



# Homeland Security

March 09, 2012

MEMORANDUM FOR: DHS FOIA Officers

FROM: Mary Ellen Callahan  
Chief FOIA Officer

A handwritten signature in blue ink, appearing to read "Mary Ellen Callahan", written over the printed name and title.

SUBJECT: DHS Freedom of Information Act Policy Guidance: 1) Processing "Misdirected" FOIA Requests; and 2) Implementation of the Department of Justice Office of Information Policy (OIP) December 2011 OIP Guidance: *Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them.*

I am issuing this memorandum for two important reasons: 1) to emphasize the importance of Departmental compliance with FOIA's requirements concerning the processing of "misdirected" requests, as set forth in 5 U.S.C. § 552(a)(6)(A)(ii); and 2) to outline the Department's implementation of OIP's recent guidance concerning the use of referrals, consultations, and coordination in responding to FOIA requests (OIP Guidance); Department of Justice, Office of Information Policy, December 5, 2011; available at <http://www.justice.gov/oip/foiapost/2011foiapost42.html>.<sup>1</sup> The Department's policies and procedures regarding the OIP Guidance, which are to be interpreted in conjunction with the Department's interim final FOIA regulations at 6 CFR Chapter 1 and Part 5 (FOIA regulations), are intended to foster efficiency and ensure a consistent approach in dealing with referrals and consultations.

## 1. Processing "Misdirected" FOIA Requests

5 U.S.C. § 552(a)(6)(A)(ii), which gives rise to the notion of "misdirected requests," is an important provision of FOIA that relates to the beginning of the running of the 20-workday time period for a component<sup>2</sup> to respond to a properly-made FOIA request. This provision establishes that the 20-workday response period begins to run when a properly made request is received by the "appropriate" component. It recognizes that the component that first receives a request may not have the records that are responsive to the request and that that component must forward the request to the another component (i.e., the "appropriate component") for response.

<sup>1</sup> This memorandum provides an outline of the OIP Guidance, and is not intended as a full recitation of its contents. Components are advised to refer to the OIP Guidance for full information of its particulars. Further, as discussed and explained below in the text, the OIP Guidance must be interpreted and applied consistent with the requirements of the Department's FOIA regulations.

<sup>2</sup> The term "component" or "components" in this memorandum always refers to a component or components of DHS.

The provision also establishes, however, that the response period will begin to run no later than 10 working days after the request is first received by any component of the agency that is designated by the agency to receive FOIA requests.<sup>3</sup> Thus, when a component receives a “misdirected” FOIA request it is critical that the request be forwarded as quickly as possible to the responding component in order to provide that component its full allotment of 20 workdays to respond to the request. For reporting purposes, when a component receives a misdirected request and then forwards the request to another component for response, the forwarding component will not log the request as its own, but the responding component will do so.

## 2. OIP Guidance: Referrals, Consultations and Coordination.

As noted in the OIP Guidance, three threshold considerations should be taken into account prior to making a referral or requesting a consultation: 1) records that originate in another component or agency ordinarily should be referred, although in some circumstances consultations rather than referrals are permissible; 2) prior to making a referral, agencies must ensure that the agency or entity to which the request is referred is subject to FOIA;<sup>4</sup> and 3) agencies and components are encouraged to adopt standard processing procedures and agreements with other components and agencies to eliminate the need for consultations or referrals for particular types of routinely requested records.<sup>5</sup> Examples of this sort of agreement are a Service Level Agreement (SLA) and a Memorandum of Understanding (MOU).

### Referrals

In accordance with the Department’s FOIA regulations and the OIP Guidance, when a component refers a request to another component or another agency for response, the FOIA Officer will, as soon as practicable, send the request and the responsive record(s) to the appropriate component or agency and advise the requester that the request and the responsive records are being referred to the other component or agency for response (see Appendices A, B and C).<sup>6</sup> In the letter advising the requester of the referral, include the name, address, and telephone number of a contact person at the other component or agency (see Appendices B and D).<sup>7</sup>

<sup>3</sup> Thus, if a component receives a “misdirected” request - a request for records not in the component’s possession but the component’s FOIA Officer believes another component has or is likely to have - the FOIA Officer will forward the request to the component(s) that should most appropriately respond to the request. For example, if the DHS Privacy Office receives a FOIA request seeking records concerning DHS actions in responding to the Deepwater Horizon oil spill, and the Privacy Office has no responsive records, the Chief FOIA Officer will refer the request to the United States Coast Guard for processing.

<sup>4</sup> Thus, requests should not be referred to Congress, the courts, state governmental entities, private businesses, or individuals.

<sup>5</sup> See 6 CFR §5.4(h), the DHS provision regarding the making of such agreements. Further, the OIP Guidance addresses the making of these agreements on page 1.

<sup>6</sup> The Department’s FOIA regulations provide that the referring component will “ordinarily” advise the requester of the referral. However, under OIP Guidance, a referral requires notifying the requester that a referral has been made. By following the OIP Guidance regarding referrals, e.g., that when a component refers a request the component will notify the requester of the referral, the Department is giving up its option not to advise the requester of the referral. The OIP Guidance’s “coordination” process, discussed below in the text, makes referrals unnecessary where doing so would inappropriately alert a requester concerning law enforcement or other matters. Thus, where coordination rather than referral takes place the issue of advising the requester of a referral does not arise.

<sup>7</sup> For further information on how referrals are made in accordance with the OIP Guidance, see page 1 of that guidance.

Under the OIP Guidance, upon receipt of records referred to components by another component or by another agency, the receiving components will assign a tracking number and should handle referrals on the same first-in, first-out basis as their other FOIA requests using the date of the request's initial receipt at the referring component or agency to establish its processing priority. Components should notify the requester in writing that his or her request to the other component or agency has been referred for response, identify the component or agency that made the referral, and include the component tracking number as well as the original FOIA request tracking number by the component or agency making the referral (see Appendix E). Components should track incoming referrals just as they would an incoming FOIA request and include it in the Annual FOIA Report.<sup>8</sup>

Again, as noted above and on page 1 of the OIP Guidance, agreements between components and between components and other agencies are encouraged, and can eliminate the need for referrals for particular types of routinely requested records.

### Coordinating a Response

The OIP Guidance recognizes that there are situations where standard referral procedures, including the need to advise requesters of the referral of their requests to other components or agencies, are not appropriate.<sup>9</sup> It has therefore provided a new approach called "coordination." Coordination is designed to be used where notifying a requester that a request is being referred could cause harm to privacy interests or law enforcement interests. At the same time, coordination ensures that the records are processed efficiently, with greater accountability, and greater customer service. Under coordination, if standard referral procedures could harm the interests noted below, the component or agency originally responsible for responding to the request retains that responsibility, including the responsibility to communicate with the requester about the processing of the request.

In accordance with the OIP Guidance, release determinations regarding law enforcement records originating with a law enforcement component or agency should be coordinated with the components or agencies involved, since the component<sup>10</sup> receiving the request might be unaware their sensitivity.<sup>11</sup> No referral should be made absent prior coordination with the law enforcement component or agency involved as described below:

1. When unacknowledged law enforcement records are identified, the FOIA Officer should contact the originating component or agency to ascertain whether their involvement in the

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<sup>8</sup> For further information on the OIP Guidance's provisions on how components should handle referrals received from other components or agencies, see page 2 of that guidance.

<sup>9</sup> A component must in almost all circumstances advise a FOIA requester when the component refers records in its possession to another component or agency for response. Not only is this approach good FOIA customer service policy, without advising of referrals it could be difficult for the Department to carry out its responsibilities to advise requesters about the status of the processing of their FOIA requests. See 5 U.S.C. § 552(l); 6 CFR § 5.4(f);

<sup>10</sup> For purposes of DHS FOIA regulations, this Office considers every unit of the Department, including the Office of the Secretary, to be a component or part of a component.

<sup>11</sup> The coordination process discussed in the OIP Guidance at page 2 covers records having national security implications. As discussed in the text below, DHS FOIA regulations provide for referral where classified records or records appropriate for classification are the subject of requests. Therefore our implementation of the OIP coordination guidance does not extend to such records.

matter can be publicly acknowledged without causing an unwarranted invasion of personal privacy, or without alerting a requester to the existence of an ongoing law enforcement investigation to the detriment of that investigation. Copies of the request and the records at issue should be made available as necessary.<sup>12</sup>

2. The originating component or agency shall promptly respond to the inquiry from the component or agency receiving the request.
3. Upon advice from the originating component or agency that the records implicate neither personal privacy nor law enforcement sensitivity (see footnote 10) by virtue of their origination, the standard referral procedures outlined above, including advising the requester of the referral and the identity of the entity to which the request is being referred, should be followed. The component or agency receiving the referral will respond directly to the requester.<sup>13</sup>

Where the records implicate personal privacy interests or law enforcement sensitivity by virtue of the identity of the component or agency from which they originated. The component that originally received the request should coordinate with the originating component or agency to determine how the records should be handled under the FOIA.

During the coordination process, the component or agency originating the records and whose views are being sought should assign a tracking number to the documents that are the subject of the coordination. Upon request, the originating entity should promptly provide a status update to the component that originally received the request. Both parties should work in concert to guarantee efficient processing; the requester should not be disadvantaged as a result of coordination. Moreover, to preserve the privacy or law enforcement interests at stake, the originating component or agency should provide its views on the records quickly, so that they can be readily incorporated into the receiving component's or agency's response letter.

All referrals and coordination as discussed in the OIP Guidance must be accomplished consistent with the DHS's FOIA regulations. These regulations, e.g., 6 CFR §5.4(c) and (d), provide that consultation or referral are options depending on the particular circumstances involved. However, as OIP Guidance requires referrals when records originate in another component or agency except when coordination is appropriate, by following the OIP Guidance referral provisions DHS will refer rather than consult in these situations. Similarly, although 6 CFR §5.4(f) provides DHS the option of not informing the requester that a referral has occurred, by following the OIP referral guidance DHS will be informing the requester of the referral. Each of these approaches by DHS is consistent

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<sup>12</sup> The concern that advising a requester of a referral could harm a law enforcement investigation is not covered by the OIP Guidance. The Department has addressed this concern in its FOIA regulations at 6 CFR § 5.4(f), which provide that a component will "ordinarily" advise a requester of a referral. As is discussed in the text, below, coordination is in essence a specialized form of consultation, and requesters are not advised that consultation is underway. Therefore, where coordination is undertaken to address the requested release of such records, there will be no referral, and issues concerning whether to advise a requester of a referral will not arise.

<sup>13</sup> For further information on the OIP Guidance's provisions on how components should coordinate a response, see page 2 of that guidance.

with its FOIA regulations. Further where DHS coordinates a response, that process, in reality a form of consultation, is consistent with DHS consultation regulations at 6 CFR §5.4(c).

However, DHS FOIA regulations do not permit coordination when classified records are involved. Our regulations require referral where a request seeks records implicating national security that have been classified, or may be appropriate for classification under the applicable classification Executive Order, by another component or another agency, even if the component or agency that classified the records or should classify the records is a member of the Intelligence Community. Under 6 CFR §5.4(e) the “receiving component shall refer the responsibility for responding to the request regarding that information to the component or agency that classified the information, or which should consider the information for classification, or which has the primary interest in it, as appropriate.”<sup>14</sup> Thus, insofar as such information is concerned, the DHS FOIA referral regulations rather than the coordination process of the OIP Guidance will apply unless the component receiving the request and the other component or agency have entered into an agreement making the referral unnecessary. See 6 CFR §5.4(h). If such an agreement exists, a coordination process as set forth in the OIP Guidance may be appropriate.

#### Standard Consultation Situations

The OIP Guidance identifies when a standard consultation rather than referral is appropriate. Thus, in responding to a request, if a component locates responsive records that originated within the component but which may implicate or involve another component’s or another agency’s interests, the component should consult with that component or agency before responding.<sup>15</sup> The consultation process is most frequently initiated when a component locates records responsive to a request that originated internally but contain information of interest to others. Consultations are appropriate, too, when DHS HQ FOIA or a component locates records in its files that originated with an entity not subject to FOIA. This is often the case when records contain information arguably subject to FOIA Exemption (b)(4).<sup>16</sup> At all times, the need for and frequency of the consultation requests should continue to be assessed. There may be ways to streamline or eliminate the need for certain consultations through various procedures and agreements. See 6 CFR §5.4(h).<sup>17</sup>

When consulting with another component or another agency, a component will:

1. Use the most time-efficient mechanism to conduct the consultation. Sometimes it may be enough to call or email the component or agency whose views are being sought. Should consultations require a more extensive review by that component or agency, provide copies of the documents at issue, a copy of the request letter, and any other information that may assist

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<sup>14</sup> DHS FOIA regulations, at 6 CFR§5.4(f), provide as noted above that “ordinarily” the referring component will inform the requester of the referral and the agency to which the referral is made. Thus, the referring component need not advise of the referral if doing so could damage national security interests.

<sup>15</sup> If there is to be a consultation rather than a referral in situations where the records at issue originated with another agency, OIP Guidance provides that both agencies should be in agreement that consultation rather than referral is appropriate.

<sup>16</sup> See 6 CFR §5.8 regarding the process by which a component must allow a submitter of such information the opportunity to provide its views regarding whether the information should be released in response to a FOIA request.

<sup>17</sup> See also page 1 of the OIP Guidance.

the other component or agency in its analysis;

2. Conduct consultations simultaneously—not sequentially—whenever possible; this will make for greater efficiency. Advise the component or agency initiating a consultation of other components or agencies that the consulted component asks to review the requested documents; and
3. Include information about ongoing consultations when updating requesters on the status of their requests. Ordinarily, with the same exceptions noted in “referrals requiring coordination” (above), the identity of the consulting component or agency should be shared with the requester.

Similarly, upon receipt of a request for consultation, a component will:

1. Assign the request a tracking number.
2. Convey DHS views on disclosure with regard to the records quickly via the most time-efficient medium.
3. Remember: during the time the component or agency originally in receipt of the request is consulting with another component or agency, it is the original component’s or agency’s responsibility to field any inquiries made by the requester.

See the attached appendices for examples of appropriate correspondence regarding referrals.

Appendix A: An Example of a Referral Memorandum to a Component for Direct Response to the Requester

MEMORANDUM FOR: [NAME OF FOIA OFFICER], FOIA Officer  
[COMPONENT]

FROM: James V.M.L. Holzer, I, MHR, CIPP/G  
Director  
Disclosure and FOIA Operations

SUBJECT: **DHS/OS/PRIV**

Attached is a FOIA request received in the DHS FOIA/PA Office. The requester is seeking records regarding [DESCRIBE REQUEST].

During our search for responsive records, we located records that originated within the [COMPONENT]. Therefore, we are referring the responsive documents, totaling [####] pages, to you for your review and direct response to the requester.

The requester has been notified of this referral. A copy of the notification letter is attached.

Appendix B: Acknowledgement Letter to Requester Notifying of Referral of FOIA Request to another Component

[NAME OF REQUESTER]  
[TITLE]  
[COMPANY]  
[ADDRESS]  
[CITY, STATE + ZIP]

Re: **DHS/OS/PRIV**

Dear [MR/MS.] [REQUESTER LAST NAME]:

This acknowledges receipt of [**OR...** This is in further response to] your Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS), [COMPONENT], dated [DATE], and received in this office on [RECEIVED DATE]. You are requesting documents regarding [DESCRIBE REQUEST].

During our search for responsive records, our office located [###] pages of records that are under the purview of [OTHER COMPONENT]. Therefore, I am referring your request, along with those responsive documents, to the FOIA Officer for [OTHER COMPONENT], [COMPONENT ADDRESS], for processing and direct response to you. You may contact the [OTHER COMPONENT] FOIA Officer at [TELEPHONE NUMBER].

If you need to contact our office again about this matter, please refer to [CASE NUMBER]. This office can be reached at [TELEPHONE NUMBER].

Sincerely,

James V.M.L. Holzer, I, MHR, CIPP/G  
Director  
Disclosure and FOIA Operations

Appendix C: An Example of a Referral Letter to another Agency for Direct Response to the Requester

[AGENCY]  
FOIA/PA Officer  
[ADDRESS]  
[CITY, STATE + ZIP]

Re: [CASE NUMBER]

Dear FOIA/PA Officer:

Please refer to the enclosed Freedom of Information Act (FOIA) request, dated [DATE OF REQUEST], and submitted to the Department of Homeland Security (DHS) from [NAME OF REQUESTER]. The requester is seeking a copy of [DESCRIPTION OF RECORDS REQUESTED].

During our search for responsive records, we located records that originated within the [AGENCY]. Therefore, we are referring the responsive documents, totaling [###] pages, to you for your review and direct response to the requester. The requester has been notified of this referral. A copy of our letter to the requester is also attached.

Please mail a courtesy copy of your response, referencing case number [DHS CASE NUMBER], to this office at the following address:

[DHS FOIA OFFICER]  
Department of Homeland Security  
[COMPONENT]  
[ADDRESS]  
[CITY, STATE + ZIP]

If you have any questions concerning this matter, please contact this office on [TELEPHONE NUMBER]. Please reference [CASE NUMBER] in all future correspondence.

Sincerely,

James V.M.L. Holzer, I, MHR, CIPP/G  
Director  
Disclosure and FOIA Operations

Enclosures: DHS Response to Requester, dated [DATE]  
FOIA Request, dated [DATE]  
Responsive Documents, ( [###] pages)

Appendix D: Acknowledgement Letter to Requester Notifying of Referral of FOIA Request to another Agency

[NAME OF REQUESTER]  
[TITLE]  
[COMPANY]  
[ADDRESS]  
[CITY, STATE + ZIP]

Re: [CASE NUMBER]

Dear [MR/MS.] [REQUESTER LAST NAME]:

This acknowledges receipt of [OR... This is in further response to] your Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS), [COMPONENT], dated [DATE]. You are requesting documents regarding [DESCRIBE REQUEST].

During our search for responsive records, we located [###] pages of records that originated within the [AGENCY]. Therefore, I am referring this request and the responsive records to the FOIA Officer for [AGENCY], [AGENCY ADDRESS], for processing under the FOIA and direct response to you. You may contact the [AGENCY] FOIA Officer at [TELEPHONE NUMBER].

If you need to contact our office again about this matter, please refer to [CASE NUMBER]. This office can be reached at [TELEPHONE NUMBER].

Sincerely,

James V.M.L. Holzer, I, MHR, CIPP/G  
Director  
Disclosure and FOIA Operations

Appendix E: An Example of an Acknowledgement Letter Notifying Requester of a Referral to DHS

[NAME OF REQUESTER]  
[TITLE]  
[COMPANY]  
[ADDRESS]  
[CITY, STATE + ZIP]

Re: **[REFERRING AGENCY CASE NUMBER]**  
**[DHS CASE NUMBER request]**

Dear M[R/S.] [REQUESTER'S LAST NAME]:

This acknowledges receipt in the Department of Homeland Security (DHS) Privacy Office of your Freedom of Information Act (FOIA) request that you addressed to [NAME] [REFERRING AGENCY], seeking records relating to [DESCRIBE RECORDS REQUESTED].

The [REFERRING AGENCY] referred your request and responsive documents to this office for processing under the FOIA. This request was received in the [COMPONENT] on [DATE].

Your request has been assigned the reference number **[DHS case number request]**. Please refer to this identifier in future correspondence. You may contact this office at our toll-free telephone number, 866-431-0486, or at 703-235-0790.

Sincerely,

James V.M.L. Holzer, I, MHR, CIPP/G  
Director  
Disclosure and FOIA Operations