
STATEMENT OF CHARLES K. EDWARDS
ACTING INSPECTOR GENERAL
U.S. DEPARTMENT OF HOMELAND SECURITY

BEFORE THE
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

U.S. HOUSE OF REPRESENTATIVES

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Good morning, Chairman Issa, Ranking Member Cummings, and Members of the Committee. I am Charles K. Edwards, Acting Inspector General for the Department of Homeland Security (DHS). Thank you for inviting me here today to discuss DHS efforts to disclose information under the Freedom of Information Act (FOIA, or the Act).

In accordance with the *Homeland Security Act of 2002* and the *Inspector General Act of 1978*, DHS Office of Inspector General (DHS-OIG) exists as an independent and objective unit within DHS tasked with, among other things, (1) conducting and supervising audits and investigations relating to DHS' programs and operations; (2) recommending policies for activities designed to promote economy, efficiency, and effectiveness in the administration of those programs and operations; and (3) providing a means for keeping both Congress and the Secretary of DHS fully and currently informed about the problems and deficiencies that we identify. In keeping with our role as an independent auditor of DHS programs, we reviewed the DHS FOIA program and issued our recommendations in the March 2011 report titled, "The DHS Privacy Office Implementation of the Freedom of Information Act."

My testimony will focus on this review and the March 2011 report. The DHS-OIG worked with DHS' Privacy Office and the Office of General Counsel during the course of our review. We thank them for their cooperation in this effort.

In our report, we determined that the Privacy Office helps DHS implement the Act. DHS components have stated that they are appreciative of the assistance and responsiveness of the FOIA staff in the Privacy Office.

We also determined that the Office of the Secretary had unprecedented involvement in the FOIA process since 2009. For several hundred requests deemed significant, components were required to provide all materials intended for release to the Office of the Secretary for review and concurrence. This review process created inefficiencies in implementing the FOIA.

Our report makes six recommendations designed to further the progress that the Privacy Office has already made.

The Act and the 2009 Executive Branch Guidance

The Act mandates that certain executive branch information be accessible to the public. The Act creates a presumption of disclosure. Materials must be disclosed unless it falls within one of nine exemptions or three exclusions, to address instances when the government's need to protect information may outweigh the public's right to know. The DHS-OIG, like other DHS components, responds to FOIA requests. My testimony and our March 2011 report describes DHS FOIA policies and procedures, which are complied by my office.

Before discussing DHS FOIA operations, it is important to mention the government disclosure guidance created early in the Obama administration. On January 21, 2009, the President directed agencies to make all FOIA decisions under a “presumption in favor of disclosure.” When in doubt, the President wrote, “openness prevails.” On March 19, 2009, the Attorney General, who provides FOIA policy guidance to federal entities, directed that agencies should not withhold records simply because an exemption may apply. When records cannot be fully disclosed, agencies must consider whether partial disclosure is possible. He added that “unnecessary bureaucratic hurdles” should not exist in a FOIA program.

The DHS FOIA Program

DHS has a substantial FOIA caseload. In fiscal year (FY) 2009, it received 103,093 FOIA requests, or 18% of the federal government’s 557,825 requests. In FY 2010, the number of requests increased by 26% to 130,098.

Most of the department’s components process requests for their own records under the guidance of a FOIA Officer, while DHS Privacy Office staff processes requests for the Privacy Office and eight headquarters’ offices. From the Privacy Office, the Chief FOIA Officer, who is also the department’s Chief Privacy Officer, supports component efforts, shares information, and monitors the DHS FOIA program. However, the Privacy Office does not control FOIA processing in DHS components, and component FOIA Officers are not supervised by the Chief FOIA Officer.

To process requests, FOIA Officers work with program experts to determine whether responsive information exists, then consider the possible exemptions or exclusions that would require the agency to withhold all or part of the information.

FOIA Officers we interviewed had positive comments about the Privacy Office. They acknowledged the Privacy Office staff to be helpful in clarifying policy, offering guidance, and assisting FOIA processing efforts. FOIA Officers also noted that the Chief FOIA Officer ensures greater communication across the department on FOIA issues, which improves consistency and efficiency in the disclosure of information.

We determined that the department’s FOIA Public Liaison, who reports to the Chief FOIA Officer, has provided important assistance in working with DHS components and the public on FOIA disclosures. Our interviewees praised the FOIA Public Liaison for approachability, thoroughness, and knowledge of FOIA case laws.

Our report also discusses DHS efforts to promote proactive disclosure. Proactive disclosure is considered as a method of providing certain information online, even if the material has not been requested. This increases the department’s level of transparency, while potentially decreasing

the number of FOIA requests that the agency receives. The Privacy Officer provided early guidance to components in this area, and we identified progress in the posting of various materials, such as the daily schedules of senior officials.

Recommendations Related to Administration of the FOIA Program in the Privacy Office

The first three recommendations in our report relate to building on the FOIA progress that the Privacy Office has made. We recommended that DHS develop additional policies on proactive disclosure that could help resolve some issues we learned about, such as, methods to ensure protection of proprietary information when contracts are proactively disclosed. Also recommended, is formalizing the roles and responsibilities of the Public Liaison, who also has a statutory role, in resolving disputes among requesters and agencies. Further, we recommended that the Privacy Office work with components to implement a regular internal review function. This would formalize the process used in some cases to improve FOIA performance in DHS components.

The Significant Request Review Process

During our review, we learned that the Office of the Secretary was involved in examining several hundred FOIA requests prior to disclosure. This process was created so the department would be aware of certain FOIA requests that it deemed to be significant. After reviewing information and interviewing DHS FOIA experts, we determined that the significant request review process of DHS (hereafter, referred to as the review process) did not prohibit the eventual release of information. However, the involvement of the Office of the Secretary created some inefficiencies and delayed the eventual release in some cases. Our concern pertains to the scope of, and inefficiency caused by, the review process, and not with the Secretary's role, as head of DHS, in overseeing the FOIA performance of her subordinates.

We received information from the Office of the Secretary and the Chief FOIA Officer about the origin of the review process. Components have been required to notify the Office of the Secretary of certain FOIA cases since 2005. This policy was designed to provide data on FOIA requests in general, including the identity of some requesters. Information gained is included in the department's weekly report to the White House.

In 2006, the policy was revised to provide more guidance to DHS components on the types of FOIA requests that were of interest for weekly reporting purposes. This policy did not require that the Office of the Secretary review the actual FOIA releases. Rather, the process provided information about what was being disclosed. Among other areas, the Office of the Secretary asked for details on FOIA releases that—

1. Related to a presidential or agency priority;
2. Would likely garner media attention;
3. Contained documents related to meetings with prominent public or private sector leaders;
and
4. Were from the media, Congress, or special interest groups.

This request policy remained in effect after the change of administrations. In 2009, the Office of the Secretary had a heightened interest in several specific FOIA requests. This prompted inquiries to components for more details about the scope of some requests and the individuals who had submitted them. A significant change occurred in September 2009, when components were prohibited from releasing responses to FOIA requests deemed significant until the Office of the Secretary reviewed and concurred on the FOIA responses.

Department officials stated that advance knowledge of significant releases can improve the DHS response to media inquiries that often follow public release of information about DHS activities. While the department has a legitimate need to be aware of media inquiries, we are not persuaded that delaying a FOIA release so that officials can prepare for expected inquiries is the best public policy. Again, the problem is that some of these inquiries unnecessarily delayed the final issuance of some FOIA responses.

The Act calls for agency action on FOIA requests within 20 business days. In certain cases, the review process led to violations of this statutory deadline. However, documents we received demonstrate several cases of releases being delayed because the Office of the Secretary asked basic questions about the FOIA process or for other minor reasons. In many cases, delays under the review process were short –1 to 4 days. These relatively brief delays still caused the temporary withholding of certain documents that a component was prepared to release. Other releases were delayed longer. In one example, the Office of the Secretary received a component's release on October 16, 2009. The review was delayed at least 10 calendar days because of higher-priority business in the reviewing office.

A similar example occurred on November 9, 2009, when the Privacy Office forwarded a FOIA response to the reviewers in the Office of the Secretary. On November 17, 2009 the Privacy Office inquired about the status of the request, since no authorization had been received to permit release of the information. Data we received from the Privacy Office included a range of case examples that were under review at the Office of the Secretary for several weeks.

For a short period, one component tracked the amount of time involved for the Office of the Secretary to review the significant FOIA requests. Of the 53 cases monitored, which covered releases sent for review from March through July 2010, the Office of the Secretary averaged 15 business days to complete the review process, with several cases taking significantly longer. Because the component could not send the information to the requester until this review was

completed and the Office of the Secretary concurred, the review process caused the department to violate the 20 business day statutory deadline in many instances.

In a June 2010 case, a component asked for an update more than 3 weeks after the review process began. In reply, a Privacy Office manager said that the release was still under review. The component FOIA expert noted the urgency of the matter, since the review process caused a violation of the 20 business day response requirement. In another example, a component received a FOIA request on March 1, 2010, and completed processing it on March 19, 2010. The release could have been made then, which was within the 20 business days requirement. However, it was not until March 31, 2010 – 23 business days after the request was made – that an Office of the Secretary staff person submitted minor wording edits to clarify the component’s response.

DHS officials expressed that correcting errors in cover letters was necessary. This led to component authors to devote more attention to grammar and quality. They asserted that letters with errors reflected poorly on the department’s professionalism and service. We agree that quality control is a legitimate basis for review of FOIA responses. However, we do not support delaying FOIA requests beyond the statutory timeframe to make minor edits - delays which could be viewed as inconsistent with the purpose of the Act and the short timeframes it established.

The department also informed us about the SharePoint process it currently uses. SharePoint is a computer-based system that enables multiples users to view the same information simultaneously. The Privacy Office uses SharePoint to provide multiple users with simultaneous access to significant FOIA responses. We acknowledge that the use of SharePoint is preferable to the abandoned process that delayed dozens of releases for long periods. Under the SharePoint process, the response was held for 3 days and then finalized under a presumed concurrence if there is no response by the Secretary’s office. As of March 28, 2011, the response is now held for one day. The department should continually examine how any delay – even of one day – affects statutory compliance and the efficiency of the DHS disclosure program and whether any such delay is truly necessary.

FOIA Experts Had Some Concerns Related to the Review Process

Under the review process, components would send significant FOIA releases to the Privacy Office. Staff there would forward the information to the Office of the Secretary for review. In our interviews, several FOIA managers stressed that the process was counter to the statute and the 2009 executive branch guidance. One member of the Privacy Office staff stated that the process was “a disservice to the requester” and it had “no added value.” FOIA Officers can be concerned with delays even when only one case is affected, because of potential legal liability and the desire to serve requesters promptly.

When the Office of the Secretary began to request copies of all significant FOIA disclosures prior to release, the Chief FOIA Officer expressed concern about this to a senior official in the Office of the Secretary. The Chief FOIA Officer suggested that the process could create inefficiencies and burden the components. These concerns were not heeded.

The documents we reviewed indicate that the Chief FOIA Officer's reservations have continued after implementation of the review process. In December 2009 emails to staff, the Chief lamented the level of attention that the Office of the Secretary was giving to significant requests. In the same month, the Chief FOIA Officer informed the DHS Office of the General Counsel that staff involved in the review process had suggested inappropriate edits to FOIA release cover letters—edits that would have altered the information requesters received on appeal rights when FOIA denials were made.

Recommendations Related to the Use of (k)(3) Authority

Recommendations 4, 5, and 6 in our report suggest expanded use of the statutory authority held by the Chief FOIA Officer to make recommendations to the Secretary. The Chief FOIA Officer has agency-wide responsibility for efficient and appropriate compliance with the Act. To coincide with this responsibility, 5 U.S.C. § 552(k)(3) establishes that the Chief FOIA Officer shall make recommendations to the Secretary for such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve implementation of the Act. The Attorney General reiterated this requirement in his March 2009 memo. The Attorney General noted that the Chief FOIA Officer must recommend adjustments to agency practices, personnel, and funding as may be necessary.

The information we received demonstrates that the review process created inefficiencies in the FOIA process. Such inefficient oversight of significant requests before release led to statutory noncompliance or prolonged delays in some cases. Additionally, various individuals who reviewed significant cases, including senior DHS officials, had little to contribute to the department's disclosure program. As cases went unprocessed for weeks, the Chief FOIA Officer could have invoked the use of 5 U.S.C. § 552(k)(3) authority. Recommending changes to DHS FOIA practices would have informed the Secretary of problems related to the review process.

The Chief FOIA Officer and FOIA staff in the Privacy Office has improved the FOIA process at DHS. Components consider that the Chief FOIA Officer deserves credit for the positive communication and open dialogue across the department's FOIA offices. Components also observe that the Chief FOIA Officer's staff deserves praise for their roles in improving DHS' FOIA operations. To further improve the DHS FOIA program, the Chief FOIA Officer should develop a policy to use the (k)(3) authority on a regular basis. Doing so would give the Secretary information on what is needed to improve DHS FOIA operations. This is important because of the legal risks that exist under the statute, and because the President has declared that

FOIA is “the most prominent expression of a profound national commitment to ensuring an open Government.”

Because the Chief FOIA Officer holds a vital position as advisor to the Secretary, routine use of (k)(3) reports would empower the Privacy Office and improve FOIA compliance across DHS. Recommendations under (k)(3) should be used to implement the President’s vision and reduce the department’s exposure to legal risk. Because the need for recommendations may fluctuate over time, a determination on the frequency of reporting should be made at the discretion of the Chief FOIA Officer.

Recommendation 4 in our report supports establishment of a policy related to the Chief FOIA Officer’s use of the (k)(3) authority. Recommendation 5 recommends that the Secretary issue guidance on the President’s vision that openness should prevail under FOIA. Recommendation 6 specifically relates to FOIA staffing and the (k)(3) authority. Additional staff could be necessary to deal with request backlogs or to improve proactive disclosure.

Conclusion

The department has made some important progress in the administration of the FOIA. We recognize the inherent challenges in processing over a hundred thousand requests each year, in a timely manner. Through implementation of our recommendations, the Privacy Office could build on successes and improve overall efficiency in the DHS disclosure program. We look forward to continued cooperation during the corrective action process.