



U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL



Transparency in Government Information

Response to Congressional Request Concerning Political Interference in Release of Documents Under the Freedom of Information Act

Report No. 15-N-0261

August 20, 2015



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Abbreviations

CFR	Code of Federal Regulations
EPA	U.S. Environmental Protection Agency
FOIA	Freedom of Information Act
OIG	Office of Inspector General

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At a Glance

Why We Did This Review

On June 23, 2015, we received a congressional request on whether involvement of non-career U.S. Environmental Protection Agency (EPA) officials (political appointees) occurred and resulted in undue delay of responses to Freedom of Information Act (FOIA) requests, or the withholding of any document or portion thereof that would have otherwise been released but for the non-career official's involvement in the process. The request also sought a written certification from the EPA's Chief FOIA Officer that (1) no non-career officials were involved in the agency's response to any FOIA request; or (2) if such involvement occurred, that it never resulted in an undue delay or the provision of less information than would have been provided but for the involvement of non-career officials. We were asked to provide a response to these issues within 60 days.

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

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

Send all inquiries to our public affairs office at (202) 566-2391 or visit www.epa.gov/oig.

The full report is at:
www.epa.gov/oig/reports/2015/20150820-15-N-0261.pdf

Response to Congressional Request Concerning Political Interference in Release of Documents Under the Freedom of Information Act

What We Found

We did not find any indications of political interference or delay in the release of FOIA documents. According to the EPA, while there have been delays in responding to FOIA requests, those delays were generally due to the complexity or volume of information requested. We made our determinations based on our review of FOIA policies and procedures; and discussions with all FOIA Coordinators in EPA's program offices and FOIA Officers in EPA's regional offices, as well as with three political appointees.

We requested a written certification from the EPA's Chief FOIA Officer that: (1) no non-career officials were involved in the agency's response to any FOIA request; or (2) if such involvement occurred, that it never resulted in an undue delay or the provision of less information than would have otherwise been provided. The EPA's Chief FOIA Officer explained that she did not find the request to be feasible given that all employees, both career and non-career, have FOIA responsibilities.

Due to the timeframes associated with this request, this report was not conducted in accordance with generally accepted government auditing standards.

FOIAonline Deployed

To improve its FOIA management and processes, the EPA in October 2012 deployed FOIAonline as its new FOIA management system. FOIAonline automates core processing and administrative activities. All FOIA requests received at the EPA are managed throughout their lifecycle in FOIAonline. Records released by the EPA in response to a FOIA request are entered into FOIAonline for public viewing and searching unless the volume of paper records is very large and conversion to electronic format is not practical, or the response is subject to special handling requirements or policies.



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

THE INSPECTOR GENERAL

August 20, 2015

MEMORANDUM

SUBJECT: Response to Congressional Request Concerning Political Interference in
Release of Documents Under the Freedom of Information Act
Report No. 15-N-0261

FROM: Arthur A. Elkins Jr.

A handwritten signature in black ink, appearing to read "Arthur A. Elkins Jr.", is written over the printed name.

TO: Ann Dunkin, Chief Information Officer
Office of Environmental Information

This is our report in response to a congressional request on whether involvement of non-career U.S. Environmental Protection Agency (EPA) officials (political appointees) resulted in undue delay of responses to Freedom of Information Act (FOIA) requests, or the withholding of any document or portion thereof that would have otherwise been released but for the non-career official's involvement in the process. This report represents the opinion of the EPA Office of Inspector General (OIG) and does not necessarily represent the final EPA position.

The Office of Information Collection within the Office of Environmental Information is responsible for managing the EPA's National FOIA Program Office.

Because this report contains no recommendations, you are not required to respond to this report. However, if you submit a response, it will be posted on the OIG's public website, along with our memorandum commenting on your response. Your response should be provided as an Adobe PDF file that complies with the accessibility requirements of Section 508 of the Rehabilitation Act of 1973, as amended. The final response should not contain data that you do not want to be released to the public; if your response contains such data, you should identify the data for redaction or removal along with corresponding justification.

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

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Purpose

On June 23, 2015, we received a request from a member of the Senate Committee on Homeland Security and Governmental Affairs to determine whether non-career U.S. Environmental Protection Agency (EPA) officials (political appointees)¹ were involved with the Freedom of Information Act (FOIA) process which resulted in the undue delay of responses or the withholding of any document or portion thereof that would have otherwise been released but for the non-career official's involvement in the process. The request also sought a written certification from the agency's Chief FOIA Officer that (1) no non-career officials were involved in the agency's response to any FOIA request; or (2) if such involvement occurred, that it never resulted in an undue delay or the provision of less information than would have otherwise been provided but for the involvement of non-career officials. We were asked to provide a response to these issues within 60 days.

Background and Responsible Officials

FOIA activities at the EPA are performed across the agency under the general direction of the Chief FOIA Officer. The Agency FOIA Officer is the program manager for the National FOIA Program, located in the Office of Information Collection within the Office of Environmental Information. At the EPA, the Office of Environmental Information's Chief Information Officer—a non-career, political appointee—is the Chief FOIA Officer, while the Agency FOIA Officer is a career employee.

The National FOIA Program office is staffed by the Agency FOIA Officer and three National FOIA Specialists, who review all FOIA requests received at the agency's headquarters and assign them to the appropriate office for processing. FOIA requests are also received by EPA regional offices for assignment and processing. There are 13 FOIA Coordinators within the EPA's program offices and 10 regional FOIA Officers, all of whom work under the general direction of the Agency FOIA Officer. The EPA Office of General Counsel provides legal advice on FOIA matters and issues final determinations on administrative and fee waiver appeals.

The EPA's *Freedom of Information Act Policy* and the *Procedures for Responding to Freedom of Information Act Requests*, both approved on September 30, 2014, define roles and responsibilities of agency staff—including political appointees—which we describe below. The EPA uses FOIAonline as its official recordkeeping system for tracking and responding to FOIA requests; details on FOIAonline also follow.

¹ Non-career officials are defined for the purposes of this report as all political appointees. We use the terms “non-career” and “political appointee” interchangeably in this report.

Scope and Methodology

We reviewed the EPA's agencywide FOIA policy, procedures and regulations, as well as individual policies of all EPA program offices and regions. We interviewed the following career employees who manage EPA's FOIA program: the Agency FOIA Officer, three FOIA Specialists, all 13 FOIA Coordinators in program offices, and all 10 FOIA Regional Officers. We also interviewed three non-career employees² who have access accounts to the EPA's FOIAonline system. We also reviewed four prior FOIA reports completed by our office between 2009 and 2014 (details below). We performed our work from July to August 2015.

Due to the timeframes associated with the congressional request, our work was not performed in accordance with generally accepted government auditing standards.

Results of Review

Prior Reports Did Not Identify Concerns on Political Appointee Involvement

The EPA Office of Inspector General (OIG) has issued four reports related to the FOIA in the past 6 years, including one report issued in 2011 focused on political appointee involvement. No reports identified concerns related to the involvement of non-career officials.

- ***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](#), issued July 16, 2014): This review assessed whether the EPA evaluated FOIA fee waivers in a timely and unbiased manner. We reviewed 1,077 FOIA fee waiver denials issued between October 1, 2009, and June 19, 2013, to look at the timeliness of decisions. We also reviewed 475 fee waiver requests from 21 organizations to determine whether the EPA appropriately applied the agency's regulatory factors to evaluate fee waiver requests. This report did not discuss or uncover any problems in the FOIA review process related to the involvement of non-career officials.
- ***Briefing Report: Review of EPA's Process to Release Information Under the Freedom of Information Act*** (Report No. [14-P-0262](#), issued May 16, 2014): This review found that each region and headquarters office had its own processes for addressing FOIA requests. While the processes varied, we concluded that all processes led to a decision to release or withhold information based on an evaluation of the request and

² The three interviewees included a Regional Administrator, a Senior Policy Advisor to a Regional Administrator, and a Director within the Administrator's Office.

the exemptions and exclusions prescribed in the FOIA. To ensure consistency in the processes used, the OIG recommended that the EPA finalize agencywide FOIA procedures by September 30, 2014. The OIG also recommended that each region and headquarters program office certify by March 31, 2015, that their local FOIA procedures were consistent with the agencywide FOIA procedures. The EPA agreed with, and timely completed, all recommendations.

- ***Congressionally Requested Inquiry into EPA's Handling of Freedom of Information Act Requests*** (Report No. [11-P-0063](#), issued January 10, 2011): In August 2010, the OIG received a congressional request to examine whether political appointees had a role in the EPA's decision making concerning FOIA requests. We interviewed FOIA Officers and Coordinators in 11 agency offices and tested a sample of 50 FOIA requests selected from a group of high-profile topics (e.g., mountaintop mining, hydraulic fracturing). We concluded that the EPA's FOIA process did not result in the filtering of requests by political appointees. We found that political appointees were not involved in the FOIA process either by policy or in practice. With few exceptions, we found that the EPA released information at the lowest practicable level, and political appointees were usually involved only to sign response letters denying or partially denying releases of information. The report made no recommendations.
- ***EPA Has Improved Its Response to Freedom of Information Act Requests But Further Improvement Is Needed*** (Report No. [09-P-0127](#), issued March 25, 2009). This review assessed whether the agency's FOIA processing and reporting procedures were meeting FOIA requirements and if improvements could be made. We reviewed FOIA request responses and fee waiver determinations of EPA Regions 2, 4, 5, 7 and 10, and the Office of Water, as well as the appeals backlog for calendar year 2006. We found that the EPA's procedures did not always ensure timely FOIA responses in all program offices and regions, or that FOIA appeals were processed timely. The report recommended mandatory training for all FOIA Officers, Coordinators, and individuals who have FOIA responsibilities, and the developing of written standard operating procedures for each office that issues FOIA responses. The EPA concurred and completed final corrective actions by September 15, 2011. This report did not note any problems in the FOIA review process related to involvement of non-career officials.

EPA's FOIA Policy and Procedures Describe Responsibilities for Political Appointees

While the EPA's FOIA Policy and Procedures describe responsibilities for political appointees, the Agency FOIA Officer and all other interviewees said political appointees' involvement was limited. Those we interviewed noted that

career employees manage the agency's FOIA program. Our review of the EPA's FOIA Policy and Procedures found that career staff who serve as FOIA Coordinators and Officers in program and regional offices, respectively, have responsibility for processing and tracking requests, in coordination with Action Offices (offices that maintain the majority of records responsive to a FOIA request). According to the EPA, the authority to issue initial determinations on FOIA requests has been redelegated to the division director or equivalent level (career level staff). The EPA's FOIA Policy and Procedures specify the following responsibility of political appointees:

The Deputy Administrator, Assistant Administrators, Associate Administrators, the Inspector General, the General Counsel, Heads of Headquarters Staff Offices and Regional Administrators (or their appropriate designee) are authorized under [40 CFR § 2.104] of EPA's FOIA regulations to issue initial determinations to release or withhold records in response to FOIA requests.³ Freedom of Information, EPA Delegations Manual, Chapter 1, Section 30, provides that this authority may be redelegated to the office director level or equivalent, who may redelegate to the division director level or equivalent. (footnote added)

Additionally, per the EPA's FOIA Procedures, political appointees could, potentially, review records prior to release:

After thorough review, the Action Office will prepare to release responsive, non-exempt records or portions of records. All records released or being withheld in total in response to a FOIA request must be reviewed by at least two knowledgeable individuals, **including one manager or supervisor** to ensure openness, transparency, consistency, and the appropriate application of FOIA exemptions. (emphasis added)

Further, the EPA's FOIA Policy states the following regarding officials with FOIA responsibilities:

Organizations will identify individuals who have critical FOIA responsibilities in their organizations by name and by position, including but not limited to FOIA Officers, FOIA Coordinators, individuals who are authorized to make decisions regarding the releasability of records ... and those who review documents before they are released to the public. This information will be made

³ The EPA's FOIA regulations can be found in the Code of Federal Regulations (CFR) at 40 CFR §§ 2.100-2.108. The regulations at 40 CFR § 2.103 note the following: "(b) Authority to grant or deny requests. The head of an office, or that individual's designee, is authorized to grant or deny any request for a record of that office or other Agency records when appropriate." At the EPA, office and division directors are career-level staff.

available to the Agency FOIA Officer and to all staff in the organization.

The EPA's FOIA Procedures require that response letters include a description of any withheld information.

Additionally, each EPA program and regional office developed FOIA procedures consistent with the agency's FOIA Policy and Procedures. Our review of each program and regional office's procedures found no mention of political appointees' involvement in the FOIA response process aside from similar language as above.

Agency FOIA Staff Did Not Report Concerns on Political Appointee Involvement

The EPA's Agency FOIA Officer told us that, in his 11 years with the agency, he has never been told by a political appointee how to respond to a FOIA request. Neither the Agency FOIA Officer nor the Assistant General Counsel for the General Law Office within the EPA's Office of General Counsel said they were aware of any situations where involvement by a political appointee resulted in delays or inappropriately withheld information. As an added control measure, one attorney and others we interviewed described how the agency has created a centralized eDiscovery team of contractors⁴ to pull responsive emails from the EPA's Microsoft Outlook database. According to the EPA's Office of Environmental Information's *Procedures for Responding to Freedom of Information Act Requests* (revised March 27, 2015), this Microsoft Outlook email search service ensures that all communications pertaining to the request are properly gathered to respond to the request. Per the procedures, subject matter experts work with search points of contact in the EPA's Office of Environmental Information to supply information for the search. Interviewees said this process removes discretion from non-career officials to determine whether they have responsive emails.

We interviewed Headquarters FOIA Specialists (who report to the Agency FOIA Officer), all 10 regional FOIA Officers, and all 13 FOIA Coordinators in program offices for their observations on involvement of political appointees. None of the interviewees described any situations where the involvement of political appointees resulted in undue delays or inappropriately withheld information. Interviewees said that decisions to release or withhold information are made by career employee subject-matter experts, typically in consultation with career employee information specialist attorney-advisors. All interviewees said that

⁴ Electronic discovery (or eDiscovery) refers to any process in which electronic data is sought, located, secured and searched in response to a request to production in litigation or an investigation. The eDiscovery team contract is managed by the Office of Technology Operations and Planning within the EPA's Office of Environmental Information.

political appointees are rarely involved in the FOIA response process and only participate when the appointees themselves have responsive records to provide.

Interviewees said that in nearly all cases, the Authorized Official function (i.e., person authorized under EPA FOIA regulations to release or withhold records in response to FOIA requests) has been redelegated to career employees. However there are some instances when this function is retained by non-career officials. For example, in one region, the FOIA Officer said that the Regional Administrator (a non-career political appointee) signs letters denying FOIA requests (i.e., full denials, when no information is released to the requester). We also heard from other program offices that FOIA denials must be signed by higher-level officials, such as Assistant Administrators or Deputy Assistant Administrators, who may be non-career political appointees.

In the Administrator's Office, the Authorized Official function is performed by a non-career employee. In this case, the non-career employee receives responsive material collected by the career FOIA Coordinator and approves the request for release or informs the Coordinator if additional FOIA exemptions may apply. Most of the time, these added exemptions have to do with personal privacy concerns (Exemption 6), such as family or medical-related issues. Career attorney-advisors offer their opinions about these exemptions and, according to the FOIA Coordinator, the non-career Authorizing Official is deferential to their opinions. Some interviewees said that delays in responses to FOIA requests may occur due to the complexity of requests and volume of responsive documents. For example, FOIA Coordinators said they may need to communicate with a requester multiple times to clarify or better understand the information request.

While the three political appointees we interviewed all have accounts in FOIAonline, according to the Office of Environmental Information, the accounts are all currently locked and no activity in the FOIAonline audit log was identified. The Office of Environmental Information said that the last time one of these appointees accessed FOIAonline was on May 21, 2014.

EPA Has Publicly Released Responsive Records Since 2012

To improve its FOIA management and processes, the EPA in October 2012 deployed FOIAonline, a shared service, as its new FOIA management system. FOIAonline automates core processing and administrative activities. All FOIA requests received at the EPA are managed throughout their lifecycle in FOIAonline. According to the Agency FOIA Officer, all records provided by the EPA in response to a FOIA request are entered into FOIAonline for public viewing and searching, unless the volume of paper records is very large and conversion to electronic format is not practical, or the response is subject to special handling requirements or policies.

According to a July 10, 2015, announcement from the U.S. Department of Justice, the EPA, along with six other agencies,⁵ applies the “release to one, release to all” approach and provides the general public access—through FOIAonline—to documents released in response to other people’s FOIA requests. While the six other agencies are piloting this approach during a 6-month trial period, the EPA’s Agency FOIA Officer said this has been the EPA’s practice since the advent of FOIAonline in 2012.

Response to Request for the EPA Chief FOIA Officer’s Certification

At the EPA, the Chief Information Officer in the Office of Environmental Information is the Chief FOIA Officer. This is a politically appointed position. We informed the Chief Information Officer of the congressional request for a written certification from the Chief FOIA Officer that (1) no non-career officials were involved in the agency’s response to any FOIA request; or (2) if such involvement occurred, that it never resulted in an undue delay or the provision of less information than would have been provided without their involvement. The Chief FOIA Officer stated in an August 14, 2015, memorandum to the OIG:

This certification request seeks information about non-career employees’ participation in any Agency FOIA response involving withheld information. I do not consider this request feasible because non-career employees have FOIA responsibilities just like career employees. In addition, the 2011 OIG report (Congressionally Requested Inquiry into EPA’s Handling of Freedom of Information Requests (Report No. 11-P-0063) found that political appointees were not involved in filtering FOIA requests, although some of them had a role in the process.

⁵ The other agencies are the Office of the Director of National Intelligence; the Millennium Challenge Corporation; components or offices of the Defense, Homeland Security and Justice Departments; and the National Archives and Records Administration.

Distribution

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