

DHS' Process for Responding to FOIA and Congressional Requests





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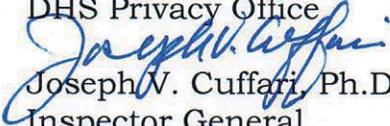
July 23, 2020

MEMORANDUM FOR: Beth Spivey
Assistant Secretary
DHS Office of Legislative Affairs

Juliana Blackwell
Acting Executive Secretary
DHS Office of the Executive Secretary

Dena Kozanas
Chief Privacy Officer
DHS Privacy Office

FROM:


Joseph W. Cuffari, Ph.D.
Inspector General

SUBJECT: *DHS' Process for Responding to FOIA and
Congressional Requests*

Attached for your action is our final report, *DHS' Process for Responding to FOIA and Congressional Requests*. We incorporated the formal comments provided by your office.

The report contains no recommendations aimed at improving how DHS responds to Freedom of Information Act (FOIA) and congressional requests. Consistent with our responsibility under the *Inspector General Act*, we will provide copies of our report to congressional committees with oversight and appropriation responsibility over the Department of Homeland Security. We will post the report on our website for public dissemination.

Please call me with any questions, or your staff may contact Jackson Eaton, Acting Assistant Inspector General for Special Reviews and Evaluations, at (202) 981-6000.

Attachment



DHS OIG HIGHLIGHTS

DHS' Process for Responding to FOIA and Congressional Requests

July 23, 2020

Why We Did This Review

In response to a request from the Senate Homeland Security and Governmental Affairs Committee, Permanent Subcommittee on Investigations, we conducted a review of DHS' handling of Freedom of Information Act (FOIA) requests and congressional requests directed to the DHS Office of the Secretary — specifically, the DHS Secretary and Deputy Secretary.

What We Recommend

This is a descriptive report and contains no recommendations.

For Further Information:

Contact our Office of Public Affairs at (202) 981-6000, or email us at DHS-OIG.OfficePublicAffairs@oig.dhs.gov

What We Found

DHS outlines its process for responding to FOIA and congressional requests in internal policy and procedure documents, which include timeliness goals (some of which are based on statutory timelines) and other guidance for searching for, collecting, processing, and producing responsive materials. Regarding FOIA requests, while DHS generally met deadlines for responding to simple FOIA requests, it did not do so for most complex requests. A significant increase in requests received, coupled with resource constraints, limited DHS' ability to meet production timelines under FOIA, creating a litigation risk for the Department. However, despite the limitations, DHS FOIA response times are better than the averages across the Federal Government. Additionally, DHS has not always fully documented its search efforts, making it difficult for the Department to defend the reasonableness of the searches undertaken.

With respect to responding to congressional requests, DHS has established a timeliness goal of 15 business days or less. However, we found that, on average, it took DHS nearly twice as long to provide substantive responses to Congress, with some requests going unanswered for up to 450 business days. Further, DHS redacted personal information in its responses to congressional committee chairs even when disclosure of the information was statutorily permissible.

DHS Response

DHS acknowledged FOIA backlogs remain a problem, despite increasing the number of requests processed. DHS stated its process for responding to congressional requests varies and that its redactions are appropriate.



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Abbreviations

ALJ	Administrative Law Judge
DOJ	Department of Justice
ESEC	External Liaison Team
FOIA	Freedom of Information Act
OCIO	Office of Chief Information Officer
OGC	Office of General Counsel
OIG	Office of Inspector General
OLA	Office of Legislative Affairs
PSI	Permanent Subcommittee on Investigations
SOP	Standard Operating Procedure
U.S.C.	United States Codes



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Introduction

The *Freedom of Information Act* (FOIA)¹ and congressional oversight serve to promote transparency in, and facilitate oversight of, the Federal Government. Agency responses to these requests provide the public with important information about their government and play a vital role in our democracy. As the third largest Federal department, composed of 22 components with various law enforcement and national security missions, the Department of Homeland Security and its operations are the subject of intense public and congressional interest. DHS receives the most FOIA requests of any Federal agency,² and some 86 congressional committees and subcommittees have asserted some form of jurisdiction or oversight of it.³ As a result, DHS must ensure it has processes in place to respond to these requests in a timely and efficient manner, in compliance with laws, regulations, and internal policies.

In response to a request from the Senate Homeland Security and Governmental Affairs Committee, Permanent Subcommittee on Investigations, we conducted a review of DHS' handling of FOIA requests and congressional requests directed to the DHS Office of the Secretary — specifically, the DHS Secretary and Deputy Secretary.⁴

Background

The DHS Privacy Office handles FOIA requests directed to the DHS Secretary and Deputy Secretary; requests directed to the DHS Secretary and Deputy Secretary by Members of Congress and congressional committees are handled by the Office of the Executive Secretary, Communications and Operations, External Liaison Team, as shown in figure 1.

¹ 5 United States Code (U.S.C.) § 552 (2006 & Supp. IV 2010)

² Department of Justice Summary of Annual FOIA Reports for Fiscal Year 2019 states that DHS received 47 percent of all FOIA requests to the Federal government, nearly 200,000 more than the Federal agency that received the second most requests.

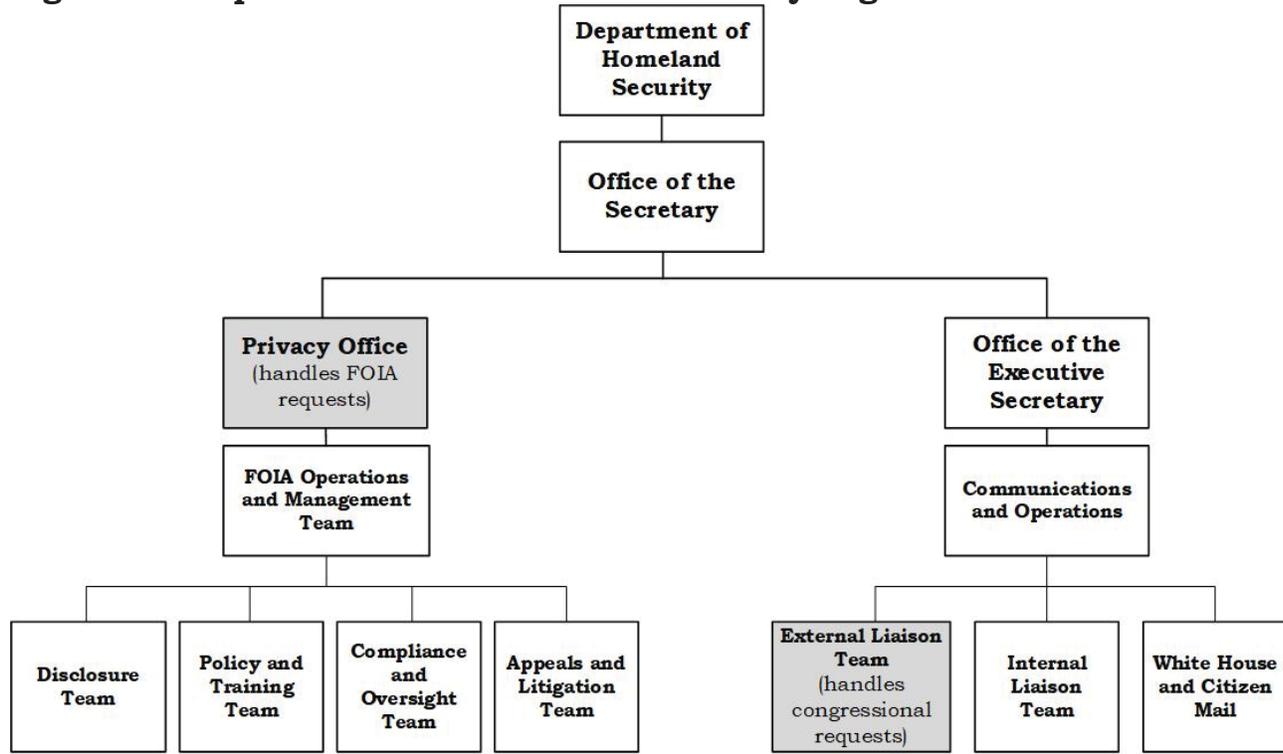
³ On September 4, 2007, then DHS Secretary Michael Chertoff sent a letter to U.S. Representative Peter King providing a list of 86 committees and subcommittees that claim jurisdiction over DHS.

⁴ Our review did not include requests sent directly to DHS components.



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Figure 1: Simplified DHS Office of the Secretary Organizational Chart



Source: Office of Inspector General (OIG) based on DHS organizational charts

Requests for Information under FOIA

Congress enacted FOIA to give the public access to information in the Federal Government. The Supreme Court has explained that “[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”⁵ In furtherance of this purpose, the Act requires Federal executive branch agencies, such as DHS and its components, to respond to a request within 20 business days, and to disclose responsive records unless such records are protected from disclosure by one or more enumerated exemptions.⁶

If an agency fails to respond to a request within the allotted time, the requester may file a lawsuit in Federal court. If a requester is unsatisfied with the agency’s initial response to the request, the requester must first file an appeal with the agency before seeking relief in Federal court. At DHS, if a requester appeals the initial response, the matter is referred to an Administrative Law

⁵ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)

⁶ 5 U.S.C. § 552(b). Appendix C provides information on the nine FOIA exemptions.



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Judge (ALJ) from the United States Coast Guard, who adjudicates all such appeals by conducting an independent review of the request and response and issuing a decision to the requester.⁷ FOIA requires decisions on appeals be issued within 20 business days.⁸ If the appeal is not favorable to the requester, or takes longer than 20 business days to decide,⁹ the requester may file a lawsuit in Federal court.¹⁰

At DHS, the FOIA Operations and Management Team (FOIA Team) within the Privacy Office processes FOIA requests submitted to the Privacy Office and 14 other DHS Headquarters offices.¹¹ To process and respond to requests, the FOIA Team takes the steps detailed in appendix D. The FOIA Team is also responsible for providing regulatory and policy guidance to DHS on compliance with FOIA.¹² Generally, the FOIA Team's guidance reiterates Department of Justice (DOJ) Office of Information Policy's guidance and information from the FOIA.gov website.

Requests for Information from Congress

Congress enjoys broad authority to obtain information. Although there is no express provision of the Constitution or specific statute authorizing the conduct of congressional oversight or investigations, the Supreme Court has established that such power is essential to the legislative function.¹³

⁷ The ALJ's independent review includes review of the entire administrative file before the agency at the time of the determination, including (if applicable) any correspondence between the agency and the requester (e.g., narrowing the scope of the request), the search conducted by the agency, the search results, the FOIA exemptions applied by the agency, and the final agency response.

⁸ 5 U.S.C. § 552(a)(6)(A)(ii)

⁹ 5 U.S.C. § 552(a)(6)(A)

¹⁰ 5 U.S.C. § 552(a)(4)(B)

¹¹ The 14 other DHS Headquarters offices are: Countering Weapons of Mass Destruction Office; Management Directorate; Military Advisor's Office; Office for Civil Rights and Civil Liberties; Office of Health Affairs; Office of Legislative Affairs; Office of Operations Coordination; Office of Partnership and Engagement; Office of Public Affairs; Office of Strategy, Policy, and Plans; Office of the Citizenship and Immigration Services Ombudsman; Office of the Executive Secretary; Office of the General Counsel; and Office of the Secretary.

¹² DHS Policy Directive 262-11: *Freedom of Information Act Compliance*

¹³ *Watkins v. United States*, 354 U.S. 178, 187 (1957) (emphasizing the "...power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 (1975) (stating the scope of Congress' power of inquiry is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution).



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Within DHS, the External Liaison Team (ESEC)¹⁴ in the Office of the Executive Secretary's Communications and Operations group manages external correspondence addressed to the Secretary and Deputy Secretary, including congressional correspondence. The Office of Legislative Affairs (OLA) receives the congressional correspondence and sends it to ESEC to coordinate the response. If the response involves information from one or more DHS components, ESEC tasks the appropriate component(s) for a response. The component drafts the response, acquires all necessary internal clearances,¹⁵ and sends the response back to ESEC to coordinate clearance within DHS.¹⁶

Once the component or ESEC has prepared a response, ESEC acquires clearances with DHS' Office of Management, Office of Policy,¹⁷ OLA, and Office of General Counsel (OGC). ESEC then packages the response for signature. ESEC's internal policy provides 5 to 15 business days to respond to congressional requests, depending on whether a request is deemed "urgent" or "routine." If a component head is to provide the response, the component releases the cleared response to Congress. If the Secretary or Deputy Secretary is to provide the response, DHS OLA releases the cleared response to Congress. Appendix D includes a flowchart showing this process.

Results of Review

While DHS generally met statutory deadlines for responding to simple FOIA requests, it did not do so for most complex requests.¹⁸ The FOIA Team experienced significant increases in the number of requests received but FOIA Team managers said they have limited staff to handle the volume, making it difficult to meet the 20-business-day requirement. In addition, the FOIA Team processed requests for 14 other DHS Headquarters offices, but did not track and could not easily identify the number of requests it processes for each office

¹⁴ We use "ESEC" to refer to the External Liaison Team for the purposes of this report.

¹⁵ Clearance is the process by which relevant staff and senior leadership reviews and concurs with materials intended for release.

¹⁶ In comments to our draft report, DHS stated that ESEC receives congressional correspondence through several sources, such as DHS components or external stakeholders, and via other means, such as email or United States Postal Service, not just through OLA. In addition, DHS clarified that the component, not ESEC, coordinates clearance with DHS' Office of Management, Office of Strategy, Policy, and Plans, Office of Legislative Affairs (OLA), and General Counsel (OGC) prior to sending the response back to ESEC. Because these changes appear to post-date our fieldwork, we are unable to independently verify them.

¹⁷ The Office of Policy has since been renamed the Office of Strategy, Policy, and Plans.

¹⁸ A simple request is a FOIA request that an agency anticipates will involve a small volume of material or can be processed relatively quickly. A complex request typically seeks a high volume of material or requires additional steps to process, such as the need to search for records in multiple locations. See <https://www.foia.gov/glossary.html>.



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so it could seek reimbursement. The FOIA Team also did not have sufficient electronic storage space to receive and process all responsive documents, which delayed several FOIA responses, in many cases by more than a year. Additionally, although reliant on DHS components and the Office of Chief Information Officer (OCIO) to conduct searches and document the methods used to complete those searches, the FOIA Team did not consistently receive completed search forms to indicate a reasonable search was conducted. However, despite the limitations and as set forth below, DHS FOIA response times are better than the averages across the Federal Government.

When responding to congressional requests, we found DHS often exceeded its timeliness goals and did not consistently provide interim responses. Further, DHS redacted personal information in its responses to congressional committee chairs that was eligible for release under DHS policy.

Resource Constraints Have Limited DHS' Ability to Respond to FOIA Requests Timely

Past and current resource limitations have delayed DHS responses to FOIA requests. The FOIA Team has faced challenges in timely processing due to a sharp increase in requests in fiscal years 2017 and 2018, and limited staff to handle the number of requests they receive. The FOIA Team also processes requests for 14 other DHS Headquarters offices, which increases the workload. However, the FOIA Team does not track and cannot easily identify the number of FOIA requests it processes for each office. As a result, it does not exercise its ability to seek reimbursement from the offices for the services it provides. We also found several FOIA responses had been delayed, in many cases by more than a year, because the FOIA Team did not have sufficient electronic storage space to accommodate the responsive emails.

Limited Staffing and Increases in FOIA Requests Hindered the FOIA Team's Ability to Meet Statutory Response Timeframes

According to FOIA, an agency must release records within 20 business days; however, with written notice to the requester, an agency may automatically extend the timeframe by an additional 10 business days for complex requests requiring the agency to:

- search for and collect requested records held by an office different than the one processing the request;
- examine a voluminous amount of records; or

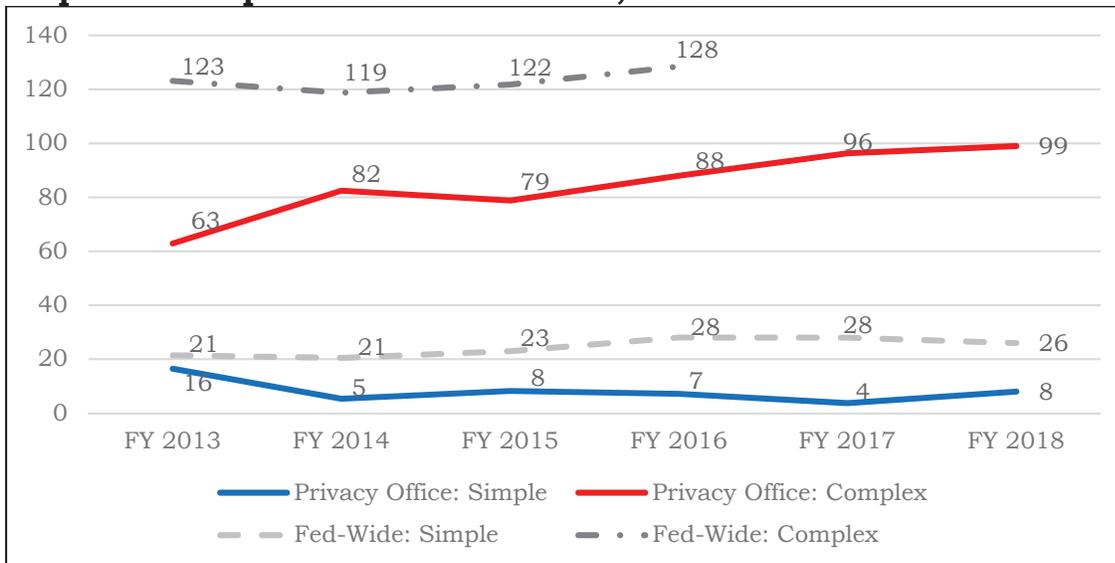


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- consult with other agencies with a substantial interest in the determination of the request.¹⁹

Even with the 10-day extension, the DHS FOIA Team consistently did not meet the statutory response time for complex requests for FYs 2013 to 2018. The FOIA Team took an average of 85 days to process complex requests during this period, peaking at an average of 99 days in FY 2018. Nevertheless, the DHS FOIA Team’s processing averages have been consistently lower than the averages across the Federal Government (figure 2).

Figure 2: Average Business Days for FOIA Team to Respond to FOIA Requests Compared to Federal-wide*, FYs 2013–2018



Source: OIG analysis of FOIA.gov data

* DOJ, *Summary of Annual FOIA Reports for Fiscal Year 2016*. DOJ did not report the average number of days for complex requests in its FY 2017 or FY 2018 reports, and we could not calculate it based on available data.

When Federal agencies do not respond to FOIA requests within statutory timeframes, a requester may file suit against the agency. We reviewed all 62 litigation cases the FOIA Team had from October 2014 to May 2018²⁰ and determined in the majority of cases, 49 of 62 FOIA requesters (79 percent) alleged lack of timeliness as the reason for litigation.²¹ These requesters waited 23 to 478 business days from when they submitted the initial FOIA request to when they filed the litigation. The reasons for litigation in the remaining 13

¹⁹ 5 U.S.C. § 552(a)(6)(B)

²⁰ The FOIA Team tracks litigation cases against its office and the 14 DHS Headquarters offices for which it processes FOIA requests.

²¹ See appendix E for all 62 litigated cases.



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cases included challenges to the adequacy of the searches performed, application of exemptions, and failure to approve expedited processing.

According to FOIA Team managers, they do not have enough staff to handle the number of FOIA requests they receive, which increased 125 percent in FY 2017, resulting in difficulty meeting the 20-business-day requirement. FOIA Team managers have requested additional staff, but the FOIA Team does not have its own line item in DHS’ budget; rather, they receive funds from the Privacy Office. According to the Deputy Chief FOIA Officer, since FY 2017, he has been able to hire contractors with funds available from the attrition of Federal employees and funds received from components for their use of FOIAXpress, the system used by DHS to track FOIA requests. Despite these efforts, the total number of staff has not increased at a rate commensurate with the increase in FOIA requests received, as shown in table 1.

Table 1: Total FOIA Requests Received and Total Full-Time and Full-Time Equivalent FOIA Staff, FYs 2013–2018

Fiscal Year	Number of FOIA Requests Received	Full-Time and Full-Time Equivalent FOIA Staff
2013	798	16
2014	705	17
2015	649	18.6
2016	599	16.58
2017	1,348	19.25
2018	1,448	25

Source: OIG analysis of FOIA.gov data

Based on this data, between FYs 2013 and 2016, the average ratio of FOIA staff members to FOIA requests was approximately 1:40; for FYs 2017 and 2018, that ratio was 1:64.

The FOIA Team Did Not Track and Seek Reimbursement for Work Performed on Behalf of 14 Other DHS Headquarters Offices

In addition to processing FOIA requests the Privacy Office receives, the FOIA Team also processes requests for 14 other DHS Headquarters offices. The FOIA Team is authorized to receive reimbursement for this work from the other offices, but does not do so, in part because it does not track and cannot easily identify the number of FOIA requests it processes for each office.

According to Office of Management and Budget, Circular A-11, *Preparation, Submission, and Execution of the Budget*, agencies can perform reimbursable



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work for other agencies under the Economy Act.²² The Economy Act authorizes the head of a major organizational unit to place an order with another major organizational unit within the same agency for services.²³ The service-providing unit — the FOIA Team, in this case — can charge the ordering units — the 14 DHS Headquarters offices — the actual cost of the services provided.

To receive reimbursement for the FOIA requests it processes for the 14 other DHS Headquarters offices, the FOIA Team would need to identify the costs associated with processing the requests. However, the FOIA Team does not track requests processed for the individual offices, and instead categorizes all requests it processes as a “Privacy Office” request in FOIAXpress. As a result, to identify the specific DHS Headquarters office for which a particular request was processed, the FOIA Team needs to open each Privacy Office request individually, which is labor intensive and inefficient. Consequently, the FOIA Team does not calculate the cost of the services it provides to each office and has not sought the reimbursement it might otherwise collect to address some of its resource limitations.²⁴

DHS Did Not Allot Sufficient Electronic Storage Space to Handle Its FOIA Processing Needs

FOIA states that in responding to a request for records, “[a]n agency shall make reasonable efforts to search for the records in electronic form or format....”²⁵ The DHS FOIA Team relies on OCIO to search for and collect emails responsive to FOIA requests.²⁶ Although OCIO completes these searches, in the past the FOIA Team lacked the necessary electronic storage space to receive all responses, which delayed the processing of these FOIA requests.

Until September 2018, when OCIO completed a search in response to a FOIA request, it informed the FOIA Team of the aggregate file size of the collected responsive emails, at which point the FOIA Team would determine whether it had the storage capacity on its server to receive the responsive emails. In

²² Office of Management and Budget Circular A-11, *Preparation, Submission, and Execution of the Budget*, 20.12, June 2019

²³ 31 U.S.C. § 1535

²⁴ Although providing no monetary reimbursement, two offices have assigned a staff member each to assist in processing FOIA requests and alleviate some of the FOIA Team’s workload.

²⁵ 5 U.S.C. § 552(a)(3)(C)

²⁶ DHS Policy Directive 141-01, *Records and Information Management*, (August 11, 2014) established the policy for managing such records, requiring OCIO “...provide for the seamless capture and storage of electronic records and associated metadata in DHS enterprise-wide systems and applications.”



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September 2018, however, the FOIA Team reached capacity on its server²⁷ and could not take additional responsive emails from OCIO, including eight pending transfers as shown in table 2, until the FOIA Team created additional space by expanding its server capacity or deleting records already provided to requesters. Because the FOIA Team did not have sufficient electronic storage space to receive the responsive emails, the emails stayed in OCIO instead of being processed and produced to the FOIA requester. As the data in table 2 shows, without adequate server capacity to receive responsive emails from OCIO, the FOIA Team exceeded statutory deadlines in many instances by more than 200 business days.

Table 2: Pending Transfers from OCIO, as of September 25, 2018

Date of Request	Size of File	Elapsed Business Days
June 23, 2017	40 GB	316
June 29, 2017	36 GB	312
July 5, 2017	48 GB	309
July 19, 2017	64 GB	299
September 5, 2017	7 GB	266
October 13, 2017	25.4 GB	239
December 4, 2017	44 GB	205
January 31, 2018	37.3 GB	166

Source: OIG analysis of OCIO data and discussions with FOIA Team personnel

Despite the absence of adequate server space, the FOIA Team took some steps to try to make progress on these FOIA requests. For instance, in one case, the FOIA Team worked with the requester and OCIO over several months to narrow the scope of the request until the volume of responsive emails was small enough to fit on the FOIA Team’s server.

As of August 2019, the FOIA Team upgraded its servers and was able to add additional electronic storage space. According to a Privacy Office official, the FOIA Team is no longer having issues accepting responsive emails from OCIO. The Deputy Chief FOIA Officer said there are plans to move the FOIA Team’s server to a cloud-based system by March 2020, which would further mitigate the storage capacity issue.

²⁷ The FOIA Team’s server capacity was six terabytes (TB) as of September 25, 2018. One TB is equal to 1,000 gigabytes (GB). The FOIA Team updated the server capacity to 10.5 TB as of August 8, 2019.



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Components and OCIO Did Not Consistently Complete FOIA Search Forms to Indicate They Conducted a Reasonable Search

When responding to a FOIA request, a Federal agency must conduct a reasonable search for responsive documents.²⁸ DOJ's *Guide to the Freedom of Information Act – Procedural Requirements* specifies:

As a general rule, courts require agencies to undertake a search that is 'reasonably calculated to uncover all relevant documents.' ... the adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.²⁹

Appeals filed by requesters often cite concerns with the reasonableness of an agency's search. Documenting the search methods used to identify and collect documents responsive to a FOIA request provides the agency with critical information needed to establish the reasonableness of the search.

Because the FOIA Team lacks access to all DHS systems and the knowledge needed to run comprehensive searches within these systems, it must rely on DHS components and OCIO to conduct searches and document the methods used. According to the FOIA Team's draft SOP, the FOIA Team provides a search form to be completed and returned when it tasks DHS components and OCIO to search for relevant records. The form sent to the components requests information about how the search was conducted, including the locations searched (e.g., paper files, electronic databases, desktop computers, shared drives, and thumb drives), search terms used, time spent searching, whether any records were found, and if the component recommends withholding information. The form sent to OCIO specifies what key words, email accounts, and relevant date ranges to search.

The Director of Compliance and Oversight said that, even when components send back responsive documents, they do not always return a completed form detailing their search methods. Additionally, OCIO sends the FOIA Team an email stating whether it found responsive emails and the size of the data set rather than returning the search form, which specifies key words, email accounts, and date ranges searched. We analyzed six FOIA requests tasked to

²⁸ *Valencia-Lucena v. United States Coast Guard, FOIA/PA Records Mgmt.*, 180 F.3d 321, 325 (D.C. Cir. 1999) (citations omitted). See also *Ancient Coin Collectors Guild v. United States Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011) ("An agency is required to perform more than a perfunctory search in response to a FOIA request.")

²⁹ DOJ, *Guide to the Freedom of Information Act – Procedural Requirements*, October 12, 2018 (internal quotations and citations omitted)



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DHS components, and three to OCIO. Of these nine FOIA requests, only three (by a DHS component) returned a completed search form. In three cases, the FOIA Team did not provide the search form when tasking the FOIA request to the component or OCIO.

Additionally, the FOIA Team's previous search form required the searcher to certify he or she had conducted a reasonable search, but the current iteration of the form does not require this certification. Since dispensing with this requirement, neither component nor OCIO staff provide contemporaneous certification of the reasonableness of their search.

At least half of the 60 appeal cases we reviewed challenged the adequacy of DHS' search. The returned search forms can be important evidence to show DHS conducted a reasonable search. In fact, DHS has used completed search forms and accompanying certification statements as evidence in appeals and litigation to prove its use of appropriate methods to search for responsive documents. Without this evidence, DHS may be placed at a disadvantage in such litigation.

DHS Often Exceeded Its Timeliness Goal When Responding to Congressional Requests and Redacted Information Eligible for Release under DHS Policy

In addition to reviewing how DHS responds to FOIA requests, we sought to determine how DHS responds to congressional requests. Unlike FOIA, DHS does not have legal requirements dictating a particular process to follow when responding to congressional requests; rather, DHS has developed and relies on internal standard operating procedures (SOP) and guidance. We found DHS exceeded its own timeliness goal for responding to congressional requests 49 percent of the time, sometimes by more than 450 business days. In some instances when DHS exceeded its timeliness goal, it did not provide any form of interim response. We also found DHS redacted personal information from responses to congressional committee chairs that was eligible for release under DHS policy.

DHS Took an Average of Almost 27 Business Days to Respond to Congressional Requests

The DHS ESEC *Executive Correspondence Handbook* specifies policies and procedures for all DHS correspondence, including correspondence with Congress, and stresses: "In support of the Secretary's commitment to being responsive, the Department-wide standard is to transmit a timely response."



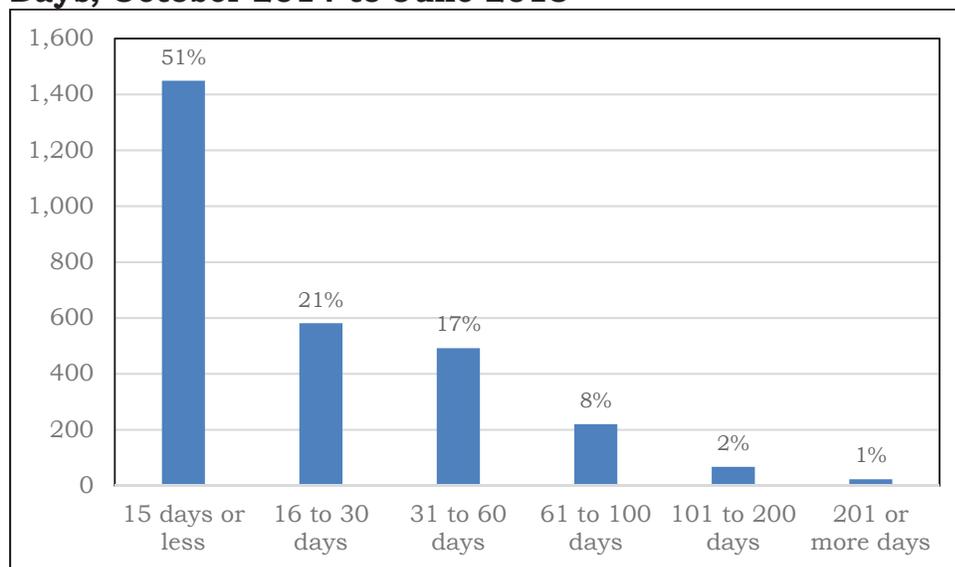
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ESEC’s timeliness goal ranges from providing a response within 5 and 15 business days.

To determine whether DHS Headquarters is providing substantive responses to congressional requests — i.e., beyond merely confirming receipt of correspondence or providing non-substantive interim responses — consistent with its own time goal, we analyzed data on all 2,894 congressional letters received from October 2014 to June 2018. DHS had issued a final response to 2,832 of those letters (closed letters); 62 letters remained open. We analyzed the closed letters and determined ESEC did not meet its response time goal of 15 or fewer business days 49 percent of the time (1,383 of 2,832 closed letters), as shown in figure 3. On average, ESEC took almost 27 business days in that period to close a congressional letter, with some responses going out within 1 business day, while at least one response took longer than 450 business days to issue.

Figure 3: Timeliness of DHS Closing Congressional Letters in Business Days, October 2014 to June 2018



Source: OIG analysis of ESEC data

According to the ESEC *Executive Correspondence Handbook*, if components expect to exceed the timeliness goal when preparing and clearing a response to a congressional request, components should periodically provide an interim response. Our analysis of 30 congressional letters older than 60 business days indicated 12 did not receive an interim letter. Seven of the 12 requests did not receive any update — whether orally or in writing — regarding the status of the request, meaning 7 requesters heard nothing from DHS for at least 60 days after sending a request. ESEC staff said components do not need to provide an



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interim response, but the *Executive Correspondence Handbook* suggests doing so and includes an interim response template as an appendix.

ESEC and component staff told us the scope of the congressional request, the volume of documents requested, and the review process affect how quickly they can respond. Depending on the information requested, DHS seeks clearance from DHS' Office of Management, Office of Strategy, Policy, and Plans, OLA, OGC, its components, and outside agencies before release. Additionally, requests for alien files can take longer to process because they contain personal information and can include sensitive case information, which involve clearance from multiple DHS components and, in some cases, DOJ.³⁰ For example, DHS received a request from a congressional subcommittee for the alien files for five individuals.³¹ Roughly 3 months later, OLA informed a subcommittee staff member the files had been reviewed by DHS, but were with DOJ for its review. DHS ultimately provided the files, with redactions, to the subcommittee 5 months after receiving the initial request.

DHS Redacted Information in Response to Requests from Congressional Committee Chairs Although It Was Eligible for Release under DHS Policy

DHS may withhold or redact information requested by Congress based on a variety of constitutional principles, common law privileges, and statutory exemptions.³² We did not review the legal sufficiency of DHS' justifications in withholding or redacting information requested by Congress, though we did examine whether withholdings or redactions were done in accordance with DHS' own policies.

The OLA SOP states personally identifiable information “can be provided following a written request from a committee or subcommittee chairman.” Further, the ESEC *Executive Correspondence Handbook*, includes a call-out text box stating,

Privacy releases are required to release an individual's personal information to a third party — unless the Chairperson of a congressional committee is requesting the information in their official capacity.

³⁰ If an alien is under investigation by the Federal Bureau of Investigation, then DOJ will have to clear the file as well.

³¹ An alien file contains personal information on non-U.S. citizens, including name, date of birth, place of birth, photographs, application information, affidavits, correspondence, and more, and can be hundreds of pages.

³² Other limitations include Executive privilege, the Privacy Act, pending litigation, and classified and sensitive materials.



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Despite the guidance allowing release to congressional committee chairs, we found DHS redacted personal information in materials (e.g., personnel and case files) responsive to requests made by committee chairs in their official capacity. We analyzed 30 such letters older than 60 business days and found DHS issued a response to 28 of the 30 letters.³³ Of those 28 responses, 6 included some redacted information appearing to be personal information that was eligible for release per DHS' guidance. DHS did not provide the basis for withholding in any of the six responses to the committee chairpersons.

The OGC staff we interviewed stated congressional committees are not allowed to receive "any and all" documents unredacted, and DHS redacts information even if it is going to a chairperson. OGC staff also told us DHS does not provide reasons for redactions in the response unless asked, stating it would "take too long." Further, component staff we spoke to said they never send unredacted alien files or provide reasons for redactions. When withholding is not required by law and disclosure is permitted under DHS' own guidance, the absence of explanation regarding particular redactions can create confusion about the basis for, and legitimacy of, the redactions.

Conclusion

DHS has a responsibility to respond to FOIA and congressional requests consistent with laws, regulations, and internal policies. Our review found DHS struggles in the execution of that responsibility. Specifically, DHS has had difficulty meeting FOIA production timelines and does not fully document its FOIA search efforts, resulting in litigation risk. Similarly, DHS has struggled to respond to congressional requests in accordance with internal timeliness goals, meeting its response time goal slightly more than half of the time, with some requests going unanswered for more than a year. To promote transparency and facilitate oversight, DHS must ensure it has processes in place to respond to these requests in a timely and efficient manner.

OIG Analysis of Management Comments

We included a copy of DHS' management comments in their entirety in appendix B. We also received technical comments and incorporated them in the report where appropriate. A summary of DHS's response and our analysis follows.

³³ We analyzed a judgmental sample (30 out of 2,896) of congressional letters.



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In its response, DHS management noted that it holds a large volume of records, including immigration records and DHS policies, which are of great interest to the general public, the news media, and Congress. DHS management explained that its FOIA backlog continues to be a systematic problem for DHS but initiated its “DHS 2020 - 2023 FOIA Backlog Reduction Plan” in March 2020 to reduce the backlog. DHS management asserted that this report did not take into account certain complicating factors that can impact DHS’ response to a congressional inquiry, including the report’s discussion of interim responses and applying redactions.

We appreciate the efforts DHS made in providing their technical comments. We modified the report accordingly where appropriate. Specifically, we updated flowcharts and made minor revisions to the report to enhance clarity and ensure accuracy. We commend DHS for proactively creating its FOIA backlog reduction plan in March 2020 to address an issue we identified in the report. We also appreciate DHS’ comments regarding its responses to congressional inquiries and acknowledge DHS’ assertion that complicated factors are involved in providing responses to congressional requests. However, as outlined in appendix A, OIG gathered the information it relied upon for this report through interviews with key personnel, DHS policies and procedures provided by the DHS offices subject to this review, and a review of the underlying data for FOIA and congressional responses. OIG attests to the accuracy of this report in conformity with the values of the independence of this office.



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Appendix A

Objective, Scope, and Methodology

Department of Homeland Security Office of Inspector General was established by the *Homeland Security Act of 2002* (Public Law 107-296) by amendment to the *Inspector General Act of 1978*.

We conducted this inspection in response to a congressional request from the Senate Homeland Security and Governmental Affairs Committee, Permanent Subcommittee on Investigations to determine how DHS Headquarters is responding (1) to FOIA requests and (2) to congressional requests.

To determine whether the FOIA Team within DHS Headquarters is complying with Federal requirements when responding to FOIA requests, we obtained an extract of all FOIA requests from October 2014 to May 2018. Of these, we obtained samples of (1) search forms used for initial FOIA requests and analyzed the completeness of the forms; (2) FOIA cases that were subject to appeal and analyzed the adequacy of the response; and (3) all FOIA litigated cases to determine the reasons for litigation. We also analyzed data available on FOIA.gov. Further, we reviewed DHS and component policies and procedures for responding to FOIA requests.

We interviewed personnel from the FOIA Team, including the Deputy Chief FOIA Officer, directors, and processors on the FOIA Team. We interviewed component FOIA directors from the United States Secret Service, U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, the Federal Emergency Management Agency, the Transportation Security Administration, and the Office of Civil Rights and Civil Liberties. We also interviewed the Data Acquisition Manager at OCIO responsible for searching for responsive emails.

To determine whether ESEC is responding to congressional requests we obtained a sample of all congressional letters from October 2014 to May 2018. We analyzed what was requested, how long it took DHS to respond, if DHS provided an interim response, and what responsive documents DHS provided. Further, we reviewed DHS and component policies and procedures for responding to congressional requests.

We interviewed DHS Headquarters and component staff responsible for overseeing and responding to congressional requests. Specifically, we interviewed personnel at DHS ESEC, OLA, and OGC. We also interviewed component personnel responsible for responding to congressional requests at



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U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection, and the U.S. Citizenship and Immigration Services.

We conducted fieldwork for this review between May and November 2018 pursuant to the authority of the *Inspector General Act of 1978*, as amended. This report was prepared according to the *Quality Standards for Federal Offices of Inspector General* issued by the Council of the Inspectors General on Integrity and Efficiency.



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Appendix B
DHS Comments to the Draft Report

U.S. Department of Homeland Security
Washington, DC 20528



**Homeland
Security**

May 18, 2020

MEMORANDUM FOR: Joseph V. Cuffari, Ph.D.
Inspector General

FROM: Jim H. Crumacker, CIA, CFE
Director
Departmental GAO-OIG Liaison Office

JIM H
CRUMPACKER

Digitally signed by
JIM H CRUMPACKER
Date: 2020.05.18
15:02:04 -0400

SUBJECT: Management Response to Draft Report: "DHS' Process
for Responding to FOIA and Congressional Requests"
(Project No. 18-085-ISP-PRIV)

Thank you for the opportunity to comment on the draft report. The U.S. Department of Homeland Security's (DHS or the Department) appreciates the work of the Office of Inspector General (OIG) in planning and conducting its review and issuing this report.

The Department is pleased to note OIG's positive recognition of U.S. Department of Justice reporting highlighting that the DHS Freedom of Information Act (FOIA) Program processing averages for both simple and complex requests have for years been consistently lower than the averages across the Federal Government. The Program provides the public and DHS with an immensely valuable service, providing records that promote transparency and directly impact and assist the public while also protecting sensitive, confidential, and private information.

Senior DHS leadership, however, is concerned that OIG's draft report contained several significant factual and contextual problems regarding DHS' handling of FOIA and congressional requests. For example, review of the report disclosed several apparent misunderstandings about what the FOIA requires. In addition, the flowcharts in the report depicting the "DHS Privacy Office FOIA Request Process" and the "DHS Congressional Request Process" were inaccurate.

Departmental program officials and subject matter experts provided the OIG technical comments under a separate cover to address these and other concerns and, to OIG's credit, the team conducting this review provided some feedback on how it planned to adjudicate these comments. It is not entirely clear, however, whether the concerns were



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adequately addressed because the team was unwilling to share a revised copy of its draft report with DHS prior to final report publication.

DHS Freedom of Information Act Program

While the primary purpose of FOIA is to shed light on the government's actions, the law is also used by people who are applying for immigration or other benefits, researching family history, seeking business information about competitors' contacts with the agency, and other purposes. The majority of FOIA requests DHS receives are for first-party records, meaning that requesters are seeking copies of information about themselves previously submitted to the government or records that document their interactions with agency officials. DHS receives a substantial number of first-party requests for contents of Alien files (A-Files) held by the U.S. Citizenship and Immigration Services (USCIS), entry-exit records held by U.S. Customs and Border Protection, biometric information held by the DHS Office of Biometric Identity Management, and personnel records held throughout the Department. DHS also receives third-party requests for these kinds of records related to high-profile people, particularly once the person is deceased.

Requests for A-file material comprise the vast majority of DHS's FOIA workload and are typically very time-consuming to fully process. A-Files document the interactions of immigrants with the U.S. government and other events while such individuals were entering or residing in the United States. The average A-File includes around 200 pages, but the size of A-Files is increasing and varies significantly based on the number of interactions with U.S. officials and the amount of material submitted to the government by the individual. These records are largely paper-based and are held and processed at the National Records Center facility in Lee Summit, Missouri, which encompasses an area of nearly six football fields and stores more than 20 million immigration files. A-Files might also be located at one of hundreds of USCIS field offices around the country and government offices overseas. To process a FOIA request for A-file material, USCIS must locate and retrieve the file and digitize its contents before the documents can be reviewed.

DHS also holds records that are of regular interest both to first parties and members of the news media. This category includes U.S. Immigrations and Customs Enforcement (ICE), Homeland Security Investigations (HSI) records, the results of U.S. Coast Guard accident investigations, and records generated by the Federal Emergency Management Agency related to disaster recovery. Additionally, the Department produces other records that are regularly requested by the news media, academia, civil society organizations, and businesses. Commonly requested records in this category include Congressional correspondence and contracts. There is also a great deal of interest in DHS policies, including policies related to ICE HSI, and in DHS's efforts to implement high-profile Administration priorities, such as the construction of a wall on the southern border.



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While FOIA backlogs have continued to be a systemic problem at DHS, the Department has made impressive progress on the number of requests processed each year. These gains, however, have been surpassed by steady increases in the number of incoming requests. The backlog has also been influenced by an increase in the complexity of requests and the volume of electronic records generated by the Department. The “DHS 2020 - 2023 FOIA Backlog Reduction Plan,” dated March 2020, includes five goals that lay out a sustainable course for containing and reducing the age of the backlog in the short-term, and sustainably lowering the size of the backlog over the next three to five years. To achieve success, the plan addresses the underlying causes of the backlog – including decentralization, technology and interoperability limitations, and staffing and resource constraints. The Department’s FOIA vision is to embrace modern workforce and information management techniques, leverage technology, enhance our systems and rebuild our processes to create a modern, mature, and sustainable FOIA program. The plan is available on the DHS public facing website at:

https://www.dhs.gov/sites/default/files/publications/final_dhs_backlog_reduction_plan_2020-2023_3.6.20.pdf.

DHS Handling of Congressional Requests

Congressional inquiries to the Department range from matters related to routine constituent correspondence submitted by individual Members of Congress to all-encompassing oversight requests received from congressional committee Chairman and Ranking Members. The process and effort required to effectively satisfy these inquiries varies greatly. Unfortunately, the OIG’s draft report does not take this variation into account, thus likely leaving many “cold readers” of the report with a mistaken impression that every congressional inquiry is basically handled the same, which is not true.

Complicating factors that can adversely affect that level of effort and time needed to respond to congressional inquiries can include whether an inquiry concerns pending policy decisions, litigation, or a current event(s) at the forefront of high priority and rapidly evolving issues. DHS also does not believe that OIG’s draft report fully discussed all the nuanced considerations associated with providing interim responses to congressional requests. Regardless of the circumstances, staff in the Department’s Office of the Executive Secretariat, which is responsible for processing congressional inquiries, prioritizes each inquiry and works with the Department’s Components and Headquarters Offices, as appropriate, to ensure each is responded to accurately, completely, and in a reasonably timely manner.

Senior DHS leadership is also concerned about the OIG opining on whether certain redactions were necessary and whether certain accommodations were made when responding to congressional requests. The OIG’s draft report correctly states that DHS and the Executive Branch are subject to legitimate congressional oversight in pursuit of



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Congress' legislative function. However, the report does not fully explain that when responding to congressional oversight inquiries, the Department is governed, in part, by the concept of accommodation between the political branches. Through accommodation, the Legislative Branch articulates the specific legislative purpose and limited scope of its request, and Executive Branch facilitates the production of information. That production could be in the form of testimony, briefings, site-visits, written responses, and select documentation. When providing documents for congressional review, DHS will, as the nature of the information and the document require, withhold documents or redact certain material from documents when such document or information would be outside the scope of the request, is privileged, or otherwise inappropriate to disclose.

While OIG's draft report acknowledges that it "did not review for legal sufficiency DHS's justifications in withholding or redaction information," the report nevertheless states that the Department "could have released more information." It bases this assertion on internal DHS Office of Legislative Affairs (OLA) guidance related to the protection of Personally Identifiable Information pursuant to the Privacy Act (5 U.S.C. § 552a(b)(9)). In so stating, the report conflates procedural measures OLA follows to ensure compliance with the Privacy Act *with* the Department's obligations under the legislative oversight responsibilities and the accommodations process, which governs such interactions between Article I and Article II. Often, the name of an individual—especially a non-decision-making individual—is not essential to the Committee's legislative or oversight purpose. This means that the disclosure of that name, while might be *permissible* under the Privacy Act, is not *required* and, in fact, could have adverse consequences for both the employee and the Department. In those instances, that individual's name is not released.

More fundamentally, however, the OIG ordinarily is not privy to the negotiations and ongoing accommodations concerning any particular request and is therefore unable to speak as to the substance of the redactions made or not made. Indeed, the draft report freely recognizes this stating, "DHS may withhold or redact information requested by Congress based on a variety of Constitutional principles, common law privileges, and statutory exemptions. We did not review the legal sufficiency of DHS' justifications in withholding or redacting information requested by Congress." Because the OIG may not have the full background on the purpose or scope of Congressional requests to which DHS responds, it is unfounded for it to assert that redactions were improper simply because they were not prohibited by the Privacy Act.

* * *

Again, thank you for the opportunity to review and comment on this draft report. Please feel free to contact me if you have any questions or concerns.



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Appendix C
Information Exempt from Disclosure under FOIA

Exemption Number	Matters that are exempt from FOIA
(1)	(A) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to the Executive Order.
(2)	Related solely to the internal personnel rules and practices of an agency.
(3)	Specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute: (A) requires that matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld, and (C) if enacted after October 28, 2009, specifically refers to section 552(b)(3) of Title 5, United States Code.
(4)	Trade secrets and commercial or financial information obtained from a person and privileged or confidential.
(5)	Interagency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.
(6)	Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.
(7)	Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:
(A)	could reasonably be expected to interfere with enforcement proceedings;
(B)	would deprive a person of a right to a fair trial or impartial adjudication;
(C)	could reasonably be expected to constitute an unwarranted invasion of personal privacy;
(D)	could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by confidential source;
(E)	would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or
(F)	could reasonably be expected to endanger the life or physical safety of an individual.
(8)	Contained in or related to examination, operating, or condition of reports prepared by, on behalf of, or for the use of an agency responsible for the regulation of supervision of financial institutions.
(9)	Geological and geophysical information and data, including maps, concerning wells.

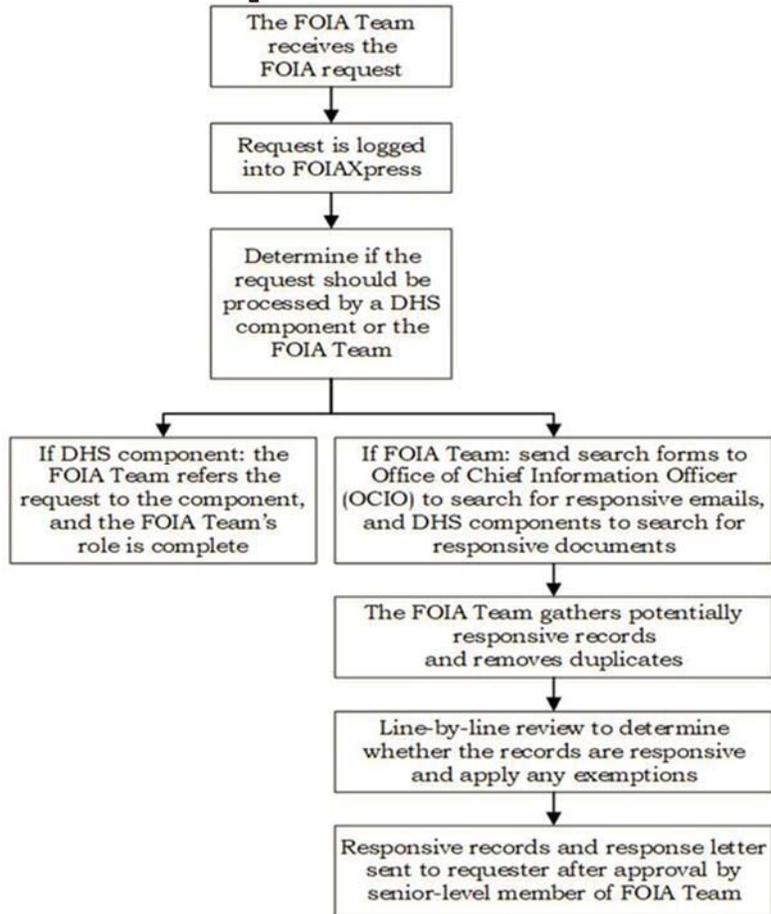
Source: 5 U.S.C. § 552(b)(1) through (b)(9)



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Appendix D
DHS Privacy Office FOIA Request Process and DHS
Congressional Request Process

DHS Privacy Office FOIA Request Process



Source: OIG analysis of FOIA Team documents



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Appendix E
FOIA Litigated Cases

Cases	Elapsed Business Days*	Reason for Litigation
1	9	Failure to approve expedited processing
2	23	Timeliness
3	23	Timeliness
4	25	Timeliness
5	32	Timeliness
6	40	Timeliness
7	40	Inadequate Search
8	41	Timeliness
9	41	Timeliness
10	41	Timeliness
11	42	Timeliness
12	42	Timeliness
13	42	Timeliness
14	43	Timeliness
15	48	Timeliness
16	49	Timeliness
17	53	Timeliness
18	54	Inadequate Search
19	57	Timeliness
20	57	Timeliness
21	63	Timeliness
22	64	Timeliness
23	65	Timeliness
24	67	Timeliness
25	71	Timeliness
26	75	Inadequate Search
27	78	Timeliness
28	79	Timeliness
29	79	Timeliness
30	79	Timeliness
31	81	Timeliness
32	86	Timeliness
33	89	Timeliness
34	90	Timeliness
35	102	Inadequate Search
36	117	Timeliness; Inadequate Search
37	130	Timeliness



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38	131	Timeliness
39	133	Timeliness
40	140	Timeliness
41	158	Timeliness
42	161	Timeliness
43	182	Timeliness
44	185	Timeliness
45	187	Exemptions
46	189	Timeliness
47	195	Timeliness
48	196	Timeliness
49	209	Timeliness
50	220	Inadequate Search
51	233	Exemptions
52	252	Timeliness
53	256	Timeliness
54	276	Timeliness
55	281	Exemptions
56	285	Timeliness
57	312	Exemptions
58	373	Timeliness
59	383	Timeliness
60	414	Timeliness
61	441	Inadequate Search
62	478	Timeliness; Exemptions

Source: OIG analysis of FOIA Team data

*We calculated elapsed business days based on the date the requester submitted the FOIA request and the date the litigation was filed.



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Appendix F
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to This Report

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Paul Lewandowski, Independent Referencer



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Appendix G
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DHS OIG Budget Examiner

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