

**U.S. House of Representatives
Committee on Oversight and Government Reform
Darrell Issa, Chairman**



A New Era of Openness?

*How and Why Political Staff at DHS
Interfered with the FOIA Process*

STAFF REPORT

**Prepared for Chairman Darrell Issa
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Table of Contents

I.	Executive Summary	3
II.	Findings.....	5
III.	Table of Names.....	8
IV.	The Letter and Spirit of the Freedom of Information Act.....	10
A.	The Statute.....	10
B.	A Renewed Commitment to FOIA.....	12
V.	Political Appointees Interfered with the Department’s FOIA Function	15
A.	DHS Briefed the Committee	16
B.	The Privacy Office Inherited a Weekly Reporting Requirement from the Bush Administration	17
C.	The Secretary’s Political Staff Asked the FOIA Office for Additional Information	20
D.	Political Appointees Lacked a Basic Understanding of FOIA.....	24
E.	The Secretary’s Political Staff Created Confusion, Tension, and Delays.....	34
F.	DHS political appointees required all significant requests to be forwarded to the Secretary’s Office	39
G.	All responses to significant requests were approved by political staff.....	43
VI.	The Bridis Story	63
A.	Sharepoint Comes Online.....	66
B.	The Secretary’s Political Staff Clears Responses over the Phone	71
C.	The OGC Stops Releases	73
VII.	Mismanagement of Requests for Documents from the Office of the Secretary	78
A.	Political Appointees Suggested Their Own Redactions.....	79
B.	The OGC Withheld Documents	81
C.	The Misadventures of Mark Dorgan	87
VIII.	The DHS Office of General Counsel Obstructed the Committee’s Investigation....	103
A.	The Department did not cooperate with the Committee’s requests for documents	103
B.	The Department obstructed the Committee’s access to witnesses	106
C.	A Department lawyer attempted to steal Committee documents	108
D.	OGC lawyers advised a witness not to answer important questions.....	110
IX.	Conclusion	111
	Appendix.....	112

I. Executive Summary

The American people have a right to know how the federal government spends their tax dollars, for without transparency, democracy cannot thrive. Enacted in 1966, the Freedom of Information Act (FOIA) guarantees the legal right of the American public to request and obtain federal agency records in a timely and thorough manner.

Before and since taking office, President Barack Obama pledged to foster a new era of openness and transparency. Executive branch agencies under an Obama administration were to assume a presumption of disclosure when responding to citizen requests for records that did not impinge on the federal government's responsibility to keep America safe or violate certain narrowly-defined executive privileges.

The results of an investigation into the disparity between the Administration's promises of transparency and the reality at the Department of Homeland Security (DHS) demonstrated that the FOIA response process is less transparent and more politicized than when President Obama took office.

The House Committee on Oversight and Government Reform has learned through the course of an eight-month investigation that political staff under DHS Secretary Janet Napolitano have corrupted the agency's FOIA compliance procedures, exerted political pressure on FOIA compliance officers, and undermined the federal government's accountability to the American people.

Moreover, Secretary Napolitano's political staff attempted to frustrate the present investigation through official non-cooperation, witness tampering, and the attempted theft of Committee documents. Indeed, a cloud of administrative incompetence, illegal politicization and official obstruction now overshadows the front-line guarantor of American's homeland security.

The Committee investigation has uncovered evidence that career FOIA professionals at DHS have been compromised in their statutory compliance by the unprecedented intrusion of Secretary Napolitano's political staff into the department's FOIA procedures. Furthermore, the apparent inability of DHS political staff to comprehend FOIA provisions and respect the integrity of the department's FOIA compliance has demoralized the staff and nurtured a corrosive environment of secrecy, political retribution, and bureaucratic unaccountability that weakens American confidence in the federal government. Worse still, the fragile relationship that exists between political staff and career professionals reflects a deeper trend of instability within DHS that does not serve to meet the department's primary mission to secure the nation from the many threats we face.

By implementing and regularly amending a complex and burdensome review and approval process for FOIA compliance, DHS political staff increased the workload of career professionals who already serve the department with the most burdensome FOIA caseload in the federal government. Aware that interference in FOIA compliance could create political fallout for the Administration, DHS political staff ceased using official email to approve FOIA

responses. Instead, political staff contacted FOIA compliance officers via telephone to end a paper trail that could prove scandalous.

Nevertheless, the Committee staff received sufficient documentary evidence of official misconduct by DHS political staff to justify a thorough investigation. The Committee reviewed thousands of pages of internal DHS e-mails and memoranda and conducted six transcribed witness interviews. In the end, the evidence obtained by the Committee supports the conclusion that DHS, as currently administered, regards as politically undesirable the chief tool of accountability and transparency to the American people.

The Committee investigation revealed the vast chasm between President Obama's promises of openness and accountability and the day-to-day management of DHS's FOIA function by the Secretary's political staff. The actions exposed in this report highlight not only the Administration's failures to properly comply with FOIA statutes, but they disclose a concerted effort by DHS political staff to actively thwart a congressional investigation, hide abusive and embarrassing official behavior, and avoid both the shame of public scrutiny and potential criminal prosecution.

II. Findings

Career FOIA staff lacked the support of the Chief Privacy Officer.

FOIA professionals were burdened by an intrusive political staff and blamed for delays, mistakes, and inefficiencies for which the Secretary's political staff was responsible. The Chief Privacy Officer, herself a political appointee, did not adequately support and defend career staff.

Weekly reporting requirements pre-date this Administration.

The weekly report of significant FOIA activity dates back to 2005. In the previous Administration, the primary purpose of these weekly reports was awareness.

DHS incorrectly characterized the radical overhaul of the Front Office review process.

The DHS Chief Privacy Officer stated the review process implemented in July 2009 varied only slightly from the process in place during the previous Administration. Documents and witness testimony show the review process was in fact new. Reporting requirements were expanded beyond what was necessary to make the Office of the Secretary aware of significant FOIA activity. Political staff had to affirmatively approve significant responses.

The political staff lacked an understanding of FOIA.

The political appointees' unfamiliarity with the statute and persistent probing for additional information about requesters burdened the career staff in the FOIA Office. The political appointees ignored attempts by career staff to improve the working relationship between the Secretary's political staff and the FOIA Office.

The Front Office marginalized and mismanaged the career FOIA staff.

The intrusion of the political staff into the FOIA process wasted the time and resources of the Privacy Office. The deterioration of the relationship between the Front Office and the FOIA Office was accelerated by constant changes to the significant FOIA response process. The constantly-evolving process and burdensome questions from the Secretary's political staff delayed responses.

The Front Office reviewed and approved responses.

By the end of September 2009, copies of all significant FOIA requests were required to be forwarded to the Secretary's political staff for review. The career staff in the FOIA Office was not permitted to release responses to these requests without approval from political staff.

Political appointees do not acknowledge the approval process.

Political appointees refused to acknowledge that approval from the Secretary's political staff was required to release a response to a significant FOIA request as of September 29, 2009. Their position during transcribed interviews was that the policy was implemented for awareness purposes only. Documents show this position is indefensible.

The career staff was burdened by the approval policy.

The heightened reporting requirements and approval process added to the workload of the career staff. Rather than recognize the effect the approval process was having on response times and staff morale, the Secretary's political staff increased its level of involvement in the Department's FOIA function.

The Front Office stopped using e-mail.

Political appointees stopped using e-mail to clear response packages in the second quarter of 2010. Instead, they contacted the career staff in the FOIA Office by telephone.

The Front Office and OGC can still withhold and delay significant responses.

The SharePoint notification system simplified the approval process for significant requests. Although the FOIA Office no longer needs an affirmative statement of approval from the Secretary's political staff, the Front Office retained the ability to halt the release of a FOIA response.

Political appointees conduct their own searches.

Documents and witness testimony show political appointees run weak and incomplete searches for their own documents. They were allowed to choose their own search terms despite lacking a basic understanding of the statute.

The Department abused the (b)(5) exception.

Original versions of documents that were heavily redacted before being released to the Associated Press show the Office of General Counsel relied on exception (b)(5) – normally meant to protect pre-decisional records– to prevent the release of embarrassing records.

Hostility toward the career staff persists.

As recently as December 2010, hostility towards career FOIA professionals by the Department's political appointees continued. To date, three of the four career staff interviewed by the Committee have been transferred, demoted, or relieved of certain responsibilities.

The Department did not produce documents expeditiously to the Committee.

On January 14, 2011 and again on February 1, 2011, the Committee requested a narrow set of documents. The Department took more than a month to produce a total of 2,145 pages, of which approximately 1,000 were off-the-shelf documents previously released to the AP. Because negotiation of the pace of documents production became an impediment to advancing the investigation, the Committee suspended its document request.

The Department obstructed the Committee's investigation.

Lawyers in the Office of General Counsel (OGC) did not negotiate the terms of witness interviews in good faith. Over three weeks of negotiation, OGC did not communicate to witnesses that the choice to appear was theirs to make, despite representing to the Committee that OGC would do so. Additionally, OGC representatives pressured one witness to allow them to participate in the planning of, and be present during, her interview.

III. Table of Names

The Office of the Secretary

Referred to internally as the “Front Office,” the following political appointees had a significant role in the FOIA response process:

- ***Noah Kroloff, Chief of Staff to Secretary Napolitano***

Kroloff led Napolitano’s 2006 gubernatorial re-election campaign and served as a deputy chief of staff during the Arizona governor’s second term. Since joining the Secretary’s staff in January 2009, Kroloff, over objections from career FOIA professionals signed off on a review and approval policy that delayed responses.

- ***John Sandweg, Counsel to Secretary Napolitano, former Chief of Staff, Office of General Counsel***

In March 2010, Sandweg moved from the Office of General Counsel to the Secretary’s Office. When Shlossman and other political staff wanted redactions applied or a response delayed, they forwarded their documents to Sandweg and his staff.

- ***Amy Shlossman, Deputy Chief of Staff to Secretary Napolitano***

After graduating college in 2004, Shlossman joined Governor Napolitano’s staff in Arizona, where she became Policy Director in 2006. Since joining the Secretary’s staff in January 2009, Shlossman was instrumental in implementing a review and approval process for significant FOIA responses.

- ***Julia Fox, Special Assistant, Office of the Chief of Staff***
Jordan Grossman, Special Assistant, Office of the Chief of Staff

Fox and Grossman assisted Shlossman with her FOIA responsibilities. They collected response packages from the career FOIA professionals and notified the FOIA Office when the Secretary’s political staff had approved a package for release.

The Privacy Office

The Privacy Office centralizes FOIA and Privacy Act operations and provides policy and programmatic oversight. The Department’s Privacy Office is bifurcated. On one side, career staff has responsibility for the Department’s Privacy Act operations. On the other, career staff manages the Department’s FOIA function (the “FOIA Office”).

Political Staff:

- ***Mary Ellen Callahan, Chief Privacy Officer and Chief FOIA Officer***

As a political appointee leading a staff of career professionals, Callahan was the liaison between the FOIA Office and the Office of the Secretary. Callahan placated career staff who

notified her of problems with the FOIA process and attempted to appease the Department's political appointees, who often disparaged the career staff under her supervision.

Career Staff in the FOIA Office:

- ***Catherine Papoi, Director of Disclosure, former Deputy Chief FOIA Officer***

Papoi joined the FOIA Office in 2005 as Deputy Director of Disclosure from the FOIA Office at the National Institutes of Health. Papoi was demoted in March 2011 after cooperating with investigations by Congress and the Office of the Inspector General.

- ***Vania Lockett, Associate Director of Disclosure and FOIA Operations***

Lockett joined the FOIA Office in 2006. She requested to be detailed out of the FOIA Office in December 2010. She is currently a Senior Privacy Analyst at the National Protection and Program Directorate. Lockett was the subject of numerous disparaging remarks by staff in the Office of the Secretary.

- ***Bill Holzerland, Associate Director for Disclosure Policy and FOIA Program Development***

Holzerland joined the FOIA Office in 2006 after serving in the Department's Office of the Inspector General and as a FOIA professional at the Transportation Security Administration. Holzerland observed and reported several serious concerns about the Department's FOIA policies.

- ***Mark Dorgan, FOIA Specialist***

After serving in the Air Force, Dorgan joined the Department's FOIA Office in 2006. Dorgan was detailed to the Office of the Secretary to assist in processing FOIA requests for the Secretary's political staff in January 2010. In July 2010, he accepted an offer to be removed from that role.

IV. The Letter and Spirit of the Freedom of Information Act

Enacted in 1966, the Freedom of Information Act (FOIA or the statute) allows the public to request and obtain unprivileged federal agency records.¹ Judicially enforceable, FOIA ensures public access to Executive Branch records. The U.S. Supreme Court has stated FOIA's purpose "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold governors accountable to the governed."²

A. The Statute

The statute established the procedural and substantive process by which agencies provide requested information. To ensure the public understands how to request records, each agency must publish "where, from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions."³

The agency has a 20-Day deadline to respond or extend

Agencies must issue a response to the requester within 20 business days of the original request.⁴ The period begins on the day the request is actually received by the FOIA office which maintains the records requested.⁵

In certain circumstances, this period may be extended ten additional business days. Agencies are allowed an additional ten business days when: (1) they need to collect responsive records from field offices; (2) the request involves a "voluminous" amount of records which must be located, compiled, and reviewed; or (3) if an agency must consult with another agency which has a substantial interest in the responsive document.⁶

When an extension is needed, the requester may be notified and offered the opportunity to modify or limit the request.⁷ The need for an extension must be documented and communicated to the requester.⁸

¹ Freedom of Information Act, 5 U.S.C. § 552 (2007).

² National Labor Relations Board v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

³ 5 U.S.C. § 552(a)(1).

⁴ 5 U.S.C. § 552(a)(6)(A).

⁵ U.S. Dept. Of Commerce FOIA Reference Guide, available at osec.doc.gov/omo/foia/foiarequest.htm#response (last visited March 23, 2011).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

The identity of the requester and the purpose of the request are irrelevant

The statute gives individuals, members of the media, watchdog organizations, good-government groups, corporations, and other entities “presumptive access to unpublished, existing and identifiable records of the agencies of the Federal executive branch **without having to demonstrate a need or reason for such request.**”⁹

The statute does not entitle agency officials to probe for additional information about the background of a requester or the reason for his or her request for information.

The Supreme Court has consistently held that FOIA does not permit agencies to investigate either FOIA requesters or their reasons for submitting requests.¹⁰ In 2004, the Court held that “[a]s a general rule, withholding information under FOIA cannot be predicated on the identity of the requester.”¹¹ The Court has also held that “[c]itizens seeking documents subject to FOIA disclosure are not required to explain why they seek the information.”¹²

Requesters may sue when the deadline is missed

A FOIA requester may sue when an agency does not respond within 20 days (or 30 days when an extension has been granted).¹³ Although the general rule of administrative law is that all administrative remedies must be fully exhausted before a requester can sue, FOIA provides an exception. According to U.S. Code, a FOIA requester is “deemed to have exhausted his administrative remedies” when an agency fails to meet the statutory time limits and can seek immediate judicial review.¹⁴

A requester who is dissatisfied with an agency response may also seek arbitration at the Office of Government Information Services (OGIS), which is located in the National Archives and Records Administration.¹⁵

The agency may only withhold records in certain limited cases

FOIA does not provide an absolute right of disclosure. Congress balanced the need for an informed citizenry with the necessity of protecting important, sensitive government information. Therefore, FOIA exempts nine categories of information from the statute.¹⁶ The

⁹ Harold C. Relyea, “Federal Freedom of Information Policy: Highlights of Recent Developments,” in *Government Information Quarterly*, vol. 26 (2009), at 314.

¹⁰ Letter from the Electronic Privacy Info. Center to OGIS Director Miriam Nisbet, Dec. 8, 2010.

¹¹ *Id.* Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157,170 (2004).

¹² *Id.* at 172; United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989) (stating that the requester’s identity has “no bearing on the merits of his ... FOIA request”).

¹³ 5 U.S.C. §552(a)(6)(C).

¹⁴ *Id.* See, e.g., Jenks v. United States Marshals Service, 514 F. Supp. 1383, 1384-87 (S.D. Ohio 1981); Information Acquisition Corp.v. Department of Justice, 444 F. Supp. 458, 462 (D.D.C. 1978).

¹⁵ The National Archives, “The Office of Government Information Services,” <http://www.archives.gov/ogis/>.

¹⁶ 5 U.S.C. § 552(b). Agencies may withhold the following:

exemptions cover records that implicate national security, personal privacy, privileged records, and law enforcement interests.

B. A Renewed Commitment to FOIA

FINDING: FOIA professionals were burdened by an intrusive political staff and blamed for delays, mistakes, and inefficiencies for which the Secretary’s political staff was responsible. The Chief Privacy Officer, herself a political appointee, did not adequately support and defend career staff.

Since entering office, President Obama and his Administration have issued three memoranda relating to transparency and open government issues. Two of those memoranda – one regarding “Freedom of Information Act” and one regarding “Transparency and Open Government” – were released on the President’s first full day in office. The third memorandum, issued by Attorney General Eric Holder, instructed the agency’s Chief FOIA Officer to support career staff by ensuring they have the tools necessary to respond promptly and efficiently to FOIA requests.

The first-day memoranda “pleased good government groups and ... journalists.”¹⁷ Collectively, the President’s memoranda were intended to move the Administration toward fulfilling the President’s pledge to “make his administration the most open and transparent in history.”¹⁸

In his FOIA memo, the President made his expectations clear to all heads of Executive Branch departments and agencies:

The Freedom of Information Act should be administered with a clear presumption: **In the face of doubt, openness prevails. The Government**

-
1. Information properly classified for national defense or foreign policy purposes as secret under criteria established by an executive order;
 2. Information relating solely to agency internal personnel rules and practices;
 3. Data specifically excepted from disclosure by a statute which either requires that matters be withheld in a non-discretionary manner or which establishes particular criteria for withholding or refers to particular types of matters to be withheld;
 4. Trade secrets and commercial or financial information obtained from a person that is privileged or confidential;
 5. Inter- or intra-agency memoranda or letters that would not be available by law except to an agency in litigation;
 6. Personnel, medical, or similar files the disclosure of which would constitute an unwarranted invasion of personal privacy;
 7. Certain kinds of investigatory records compiled for law enforcement purposes;
 8. Certain information relating to the regulation of financial institutions; and
 9. Geological and geophysical information and data.

¹⁷ Ed O’Keefe, *New Obama Orders on Transparency, FOIA Requests*, Wash. Post, Jan. 21, 2009.

¹⁸ Macon Phillips, “Change Has Come to WhiteHouse.gov,” The White House Blog, Jan. 20, 2009, available at http://www.whitehouse.gov/blog/change_has_come_to_whitehouse-gov/ (last visited Mar. 23, 2011).

should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.¹⁹

The President added that under the new Administration “[a]ll agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.”²⁰

The memorandum then directed the Attorney General to “issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the Federal Register.”²¹

Pursuant to President Obama’s directive, Attorney General Eric Holder released a guidance memorandum on March 19, 2009.²² According to the Attorney General, the presumption of openness established by the President meant “an agency should not withhold information simply because it may do so legally.”²³ Further, if an agency cannot make a full disclosure of a record, “it must consider whether it can make a partial disclosure.”²⁴

Attorney General Holder put the federal agencies on notice that the personnel and processes in place to manage FOIA are key components of the President’s standard for openness:

Open government requires not just a presumption of disclosure, but also an effective system for responding to FOIA requests. Each agency must be fully accountable for its administration of the FOIA.²⁵

* * *

Improving FOIA performance requires the active participation of agency Chief FOIA Officers.²⁶

* * *

¹⁹ President Barack Obama, Memorandum, “Freedom of Information Act,” Jan. 21, 2009.

²⁰ *Id.*

²¹ *Id.*

²² Attorney General Eric Holder, Memorandum for the Heads of Executive Departments and Agencies, “The Freedom of Information Act,” Mar. 19, 2009.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

Equally important, of course, are the FOIA professionals in the agency who directly interact with FOIA requesters and are responsible for the day-to-day implementation of the Act. ... **Those professionals deserve the full support of the agency's Chief FOIA Officer to ensure that they have the tools they need to respond promptly and efficiently to FOIA requests.** FOIA professionals should be mindful of their obligation to work 'in a spirit of cooperation' with FOIA requesters, as President Obama has directed. Unnecessary bureaucratic hurdles have no place in the "new era of open Government" that the President has proclaimed.²⁷

The White House issued follow-up guidance on March 16, 2010. Agency and department heads were required to "update all FOIA guidance and training materials to include the principles articulated in the President's Memorandum."²⁸ Further, they were to make sure their agency or department was "devoting adequate resources to responding to FOIA requests promptly and cooperatively."²⁹

In addition to issuing memoranda, the Administration conducted a series of online public input forums between January and July 2009, seeking feedback and ideas from federal employees, the public, and industry representatives on ways to make the federal government more transparent, collaborative, and participatory.³⁰

The career professionals in the Department's FOIA Office internalized the new FOIA guidance. Deputy Chief FOIA Officer Catherine Papoi testified that the President's Memorandum reset the default position to "release instead of withhold."³¹

Under the former administration, the Ashcroft memo was the guidance to follow and it was foreseeable harm. And so we definitely would have withheld much more under B-5 and B-2.

The current administration has amended that, as it does every time there is a change in administration. It went from, you know, Reno to Ashcroft. So it changes. So under this administration, the openness and transparency, we are now back to release instead of withhold.³²

DHS FOIA Office Associate Director William Holzerland was enthused by the President's commitment to openness. He circulated the President's FOIA memorandum at 11:30 p.m. the night it was released. Holzerland testified that he expected the new Administration to

²⁷ *Id.*

²⁸ Chief of Staff Rahm Emanuel and Counsel to the President Robert Bauer, Memorandum to Agency and Department Heads, "The Freedom of Information Act," Mar. 16, 2010.

²⁹ *Id.*

³⁰ Wendy R. Ginsberg, *The Obama Administration's Open Government Initiative: Issues for Congress*, CRS Report R41361 (Jan. 28, 2011).

³¹ Transcribed Interview of Catherine Papoi, Transcript at 119 (March 3, 2011) (on file with author) [hereinafter Papoi Transcript].

³² *Id.*

be more transparent. An excerpt from the transcript of Holzerland's March 4, 2011 interview with the Committee shows his response to the President's memorandum:

Q So someone who, as you just described, has a background in journalism and whose inclination is to err on the side of transparency, when the President's memo about FOIA on transparency came out in January '09 and the Attorney General's memo came out shortly thereafter, I assume kind of the tone and the instructions in those memos were something that you endorsed; is that fair?

A I could not have been more excited when President Obama issued a FOIA memorandum on his first full day in office. I was so excited at that point, you may have the e-mail somewhere, but I actually issued it to all our FOIA officers at 11:30 at night. I wanted to make sure everybody hit the ground running the next day, because it seemed like we were headed towards more – being able to have more transparency in the executive branch.³³

V. Political Appointees Interfered with the Department's FOIA Function

Despite the clear message from the White House and the U.S. Supreme Court's holding that the identity of a requester and the purpose of the request can have no bearing on the agency's response, the Associated Press (AP) learned that political staff at DHS probed FOIA Officers for such information. According to a July 21, 2010 story by AP reporter Ted Bridis, DHS filtered FOIA requests through political staff to be screened and cleared prior to release. Bridis reported:

[I]n July 2009, Homeland Security introduced a directive requiring a wide range of information to be vetted by political appointees for 'awareness purposes,' no matter who requested it.

Career employees were ordered to provide Secretary Janet Napolitano's political staff with information about the people who asked for records - such as where they lived, whether they were private citizens or reporters - and about the organizations where they worked. If a member of Congress sought such documents, employees were told to specify Democrat or Republican.³⁴

³³ Transcribed Interview of William Holzerland, Transcript at 29 (March 4, 2011) (on file with author) [hereinafter Holzerland Transcript].

³⁴ Ted Bridis, *Playing politics with public records requests*, ASSOC. PRESS, Jul. 21, 2010. [hereinafter Bridis]

If true, the allegations contained in the Associated Press story meant that political appointees at DHS were willfully ignoring the President's FOIA guidance. Additionally, the documents obtained by the AP contained evidence that political appointees acted improperly by delaying responses and creating tension between political appointees in the Office of the Secretary ("Front Office") and the career staff in the FOIA Office.

Through a spokesman, the Department denied that the review process adversely affected the content of responses. Assistant Secretary for Public Affairs Sean Smith stated "[n]o information deemed releasable by the FOIA office or general counsel was withheld, and responsive documents were neither abridged nor edited."³⁵ This statement, it turns out, was not true.

A. *DHS Briefed the Committee*

On July 30, 2010, then-Ranking Member Darrell Issa requested that the Department provide documents to show the role of its political staff in the process for responding to "significant" FOIA requests.³⁶ On August 18, 2010, the Department produced six pages of documents which consisted of reporting guidelines from February 2005, August 2006, and July 2009.

In the August 18, 2010 cover letter, the Department attempted to assuage then-Ranking Member Issa's concerns by noting that the significant FOIA reporting requirement was left largely unchanged from the Bush Administration, whose policies on openness and transparency were denounced by then-Senator Obama.³⁷

Chief Privacy Officer Mary Ellen Callahan stated: "The July 2009 memorandum regarding the Department policy on reporting significant FOIA requests is just a slight modification of the weekly reporting process that has existed since the inception of the Department [in 2002]. The weekly reporting requirements have been part of the FOIA Office's normal reporting mechanism since its implementation under the first Chief FOIA Officer."³⁸

Callahan further stated that "[a]t no point does political staff compile information or decide whether information should be released. As has been the practice since the beginning of the Department, senior leadership receives notice of significant FOIA requests pursuant to the Department's normal reporting mechanism. This notice is for awareness purposes only, and no political staff member makes decisions about the processing of a FOIA request."³⁹

Callahan briefed Committee staff on September 17, 2010. During that briefing, Callahan made clear and unambiguous statements about the involvement of political appointees in the FOIA response process. Callahan stated:

³⁵ *Id.*

³⁶ Letter from Ranking Member Darrell Issa to Secretary Janet Napolitano, Jul. 30, 2010.

³⁷ Letter from Chief Privacy Officer Mary Ellen Callahan to Ranking Member Darrell Issa, Aug. 18, 2010.

³⁸ *Id.*

³⁹ *Id.*

- Political appointees reviewed letters only for typos, grammar, and quality control issues;⁴⁰
- Political appointees did not delay FOIA responses;⁴¹
- The substance of FOIA response packages was never edited;⁴²
- Political appointees were made aware of significant FOIA requests – they did not substantively review responses;⁴³
- By Fall 2009, political appointees notified FOIA Officers when a request was “good to go”;⁴⁴ and,
- Callahan was the only political appointee involved in the FOIA response process.⁴⁵

On March 2, 2011, the Committee conducted the first of six transcribed interviews of DHS employees. Witness testimony and documents obtained by the Committee showed employees in the Office of the Secretary routinely screened and approved FOIA response packages. The pre-release approval process did in fact cause delays and other problems.

B. The Privacy Office Inherited a Weekly Reporting Requirement from the Bush Administration

FINDING: The weekly report of significant FOIA activity dates back to 2005. In the previous Administration, the primary purpose of these weekly reports was awareness.

As early as February 2005, the DHS FOIA Office⁴⁶ collected weekly reports of FOIA activity from the DHS components. The FOIA Office then prepared a weekly report of significant FOIA activity and transmitted it to the Office of the Secretary. The primary purpose of these weekly reports was awareness; the Secretary’s Office and the Department’s public affairs staff had a legitimate interest in being familiar with FOIA releases that were likely to generate media scrutiny.

As of February 2005, the weekly reports from the components included “new FOIA requests received during the preceding week and those requests closed out during the same time

⁴⁰ Mary Ellen Callahan, Statement during briefing for staff of the H. Comm. on Oversight and Gov’t Reform and H. Comm. on Homeland Security, Sep. 17, 2010, 2:00 PM.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ The DHS Privacy Office is the Department of Homeland Security’s headquarters for FOIA and Privacy matters.

period.”⁴⁷ The report included the date FOIA requests were received, name of requester, requester organization if applicable, and subject of the request.⁴⁸ The same information was included for closed requests.⁴⁹ Open requests from the media were also listed.⁵⁰

February 9, 2005

To the DHS FOIA and Privacy Team:

At our last monthly meeting I mentioned that we would be asking you to assist the DHS Privacy Office in preparing a weekly report to the Secretary. We report weekly to the Secretary regarding the activities of the Privacy Office. As part of this report, the Privacy Office notifies the Secretary about recently completed and/or published systems of records notices (SORNs), Privacy Impact Assessments (PIAs), new FOIA requests received during the preceding week and those requests closed out during the same time period. Additionally, this report advises the Secretary about PIAs and SORNs (or amendments thereto) that are in progress and pending FOIA media requests. The report is also the basis for developing the Department's weekly report to the White House.

To ensure accuracy and completeness of the 2005 reports to the Secretary, we ask that you report (via e-mail) to the Privacy Office by COB every Friday the following information:

1. Existing SORNs that are in the process of being amended or have been identified as needing amendment.
2. New SORNs that are in the process of being drafted.
3. SORNs that have been published.
4. Existing PIAs that are in the process of being amended or have been identified as needing amendment (even if that process has not yet begun).
5. New PIAs that are in the process of being drafted.
6. PIAs that have been published.
7. FOIA requests received, including date received, name of requester, requester organization if applicable, and subject of the request.
8. FOIA requests completed, including date original request received, date closed, name of requester, requester organization if applicable, subject of the request and disposition.
9. FOIA Media requests that are open, including date received, name of requester, requester organization, and subject of the request.

Please submit your reports by COB every Friday to [REDACTED] and [REDACTED]. For questions or additional information, you may contact them as well by email or by calling our office at [REDACTED].

Thank you for helping in this team effort.

Nuala O'Connor Kelly, Chief Privacy Officer

In August 2006, the Privacy Office modified the reporting requirement. Under the new guidelines, components had to report significant FOIA requests to the Privacy Office, defined generally as requests related to a White House priority or requests from the media or Members of Congress.⁵¹

⁴⁷ Memorandum from Chief Privacy Officer Nuala O'Connor Kelly to DHS FOIA Office staff, Feb. 9, 2005.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Submission Guidelines, Aug. 4, 2006.

3. Select FOIA requests for submission if one of the following criteria are met:
 - a. The FOIA request relates to a Presidential or agency priority;
 - b. The FOIA requester or requested documents will garner media attention or is receiving media attention;
 - c. The FOIA request is for documents associated with meetings with prominent elected, business, and/or community leaders;
 - d. The FOIA request is for congressional correspondence;
 - e. The FOIA request is from a member of Congress;
 - f. The FOIA request is from a member of the media;
 - g. The FOIA request is from a member of an activist group, watchdog organization, special interest group, etc.;
 - h. The FOIA request is for documents associated with a controversial or sensitive subject;
 - i. The FOIA request is for documents associated with a senior official of the component;
 - j. A FOIA appeal if it meets one of the "a" through "i" criteria;
 - k. It is a FOIA request and not a Privacy Act request;

The August 2006 update included guidelines for providing information about requesters to the Privacy Office.⁵² Components were instructed to identify the requester's name, city and state of residence, affiliation, and a brief summary of the requested records.⁵³

Format for submitting FOIA items to the weekly report:

1. Identify the requester's name, city and state
2. Identify the requester by affiliation (private citizen, organization membership, etc.)
3. Identify your component as the receiving component (in the case of transfers within DHS, the initial component receiving the request will report the item)
4. Provide a brief description of any lesser-known organization's mission (a Google search usually provides sufficient info)
5. Spell out all acronyms and use the component's full name
6. Provide a brief summary of the requested records

Sample format:

On April 10, Jonathan Tamez, an attorney from Phoenix, Arizona, requested from US-VISIT biometric and admission records on behalf of his client.

On April 11, Elliot Spagat, with *The Associated Press*, Washington, D.C. bureau, requested from Customs and Border Protection (CBP) copies of the data dictionary (i.e., table of contents) for the Enforcement Case Tracking System database, which maintains a record of Border Patrol apprehensions.

Under President Obama's Administration, the FOIA Office continued to compile FOIA requests for the weekly report based on significant FOIA activity submitted by the DHS components and requests received by the Privacy Office. Much as they did during the Bush Administration, the weekly reports included:

⁵² *Id.*

⁵³ *Id.*

Any FOIA requests received, including date received, name of requestor, requestor organization, if applicable, and the subject of the request; any FOIA requests completed, including the date the original request was received, the date it was closed, the name requestor or organization; and any FOIA media requests that are opened, including date received, name of requestor, requestor organization, and subject of request.⁵⁴

C. The Secretary's Political Staff Asked the FOIA Office for Additional Information

FINDING: The DHS Chief Privacy Officer stated the review process implemented in July 2009 varied only slightly from the process in place during the previous Administration. Documents and witness testimony show the review process was in fact new. Reporting requirements were expanded beyond what was necessary to make the Office of the Secretary aware of significant FOIA activity. Political staff had to affirmatively approve significant responses.

Initially, the weekly reports satisfied Secretary Janet Napolitano's political staff. The Privacy Office continued to submit the weekly reports to the Secretary's political staff. But in the first and second quarters of 2009, DHS political staff began to pester the FOIA professionals in the Department's Privacy Office with questions regarding the significant requests.

Director of Disclosure Vania Lockett testified that the heightened reporting requirements were new; there were no such requirements during the previous Administration:

Well, in 2006 when I started, there was no separate process. Everything was handled the same way. We did report the significant requests in the weekly reports, but there was no difference in how we processed them, no extra clearance or anything like that.

Q Do you recall when or if that process changed?

A I do not recall exactly when, no.

Q Can you describe to me the first change that you recall in the process for handling what we're calling significant requests?

⁵⁴ Papoi Transcript at 11–12.

A The first change that I recall was just in the level of detail we were being required to provide with respect to the requests we were reporting in the weekly reports.⁵⁵

The weekly report was transmitted to the Office of the Secretary via e-mail every Monday. Frequently, the political staff would respond with follow-up questions for the FOIA professionals in the Privacy Office. The questions ranged from why the requester was interested in the documents to the subject matter of the actual request.⁵⁶ There were follow-up questions for most of the requests listed on the report.⁵⁷ For example:

What was this meeting about? Was it a public/open press event?

- **6/19: Steven Emerson of *SAE Productions*** in Washington requested from USCIS records pertaining to the February 2009 meeting between the Council on American-Islamic Relations' Civil Rights Director and USCIS.

What is this agreement?

- **6/22: Jesse Franzblau of *The National Security Archive*** in Washington requested from ICE all documents related to the "Local Arrangement for Repatriation of Mexican Nationals" agreement between the U.S. and Mexico.

Will this will be handled as other USSS requests of this type are – pending court decisions?

- **6/22: Anne Weismann of *Citizens for Responsibility and Ethics in Washington*** requested from USSS all records relating to visits by specific representatives of pharmaceutical, health insurance, and other healthcare-related companies, to the White House or the residence of the Vice President from 1/21/2009 to the present.

As FOIA specialists and non-subject matter experts, the FOIA professionals had to conduct research on the Internet or Lexis-Nexis or contact the subject matter experts in various DHS components to answer questions for the Secretary's political staff. Finding answers took time away from the FOIA professionals' primary responsibility – processing FOIA requests.⁵⁸

Associate Director William Holzerland testified that getting answers to the follow-up questions was time-consuming. He further testified that in one instance, Lockett, a GS-14, spent an entire day compiling a response to questions from the Secretary's political staff about significant FOIA requests:

Q How long did it typically take to find answers to the questions that would come back in response to the weekly report?

A That would depend on the nature of the question.

⁵⁵ Transcribed Interview of Vania Lockett, Transcript at 18 (March 2, 2011) (on file with author) [hereinafter Lockett Transcript].

⁵⁶ E-mail from Vania Lockett, Acting Departmental Disclosure Officer, Department of Homeland Security, to Jordan Grossman, Deputy Assistant to the Deputy Chief of Staff, Department of Homeland Security (June 30, 2009, 2:49 p.m. EST); E-mail from Jordan Grossman, Deputy Assistant to the Deputy Chief of Staff, Department of Homeland Security, to Emily Lantz, Department of Homeland Security (June 29, 2009, 7:48 p.m. EST).

⁵⁷ Papoi Transcript at 18.

⁵⁸ Holzerland Transcript at 18.

Q A series of about 10 questions like these, several of which look to me complex, is this a significant homework assignment, for lack of a better word?

A Did they eat up significant time?

Q That is my question, yes.

A The answer to that is yes.⁵⁹

* * *

Q Do you know how answers like this are – where they are pulled from? Is this information that is available on the request itself or does it require some due diligence, using other resources?

A I actually recall this particular set of responses. Vania is fairly senior, she is a 14, she gets paid well. This took up a whole day of her time doing research to respond to these particular requests.⁶⁰

On June 30 2009, Associate Director Vania Lockett pushed back against the burdensome questions. In an e-mail to Jordan Grossman, the Deputy Assistant to the Deputy Chief of Staff, Lockett reminded the Office of the Secretary that “as FOIA professionals, we are not subject matter experts. Going forward, any substantive questions regarding the records should be directed to the respective program offices.”⁶¹

Grossman sensed the career professionals in the FOIA Office were frustrated by the increase in questions from the Secretary’s political staff. He forwarded Lockett’s e-mail to Deputy Chief of Staff to the Secretary Amy Shlossman and added a note: “They really hate us.”⁶²

Holzerland testified that Grossman may have believed the FOIA professionals felt that way because he was aware of the adverse effects of the new policy.

Q Why do you think Jordan would think that you, Vania, and Mary Ellen hates "us"? And I assume "us" refers to Jordan, Amy Shlossman. Those are the folks involved in that conversation, so we will limit it to them.

⁵⁹ *Id.* at 12.

⁶⁰ *Id.* at 15.

⁶¹ E-mail from Vania Lockett, Acting Departmental Disclosure Officer, Department of Homeland Security, to Jordan Grossman, Department of Homeland Security (June 30, 2009, 2:49 p.m. EST).

⁶² E-mail from Jordan Grossman to Amy Shlossman, Jun. 30, 2009, 2:53 PM EST.

A I assume – again, not being Jordan, this is an assumption – that he was aware that our efforts to respond to his questions ate up significant time from our FOIA processing duties, and it was something that sidetracked us and prevented us from processing FOIA requests. So he knew that we were not doing our jobs while we were responding to his request, and that it took a lot of effort. I assume that he is referring to that.⁶³

Lockett testified that her ability to do her job was adversely affected because she was often responsible for responding to the questions from the Secretary’s political staff. Complying with the process was time-consuming. For some requests, Lockett had to generate as many as four advisories.

Q You mentioned earlier that, in some instances, there were as many as four advisories that you would have to draft and distribute. In other cases, there would be three. If nothing else, that sounds like a lot of work and resources that would go into complying with whatever policy was in place at that time.

Can you just describe to me your thoughts on whether you thought that was the best use of resources and time?

A And, no, I mean, that was a burden on me, to have to draft the different summaries and different formats every time something needed to be reviewed or to put into the weekly reports. So, no, I didn't think that was the best use of my time or anyone else's time.

Q Your obligations in terms of complying with the policies in place interfered with your ability to otherwise do your job as a FOIA officer, in terms of gathering responses and distributing them to the requesters?

A To an extent, yes. It was time-consuming.⁶⁴

⁶³ Holzerland Transcript at 18.

⁶⁴ Lockett Transcript at 91.

D. Political Appointees Lacked a Basic Understanding of FOIA

FINDING: The political appointees' unfamiliarity with the statute and persistent probing for additional information about requesters burdened the career staff in the FOIA Office. The political appointees ignored attempts by career staff to improve the working relationship between the Office of the Secretary and the FOIA Office.

Callahan testified that she was aware of problems that arose because the political appointees with FOIA responsibilities in the Office of the Secretary lacked a basic understanding of the statute.

Q Had there been problems or issues that arose because people in the Front Office didn't have a basic understanding of FOIA?

A I had recently become aware that there were some questions being asked by the Front Office with regard to the basic operational aspects of FOIA, yes.

Q Do you remember more specifically what those were?

A Well, for a little context, as I mentioned, apparently my predecessor didn't do much with FOIA. And so, Catherine Papoi was on detail, so Vania Lockett, who was the acting director of disclosure and FOIA at the time, didn't bring these back-and-forth questions from the Front Office to my attention until about June. And they were questions, you know, what does this exemption mean? What does this processing mean? Questions about – again, the weekly report standard was the same since 2006, but asking, this request came in on Tuesday, when is the response due? When are we going to send the response out? So, again, it was a basic explanation of what the Freedom of Information Act requires and what it does not require.⁶⁵

The political appointees' unfamiliarity with the statute and persistent probing for additional information about requesters burdened the career staff in the FOIA Office. Holzerland testified that the questions being asked were not relevant to the "releasability" of records:

Q On December 29, Julia Fox sent an e-mail to you and James Holzer, she is asking some questions about an entry on the weekly report. The question she asks is: Do you know anything about this investigation or why it is of interest/significant. And you respond,

⁶⁵ Transcribed Interview of Mary Ellen, Callahan, Transcript at 64-65 (March 14, 2011) (on file with author) [hereinafter Callahan Transcript].

The issue of why the requester is interested in the records is legally irrelevant.

Is that your interpretation of the statute; the FOIA statute?

A Yes.

Q Can you explain for us a little bit that interpretation?

A My interpretation of why the requester is irrelevant?

Q Why that is not relevant to a conversation about a FOIA request.

A Well, typically disclosure to one is a disclosure to all. So why a requester wants them doesn't – can't factor into our analysis of whether or not they are releasable. Whether or not the requester falls – the identity of the requester, for example, doesn't matter with respect to releasability.⁶⁶

* * *

But whether they are going to wallpaper their bedroom with the records or put them on the front page of The Post, it just doesn't matter in terms of releasability. ... Yes, that is something you would learn in a FOIA 101 class. So at this point in the timeline here, we had had enough of these where that question should not have, in my opinion, should not have been asked. They should have known the answer to that question; it is irrelevant to us. So we didn't dig into that kind of information.⁶⁷

Holzerland believed it would be helpful to educate the Secretary's political staff on the fundamentals of FOIA. Holzerland was hopeful that with a better understanding of the statute, the political appointees who had taken an increased interest in FOIA would ask fewer misguided questions going forward.

Callahan agreed, and the "FOIA 101" meeting was scheduled for July 1, 2009.⁶⁸ The meeting was intended to educate the Secretary's political staff on the basic principles of FOIA in hopes of alleviating the burden being created by their ignorance of the statute. Holzerland testified that he wanted the political staff to:

[A]llow us [The Privacy Office] to have at least a brief amount of time with them so that we wouldn't – so that we could sort of stem the tide of some of these questions that we were getting about particular FOIA

⁶⁶ Holzerland Transcript at 57.

⁶⁷ *Id.* at 57-60.

⁶⁸ Callahan Transcript at 64.

requests. Some of them would be – the questions wouldn't be asked if they were aware how FOIA worked.⁶⁹

The day before the meeting, the disdain of the Secretary's political staff for the career staff in the FOIA Office was apparent. To prepare for the meeting, Lockett attempted to ascertain which of the Secretary's political staff would attend. In an e-mail on June 30, 2009, she asked Grossman: "Can you let me know who is attending our FOIA meeting tomorrow? Thanks."⁷⁰

Grossman forwarded Lockett's question to Shlossman. Shlossman responded: "This is their fucking meeting!!!!!"⁷¹

The political appointees invited to the meeting failed to recognize the meeting was an opportunity to improve the working relationship between the Secretary's political staff and the FOIA Office. In fact, Shlossman invited Sandweg to the meeting because she expected Holzerland's presentation would be good for a few laughs. In her e-mail the day before the meeting, Shlossman referred to Lockett: "This woman is a lunatic."⁷²

⁶⁹ Holzerland Transcript at 19.

⁷⁰ E-mail from Vania Lockett to Jordan Grossman, Jun. 30, 2009, 9:57 AM EST.

⁷¹ E-mail from Amy Shlossman to Jordan Grossman, Jun. 30, 2009.

⁷² *Id.*

From: Shlossman, Amy [REDACTED]
Sent: Tuesday, June 30, 2009 2:57 PM
To: Sandweg, John
Cc: Grossman, Jordan
Subject: FW: FOIA submission status updates

This woman is a lunatic.

Sandweg, you have to attend this mtg- if nothing else, for the comic relief.

From: Grossman, Jordan
Sent: Tuesday, June 30, 2009 2:53 PM
To: Shlossman, Amy
Subject: FW: FOIA submission status updates

They really hate us.

From: Lockett, Vania
Sent: Tuesday, June 30, 2009 2:49 PM
To: Grossman, Jordan
Cc: Fox, Julia; Callahan, Mary Ellen; Holzerland, William
Subject: FOIA submission status updates

Jordan,

Below are the status updates that you requested. Please note that, as FOIA professionals, we are not subject matter experts. Going forward, any substantive questions regarding the records should be directed to the respective program offices. I look forward to meeting you tomorrow, and we can discuss this further.

Thanks.

Vania

During her interview, Shlossman expressed regret for her choice of words in that e-mail. She testified that the e-mail was a product of her frustration with the FOIA Office at the time.

Q Then you respond on June 30th to John Sandweg, cc'ing Jordan Grossman, this woman is a lunatic. Sandweg, you have to attend this meeting, if nothing else for the comic relief. This woman is Vania Lockett that you're referring to?

A Based on the chain that's what it looks like.

Q What made you say that she's a lunatic?

A Now, clearly in retrospect this was a very inappropriate e-mail that was likely written you know in the heat of the moment expressing frustration. I'm sure we can all appreciate that that sometimes happens over e-mail, and you know certainly something when you look back on you regret sending. I think based on the chain you can see you know the context for that.

Q Based on the chain I can see Vania notifying people that the program officers are the appropriate people to receive these questions. To me that doesn't qualify her as a lunatic. Are there things maybe outside the chain of this e-mail that made you choose to use that word?

A Clearly frustrations were building for some time and there were, you know, many requests made of this office for information and, you know, we often, you know, face some issues in getting information back.

Q Lunatic suggests that somebody is like mentally imbalanced or has actual mental problems. Is that the way you were using the word or did you mean to use it another way?

A Again, it was an inappropriate e-mail that was written in the heat of the moment. It had no intention whatsoever to characterize someone's mental state.

Q So you didn't mean it literally?

A No, I did not mean it literally.⁷³

In attendance at the July 1, 2009 meeting were the political staff principally responsible for handling FOIA in the Office of the Secretary: then-Chief of Staff to the Office of General Counsel John Sandweg, Special Assistant Jordan Grossman, Special Assistant Julia Fox, and Shlossman. The meeting was conducted by Holzerland. Callahan also attended.

During the meeting, the Secretary's political staff staff was not engaged. Holzerland testified the meeting did not improve the working relationship between the Secretary's political staff and the FOIA Office.

Well, if you look at the e-mail above Jordan's that we were just discussing, from Amy Shlossman to John Sandweg and a copy to Jordan, Tuesday, June 30, 2009, responding to Jordan she says, "This woman," referring to Vania, "is a lunatic. Sandweg, you have to attend this meeting, if nothing else for the comic relief."

By "this meeting" she is referring to a half hour that I was allotted, I and Mary Ellen were allotted, to train Jordan, Julia and Amy, the three of them, on the very basic tenets of the FOIA. That meeting was a few days later, after the string of e-mails. So Mary Ellen and I went to the Nebraska Avenue complex and briefed the three folks I just mentioned, along with John Sandweg. **During that meeting**

⁷³ Transcribed Interview of Amy Shlossman, Transcript at 66 (March 9, 2011) (on file with author) [hereinafter Shlossman Transcript].

Mary Ellen was sitting next to me, literally kicking me under the table, saying move it along because Amy was bored and looking at her BlackBerry, and apparently that was a bad thing.

Q Whose idea was it to arrange that briefing?

A The Privacy Office staff had, and by that I mean Catherine Papoi, Vania Lockett, and myself had approached the chief FOIA officer as sort of – who interfaced with the political appointees in the Front Office, to get them to allow us to have at least a brief amount of time with them so that we wouldn't – so that we could sort of stem the tide of some of these questions that we were getting about particular FOIA requests. Some of them would be – the questions wouldn't be asked if they were aware of how FOIA worked.

Q So your intention was to give them as much as you could, in 30 minutes, of basic FOIA background and principles in the hopes that you could refine the Front Office review process to make it less burdensome?

A Yes.

Q To ... improve it in some way?

A Yes. And we have been asking for that meeting for months at that point. ...

Q Just to confirm, the process was not improved after the meeting that you just described and that is referenced in this June 30th e-mail?

A That is correct.⁷⁴

Even though Holzerland's presentation failed to entertain Shlossman, Callahan believed the meeting was productive. Callahan testified that Holzerland failed to engage the political staff because his presentation focused on very fundamental aspects of FOIA:

Q When you got together in June or July to meet to have a FOIA 101 type of briefing for the Front Office folks, was that productive? Do you remember that improving things?

A I thought it went pretty well. I thought it was productive. I thought it helped illustrate elements. I will say the presenter was good, but wasn't engaging on the types of levels that I would have wanted. It was very boilerplate as opposed to tailored for the Front

⁷⁴ Holzerland Transcript at 18-21.

Office for what they would be aware of. But it was okay. And I do think it did help increase the understanding of the Federal FOIA, yes.⁷⁵

Shlossman testified that she recalled that the Secretary's political staff and the FOIA Office were not working well in the weeks leading up to the July 1, 2009 meeting. She further testified that she does not recall the outcome of the meeting:

Q In the second sentence, you have to attend this meeting, if nothing else for the comic relief, do you recall what meeting you were talking about?

A You know, I'm not sure. I think around that time we were looking to set up a meeting with the FOIA Office.

Q What was to be discussed during that meeting, if you recall?

A I think we were trying to work through some communications issues and figure out a better path forward on how we could work together.

Q And you expected there to be some comic relief during the meeting?

A Again, as I've said about this e-mail, it was written in the heat of the moment. I'm not sure what I was referring to at that given time. This was you know 18 months ago. So I'll leave it at that.

Q So the meeting was planned to try to address some of the issues that had cropped up now 5 months into the administration, is that correct?

A That's to the best of my recollection. We were looking to get together to actually meet in person about the process.

Q Do you remember whose idea it was to have that meeting?

A I don't.

Q But it was meant to move things forward?

A I think that was the intention.

Q It sounds like you didn't anticipate it being very productive, was that right?

⁷⁵ Callahan Transcript at 106.

A Again, I can't – I don't know what I was thinking when I wrote that e-mail 18 months ago. Our relationship to this point and the exchanges that we had I don't think you could describe as productive.

Q Going into this meeting with the mindset that there would be comic relief, you're inviting John Sandweg to attend because there would be comic relief, gives me the concern that you're going into the meeting with a mindset that it will be difficult to make progress setting up new policies or addressing some of the issues. Do you remember if the meeting moved things forward at all?

A I don't really recall the meeting when it happened.⁷⁶

Despite the efforts of the FOIA Office to educate the political staff about the fundamentals of FOIA, the Secretary's political staff continued to push for changes that diminished the quality of the Department's responses. Shlossman and Grossman each suggested changes to the response letter template for public relations purposes.

Because of their lack of FOIA experience and resistance to being briefed on the statute by FOIA professionals, they failed to appreciate that certain language was necessary for legal reasons. Papoi testified that Shlossman was sensitive about repeating negative allegations in response cover letters; Grossman wanted cover letters to include less legal boilerplate:

Amy Shlossman was very concerned about the language we used to describe what the requester was seeking. We parrot back verbatim what the requester is seeking from their letter so there isn't any miscommunication. And she felt that when there was any sort of a negative request that that shouldn't be parroted back in our response letter because that could look – be looked upon as negative. In addition, Jordan Grossman at one point did not want the appeal language included in the response letter. He felt it was too legalistic, and I pointed out that this is a statute with legal requirements so we have to keep that language in the letter.⁷⁷

Documents obtained by the Committee show Shlossman objected to repeating “inflammatory” allegations in response letters.⁷⁸ She asked Mary Ellen Callahan: “If there are legal reasons why we need to include the request in the response verbatim, let us know.”⁷⁹

⁷⁶ Shlossman Transcript at 66-68.

⁷⁷ Papoi Transcript at 40-41.

⁷⁸ E-mail from Amy Shlossman to Mary Ellen Callahan, Dec. 16, 2009, 5:32 PM.

⁷⁹ *Id.*

From: Shlossman, Amy
Sent: Wednesday, December 16, 2009 5:32 PM
To: Callahan, Mary Ellen
Subject: FW: ***FRONT OFFICE REVIEW REQUEST***December 14, 2009

There doesn't seem to be a standard across the board with FOIA responses about whether we include the text from the actual request in the response letter (sometimes it's summarized, sometimes included in total).

For FOIA's that make specific allegations against the department, we'd like to use the same standard we use with congressional and other correspondence- acknowledge receipt of the request, but don't repeat the allegations in our response.

This response caught our attention, because the allegations that were included in our response letter are particularly inflammatory, including:

"In your request letter you also indicated that Ms. Porter believes that DHS may have information pertaining to her because she was advised by AT&T that her telephone lines have been wiretapped and because DHS issued a report entitled *Rightwing Extremism: Current Economic and Political Climate Fueling Resurgence in Radicalization and Recruitment*."

A revised response letter with the request/ allegations deleted is attached.

If there are legal reasons why we need to include the request in the response verbatim, let us know.

Thanks.

Callahan is an attorney and a frequent author and speaker on privacy issues.⁸⁰ She serves as vice-chair of the American Bar Association's Privacy and Information Security Committee of the Antitrust Division.⁸¹ Callahan advised Shlossman that the language from the request letter is repeated verbatim because not doing so would disadvantage the Department in litigation. Callahan explained that if the request was not repeated verbatim, a requester could argue in court that the Department intentionally misconstrued the request.⁸²

Shlossman was not satisfied. She asked John Sandweg and Noah Kroloff to "get a read on" Callahan's opinion.⁸³

⁸⁰ Biography of Mary Ellen Callahan, DHS website, available at http://www.dhs.gov/xabout/structure/bio_1236273286409.shtm (last visited Mar. 26, 2011).

⁸¹ *Id.*

⁸² E-mail from Mary Ellen Callahan to Amy Shlossman, Dec. 17, 2009, 6:25 PM.

⁸³ E-mail from Amy Shlossman to John Sandweg and Noah Kroloff, Dec. 17, 2009, 6:30 PM.

From: Shlossman, Amy [REDACTED]
Sent: Thursday, December 17, 2009 6:30 PM
To: Sandweg, John; Kroloff, Noah
Subject: Fw: ***FRONT OFFICE REVIEW REQUEST***December 14, 2009

Legally we have to repeat allegations in foia's? Can we get a read on that prior to the mtg tomorrow?

From: Callahan, Mary Ellen
To: Shlossman, Amy
Cc: Callahan, Mary Ellen [REDACTED]
Sent: Thu Dec 17 18:25:24 2009
Subject: RE: ***FRONT OFFICE REVIEW REQUEST***December 14, 2009

Hi, I know we are meeting tomorrow, and this can be addressed then, but wanted to explain the purpose being repeating the statements. We have been advised to repeat the language verbatim to limit the opportunity for a component to misconstrue a request or a requester making such an allegation. We direct the components to use the language from the requester's letter. When we are taken to court it eliminates the requester's argument that DHS accidentally or intentionally construed their request incorrectly. The response letter could be used as evidence in this situation. With that said, we have re-submitted the boilerplate language to go through OGC to confirm that all the language and requirements (preserving the appeals language, etc.) are still required. You just pointed out a change in a summary of a request that changed the meaning of the request – I think we need to try to use their language as much as possible to avoid any misconstruing of the request, but will defer to counsel when their review is final.

Shlossman made FOIA decisions based on the same considerations she applied to the Department's public relations strategy. She testified that she did not differentiate between FOIA response cover letters and the Department's other forms of correspondence:

- Q Do you remember why you asked Mary Ellen to handle responses that way?
- A I believe exactly for the reasons that I laid out here. Because in our external correspondence at the Department we acknowledge receipt but we don't tend to repeat allegations.
- Q Why did you want to avoid repeating allegations?
- A It's the basic standard that we have at the Department, especially if the allegations cannot be substantiated. We believe we should acknowledge receipt of the correspondence and then move on to the facts.⁸⁴

⁸⁴ Shlossman Transcript at 92.

E. The Secretary's Political Staff Created Confusion, Tension, and Delays

FINDING: The intrusion of the political staff into the FOIA process wasted the time and resources of the Privacy Office. The deterioration of the relationship between the Secretary's political staff and the FOIA Office was accelerated by constant changes to the significant FOIA response process. The constantly-evolving process and burdensome questions delayed responses.

By July 2009, Amy Shlossman and the rest of the political appointees in the Office of the Secretary had effectively ground the Department's FOIA operation to a halt. By burdening the FOIA Office with unnecessary questions and ignoring their concerns, the Secretary's political staff created a problem that did not exist during the previous Administration. The intrusion of the political staff into the FOIA process wasted the time and resources of the Privacy Office. Despite their own lack of FOIA expertise, the Secretary's political staff dismissed the advice of FOIA professionals.

The deterioration of the relationship between the Secretary's political staff and the FOIA Office was accelerated by constant changes to the significant FOIA response process. Holzerland testified that between June 2009 and September 2009, "the process evolved almost daily."⁸⁵

Lockett testified that she had to ask Papoi to clarify the process several times:

I honestly – because it's changed so many times, and at times throughout the process I wasn't even clear on what it was. There were several times where I had to go to Catherine and say, could you clarify, you know, what is the process now? I wouldn't be able to walk you through a timeline.⁸⁶

For example, one day the Secretary's political staff wanted to receive notice of all the FOIA litigation releases only to change its mind the next day.⁸⁷ Holzerland testified the constantly-evolving process and burdensome questions from the Secretary's political staff made it difficult to respond to significant FOIA requests.

Q If you look at the second e-mail down from the top, from Mary Ellen Callahan to Vania Lockett, Catherine Papoi, and you, this is September 9, 2009, at 1:47 p.m., Mary Ellen says, "I understand the problem with constantly changing processes, and am empathetic, but let's see what happens on Friday."

⁸⁵ Holzerland Transcript at 22.

⁸⁶ Lockett Transcript at 77.

⁸⁷ Papoi Transcript at 106–107.

You just touched on this. Can you talk about the constantly changing processes and how that affected your office and the ability to respond in a timely way to requesters?

A As I mentioned, the constant questions from the Front Office were an impediment to getting requests out the door, and had been for some time. Up to this time frame, the players changed several times; the process changed several times; we weren't clear on who was responsible for what; what our duties were with respect to what had to be done before requests could be sent out. It was very gray, for lack of a better way to put it.⁸⁸

The Secretary's political staff also began reaching out directly to FOIA officers Department-wide, blurring the chain of command.⁸⁹ FOIA officers at the component level were unsure whether to respond directly to the Secretary's political staff or to their own leadership.⁹⁰ Holzerland testified the career staff in the component FOIA Offices were frustrated with the "convoluted process."⁹¹ Holzerland further testified that the unclear response policy disrupted FOIA functions at the component level.

Q The folks in the component's FOIA offices, say, at ICE, maybe had one understanding about how to handle significant requests and who to forward them to and whether or not to wait for approval, generally just how to handle them, while the folks at, say, the Coast Guard maybe had a different understanding?

A I would characterize that as accurate. I would say nobody, including the Privacy Office, was very clear on what the process was. It was very disheveled.

Q The components relied on your office to announce policy changes, and you guys weren't entirely clear on what the policy was?

A Yes, the components relied upon the Privacy Office to announce policy changes; and, no, we were not clear on what the policy – on what the exact process was supposed to be.⁹²

The constant changes and tweaks created confusion and frustration for both the Privacy Office and the DHS components. Tracking the constantly-changing review process and communicating with the components diverted the FOIA Office's human resources away from their other responsibilities. Papoi testified that managing the review policy on behalf of the FOIA Office became a full-time job:

⁸⁸ Holzerland Transcript at 23-24.

⁸⁹ *Id.* at 25.

⁹⁰ *Id.* at 40.

⁹¹ *Id.*

⁹² *Id.* at 26.

Q So amidst all the confusion of trying to communicate with the components, what rules were in place, trying to figure out amongst yourselves what rules were in place, having to go back and ask the Front Office for clarification in some cases, I would imagine that took a lot of time?

A It took all my time. I have – I guess in a way it is good that I am not sitting on committees or having meetings any more because this has taken up virtually all of my time. I haven't had an opportunity to build policy or outreach. I haven't done a single speaking engagement in a year-and-a-half, 2 years.

Q So trying to track and manage the various policies as they evolved became your full-time job essentially over the last year-and-a-half or so?

A Yes, it did. Yes.

Q Obviously that was, with all your training and experience as an FOIA officer and your legal training before you started at NIH and then came to DHS, you add all that up, and you are talking about at least 8-10 years of FOIA training. It seems like you could have been better utilized. Would you agree with that?

A Yes, I would.⁹³

Political appointees in the Office of the Secretary acknowledged that the significant FOIA response process underwent many changes in the first six months of the Administration. Shlossman stated the reporting requirements were “a process that evolved over time.”⁹⁴ However, instead of recognizing the Front Office’s role in creating the confusion and frustration, Shlossman attributed the problems to natural growing pains. She stated the first six months were “a learning process for us both to understand how their process worked and also for them to understand what the new Administration expected.”⁹⁵

Shlossman failed to appreciate the severe burden imposed on the career staff by the political appointees in the Office of the Secretary. She testified that she believed the extent of the burden on the FOIA Office was notifying all the various components that a new reporting policy was in place.

Q Do you know how that affected the workload of the FOIA Office?

⁹³ Papoi Transcript at 107-108.

⁹⁴ Shlossman Transcript at 64.

⁹⁵ *Id.*

A Well, I think part of what we learned through this process is that not all these FOIAs were actually coming to the headquarters FOIA Office, so it was a matter that they would have to have the component FOIA offices actually send them the relevant request letter. And so it wasn't necessarily labor intensive on the headquarters FOIA part, but it was just a matter of making sure that everyone was sending their requests in.

Q So the FOIA Office, the burden on them was to communicate with all the components and notify them that this was the new policy?

A As I understand, yes.

Q And then once they, once everyone was on notice it was your expectation that the components would send their requests along with their weekly reports, and that's how the system would work going forward?

A Yes.⁹⁶

Mary Ellen Callahan stated the process implemented in July 2009 varied only slightly from the process that was in place during the previous Administration. Documents and witness testimony directly contradict that statement. In response to questions from the Committee's Democratic staff, Vania Lockett testified that the review process implemented during the current Administration was new. Furthermore, she testified that it did not improve the reporting process in place during the previous Administration.

Q Okay. And so, just generally speaking, and I know that you haven't been involved in the process from its creation in sometime in 2009, but is it your understanding that it has evolved or improved in any way?

A That it has evolved or improved? **There wasn't a review process at all previously. It was more of just a reporting process just to make individuals or to make the Front Office aware of requests.**

Q Uh-huh.

A So I can't say that the review process has improved, no. It's sort of a new process.

Q So it's just still too new to know if it's improved or not improved?

A I don't think that it has improved anything.⁹⁷

⁹⁶ *Id.* at 84.

* * *

A Initially, we were only reporting requests received. It wasn't until later, during the current administration, that they wanted us to add documents that were being released to the report, as well, and litigation and appeals.⁹⁸

As previously mentioned, Attorney General Holder expected transparency and openness to be the hallmarks of the Administration's FOIA policies. In March 2009, he stated: "[u]nnecessary bureaucratic hurdles have no place in the 'new era of open Government.'"⁹⁹ Despite the Attorney General's clear expectations, the political appointees in the Office of the Secretary expanded reporting requirements and burdened the FOIA staff with confusing and amorphous policies.

Papoi testified that the delays and confusion caused by the review process are reflected in the Department's backlog of FOIA requests:

Q Do you think that the backlog increasing has to do with the review process by the Front Office?

A I think it does. I can speak as to headquarters. I think almost all of our backlog cases are in the Front Office.¹⁰⁰

Holzerland testified that the confusion that reigned between July and September 2009 made it difficult for the career staff in the FOIA Office to meet the standard for transparency set forth in President's January 2009 memorandum.

Q Okay. I am referring to the confusion that seems to have affected people in your office and out in the components' FOIA offices about how to handle significant requests. Did that confusion affect your offices and your staff's ability to meet the standards enunciated in the President's memo?

A Yes. And I can only speak for myself, but from my vantage point, you know, viewing what the Department does in the various FOIA offices on a day-to-day basis, yes, the **confusion over the Front Office process frustrated our ability to operationalize the transparency that the President expected.**¹⁰¹

⁹⁷ Lockett Transcript at 87.

⁹⁸ *Id.* at 47.

⁹⁹ 2009 Attorney General Memorandum, *supra note* 22 at 11.

¹⁰⁰ Papoi Transcript at 122.

¹⁰¹ Holzerland Transcript at 30.

F. DHS political appointees required all significant requests to be forwarded to the Secretary's Office

By September 2009, the weekly reports of significant FOIA activity no longer satisfied the Secretary's political staff. Political staff in the Office of the Secretary believed having the original request would improve awareness and reduce the need for follow-up questions. Rather than briefly summarizing significant FOIA requests in the weekly report, Amy Shlossman instructed the FOIA Office to attach copies of the request letters.¹⁰²

There were immediate concerns that the practice of gathering and forwarding original requests to the Secretary's political staff would be overly-burdensome. The new policy meant career staff in the FOIA Office had to collect all the significant FOIA requests from the components, scan them, and attach them to the weekly report.¹⁰³ This additional step added another layer to the increasingly-bureaucratic review process for responding to significant FOIA requests.

Mary Ellen Callahan testified that at the time the new policy was put in place, she was advised by her staff that having to gather and forward all significant requests would be burdensome:

Q We talked earlier, I think there was a point where the Front Office asked to see the original requests along with the items that were highlighted on the weekly report. Is [September 24, 2009] kind of the beginning of that process?

A It appears to be, yes.

Q And then there is a little bit of pushback. [In an e-mail to] Vania Lockett and Catherine Papoi on September 25, ... you say, 'I will try to fight on the going forward process. Yes, I realize it will take a lot of time, but I don't see an alternative this week.' I think this gets back to something you said earlier. At the time that the process was put in place you anticipated that it might be burdensome, is that right?

A I had been advised by my professional FOIA staff that to provide the requests along with the weekly report would be a significant burden, yes.¹⁰⁴

Amy Shlossman testified that the additional reporting requirement was actually meant to reduce the burden on the FOIA Office. Shlossman expected the policy to eliminate some of the questions the Secretary's political staff asked about significant requests. However, questions

¹⁰² E-mail from Julia Fox, Special Assistant, Department of Homeland Security, to Vania Lockett, Acting Departmental Disclosure Officer, Department of Homeland Security (Sept. 24, 2009, 5:05pm EST).

¹⁰³ Papoi Transcript at 17.

¹⁰⁴ Callahan Transcript at 71.

from the Secretary's political staff continued. The career staff in the FOIA Office continued to push back on questions that appeared overly intrusive. On December 29, 2010, Julia Fox asked Holzerland: "Do you know anything about this investigation or why it is of interest/significant?"¹⁰⁵

Holzerland replied: "[U]nder FOIA, the issue of 'why' the requester is interested in the records is legally irrelevant."¹⁰⁶

From: Holzerland, William
Sent: Tuesday, December 29, 2009 11:07 AM
To: Fox, Julia; Holzer, James
Cc: Papol, Catherine; Lockett, Vania; Grossman, Jordan
Subject: Re: December 28, 2009 FOIA Weekly Report

Hi Julia, I am sorry, but the Privacy Office would not have any information about this investigation. Also, under FOIA, the issue of 'why' the requester is interested in the records is legally irrelevant. We do not have information responsive to that portion of your question either, unfortunately. The request was included in the significant activity report as the requester presented themselves as a journalist. Thank you, Bill

William H. Holzerland, CIPP/G
U.S. Department of Homeland Security
Associate Director,
Disclosure Policy & FOIA Program Development

From: Fox, Julia
To: Holzerland, William; Holzer, James
Cc: Papol, Catherine; Lockett, Vania; Grossman, Jordan
Sent: Tue Dec 29 10:56:23 2009
Subject: RE: December 28, 2009 FOIA Weekly Report

Thank you.

Also, sorry for the last minute request, but one more below:

Do you know anything about this investigation or why it is of interest/significant?

- On December 24th, David Armstrong with the National Security News Service, requested from DHS records between January 1, 2007 and the present, to include records of phone conversations or meetings concerning requests from any U.K. government authorities, including but not limited to representatives of the Independent Police Complaints Commission, for DHS assistance in the following: 1) A British investigation of a U.K. citizen named Atif Amin, and 2) Obtaining information about David Armstrong or the National Security News Service.

Shlossman testified that the policy was implemented despite Mary Ellen Callahan's warning that it would in fact increase the burden on the career staff in the FOIA Office.

Q So up until this point, September, late September '09, there were times when the weekly report would be sent up and some of the follow-up questions from the Front Office might have been answered or maybe refined if they also had the request itself. Was that part of the reason for asking for the request?

A Yes, that was part of the reason.

¹⁰⁵ E-mail from Julia Fox to William Holzerland, Dec. 29, 2010, 10:56 AM.

¹⁰⁶ E-mail from William Holzerland to Julia Fox, Dec. 29, 2010, 11:07 AM.

Q Mary Ellen responds to you on 25 September '09. Amy - happy to try to help, but it is a pretty big lift, and we would have to try to get all the requests from all the components.

It seems like Mary Ellen is pushing back a little bit trying to let you know that this is going to be labor intensive. How did – was this policy ultimately implemented?

A It was.¹⁰⁷

Documents show that the additional reporting requirement was approved by Chief of Staff Noah Kroloff.¹⁰⁸ Callahan testified that Kroloff convinced her that the benefits of the policy – elimination of inconsistencies and inaccuracies in the descriptions of requests – outweighed the adverse effects on Callahan's staff.

A I had had, as you can see here, I had a Monday meeting with Noah on a variety of issues in the ordinary course of my responsibility – as I mentioned to you earlier, I do report to the Secretary – and so this was one of the things that we had talked about.

Q How did Noah make his case that this policy should be put into effect?

A Well, I certainly knew anecdotally that there were inconsistencies or inaccuracies in how the narrative descriptions were being implemented, and that we discussed the desire for the Front Office to see that to make sure they knew the underlying requests. So we talked about the pros and cons in terms of how to implement it.

Q And so the cons that you discussed during that meeting would have been the burden on the professional staff?

A The professional staff had indicated to me that they were concerned that this would be a significant burden, and so I conveyed that on their behalf. And at the time I was persuaded that it could have been a significant burden to provide the requests in the weekly report. Now having the hindsight of 18 months, I don't think there has been a big burden for the provision of the request and the quality has improved.¹⁰⁹

¹⁰⁷ Shlossman Transcript at 83.

¹⁰⁸ E-mail from Amy Shlossman to Mary Ellen Callahan, Sep. 25, 2009, 6:16 PM EST.

¹⁰⁹ Callahan Transcript at 72-73.

From: Callahan, Mary Ellen
To: Shlossman, Amy
Cc: Kroloff, Noah; Callahan, Mary Ellen
Sent: Fri Sep 25 08:24:58 2009
Subject: Re: FOIA's

Amy - happy to try to help, but it is a pretty big lift, and we would have to get all the requests from all the components. Noah had mentioned he wanted to talk to me abt foia, and I had a previously scheduled mtg on monday, so I just figured I would talk thru exactly what you were looking for. Not trying to be a problem, just wanted to see if there was another way to solve the problem (I had talked to leezie about sending up the whole list of inbound foias that we at hq gets).

We are working on getting the discrete requests below, it was just the going forward that I wanted to see if we could answer differently. Happy to discuss.

Thanks,
Mary Ellen
Mary Ellen Callahan
Chief Privacy Officer
Department of Homeland Security
[REDACTED]

From: Shlossman, Amy
To: Callahan, Mary Ellen
Cc: Kroloff, Noah
Sent: Fri Sep 25 08:16:52 2009
Subject: FW: FOIA's

Mary Ellen,

Not sure what the confusion is, but please know this request is coming directly from the front office and Noah has been fully briefed. Can you please have your staff forward the actual FOIA requests that are included in our weekly reports each week so we can refer to them as needed.

Thank you.

Amy

Shlossman designated Fox and Grossman as the points of contact for receiving the responses that required Front Office review. Fox and Grossman forwarded the response packages to Shlossman and waited for her feedback. Fox and Grossman would then relay Shlossman's instructions to the FOIA Office.

From: Shlossman, Amy
Sent: Monday, September 28, 2009 1:12 PM
To: Callahan, Mary Ellen
Cc: Fox, Julia; Grossman, Jordan
Subject: Re: FOIA Document review process

Julia Fox and Jordan Grossman

From: Callahan, Mary Ellen
To: Shlossman, Amy
Sent: Mon Sep 28 13:08:46 2009
Subject: FOIA Document review process

Amy – who do you want to be the point person for receiving the FOIA responses? We wanted to start implementing, but weren't sure to whom to address it/work out the FOIA review process. Please just let me know. Thanks, mec

Mary Ellen Callahan, CIPP
Chief Privacy Officer
U.S. Department of Homeland Security
245 Murray Lane SW, Mail Stop 0655
Washington, DC 20528-0655

Website: www.dhs.gov/privacy

G. All responses to significant requests were approved by political staff

FINDING: By the end of September 2009, copies of all significant FOIA requests were required to be forwarded to the Secretary's political staff for review. The career staff in the FOIA Office was not permitted to release responses to these requests without approval from political staff.

The Secretary's political staff agreed to review and approve responses within three business days. That agreement was largely ignored. The approval process caused delays and burdened the career staff in the FOIA Office. The career staff grew concerned that the process was frustrating their ability to operate the FOIA Office in accordance with the openness and transparency guidelines enunciated by the President and the Attorney General.

Holzerland testified the approval policy was inconsistent with the President's FOIA memoranda.

Q [N]ow that we are in September '09 and a policy has just been put in place whereby the Front Office has to give clearance to your office to respond to requesters about significant issues, how did you square that policy with the President's FOIA memos?

A In my opinion?

Q Yes.

A It does not square. And that was expressed unequivocally to any party who would listen at the time. And by that I mean the folks within my office; Mary Ellen, Catherine, Vania. All of us in our discussions expressed our frustration with this process. Mary Ellen, being the head of the office and a political appointee, had to sort of walk in both worlds, and work with the – liaise with the Front Office and implement their policies and understand that we are under an already tight statutory time frame in terms of processing FOIA requests. So she had to sort of handle both issues.¹¹⁰

Three-Day Turnaround

It was agreed on September 30, 2009 that the Secretary's political staff would review and respond to the FOIA Office within three days of receiving the response package. Until Fox or Grossman notified the FOIA Office that a response was cleared for release, response packages could not go out the door.

From: Grossman, Jordan
Sent: Wednesday, September 30, 2009 11:26 AM
To: Papoi, Catherine; Fox, Julia
Cc: [REDACTED]
Subject: RE: Front Office FOIA review process

Thanks! Going forward, Julia will send the requests that the Front Office would like to review each week on Tuesday night (after we review the Weekly FOIA report). Then, when the package of responsive records is assembled for these requests, the Front Office would like to review these as well before they are released. The list Julia sent this week will likely be an average amount. In the interim, can you pass along any responsive records going to media organizations or third-party groups before they're released (i.e. in other words, the requests that are currently in process but for which we won't have asked for the original requests)?

In terms of turnaround time, would 3-days work alright for you? I know particularly in the middle of the week it will be difficult for us to get through this much material, and so an extra day would be extremely helpful.

Thanks again!

Every week, Fox and Grossman received the weekly report on Monday. On Tuesday, Fox returned the Front Office's list of flagged requests. The first weekly report under the new policy was sent to the Secretary's political staff on Monday, October 5, 2009. The next day, Fox returned a list of tagged requests to the FOIA Office. Every media request was tagged.¹¹¹ By October 6, 2009, coordinating the Front Office review process had become a "full-time job" for Papoi.¹¹²

¹¹⁰ Holzerland Transcript at 30-31.

¹¹¹ E-mail from Catherine Papoi to Mary Ellen Callahan, Oct. 6, 2009, 3:00 PM EST.

¹¹² *Id.*

From: Papoi, Catherine
To: Callahan, Mary Ellen
Cc: Kropf, John; Papoi, Catherine [REDACTED]
Sent: Tue Oct 06 15:00:48 2009
Subject: FW: FOIA Report

Today I received the below email from Julia Fox with the requests the front office wishes to review prior to release (I will receive an email like this from Julia every Tuesday). She lists all of the media requests from our weekly report. This equates to a grand total of 53 releases I am coordinating for front office review and this has turned into a full-time job. I am stopping by the NAC on my way in tomorrow morning for my flu shot, but if we can discuss coordination options (I have some ideas I want to run past you) tomorrow at some point, it would be great. Thanks.

C

Catherine Papoi was charged with managing the Front Office approval process. As the point of contact in the FOIA Office with the political staff, Papoi had to follow up on requests that lingered in the Office of the Secretary for more than three days. Papoi testified that the Secretary's political staff frequently failed to clear responses within the three-day timeframe.

A Yes. Mary Ellen Callahan called me into a meeting in late September and advised me that the Front Office wanted to institute a review process and that I was to be the POC for our office. And I would be orchestrating the review with the Front Office.

Q And this is the initial – this is the ultimate result of that? This sort of tentative working agreement on a 3-day turnaround time?

A This was the initial agreement, correct.

Q Okay. Where did it go from there?

A Well, the review times were greatly extended from 3 days to up to weeks, months.

Q And was there a process for dealing with that, when these reviews go past 3 days?

A I would harass Jordan Grossman and Julia Fox and remind them that we have a statutory time frame for a response, and that every day that passes we are opening ourselves up to potential constructive denial lawsuits. The fallback was for me to go to Mary Ellen Callahan and ask her to contact the Front Office at a higher level and try to move the request along.

Q How often would you say that this happened?

A This, being –

Q Well, either it got elevated or extended to a point where you felt like that you needed to harass or give an additional push to the Front Office?

A I don't have the exact numbers, but I feel very comfortable saying that it was more often than not.¹¹³

“Awareness,” “Good to Go,” “Affirmative Statement,” “Give the Thumbs Up,” “Active Concurrence,” but not Approval

FINDING: Political appointees refused to acknowledge that approval from the Secretary’s political staff was required to release a response to a significant FOIA request as of September 29, 2009. Their position during transcribed interviews was that the policy was implemented for awareness purposes only. Documents show this position is indefensible.

Amy Shlossman and Mary Ellen Callahan refused to acknowledge that actual approval from the Secretary’s political staff was required to release a response to a significant FOIA request as of September 29, 2009. Their position during transcribed interviews was that the three-day review process was implemented to “gain greater awareness” of significant responses prior to release.

Internally, Callahan was careful to correct FOIA Office personnel who described the significant request review process as an approval process. On December 15, 2009, Callahan policed the use of the word “approved” in an e-mail to Grossman, Fox, and Papoi.

¹¹³ Papoi Transcript at 29-30.

From: Callahan, Mary Ellen [REDACTED]
Sent: Tuesday, December 15, 2009 11:27 AM
To: Grossman, Jordan; Papoi, Catherine; Fox, Julia
Cc: Callahan, Mary Ellen
Subject: Re: ***FRONT OFFICE REVIEW REQUESTED***

Please expedite. And to be clear, this is a review, not an approval. Let's make sure we use the proper term.

Mary Ellen Callahan
Chief Privacy Officer
Department of Homeland Security
[REDACTED]

From: Grossman, Jordan [REDACTED]
To: Papoi, Catherine [REDACTED]; Fox, Julia [REDACTED]
Cc: Callahan, Mary Ellen [REDACTED]
Sent: Tue Dec 15 11:12:13 2009
Subject: Re: ***FRONT OFFICE REVIEW REQUESTED***

No - we are reviewing today.

From: Papoi, Catherine [REDACTED]
To: Grossman, Jordan <[REDACTED]>; Papoi, Catherine [REDACTED]
Fox, Julia [REDACTED]
Cc: Callahan, Mary Ellen [REDACTED]
Sent: Tue Dec 15 11:08:08 2009
Subject: RE: ***FRONT OFFICE REVIEW REQUESTED***

Is the release approved by the front office?

During her interview, Shlossman professed not to know whether the FOIA Office was authorized to release responses to significant FOIA requests without approval from the Secretary's political staff. In fact, Shlossman frequently did not answer the Committee's questions.¹¹⁴ She testified that she was not aware of what the FOIA Office did after making the Secretary's political staff aware of a significant request.

Q So the FOIA Office could send out – once they made the Front Office aware of a request they could send out the response?

A Again, I'm not the FOIA Office, so I didn't make the determination on that.¹¹⁵

¹¹⁴ Shlossman responded she could not remember, was unaware of, or simply did not know the answer to a question from Committee investigators 79 times during the course of her four-hour interview. Additionally, Shlossman left the interview room six times to confer with counsel, including twice when she was presented an exhibit in the middle of a round of questioning. Having not objected to a single question asked to the three prior witnesses whose interviews were attended by DHS counsel, Deputy General Counsel Joe Maher objected 11 times during Shlossman's interview. The behavior of the witness and counsel during Shlossman's interview gave Republican staff present the impression that her testimony was intentionally vague on the advice of counsel.

¹¹⁵ Shlossman Transcript at 89.

* * *

Q So the FOIA Office could not release the response until they heard back from the Front Office?

A I don't know their exact policy, but I do know that there were conversations regarding the status of given requests.¹¹⁶

* * *

Q And was it discussed at the time what should happen once the 3 days have expired, as far as what the FOIA Office should do? They at this point gathered responsive documents, they've created a cover letter and sent it up to Julia Fox and Jordan Grossman, and the 3-day clock is ticking. Was it ever discussed what they should do after 3 days?

A Not that I'm aware of.¹¹⁷

Documents and witness testimony show the September 29, 2009 policy was in fact an approval process. For requests tagged by the Secretary's political staff, Shlossman reviewed and cleared both the cover letter and responsive documents prior to authorizing the FOIA Office to release. Holzerland stated:

[T]he Front Office would receive an advance copy of both the cover letter and the records to be released to the requester, have an opportunity to review and have to approve the release of both the letter and the records to be released.¹¹⁸

Papoi corroborated Holzerland's testimony regarding the September 2009 policy change as an approval process.

Q In subsection 3, it says, Effective immediately, the DHS Front Office will review and clear on those tagged requests prior to release. Can you explain what that meant?

A Yes. The Front Office would specify certain requests that we forwarded in our weekly report as tagged requests. **Item three is implementing a review and clearance by the Front Office of those tagged requests.**

¹¹⁶ *Id.* at 18-19.

¹¹⁷ *Id.* at 19-20.

¹¹⁸ Holzerland Transcript at 24.

Q So the report that would be created in your office and sent to the Front Office, from that report they would tag certain requests, and **you could not respond to the requests until the Front Office cleared the response?**

A **That is correct.**¹¹⁹

The Department's political staff came up with a number of creative ways to avoid using the words "approval" or "clearance" to describe the Front Office review process. On September 17, 2010, Callahan told Committee staff that the Secretary's political staff notified FOIA officers when a response was "good to go."¹²⁰

From: Fox, Julia
Sent: Thursday, January 28, 2010 2:42 PM
To: Papoi, Catherine; Grossman, Jordan
Cc: [REDACTED]
Subject: RE: ***FRONT OFFICE REVIEW REQUEST***January 26, 2010

Hi Catherine,
We have finalized our review of this and it is good to go, but it might be worth double-checking that all of the records being provided are ARRA-related (as indicated in the response letter).
Thanks!
Julia

During her interview, Callahan testified that an "affirmative statement" was required before the FOIA Office could release a response to a significant request.

Q [A]fter October 1, 2009, if a FOIA officer didn't hear back after 3 days, would a response go out?

A As stated earlier, in the initial part of the awareness campaign **there had to be an affirmative statement** that the Front Office had reviewed the FOIA response.¹²¹

Shlossman described the review process another way. Shlossman testified that after the Front Office review, "mutually they [headquarters FOIA Office and the Front Office] would go ahead and give the thumbs up to the relevant component to release the documents."¹²²

Despite the careful efforts to characterize the purpose of the policy implemented on September 29, 2009 as mere awareness, documents and witness testimony showed that Front Office approval was a fundamental component of the process. The career staff was not permitted to release responses to FOIA requests without approval from the Secretary's political staff. The career staff consistently confirmed that they had to wait for clearance from the Secretary's political staff before they could release FOIA responses.

¹¹⁹ Papoi Transcript at 19.

¹²⁰ Meeting with DHS Chief Privacy Officer Mary Ellen Callahan and H. Comm. on Oversight and Gov't Reform and H. Comm. on Homeland Security Staff, Sept. 17, 2010, 2:00 PM.

¹²¹ Callahan Transcript at 29.

¹²² Shlossman Transcript at 18.

Vania Lockett testified: “We were then required to start sending requests to the Front Office for clearance before we released records to those requests.”¹²³

Catherine Papoi testified:

They were – well, reviewing and then approving, yeah. Absolutely. Because if we couldn’t send something out the door until they gave the thumbs up, that’s approval.¹²⁴

Instructions distributed by the main FOIA Office to the component FOIA Offices explicitly stated that responses were not to be released without clearance from the Secretary’s political staff. The instructions stated: “It is imperative that these requests are not released prior to the Front Office clearing on both the letter and records.”¹²⁵

Callahan’s testimony to the Committee on March 14, 2011 made clear that Front Office approval was in fact required. Callahan testified that absent an express statement from the Secretary’s political staff, the career FOIA staff could not release a package in response to a significant request.

Q Okay. The date being October 1, 2009, before SharePoint was online, the Front Office would receive a response package. After 3 days lapsed, could the FOIA office send out the response package, having heard nothing back from the Front Office?

A No. The FOIA office had to wait for an express statement from the Front Office that they had reviewed and were aware of the response.

Q What would that express statement look like? And maybe you could just describe it for us.

A I mean, it was an e-mail usually saying, We have reviewed, or thanks. "Good to go," I think was some of the e-mails, but it was – and sometimes there were phone calls.

Q So absent a "good to go" e-mail or the type of notification you just described, the FOIA office could not send out the response as of October 1, 2009?

A And by the "response," if you mean the significant response that had been part of the awareness review –

¹²³ Lockett Transcript at 19.

¹²⁴ Papoi Transcript at 86.

¹²⁵ E-mail from Catherine Papoi, Deputy Chief FOIA Officer, Department of Homeland Security, to Mary Ellen Callahan, Chief Privacy Officer, Department of Homeland Security (Sept. 29, 2009, 9:22 a.m. EST).

Q Yes, just talking about the significant requests.

A **The FOIA office had to wait for an express statement.**¹²⁶

Callahan's testimony regarding the need for an "express statement" was an acknowledgement that an approval process was in fact in place after September 29, 2009. Unlike Callahan, Amy Shlossman refused to budge from her position that significant FOIA responses were merely reviewed by the Secretary's political staff:

Q In hindsight how would you have described the process as of December of '09, as a Front Office review process or as a Front Office approval process?

A Well, considering that on every single e-mail that the FOIA Office sent to my staff that had the same title, Front Office review, I think that would probably appropriately describe it.

Q So responses could go out to requesters without approval from the Front Office?

A Again, we talked about this earlier. There wasn't really any type of established policy that I was aware of that was in place, you know, to determine that.¹²⁷

Given the documents and testimony obtained by the Committee, Shlossman's professed lack of awareness of the approval process is not credible.

OIG documents were subject to review

Concerned about the implications of this new policy, the FOIA Office's career staff pushed back. Holzerland expressed concern that the approval process implicated the independence of the Office of the Inspector General (OIG). On the day the approval policy was put in place, he e-mailed Callahan: "I am thinking ahead here and foresee (sic) a problem with OIG on the idea of the DHS Front Office approving their work."¹²⁸

Holzerland was concerned that the approval process would expose the OIG to being in a position of needing permission from the Secretary's political staff to take action. Holzerland's familiarity with the Inspector General Act of 1978 (IG Act) allowed him to anticipate this potential problem. Holzerland testified that he foresaw a possible situation where the OIG was pitted against the Secretary's political staff in a power struggle.

¹²⁶ Callahan Transcript at 30-31.

¹²⁷ Shlossman Transcript at 88.

¹²⁸ E-mail from William Holzerland, Associate Director, Department of Homeland Security to Mary Ellen Callahan, Chief Privacy Officer, Department of Homeland Security (Sept. 29, 2009, 1:15 p.m. EST).

I worked in the Inspector General's Office for a short time, I am familiar enough with the IG Act of 1978 to know that the inspector general operates somewhat independently. Though the IG is under the general supervision of the Secretary, they operate somewhat independently from the rest of the Department. And the counsel to the inspector general reports only to the IG. He is the only counsel in the Department who does not report to the DHS general counsel.

So I was trying to – at this point "we," meaning Catherine, Vania and I, had already been advised by Mary Ellen that the Front Office was not going to budge on the required review process. And I had been imploring Mary Ellen, I and others had been imploring Mary Ellen to try and get them to see this was not a workable process in some ways. And in this e-mail I was trying to express to Mary Ellen that I figured logic might help. I said, Look, the IG is independent, and at some point they may choose to play, they can choose to play ball with us and get in line with our policies, but if at some point our policies don't gel with the IG independence issue, they are sort of a bucking bronco and we may be in a situation where the IG says the, Front Office, we may be – excuse me, let me back up. We may be in a situation where the Front Office says, we don't clear on the IG's release; and the IG will come back and say, I don't care what the Front Office says, this is going out the door.

And I was looking down the road, thinking there is going to be – there could potentially be a point where the Front Office's opinion and the IG's opinion don't gel and this may come to a head.¹²⁹

Callahan recognized the potential conflict but took no action. On September 29, 2009, she responded to Holzerland:

Fair enough point, but I don't know when their foias are ever going to be a part of the mix. I think we can tell them on the sly that theirs wont have to go up, but I think we fight that fight another day.¹³⁰

Holzerland testified that the "fight" Callahan was trying to avoid nearly happened. Late in 2009, various DHS components received FOIA requests for documents related to detainee deaths. The Office of the Inspector General also received the request because it had investigated detainee deaths. The Secretary's political staff held up the responses because they wanted to apply the same fee category to each requester. Holzerland testified: "I spent most of ... 2 or 3 days going back and forth with the Front Office, trying to explain to them that we couldn't necessarily force the IG to get in line with what they wanted."¹³¹

¹²⁹ Holzerland Transcript at 32-33.

¹³⁰ E-mail from Mary Ellen Callahan, Chief Privacy Officer, Department of Homeland Security, to William Holzerland, Associate Director, Department of Homeland Security (Sept. 29, 2009, 2:05 p.m. EST).

¹³¹ Holzerland Transcript at 35.

The Secretary's political staff maintained the OIG had to wait for approval to release the response. Holzerland testified that a crisis of independence was narrowly averted.

[T]he IG had engaged in litigation with this particular group on a prior request. They wanted to make very sure that they responded to this request within the statutory timeframe of 20 business days. And they said, we have processed the records. We don't care whether the Front Office clears this in time. We are sending it on the 20th business day. We want to be on time so we don't get sued again.

It was very tense for a few days trying to, on one hand, I empathized with the IG. On the other hand, Mary Ellen told me in no uncertain terms you tell them they are not sending out. I said – well, I tried to advocate for the IG to Mary Ellen, saying, If you can, get the Front Office to hurry this up in any way, it would be most appreciated. So we don't have that situation. That way everybody will back down.

To make a long story short, the Front Office cleared it in time, it went out on time, so the nuclear option did not happen.

Q So you averted the showdown, fortunately, because the Front Office cleared in time –

A Yes.

Q – the IG response came out within the statutory deadline.

A That is correct.

Q Did you get the sense that the IG was going to send out the response –

A Yes, absolutely.

Q – to meet the deadline, regardless?

A Yes. They absolutely said that. But in order to avert that, I had spent the week before New Years driving from office to office picking up records on CD, physically bringing them to the NAC myself, talking to Jordan Grossman and Julia Fox about any issues with respect to those records, liaising with the two components affected, working until midnight trying to get the letters refined,

make sure the records were all redacted consistently. That sort of thing. And trying to move the process along.¹³²

The approval process caused delays

The involvement of the Secretary's political staff in the FOIA response process caused delays. When the approval process was implemented in September 2009, the Secretary's political staff agreed to review and clear responses within three business days.¹³³ In practice, this time frame was frequently ignored. When the three-day clock expired, FOIA professionals in the Privacy Office had to proactively seek updates from the Secretary's political staff to move the process forward.

In many cases, the FOIA Office had to wait anywhere from a week to several months for the Secretary's political staff to approve the release of a significant response.¹³⁴ Shlossman testified that the approval process implemented on September 29, 2009 did not address what happened when the three-day clock expired.¹³⁵

Q So in late summer, fall of 2009, there was kind of an evolving understanding of how to handle significant requests, and the 3-day turnaround was, I don't want to use the word "negotiated," but was discussed and implemented around that time?

A Based on my understanding, yes.

Q And was it discussed at this time what should happen once the 3 days have expired, as far as what the FOIA Office should do? Was it ever discussed what they should do after 3 days?

A Not that I'm aware of.

Q That wasn't made part of the policy when it was implemented at this point in 2009?

A Not that I'm aware of.¹³⁶

When asked whether the FOIA Office could release a significant response after three days without Front Office clearance, Shlossman replied, "I'm not sure."¹³⁷

¹³² Holzerland Transcript at 35-36.

¹³³ Papoi Transcript at 29- 30.

¹³⁴ Lockett Transcript at 26.

¹³⁵ Shlossman Transcript at 18-20.

¹³⁶ *Id.* at 19-20.

¹³⁷ *Id.* at 21-22.

The persistent delays exposed the Department to litigation. Vania Lockett testified that Front Office reviews affected the Department's ability to meet the statutory deadline.

Q So a package that has been put together in response to a significant FOIA request, a cover letter has been drafted, the additional days, weeks, or months that the Front Office is taking to review it affects the Department's ability to meet the statutory deadline?

A That's correct.¹³⁸

Holzerland corroborated Lockett's testimony. He described a request for documents from the Coast Guard that languished in the Front Office for 37 days. He testified that this was but one example of "many" where the Front Office approval policy delayed the release of responses.¹³⁹

Q So at least in that case a request was delayed because of the policy of bringing a significant request to the attention of the Front Office?

A That would be one instance, yes.

Q And do you think that is the only instance that the response time to a request was delayed because of the policy of the Front Office?

A No. There were many instances of that.¹⁴⁰

As the most senior career professional in the FOIA Office, Papoi was responsible for following up with the Secretary's political staff when responses were delayed beyond three days. She reached out to the political staff by phone and e-mail and frequently got no response. Papoi testified that the non-responsiveness of the Secretary's political staff forced the FOIA Office to wait because they simply did not hear back from the political staff:

Q You said that you would, you used the word "harass" the Front Office, which I interpreted to mean e-mail, phone call, asking them for status updates, is that right?

A That is correct.

Q Were they responsive when you would e-mail or call?

A No. There were oftentimes when they wouldn't even return my e-mails.

¹³⁸ Lockett Transcript at 26.

¹³⁹ Holzerland Transcript at 96.

¹⁴⁰ *Id.*

Q So that would lead to additional waiting; you couldn't take action until you heard back?

A That is correct.

Q And you could only harass to the extent that they were responding?

A That is correct.¹⁴¹

The delays that became inherent in the approval process rendered the policy inconsistent with Attorney General Holder's March 2009 FOIA guidance, which noted that: "[t]imely disclosure of information is an essential component of transparency."¹⁴²

The delays caused by the approval process were reflected in tracking statistics compiled by the FOIA Office. In an April 13, 2010 memorandum, Papoi wrote:

The Front Office review process, implemented in September 2009, has significantly hampered the ability of DHS and its components to respond promptly to requests. Approximately 70% of requests sent to the Front Office for review have not been returned within the established three-day timeframe. The Annual FOIA Report to the Attorney General of the United States tracks response times and DHS may witness an increase in FY10 overall response times due to this review procedure.¹⁴³

The approval process burdened FOIA professionals

FINDING: The heightened reporting requirements and approval process added to the workload of the career staff. Rather than recognize the effect the approval process was having on response times and staff morale, the Secretary's political staff increased its level of involvement in the Department's FOIA function.

In his March 2009 FOIA guidance, the Attorney General stated: "[Career FOIA] professionals deserve the full support of the agency's Chief FOIA Officer to ensure that they have the tools they need to respond promptly and efficiently to FOIA requests."¹⁴⁴ At DHS, FOIA professionals were burdened by an intrusive political staff and blamed for delays, mistakes, and inefficiencies for which the Secretary's political staff was responsible.

Rather than recognize the effect the approval process was having on response times and staff morale, the Secretary's political staff increased its level of involvement in the Department's

¹⁴¹ Papoi Transcript at 49.

¹⁴² 2009 Attorney General Memorandum, *supra* note 22 at 11.

¹⁴³ Memorandum from Catherine Papoi to Mary Ellen Callahan, "DHS Disclosure Program Resource Allocation," Apr. 13, 2010.

¹⁴⁴ 2009 Attorney General Memorandum, *supra* note 22 at 11.

FOIA function. In January 2010, the Secretary's political staff notified the FOIA Office that all requests listed on the weekly report should be considered tagged for review. Deputy Chief FOIA Officer Catherine Papoi was notified by Julia Fox of the new policy in a phone call:

Q There is an e-mail that starts on the first page and ends on the second page dated January 11, 2010, from you to Mary Ellen Callahan that says Julia Fox called to let me know that the Front Office wants to start flagging all requests reported on the weekly reports. Mary Ellen responds, one word, fine.

Can you describe to us what Julia Fox told you over the phone and how the policy changed after that phone call?

A On the phone, Julia informed me that instead of indicating specific requests from the weekly, that they would just be flagging all of the requests. Up until that point, they had been indicating on a weekly basis which cases they would like to be deemed flagged. But in essence they were already flagging almost all of the cases on the weekly report.

Q So up until this point, if, say, the weekly report had 20 FOIA requests on there that you wanted to bring to the attention of the Front Office, then they would get back to you and say 18 of those, consider them flagged and proceed accordingly?

A That is correct.

Q As of this e-mail, all the requests were to be considered flagged?

A That is correct.

Q **And at this point, did you expect that to increase the burden on your office in terms of having to manage the Front Office review process?**

A **Yes.**¹⁴⁵

Holzerland was frustrated with the review process and confused about the expectations of the Secretary's political staff. Holzerland testified that the delays in the review process interfered with the FOIA Office's role in maximizing the Department's level of service to the public:

[T]o me, engaging in any tactics that are dilatory in nature or that add a layer of bureaucracy frustrates our ability to make sure that DHS is operating in some way. And at this point we weren't

¹⁴⁵ Papoi Transcript at 61-62.

exactly clear on what the Front Office wanted, and we were having a difficult time getting clarification from them on what their expectations were. And that was a very frustrating experience for all involved.¹⁴⁶

Quality Control Issues

The Department's political appointees testified that the Front Office review process was intended in part to improve the quality of FOIA responses. In interviews, Mary Ellen Callahan and Amy Shlossman testified that typographical errors and other mistakes required the Secretary's political staff to insert itself into the response process to conduct quality control. In fact, in the September 17, 2010, briefing, Callahan had stated the extent of the role of political appointees in the response process was to check "only for typos, grammar, and things of that nature."¹⁴⁷

Shlossman testified that edits to cover letters "were often made."¹⁴⁸ Shlossman further testified that political appointees did not edit or otherwise amend responsive documents that came up for review. If the Secretary's political staff had concerns about the documents, they referred the response package to the Office of General Counsel.

So there were two separate parts of that package in a given FOIA response. There's the cover letter. That's just the basic cover letter saying here's the response to your request. And in those documents recommended edits were often made. So I would receive that document in track changes wherever recommended edits were needed or additional clarity was needed. Separate and apart from the cover letter was the actual responsive documents that were retrieved for a given FOIA request. My staff and myself, we didn't do anything with those documents. If there was an issue that merited a secondary review by the General Counsel's Office, then those were referred to the General Counsel's Office for review.¹⁴⁹

William Holzerland testified that typographical errors and similar quality control issues were isolated and infrequent. His testimony raised concerns about the nature of the edits "often made" by Shlossman and other political appointees in the Office of the Secretary:

Q Were there any other instances in the past, other than this particular ICE scenario, were there other instances you've seen where there were letters with typos or other kinds of problems like that?

¹⁴⁶ Holzerland Transcript at 29.

¹⁴⁷ Mary Ellen Callahan, Statement during briefing for staff of the H. Comm. on Oversight and Gov't Reform and H. Comm. on Homeland Security, Sep. 17, 2010, 2:00 PM.

¹⁴⁸ Shlossman Transcript at 15.

¹⁴⁹ *Id.*

A Over the years, it is possible. Do you have any specific issues in ... mind?

Q No. I am just putting that to you to ask if that was something that had been a problem.

A Not that I am aware of.¹⁵⁰

* * *

Q How often did you find yourself doing sort of quality control on stuff that came into your office from the component? Was ICE the main offender or were there frequent problems with spelling and grammatical stuff?

A What we are talking about here is an isolated incident.¹⁵¹

In fact, career FOIA professionals in the FOIA Office did their own quality control before submitting a response to the Secretary's political staff for review. Holzerland testified that he and Lockett ensured a minimum standard of quality was met before a response was considered ready for review.

Q So when a package would come in from a component to your office, before sending it up to the Front Office for review you or Vania or somebody would have a look to make sure it met a certain quality standard?

A Yes, that is correct.

Q So packages that went up to the Front Office were generally reviewed by your office and deemed to be of a sufficient quality to move forward.

A Yes.¹⁵²

With Holzerland and Lockett already spot-checking cover letters for typos and other mistakes, it is unlikely that the Secretary's political staff was concerned about such quality issues before September 2009. In fact, political appointees had no prior awareness of quality issues before the implementation of the approval policy, because they did not begin to review response packages until September 29, 2009:

Q So moving forward from January '09 you wanted to start getting a better sense of the responses?

¹⁵⁰ Holzerland Transcript at 48-49.

¹⁵¹ *Id.* at 55.

¹⁵² *Id.* at 56.

A I don't – as we discussed earlier, we didn't really start getting a good sense of those responses until September 2009 or around then. So obviously that was in discussion and development during that period.

Q During that period did responses go out with typos and other quality control issues that weren't corrected before the cover letter left, went out the door?

A Well, we didn't see those responses before they went out the door, so we didn't have the opportunity to review for those types of issues.¹⁵³

The partial justification of the approval policy as a mechanism to improve the quality of responses is not credible. The Secretary's political staff used the expanded weekly reports to identify requests for which affirmative approval was required before a response could be released.

Career FOIA professionals had serious concerns

After the approval process was implemented on September 29, 2009, the FOIA Office became concerned that Secretary's political staff were trying to make substantive changes to the significant FOIA responses. Documents and witness testimony show in several instances, the Secretary's political staff attempted to edit or amend both cover letters and responsive documents.

On December 16, 2009, Shlossman notified Callahan that she did not want to repeat "allegations against the department" in cover letters.¹⁵⁴ Callahan informed her that to minimize legal liability, the career professionals in the FOIA Office repeat the language contained in the requester letter verbatim.¹⁵⁵ Despite raising this concern and referring it to OGC, Shlossman testified that she did not recall how OGC advised or whether cover letters currently repeat allegations verbatim in the cover letters.¹⁵⁶

Q On the second page there's an e-mail from you to Mary Ellen Callahan from December 16, 2009. The second paragraph you tell Mary Ellen, for FOIAs that make specific allegations against the Department we would like to use the same standard we use with

¹⁵³ Shlossman Transcript at 107-108.

¹⁵⁴ E-mail from Amy Shlossman, Deputy Chief of Staff, Department of Homeland Security, to Mary Ellen Callahan, Chief Privacy Officer, Department of Homeland Security (Dec. 16, 2009, 5:32 p.m. EST).

¹⁵⁵ E-mail from Mary Ellen Callahan, Chief Privacy Officer, Department of Homeland Security, to Amy Shlossman, Deputy Chief of Staff, Department of Homeland Security (Dec. 17, 2009, 18:25:24 EST).

¹⁵⁶ Shlossman Transcript at 93.

congressional and other correspondence. Acknowledge receipt of the request but don't repeat the allegations in our response.

Do you remember why you asked Mary Ellen to handle responses that way?

A I believe exactly for the reasons that I laid out here. Because in our external correspondence at the Department we acknowledge receipt but we don't tend to repeat allegations.

Q Why did you want to avoid repeating allegations?

A It's the basic standard that we have at the Department, especially if the allegations cannot be substantiated. We believe we should acknowledge receipt of the correspondence and then move on to the facts.

Q What would the concern be about repeating the allegations in ... the cover letter to the response?

A I think our concerns in general is it's just not necessary. We're not being asked to repeat allegations, we're being asked to respond to them.

Q Mary Ellen responds to you on December 17th on the first page, we have been advised to repeat the language verbatim to limit the opportunity for a component to misconstrue a request or a requester making such an allegation. We direct the components to use the language from the requester's letter. When we are taken to court it eliminates the requester's argument that DHS accidentally or intentionally construed their request incorrectly.

It sounds like Mary Ellen had some concerns about if you didn't repeat the request verbatim it might put the Department in a bad position in litigation. Was this dispute ever resolved one way or the other?

A You know, I frankly don't remember.¹⁵⁷

Responsive documents were also edited during the Front Office review process. Papoi testified that the Secretary's political staff made substantive edits to their own records before turning them over to the FOIA Office.¹⁵⁸

¹⁵⁷ *Id.* at 91-93.

¹⁵⁸ Papoi Transcript at 35.

Q Do you know of any circumstances in which substantive edits were made by the Front Office during this tagging process, as opposed to the normal back and forth you would have on their documents in which there's equity for them?

A Yes.

Q There were examples of substantive edits?

A There were substantive edits requested on records that were part of the Front Office review. However, there were also instances where those requests, after educating the Front Office on FOIA and just the statute in general, they would back down on their recommended edits.

Q So you can't think of any examples when the edits were actually made?

A Oh, yes. **There are examples where the Front Office specifically stated they wanted pieces of information redacted or altered prior to release.**¹⁵⁹

In many cases, Papoi was able to get the Secretary's political staff to back down on their recommended edits after referring to specific provisions in the FOIA statute.¹⁶⁰ However, she was not successful every time. Substantive edits were made to FOIA responses to requests for documents related to the American Recovery and Reinvestment Act and Umar Farouk Abdulmutallab, the so-called Christmas Day bomber.¹⁶¹

Q And were any of those edits ever finalized and included in the package that was sent out?

A Yes.

Q Can you give an illustration?

A For example, the ARRA-related responses were re-edited by the Front Office and some of those changes were incorporated. The requests pertaining to the Christmas Day, quote, unquote, underwear bomber, those responses were edited.¹⁶²

The FOIA Office was also concerned about delays. When career staff raised concerns to the Secretary's political staff, political appointees blamed the inadequacies of the response

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 36.

¹⁶² *Id.* at 35-36.

packages. The Secretary's political staff claimed the review process was lengthy because the responses required significant edits. Papoi e-mailed Callahan to explain her concerns:

The problem is that I currently have 98 requests that are tagged by the Front Office for tracking and forwarding to the Front Office. I simply don't have the time or staff to review all of those requests before we send them on. Quite honestly, we shouldn't have to as these are GS-15s (and SES in some cases) in the components writing and signing these letters Between dealing with OGC's constant stonewalling efforts, component pushback (over which I actually have no supervisory authority), and Front Office meddling/delays, I honestly don't know how we are expected to run an efficient disclosure program!¹⁶³

On December 15, 2009, Callahan responded:

From: Callahan, Mary Ellen
Sent: Tuesday, December 15, 2009 12:29 PM
To: Papoi, Catherine
Subject: RE: ***FRONT OFFICE REVIEW REQUESTED***

I know I know, I completely understand. With that said, when you get a support person, she/he can proof them (if they are still going up). This level of attention is CRAZY. I really really want someone to foia this whole damn process.

VI. The Bridis Story

The Department's review and approval policy came to light in a July 21, 2010 story by Ted Bridis of the AP. The story was based on documents obtained by the AP in response to a December 2009 FOIA request to DHS. The AP sought "all communication ... pertaining to Front Office oversight of FOIA operations at DHS" and for "all communications directing DHS FOIA staff to amend the protocol of processing requests and involvement of the Front Office and staff members in the review, approval and formulation of FOIA responses."¹⁶⁴ The AP sought documents dating from January 1, 2009 to the present.¹⁶⁵

The AP's request was itself subject to the slow-moving Front Office approval process.¹⁶⁶ The Department's response to the request was delayed for months. The AP sued, and the matter was referred to the Office of Government Information Services (OGIS).¹⁶⁷ Through mediation,

¹⁶³ E-mail from Catherine Papoi, Deputy Chief FOIA Officer, Department of Homeland Security, to Mary Ellen Callahan, Chief Privacy Officer, Department of Homeland Security (Dec. 15, 2009, 12:27p.m. EST).

¹⁶⁴ Kim Zetter, *Report: Political Appointees Vetted DHS Public Records Request*, wired.com, Jul. 22, 2010, available at <http://www.wired.com/threatlevel/2010/07/foia-filtered/> (last visited March 24, 2011).

¹⁶⁵ *Id.*

¹⁶⁶ Bridis.

¹⁶⁷ Letter from EPIC to OGIS Director Miriam Nisbet, Dec. 8, 2010.

the AP secured the release of more than 1,000 pages of agency records related to the Front Office review process.¹⁶⁸

The story spelled out the degree to which political appointees were involved in the Department's FOIA function. The AP reported:

For at least a year, the Homeland Security Department detoured requests for federal records to senior political advisers for highly unusual scrutiny, probing for information about the requesters and delaying disclosures deemed too politically sensitive

The department abandoned the practice after AP investigated. Inspectors from the department's Office of Inspector General quietly conducted interviews last week to determine whether political advisers acted improperly.

The Freedom of Information Act, the main tool forcing the government to be more open, is designed to be insulated from political considerations. Anyone who seeks information through the law is supposed to get it unless disclosure would hurt national security, violate personal privacy or expose confidential decision-making in certain areas.

But in July 2009, Homeland Security introduced a directive requiring a wide range of information to be vetted by political appointees for "awareness purposes," no matter who requested it.

Career employees were ordered to provide Secretary Janet Napolitano's political staff with information about the people who asked for records — such as where they lived, whether they were private citizens or reporters — and about the organizations where they worked.

If a member of Congress sought such documents, employees were told to specify Democrat or Republican.¹⁶⁹

* * *

The special reviews at times delayed the release of information to Congress, watchdog groups and the news media for weeks beyond the usual wait, even though the directive specified the reviews should take no more than three days.¹⁷⁰

¹⁶⁸ *Id.*

¹⁶⁹ Bridis.

¹⁷⁰ *Id.*

The foot-dragging reached a point that officials worried the department would get sued, one e-mail shows.¹⁷¹

* * *

The directive laid out an expansive view of the sort of documents that required political vetting.

Anything that related to an Obama policy priority was pegged for this review. So was anything that touched on a "controversial or sensitive subject" that could attract media attention or that dealt with meetings involving prominent business and elected leaders.

Anything requested by lawmakers, journalists, activist groups or watchdog organizations had to go to the political appointees. This included all of AP's information requests, even a routine one for records that had already been sought by other news organizations.

The Justice Department office that oversees FOIA across the federal government is unaware of any other agencies with similar mandatory review policies, spokeswoman Gina Talamona said.¹⁷²

In the story, DHS spokesman Sean Smith stated: "No information deemed releasable by the FOIA office or general counsel was withheld, and responsive documents were neither abridged nor edited."¹⁷³

Papoi testified that Smith's statement was not truthful.

Q The quote states, ... 'No information deemed releasable by the FOIA office or General Counsel was withheld.'

In what instance was that not a true statement? Can you describe for me some instance when that is not a true fact?

A Right. There were documents – I believe I give an example where someone in the Front Office had made a comment where they were swearing and there was also a comment about the way that the Secretary dresses, and those were withheld.

Q So in two instances, ... the FOIA office wanted to disclose something, and the Front Office came through and said they did not, and it was ultimately withheld.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

A And it was ultimately –

Q Not released, I guess?

A That is correct. And I should point out that generally the call would end up falling with General Counsel, they would go to General Counsel, and, again, David Palmer, and he would, instead of pushing back like I would have, he would generally just say, okay, fine, take it out.

Q And so do you know in these two instances whether [the] General Counsel's Office signed off on those and permitted those to be redacted?

A Yes, they did. And that is I believe why initially when you asked no information deemed releasable by the FOIA office. I think when you were questioning me, right, information deemed releasable by the FOIA office was withheld. As released to General Counsel intervening subsequently, then they would sometimes sign off on things that we would not have withheld in the FOIA office.

Q And are there any other instances, any other examples of this particular statement being not factually correct?

A There are other examples. Vania Lockett is the one that dealt with a lot of the actual documents and the redactions.¹⁷⁴

Between the date of the AP's FOIA request and the date Bridis's story was published, the Department made several significant changes to the FOIA function. The changes appear to have been strategically designed to shield the FOIA function from future scrutiny from the media and Congress.

A. *Sharepoint Comes Online*

In November 2009, the Department implemented an internal document control system. A Microsoft software package known as SharePoint was used to manage documents on the Department's intranet. Callahan testified:

The SharePoint system is essentially a document control system that allows access, editability, readability, for documents and other items. It can serve as an intranet-type of functionality, as I said, as well as a document management system.

¹⁷⁴ Papoi Transcript at 97-98.

The Department, prior to the launch of SharePoint, had no Department-wide document management system and in fact relied on shared drives and other, in my opinion, fairly cumbersome document management technologies. So as I said, it launched in early November, but was an iterative process as we kind of unrolled it and developed it.¹⁷⁵

In spring 2010, discussions began regarding incorporating SharePoint into the FOIA process to facilitate reviews of responses to significant requests. Those discussions took place during late March and early April between Callahan and Sandweg, who moved at that time from the Office of General Counsel to the Secretary's Office.¹⁷⁶ Sharepoint was designed to formalize the three-day "awareness" process by serving both as a repository for response packages and a notification system.

SharePoint became fully operational for FOIA document management in July 2010 and is currently in use today. On SharePoint, career FOIA professionals could upload FOIA cover letters and responsive documents. Once uploaded, the documents are sent to a distribution list in an e-mail with the heading: "FOIA Release Notification." The notification includes a link to the response package.

Callahan testified that recipients of the SharePoint notification include individuals in "the Office of Secretary, the Office of Public Affairs, Intergovernmental Relations and Office of Legislative Affairs"¹⁷⁷ The following is an example of how significant FOIA requests are provided to the Secretary's political staff for their review and approval:

¹⁷⁵ Callahan Transcript at 25.

¹⁷⁶ *Id.* at 26.

¹⁷⁷ *Id.* at 41.

From: Papoi, Catherine
Sent: Monday, August 16, 2010 9:26 AM
To: Callahan, Mary Ellen; Carte, Willard; Chandler, Matthew; Fetcher, Adam; Grant, Daniel; Grossman, Jordan; Holzer, James; Kayyeth, Juliette; Kudwa, Amy; Papoi, Catherine; Peacock, Nelson; Sandweg, John; Wiggins, Chani
Subject: FOIA RELEASE NOTIFICATION

On February 12, 2010, Fred Lucas, a reporter with the Cybercast News Service requested from the Department of Homeland Security (DHS) all communications and/or documents between the Department of Justice, the Federal Bureau of Investigation, the Department of Homeland Security; the Department of State, the Department of Defense, the White House/Executive Office of the President, the Transportation Safety Administration and Customs and Border Protection that refer or relate in any way, shape, or form to the following: 1) arrest of Umar Farouk Abdulmutallab; 2) whether or not and when to read Miranda rights to Umar Farouk Abdulmutallab; 3) whether or not to try Umar Farouk Abdulmutallab as a criminal; 4) whether or not to try Umar Farouk Abdulmutallab as an enemy combatant; 5) the protocol followed during Umar Farouk Abdulmutallab's arrest; 6) preparing Umar Farouk Abdulmutallab's criminal complaint; 7) Umar Farouk Abdulmutallab's indictment; and 8) immediate security-related response to Umar Farouk Abdulmutallab's arrest.

The DHS HQ response advises the requester that, absent consent from the individual, we could not search certain systems of records; therefore, our search produced negative results. This response has been uploaded to SharePoint (HQ Lucas August 13) and will be released on August 18, 2010:

<http://mgmt-sp.dhs.gov/privacy/FOIAReview/Shared%20Documents/Forms/AllItems.aspx?RootFolder=%2fprivacy%2fFOIAReview%2fShared%20Documents%2fComponent%20FOIA%20Releases%20%2d%203%20day%20advisement%2fHQ%20Lucas%20August%2013&FolderCTID=&View=%7bCA1CA97B%2d432D%2d4A4E%2dA924%2d09DF8E360F51%7d>

Having received the notification that a significant response package is ready for review, individuals with access to SharePoint can review the documents, and in certain instances, edit them. The recipients have three business days to review the response package. If the FOIA Office hears nothing after three days, the response package is released.

The Department made a concerted effort to make it appear the review process implemented in September 2009 had been abandoned in favor of a new system. FOIA Officers were instructed to refer to the three-day period as an “awareness” notification rather than a “review.”¹⁷⁸ Holzerland testified that he was instructed not to use the term “review” in the SharePoint notification messages:

Q Do you recall kind of any other changes that happened around that time, summer 2010, July 2010, in terms of the way significant requests were handled or just generally how the Department anticipated and then subsequently responded to the article?

A Yes.

Q Can you describe some of those changes?

A The process was – we were required to state that it was, that requests were forwarded for awareness versus for review. There is a very important distinction between, you know, there is different connotations to those terms. So we were told in no uncertain terms

¹⁷⁸ Holzerland Transcript at 77.

these requests aren't going forward for review, they are going for awareness.

Q So say in the subject line of an e-mail that you would be sending up to the Front Office you would no longer say for your review or for your approval, documents would be for your awareness?

A I believe they say three-day notification.

Q Three-day notification is the standard subject line?

A Yes.

Q When they go to the Front Office now. And that is the policy that is still in effect today?

A Yes, that is correct.¹⁷⁹

As with the approval process implemented in September 2009, the Front Office maintained the ability to stop response packages from going out the door. Papoi testified that political appointees are able to issue a "do not release" order to the FOIA Office:

Q After 3 days, what happens?

A They go out the door, unless the Front Office or Mary Ellen asks us to hold them back, to pull them back.

Q Why might they ask you to pull them back?

A Generally the reason given is they need further review.

Q So during the 3 days, when you have sent up a list of significant requests that are 3 days away from being released, somebody in the Front Office reviews the cover letter and the documents and has the option of saying do not release?

A Correct.

Q So essentially what we have is a policy where if they do not notify you that they object to the release, then the documents go out after 3 days, but they reserve the right to hold the release?

A Yes.

¹⁷⁹ Holzerland Transcript at 77-78.

Q That is the policy presently in place and has been in place since approximately the summer of 2010?

A That is correct. That is correct.¹⁸⁰

On March 28, 2011, Callahan announced the three-day clearance window was reduced to a single day. In a Department-wide e-mail to FOIA Officers, Callahan stated:

Going forward, the timing on the SharePoint Awareness Review will be one business day, changed from the original three business days. The process remains the same -- upload the response letter and responsive documents, and inform the DHS Privacy Office that the documents are ready, and the location of the documents on SharePoint system (and notify other FOIA officers as relevant). If no problems or inconsistencies are identified, you should send out the production the next day. Of course, as always, if you have to meet a deadline (FOIA, litigation, etc.), just put it into the notification, we can of course work around your schedules.¹⁸¹

The reduction of the review period built into the SharePoint system from three days to one represents an acknowledgement that finalized FOIA responses should not be subject to additional delays. Still, any process in which the Secretary's political staff has the opportunity to stall a release is problematic.

¹⁸⁰ Papoi Transcript at 104.

¹⁸¹ E-mail from Mary Ellen Callahan to DHS FOIA Officers, Mar. 28, 2011.

B. The Secretary's Political Staff Clears Responses over the Phone

FINDING: Political appointees stopped using e-mail to clear response packages in the second quarter of 2010. Instead, they contacted the career staff in the FOIA Office by telephone.

Having learned the hard way that the written communications regarding the Department's FOIA process are themselves subject to FOIA, political appointees stopped using e-mail to clear response packages. Once SharePoint was brought online, the Secretary's political staff stopped providing written clearance to release significant FOIA responses.

An e-mail exchange between Lockett and Callahan on August 19, 2010 shows the degree to which the Secretary's political staff and OGC approval remained a part of the SharePoint system. According to Lockett: "The Front Office is no longer providing written clearance on any of these requests. Instead they are cleared via telephone."¹⁸²

From: Lockett, Vania
Sent: Thursday, August 19, 2010 7:04 PM
To: Callahan, Mary Ellen; Papoi, Catherine
Subject: RE: FOIA RELEASE NOTIFICATION

Mary Ellen,

The Reuven Blau request was uploaded to SharePoint on July 28 for Front Office clearance. I was advised via telephone on August 6 that this response was cleared for release. My understanding is that Clint coordinates the reviews with Sandweg. When Clint clears on a response, my assumption is that it has been reviewed by Sandweg.

The Front Office is no longer providing written clearance on any of these requests. Instead they are cleared via telephone. However, I do try to keep notes (see attached) of when the phone calls occur. Since you have indicated that Sandweg did not review these documents, I will pull this request back and return it to the list of requests pending Front Office review. It has been pending since July 28.

Thanks.

Vania

From: Callahan, Mary Ellen
Sent: Thursday, August 19, 2010 6:30 PM
To: Lockett, Vania; Papoi, Catherine
Cc: Callahan, Mary Ellen
Subject: FW: FOIA RELEASE NOTIFICATION

Vania, who cleared on this? Sandweg said he didn't review this. As we have discussed, for all responses that deal directly with the Front Office (s1, s2, COS), we should be certain to not only get Clint-level approval but also Sandweg as Counselor to the Secretary. Please pull this back and do not send out until he clears. Vania or Catherine (not sure if you have AWS tomorrow), please send him the documents directly, just so he can review.

Thanks a lot. Please make sure we follow this procedure going forward.

¹⁸² E-mail from Vania Lockett, Associate Director, Disclosure & FOIA Operations, Department of Homeland Security, to Mary Ellen Callahan, Chief Privacy Officer, Department of Homeland Security (Aug. 19, 2010, 7:04 p.m. EST).

The e-mail exchange shows the Secretary's political staff moved away from written clearance of records after the Bridis story was published. The other witnesses corroborated Lockett's testimony about the new clearance process. Papoi testified that the "Front Office started calling our office if they had any issues instead of e-mailing. They stopped sending e-mails."¹⁸³

Q Okay. Just jumping around again, we talked a little bit earlier when we came to the point in the timeline where the Ted Bridis article was released in July 2010, you mentioned that in advance of that release, you just knew it was coming, and that was about when the policy changed to what it is now.

A Correct.

Q Were there any other changes, and what I am specifically kind of referring to here, the way the Front Office communicated to the FOIA office change in any way?

A The Front Office started calling our office if they had any issues instead of e-mailing. They stopped sending e-mails. And, additionally, they, as I said, now it is really political-to-political communication. It is very rare that they will talk to careerists.

Q So when the report of significant requests – there is still a weekly report, is that right?

A Yes.

Q When the weekly report goes up or when a 3-day advance notice goes up to the Front Office, you typically don't hear back from them on e-mail?

A No. Never. No.

Q Never?

A No. Not any more.

Q Since the summer of 2010?

A Right.

Q If they have a question or concern, they call someone in your office?

¹⁸³ Papoi Transcript at 115.

A Correct.¹⁸⁴

C. The OGC Stops Releases

FINDING: The SharePoint notification system simplified the approval process for significant requests. Although the FOIA Office no longer needs an affirmative statement of approval from the Secretary’s political staff, the Front Office retained the ability to halt the release of a FOIA response.

The implementation of the SharePoint system simplified the reporting requirements for the career staff in the FOIA Office by allowing some responses to go out the door without any input from the Secretary’s political staff. Most significant FOIA responses are uploaded onto SharePoint and circulated to the Secretary’s political staff as a “three-day advisement.”¹⁸⁵ In cases where they hear nothing after three days, the career staff can release the response package without having to follow-up with the Secretary’s political staff to get formal approval.

Still, the Secretary’s political staff retained the ability to halt the release of a FOIA response. Some significant FOIA responses are required to receive “active concurrence” prior to release.¹⁸⁶ Holzerland testified that active concurrence is substantially similar to approval.

Q Three-day notification. What does the Front Office do, as far as you know?

A What they do is a mystery to me. But I am told that they will review what is going out for awareness purposes.

Q And so they, on day 1, day 2, day 3, they are reviewing the package presumably. Now when day three expires and you haven't heard back from them what do you do?

A There are two separate categories within this process. There are those that are advisement. I think the way this is couched now is there is three-day advisement; hey, this is going out the door in three days, and there is no active concurrence required. And then there is some that require active concurrence.¹⁸⁷

* * *

Q I think concurrence to me sounds like another way of saying approval, is that fair?

¹⁸⁴ *Id.* at 114-115.

¹⁸⁵ Holzerland Transcript at 78.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

A Yes, it sounds that way to me too.¹⁸⁸

Shlossman testified that the Secretary's political staff and OGC can both initiate the process by which a release is stopped from going out the door. According to Shlossman, if the political appointees in the Front Office had concerns about a release, they notified OGC. OGC reviewed the concerns of the Secretary's political staff and advised them whether or not to proceed with release.

Q During that time period between the notification and the release, can the Front Office ask the FOIA Office not to release the response?

A The Front Office could refer any concerns to OGC for review. But again, the Front Office throughout this process has not directed the FOIA Office not to release documents.

Q So if the – when the Front Office is made aware by SharePoint that a response is going to go out and they identify something that OGC should have a look at, how does that happen? Is that also on SharePoint now?

A I don't believe so. I think it's simply a matter of someone giving someone else a call or sending an e-mail asking them to look at something. But since OGC is also on this list it gives them greater visibility, and they obviously have access to the documents and can review them at their convenience as well.¹⁸⁹

Papoi testified that Sandweg had final decision authority for clearance of responses that required active concurrence.

Q Do you know what John Sandweg's role was at this point?

A Not with 100 percent certainty. All I do know is that both Jordan Grossman and Willard Carte would indicate they were following up with John Sandweg on the status of requests for clearance.

Q So they seemed to be seeking an all-clear from him?

A That's correct.¹⁹⁰

Callahan testified that responses are released after three days “absent a review that indicates there is something substantively wrong”¹⁹¹

¹⁸⁸ *Id.* at 79.

¹⁸⁹ Shlossman Transcript at 110-111.

¹⁹⁰ Papoi Transcript at 40.

Q When the SharePoint notification goes out on a certain day, 3 days later what happens?

A Absent a review that indicates that there is something substantively wrong with the review, at that point the FOIA response is sent out. So, unlike the beginning part when we had to e-mail back and forth, in this circumstance it is, FYI, this response is going to go out, and then after 3 days the FOIA officer sends it out as a matter of course.

Q So if the FOIA officer hears nothing back after 3 days, the response goes out.

A Yes.¹⁹²

Papoi testified that in one case, a response to a significant request was halted by Deputy Associate General Counsel David Palmer. In response to questions from the Committee Democratic staff, Papoi testified that Palmer halted the release of a responsive draft document so the Department could wait until the Secretary publicly released a final version.

Q Are there, and maybe this is the part I misunderstood, are there other – if they stopped during that 3-day process, which I think you said rarely happens, if at all?

A It does happen, but it is rare, yes.

Q What would be the reasons?

A If it needs – if it warrants further review. And these are explanations I have been given. If a response warrants further review. If they are, say, short staffed for whatever reason and they need some more time. For – I mean, if they want to send it up to OGC, I guess that is warranting further review. If they want to make changes to the documents.

I don't know. There may have been other reasons, but I just – oh, **there was the one with David Palmer. They didn't want one going out because they thought it would be more appropriate to wait until the Secretary issued a final document as opposed to releasing the draft. Things of that nature.**¹⁹³

¹⁹¹ Callahan Transcript at 28-29.

¹⁹² *Id.*

¹⁹³ Papoi Transcript at 120-121.

Senior FOIA Specialist Mark Dorgan testified that he also recalled being told to hold off on releasing a request because management was waiting for a final report to be issued.

Q Have there been any cases where you did hear back and said don't send –

A There was one case, yes.

Q Can you talk about that one?

A There was a response that was some management issue and I put it out there and then Catherine sent an e-mail saying hold off on this one and I held off. And then I had to go back to people and ask why and then finally 2 weeks later I got the okay and sent it out.

Q When you asked around to find out why, what did you learn?

A I think they were waiting on a report to be released or something like that.¹⁹⁴

Papoi further testified that she did not believe the OGC held up responses to improve their quality. She assumed that responses were being held up to allow OGC to make redactions or to allow the Department's Office of Political Affairs to coordinate the timing of the release.

Q Do you know what that review involves? Is it searching for additional documents to improve the quality of the response?

A I hope not. Cast your net once. I hope not.

Q So if the Front Office isn't looking to improve the quality of the response in terms of identifying more responsive documents, can we assume they are making redactions or otherwise editing the response?

A Correct. Correct.

Q Or making no changes and simply holding it for timing purposes?

A Precisely.¹⁹⁵

Documents obtained by the Committee show that David Palmer and John Sandweg were responsible for halting releases on behalf of the OGC and the Office of the Secretary, respectively. On August 12, 2010, Catherine Papoi sent a SharePoint notification for an

¹⁹⁴ Transcribed Interview of Mark Dorgan, Transcript at 66 (March 7, 2011) (on file with author) [hereinafter Dorgan transcript].

¹⁹⁵ Papoi Transcript at 105.

impending response to an Associate Press request for documents related to the attempted bombing of a flight bound for Detroit on Christmas Day 2009.¹⁹⁶ The notification alerted recipients that the response would be released on August 16, 2010, nearly five months after the date of the request.¹⁹⁷

Callahan responded to the Sharepoint notification:

The production is not going to be produced on August 11, it needs to undergo an additional review by OGC for privileged information. It will be removed from SharePoint until after the review.¹⁹⁸

Papoi subsequently instructed Vania Lockett to send the responsive documents to David Palmer in the Office of General Counsel. Papoi also stated:

Please let him know this is a high priority and we need a fast turnaround. You may want to mention this is the case that S1 wanted as a high priority, right? Not to mention we granted expedited processing... It would have been nice if the Front Office mentioned they wanted OGC review when they originally cleared this! MEC [Mary Ellen Callahan] said that that additionally John Sandweg wants to socialize with Amy A. and Noah in the Front Office before it goes out the door. I told MEC they already know that these documents were requested, but John S. called from Arizona and asked that we pull it back she he can tell Amy and Noah that we are releasing it.¹⁹⁹

Papoi testified that Sandweg and Palmer were in fact both able to stop or delay responses to significant requests, such as those related to the Christmas Day bomber or the American Reinvestment and Recovery Act (ARRA).

A Yes, the General Counsel's Office I believe was involved. Again, I think it was David Palmer. The person though that made the ultimate call on the ARRA documents though was John Sandweg. He seemed to be the one that made all of the ultimate decisions on all of the releases. David Palmer could weigh in, but it was Sandweg who made the ultimate determinations.

Q Was that in his role as the Chief of Staff to the Office of General Counsel?

A No. No. That was in his role as adviser, senior adviser to the Secretary.²⁰⁰

¹⁹⁶ E-mail from Catherine Papoi to Mary Ellen Callahan et al, Aug. 12, 2010, 11:03 AM.

¹⁹⁷ *Id.*

¹⁹⁸ E-mail from Mary Ellen Callahan to Catherine Papoi et al, Aug. 12, 2010, 11:52 AM.

¹⁹⁹ E-mail from Catherine Papoi to Vania Lockett, Aug. 12, 2010, 12:33 PM.

²⁰⁰ Papoi Transcript at 103.

VII. Mismanagement of Requests for Documents from the Office of the Secretary

In addition to implementing an approval process that burdened career staff and delayed responses, the Secretary's political staff also mismanaged searches for and production of its own documents in response to FOIA requests.

Requests for records in the custody and control of the Office of the Secretary are handled differently than FOIA requests for documents that originate in the components. Lockett testified that all records that originate in the Office of the Secretary, such as requests for the Secretary's calendar, must be cleared by political appointees.

Q Did the process for those change when you went to the 3-day advanced notification policy? Or did you still have to wait for clearance to release calendar requests?

A We did still have to wait for clearance, but that would be the case for any record that actually originated with the Front Office. So that wasn't unusual.

Q So any record that originates in the Front Office, even after switching over to the 3-day advanced notice policy, still required formal clearance to release?

A Yes. Yes.

Q Is that still the policy, as far as you know?

A Yes.²⁰¹

As custodian of the documents in these cases, political appointees have even greater involvement in the FOIA process. Political staff, with the full support of the Office of General Counsel, took steps to shield themselves from embarrassment at the expense of honoring the letter and spirit of the statute.

Documents and witness testimony show that political considerations were an important factor in the process for responding to requests for Front Office documents ("Front Office equity" requests). Additionally, the lack of FOIA experience among the Secretary's political staff adversely affected the quality of responses to such requests. Because the Secretary's political staff ran ineffective searches for their documents and had them pre-screened by OGC before forwarding them to the career FOIA staff, requesters did not get full and complete responses.

²⁰¹ Lockett Transcript at 68.

A. Political Appointees Suggested Their Own Redactions

Political staff in the Office of the Secretary attempted to insert themselves in the process of applying redactions within weeks of starting at the Department. In February 2009, a request for certain directives issued by Secretary Napolitano was submitted by the AP. Shlossman testified that the AP was seeking: “specific requests that the Secretary made at the very beginning of the administration to gather information from the components.”²⁰²

Lockett was charged with obtaining the documents from the Office of the Secretary. On February 25, 2009, at 4:31 PM, Shlossman was copied on an e-mail from Lockett to Deputy Assistant Secretary Amy Kudwa in which she advised the Secretary’s political staff “[The FOIA Office] simply needs copies of the documents so that we can review and respond to the FOIA request.”²⁰³

Lockett was following up with Kudwa because she had been advised that the Office of Political Affairs did not have the documents the AP requested. Shlossman was familiar with the documents; she immediately offered some unsolicited legal advice to Kroloff and staff in the Office of Public Affairs. Four minutes after receiving Lockett’s e-mail, Shlossman e-mailed: “All the docs from the oral briefs are pre-decisional. Nothing’s ready to be released.”²⁰⁴

Kudwa responded:

Understood – what the FOIA office does is review the documents, redact out all the pre-decisional and other protected information, and submit back to the office that provided them for review. We will absolutely review before anything is released, but there is an expectation that materials be provided to the FOIA office for their review of what is releasable.²⁰⁵

²⁰² Shlossman at 76.

²⁰³ E-mail from Vania Lockett to Amy Kudwa, Feb. 25, 2009, 4:31 PM EST.

²⁰⁴ E-mail from Amy Shlossman, Deputy Chief of Staff, Department of Homeland Security, to Amy Kudwa, Public Affairs Office, Department of Homeland Security (Feb. 25, 2009, 4:35 p.m. EST).

²⁰⁵ E-mail from Amy Kudwa, Public Affairs Office, Department of Homeland Security, to Amy Shlossman, Deputy Chief of Staff, Department of Homeland Security (Feb. 25, 2009, 5:16 pm. EST).

From: Shlossman, Amy
Sent: Wednesday, February 25, 2009 6:21 PM
To: Kudwa, Amy; Smith, Sean; Kroloff, Noah
Subject: RE: FOIA Requests From AP Concerning S1 Directives

Thanks.

Can we make the case that all of the materials are pre-decisional at this pt since the Secy hasn't gotten any paper from the components yet?

I'm concerned about releasing info before she's had the opportunity to go through the materials, ask follow-up questions and make decisions accordingly.

From: Kudwa, Amy
Sent: Wednesday, February 25, 2009 5:16 PM
To: Shlossman, Amy; Smith, Sean; Kroloff, Noah
Subject: RE: FOIA Requests From AP Concerning S1 Directives

Understood -- what the FOIA office does is review the documents, redact out all the pre-decisional and other protected information, and submit back to the office that provided them for review. We will absolutely review before anything is released, but there is an expectation that materials be provided to the FOIA office for their review of what is releasable.

From: Shlossman, Amy
Sent: Wednesday, February 25, 2009 4:35 PM
To: Kudwa, Amy; Smith, Sean; Kroloff, Noah
Subject: Fw: FOIA Requests From AP Concerning S1 Directives

All of the docs from the oral briefs are pre-decisional. Nothing's ready to be released.

From: Lockett, Vania
To: Kudwa, Amy
Cc: Clark-Moo, Loren; Kroloff, Noah; Smith, Sean; Shlossman, Amy; Simmons, Caroline
Sent: Wed Feb 25 16:31:47 2009
Subject: RE: FOIA Requests From AP Concerning S1 Directives
Amy (Kudwa),

Per our conversation last week, my understanding was that OPA did not have the documents. My office simply needs copies of the documents so that we can review and respond to the FOIA request. Please clarify.

I can be reached at [REDACTED] if you have questions.

Thanks.

Vania

Lockett's testimony before the Committee corroborated Kudwa's understanding of how and by whom redactions are applied. Lockett testified:

Q Who applies the exemptions? Who makes the determination an exemption applies?

A The Privacy Office makes the final determination.²⁰⁶

²⁰⁶ Lockett Transcript at 12-13.

Shlossman's failure to understand her role in applying exemptions, as of February 25, 2009, might be attributable to the fact that she was new to the Department. She assumed the position of Deputy Chief of Staff in January 2009.²⁰⁷ Lockett, on the other hand, had extensive experience managing the Department's FOIA operation. She described more than five years of FOIA experience at DHS alone in her testimony to the Committee.

Q How long have you been in the Department's FOIA operation?

A I came to the Department somewhere, I believe, around January or February of 2006 as a contractor. And I came onboard as a Federal employee in December of 2006.

Q Can you describe for us your prior experience or training that prepared you to take on the role as a FOIA officer?

A Prior to coming to DHS, I spent several years working for the Department of Defense as a contractor doing FOIA support and managing several different FOIA contracts, processing FOIA requests, as well as some declassification work. And then, since coming to DHS, I've been responsible for managing the headquarters' FOIA program.²⁰⁸

B. The OGC Withheld Documents

FINDING: Original versions of documents that were heavily redacted before being released to the Associated Press show the Office of General Counsel relied on exception (b)(5) – normally meant to protect pre-decisional records– to prevent the release of embarrassing records.

Despite the clear instruction from Kudwa on February 25, 2009, to leave redaction decisions to the highly-trained specialists in the FOIA Office, Shlossman continued to advise the Secretary's political staff to withhold documents. Unable to convince Kudwa and Lockett to withhold documents in February, Shlossman later found a more willing partner in the OGC. In an e-mail conversation with then-OGC Chief of Staff John Sandweg on March 26, 2009, Shlossman expressed aggravation that an unidentified "damn FOIA lady" had been going around her "for the past two months."²⁰⁹

Sandweg advised Shlossman not to worry. He replied to Shlossman: "Bottom line, we can hold your stuff for a while."²¹⁰

²⁰⁷ Shlossman Transcript at 5.

²⁰⁸ Lockett Transcript at 6.

²⁰⁹ E-mail from Amy Shlossman to John Sandweg, Mar. 26, 2009, 5:33 PM EST.

²¹⁰ E-mail from John Sandweg to Amy Shlossman, Mar. 26, 2009, 5:35 PM EST.

Shlossman, apparently drawing on her experience “responding to [FOIA] requests”²¹¹ while serving then-Governor Napolitano in Arizona, advised Sandweg not to release the documents:

From: Shlossman, Amy
Sent: Thursday, March 26, 2009 5:42 PM
To: Sandweg, John
Subject: RE: Go straight to me next time!!!

We need to hold this for a long time. Nothing should be released- it's all pre-decisional.

From: Sandweg, John
Sent: Thursday, March 26, 2009 5:35 PM
To: Shlossman, Amy
Subject: RE: Go straight to me next time!!!

Jesus.

No worries, it is just that Button's head is already giant and he is bugging.

Bottom line, we can hold your stuff for a while.

Catch you tomorrow.

John R. Sandweg
Chief of Staff
Office of the General Counsel


From: Shlossman, Amy
Sent: Thursday, March 26, 2009 5:33 PM
To: Sandweg, John
Subject: RE: Go straight to me next time!!!

I didn't go to him and i wouldn't have.

That damn FOIA lady went straight to him.

She's been going around me for the past two months.

From: Sandweg, John
Sent: Thursday, March 26, 2009 5:29 PM
To: Shlossman, Amy
Subject: Go straight to me next time!!!

We do the FOIA and GAO stuff. If you don't go to me, I have to work with him and that is getting old.

The (b)(5) exemption, which covers pre-decisional records and communications, was a frequent tool used by OGC to withhold Front Office equity documents. The OGC used FOIA exemption (b)(5) inappropriately and excessively to avoid releasing embarrassing material.

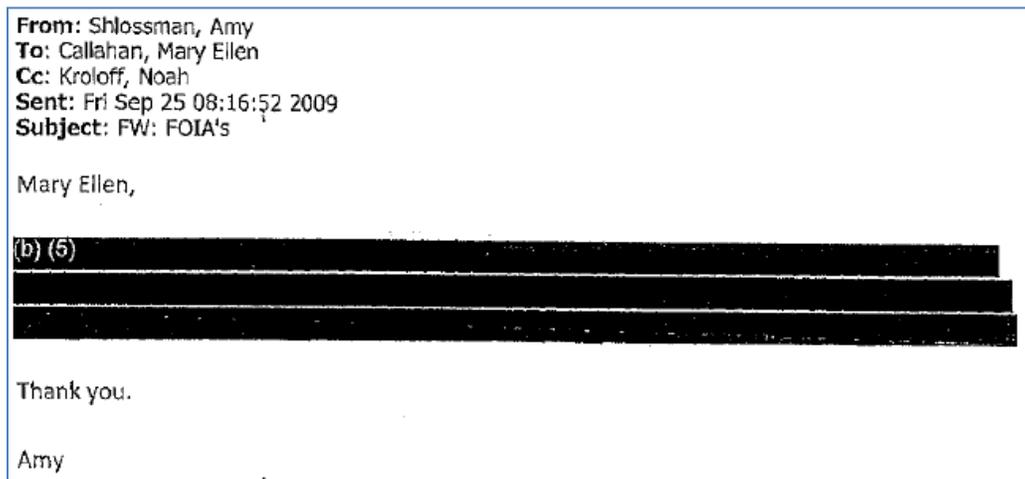
Pursuant to the FOIA statute, exemption (b)(5) protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in

²¹¹ Shlossman Transcript at 5-6.

litigation with the agency.”²¹² The courts have interpreted exemption (b)(5) to include all the privileges available under civil discovery rules.²¹³ One of the most commonly invoked privileges under exemption (b)(5) is the “deliberative process privilege.”²¹⁴ To invoke the privilege, the agency must demonstrate that (1) the communication is pre-decisional,²¹⁵ and (2) the communication must be deliberative, or in other words, “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.”²¹⁶

The OGC’s reliance on (b)(5) to prevent public relations problems was apparent in the redactions made to the documents released to the Associated Press in response to the January 2010 request for information about political involvement in the FOIA process. In its response, DHS made a number of redactions under exemption (b)(5). The Committee obtained unredacted versions of the documents produced to the AP. The documents show that OGC misapplied the (b)(5) exemption to withhold embarrassing e-mails.

The Department used (b)(5) to withhold a September 25, 2009 e-mail from Shlossman to Callahan.



The un-redacted document showed an e-mail message discussing the implementation of a new policy about which Kroloff had been fully briefed. Shlossman was neither developing a new policy nor deliberating about whether or not to implement the policy. She was delivering clear and unambiguous instructions to the Chief Privacy Officer.

²¹² Freedom of Information Act, 5 U.S.C. § 552(b)(5) (2007).

²¹³ Department of Justice, Freedom of Information Act Guide, May 2004, Exemption 5, <http://www.justice.gov/oip/exemption5.htm> [hereinafter DOJ FOIA Guide Exemption 5]; *see also* United States v. Weber Aircraft Corp., 465 U.S. 792, 800 (1984); *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1184 (D.C. Cir. 1987).

²¹⁴ *See supra* note 212 at 79.

²¹⁵ *Jordan v. United States Dep’t of Justice*, 591 F.2d 753, 774 (D.D.C. 2000) (the communication must be “antecedent to the adoption of an agency policy); *see also id.*

²¹⁶ *Vaughn v. Rosen*, 523 F.2d. 1136, 1143–1144 (D.C. Cir. 1975); *see also id.*

From: Shlossman, Amy
To: Callahan, Mary Ellen
Cc: Kroloff, Noah
Sent: Fri Sep 25 08:16:52 2009
Subject: FW: FOIA's

Mary Ellen,

Not sure what the confusion is, but please know this request is coming directly from the front office and Noah has been fully briefed. Can you please have your staff forward the actual FOIA requests that are included in our weekly reports each week so we can refer to them as needed.

Thank you.

Amy

The Department similarly used (b)(5) to withhold the content of a September 25, 2009, e-mail from Holzerland to Callahan, Lockett and Papoi.

From: Holzerland, William
Sent: Friday, September 25, 2009 9:42 AM
To: Callahan, Mary Ellen; Lockett, Vania; Papoi, Catherine
Subject: RE: FOIA's

(b) (5)

The un-redacted document showed a three-word e-mail message.

From: Holzerland, William
Sent: Friday, September 25, 2009 9:42 AM
To: Callahan, Mary Ellen; Lockett, Vania; Papoi, Catherine
Subject: RE: FOIA's

This is bananas!

The content of Holzerland's e-mail represented his thoughts about the new policy Shlossman described in her September 25, 2009 e-mail to Callahan. Holzerland's e-mail expressed the author's personal opinion about the latest evolution in the Front Office review process. It is neither part of the deliberative process nor is it pre-decisional. It is simply embarrassing to the Department's political appointees.

Papoi testified that she has little confidence in OGC's ability to properly redact responsive documents. Having seen the documents released to the AP, Papoi believed redactions were applied inconsistently and improperly:

I do not consider [OGC attorney David Palmer] to have expertise in FOIA. There have been several times I have had to educate him on some very basic concepts.

Q So if David Palmer in the General Counsel's Office was signing off on a change or suggesting an edit, do you have confidence that that would be an appropriate edit, or are you saying you won't have confidence in that?

A I would not have confidence in it. Actually, the Ted Bridis request is a very good example. I was recused from that request, as were my subordinates and Mary Ellen Callahan, for obvious reasons, we were named in it, so OGC processed that request; namely, David Palmer was in charge of the processing of the request. And when I looked at the final product after it was released, inconsistent redactions, improperly redacted information. I did not have confidence in his FOIA abilities. He is a great lawyer. It is just FOIA isn't his – it isn't most people's specialty.²¹⁷

Papoi also testified that she recalled a case where a responsive document was withheld because it contained embarrassing language. According to Papoi, the FOIA Office was prepared to release the document:

Q So redactions –

A And those would be the redactions. For instance, information that is embarrassing.

Q Right.

A There was one instance where Amy Shlossman, I believe she was swearing or she said something she felt was embarrassing, and we were going to release that, but that was withheld.²¹⁸

The documents show that the Secretary's political staff attempted to edit and amend responsive documents to avoid embarrassment. When the Secretary's calendar was requested, political staff in the Office of the Secretary noticed that Secretary of State Hillary Clinton was improperly referred to as "Senator Clinton." The Secretary's political staff pressured the FOIA Office to allow them to act as if the search had not been tasked so they could correct the mistake. Then, the FOIA Office could redo the search and retrieve the amended calendar. The career professionals in the FOIA Office refused. Career staff in the FOIA Office informed the Secretary's political staff they would "under no circumstances alter agency records before they are released to 'avoid embarrassment.'"²¹⁹

Papoi testified that a staffer in the Office of the Secretary still has not forgiven her for releasing the unedited version of the Secretary's calendar.

²¹⁷ Papoi Transcript at 93-94.

²¹⁸ *Id.* at 72.

²¹⁹ E-mail from Catherine Papoi to Vania Lockett, Aug. 9, 2010.

Q So Clint aka Willard Carte is in the Front Office. Can you explain to us the conversation that he and Vania had about altering records?

A Yes. The record in question was the Secretary's calendar, and Mary Ellen Brown, her scheduler, had referred to Secretary Clinton as Senator Clinton in the record, and they, they being the Front Office, wanted that changed before the response went out the door and we were pushing back saying that once you cast your net and retrieve a record, you can't alter a record because of mere embarrassment.

Q So that mistake, calling Secretary Clinton "Senator," was something that was identified in the course of gathering the documents in response to this request?

A That is correct.

Q So at this point, to use the term you just used, once you cast your net, the documents that you catch are considered to be in their final format?

A Correct.

Q They are no longer living documents that can be edited?

A Precisely.

Q Do you treat documents that way because of the statute?

A Yes. Once you have retrieved the records, they lose, as you said, the living nature where they are evolving, and the statute requires that you retrieve the records and then process them.

DOJ has also opined that you don't cast your net twice, you cast once. You retrieve the records and you process them. So they also suggested making the changes and then recasting our net, and it was explained that also was unacceptable.

Q So they essentially asked you to act as if the first net hadn't been cast?

A Correct.

Q To ignore it. Vania responds to you that same day, she says she let Clint know that I am not going to alter the record, but he did not clear on it.

A Correct.

Q Do you know what ultimately happened with that request and how it was responded to?

A I refused to let it go out the door altered, and so we released it as Senator Clinton, and Mary Ellen Brown still will not talk to me today.²²⁰

The OGC's overreliance on (b)(5) to withhold embarrassing documents is problematic regardless of context. It is even more questionable in light of the President's guidance on how the federal government should handle FOIA requests that capture embarrassing documents. The President's January 2009 FOIA memorandum was unambiguous: **"[t]he Government should not keep information confidential merely because public officials might be embarrassed by disclosure."**²²¹

C. The Misadventures of Mark Dorgan

Mark Dorgan was a member of Catherine Papoi's staff of career FOIA specialists.²²² Dorgan worked at DHS in the main FOIA Office for more than five years.²²³ He is certified in information privacy and FOIA.²²⁴ His responsibilities included identifying the scope of incoming FOIA requests, coordinating with the potential document owners, collecting the responsive documents, applying exemptions, and preparing a FOIA response package for final release.²²⁵

In January 2010, Dorgan was detailed to the Office of the Secretary to serve as the point of contact for FOIA requests with Front Office equities. Dorgan's move to the Front Office was intended to help "streamline the Front Office processing,"²²⁶ decrease delays, and help answer Front Office questions on FOIA.²²⁷

²²⁰ Papoi Transcript at 67-69.

²²¹ 2009 President's Memorandum, *supra* note 19 at 11.

²²² Papoi Transcript at 8.

²²³ Dorgan Transcript at 5-6.

²²⁴ *Id.* at 6.

²²⁵ E-mail from Mary Ellen Callahan, Chief Privacy Officer, Department of Homeland Security, to Phil McNamara and Mark Dorgan, Department of Homeland Security (Jan. 6, 2010, 7:12 p.m. EST).

²²⁶ Callahan Transcript at 21.

²²⁷ Holzerland Transcript at 65-66.

From: Callahan, Mary Ellen
Sent: Wednesday, January 06, 2010 7:12 PM
To: McNamara, Phil; Dorgan, Mark
Cc: Callahan, Mary Ellen; Papoi, Catherine; Sandweg, John; Shlossman, Amy
Subject: Introduction of the Front Office FOIA Specialist

Hi, Phil, hope you are doing well. Per our conversation with the Front Office last month, I wanted to introduce you to Mark Dorgan. As I mentioned in the meeting, you in the Executive Secretariat will distribute the Front Office FOIA requests; Mark will directly and personally process each of those FOIA responses once the documents have gathered. If I get a chance, I will bring Mark down for an introduction, but wanted to meet each other. As we discussed, if you can find Mark a desk near the Exec Sec, that would help facilitate the process.

Thanks again. Please let me know if you have any questions.

Best,
Mary Ellen

Dorgan's stay did not last long. In July 2010, he accepted an offer to be removed from his detail. Documents and witness testimony show that he felt uncomfortable working with the Secretary's political staff.²²⁸

From: Papoi, Catherine
Sent: Friday, July 16, 2010 9:58 AM
To: Lockett, Vania; Holzerland, William
Cc: Papoi, Catherine
Subject: Mark

Ok, I had to offer Mark the option to stop processing records for the front office. Mark said that he felt very awkward when Amy S. and Noah asked if he could processes their records cradle-to-grave to avoid having their records sent to us. I told Mary Ellen that I did not want to risk Mark deciding to leave DHS for another department b/c the front office made him feel so uncomfortable. He is too valuable an employee with too much institutional knowledge to risk losing him due to a few inexperienced political appointees. So, that puts us back to using ESec??

Papoi testified that Dorgan's presence in the Front Office did not improve the working relationship between the political staff and career FOIA professionals.

Q While he was over in the Front Office, did his presence there improve the coordination of the Front Office review?

A No. In fact, it complicated things. It also made Mark extremely uncomfortable working with the Front Office. They repeatedly asked him to go around my office, to not make waves, statements of that nature.

Q When you say go around your office, does that mean go directly to the components?

²²⁸ Papoi Transcript at 57-58; Holzerland Transcript at 68.

A Yes, regarding requested changes, things of that nature.

Q So rather than, as had been the policy before, to make edits or suggestions and then pass the package back to you to then coordinate with the component, Mark started going directly to the components with the Front Office changes?

A Well, that is what people in the Front Office wanted him to do. That is not what he was supposed to do. And he let me know right away that they were asking him to do this. He was very uncomfortable with it, given that I am his supervisor and actually – you know, he did this out of the goodness of his heart, but he ended up being berated one time by Mary Ellen for a request that she actually pulled back and blamed it on Mark, and then the final straw for Mark was when they repeatedly asked him to go around me and my office, and after he kept saying it makes me uncomfortable. So finally he indicated he no longer wanted to work with the Front Office.²²⁹

OGC pre-screened documents for the Secretary’s political staff

From the outset, Dorgan faced issues in his new role. After tasking the Secretary’s political staff to search for documents, he found it difficult to get progress reports. The Front Office document owners were often non-responsive. Dorgan testified: “I don’t always get an answer from them.”²³⁰

Holzerland testified that the Dorgan’s experiences dealing with non-responsive political staff in the Office of the Secretary were not what the President and Attorney General envisioned for this Administration.

A Well, one thing that the President said unequivocally in his memorandum issued on January 21, 2009 that Attorney General Holder expanded upon in his guidance issued March 15, 2009 was that additional bureaucratic hurdles have no place in the new era of open government. And to me, adding any sort of layer to any of the required – the already cumbersome processes is an impediment to transparency. So that is a concern.

Q So you felt what Mark was experiencing in the Front Office amounted to an impediment to transparency?

²²⁹ Papoi Transcript at 57-58.

²³⁰ Dorgan Transcript at 13.

A Yes, I did, actually.²³¹

Although it was the Department's well-established policy that career staff in the FOIA Office applied redactions, Dorgan found that the Secretary's political staff routinely handed their documents to the OGC for screening. Dorgan frequently received responsive documents not from the document owner, but from OGC staff.

Shlossman testified: "I generally just provide them [responsive FOIA documents] to the General Counsel's Office and let them make ... determinations [about redactions]."²³²

Having observed that it was the pattern and practice of the political staff to pass responsive documents through the OGC, Dorgan asked Papoi: "We might as well have OGC process the Front Office requests, no?"²³³

Dorgan testified that having OGC in the process caused delays. He stated that receiving documents directly from the political staff was the "most expeditious way to get them out."²³⁴

Q May 26, 2010, you write to Catherine, "We might as well have OGC process the Front Office request." Can you explain what you meant by that?

A Well, it looks like when the documents were supposed to come directly to me, they were going to other people.

Q So it was your expectation that responsive documents would come directly to you from Amy Shlossman or whoever had them tasked?

A That is the most expeditious way to get them out, yeah, because we get them in and send them right out so they can be reviewed.

Q And in this case in particular, and in other cases, people were handing their responsive documents to OGC, and then you would get the documents from OGC?

A In this case, yes, that is what happened in that one.²³⁵

The degree to which the OGC was impeding Dorgan's access to responsive documents became apparent when he attempted to process a response to another AP request in March 2010. The AP requested documents owned by six political appointees in the Office of the Secretary and

²³¹ Holzerland Transcript at 71.

²³² Shlossman Transcript at 77.

²³³ E-mail from Mark Dorgan, FOIA Officer, Department of Homeland Security, to Catherine Papoi, Deputy Chief FOIA Officer, Department of Homeland Security (May 26, 2010, 10:50:50 EST).

²³⁴ Dorgan Transcript at 60.

²³⁵ *Id.*

one former employee about the Christmas Day bomber.²³⁶ When a FOIA request implicates documents owned by a former DHS employee, FOIA Officers work with the Office of the Chief Information Officer (CIO) to conduct an electronic search. The CIO would then typically provide a CD-ROM containing responsive documents. Dorgan followed that procedure and, in this case, the CIO prepared a disc with documents owned by every employee named on the AP request, not just the former employee's.

Callahan instructed Dorgan to return the CD-ROM to the OGC. Callahan e-mailed Dorgan: "Sandweg said to use hard copies that will be provided by John Sandweg for Mr. Kroloff and Ms. Shlossman's e-mails."²³⁷

When Dorgan arrived at Sandweg's office, he was handed a set of hard copies. Dorgan handed Sandweg the disc.²³⁸ Dorgan immediately noticed that the stack of hard copies Sandweg gave him consisted of significantly fewer responsive documents than were contained on the CD-ROM.

Dorgan testified that he had never before been asked to swap a CD-ROM containing responsive documents for hard copies.

Q So you had a disc that contained all of Amy Shlossman's e-mails from those 2 days?

A Yeah.

Q And gave that to John Sandweg?

A Yes.

Q For him to review and pull responsive e-mails off of it?

A I don't remember how that actually – I remember going to his office with a disc and then he had the stack of papers and then I think I took the papers with me and left the disc there. I'm not really sure.

Q [In an April 7th, 2010 e-mail] from Catherine Papoi to Mary Ellen Callahan, towards the bottom of that paragraph Catherine writes 'this does not smell right and this is specifically why Eileen Sullivan did not want to limit the scope of her request.'

²³⁶ E-mail from Mark Dorgan, FOIA Officer, Department of Homeland Security, to Amy Shlossman, Deputy Chief of Staff, Erin O'Connor, and Caroline Simmons, Department of Homeland Security (March 30, 2010, 9:58 a.m. EST).

²³⁷ Dorgan Transcript at 33.

²³⁸ *Id.*

Did you think that there was something that did not smell right, to use Catherine's language, about the way things were being handled on this request, in terms of John Sandweg's involvement and the way the disc was being handled?

A I have never been asked to provide a disc to somebody when I already had the records, but this is – this is early on in the dealings with them, so I didn't really know how they operated or what their norms are. But –

Q So providing the disc to John Sandweg, that was not a part of the process that had been in place. Now you have been there it looks like about 3 or 4 months and this was the first time –

A Yes.

Q – you had been asked to provide a disc?

A Yes.

Q Catherine ... wrote 'if Mark is there to collect, review and process Front Office records, Sandweg should not be prescreening.' Is that what you thought John Sandweg was doing when you were giving him the disc?

A I didn't really – I'm not sure if he wanted to prescreen or if he wanted a record of his own or what. I wasn't really sure.

Q If John Sandweg hadn't asked for the disc, what would the process have been?

A Just to take the ones that I downloaded and use those as records and send them to the Privacy Office.²³⁹

* * *

Q The next e-mail chain from May 4th, 2010, which is almost a month later, Vania Lockett writes to Catherine Papoi, "We were advised that we should use the hard copies of e-mails provided by John Sandweg instead of the electronic copies. However, there are significantly fewer documents in the stack of hard copies, and we were not provided with any release recommendations. Do we know how or why certain documents were removed?"

²³⁹ *Id.* at 30-31.

Do you at this point know how or why certain documents were removed; why the stack of hard copies was smaller?

A I don't know. I mean, they usually deal in hard copies, so I am used to that, but I don't know why or how they removed them.

Q So the volume of e-mails and documents on the disk was greater than the stack of documents, the e-mails and records contained in the hard copies?

A That is what – yeah, this says it, yeah.²⁴⁰

Holzerland testified that he also was aware of an incomplete production of Front Office documents. According to Holzerland, the Secretary's political staff withheld embarrassing e-mails that were not otherwise exempt from the statute:

I can give you an example, a recent example, where a request touched on several components of the Department and the Front Office records were – records belonging to the Front Office were among those implicated, a search was conducted by the Front Office, among other components, ICE, and records were processed by ICE that were – the search conducted at ICE turned up additional records from the DHS Front Office that the search at the DHS Front Office did not turn up.

So there is a concern of, I mentioned – there is always a concern of adequacy of search, because you know depending on the search terms and other things we want to make sure that we have as few holes in the net as possible or eliminate them to the extent we can. And in this case, there were e-mails that were no serious national security concerns or anything of that nature, just embarrassing stuff, curse words, things like that, that did not show up in the DHS Front Office search, but when ICE's Front Office did the search did show up, and they were responsive to the request.²⁴¹

²⁴⁰ *Id.* at 34-35

²⁴¹ Holzerland Transcript at 83.

Political appointees improperly limited searches

FINDING: Documents and witness testimony show political appointees run weak and incomplete searches for their own documents. They were allowed to choose their own search terms despite lacking a basic understanding of the statute.

Dorgan tasked political appointees to conduct searches for responsive documents on a request-by-request basis. Dorgan’s tasking included date ranges, subject matter, and in some cases suggested search terms. However, Dorgan was unable to ensure that his assignments were being carried out. In an e-mail to Callahan, he wrote: “I can task requests out, but I am limited in my ability to force people to perform proper searches.”²⁴²

Dorgan testified that the tasking sheet he sent to Front Office staff was a template that he filled out. The tasking sheet was a resource that political staff could refer to while conducting a document search; it contained information meant to be helpful.

A This is how I task things out. I basically send them a request stating – a request is usually attached to this stating what we are looking for. And in this one, there was a time frame scope. So I included the dates. I kind of gave them search words – if you're checking your e-mail, you don't necessarily know what to look for. So I –

Q On the task sheet that would be attached to this e-mail?

A Yes.

Q And that would contain suggested search terms and any other instructions?

A Yeah. It is kind of an information sheet they can use to search for.

Q Is that a document that you would draft?

A It is a template and then I just kind of fill in.

Q There are blanks that you fill in?

A Yeah.

Q For search terms and date range?

²⁴² E-mail from Mark Dorgan, FOIA Officer, Department of Homeland Security, to Mary Ellen Callahan, Chief Privacy Officer, and Catherine Papoi, Deputy Chief FOIA Officer, Department of Homeland Security (March 5, 2010, 3:37 p.m. EST).

A Yes.

Q And other helpful information?

A Yes.²⁴³

Holzerland testified that Dorgan expressed general concerns about the way the Secretary's political staff conducted searches for responsive documents:

Q Do you remember [Mark Dorgan] describing to you any other concerns or any other specific issues he was having ...?

A Yes.

Q Can you describe those?

A I do recall Mark expressing to me, and a lot of this is verbal, that he had concerns with some of the searches that were being conducted, whether or not adequate searches were being made, that he was – he was concerned we were not capturing records that may have existed that may have been responsive. But again, it is one of those things it is very difficult to empirically prove. I don't have direct knowledge of that. You know, this is all secondhand.

Q I have heard you use the term, and I have heard other folks use the term casting a net in reference to conducting a search?

A Yes.

Q So he was concerned that the net wasn't being cast wide enough or maybe there were some holes in the net, to continue the metaphor?

A He was concerned there were holes in the net.²⁴⁴

Documents show that Dorgan's concerns were well-founded. When AP reporter Eileen Sullivan requested e-mails to and from Shlossman, Kroloff, and Deputy Secretary Jane Holl Lute "related to the BP oil spill," Dorgan sent a tasking e-mail to their assistants. Dorgan asked that each individual "perform a search of e-mails that relate to the BP oil spill using a time frame of April 20, 2010 to May 13, 2010"²⁴⁵

Shlossman conducted a search for e-mails containing the exact phrase "oil spill." She advised Kroloff to do the same.²⁴⁶ Even though Kroloff was unsure what search terms to use, he

²⁴³ Dorgan Transcript at 10-11.

²⁴⁴ Holzerland Transcript at 68-69.

²⁴⁵ E-mail from Mark Dorgan to Daniel Grant, Erin O'Connor, and Lauren Kelly, May 13, 2010, 3:55 PM.

²⁴⁶ E-mail from Amy Shlossman to Noah Kroloff, May 17, 2010, 8:52 AM.

did not consult the Front Office's in-house FOIA expert. Dorgan testified that Shlossman and Kroloff never asked for his guidance.

Q So no one ever came back to you with the question, 'What date range should we use?'

A No.²⁴⁷

By limiting their searches to e-mails that contained the exact phrase "oil spill," it is likely that Shlossman and Kroloff did not capture all responsive documents. For example, responsive e-mails that did not contain the exact phrase "oil spill" but discussed the "spill," "BP," "Deepwater Horizon," "Gulf of Mexico," and other terms easily associated with the BP oil spill would not be produced.

Shlossman further diminished the quality of the Department's response to the Sullivan request by incorrectly limiting the date range in which she searched for e-mails. Despite Dorgan's clear instruction to search for e-mails between April 20, 2010 and May 13, 2010, Shlossman only searched through April 30, 2010:

From: Shlossman, Amy [REDACTED]
Sent: Monday, May 17, 2010 8:59 AM
To: Kroloff, Noah; Shlossman, Amy; McNamara, Phil; Sandweg, John
Subject: Re: 10-14A Sullivan Request

I think dorgan made that up. No reason for it. Letter is dated 4/30.

From: Kroloff, Noah [REDACTED]
To: Shlossman, Amy [REDACTED]; Kroloff, Noah [REDACTED]; McNamara, Phil [REDACTED]; Sandweg, John [REDACTED]
Sent: Mon May 17 08:54:02 2010
Subject: RE: 10-14A Sullivan Request

Isnt it to 5/13?

From: Shlossman, Amy [REDACTED]
Sent: Monday, May 17, 2010 8:52 AM
To: Kroloff, Noah; McNamara, Phil; Shlossman, Amy; Sandweg, John
Subject: Re: 10-14A Sullivan Request

I used "oil spill" from 4/20-4/30, when the request was sent.

From: Kroloff, Noah [REDACTED]
To: McNamara, Phil [REDACTED]; Shlossman, Amy [REDACTED]; Sandweg, John [REDACTED]
Sent: Mon May 17 08:49:31 2010
Subject: FW: 10-14A Sullivan Request

So, what exactly is my search term on this?

Shlossman wrongly believed that the end date for a search range is established by the date the request was sent. She further believed that Dorgan "made ... up" the end date of May 13, 2010. She was wrong.

²⁴⁷ Dorgan Transcript at 58.

Dorgan testified that he did not make up the date range. He specifically tasked Shlossman to conduct a search for e-mails through May 13, 2010 based on his understanding of the statute.

Q Based on your understanding of the statute, do you believe that the request covers documents –

A Yeah, to May 13th. So that is what...

Q So when Amy Shlossman says, I think Dorgan made that up –

A I didn't make that up.

Q You didn't pull May 13th, 2010, out of thin air?

A No, no.

Q When she in the second sentence says, "No reason for it. Letter is dated 4/30," does the date on the letter factor into the date range, or is it the date that it is tasked?

A The date that it is tasked out.²⁴⁸

Dorgan's understanding of FOIA is correct. Shlossman's is not. It is well-established that the date range covered by a FOIA request runs through the date the search is conducted. The Code of Federal Regulations states that the cut-off date for a search for responsive FOIA documents is the date the search is initiated.²⁴⁹ Federal courts have consistently held the same.²⁵⁰

As of the date of her interview with the Committee, Shlossman was still unaware that the date range for her search was improper. She testified that she based her understanding of search ranges on her FOIA experience working for then-Governor Napolitano in Arizona.

Q So the – is there any basis in the statute for your understanding that the date on the request letter is the date through which documents should be searched for?

²⁴⁸ *Id.* at 57-58.

²⁴⁹ 6 C.F.R.s.5.4(a) "In determining which records are responsive to a request, a component ordinarily will include only records in its possession as of the date the component begins its search for them. If any other date is used, the component shall inform the requester of that date."

²⁵⁰ *See, e.g.,* Edmonds Inst. v. United States Dep't of the Interior, 383 F. Supp.2d 105 (D.D.C. 2005). In *Edmonds*, the court found that the Department of the Interior acted properly in setting its cut-off date as the date the search began, in fact finding that the agency *must* include records through the date the search begins. The Court also reiterated that "[t]he D.C. Circuit has all but endorsed the use of date-of-search as the cut-off date for FOIA requests." (*Edmonds Institute* at 111). (*See also* Public Citizen, v. Dep't of State, 276 F.3d at 637 (D.C.Cir. 2002), stating that the appropriate cut-off was the date of the search, unless another date was specified. The *Edmonds* court also noted it is the "fair and sensible outcome" to use the date of search as the cut off. (*Edmonds* at 111).

A No. I was actually just basing that on personal experience. In Arizona it was always the date that it was sent, that that's the date you pulled from.

Shlossman testified that she never went back to retrieve responsive e-mails through May 13, 2010 – the proper end date for the search.

Q Do you know whether eventually you went back and retrieved the additional e-mails to the May 13th date?

A I don't believe I did.²⁵¹

Shlossman's decision to limit her search to e-mails that contained "oil spill," coupled with her failure to search within the proper date range, did not constitute a good faith effort to be responsive to Eileen Sullivan's FOIA request. The incomplete search could expose the Department to litigation; at the very least, Shlossman's effort failed to meet the standards set forth in the President's and the Attorney General's memoranda on FOIA.

Tension between career and political staff persists

FINDING: As recently as December 2010, hostility towards career FOIA professionals by the Department's political appointees continued. To date, three of the four career staff interviewed by the Committee have been transferred, demoted, or relieved of certain responsibilities.

Even after Dorgan stopped tasking out Front Office searches, hostility towards career FOIA professionals by the Department's political appointees continued. In a December 9, 2010 e-mail from Mary Ellen Callahan to John Sandweg, she stated: "I have idiots for staff."²⁵²

²⁵¹ Shlossman Transcript at 119.

²⁵² E-mail from Mary Ellen Callahan to John Sandweg, Dec. 9, 2010.

From: Callahan, Mary Ellen [REDACTED]
Sent: Thursday, December 09, 2010 11:57 AM
To: Sandweg, John
Subject: Re: Foia annual report

I have idiots for staff. To whom shd it be addressed? They are saying s1 only. Is that right?

Mary Ellen Callahan
Chief Privacy Officer
Department of Homeland Security
[REDACTED]

----- Original Message -----

From: Sandweg, John [REDACTED]
Sent: Thursday, December 09, 2010 11:23 AM
To: Callahan, Mary Ellen [REDACTED]; Sandweg, John [REDACTED]
Subject: Re: Foia annual report

Not sure. I "approved with comment" and noted that cover memo needed to be changed.

----- Original Message -----

From: Callahan, Mary Ellen [REDACTED]
Sent: Thursday, December 09, 2010 11:21 AM
To: Sandweg, John [REDACTED]
Subject: Re: Foia annual report

Are you fucking kidding me? Ok.

Is it with dayton now?

Mary Ellen Callahan
Chief Privacy Officer
Department of Homeland Security
[REDACTED]

The persistent degradation of career staff by the Secretary's political appointee raises doubts that a professional and efficient FOIA function can be implemented by current management. To date, three of the four career staff interviewed by the Committee have been transferred, demoted, or relieved of certain responsibilities. Papoi was demoted effective March 14, 2011. She is currently on unpaid medical leave. Lockett requested to go on detail in January 2011. She testified that she "needed a break from FOIA."²⁵³ Dorgan requested to be removed from the Front Office in July 2010.

Meanwhile, political appointees who came to the Department early in 2009 continue to have a significant role in the FOIA response process. Holzerland testified that DHS has not improved its FOIA performance during their tenure.

Q Do you think that more information is being disclosed, for example, by DHS? Is more information being disclosed following those policy changes versus before; under this administration versus the last one. Or, do you see any changes?

²⁵³ Lockett Transcript at 70.

A So you are asking for my opinion. My opinion is that that is difficult to measure. All in all, I would say no, there is not more transparency. ... But I would say, on balance, I see little difference.

The reduction of the overall FOIA backlog does not justify the significant review process

At every turn, the Department has touted the successful reduction of the FOIA backlog during this Administration.²⁵⁴ In a January 28, 2011 letter to Chairman Issa, the Department stated that reduction of the backlog is “an important achievement, and one that matters to the leadership of our Department.”²⁵⁵ The Department summarized the accomplishments of the FOIA Office in a letter to Chairman Issa on February 4, 2011:

As we noted in our previous letter, we are proud of our accomplishments, having reduced the FOIA backlog while processing a record number of FOIA requests in a record amount of time. In fact, over the past two years this Department has processed 25 percent of all the FOIA requests submitted to the executive branch - far more than any other Federal agency.²⁵⁶

The Department relies on these statistics to defend the involvement of political appointees in the FOIA function. Documents and witness testimony show the reduction of the backlog is a red herring. Requests that pass through the Secretary’s political staff are in fact substantially delayed. Catherine Papoi testified that the bulk of the current backlog is comprised of requests that are with the Secretary’s political staff:

A They also have claimed rather recently that the backlog reduction is the result of the Front Office review. And that is absolutely not the case. At headquarters level, all of our backlog cases are with the Front Office.²⁵⁷

The Front Office seems to be attributing that backlog reduction to their Front Office review, and I am not sure how reviewing records lowers the backlog.

²⁵⁴ See, Letter from Mary Ellen Callahan to Ranking Member Issa, Aug. 18, 2010; Letter from Nelson Peacock to Chairman Darrell Issa, Jan. 28, 2011; Letter from Nelson Peacock to Chairman Darrell Issa, Feb. 4, 2011. Mary Ellen Callahan also touted the reduction of the Department’s backlog in a staff briefing on Sept. 17, 2010.

²⁵⁵ Letter from Nelson Peacock to Chairman Darrell Issa, Jan. 28, 2011.

²⁵⁶ Letter from Nelson Peacock to Chairman Darrell Issa, Feb. 4, 2011.

²⁵⁷ Papoi Transcript at 43.

Q So, to summarize what you are saying, DHS was able to achieve these significant reductions in backlog despite the Front Office review, not because of it?

A That is correct.²⁵⁸

On March 14, 2011, the AP reported that DHS dumped 3,800 delayed requests on the State Department each month to reduce its own backlog. The story also disclosed that much of the Department's backlog reduction is attributable to the work of contractors approved during the previous Administration. According to the AP:

Some federal agencies showed marked improvements, but sometimes it came at a cost elsewhere in the government. The Homeland Security Department cut its number of backlogged information requests by 40 percent last year, thanks mostly to work under a \$7.6 million federal contract with TDB Communications of Lenexa, Kan., which was approved during the Bush administration. The company accomplished its work partly by forwarding to the State Department tens of thousands of requests for immigration records from Homeland Security's Citizenship and Immigration Services because the State Department makes visa determinations in immigration cases. At one point, as the Homeland Security Department was reducing its backlog, it was sending as many as 3,800 cases each month to the State Department, said Janice DeGarmo, a State Department spokeswoman.

The State Department received and handled three times as many requests in 2010 than the previous year. It ended up with a backlog of more than 20,500 overdue cases, more than twice as many as the previous year.²⁵⁹

Holzerland testified that a significant portion of the backlog was in fact reduced by forwarding unanswered requests on the State Department.

A So in this instance, we are talking about 30,000 requests where the alien files in question had State Department records for whatever reason. Those requests were referred to State for a direct response to the requester. So literally, boxes on pallets were dumped on the State Department when we had done our portion of the processing, and so they had an unexpected influx of requests from us.

Q I know the DHS overall backlog has been reduced significantly, I don't have the numbers here with me. And I don't mean, in any way, to diminish that accomplishment, because I am sure tons of hard work went into it from you and the rest of the staff. But in this case, it sounds like that at least those 30,000 requests, they

²⁵⁸ *Id.* at 44.

²⁵⁹ Assoc. Press, *Promises, Promises: Little Transparency Progress*, Mar. 14, 2011.

weren't responded to. So while 30,000 came [off] the books at DHS they went on the books somewhere else.

A As I mentioned clearly in my e-mail, my concern is the requester. And though we got those off our books, which is great, and we got the requests moving along through the process, since we do not own State Department's records, we can't make a determination on them. At the end of the day those 30,000 requests are still sitting somewhere in the Federal Government. So while it is a victory in some ways that we have gotten – they could theoretically have sat at USCIS even longer before being referred, but in that case we got them out the door so our portion was done but the requester is still waiting.

Q When you said the "requester still gets shafted," you mean that this reduction of the backlog didn't benefit any requesters?

A It is not that it didn't benefit any requesters necessarily ... but they are still waiting on a portion of it, so they don't have the complete file. **So they are still sitting by their mailbox waiting, which has got to be frustrating.**²⁶⁰

Unlike the Department's political appointees, Holzerland and his peers in the FOIA Office recognized the bottom line: to get responsive documents to requesters as quickly as possible. This view of FOIA is consistent with the spirit of the President's FOIA memorandum and Attorney General Holder's guidance.

²⁶⁰ Holzerland Transcript at 72-73.

VIII. The DHS Office of General Counsel Obstructed the Committee's Investigation

During the week of January 10, 2011, the Committee obtained documents that called into question the statements made by Callahan during the September 2010 briefing. On January 14, 2011, Chairman Issa asked the Department to produce documents, including e-mails, to clarify the role of political appointees in the Department's FOIA review and response process.²⁶¹

A. *The Department did not cooperate with the Committee's requests for documents*

FINDING: On January 14, 2011 and again on February 1, 2011, the Committee requested a narrow set of documents. The Department took more than a month to produce a total of 2,145 pages, of which approximately 1,000 were off-the-shelf documents previously released to the AP. Because negotiation of the pace of documents production became an impediment to advancing the investigation, the Committee suspended its document request.

The Department was asked to produce the following information by January 29, 2011:

- Electronic communications and memoranda between and among personnel in the Office of the Secretary and the Office of General Counsel relating to FOIA request, review and response guidelines and procedures;²⁶²
- Electronic communications and memoranda between and among personnel in the Office of the Secretary and the Office of General Counsel relating to specific FOIA requests that were reviewed by any person outside of the DHS FOIA office;²⁶³ and,
- Memoranda to or from Chief Privacy Officer Mary Ellen Callahan and staff in the DHS Privacy Office relating to FOIA request, review and response guidelines and procedures.²⁶⁴

The Department gave no indication that it would not be able to comply by the deadline in the January 29, 2011 deadline. Moreover, if the statements made by Callahan at the September 2010 briefing were accurate, the request would have covered a relatively small universe of documents.

²⁶¹ Letter from Chairman Darrell Issa to Secretary Janet Napolitano, Jan. 14, 2011.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

The Department responded to the Chairman's letter on January 28, 2011.²⁶⁵ In a two-page letter from Assistant Secretary for Legislative Affairs Nelson Peacock, the Department pledged to cooperate with the Committee's investigation.²⁶⁶ By the January 29, 2011 deadline, however, the Department had produced no documents.

Chairman Issa subsequently learned that on or about January 20, 2011, the Office of General Counsel instructed staff not to search for responsive documents.²⁶⁷ Furthermore, the Department's FOIA officers were advised that DHS Associate General Counsel Joe Maher would coordinate the response and provide all future instructions.

----- Original Message -----
From: Kropf, John [REDACTED]
Sent: Thursday, January 20, 2011 08:24 AM
To: Papoi, Catherine [REDACTED]; Kropf, John W [REDACTED]
Subject: Re: Work

Catherine
Per Joe Maher, we are to NOT search for documents responsive to the Issa request, to stand down on that issue asap, all future instructions will come from Maher.

Sent from my BlackBerry Wireless Handheld. Typed with all thumbs so please excuse typos.

This directive called into question the Department's pledge to identify and produce documents expeditiously.

In his January 28, 2011 response to Chairman Issa, Peacock stated that the Department had "made public over a thousand pages of documents, participated in several interviews, and provided briefings to [Committee] staff as well as to other congressional offices regarding FOIA requests."²⁶⁸ That statement was disingenuous. As of the date of his letter, DHS had produced only six pages of documents and provided one briefing to the Committee. Incidentally, the majority of the documents provided were created during the previous Administration.²⁶⁹

Furthermore, it was the substance of the single briefing provided by the Department that required Committee staff to spend much more time and resources uncovering the truth than would have been otherwise necessary. During the briefing touted by the Department in its January 28, 2011 response, Callahan had the opportunity to disclose the true role of the Secretary's political staff in the FOIA response process. Instead, she assured Committee staff

²⁶⁵ Letter from Assistant Secretary Nelson Peacock to Chairman Darrell Issa, Jan. 28, 2011.

²⁶⁶ *Id.* The Department stated: "We are also in the process of retrieving other responsive documents you requested and will make them available for your review expeditiously."

²⁶⁷ E-mail from Deputy Chief Privacy Officer to Deputy Chief FOIA Officer Catherine Papoi, Jan. 20, 2011.

²⁶⁸ *See supra* note 262 at 2.

²⁶⁹ In an Aug. 18, 2010 response to a letter from Ranking Member Issa dated July 30, 2010 requesting documents and information related to DHS FOIA response policies and practices, the Department provided six pages of original documents consisting of three memoranda dated Feb. 9, 2005, Aug. 4, 2006, and July 7, 2009. The Department also made Chief Privacy Officer Mary Ellen Callahan available for a briefing on Sep. 17, 2010. In a Jan. 28, 2011 response to Chairman Issa's document request dated Jan. 14, 2011, the Department did not include any documents.

their role was left unchanged from the prior Administration. When the Committee obtained evidence to the contrary, a great deal of time and resources were dedicated to figuring out the truth of the matter.

Because the Department had yet to produce a single document in response to his January 14, 2011 request, Chairman Issa wrote another letter to Secretary Napolitano on February 1, 2011.²⁷⁰ To advance the Committee's investigation, Chairman Issa requested expedited production of a narrow set of documents, most of which had been previously gathered and released in response to a FOIA.²⁷¹ The Chairman requested:

1. Documents released to the Office of the Inspector General (OIG), the Associated Press, and other congressional offices;²⁷²
2. E-mail between DHS personnel and the White House;²⁷³ and,
3. Responsive e-mails to or from Front Office personnel regarding FOIA.²⁷⁴

On February 18, 2011, more than a month after the Chairman's initial request for documents, the Department had produced a total of 2,145 pages, of which approximately 1,000 were off-the-shelf documents previously released to the AP. Because negotiation of the pace of documents production became an impediment to advancing the investigation, the Committee suspended its document request at that time. The Department subsequently notified the Chairman:

To fulfill the various requests from the committee, we ... diverted 15 lawyers and more than six other support staff away from their existing responsibilities at the Department of Homeland Security. To date, Department employees have logged more than 700 hours responding to requests from the Committee, and provided transcribed interviews with senior Department officials. We have delivered more than 3,000 pages of responsive documents to the Committee.²⁷⁵

The assertion that it took 21 OGC staff more than 700 hours to identify and produce 3,000 pages of documents is highly suspect. Many of these documents were already gathered in response to a previous FOIA request from the AP and available on the DHS website. OGC's response brought its own competence and professionalism into question.

²⁷⁰ Letter from Chairman Issa to Secretary Napolitano, Feb. 1, 2011.

²⁷¹ *Id.*

²⁷² *Id.* On August 31, 2010, Inspector General Richard Skinner initiated a review of the Department's FOIA policies and procedures. In July 2010, the Office of General Counsel released 1,051 pages of documents to the Associated Press in response to a January 5, 2010 FOIA request from Ted Bridis for internal memoranda and e-mails related to front office involvement in the FOIA process. At the time of Chairman Issa's request, heavily-redacted versions of those documents were available online in the Department's Electronic Reading Room.

²⁷³ *Id.* E-mail to and from the White House is easily identifiable by the handle "@who.eop.gov."

²⁷⁴ *Id.*

²⁷⁵ Letter from Assistant Secretary Nelson Peacock to Chairman Darrell Issa, Mar. 16, 2011.

B. The Department obstructed the Committee's access to witnesses

FINDING: OGC lawyers did not negotiate the terms of witness interviews in good faith. Over three weeks of negotiation, OGC did not communicate to witnesses that the choice to appear was theirs to make, despite representing to the Committee that OGC would do so. Additionally, OGC representatives pressured one witness to allow them to participate in the planning of, and be present during, her interview.

The Chairman also requested transcribed interviews of six DHS employees.²⁷⁶ Committee staff entered into negotiations with the Office of General Counsel over the terms under which the witnesses would be made available for interviews. The Committee subsequently learned that OGC lawyers did not negotiate in good faith.

During the three weeks of negotiation, OGC did not communicate to any of the six employees that the choice to appear was theirs to make. After repeated requests to convey this message were ignored, it became clear the Department had no intention of giving witnesses the option to appear voluntarily. The failure by OGC to communicate this information to agency employees may be contrary to legal ethics requirements. Just as an attorney is obligated to communicate information relating to an offer of settlement to his client, OGC lawyers may have been required to communicate the Committee's offer to appear without a subpoena.

At impasse, the Committee had no choice but to deliver two subpoenas on February 22, 2011, one to Deputy Chief FOIA Officer Catherine Papoi and one to FOIA Specialist Mark Dorgan. The Department subsequently agreed to allow witnesses to sit for transcribed interviews, and the subpoenas were withdrawn.

Dorgan testified that aside from being notified by a fellow career FOIA Office colleague – not OGC – of the February 1, 2011 letter requesting an interview, he heard nothing at all from the OGC until a subpoena showed up with his name on it.

Q Prior to the subpoena, was it explained to you that you had the option to appear voluntarily?

A No.

Q So when you were notified that there was this February 1st letter from Chairman Issa in which your name appears –

A Yeah, I saw the letter with my name on it February 3rd or something like that.

Q You saw it where?

²⁷⁶ See *supra* note 267 at 99.

- A I think Bill sent it to me.
- Q So you read the full letter, saw your name was in it and knew you might –
- A Be having to go here.
- Q You were in the mix at that point?
- A Yeah. Yes.
- Q But no one explained to you what your options were at that point?
- A No. I just kind of sat by and waited for someone to mention something.
- Q And then the next time you heard was when there was a subpoena with your name on it delivered?
- A Yes.
- Q And you were notified?
- A Yes.
- Q After that time, were you notified that you still had the option of appearing voluntarily?
- A No. They just said that on this day, keep this week free, you know, they might want to talk to you. That is their way of explaining it.²⁷⁷

Between February 1 and February 22, 2011, Committee staff asked both OGC lawyers and officials in the Office of Legislative Affairs whether the witnesses would agree to appear voluntarily, or whether a subpoena was required to compel their attendance. The officials never conveyed this message to the witnesses. That tactic made clear the Department used career FOIA officials as pawns to force the Chairman to issue testimonial subpoenas.

Additionally, OGC representatives made a number of inappropriate requests to Papoi through her private counsel. DHS lawyers pressured Papoi, through her counsel, to allow them to be present during her interview.²⁷⁸ OGC Representatives also requested that Papoi's counsel allow DHS to negotiate the parameters of her testimony and to coordinate the date thereof.²⁷⁹ As was her right, Papoi did not allow OGC representatives to attend her interview.

²⁷⁷ Dorgan Transcript at 71-72.

²⁷⁸ See Letter from Chairman Darrell Issa to Secretary Napolitano, Mar. 16, 2011.

²⁷⁹ Letter from Assistant Secretary for Legislative Affairs Nelson Peacock to Chairman Darrell Issa, Mar. 16, 2011.

The Department's maneuvering slowed a congressional investigation and interfered with the Committee's access to witnesses. Obstructing a congressional investigation is a crime.²⁸⁰ Additionally, denying or interfering with employees' rights to furnish information to Congress is against the law.²⁸¹ Congress relies on truthful testimony from witnesses to identify waste, fraud and abuse in the federal government. Federal officials who retaliate against or otherwise interfere with employees who exercise their right to furnish information to Congress are not entitled to have their salaries paid by taxpayer dollars.²⁸²

C. A Department lawyer attempted to steal Committee documents

After a witness interview on March 4, 2011, a Department lawyer attempted to remove Committee documents from the interview room. During the interview, Committee staff introduced 13 exhibits. All documents entered as exhibits during the interview were obtained by the Committee in the course of its investigation into political interference with the Department's FOIA function.

After the interview concluded and the court reporter packed her equipment, Attorney Reid Cox attempted to leave the room with the Committee's exhibits in his bag. Committee staff asked Cox if he had the exhibits in his bag, and he confirmed that he did. Cox was admonished by Republican and Democratic staff that he was not permitted to leave with the exhibits. Democratic staff advised Cox that the exhibits are Committee documents and as such, they are the property of the Committee and cannot be removed without permission. Cox explained that the Department disagreed with that position and he moved toward the door.

²⁸⁰ 18 U.S.C. § 1505 states, in pertinent part: Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress -- Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

²⁸¹ 5 U.S.C. § 7211 states: The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.

²⁸² P.L. 111 -117 § 714 states: No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who -

- (1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee; or
- (2) removes, suspends from duty without pay, demotes, reduces in rank, seniority, stats, pay, or performance of efficiency rating, denies promotion to, relocates, reassigns, transfers, disciplines, or discriminates in regard to any employment right, entitlement, or benefit, or any term or condition of employment of, any other officer or employee of the Federal Government, or attempts or threatens to commit any of the foregoing actions with respect to such other officer or employee, by reason of any communication or contact of such other officer or employee with any Member, committee, or subcommittee of the Congress as described in paragraph (1).

Republican staff advised Cox to leave the exhibits and contact the Committee to discuss the matter. Cox had a counter-proposal: “How about I take the exhibits, and you call me?”

Cox was further advised not to leave the room with the exhibits. He stated that he needed to call his boss. When he returned, he requested that the record be re-opened so he could state an objection. Cox stated:

As counsel for DHS, I object to counsel for the committee's refusal to allow exhibits they had shown to the witness and that all are e-mail messages from DHS personnel to DHS personnel on their official DHS-issued accounts and use of e-mail services. These are not committee records, these are, rather, DHS records; and so there is no reason the committee should be able to prevent us from taking them, since they have shown them to the witness and used them in this interview.²⁸³

* * *

I mean, I guess I would note also for the record that because the committee – because the records have no origination nor creation or editing by the committee, other than redactions, it seems to me the committee has no reason to be able to exercise any control over those documents, and that they retain the nature of being DHS documents.²⁸⁴

In fact, the Committee does have a reason to exercise control over its documents. Documents obtained by the Committee in the course of an investigation are frequently produced by sources who wish to remain anonymous. In some cases, a source could be identified through scrutiny of the records produced to the Committee.

In this case, because the documents introduced during the interview were internal Department e-mails, the Department had no need to take them. The Department has full access to every document used during the March 4, 2011 interview and every other interview. Because the Department already had access to the documents, and because leadership in the Office of General Counsel (OGC) apparently instructed Cox to take the exhibits, Republican staff were concerned the Department was attempting to identify the Committee's source.

Any attempt to steal Committee documents is a serious matter. If the motive for stealing Committee documents is to use them to conduct a forensic investigation to identify a Committee source, it creates an extremely sensitive situation. The Department was notified that any future efforts to remove documents would not be tolerated. In a March 4, 2011 e-mail to Assistant Secretary for Legislative Affairs Nelson Peacock, Republican staff stated:

[W]e have had some bizarre exchanges with your lawyers. They keep trying to steal the exhibits we show the witnesses. The Committee's rules

²⁸³ Holzerland Transcript at 97.

²⁸⁴ *Id.*

don't allow the exhibits to leave with the witness. This is not a Republican or Democratic matter. It is just the way we have always done it.

This has actually become somewhat of a problem. This afternoon, after being expressly told not to leave with the exhibits, Mr. Reid Cox took possession of the exhibits, placed them in his satchel and closed the satchel. During this attempted document theft, both Republican and Democratic lawyers were admonishing him.

After this exchange, Mr. Cox demanded that the court reporter allow him to make an objection on the record. The court reporter had to unpack her equipment and re-setup everything just so he could make some wacky argument that the documents the committee has obtained during the course of its investigation, were not in fact committee documents.

We do not have to allow OGC to attend these things. If they are going to act out like this, we will revisit our position.²⁸⁵

D. OGC lawyers advised a witness not to answer important questions

During her interview, Shlossman confirmed that since SharePoint was brought online, the Office of General Counsel has stopped a FOIA release from going out the door. She was advised by DHS Deputy General Counsel not to answer questions about OGC's role in stopping responses.

Q So someone from the General Counsel's Office would notify someone in the FOIA Office, do not send, there is – you know, then they would state their concern?

A I would assume so.

Q Are you aware of any times that something like that has happened?

A Yes.

Q Can you describe those times?

Mr. Maher. Just to interject, I'll direct the witness not to answer to the extent your answer calls for discussions about legal advice provided by the lawyers.

Ms. Shlossman. I would defer to that.²⁸⁶

²⁸⁵ E-mail from Republican staff to Nelson Peacock, Mar. 4, 2011, 6:07 PM.

²⁸⁶ Shlossman transcript at 112.

Maher's instructions to Shlossman prevented the Committee from hearing testimony from the Secretary's political staff about OGC's role in stopping responses from going out the door. Whether there is an opportunity for Secretary's political staff and OGC employees to delay or withhold responses is a key question in the Committee's investigation of the adequacy of the current significant review process.

IX. Conclusion

The Secretary's political staff views FOIA through the prism of politics. Public relations were a major consideration when the political staff considered how to handle significant FOIA responses. It comes as no surprise that the involvement of political staff lacking a sophisticated understanding of the statute led to a dysfunctional FOIA response process.

The Secretary's political staff failed to recognize that they are servants of the public. They are entrusted to place the interests of the American people ahead of their own. In the case of FOIA, political appointees were more concerned with protecting themselves from embarrassment than running an effective disclosure program. The extent of the mismanagement of the FOIA function at DHS calls into question the competence and commitment of high-level staff charged with protecting the homeland from serious threats.

During this Administration, the significant FOIA response process evolved from a weekly report of significant FOIA activity to an approval process that caused delays and confusion. This is not what the President envisioned when he proclaimed on his first day in office the arrival of a new era of openness and transparency.

Appendix

Table of Appendices:

1. Timeline of the evolution of the DHS process for responding to significant FOIA requests
2. Explanation of FOIA Exemptions
3. Catalog of improper redactions applied by OGC to the response to the December 2009 AP FOIA request
4. Timeline of the Committee's investigation
5. Letter from Chairman Darrell Issa to Secretary Janet Napolitano re: the demotion of Catherine Papoi (Mar. 16, 2011)
6. Letter from Assistant Secretary Nelson Peacock to Chairman Darrell Issa re: the demotion of Catherine Papoi (Mar. 16, 2011)
7. E-mail from Republican staff to Assistant Secretary Nelson Peacock re: his letter dated March 16, 2011 (Mar. 17, 2011)

APPENDIX 1

DHS "Significant FOIA" Process Timeline

January 2009: New Administration

- The new Administration inherits the prior Administration's "significant FOIA" weekly report.

February 2009: Excessive Questions

- The Secretary's political staff started asking excessive questions about the identity and intent of requesters to the career staff in the FOIA Office.

July 1, 2009: FOIA 101 Meeting

- Career staff attempted to educate the political staff about the fundamentals of FOIA in an attempt to curb the excessive questions. No improvements or positive changes came from the meeting.

September 24, 2009: Attaching FOIA Requests

- FOIA Office was required to attach all actual FOIA requests to the weekly report.

September 30, 2009: Approval Process

- The Secretary's political staff implemented an "approval process" – any flagged FOIA requests were required to receive approval before being released.

October 6, 2009: All Significant Media FOIA Requests Flagged

- The Secretary's political staff flagged all significant media FOIA requests in the weekly reports for approval.

December 2009: Bridis Request

- Ted Bridis of the AP filed a FOIA request to DHS regarding the DHS FOIA process.

January 2010: All Significant FOIA Requests Flagged

- The Secretary's political staff flagged all significant FOIA requests in the weekly reports for approval.

March 2010: Renewed Bridis Request

- Ted Bridis amended his FOIA request to DHS.

First Quarter 2010: SharePoint Discussion

- DHS political appointees began discussions of the implementation of SharePoint software to facilitate the approval process.

July 2010: SharePoint Online

- SharePoint was brought online. The Secretary's political staff and Office of General Counsel can still halt the release of FOIA responses.
- The Secretary's political staff clear releases over the phone.

July 21, 2010: Bridis AP Article

- Ted Bridis released his story on the DHS FOIA process.

APPENDIX 2

FOIA EXEMPTIONS

The below chart provides the FOIA statutory exemption followed by the plain language understanding of the exemption.

Exemption	5 U.S.C. 552(b)	FOIA.gov
(b)(1)	<p>(b) This section does not apply to matters that are—</p> <p>(1)</p> <p>(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and</p> <p>(B) are in fact properly classified pursuant to such Executive order;</p>	<p>Information that is classified to protect national security. The material must be properly classified under an Executive Order.</p>
(b)(2)	<p>(2) related solely to the internal personnel rules and practices of an agency;</p>	<p>Information that concerns internal agency rules and practices, where release of the information would risk circumvention of the law, or is of no public interest.</p>
(b)(3)	<p>(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—</p> <p>(A)</p> <p>(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or</p> <p>(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and</p> <p>(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.</p>	<p>Information that is prohibited from disclosure by another federal law.</p>
(b)(4)	<p>(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;</p>	<p>Information that concerns business trade secrets or other confidential commercial or financial information.</p>
(b)(5)	<p>(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;</p>	<p>Information that concerns communications within or between agencies which are protected by legal privileges, that include but are not limited to:</p> <ol style="list-style-type: none"> 1. Attorney-Work Product Privilege 2. Attorney-Client Privilege 3. Deliberative Process Privilege 4. Presidential Communications Privilege

FOIA EXEMPTIONS

(b)(6)	(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;	Information that, if disclosed, would invade another individual's personal privacy.
(b)(7)	(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 an 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 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 a 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 any individual;	Information compiled for law enforcement purposes if one of the following harms would occur. Law enforcement information is exempt if it: <ul style="list-style-type: none"> • 7a. Could reasonably be expected to interfere with enforcement proceedings • 7b. Would deprive a person of a right to a fair trial or an impartial adjudication • 7c. Could reasonably be expected to constitute an unwarranted invasion of personal privacy • 7d. Could reasonably be expected to disclose the identity of a confidential source • 7e. Would disclose techniques and procedures for law enforcement investigations or prosecutions • 7f. Could reasonably be expected to endanger the life or physical safety of any individual
(b)(8)	(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;	Information that concerns the supervision of financial institutions.
(b)(9)	(9) geological and geophysical information and data, including maps, concerning wells.	Geological information on wells.

APPENDIX 3

DHS Redactions from the AP FOIA Request

The below chart goes through examples of DHS redactions from the Ted Bridis AP FOIA Request along with the exemption used and the corresponding page number from the DHS online posting of the FOIA release.

Page Number (DHS Online Posting of Bridis FOIA release)	Exemption	Redacted Text (Highlighted Text)
P9	(b)(5)	<p>From: Papoi, Catherine [mailto:] Sent: Friday, November 13, 2009 9:00 AM To: Callahan, Mary Ellen Cc: Papoi, Catherine Subject: FW: FOIA Search Request (DHS/OS/PRIV 10-0115)</p> <p>FYI – this is the Eileen Sullivan request re documents pertaining to the use of the word “terror.” The front office is not interpreting this request correctly. Please advise if you want me to reach out to Amy on this. Thanks.</p>
P20	(b)(5)	<p>From: Papoi, Catherine Sent: Wednesday, December 02, 2009 10:06 AM To: Grossman, Jordan; Fox, Julia Cc: 'Papoi, Catherine'; Callahan, Mary Ellen Subject: RE: Release of records to USA Today, ICE 10FOIA465</p> <p>Jordan and Julia, Obviously no problem with changing the date of the letter, but the other portions you removed need to be left in for appeal purposes. The language ICE used allows for the requester to understand the scope of the search, what the search produced (and didn't produce) and what they are entitled to appeal. May I ask who is making these suggested edits?</p>
P40-41	(b)(5)	<p>From: Papoi, Catherine Sent: Tuesday, December 15, 2009 12:44 PM To: Holzerland, William Subject: RE: ***FRONT OFFICE REVIEW REQUESTED*** ***FRONT OFFICE REVIEW REQUESTED*** Page 1 of 6</p> <p>Lol. No, but I do think we may want to discuss further...</p> <p>From: Holzerland, William Sent: Tuesday, December 15, 2009 12:42 PM To: Papoi, Catherine Subject: Re: ***FRONT OFFICE REVIEW REQUESTED***</p> <p>Wow. Should I ping S1 on this at the town hall? I am sitting 5 feet away from her.</p> <p>From: Callahan, Mary Ellen Sent: Tuesday, December 15, 2009 12:29 PM To: Papoi, Catherine Subject: RE: ***FRONT OFFICE REVIEW REQUESTED***</p>

DHS Redactions from the AP FOIA Request

		<p>I know I know, I completely understand. With that said, when you get a support person, she/he can proof them (if they are still going up). This level of attention is CRAZY. I really really want someone to foia this whole damn process.</p> <p>Mary Ellen Callahan, CIPP Chief Privacy Officer U.S. Department of Homeland Security 245 Murray Lane SW, Mail Stop 0655 Washington, DC 20528-0655</p> <p>From: Papoi, Catherine Sent: Tuesday, December 15, 2009 12:27 PM To: Callahan, Mary Ellen Subject: RE: ****FRONT OFFICE REVIEW REQUESTED****</p> <p>The problem is that I currently have 98 requests that are tagged by the front office for tracking and forwarding to the front office. I simply don't have the time or staff to review all of those requests before we send them on. Quite honestly, we shouldn't have to as these are GS-15s (and SES in some cases) in the components writing and signing these letters. Not to mention, we are not just talking the letters, but also the redacted documents for release so potentially hundreds of pages. Between dealing with OGC's constant stonewalling efforts, component pushback (over which I actually have no supervisory authority), and front office meddling/delays, I honestly don't know how we are expected to run an efficient disclosure program! If I devote myself 100% to tagged request "prereview", I will not have any time to manage the disclosure program. If the front office insists on continuing this "review" effort, then maybe the front office should deal directly with the components. I don't want their lack of attention to detail reflecting poorly on my program, but I don't have a supervisory hammer to change their methods anyway.</p>
P52-54	(b)(5)	<p>From: Callahan, Mary Ellen To: Kroloff, Noah Sent: Wed Dec 16 18:15:15 2009 Subject: Re: Nation of Islam</p> <p>She is my director of foia operations. I didn't know anything abt this, will circle back.</p> <p>Mary Ellen Callahan Chief Privacy Officer Department of Homeland Security From: Kroloff, Noah To: Callahan, Mary Ellen Sent: Wed Dec 16 18:10:34 2009 Subject: FW: Nation of Islam</p> <p>Who is Vania</p>
P68	(b)(5)	<p>From: Callahan, Mary Ellen Sent: Wednesday, December 23, 2009 1:45 PM To: Shlossman, Amy</p>

DHS Redactions from the AP FOIA Request

		<p>Cc: Papoi, Catherine Subject: RE: ***FRONT OFFICE REVIEW***December 17, 2009</p> <p>Talked to Catherine – she had previously made USCG redo their production, so there is a distinction between the redactions – it was to show the changes made. I understand it would not have been produced that was. We have had a question from the components who have pending “awareness” productions; a few have statutory deadlines next week. Will your staff be able to review for awareness purposes in the normal 3-4 business day time period? Please advise so we can let them know what to expect (one production is related to a pending FOIA litigation, so we anticipate that if we miss the statutory deadline we will be sued on that production as well).</p>
P77-78	(b)(5)	<p>From: Papoi, Catherine [mailto:] Sent: Thursday, December 17, 2009 8:47 AM To: Callahan, Mary Ellen; Papoi, Catherine; Lockett, Vania; Palmer, David Subject: RE: ***FRONT OFFICE REVIEW REQUEST***December 14, 2009</p> <p>Today is the cut-off for the front office review on this letter. Am I cleared to release this letter as we originally drafted or are we going to have to go back and forth for days like we had to on the RWE response letter?</p> <p>From: Shlossman, Amy To: Callahan, Mary Ellen Sent: Wed Dec 16 17:31:59 2009 Subject: FW: ***FRONT OFFICE REVIEW REQUEST***December 14, 2009</p> <p>There doesn't seem to be a standard across the board with FOIA responses about whether we include the text from the actual request in the response letter (sometimes it's summarized, sometimes included in total). For FOIA's that make specific allegations against the department, we'd like to use the same standard we use with congressional and other correspondence- acknowledge receipt of the request, but don't repeat the allegations in our response.</p> <p>This response caught our attention, because the allegations that were included in our response letter are particularly inflammatory, including: “In your request letter you also indicated that Ms. Porter believes that DHS may have information pertaining to her because she was advised by AT&T that her telephone lines have been wiretapped and because DHS issued a report entitled <i>Rightwing Extremism: Current Economic and Political Climate Fueling Resurgence in Radicalization and Recruitment.</i>” A revised response letter with the request/ allegations deleted is attached. If there are legal reasons why we need to include the request in the response verbatim, let us know.</p>
P86	(b)(5)	<p>From: Callahan, Mary Ellen Sent: Monday, December 28, 2009 3:48 PM To: Holzerland, William; Kropf, John Subject: Fw: 2 FOIAs coming in tomorrow</p> <p>As I suspected they care most abt the ltrs. Bill, see if nikki will send us the ltr</p>

DHS Redactions from the AP FOIA Request

		<p>unsigned, and make it clear she isn't to produce anything until she gets green light. Tx.</p> <p>From: Callahan, Mary Ellen [mailto:] Sent: Monday, December 28, 2009 3:35 PM To: Grossman, Jordan; Fox, Julia; Shlossman, Amy Cc: Holzerland, William; Papoi, Catherine Subject: 2 FOIAs coming in tomorrow</p> <p>Jordan and Julia - I trust you had a good holiday. I know you aren't back until tomorrow, but I wanted you to be aware that there will be 2 voluminous FOIAs coming tomorrow, one from the IG, one from ICE. Since these are related to ongoing litigation (and for fear of being sued), IG and ICE very much want to be able to produce within the 20 day statutory deadline, which expires on Wednesday. If possible, could you please review by COB wednesday? My colleague Bill Holzerland will send you the materials (in Catherine's absence), please let him know when you have reviewed.</p>
P136	(b)(5)	<p>From: Papoi, Catherine To: Lockett, Vania; Subject: Re: DOJ sample letters Date: Thursday, January 07, 2010 9:52:02 AM</p> <p>Would you mind reaching out to doj and asking them to share again? I need to prove to ogc and the front office we know what we are doing and are not making this stuff up.</p>
P186	(b)(5)	<p>Sent: Monday, January 11, 2010 11:03 AM To: Callahan, Mary Ellen Cc: Papoi, Catherine Subject: FW: ***ACTION NECESSARY*** Importance: High</p> <p>I am at a loss. Neither Mia, nor David, will respond to the below. Suggestions? Should I forward this to Audrey?</p> <p>C Catherine Papoi, J.D., CIPP/G Deputy Chief FOIA Officer Director, Departmental Disclosure & FOIA U.S. Department of Homeland Security Washington, D.C. 20528</p> <p>From: Papoi, Catherine [mailto:] Sent: Friday, January 08, 2010 2:26 PM To: Day, Mia; Palmer, David Cc: Papoi, Catherine Subject: FW: ***ACTION NECESSARY*** Importance: High</p> <p>I am still waiting for the name of the individual that will be responsible for QC of the OGC responses that are flagged by the front office. All of the other components have sent me their designee's name. Please advise today.</p>

DHS Redactions from the AP FOIA Request

		<p>Catherine Catherine Papoi, J.D., CIPP/G Deputy Chief FOIA Officer Director, Departmental Disclosure & FOIA U.S. Department of Homeland Security Washington, D.C. 20528</p> <p>From: Papoi, Catherine [mailto:] Sent: Thursday, January 07, 2010 10:33 AM To: Papoi, Catherine Cc: Papoi, Catherine Subject: ***ACTION NECESSARY*** Importance: High</p> <p>On yesterday's FOIA Officer teleconference we announced that by 5pm yesterday each component must designate one senior level official that will be reviewing all packages the component sends forth to me for front office approval. This individual will be held personally accountable for assuring that each letter and package is of superior quality. These packages are reviewed by Secretary Napolitano's office. As of this morning, I have not received notification of your component's designee. Please advise immediately. On a related matter, the FOIA Officer teleconference is held every other Wednesday. With the many recent and evolving disclosure issues to discuss, it is very important that every component have a senior level disclosure official call in. If you have not been participating in these calls, please assure that you do going forward. Thank you,</p> <p>Catherine</p> <p>Catherine Papoi, J.D., CIPP/G Deputy Chief FOIA Officer Director, Departmental Disclosure & FOIA U.S. Department of Homeland Security Washington, D.C. 20528</p>
P220-22	(b)(5)	<p>From: Papoi, Catherine [mailto:] Sent: Thursday, January 14, 2010 2:11 PM To: Holzerland, William Subject: RE: FOIA Annual Report</p> <p>I agree! At least we have the appeal memo all set to go. Are you reaching out to Pat Nolan on when Mark wants this?</p> <p>From: Holzerland, William [mailto:] Sent: Thursday, January 14, 2010 2:03 PM To: Papoi, Catherine Subject: Re: FOIA Annual Report</p> <p>That's what I am wondering. That aside, we share Mark's concerns about appeal numbers and the outlying number (like the 10oldest, etc). This is a serious opportunity to air some of these issues out w/S2 and get some SERIOUS</p>

DHS Redactions from the AP FOIA Request

		<p>muscle behind us though.</p> <p>----- William H. Holzerland, CIPP/G U.S. Department of Homeland Security Associate Director, Disclosure Policy & FOIA Program Development</p> <p>From: Papoi, Catherine <> To: Holzerland, William <> Sent: Thu Jan 14 13:57:11 2010 Subject: RE: FOIA Annual Report</p> <p>What does her email mean?? He wants a report on the report?? Before this goes out the door?????</p> <p>From: Nolan, Patricia To: Holzerland, William; Hawkins, Sandra L. Cc: 'Callahan, Mary Ellen' <>; 'Papoi, Catherine' <>; Saunders, Diane; Allen-Gifford, Patrice; Williams, Derrick Sent: Thu Jan 14 13:32:14 2010 Subject: RE: FOIA Annual Report</p> <p>Bill/Sandy, Thank you so much. We'll get this back up to the Front Office right away. Please note, Mark Dayton has asked that "PRIV prepare a briefing on this report and history of progress for S2. I have some concerns about appeal times and outliers generally." You can submit that scheduling request to S2's office through the normal scheduling process.</p> <p>Patricia Nolan Component Liaison Officer Office of the Executive Secretary Department of Homeland Security</p>
P244-46	(b)(5)	<p>From: Dorgan, Mark Sent: Friday, January 15, 2010 5:21 PM To: Papoi, Catherine Subject: Re: FOIA Search Request (DHS/OS/PRIV 10-0190)</p> <p>Phil said he wanted a list of what records were provided and what is overdue. I am thinking I don't have to provide it to him though. He has no stake in responses and he would see any requests that are tasked due to the fact that I request the records through him.</p> <p>From: Papoi, Catherine To: Dorgan, Mark Sent: Fri Jan 15 16:09:12 2010 Subject: RE: FOIA Search Request (DHS/OS/PRIV 10-0190)</p>

DHS Redactions from the AP FOIA Request

		<p>What do you mean by "I provide a list of what goes out and comes in every two weeks"? who are you providing a list to and of what requests are released and received??"</p> <p>Catherine Papoi, J.D., CIPP/G Deputy Chief FOIA Officer Director, Departmental Disclosure & FOIA U.S. Department of Homeland Security Washington, D.C. 20528</p> <p>From: Dorgan, Mark Sent: Friday, January 15, 2010 3:19 PM To: Papoi, Catherine Subject: FW: FOIA Search Request (DHS/OS/PRIV 10-0190)</p> <p>Catherine, Just to make sure everyone is on the same page, is this the process you and Mary Ellen were going for? I am good with whatever, as long as I get the documents from them in a timely manner. I am ok with going through the ESEC and the documents may get to me quicker. I just want to make sure that everything shakes out in the Privacy Office's best interests.</p> <p>Process</p> <ul style="list-style-type: none"> • I receive requests • I task out requests and email them directly to Phil McNamara • I receive records from Sonnita Neal and review • I either provide them to Vania if it is a compiled request, or construct a response and let the record creator review prior to release. <p>Provide</p> <ul style="list-style-type: none"> • I provide a list of what searches are still outstanding • I provide a list of what goes out and comes in every two weeks (Is this a good idea?) <p>Mark</p>
P292	(b)(5)	<p>From: Papoi, Catherine To: Holzerland, William; Date: Wednesday, January 20, 2010 4:00:00 PM</p> <p>Hey, wasn't the thing we were going to tell MEC something about USCG trying to go around her to the front office or something of that nature? C</p> <p>Catherine Papoi, J.D., CIPP/G Deputy Chief FOIA Officer Director, Departmental Disclosure & FOIA U.S. Department of Homeland Security</p>
P303	(b)(5)	<p>From: Papoi, Catherine To: Gramian, Nikki; Papoi, Catherine; Kuehn, Stephanie; cc: Gramian, Nikki; Gallo, Katherine; Pavlik- Keenan, Catrina M; Subject: RE: Significant FOIA Release (OIG 2010-028 Shapiro)</p>

DHS Redactions from the AP FOIA Request

		<p>Date: Monday, January 25, 2010 2:39:00 PM</p> <p>The front office is going to want to make sure that we are releasing the same info to the requester from both components. Would you please reach out to ICE and see if you guys can coordinate this response? I know it will take extra time, but the new administration is calling the shots.</p> <p>C</p> <p>Catherine Papoi, J.D., CIPP/G Deputy Chief FOIA Officer Director, Departmental Disclosure & FOIA U.S. Department of Homeland Security Washington, D.C. 20528</p> <p>From: Gramian, Nikki [] Sent: Monday, January 25, 2010 2:17 PM To: Papoi, Catherine; Kuehn, Stephanie Cc: Gramian, Nikki; Gallo, Katherine Subject: Re: Significant FOIA Release (OIG 2010-028 Shapiro)</p> <p>Catherine, stephanie is out today. We know ICE also submitted their first interim response. But typically, we don't check with each other when we want to respond to the requester. I heard for this FOIA request, ICE has a lot more documents than we do.</p>
P348	(b)(5)	<p>From: Callahan, Mary Ellen Sent: Tuesday, September 29, 2009 2:05 PM To: Holzerland, William; Catherine Papoi; Lockett, Vania; Parker, Lynn Subject: RE: OIG/front office reporting issue</p> <p>Fair enough point, but I don't know when their foias are ever going to be part of the mix. I think we can tell them on the sly that theirs wont have to go up, but I think we fight that fight another day.</p> <p>Mary Ellen Callahan, CIPP Chief Privacy Officer U.S. Department of Homeland Security 245 Murray Lane SW, Mail Stop 0655 Washington, DC 20528-0655</p> <p>From: Holzerland, William Sent: Tuesday, September 29, 2009 1:51 PM To: Callahan, Mary Ellen;; Lockett, Vania; Parker, Lynn Subject: OIG/front office reporting issue</p> <p>I am thinking ahead here and forsee a problem with OIG on the idea of the DHS front office approving their work. There are IG independence issues involved, so I am picturing Nikki/Kathy/Reback burning up our phone lines after the conference call tomorrow. I don't know how/whether it would make sense to proactively address this topic on the call tomorrow. Obviously, it's not become a practical problem yet, but I am certain they'll be bent out of shape about this whole thing. I volunteer to bring the excedrin tomorrow... -B</p>

DHS Redactions from the AP FOIA Request

		<p>----- William H. Holzerland, CIPP/G U.S. Department of Homeland Security Associate Director, Disclosure Policy & FOIA Program Development</p>
P411-12	(b)(5)	<p>From: Holzerland, William Sent: Friday, September 25, 2009 9:42 AM To: Callahan, Mary Ellen; Lockett, Vania; Papoi, Catherine Subject: RE: FOIA's</p> <p>This is bananas!</p> <p>From: Callahan, Mary Ellen Sent: Friday, September 25, 2009 8:25 AM To: Shlossman, Amy Cc: Kroloff, Noah; Callahan, Mary Ellen Subject: Re: FOIA's</p> <p>Amy - happy to try to help, but it is a pretty big lift, and we would have to get all the requests from all the components. Noah had mentioned he wanted to talk to me abt foia, and I had a previously scheduled mtg on monday, so I just figured I would talk thru exactly what you were looking for. Not trying to be a problem, just wanted to see if there was another way to solve the problem (I had talked to leezie about sending up the whole list of inbound foias that we at hq gets).</p> <p>We are working on getting the discrete requests below, it was just the going forward that I wanted to see if we could answer differently. Happy to discuss.</p> <p>Thanks, Mary Ellen Mary Ellen Callahan Chief Privacy Officer Department of Homeland Security</p> <p>From: Shlossman, Amy To: Callahan, Mary Ellen Cc: Kroloff, Noah Sent: Fri Sep 25 08:16:52 2009 Subject: FW: FOIA's</p> <p>Mary Ellen, Not sure what the confusion is, but please know this request is coming directly from the front office and Noah has been fully briefed. Can you please have your staff forward the actual FOIA requests that are included in our weekly reports each week so we can refer to them as needed. Thank you. Amy</p>
P414-15	WH review	<p>From: Papoi, Catherine Sent: Friday, September 25, 2009 11:29 AM</p>

DHS Redactions from the AP FOIA Request

To: 'william.holzerland; 'catherine.papoi; 'Mary.Ellen.Callahan; 'Vania.Lockett
Subject: Re: Uscis (a)(2) posting

Mec is meeting with Noah next Monday, so we should know more then.

Catherine Papoi, J.D., CIPP/G
Deputy Chief FOIA Officer
Director, Departmental Disclosure & FOIA
U.S. Department of Homeland Security
Washington, D.C. 20528

From: Holzerland, William
To: Papoi, Catherine; Callahan, Mary Ellen; Lockett, Vania
Sent: Fri Sep 25 11:27:30 2009
Subject: RE: Uscis (a)(2) posting

'Aye-'aye. The question is, how do we go about getting such a thing cleared? I know there's been some recent confusion over who ought to clear what, so we should make sure we're doing this exactly how the front office wants.

From: Papoi, Catherine [mailto:]
Sent: Friday, September 25, 2009 9:17 AM
To: Holzerland, William; Callahan, Mary Ellen; Papoi, Catherine; Lockett, Vania
Subject: Re: Uscis (a)(2) posting

In my opinion, yes, but please defer to mec.

Catherine Papoi, J.D., CIPP/G
Deputy Chief FOIA Officer
Director, Departmental Disclosure & FOIA
U.S. Department of Homeland Security
Washington, D.C. 20528

From: Holzerland, William
To: Callahan, Mary Ellen; Papoi, Catherine; Lockett, Vania
Sent: Fri Sep 25 09:15:17 2009
Subject: Uscis (a)(2) posting

The NRC released POTUS' father's A-File to the Boston Globe this week. They're planning to post it to the e-reading room. Should I tell them to hold off til we clear with the front office?

William H. Holzerland, CIPP/G
U.S. Department of Homeland Security
Associate Director,
Disclosure Policy & FOIA Program Development

DHS Redactions from the AP FOIA Request

P444	(b)(5)	<p>From: Papoi, Catherine Sent: Tuesday, September 29, 2009 8:25 PM To: Lockett, Vania Subject: Fw: Front Office FOIA review process</p> <p>Didn't we already send Julia the below incoming requests? I plan to tell them the responses are out the door.</p> <p>Catherine Papoi, J.D., CIPP/G Deputy Chief FOIA Officer Director, Departmental Disclosure & FOIA U.S. Department of Homeland Security Washington, D.C. 20528</p>
P452	(b)(5)	<p>From: Callahan, Mary Ellen Sent: Monday, May 25, 2009 2:18 PM To: Grossman, Jordan; Lockett, Vania Cc: Callahan, Mary Ellen; Neal, Sonnita; Shlossman, Amy Subject: RE: FOIA Request for Office of the Secretary's Weekly Report</p> <p>Jordan – my office would love to be involved in the discussions relating to this request. Just let me know, I can stop by when I am at the NAC.</p> <p>Thanks a lot, Mary Ellen</p> <p>From: Grossman, Jordan Sent: Friday, May 22, 2009 6:25 PM To: Lockett, Vania Cc: Callahan, Mary Ellen; Neal, Sonnita; Shlossman, Amy Subject: RE: FOIA Request for Office of the Secretary's Weekly Report</p> <p>Hi Vania, Thank you very much for letting me know about this. Please hold on this for the short-term – we are going over this request with OGC to determine a way forward.</p> <p>Thanks! Jordan</p>
P472-73	(b)(5)	<p>From: Callahan, Mary Ellen Sent: Tuesday, October 06, 2009 3:58 PM To: Papoi, Catherine Cc: Kropf, John; Subject: Re: FOIA Report</p> <p>That is way too much. Let's discuss and figure out how to do this.</p> <p>Mary Ellen Callahan Chief Privacy Officer Department of Homeland Security</p> <p>From: Papoi, Catherine</p>

DHS Redactions from the AP FOIA Request

		<p>To: Callahan, Mary Ellen Cc: Kropf, John; Papoi, Catherine Sent: Tue Oct 06 15:00:48 2009 Subject: FW: FOIA Report</p> <p>Today I received the below email from Julia Fox with the requests the front office wishes to review prior to release (I will receive an email like this from Julia every Tuesday). She lists all of the media requests from our weekly report. This equates to a grand total of 53 releases I am coordinating for front office review and this has turned into a full-time job. I am stopping by the NAC on my way in tomorrow morning for my flu shot, but if we can discuss coordination options (I have some ideas I want to run past you) tomorrow at some point, it would be great. Thanks.</p> <p>C</p> <p>Catherine Papoi, J.D., CIPP/G Deputy Chief FOIA Officer Director, Departmental Disclosure & FOIA U.S. Department of Homeland Security Washington, D.C. 20528</p>
P504	(b)(5)	<p>From: Grossman, Jordan Sent: Tuesday, June 02, 2009 4:41 PM To: Lockett, Vania Subject: RE: FOIA Request for Office of the Secretary's Weekly Report</p> <p>Hi Vania, How exactly would you go about collecting the information on this request if the front office were to give it the go-ahead? (In other words, from whom would you be asking for information, and what documents would you be seeking?).</p> <p>Thanks!</p>
P528	(b)(5)	<p>From: Lockett, Vania To: Papoi, Catherine Subject: RE: ***FRONT OFFICE FOIA REVIEW REQUESTED*** Date: Monday, October 26, 2009 5:10:01 PM</p> <p>Catherine, The first two documents are printouts from blogs. They are documents that were compiled by DHS for law enforcement purposes, making them DHS records. As for why they were included as responsive to this request, we included all of the source documents that mentioned abortion or pro-life activism. The request sought documents that were sources to the statements made in I&A's report with respect to pro-life activism and rightwing extremism.</p> <p>Thanks. Vania</p> <p>From: Grossman, Jordan To: Papoi, Catherine; Fox, Julia Sent: Mon Oct 26 16:29:28 2009 Subject: RE: ***FRONT OFFICE FOIA REVIEW REQUESTED***</p>

DHS Redactions from the AP FOIA Request

		<p>Hi Catherine, I apologize again for the delay. We're a little confused as to why the first two documents in this package have been included, as they don't seem directly relevant to the request and are neither official documents nor produced by the Department. Is there a particular reason for their inclusion? Thanks! Again, sorry for the delay. Jordan</p>
P549-50	(b)(5)	<p>From: Lockett, Vania Sent: Monday, November 09, 2009 11:17 AM To: Papoi, Catherine Subject: RE: PRIV 09-517 - RWE Case - Front Office Review Request</p> <p>Will do. Thanks.</p> <p>From: Papoi, Catherine Sent: Monday, November 09, 2009 10:31 AM To: Papoi, Catherine; Lockett, Vania Subject: RE: PRIV 09-517 - RWE Case - Front Office Review Request</p> <p>The more I think about it, the more I think that we had better send these through the exec sec. Please have them note that both Noah and Amy Shlossman expressed an interest in reviewing these responses. Thanks. C</p> <p>Catherine Papoi, J.D., CIPP/G Deputy Chief FOIA Officer Director, Departmental Disclosure & FOIA U.S. Department of Homeland Security Washington, D.C. 20528</p> <p>From: Papoi, Catherine Sent: Monday, November 09, 2009 10:25 AM To: Lockett, Vania Subject: RE: PRIV 09-517 - RWE Case - Front Office Review Request</p> <p>Last round I cc'd mec and she forwarded them to Noah. Let's just stick with that on these since technically these requests don't involve front-office records, right?</p> <p>Catherine Papoi, J.D., CIPP/G Deputy Chief FOIA Officer Director, Departmental Disclosure & FOIA U.S. Department of Homeland Security Washington, D.C. 20528</p> <p>From: Lockett, Vania Sent: Friday, November 06, 2009 11:39 AM To: Papoi, Catherine Subject: FW: PRIV 09-517 - RWE Case - Front Office Review Request</p>

DHS Redactions from the AP FOIA Request

		<p>Not sure if our discussion w/ESEC this week changes how we clear the rightwing-related cases. These were of particular interest to Noah Kroloff. Let me know your thoughts on whether we should route these through Sonnita with a note to have Kroloff clear. Thx.</p> <p>Vania</p>
P557	(b)(5)	<p>From: Papoi, Catherine Sent: Friday, November 13, 2009 4:29 PM To: Callahan, Mary Ellen Subject: RE: ***FRONT OFFICE FOIA REVIEW REQUESTED***November 9, 2009</p> <p>Nope. They entirely change our response. Spoke with Jordan and he is going to "further confer with OGC" ...</p> <p>Catherine Papoi, J.D., CIPP/G Deputy Chief FOIA Officer Director, Departmental Disclosure & FOIA U.S. Department of Homeland Security Washington, D.C. 20528</p> <p>From: Callahan, Mary Ellen Sent: Friday, November 13, 2009 4:26 PM To: Papoi, Catherine Subject: Re: ***FRONT OFFICE FOIA REVIEW REQUESTED***November 9, 2009</p> <p>I can't see edits. Are they useful?</p> <p>Mary Ellen Callahan Chief Privacy Officer Department of Homeland Security</p> <p>From: Papoi, Catherine To: Callahan, Mary Ellen Sent: Fri Nov 13 13:59:23 2009 Subject: FW: ***FRONT OFFICE FOIA REVIEW REQUESTED***November 9, 2009</p> <p>We knew it was coming...they are trying to substantively edit our letters.</p> <p>Catherine Papoi, J.D., CIPP/G Deputy Chief FOIA Officer Director, Departmental Disclosure & FOIA U.S. Department of Homeland Security</p>
P586-88	(b)(5)	<p>From: Callahan, Mary Ellen Sent: Wednesday, December 30, 2009 2:40 PM To: Holzerland, William</p>

DHS Redactions from the AP FOIA Request

	<p>Subject: Re: Do I want to know</p> <p>Why don't you call julia? May be path of least resistance.</p> <p>Mary Ellen Callahan Chief Privacy Officer Department of Homeland Security</p> <p>From: Holzerland, William To: Callahan, Mary Ellen Sent: Wed Dec 30 14:38:43 2009 Subject: RE: Do I want to know</p> <p>Julia confirmed with me that this was a tight turnaround necessitating review by today. The OIG, however, stressed that 3:30pm today was the drop-dead time for them. I communicated your position on the matter to OIG and OIG's back to you. I did not, however, inform Julia of OIG's plan to drop this in the mail at 3:30pm, as it did not seem appropriate to do so. I bring all of this up bc OIG just pinged me for a status update a few minutes ago.</p> <p>From: Holzerland, William To: Callahan, Mary Ellen Sent: Wed Dec 30 14:30:13 2009 Subject: RE: Do I want to know</p> <p>MEC, sorry to keep up the email traffic on this issue while you're enjoying some time off...but at some point, would it make sense to have you check status of the review on OIG's materials? OIG's starting to ask about it.</p> <p>Thanks, Bill</p> <p>From: Callahan, Mary Ellen</p> <p>Sent: Wednesday, December 30, 2009 11:22 AM</p> <p>To: Holzerland, William Subject: Re: Do I want to know</p> <p>19000 from oig alone? Does that strike you as odd?</p> <p>Mary Ellen Callahan Chief Privacy Officer Department of Homeland Security</p> <p>From: Holzerland, William To: Callahan, Mary Ellen Sent: Tue Dec 29 22:03:04 2009 Subject: Re: Do I want to know</p>
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DHS Redactions from the AP FOIA Request

		<p>Doing my best to herd the cats...it should help the front office has already seen the ICE records in question and they've been released in response to other FOIAs. So the review of the records is a mere formality. It's the other 19,000+ pages that are responsive to this request that have me worried. Gulp.</p> <p>-----</p> <p>William H. Holzerland, CIPP/G U.S. Department of Homeland Security Associate Director, Disclosure Policy & FOIA Program Development</p> <p>From: Holzerland, William To: Callahan, Mary Ellen Sent: Tue Dec 29 21:35:38 2009 Subject: Re: Do I want to know</p> <p>Well, it's somewhat better. ICE fixed the letter and I just forwarded it to Amy et. al. The responsive records are apparently too voluminous to send via email, so I am headed over to ICE bright and early to pick them up and drive them to the NAC.</p> <p>-----</p> <p>William H. Holzerland, CIPP/G U.S. Department of Homeland Security Associate Director, Disclosure Policy & FOIA Program Development</p>
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APPENDIX 4

OGR Investigation Timeline

July 21, 2010: Bridis AP Article

- Ted Bridis released his story on the DHS FOIA process.

September 17, 2010: DHS Briefing

- DHS Chief Privacy Officer Mary Ellen Callahan provided a briefing to Committee staff.

January 10, 2011: Documents Provided

- During the week of January 10th, documents provided to the Committee called into question information supplied at the September 17, 2010 briefing.

January 14, 2011: Documents Requested

- The Committee made its first document request to the Department.

February 1, 2011: Follow-Up Requests

- The Committee submitted a follow-up request for documents and requested interviews with certain Department employees.

February 4, 2011: Conference Call

- A conference call between the Committee and the Department took place to attempt to schedule the interviews.

February 8, 2011: Follow-Up Notice on Interviews

- The Committee sent a follow-up written notice via e-mail to the Department expressing the Chairman's continued interest in scheduling witness interviews.

February 9, 2011: DHS Refuses Interviews

- The Department advised that it cannot commit to transcribed interviews.
- The Committee sent a follow-up e-mail requesting confirmation that the Department has changed its mind with respect to cooperating with requested interviews.

February 10, 2011: Request for DHS Position on Interviews

- Committee staff met with a Department lawyer. The Committee requested an update on the Department's position with respect to the interviews. The Committee staff requested that witness interviews be scheduled.

February 16, 2011: Negotiations on Interviews

- Committee staff had numerous telephone discussions with Department lawyers regarding the need for improved cooperation. The Committee informed the Department that the Chairman was considering using compulsory process for both the documents and the witness interviews.
- Committee staff began a discussion with the Minority Committee staff. The Committee advised the Minority of the Chairman's intent to issue subpoenas for six (6) witness interviews and documents.

- The Committee reached an understanding with the Department that the Chairman would consider **not** issuing the document subpoena in lieu of the Department's willingness to schedule voluntary witness interviews.
- Committee staff suggested the Department schedule the witness interviews. The Committee and the Department agreed to revisit negotiations on the parameters of the interview as the interviews approach. Committee staff suggested that if the Department was unhappy with the parameters of the proposed interviews, the Department could cancel at any time. Committee staff reaffirmed that the Chairman was considering issue subpoenas for both documents and witnesses.

February 17, 2011: DHS Refuses to Cooperate

- The Department notified the Committee it would **not** cooperate with witness interviews.
- The Committee's Majority and Minority staff met to discuss a way forward. They participated in a joint conference call with Department lawyers.
- The Committee staff informed the Minority staff and the Department of the Chairman's intent to issue both a subpoena for documents. The Minority staff and the Department were also advised that the Chairman was considering a subpoena for witness depositions.
- Committee staff asked the Department whether they would confer with the witnesses to determine whether the witnesses would appear voluntarily.
- The Department pledged to notify Committee staff by the end of the day. The Department has never answered this question.
- At 10:30 p.m., Committee staff e-mailed the Department's legislative affairs staff about the different interview options, i.e., transcribed interview or deposition. The Minority staff was consulted and copied on the correspondence.
- At 11:20 p.m., Committee staff e-mailed Department lawyers explaining that the Chairman has substantial issues with the Department's response to the document requests and with the Department's unwillingness to schedule interviews or depositions. The minority was consulted and copied on the correspondence.

February 18, 2011:

- The Chairman decided to continue to consult with the Ranking Member rather than issue subpoenas. A noon meeting was scheduled between the Chairman and Ranking Member. All documents obtained by the Committee staff were copied and prepared for the Minority staff. The Chairman agreed to give this process more time.
- At 1:30 p.m., the Chairman had a teleconference with the Secretary where he urged the Department to participate in voluntary transcribed interviews. The Secretary explained to the Chairman how difficult it had been to comply with the Committee's document request. The Chairman agreed to work with the Department on ways to narrow the document request.
- At 3:00 p.m., the Department followed up on the conference call. The Department misstated what it believed was an agreement between the Chairman and the Secretary where the Committee would agree to suspend its request to seek transcribed interviews with Department officials in lieu of a joint briefing.
- At 5:00 p.m., the Committee e-mailed the Department and reiterated the need for transcribed interviews. The Committee agreed to explore ways to minimize costs associated with document request.

- At 7:30 p.m., the Chairman suggested the Committee table the document request until the witness interviews are completed. The Committee reaffirmed the need for transcribed interviews with key witnesses.

February 22, 2011: Committee Forced to Issue Subpoenas

- At 10:45 a.m., the Department refused the Committee's request for transcribed interviews, and advised the Committee it was only willing to proceed with briefings.
- The Chairman authorized the issuance of subpoenas for witness testimony. Chairman spoke by phone with Ranking Member.
- At 12:30 p.m., Committee staff advised the Minority and the Department of the Chairman's intent to issue subpoenas for witness testimony. The Department requested one hour to respond.
- At 2:00 p.m., the Chairman instructed the Committee staff to serve subpoenas for witness testimony.

APPENDIX 5

DARRELL E. ISSA, CALIFORNIA
CHAIRMAN

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TODD RUSSELL PLATTS, PENNSYLVANIA
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LAWRENCE J. BRADY
STAFF DIRECTOR

ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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March 16, 2011

The Honorable Janet Napolitano
Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Dear Secretary Napolitano:

It has been brought to my attention that a career professional in the Privacy Office was recently demoted after cooperating with a Committee investigation and providing information to the Office of Inspector General (OIG). The demotion was effectuated one day after she appeared for a transcribed interview to provide information – much of it critical of personnel in the Office of the Secretary – in connection with the Committee's investigation of the Department's Freedom of Information Act (FOIA) function.¹ This witness requested to attend the interview without a Department minder. The Department was not pleased.

At the request of Ranking Member Cummings, for this investigation, I agreed to allow representatives from the Office of General Counsel (OGC) to attend interviews. The Ranking Member made this request so witnesses could avoid the financial burden of hiring their own personal lawyer. The choice to attend the interview with agency counsel is the witness's, and the witness's alone.

To date, one agency official has asked that agency counsel not participate – then-Deputy Chief FOIA Officer Catherine Papoi. I have learned that her decision to decline agency counsel did not sit well with OGC. Prior to her interview, the Department's lawyers asked Ms. Papoi's counsel to stand down and allow the OGC to represent his client before the Committee. Ominously, the OGC lawyer advised – do the right thing. Ms. Papoi declined.

Ms. Papoi attended her interview on March 3, 2011 with personal counsel. The next day, March 4, Deputy Chief Privacy Officer John Kropf called Ms. Papoi to notify her that she was being demoted effective March 14, 2011. Ms. Papoi was replaced by a newly-minted member of the Senior Executive Service (SES). The new SES, who now serves as Ms. Papoi's supervisor, was given her title – Deputy Chief Privacy Officer –

¹ See Letter from Ranking Member Darrell Issa to Sec. Janet Napolitano, July 30, 2010.

and office. Ms. Papoi was moved to an office formerly occupied by her subordinate and given a narrower set of responsibilities. In her new role, Ms. Papoi will manage the Department's proactive disclosure program.

The new SES accepted the job on January 10, 2011 and received security clearance on February 24, 2011. The decision to wait until March 4 – the day after her interview – to notify Ms. Papoi of her demotion appears to have been made for reasons other than logistics. By notifying Ms. Papoi of her less desirable office assignment and diminished job responsibilities the day after she appeared before the Committee, the Department created the appearance of retaliation against a witness who did not allow representatives from the OGC to attend her interview. Ms. Papoi has cleared her office and is now on leave.

The decision to demote Ms. Papoi itself also appeared to be an act of retaliation because of her history of providing information to the OIG, and the Department's belief – whether founded or not – that Ms. Papoi was providing information to this Committee. A lawyer from OGC intimated to my staff yesterday, and the Ranking Member's staff, that he believed Ms. Papoi provided documents to the Committee.

As the Department knows, Ms. Papoi wrote former Inspector General Richard Skinner on March 25, 2010 to request an investigation of interference with the FOIA function by political appointees. Ms. Papoi alleged political appointees were "breaking the law by knowingly and intentionally delaying and obstructing the release of agency records requested pursuant to the Freedom of Information Act."²

In November 2010, Ms. Papoi observed Chief Privacy Officer Mary Ellen Callahan strike a subordinate employee. She reported the incident to the OIG.

The process to fill the SES allocation played out with the Department's knowledge that Ms. Papoi initiated two OIG investigations of abuse and mismanagement by the Department's political appointees. In that context, management's decision to bypass and ultimately demote a six-year veteran of the DHS Privacy Office with extensive FOIA training and experience raises questions.

To date, the Committee has interviewed six witnesses and reviewed more than 3,000 pages of documents produced by the Department. We have found no evidence that would support a reduced role for Ms. Papoi in the Department's FOIA function. In fact, the Department has repeatedly touted the successes of the FOIA Office during this Administration.³ Assistant Secretary for Legislative Affairs Nelson Peacock summarized the accomplishments of the FOIA Office in the Department's most recent letter:

² Letter from Catherine Papoi to IG Richard Skinner, Mar. 25, 2010.

³ See, Letter from Mary Ellen Callahan to Ranking Member Issa, Aug. 18, 2010; Letter from Nelson Peacock to Chairman Darrell Issa, Jan. 28, 2011; Letter from Nelson Peacock to Chairman Darrell Issa, Feb. 4, 2011. Mary Ellen Callahan also touted the reduction of the Department's backlog in a staff briefing on Sept. 17, 2010.

As we noted in our previous letter, we are proud of our accomplishments, having reduced the FOIA backlog while processing a record number of FOIA requests in a record amount of time. In fact, over the past two years this Department has processed 25 percent of all the FOIA requests submitted to the executive branch - far more than any other Federal agency.⁴

The Department's decision to marginalize the FOIA Office's most senior career official after two years of record performance is hard to countenance. The decision weakens the Department's claim that reduction of the FOIA backlog is "an important achievement, and one that matters to the leadership of our Department."⁵ The Department cannot have it both ways. Either it is proud of its FOIA program, the backlog reduction, and the career personnel that manage and operate the program, or it is not.

The appearance of retaliation is further heightened because the OGC did not negotiate the terms by which Department employees would appear before the Committee in good faith. On February 1, 2011, I requested that six employees be made available for transcribed interviews.⁶ During the three weeks of subsequent negotiation of the terms of those interviews, OGC did not communicate to any of the six employees that the choice to appear was theirs to make. After repeated requests to convey this message were ignored, it became clear the Department had no intention of giving witnesses the option to appear voluntarily. The failure by OGC to communicate this information to agency employees may be contrary to legal ethics requirements.

At impasse, the Committee delivered two subpoenas on February 22, 2011, one to Ms. Papoi and one to FOIA Specialist Mark Dorgan. The Department subsequently agreed to allow witnesses to sit for transcribed interviews, and the subpoenas were withdrawn.

Mr. Dorgan testified that aside from being notified of the February 1, 2011 letter, he heard nothing at all from the OGC until a subpoena showed up with his name on it. This is outrageous. Between February 1 and February 22, Committee staff asked both OGC lawyers and officials in the Office of Legislative Affairs whether the witnesses would agree to appear voluntarily, or whether a subpoena was required to compel their attendance. It now seems clear the Department used career FOIA officials as pawns to force my hand.

The lawyers in the Office of the General Counsel are paid to protect the interests of the Department. In that role, they are necessarily in an adversarial relationship with employees who allege wrongdoing. With that in mind, DHS employees may reasonably

⁴ Letter from Nelson Peacock to Chairman Darrell Issa, Feb. 4, 2011.

⁵ Letter from Nelson Peacock to Chairman Darrell Issa, Jan. 28, 2011.

⁶ Letter from Chairman Darrell Issa to Sec. Janet Napolitano, February 1, 2011.

be apprehensive to give answers that implicate senior officials in the presence of OGC attorneys and may therefore prefer to be accompanied by their own lawyer during an interview with congressional investigators. By informing witnesses of their right to appear voluntarily only after the Committee showed its willingness to compel testimony, the Department exposed employees to the unfortunate and unnecessary situation of having their names on congressional subpoenas. By its very nature, a subpoena can carry the implication that the witness is being uncooperative.

The Department's tactics slowed a congressional investigation and interfered with the Committee's access to witnesses. Obstructing a Congressional investigation is a crime.⁷ Additionally, denying or interfering with employees' rights to furnish information to Congress is against the law.⁸ Congress relies on truthful testimony from witnesses to identify waste, fraud and abuse in the federal government. Federal officials who retaliate against or otherwise interfere with employees who exercise their right to furnish information to Congress are not entitled to have their salaries paid by taxpayer dollars.⁹

⁷ 18 U.S.C. § 1505 states, in pertinent part:

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress--

Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

⁸ 5 U.S.C. § 7211 states:

The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.

⁹ P.L. 111 -117 § 714 states:

No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who -

(1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee; or

(2) removes, suspends from duty without pay, demotes, reduces in rank, seniority, status, pay, or performance of efficiency rating, denies promotion to, relocates, reassigns, transfers, disciplines, or discriminates in regard to any employment right, entitlement, or benefit, or any term or condition of employment of, any other officer or employee of the Federal Government, or attempts or threatens to commit any of the foregoing actions with respect to such other officer or employee, by reason of any communication or contact of such other officer or employee with any Member, committee, or subcommittee of the Congress as described in paragraph (1).

The Honorable Janet Napolitano
March 16, 2011
Page 5

Please ensure that all DHS employees are aware of their rights and whistleblower protections. Please also make DHS managers aware of the consequences for retaliation against witnesses who furnish information to Congress. Additionally, by March 25, 2011 please identify in writing all actions taken by the Office of the General Counsel to advise witnesses of their right to appear voluntarily before the Committee, including the date of any such action. Please also identify any individual in the Office of General Counsel with information about the same.

Thank you for your attention to this matter.

Sincerely,



Darrell Issa
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

APPENDIX 6



Homeland Security

March 16, 2011

The Honorable Darrell Issa
Committee on Oversight and Government Reform
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman,

I was disappointed to receive your letter to Secretary Napolitano today, particularly because of its factually inaccuracies.

The employment status of Catherine Papoi at DHS has not changed. Moreover, counsel for DHS has at all times operated in this matter with integrity and deference to the wishes of all witnesses, including Ms. Papoi. The following provides an overview of the factual inaccuracies in your letter and the relevant facts:

1. *You state* that “a career professional in the Privacy Office was recently demoted.” *The fact is* that Ms. Papoi competed for a new position for which she was not selected. In February 2010, the Department was awarded new Senior Executive Service (SES) positions. A panel of senior career and non-career employees conducted an assessment of Departmental needs in order to determine the allocation of these positions among DHS offices. This panel determined that one of these positions should be allocated to the Privacy Office for a career SES position. Based on longstanding federal regulations, the selection of an SES official requires an extensive, competitive, merit based process. This process includes a public posting of the vacancy, a written application, a review of applicant qualifications by career officials in both the Department and the Office of Personnel Management (OPM), interviews conducted by a panel of SES employees, and a final selection by a selecting official. Even after these steps have been completed, OPM must certify the selection. Each of these steps was completed in the selection of the candidate who ultimately filled this new SES position.
2. *You state* that “[t]he demotion was effectuated one day after she appeared for a transcribed interview.” *The fact is* that Ms. Papoi was informed on January 10, 2011 that she was not selected for the SES position for which she applied. Her transcribed interview took place almost two months later, on March 3, 2011.
3. *You state* that “the Department’s lawyers asked Ms. Papoi’s counsel to stand down and allow the OGC to represent his client before the Committee.” *The fact is* that DHS counsel have repeatedly noted to both Ms. Papoi and her counsel that they do not represent her and would not appear at her transcribed interview in light of her request to that effect. The only request

that was ever made of her counsel was his forbearance to allow DHS counsel to negotiate the parameters of all witness testimony and to coordinate the dates thereof.

4. *You state* that “Ominously, the OGC lawyer advised - do the right thing.” *The fact is* that no DHS lawyer ever uttered those words or anything resembling those words to Ms. Papoi or her counsel.
5. *You state* that “The next day, March 4, Deputy Chief Privacy Officer John Kropf called Ms. Papoi to notify her that she was being demoted effective March 14, 2011.” *The fact is* that Ms. Papoi was informed in on January 10 that someone else had been selected for the new position for which she had applied. On March 5, Mr. Kropf called Ms. Papoi to inform her of the new employee’s start date – March 14.
6. *You state* that “[t]he decision to demote Ms. Papoi itself also appeared to be an act of retaliation because of her history of providing information to the OIG, and the Department's belief - whether founded or not - that Ms. Papoi was providing information to this Committee.” *The fact is* that it is not the practice of OIG to reveal the sources of information that may lead to an inspection. Indeed, it was your correspondence of earlier today that revealed this claim. Moreover, the selection of the preferred candidate was made in December 2010. The Department learned that you had received documents relating to this inspection from another source in your letter of January 14, well after this hiring decision was made.
7. *You state* that “A lawyer from OGC intimated to my staff yesterday, and the Ranking Member's staff, that he believed Ms. Papoi provided documents to the Committee.” The lawyer said no such thing; he merely pointed out the chronology described above regarding the hiring process and the investigation.
8. *You state* that “The process to fill the SES allocation played out with the Department's knowledge that Ms. Papoi initiated two OIG investigations [sic] of abuse and mismanagement by the Department's political appointees.” As noted above, the suggestion that Ms. Papoi initiated the OIG inspection was brought to our attention through your letter today.
9. *You state* that “management's decision to bypass and ultimately demote a six-year veteran of the DHS Privacy Office with extensive FOIA training and experience raises questions.” *The fact is* Ms. Papoi was determined by the career SES panel to be less qualified than the individual selected, a candidate with more than 20 years of federal program management and IT experience with specialized expertise in FOIA administration, including leading a FOIA office for a Federal agency and serving in several senior management positions.
10. *You describe* Ms. Papoi as “the FOIA Office's most senior career official.” *The fact is* she is not. The most senior career employee in the Privacy office in which she is employed is John Kropf, Deputy Chief Privacy Officer.

11. *You state* that “The decision weakens the Department's claim that reduction of the FOIA backlog is ‘an important achievement, and one that matters to the leadership of our Department.’” *The fact is* that the Department is indeed proud of its accomplishments on FOIA and of its career employees who have helped achieve those accomplishments. The office in which Ms. Papoi works has 18 career employees. Department-wide, the Department employs approximately 400 career employees who focus on FOIA.

I should note further that privacy considerations prevent the Department from providing a complete written response to address additional inaccuracies in your letter at this time.

Your letter also makes unfounded allegations of bad faith and a breach of legal ethics — all based on assumptions about what the Office of the General Counsel did or did not do while the Department sought means to accommodate the Committee staff's request for information. But contrary to those assumptions, the Department and the Office of the General Counsel have taken appropriate steps to respond to your requests expeditiously. Characterizing our engagement as somehow designed to “slow” or “interfere[]” with your oversight activities is false. To fulfill the various requests from the committee, we have diverted 15 lawyers and more than six other support staff away from their existing responsibilities at the Department of Homeland Security. To date, Department employees have logged more than 700 hours responding to requests from the Committee, and provided transcribed interviews with senior Department officials. We have delivered more than 3,000 pages of responsive documents to the Committee. We have also offered to have Department officials meet with you or your staff for weeks before the dates on which your staff conducted formal interviews. In addition, we have agreed to participate in a hearing at the end of this month on the Department's FOIA process pursuant to discussions with your staff today.

The Department has not taken *any* retaliatory action against employees that have provided information to your Committee, and we have taken appropriate steps to provide you with access to Department employees. Moreover—and in contrast with your assertions—steps that the Office of the General Counsel has taken in advising the employees you have identified of their obligations toward Congress have been completely appropriate. Those steps reflect the longstanding practice between the Executive and Legislative branches or the appropriate consideration for important Executive Branch institutional interests.

We remain committed to the view that the Congress has an important and legitimate role in reviewing the activities of our Department. We will continue to attempt to work with you and your staff in good faith, and continue to hope that that good faith will be reciprocated.

Respectfully,



Nelson Peacock
Assistant Secretary
Office of Legislative Affairs

APPENDIX 7

Laux, Jessica

From: Castor, Stephen
Sent: Tuesday, March 29, 2011 1:49 PM
To: Laux, Jessica
Subject: FW: Your letter

-----Original Message-----

From: Castor, Stephen
Sent: Thursday, March 17, 2011 7:01 PM
To: Peacock, Nelson
Subject: Your letter

Hi Nelson

Getting back to you on your letter from late last night --

I understand that you had to put some words on paper to respond publicly to the Chairman's letter yesterday given the seriousness of the allegations it contained. I hope you can understand why I am nonplussed about some of the "factually inaccuracies [sic]" that you identified. The facts and arguments contained in the paragraphs numbered 1-11 didn't do much to alleviate the Chairman's concerns.

The clever accounting that identified 11 points of dispute also didn't move us forward. If we could easily identify the statements in the Chairman's letter at the core of our misunderstanding, then maybe we could have a productive conversation to address them. But since so many of the 11 are the same or slight modifications, it's hard for us to drill down on what exactly you take issue with.

As best we can tell, the central point of confusion seems to be your belief that Ms. Papoi was not in fact demoted. You are welcome to make that case privately to us and the Minority staff, and publicly to Politico and the AP and anyone else, but I don't think we will come around on that one. Hopefully this clarifies our position:

1. In the Chairman's letter, he stated "a career professional in the Privacy Office was recently demoted." You misunderstood this to refer to Ms. Papoi not being awarded a new Senior Executive Service (SES) position. That was missing out on a promotion. Ms. Papoi's demotion occurred when she was stripped of her title, moved to a less desirable office, and given a narrower set of responsibilities. Any reasonable person who experienced the same would consider themselves to have been demoted. Nelson, if Deputy Secretary Lute calls you to explain that a new Assistant Secretary for Legislative Affairs will be taking over your office and job responsibilities, and that you are to pack your things and move into a broom closet down the hall to handle just my requests, you should consider yourself to have been demoted.

2. Catherine Papoi's demotion was not effectuated when she found out on January 10, 2011 that she missed out on a promotion (see #1). Her demotion was effectuated when she found out she would be stripped of her title, moved to a less desirable office, and given narrower responsibilities. As the Chairman said in his letter, John Kropf called Ms. Papoi on March 4 to tell her to clean out her office. She was instructed to be out of her office by March 10 so the new SES could move in on March 14. We interviewed Ms. Papoi on March 3, the day before Kropf called her to start that conversation (i.e. effectuate the demotion).

3. You state that "DHS counsel have repeatedly noted to both Ms. Papoi and her counsel that they do not represent her and would not appear at her transcribed interview in light of her request to that effect." I can't imagine why it would take repeated conversations to tell Ms. Papoi and her lawyer that you won't come to her interview - seems like a conversation that would only have to happen once. Furthermore, DHS lawyers had no right to request that Ms. Papoi's counsel allow them to coordinate the parameters of her testimony.

4. You are calling Ms. Papoi's counsel a liar. Mr. Bransford told staff that he was contacted by DHS lawyers several times and urged to "do the right thing." Mr. Bransford was clear and unambiguous, and our notes from the call reflect that. After having seen the letter himself, Mr. Bransford did not dispute that words to that effect were uttered.

5. See #2.

6. We have no reason to believe the OIG indicated to anyone the source of the March 25, 2010 complaint. Through counsel, Ms. Papoi consented to being publicly identified as the complainant to the IG because she was made to understand by words and actions of DHS employees that her identity was already known to the Department.

7. When Jon Meyer called Republican and Democratic staff on Tuesday to head off the letter that he apparently knew was coming, he attempted to explain chronologically why the decision not to promote Ms. Papoi was unrelated to her testimony of March 3 (like you, he misunderstood the difference between not getting a promotion and being demoted, see #1). He stated that Ms. Papoi was informed she didn't get the SES spot on January 10. He then said "I believe from your first letter that you received documents the week of January 10th." He sarcastically advised staff on the call to "take that how you will." Because the date when the Committee received documents from a whistleblower was irrelevant to the conversation, Republican staff on the call took that to mean "I believe Catherine Papoi was the source of the documents you received the week of January 10."

8. See #6.

9. You again confuse the determination of the career SES panel in December 2010 with Ms. Papoi's subsequent demotion in March 2011. The FACT that Ms. Papoi was bypassed for a promotion and subsequently demoted indeed raises questions. It raised questions for the Republican staff because we believe that (a) Deputy Chief FOIA Officer Papoi was qualified to be promoted to the SES position, and (b) during the SES selection process, it was known or suspected by Department officials that Ms. Papoi initiated two OIG investigations.

10. We have been made to understand by six witnesses and the DHS website that the Department's Privacy Office is bifurcated. On one side, Deputy Chief Privacy Officer John Kropf manages the Office's Privacy Act operations. On the other side, now former-Deputy Chief FOIA Officer Catherine Papoi managed FOIA operations (i.e. the FOIA Office). Because it is our understanding that Mr. Kropf is not an employee of the FOIA Office, we consider Ms. Papoi to have been (until Monday) the most senior career employee in the FOIA Office.

11. Because the Department demoted the most senior career employee in the FOIA Office after two years of record performance, the touting of the reduction of the FOIA backlog that you worked into every letter to the Chairman lost credibility. That is a fact whether or not the Department is indeed proud of those accomplishments.

On the unnumbered additional paragraphs:

The Department received a narrowly-tailored request for documents on January 14, 2011. Most, if not all, of the documents requested were previously produced to the OIG or the AP. On or about January 20, OGC instructed staff in the Privacy Office not to search for responsive documents. Undoubtedly, that instruction slowed the Department's response to the Chairman's

request. To say OGC's engagement in this matter did not slow the process down is disingenuous.

More than a month after the Chairman's request, the Department had produced 2,145 pages, of which approximately 1,000 were off-the-shelf documents previously released to the AP.

If 15 lawyers and six other support staff needed 700 hours to identify and produce the small amount of documents that were previously produced to the IG and the AP, then maybe we have a better understanding of why the Department takes so long to respond to FOIA requests. If the six Department employees that were interviewed were burdened beyond the 30 or so hours it took to interview them, then that itself would be alarming. It shouldn't take much time to prepare witnesses to come in and tell the truth about their role in handling FOIA responses.

We remain committed to making reasonable accommodations to advance the Committee's investigation. But we have to be confident that the Department, and especially the OGC, is acting in good faith. When there is the appearance of retaliation against a whistleblower and people tell us the Department's lawyers are communicating inappropriately (or not at all) with witnesses, then we begin to have doubts.

I typed this on my bb so if there are any typos, please excuse them.

Thanks

Steve

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