. It seems very subjective because there is a lot of wiggle room in the word "significantly."
>
> I've done this a lot of times and I'm fairly conversant with it. If I were not, I would find the distinction between some of the elements difficult to parse – #2, #3 and #4 all tend to merge together. The distinction between those three doesn't make a whole lot of sense. They seem like terms of art instead of obvious distinctions. The factors are not self-explanatory.

The EPA Eliminated Its Practice of Requesting Additional Justification

Although not required by the FOIA or the EPA's regulations, the EPA in practice followed up with a requester for additional information to decide whether a fee waiver request met the six factors. Our review found that the EPA inconsistently requested additional justification from the 21 organizations in the 475 files we reviewed, even in instances where the agency requested additional justification from the same requester in the past. Out of the 475 files, we noted that the EPA requested additional justification in 103 instances (approximately 22 percent of the time). We found instances where the EPA did not seek additional justification from some organizations that frequently request fee waivers despite requesters having submitted very little information on fee waivers.

Neither the FOIA nor the EPA's regulations require the agency to request additional justification; it was an extra step that the agency took. The EPA's fee waiver workflow diagram stated that when a requester has not met the six factors

but "if FOIA Specialists … feels that [a requester] could, they will send a 'substantiation letter' to the fee waiver requester." If a requester did not respond within 7 days to the agency's request, the fee waiver was then automatically denied. The agency FOIA Officer stated that, at the time, this process involved staff using their experience "to identify and deny those that will never meet the criteria (e.g., prisoners) based on what is presented." The agency FOIA Officer added that they tried to use information a requester provided and not go back and forth if they did not have to.

Initially, the agency FOIA Officer said that OEI would develop examples for when FOIA Specialists do not have to reach back to the requester for additional information. Upon further consideration, the agency decided to eliminate any possibility of inconsistency in this area by no longer requesting additional justification for any request. We agree that this action would address the risk of an appearance of differential treatment by the EPA asking for additional justification from some requesters and not others.

Conclusion

While we agree with how the EPA applied the six factors to 95 percent of the fee waiver requests from the variety of organizations within our sample, opportunities exist for the agency to enhance its process by better clarifying the factors it uses.

Recommendations

We recommend that the Assistant Administrator for Environmental Information:

2. Clarify what requesters must demonstrate under each factor to receive a fee waiver.

3. Inform the public of enhancements to the agency's FOIA website and other efforts to clarify what must be demonstrated under each factor.

4. Clarify the EPA's approach on when to request additional justification.

Agency Comments and OIG Evaluation

In its response to our draft report, the agency did not agree with recommendation 2. After meeting with the agency to discuss its comments, we modified the recommendation. Recommendation 2 initially stated that the EPA should revise its regulations to clearly state what requesters must demonstrate under each factor to receive a fee waiver. The agency said it did not need to wait for a regulatory action to more clearly inform requesters on how the agency considers the factors. The revised recommendation 2 leaves to the EPA the decision on how to inform the public as long as the clarification takes place. The

EPA agreed. Recommendation 2 is resolved and open with agreed-to actions due for completion in March 2015.

For recommendation 3, the EPA agreed and provided acceptable corrective actions. Recommendation 3 is resolved and open with agreed-to actions due for completion in March 2015.

For recommendation 4, we initially recommended that the EPA develop criteria and policy for FOIA Specialists on when to request additional justification. Subsequently, on June 2, 2014, the EPA acted on this recommendation by discontinuing its practice to request additional justification. We agree with the EPA's decision to stop requesting additional justification. Recommendation 4 will be closed upon issuing this final report.

Appendix B includes the agency's full response to the official draft report, and the OIG's comments.

Status of Recommendations and Potential Monetary Benefits

RECOMMENDATIONS						POTENTIAL MONETARY BENEFITS (in $000s)	
Rec. No.	Page No.	Subject	Status[1]	Action Official	Planned Completion Date	Claimed Amount	Agreed-To Amount
1	15	Examine and address the reasons for variability in response times for FOIA fee waiver decisions and appeals.	O	Assistant Administrator for Environmental Information and the General Counsel	03/31/15		
2	19	Clarify what requesters must demonstrate under each factor to receive a fee waiver.	O	Assistant Administrator for Environmental Information	03/31/15		
3	19	Inform the public of enhancements to the agency's FOIA website and other efforts to clarify what must be demonstrated under each factor.	O	Assistant Administrator for Environmental Information	03/31/15		
4	19	Clarify the EPA's approach on when to request additional justification.	C	Assistant Administrator for Environmental Information	06/02/14		

[1] O = recommendation is open with agreed-to corrective actions pending
C = recommendation is closed with all agreed-to actions completed
U = recommendation is unresolved with resolution efforts in progress

Appendix A

Methodology for OIG Sample Selection

The EPA has FOIA information in two systems—FOIAXpress, which was deployed in 2005, and FOIAonline, a new record keeping system deployed in October 2012. To select the two samples used for our review, we first had to determine the universe of FOIA fee waiver requests. We ran reports out of both FOIAXpress and FOIAonline to obtain a listing of FOIA fee waiver requests dated October 1, 2009, to June 19, 2013. After working to eliminate duplicates, we combined the FOIAXpress and the FOIAonline datasets from this time period into one dataset of 2,826 fee waiver requests. We relied on the data from these reports and did not do additional test work to check or verify the accuracy of the data in FOIAXpress and FOIAonline. Based on the universe of 2,826 fee waiver requests, we created two groups, described below:

1. **Fee Waiver Denials**

    - Of the 2,826 fee waiver requests in the EPA's data systems, we identified 1,117 that were listed as being denied (40 percent). During the course of our review we noted additional duplicate entries. We also found that some of these entries were not actually denials but instead should have been characterized differently (i.e., granted, withdrawn, not billable). After accounting for these, the list of denials reviewed for our sample was 1,077.
    - We reviewed all of the 1,077 denials for the factor cited for denial and the date when the EPA sent the denial letter. We also determined whether documentation indicated that the EPA requested additional justification for the waiver requests.
    - We also determined whether there was documentation of requesters appealing denial decisions. If a denial was appealed, we documented the date of the appeal, the date on the EPA's appeal decision letter, the EPA's determination, and the factor(s) cited if the EPA upheld the denial on appeal.
    - Our review and findings on these 1,077 denials addressed our objective to determine whether the EPA was timely in evaluating fee waiver requests and appeals in accordance with the EPA's regulations and policies and procedures.
    - In developing charts on elapsed days, for the initial determination start date, we used dates listed in the reports we ran from FOIAXpress and FOIAonline. For FOIAXpress requests, we used the dates labeled "Requested Date." For FOIAonline requests, we used the dates labeled "Submitted." For the end date for both data sets, we used the date listed on the fee waiver denial letter sent by the EPA, except for two instances where letters were undated. For these two, we used the date listed in FOIAonline. For appeals, we used the date listed on the requester's appeal letter as the start date, and the date listed on the appeal determination letter sent by the EPA as the end date. Also, we did not review files for extensions and did not take extensions into account in our analysis.

2. File Review

- From the list of 2,826 fee waiver requests, we eliminated those listed as news media, educational and non-commercial scientific organizations because these groups do not pay for search and review under FOIA. In addition, we determined to only review entries listed as granted or denied. This resulted in 1,730 fee waiver requests that had either been fully denied or fully granted and did not include requests made by news media, educational or non-commercial scientific organizations.
- From the list of 1,730 fee waiver requests, we identified requests from those organizations with 10 or more requests from October 2009 to June 2013. This resulted in 521 requests from 22 separate requester organizations. After eliminating duplicate requests, those with missing documentation, and one errant group (that the data system coded as requesting fee waivers when in fact it had not), we had a list of 475 fee waiver requests from 21 organizations. We reviewed the 475 requests to determine whether the EPA appropriately (i.e., in an 'unbiased' manner) applied the criteria for making a fee waiver determination and whether entities asking for waivers appropriately justified their requests. We also reviewed any appealed denials of these 475 requests, including whether requesters provided more information in their appeal of a denial than they did in their initial requests.
- We interviewed individuals from requester organizations to get their perspectives on the EPA's fee waiver process and whether they had any suggestions for improvement. In choosing an interview sample, we wanted to identify those that could share an experience with grants, denials and appeals to speak to the entirety of the process from a customer perspective. From the list of 21 organizations described above, we eliminated organizations whose fee waiver requests were either 100 percent granted or denied, which dropped the list to 16. We then identified requesters within the remaining organizations that had appealed fee waiver denials. This resulted in individual requesters within five organizations with experience in grants, denials and appeals:

    - Center for Biological Diversity.
    - Competitive Enterprise Institute.
    - Natural Resources Defense Council.
    - Northwest Environmental Advocates.
    - Public Employees for Environmental Responsibility.

Agency Response to the Official Draft Report and OIG Comments

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN - 2 2014

OFFICE OF ENVIRONMENTAL INFORMATION

MEMORANDUM

SUBJECT: Response to Office of Inspector General Draft Report No. OPE-FY13-0024 *EPA Can Improve its Timeliness and Consistency in Processing Freedom of Information Act Fee Waiver Requests,"* dated April 22, 2014

FROM: Renee P. Wynn
Acting Assistant Administrator
and Chief Information Officer

TO: Arthur A. Elkins, Jr.
Inspector General

Thank you for the opportunity to respond to the issues and recommendations described in the draft audit report. The Office of Environmental Information (OEI) worked in coordination with the Office of General Counsel (OGC) to review this report.

OEI's response to the audit's findings and recommendations is attached. For the recommendations with which we agree, we provide high-level intended corrective actions and estimated completion dates. For the recommendations with which OEI does not agree, we explain our position and provide proposed alternatives to the recommendations, as appropriate.

I want to assure you that EPA is committed to continuous improvements to the FOIA program. We have made great strides in implementing the recommendations from the Deputy Administrator's FOIA workgroup and, where fiscally responsible, will continue to implement the workgroup's recommendations. Recent improvements in the FOIA program include:

- Issuing a national interim FOIA policy and interim FOIA processing procedures;
- Establishing an implementation schedule for the 22 FOIA recommendations made by the FOIA Workgroup;
- Sending quarterly progress reports to the Deputy Administrator on implementing the FOIA Workgroup recommendations;
- Sending a quarterly report to Agency Deputy Assistant Administrators and Deputy Regional Administrators on the processing status of FOIA requests in their organizations;

- Delivering training to the Agency's FOIA coordinators and FOIA officers; and other FOIA professionals, employees and managers who make decisions on the release of documents; and
- Developing a new FOIA Intranet site that provides immediate access to FOIA guidance, management reports, tools, and training courses.

OEI appreciates this evaluation by the Office of Inspector General (OIG) and the opportunity to address each finding and recommended action. We are committed to ensuring full compliance with the Freedom of Information Act.

If you have questions regarding this response, please contact Larry Gottesman, Acting Chief, FOIA and Privacy Branch, in the Office of Information Collection, Collection Strategies Division, at 202-566-2162.

Attachment

cc: Scott Dockum (OEI)
Matthew Leopard (OEI)
Rebecca Moser (OEI)
Erin Collard (OEI)
Larry Gottesman (OEI)
Avi Garbow (OGC)
Kevin Minoli (OGC)
Kevin Miller (OGC)
Patrick Gilbride (OIG)
Erin Barnes-Weaver (OIG)

Attachment

Response to OIG Findings and Recommendations

Title of Report and OIG At a Glance Page: *Title of Report "The EPA Can Improve Its Timeliness and Consistency in Processing Freedom of Information Act Fee Waiver Requests"*

General Comments:

The EPA strongly recommends revising the title of the report to avoid confusion over the findings of the report. The current title does not specify what EPA activity OIG has found to be inconsistent in our processing of fee waiver requests. According to the report, the only inconsistency identified is in the time taken to process a request, and the title should reflect that. As written, the title strongly implies that the OIG found evidence of inconsistent substantive decisions or bias, as well as evidence of inconsistent processing times. To avoid public misunderstanding of the findings, the EPA suggests a revision to the title to state clearly that no evidence of substantive bias was found. If OIG would like to focus the title of the report on the findings regarding processing times, a possible revision that would avoid this confusion is "The EPA Can Improve the Speed and Consistency of Fee Waiver Request Processing Times."

In addition to adjusting the title of the report to more accurately reflect OIG's findings, the EPA believes that the report should point out that the Deputy Administrator specially asked OIG to determine whether fee waiver decisions were biased. This topic of inquiry is prominently featured in the Purpose section of the document, but largely absent from the At a Glance page and the Table of Contents. The finding that they were not biased should be made clear and featured in its own section of the report. Instead, this key finding is relegated to a clause that begins with the word "While…" on the "At a Glance" summary of the report findings. This passing mention of OIG's conclusion might allow individuals to allege that the auditors are intentionally seeking to de-emphasize this key finding.

OIG Response 1: We revised the title and the At a Glance to clearly state that we found no indications of bias in the sample of fee waivers that we reviewed.

Finally, this summary page incorrectly states that OEI concurred with the recommendation to revise the text of its regulations to more clearly state what requesters must demonstrate under each factor. OEI did agree to evaluate the feasibility of incorporating OIG recommendations during the process of revising the agency's FOIA regulations. As discussed further below, OEI does not concur with the specific recommendation to modify the regulatory text in this area.

OIG Response 2: We modified our recommendation after discussing it with the agency. The agency said it did not need to wait for a regulatory action to more clearly inform requesters on how the agency considers the factors. The revised recommendation leaves to the EPA the decision on how to inform the public as long as the clarification takes place. The EPA agreed.

Chapter 1 – Introduction

General Comments:

The EPA suggests that OIG include a background sentence that also provides the 1987 DOJ/OIP guidance establishing the six statutory fee waiver factors, available here: http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm and more clearly states that all or nearly all federal agencies, including the EPA, adhere to these factors in their regulations.

OIG Response 3: We added a footnote to chapter 1 on DOJ's 1987 guidance.

The EPA also suggests including a footnote describing the 20 working day processing time for FOIA request, to note that the 20 working day processing time can properly be extended by the agency under provisions of the FOIA accounting for complex requests and unusual or exceptional circumstances. See 5 U.S.C. 552(a) (6) (B) & (D).

OIG Response 4: We added a footnote to chapter 1 on extensions to the 20-working-day processing time.

Finally, the EPA suggests that the background section point out that our FOIA regulations are consistent with OMB Fee Guidance of 1987, the Department of Justice FOIA regulations, and the regulations of nearly all other federal agencies.

OIG Response 5: We did not review whether the EPA's FOIA regulations were consistent with those of other federal agencies. We added the EPA's assertion to chapter 1.

Chapter 2 – The EPA Should Address Variability in Response Times for Fee Waiver Requests and Appeals

General Comments:

The report correctly notes that the Freedom of Information Act is silent as to the statutory deadline for making fee waiver[15] determinations. The EPA had established an internal goal of 10 days, but as a result of the OIG review, the EPA will now follow the 20 day timeline that applies to the FOIA request itself. The report notes that EPA has a 12 day average response time to fee waiver requests, which is clearly within the statutory time limit for responding to FOIA requests. In light of this 12 day average for the EPA to respond to fee waiver requests, the two examples cited on page 6 are extreme outliers. The EPA suggests emphasizing that these two examples are outliers in the context of the 1062 decisions reviewed, and that they represent less than 0.2% of total decisions reviewed. It may be more helpful to discuss what other figures support the finding of "considerable variability" in response times, outside of these two extreme examples.

[15] The Freedom of Information Act provides the agency 10 days to make expedited processing determinations.

OIG Response 6: We agree that the EPA's response time is within the statutory time limit for responding to FOIA requests. We did not make any changes to emphasize the two outliers as they, along with other data in figure 1, comprise the "considerable variability" we noted in chapter 2 (i.e., response times that exceeded the statutory time limit).

The EPA would also like to note that the higher than average business days to deny request for Q4-2012 and Q1-2013, as depicted in Table 5, can be attributed to the deployment and implementation of the new FOIA Online system and the learning curve associated with any major new system deployment.

OIG Response 7: We added the EPA's explanation to chapter 2.

Finally, in the discussion of the fee waiver factors and reasons on page 11, the EPA suggests replacing the word "factor" with "reason" when discussing factors #7-10 in order to distinguish between the regulatory factors and the OIG added reasons. Because EPA uses the same six factor test that all or nearly all other federal agencies use, and the word "factor" is used consistently by courts and the agencies when describing this test, it is likely to cause confusion to describe 4 additional "factors" in this context that are not included in the standard six factor test.

OIG Response 8: We explained in chapter 2 that the EPA cited six regulatory and four "other factors" as the basis for fee waiver denials and appeals.

OIG Recommendation 1: *Examine and address the reasons for variability in response times for FOIA fee waiver decisions and appeals.*

Corrective Action 1:

The EPA agrees with the recommendation and will complete this task during the 2nd quarter of FY 2015.

OIG Response 9: In our discussions, the agency agreed that we could note the last day of the second quarter of fiscal year 2015 (or March 31, 2015) as the planned completion date.

Chapter 3 – The EPA Should Better Clarify Review Factors and When to Request Additional Justification

General Comments:

The EPA's Deputy Administrator specifically requested OIG to evaluate whether any bias in our processing of fee waiver requests. The title for Chapter 3 needs to reflect the OIG finding that no bias exists. The current title fails to address the evaluation performed in Chapter 3.

OIG Response 10: We revised the chapter 3 title to state that we found no indications of bias.

The EPA believes that references to a need to "lessen any perception of differential treatment" or "any perception of bias" are inappropriate and strongly recommends removing all references. Nowhere in the report does OIG indicate that it sought to determine whether there was, in fact, a perception of bias with regards to the EPA's fee waiver decisions that extended beyond a report of a single organization whose allegations have been proven false by EPA data and this very evaluation. While individual members of Congress may have expressed concern over that organization's allegations, to date, not a single other entity has, to our knowledge, expressed a perception of bias. In light of that, these references are inappropriate.

OIG Response 11: The Deputy Administrator's request asked that our review assess whether the EPA applied factors in a manner that adhered to the agency's policy of timely and unbiased treatment of fee waiver requests. That, per se, meant that our review sought to establish or refute any bias, real or perceived. For example, we identified the perception of differential treatment in how the EPA requested additional justification from some requesters and not others. The EPA agreed below that this voluntary practice could introduce inconsistency in its process and decided to stop requesting additional justification. Thus, the EPA's actions addressed this perceived bias/inconsistency.

The section "The EPA Consistently Applied the Regulatory Standard to Fee Waiver Requests" should be clearly answered in the "At a Glance" opening section and be featured as its own chapter.

OIG Response 12: We did not make this change because our addition of the words regarding no indication of bias to the report title and chapter 3 title makes this conclusion more prominent.

Additionally, in light of the statistical conclusions in the report, it is inappropriate to say that additional clarity is needed, as stated in the section title "Additional Clarity Needed on Factors the EPA Uses to Decide Fee Waiver Requests." OIG auditors agreed with EPA fee waiver decisions 95% of the time. While not perfect, a 95% agreement rate is very high and does not

justify a headline that additional clarity is "needed." A more appropriate title would be that additional clarity would be helpful.

OIG Response 13: We changed "needed" to "would be helpful" per the EPA's suggestion.

In the same section, the EPA believes that the report needs to indicate that our factors are the same used by the DOJ and almost every other agency, and that they are explained in the DOJ's FOIA guide. To fail to do so would allow the reader to draw an inappropriate conclusion that the EPA has adopted factors that are different from or less well understood than the rest of the government. Allowing such a conclusion while knowing that it is not accurate could call into question the objectivity of the report.

OIG Response 14: We added this to our report per the EPA's similar comment on chapter 1.

In the interviews with 4 organizations regarding Factors #2 and #4, the interviewees say that "we read the denials but we don't understand what we can do to fix it." To be fair, the report should note that each fee waiver denial and each appeal contains contact information for the EPA's FOIA Liaison and OGIS. It does not appear that OIG evaluated whether any of these organizations took advantage of the resources the EPA offered them.

OIG Response 15: We noted in chapter 1 how the agency's FOIA website contains contact information for FOIA staff. The organizations with whom we spoke described varying degrees to which they took advantage of the EPA's contact information on FOIA questions.

Finally, on page 11 the report states that OEI is in the process of developing examples for when FOIA specialists do not have to reach back to the requester for additional information. It is more accurate to state that OEI has determined that it can eliminate any possibility of inconsistency in this area by no longer requesting additional information for any request. It is not accurate to state that OEI will be continuing this voluntary practice.

OIG Response 16: We revised the report to note the EPA's decision to stop its voluntary practice of requesting additional justification.

OIG Recommendation 2: *Revise the EPA's regulations to clearly state what requesters must demonstrate under each factor to receive a fee waiver.*

Corrective Action 2: The EPA does not concur with OIG Recommendation 2.

Discussion of OIG Finding 2:
The EPA is currently revising its regulations with a variety of goals in mind to assist the requesting public. However, the six factors set out in the EPA's regulations are prescribed by OMB to all federal agencies. To modify the regulatory language would make the EPA's fee

waiver standard inconsistent with the standard applied by the rest of the federal government and actually increase public confusion by deviating from the developed body of case law that relates to this existing standard. The EPA believes it is more appropriate to supplement the public's understanding of the six standard factors by reference to existing DOJ guidance and to judicial opinions interpreting the standard, rather than revising the language in the EPA's regulations. If OIG is recommending that the EPA adopt regulations that differ, even if in being more specific, from DOJ regulations and guidance, it should acknowledge that they are making that significant recommendation.

OIG Response 17: After meeting with the agency to discuss their comments, we modified the recommendation. Recommendation 2 initially stated that the EPA revise its regulations to clearly state what requesters must demonstrate under each factor to receive a fee waiver. The agency said it did not need to wait for a regulatory action to more clearly inform requesters on how the agency considers the factors. The revised recommendation 2 leaves to the EPA the decision on how to inform the public as long as the clarification takes place. The EPA agreed.

OIG Recommendation 3: *Inform the public of any regulatory changes, such as through enhancements to the agency's FOIA website and/or other communication efforts.*

Corrective Action 3:
The EPA agrees with this recommendation and is currently completing this task.

OIG Response 18: In our discussions, the agency agreed that we could note the last day of the second quarter of fiscal year 2015 (or March 31, 2015) as the planned completion date.

OIG Recommendation 4: *Develop criteria and policy for FOIA Specialists on when to request additional justification.*

Corrective Action 4: The EPA does not concur with OIG Recommendation 4.

Discussion of OIG Finding 4:

The EPA does not agree with the recommendation to provide further instruction or guidance on when to seek additional information from requesters. Due to the possibility that this voluntary practice could introduce inconsistency into the process, EPA will now make our decisions based upon the FOIA requester's submission and will no longer request additional justification. EPA will instead rely on the additional communications described in our response to Recommendation 3, as well as during the rulemaking process for revising EPA's regulations, to help inform the public about existing standards and practices so that initial fee waiver submissions contain all the information necessary for EPA to evaluate the requests with enough information.

OIG Response 19: We initially recommended that the EPA develop criteria and policy for FOIA Specialists on when to request additional justification. Subsequently, on June 2, 2014, the EPA acted on this recommendation by discontinuing its practice to request additional justification. We agree with the EPA's decision and modified our recommendation. We will close this recommendation upon issuing our final report.

Appendix C

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