



Homeland  
Security

July 8, 2011

MEMORANDUM FOR: DHS FOIA Appeals Officers  
DHS FOIA Officers

FROM: Mary Ellen Callahan  
Chief FOIA Officer

Ivan K. Fong  
General Counsel

SUBJECT: Reassignment of Certain Freedom of Information Act (FOIA) Appeals to  
United States Coast Guard Administrative Law Judges

### Purpose

This memorandum announces the adoption of a process by which pending FOIA appeals for those Components that develop significant backlogs of FOIA appeals will be reassigned for processing to administrative law judges (ALJs) of the United States Coast Guard (Coast Guard ALJ program). Under this mechanism the Coast Guard ALJ program will, on a reimbursable basis, prepare final decisions on these appeals.

### Background

Despite the Department's considerable improvements to its FOIA program, including resolving FOIA appeals, reported recently in the 2011 Chief FOIA Officer's Annual Report,<sup>1</sup> certain DHS Components continue to face challenges both in the number of appeals pending and in the number of days that FOIA appeals remain pending before resolution.<sup>2</sup> Tables from the Annual Report, which are attached as Exhibits 1 and 2, show: 1) the number of appeals pending for each Component at the end of FY 2010; and 2) each Component's FOIA appeal response times and the number of business days that each Component's 10 oldest appeals were pending at the end of FY 2010.

To better track the Department's monthly progress in resolving FOIA appeals, the Office of General Counsel and the Privacy Office established a requirement in October 2010 for Components to report monthly on their appeals resolution activity. On November 22, 2010, we announced that while the Components could continue to process their own appeals, those Components with significant appeal

<sup>1</sup> See DHS 2011 Chief FOIA Officer's Annual Report, available at <http://www.dhs.gov/xlibrary/assets/foia/priv-chief-foia-officer-report-cy11.pdf>.

<sup>2</sup> See Tables VI. A. and VI. C.(4) and (5) of the Department's 2010 Annual FOIA Report to the Attorney General, available at <http://www.dhs.gov/xlibrary/assets/foia/privacy-rpt-foia-2010.pdf>.

backlogs would be required to use an alternative means to eliminate that backlog. In that November 22, 2010 memorandum, we noted that we were working to determine the maximum number of appeals that a Component could carry before those appeals in excess of the limit would be reassigned and that we would provide greater details once they were developed. This memorandum provides those details.

### Discussion

The Components' monthly reporting since October 2010 reveals that appeal backlogs continue to be an issue for certain Components. In addition, a pilot in which Coast Guard ALJs were used to process FOIA appeals has been reasonably successful.<sup>3</sup> Therefore, the Department is adopting the following approach for appeal resolution:

Each Component is expected each fiscal year quarter to reduce the number of its pending FOIA appeals by at least 5% compared to the number of FOIA appeals the Component had pending at the end of the previous fiscal year. (Over the course of an entire fiscal year, this would result in an appeal backlog reduction of approximately 20%.) If this quarterly reduction expectation is not met, the Component must reassign the number of appeals necessary to achieve this reduction to the Coast Guard ALJ program. The appeals to be reassigned will begin with the oldest and progress chronologically with more recent appeals. Further, a Component must reassign to the Coast Guard ALJ program any appeal that has been pending at the end of two fiscal year quarters. This latter requirement also applies to any FOIA appeal that has been pending at the end of two fiscal year quarters as of the date of this memorandum.<sup>4</sup> Pursuant to a delegation from the General Counsel, the Coast Guard ALJ program will issue the Department's final decisions on all reassigned appeals.<sup>5</sup>

This approach does not apply to Headquarters Components that are not processing their own appeals, because those FOIA appeals will be processed directly by the Coast Guard ALJ program in accordance with other instructions that we will issue.

If you have any questions concerning the operation of this appeal procedure, please contact Delores Barber, Deputy Chief FOIA Officer, 703-235-0790.

cc: Chief Administrative Law Judge, United States Coast Guard  
Component Chief Counsel

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<sup>3</sup> Under this limited trial a number of Office of General Counsel (OGC) FOIA appeals that had been pending at TSA, were referred to the Coast Guard ALJs for action. These appeals include those appeals from decisions of the Privacy Office regarding FOIA requests to DHS headquarters components and the Office of the Secretary. The Privacy Office has recently received from the Coast Guard ALJ program decisions on several of these referred FOIA appeals. We believe these appeals were handled expeditiously and effectively.

<sup>4</sup> The Coast Guard ALJ program's decision-making work on the reassigned appeals will be undertaken on a reimbursable basis consistent with the requirements of the Economy Act, 31 U.S.C. 1535.

<sup>5</sup> Although not the subject of this memorandum, the same reassignment approach will be followed regarding Privacy Act appeals.

Exhibit 1.

Received, Processed, and Pending Administrative Appeals

Component	No. of Appeals Pending as of Start of Fiscal Year	No. of Appeals Received in Fiscal Year	No. of Appeals Processed in Fiscal Year	No. of Appeals Pending as of End of Fiscal Year
CBP	388	450	815	23
FLETC	0	1	1	0
ICE <sup>6</sup>	331	25	331	25
OGC <sup>7</sup>	520	157	134	543
TSA	2	21	14	9
USCG	69	42	62	49
USCIS	2,009 <sup>8</sup>	2,004	3,924	89
USSS	6	40	44	2
<b>AGENCY OVERALL</b>	<b>3,325</b>	<b>2,740</b>	<b>5,325</b>	<b>740</b>

Exhibit 2.

Response Times for Administrative Appeals

Component	Median Number of Days	Average Number of Days	Lowest Number of Days	Highest Number of Days
CBP	101.00	128.00	1.00	735.00
FLETC	19.00	19.00	19.00	19.00
ICE	483.00	489.00	1.00	1,416.00
OGC	627.00	627.00	1.00	1,979.00
TSA	18.50	50.40	6.00	217.00
USCG	285.00	268.50	34.00	685.00
USCIS	134.00	248.00	1.00	1,636.00
USSS	32.00	83.00	3.00	683.00
<b>AGENCY OVERALL</b>	<b>142.00</b>	<b>223.62</b>	<b>1</b>	<b>1,979.00</b>

<sup>6</sup> Prior to July 25, 2010, ICE FOIA appeals were processed and tracked by OGC. ICE began to process its own FOIA appeals on July 13, 2010. At that time, DHS/OGC provided ICE with 331 FOIA appeals. An additional 25 FOIA appeals were received at ICE after July 25, 2010.

<sup>7</sup> OGC processes FOIA appeals for: CRCL, FEMA, I&A, MGMT, NPPD, OHA, OIG, OPS, PLCY, NPPD, PRIV, S&T, and US-VISIT; OIG began processing their own requests on September 1, 2010, and will be delineated in the next annual report.

<sup>8</sup> Corrected number due to component reporting error in FY 2009.

Exhibit 3.

Ten Oldest Pending Administrative Appeals

<b>Component</b>	<b>Sub-Row Heading</b>	<b>10th</b>	<b>9th</b>	<b>8th</b>	<b>7th</b>	<b>6th</b>	<b>5th</b>	<b>4th</b>	<b>3rd</b>	<b>2<sup>nd</sup></b>	<b>Oldest Appeal</b>
CBP	Date of Receipt	2010-09-16	2010-09-14	2010-09-14	2010-09-14	2010-09-07	2010-09-07	2010-09-07	2010-09-07	2010-09-07	2010-09-07
	Number of Days Pending	11	13	13	13	18	18	18	18	18	18
ICE	Date of Receipt	2010-08-12	2010-08-12	2010-08-04	2010-07-27	2010-07-23	2010-07-22	2010-07-21	2010-07-06	2010-06-30	2010-06-17
	Number of Days Pending	35	35	41	47	49	50	51	62	65	74
OGC	Date of Receipt	2006-08-22	2006-07-27	2006-06-22	2006-04-26	2006-03-30	2006-03-23	2005-03-03	2005-02-08	2005-02-08	2003-10-06
	Number of Days Pending	1,027	1,045	1,069	1,109	1,128	1,133	1,398	1,414	1,414	1,762
TSA	Date of Receipt	N/A	2010-09-16	2010-08-27	2010-06-01	2010-03-26	2010-03-04	2010-03-03	2009-12-17	2009-11-18	2009-06-23
	Number of Days Pending	0	11	24	86	132	148	149	195	215	317
USCG	Date of Receipt	2009-06-18	2009-06-17	2009-05-27	2009-05-20	2009-05-20	2009-05-19	2009-05-13	2009-04-24	2009-04-21	2009-03-10
	Number of Days Pending	320	321	336	340	340	341	345	358	361	391
USCIS	Date of Receipt	2010-09-08	2010-09-08	2010-09-07	2010-09-02	2010-09-02	2010-09-02	2010-08-31	2010-07-26	2010-06-14	2010-05-19
	Number of Days Pending	17	17	18	20	20	20	22	48	77	94
USSS	Date of Receipt	N/A	2010-08-26	2010-08-26							
	Number of Days Pending	0	0	0	0	0	0	0	0	25	25
<b>AGENCY OVERALL</b>	<b>Date of Receipt</b>	<b>2006-08-22</b>	<b>2006-07-27</b>	<b>2006-06-22</b>	<b>2006-04-26</b>	<b>2006-03-30</b>	<b>2006-03-23</b>	<b>2005-03-03</b>	<b>2005-02-08</b>	<b>2005-02-08</b>	<b>2003-10-06</b>
	<b>Number of Days Pending</b>	<b>1,027</b>	<b>1,045</b>	<b>1,069</b>	<b>1,109</b>	<b>1,128</b>	<b>1,133</b>	<b>1,398</b>	<b>1,414</b>	<b>1,414</b>	<b>1,762</b>