

# WHY ISN'T THE DEPARTMENT OF HOMELAND SECURITY MEETING THE PRESIDENT'S STANDARD ON FOIA?

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## HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT  
AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

MARCH 31, 2011

**Serial No. 112-22**

Printed for the use of the Committee on Oversight and Government Reform



Available via the World Wide Web: <http://www.fdsys.gov>  
<http://www.house.gov/reform>

U.S. GOVERNMENT PRINTING OFFICE

67-719 PDF

WASHINGTON : 2011

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## **WHY ISN'T THE DEPARTMENT OF HOMELAND SECURITY MEETING THE PRESIDENT'S STANDARD ON FOIA?**

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**THURSDAY, MARCH 31, 2011**

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,  
*Washington, DC.*

The committee met, pursuant to notice, at 9:35 a.m., in room 2154, Rayburn House Office Building, Hon. Darrell E. Issa (chairman of the committee) presiding.

Present: Representatives Issa, Burton, Platts, McHenry, Jordan, Chaffetz, Walberg, Lankford, Amash, Buerkle, Meehan, DesJarlais, Gowdy, Ross, Farenthold, Cummings, Towns, Norton, Tierney, Connolly, Quigley, Davis, and Welch.

Staff present: Steve Castor, chief counsel, investigations; Jonathan Skladany, senior investigative counsel; Jessica Laux and Rafael Maryahin, counsels; Jean Humbrecht and John Ohly, professional staff members; Molly Boyd, parliamentarian; Ashley Etienne, director of communications; Kate Dunbar, staff assistant; Adam Fromm, director of Member liaison and floor operations; Linda Good, chief clerk; Laura Rush, deputy chief clerk; Dave Rapallo, minority staff director; Suzanne Sachsman Grooms, minority chief counsel; Krista Boyd, minority counsel; Adam Miles and Amy Miller, minority professional staff member; Lucinda Lessley, policy director; and Carla Hultberg, minority chief clerk.

Chairman ISSA. This hearing will come to order. The full committee hearing is on Why Isn't the Department of Homeland Security Meeting the Presidential Standard For FOIA? I hope by the end of today we'll find that it wasn't, but it is now.

It is a policy of the committee to have our mission statement in our opening. So with that, the Oversight Committee, we exist to secure two fundamental principals: First, Americans have a right to know the money Washington takes from them is well spent. And second, Americans deserve an efficient, effective government that works for them. Our duty on the Oversight and Government Reform committee is to protect these rights. Our solemn responsibility is to hold government accountable to taxpayers because taxpayers have a right to know what they get from their government. We will work tirelessly in partnership with citizen watchdogs to deliver the facts to the American people and bring genuine reform to Federal bureaucracy. This is the mission of the Oversight and Government Reform committee.

Today's hearing follows an 8-month investigation into what we believe are abuses of procedures at Department of Homeland Security. This matter could have been resolved in July 2010 when DHS first was confronted with allegations of political interference with FOIA process. I might add that came from the Associated Press and others who looked into this.

The Chief Privacy Officer we believe misled committee staff in 2010 briefing. If not for a whistleblower, the truth of the matter may never have come to light. That whistleblower was asked to clear her office, lost her job, and title and responsibility, was moved to a smaller office with narrower responsibility the day after she testified. That concerns us that the Department of Homeland Security is not taking the responsibility to the hard-working men and women in the FOIA Department to this day.

The truth of this matter is that the Secretary's political staff did approve significant releases, they delayed responses, they withheld documents, they conducted weak searches. And by that, I mean non professionals searched their own documents, using their own selected key words, and did not, in fact, avail themselves of the career professionals who were there long before them and know the system.

Documents and witness testimonies show that the Chief Privacy Officer statements from September 2010 are indefensible. Yet several of them appear in her testimony at this hearing today. She continues to insist that the policy implemented in September 2009 was intended to merely make political staff aware of significant releases. The bottom line is, responses could not go out the door until a political appointee said so. And the problem that the Department has not accepted accountability for. The disparity between the Department's FOIA compliance and the President's promise about transparency and accountability is stark.

The committee is committed to getting to the bottom of the abuses of DHS and making sure that the politicization of the transparency issue does not metastasize—that word I can do—throughout the Federal bureaucracy.

The chair is further concerned that there was a requirement we discovered through whistleblower and documents that, in fact, one of the most important issues that came wasn't just the document related to FOIA, but, in fact, who was sending it, whether it was a political individual or the press. That wreaks of Nixonian enemies list, and this committee will not tolerate it.

[The prepared statement of Hon. Darrell E. Issa follows:]

Chairman Issa Opening Statement  
DHS FOIA Hearing – March 31, 2011

- Today's hearing follows an eight-month investigation into the abuses of FOIA procedures at the Department of Homeland Security.
- This matter could have been resolved in July 2010 when DHS was first confronted with allegations of political interference with the FOIA process. Instead, the Chief Privacy Officer misled Committee staff in a September 2010 briefing.
- If not for a whistleblower, the truth of the matter may never have come to light.
- That whistleblower was asked to clear her office, lost her title, and lost job responsibilities. The way the Department treated this whistleblower will have a chilling effect on concerned DHS employees who may wish to report waste, fraud and abuse in the future.

- The truth of the matter is the Secretary's political staff did approve significant releases, they delayed responses, and they withheld documents by conducting weak searches. The fact that political staff are allowed to conduct their own documents searches is itself troubling.
- Documents and witness testimony show that the Chief Privacy Officer's statements from September 2010 are indefensible. Yet several of them appear in her testimony for this hearing.
- She continues to insist that the policy implemented in September 2009 was intended to merely make political staff aware of significant releases. The bottom line is that responses could not go out the door until a political appointee said so. And that is a problem that the Department has not accepted accountability for.

- The disparity between the Department's FOIA compliance and the President's promises about transparency and accountability is stark.
- This Committee is committed to getting to the bottom of the abuses at DHS and making sure that the politicization of transparency does not metastasize throughout the federal bureaucracy.
- I yield to Ranking Member Cummings for his opening statement.

Chairman ISSA. With that, I recognize the ranking member for his opening statement.

Mr. CUMMINGS. I thank the chairman for calling this hearing. Mr. Chairman, I've said it before and I'll say it again, my goal is to always be as constructive as possible, so let me start with what I think we do agree on. First, I think you and I agree with President Obama's decision on his first day in office to reverse 8 years of previous administration's FOIA policy. To adopt a presumption in favor of disclosure and to renew the Federal Government's commitment to FOIA.

I think we would also agree that the process used by DHS to review certain FOIA responses in 2009, 2010 was not efficient. Sometimes led to delays and caused confusion about roles and responsibilities that resulted in our interoffice tension at DHS.

Finally, I think we can agree that since then, DHS has made significant improvements, but it must continue to take additional steps to fully address these concerns and I am convinced that we can always do better.

Despite some areas of agreement, however, we part ways when you make extreme accusations that are not supported by the documents, not supported by the interviews, and not supported by the investigation conducted by the DHS inspector general's office. Over and over again, you've claimed that DHS officials are making FOIA decisions based on partisan political considerations. In July, you claimed DHS, "Ignored the intent of Congress and politicized the FOIA process." In August, again, you claimed that political appointees at DHS, "Inappropriately injecting partisan, political considerations into the process."

You continue to make these accusations today. Even though the committee has concluded interviews—conducted interviews and gathered documents that show the opposite to be true. The report you released yesterday accused DHS officials of, "Illegal politicization." It claimed that political considerations were an important factor in the process. And without requesting a single document from the previous administration, the report concluded that the FOIA process is now, "More politicized than when President Obama took office."

These extreme accusations are unsubstantiated. In preparation for today's hearing my staff examined eight different allegations in detail. They reviewed the documents produced to the committee, as well as the transcripts of interviews conducted by committee staff. We found no evidence that DHS withheld any information for partisan political purposes. We found no evidence that FOIA requesters received different treatment based on their political affiliation. And we found no evidence that DHS officials implemented the FOIA process to advance partisan political objectives.

In every instance we examined, information was withheld only with the approval of either the FOIA office or the general counsel's office. This is not just our assessment and I repeat that, this is not just our assessment. This is also the conclusion of a DHS inspector general, which issued a report yesterday refuting these specific allegations. This is what the IG investigator said, "After reviewing information and interviewing DHS FOIA experts, we determined that the significant request review process did not, did not prohibit

the eventual release of information.” And it goes on to say, “None of this information demonstrated that the Office of the Secretary prohibited the eventual release of information under FOIA. Information we obtained from FOIA, the FOIA staff and our review of documents corroborates this assessment.” It goes on to say, “No FOIA officer said that the requesters were disadvantaged because of their political party or particular area of interest.”

Mr. Chairman, our committee has a great opportunity to help Federal agencies as they strive to achieve President Obama’s high standard. We must also have an obligation to conduct oversight that is responsible, and indeed fair. In the long run, as I said many times, we are just as concerned about government running well as you are. And it is just as important to us as it is to you, because we are Americans too and we want our constituents to be served well. That’s what this is all about, this is the all-American way. It is not about a Republican way, it is not about a Democratic way, it is about the American way. And so with that, Mr. Chairman, I want to thank you again for holding this hearing, and with that, I yield back.

[The prepared statement of Hon. Elijah E. Cummings follows:]

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**Opening Statement**  
**Rep. Elijah E. Cummings, Ranking Member**

**Hearing on "Why isn't the Department of Homeland Security  
Meeting the President's Standard on FOIA"**

**March 31, 2011**

Thank you, Mr. Chairman. My goal is always to be as constructive as possible, so let me start with what I think we agree on.

First, I think you and I agree with President Obama's decision, on his first day in office, to reverse eight years of the previous Administration's FOIA policy, to adopt a presumption in favor of disclosure, and to renew the Federal Government's commitment to FOIA.

I think we also agree that the process used by DHS to review certain FOIA responses in 2009 and 2010 was not efficient, sometimes led to delays, and caused confusion about roles and responsibilities that resulted in inter-office tension at DHS.

Finally, I think we can agree that since then, DHS has made significant improvements, but it must continue to take additional steps to fully address these concerns.

Despite some areas of agreement, however, we part ways when you make extreme accusations that are not supported by the documents, not supported by the interviews, and not supported by the investigation conducted by the DHS Inspector General's Office.

Over and over again, you have claimed that DHS officials are making FOIA decisions based on partisan political considerations.

In July, you claimed that DHS "ignored the intent of Congress and politicized the FOIA process."

In August, you claimed that political appointees at DHS were "inappropriately injecting partisan political considerations into the process."

You continue to make this accusation today, even though the Committee has conducted interviews and gathered documents that show the opposite is true.

The report you released yesterday accused DHS officials of “illegal politicization.” It claimed that “political considerations were an important factor in the process.”

And without requesting a single document from the previous Administration, the report concluded that the FOIA process is now “more politicized than when President Obama took office.”

These extreme accusations are unsubstantiated. In preparation for today’s hearing, my staff examined eight different allegations in detail. They reviewed the documents produced to the Committee, as well as the transcripts of interviews conducted by Committee staff.

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We found no evidence that FOIA requestors received different treatment based on their political affiliation.

And we found no evidence that DHS officials implemented the FOIA process to advance partisan political objectives.

In every instance we examined, information was withheld only with the approval of either the FOIA Office or the General Counsel’s Office.

This is not just our assessment. This is also the conclusion of the DHS Inspector General, which issued a report yesterday refuting these specific allegations. This is what the IG investigators said:

- “After reviewing information and interviewing DHS FOIA experts, we determined that the significant request review process ... did not prohibit the eventual release of information.”
- “None of this information demonstrated that the Office of the Secretary prohibited the eventual release of information under FOIA. Information we obtained from the FOIA staff and our review of documents corroborates this assessment.”
- “No FOIA officer said that requesters were disadvantaged because of their political party or particular area of interest.”

Mr. Chairman, our Committee has a great opportunity to help federal agencies as they strive to achieve President Obama’s high standard. But we also have an obligation to conduct oversight that is responsible. I hope we can work together to achieve both.

Chairman ISSA. I thank the gentleman, I thank him for using Chuck Schumer's extreme word the appropriate amount of times.

Members may have 7 days in which to submit opening statements and include extraneous information into the record. Pursuant to committee rules, all members are to be sworn, would you please rise to take the oath?

[Witnesses sworn.]

Chairman ISSA. Let the record indicate both witnesses are in the affirmative.

In order to allow time for discussion, this committee has a long-standing policy of asking you to—your entire opening statements be placed in the record. We would ask you to stay as close as you can to within 5 minutes. I don't cut people off mid sentence, but if I think you get to the end of a paragraph, I will.

We expect to have only one round of questioning unless there is a specific request for a second round. And our goal is to make this factual and succinct, so I will be pretty heavy handed with people on this side. If someone runs to where you see a red light on during questioning and they still haven't gotten to the question, you may see a gavel and you won't have to answer. So it is fair warning to both sides that we want to keep you within your time. We also want Members here to ask questions so that you have proper time to respond.

Additionally, we are not prohibited from having votes. If we have votes, we will wait until about 5 to 10 minutes after the vote has been called because the first one is 15. We will recess and as soon as there's a two-person working group back here we will reconvene, even if I'm not back here, whoever the senior Republican is, we will commence so that we can be cognizant of your time and schedule.

I didn't want to make any mistakes on the name even though they are in front of me, the chair now recognizes our first panel, Ms. Mary Ellen Callahan is the Chief Privacy Officer of Department of Homeland Security, and Mr. Ivan Fong is the general counsel to the Department of Homeland Security. We are pleased to have both of you here today and with that, ladies first.

**STATEMENTS OF MARY ELLEN CALLAHAN, CHIEF PRIVACY OFFICER, THE PRIVACY OFFICE, U.S. DEPARTMENT OF HOMELAND SECURITY; AND IVAN FONG, GENERAL COUNSEL, OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF HOMELAND SECURITY**

**STATEMENT OF MARY ELLEN CALLAHAN**

Ms. CALLAHAN. Thank you, sir. Good morning Chairman Issa, Ranking Member Cummings and distinguished members of the committee. I am Mary Ellen Callahan, the chief FOIA officer and chief privacy officer at the Department of Homeland Security. My office administers policies, procedures, programs to ensure that the Department complies with the Freedom of Information Act and the Privacy Act. I appreciate the opportunity to appear before you today to discuss the Department's Freedom of Information Act processing and policy, both past and present.

Two years ago, the Department faced a backlog of more than over 74,000 FOIA requests. We began to work immediately to ad-

dress the issue and have had success. Under this administration, we have reduced the backlog by 84 percent, for more than 63,000 FOIA requests. In fiscal year 2010 alone, DHS reduced its backlog by 40 percent, eclipsing both the governmentwide open government directives instruction to reduce the FOIA backlog by 10 percent each year, as well as DHS's own open government plans goal of a 15 percent reduction for the fiscal year.

In fiscal year 2010, 650, less than one half of 1 percent of the more 138,000 FOIA requests processed, were deemed significant by career FOIA officers pursuant to the standards that were established at the Department in 2006. The significant requests include those related to ongoing litigation, related to sensitive topics, requests made by the media and requests related to Presidential or agency priorities. In these relatively few cases, senior department management was provided an opportunity to become aware of the contents of a release prior to its issuance to the public. To enable them to respond to inquiries from Members of Congress, to enable them to respond to inquiries from their staffs, media and the public, and to engage the public on the merits of the underlying policy issues.

The significant FOIA request—the significant FOIA review process began after several significant FOIAs were released at the beginning of the new administration without notice to senior management. These significant FOIA responses related to ongoing litigation, records from the previous administration, and records from other departments. The bottom line is, that basic lack of awareness of significant FOIA responses hinder the Department's abilities to manage and oversee the Department.

The transition of where we were then and where we are now was not seamless. There were management challenges in implementing the awareness process initially. However, we recognized these problems at the time and have taken significant action to address them. I believe that transitioning to the SharePoint system last year represents a significant step forward and I believe it is now a system that works effectively and efficiently for FOIA professionals in my office and for senior management across the Department.

At the same time we were implementing this awareness process, the average number of days it takes the Department to process a FOIA request has decreased significantly from 240 days to 95 days, a record of which the Department is rightfully proud.

There have been allegations that political appointees in the Department's front office redacted FOIAs and restricted their release. Let me be clear, to my knowledge, no one other than a FOIA professional or an attorney in the Office of the General Counsel made a substantive change to a proposed FOIA release. Further, to my knowledge, no information deemed releasable by the FOIA office or the Office of General Counsel, has at any point, been withheld and responsive documents have neither been abridged nor edited. I would also point the committee to the inspector general's independent analysis that makes many critical findings, including the significant request review process did not prohibit the eventual release of information; no FOIA requesters were disadvantaged because of their political party or particular area of interest; the Office of the Secretary is responsible for overseeing DHS operations,

and thus is well within its rights to oversee the FOIA process; and DHS has made important progress in sharing openness, including through proactive disclosure.

We concur with all six of the IG recommendations. I am heartened to see that the inspector general sees the progress we have made. We are committed to doing more and we look forward to working with the committee on these important issues. I'd be happy to take questions, thank you.

Chairman ISSA. Thank you.

[The prepared statement of Ms. Callahan follows:]



Statement of

Mary Ellen Callahan

Chief FOIA Officer and Chief Privacy Officer

Privacy Office

U.S. Department of Homeland Security

Before the

United States House of Representatives

Committee on Oversight and Government Reform

March 31, 2011

Good morning Chairman Issa, Ranking Member Cummings, and distinguished Members of the Committee. My name is Mary Ellen Callahan. I am the Chief FOIA Officer and Chief Privacy Officer at the Department of Homeland Security. My office administers policies, programs and procedures to ensure that the Department complies with the Freedom of Information Act (FOIA)<sup>1</sup> and the Privacy Act,<sup>2</sup> respectively. I appreciate the opportunity to appear before you today to discuss the Department of Homeland Security's (DHS) FOIA process and policy both past and present and to clarify misconceptions regarding the Department's significant FOIA review process.

DHS has approximately 420 full time equivalent federal employees devoted to processing FOIA requests, and we take our mission of openness and responsiveness very seriously. As I stated in my written testimony to this committee last year,<sup>3</sup> these FOIA professionals have done an extraordinary job in addressing FOIA backlogs as well as engaging in an unprecedented initiative to proactively disclose frequently requested records and items of public interest.

Two years ago, the Department faced a backlog of more than 74,000 FOIA requests. Under this Administration, we have reduced the backlog by 84 percent, or more than 63,000 requests. In fiscal year (FY) 2010 alone, DHS reduced its backlog by 40 percent, eclipsing both the government-wide Open Government Directive's instruction to reduce the FOIA backlog by 10 percent each year, as well as DHS's own Open Government Plan's goal of a 15 percent reduction for the fiscal year. In those past two years, we also reduced the average time it takes to process FOIA requests in our system by 58 percent, from 225 days to 95 days. Remarkably, we have been able to reduce this backlog, and accelerate response times, while processing an incredible number of new FOIA requests. In FY 2010, DHS received 130,098 FOIA requests - more than any other federal department, and 22 percent of all FOIAs received by the federal government - and processed 138,651 requests, also more than any other federal department.

In FY 2010, of those more than 138,000 requests processed, approximately one half of one percent were deemed 'significant' by career FOIA officers according to standards established at

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<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> 5 U.S.C. § 552a.

<sup>3</sup> This testimony is available at [http://www.dhs.gov/ynews/testimony/testimony\\_1301424145007.shtm](http://www.dhs.gov/ynews/testimony/testimony_1301424145007.shtm).

the Department in 2006 regarding major FOIA requests that may have a significant public interest. Examples included requests involving significant ongoing litigation, requests relating to sensitive topics, requests made by the media, and requests relating to Presidential or agency priorities. In these relatively few cases, senior Department management was provided an opportunity to become aware of the contents of a release prior to its issuance to the public, primarily to enable them to respond to inquiries from members of Congress and their staffs, the media, and the public and to engage the public on the merits of the underlying policy issues. I am not aware of a single case in which anyone other than a career FOIA professional or an attorney in the Office of the General Counsel made a substantive change to a proposed FOIA release. Further, to my knowledge, no information deemed releasable by the FOIA Office or the Office of the General Counsel has at any point been withheld and responsive documents have neither been abridged nor edited.

The roots of this significant FOIA policy lie not with this Administration, but with its predecessor. Beginning in 2005, the DHS FOIA office began identifying significant FOIA requests pursuant to objective standards<sup>4</sup> and providing notice of them to senior Department management in a weekly report. In 2006, submission guidelines for what constituted a 'significant FOIA' request were officially established by the DHS Privacy Office, and the current Administration has basically followed suit.<sup>5</sup>

Discussion between the Privacy Office and senior Department management about how to increase awareness of significant documents began after several significant FOIAs were released at the beginning of the new Administration without notice to senior management. These significant FOIA responses related to ongoing litigation, records from the previous Administration, and records from other Departments, among other issues. This basic lack of awareness of significant FOIA responses presented challenges to the Department's ability to

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<sup>4</sup> All DHS Privacy Office memoranda on significant FOIA requests are available in the DHS FOIA Library at [www.dhs.gov/foia](http://www.dhs.gov/foia).

<sup>5</sup> The 2006 Submission Guidelines are available at:

[http://www.dhs.gov/xlibrary/assets/foia/priv\\_foia\\_cabinet\\_report\\_submission\\_guidelines\\_20060804.pdf](http://www.dhs.gov/xlibrary/assets/foia/priv_foia_cabinet_report_submission_guidelines_20060804.pdf).

The 2009 guidelines are available at:

[http://www.dhs.gov/xlibrary/assets/foia/priv\\_cfoiao\\_memo\\_cabinet\\_report\\_foia\\_guidelines\\_20090707.pdf](http://www.dhs.gov/xlibrary/assets/foia/priv_cfoiao_memo_cabinet_report_foia_guidelines_20090707.pdf).

effectively respond to inquiries from the media, Congress and the public, inhibiting senior leadership's ability to fulfill its responsibility to manage the Department and to engage the public on merit-based discussions related to the associated policy issues.

As a result, the Department developed a process during the fall of 2009 by which senior Department management were made aware of significant FOIA requests and planned releases. As explained above, the determination of which FOIA releases were deemed significant and thus subject to this awareness process were made by career FOIA officials. While the review period was set at three days, that goal unfortunately was not always met due to the urgency of other priorities and some FOIA releases were delayed. This was particularly true in early 2010, in the wake of the attempted terrorist attack on Christmas Day and other incidents that necessarily drew the attention of senior management away from regular day-to-day activities and deadlines.

In the spring of 2010, recognizing that enhancements to this review process were needed to ensure that the appropriate awareness was provided to senior management in a manner that allowed prompt processing of FOIA requests, Departmental leadership and the Privacy Office collaborated to develop an improved system. Under this improved system, significant FOIA releases are uploaded to an online intranet-hosted, role-based SharePoint site to which senior Department management have read-only access, originally three days in advance of release. This was done in order to allow officials from the Department's offices of Legislative Affairs, Public Affairs, Intergovernmental Affairs, and the Office of the Secretary to review the documents simultaneously, and when inquiries are made. FOIA responses are automatically sent out after the review period has expired, unless one of the reviewers or a FOIA officer identified a problem with the FOIA response. To my knowledge, the identification of inconsistencies or inappropriate redactions or disclosures has occurred only a handful of times in the nine months since the SharePoint notification system was implemented.

To my knowledge, at no point during this awareness review process did anyone other than a career FOIA professional or an attorney in the Office of the General Counsel make a substantive change to a proposed FOIA release or a substantive determination regarding what should be released or redacted. While there is no doubt that this awareness review at times took longer

than anticipated, the issue of delay in responding to some FOIA requests must be evaluated in its larger context. Since the implementation of this awareness policy, the average number of days it takes the Department to process a FOIA request has *decreased* significantly – from 240 to 95 days, a record of which the Department is rightfully proud.

Despite some management challenges in developing this new system, we believe significant progress has been made by establishing the SharePoint site. We have continually tried to improve this process to ensure the Department is as responsible and responsive as possible. We have been and remain mindful of the Attorney General's March 2009 guidance that "open government requires agencies to work proactively and respond to requests promptly" and that "responsibility for effective FOIA administration belongs to all of us—it is not merely a task assigned to an agency's FOIA staff." (emphasis mine)

In fact, we continue to improve the system; DHS has now moved to a one-day awareness review for significant FOIA responses. Substantive determinations regarding application of FOIA law and exemptions will continue to be made by FOIA professionals or attorneys in the Office of the General Counsel.

We are proud of the strides we have made in this effort, but we also acknowledge that there is always room for improvement; we welcome the Committee's suggestions to improve our process. To best facilitate any recommendations from the Committee, let me set forth our current procedure for responding to all FOIA requests:

1. DHS receives a request for information under the FOIA.
2. The request is logged by the relevant component FOIA office, and reviewed for compliance with DHS regulations and to ensure it reasonably describes the records sought (i.e., that it is perfected). If the request is not perfected, the FOIA professional corresponds with the requester to seek clarification of the scope of the request; once the request is perfected, the FOIA professional sends an acknowledgement letter to the requester.

3. Career FOIA professionals then determine whether or not the request is significant using criteria and factors that have not changed materially since 2006.
4. Information about significant requests, including the actual request letter and a summary, is submitted to my office – the DHS Privacy Office – which consolidates significant requests and reports them to DHS senior management on a weekly basis for awareness.
5. The relevant FOIA Office tasks out the request to a component, group or subject matter expert(s) within the Department who may have responsive federal records according to the information requested and the scope covered.
6. Federal records from the subject matter experts or identified parties that are responsive to the request are returned to the FOIA Office from which it was tasked.
7. Career FOIA professionals review the response and identify appropriate legal exemptions (for law enforcement, national security, privacy and pre-decisional considerations, among other things as defined in the law).
8. After the DHS subject matter expert (custodian of the federal records) confirms the final response is appropriate, the FOIA professional then prepares the information for release – including a letter and explanation of various exemptions.
9. In many DHS components and offices, attorneys from the Office of the General Counsel review the proposed response prior to release to confirm that all redactions and disclosures are being made appropriately.
10. FOIA releases are reviewed and approved by a FOIA manager.
11. Non-significant FOIA releases (99.5 percent of releases) are released to the requester. Significant FOIA releases are uploaded into a SharePoint system for a limited awareness review period – now one business day – and then automatically released by the relevant component FOIA office back to the requester.

In conclusion, it is my sincere hope that through the Department's actions to date – including implementing a FOIA process that leads the federal government in disclosure – and by appearing here today we will clear up any lingering misconceptions on this topic. As is the case at any agency, establishing new procedures is not always seamless and sometimes minor delays are unavoidable as you seek to fine-tune processes. These refinements have helped us establish the

current system, which is more effective in confirming that FOIAs are processed in a timely manner while ensuring that senior management is made aware of significant FOIAs. The Department understands that a strong, collaborative relationship with Congress is crucial to the overall success of the Department and we look forward to working with the Committee to further refine and develop our FOIA processes. I welcome your recommendations and would be happy to answer your questions.

Chairman ISSA. Mr. Fong.

**STATEMENT OF IVAN FONG**

Mr. FONG. Good morning, Mr. Chairman, Ranking Member Cummings and distinguished members of this committee. My name is Ivan Fong, I am the general counsel of the Department of Homeland Security, I appreciate this opportunity to appear before you today to discuss the Department of Homeland Security's Freedom of Information Act policies.

As general counsel, I lead and oversee a law department of more than 1,800 lawyers in our headquarters and our component legal offices. In my leadership capacity, I emphasize the important role DHS lawyers play both in advising on and in insuring compliance with the law and in setting high standards for professional and personal integrity across the Department.

In the course of performing their duties, headquarters attorneys, as well as lawyers in our component legal offices, may be called upon to interpret the FOIA statute, and to apply its provisions to records collected and processed by the office of privacy for possible disclosure in response to FOIA requests.

As you know, FOIA establishes a mechanism that makes records held by agencies and departments of the executive branch accessible to members of the public, except to the extent the records, or portions thereof, are protected from disclosure by one of nine statutory exemptions, or by one of three special law enforcement record exclusions. The nine exemptions included in FOIA reflect Congress' recognition that the goal of an informed citizenry, vital to the functioning of a democratic society, must sometimes be balanced against other important societal goals such as protecting the confidentiality of sensitive, personal, commercial and government information.

This administration has taken significant steps to increase openness in government. In January 2009, for example, President Obama issued two important memoranda to the heads of executive departments and agencies concerning government transparency. In his transparency and open government memorandum, he committed this administration to, "Unprecedented level of openness in government." And in his Freedom of Information Act memorandum, he stressed the importance of FOIA stating that it is, "The most prominent expression of a profound national commitment to insuring an open government."

To reinforce this commitment to transparency, Attorney General Holder, in March 2009, issued a guidance memorandum that among other things, reiterated the President's call for a proactive disclosure in anticipation of public interest. Required agencies to consider making partial disclosures whenever full disclosure of a record is not possible, and urge agencies to create and maintain effective systems for responding to requests. Against this backdrop, the Department's lawyers provide day-to-day legal advice to the Department's chief FOIA officer, her staff and others in headquarters and their components who are responsible for responding to FOIA requests. In doing so the lawyers who practice in this area provide legal advice on specific requests and potentially responsive records. And they do so based on their best understanding of the

facts and their best legal analysis and interpretation of the FOIA statute, the relevant case law, and applicable guidance.

With respect to the involvement of the Office of the Secretary and other senior department leaders in being informed of significant events affecting the Department, including the release of significant departmental information, the Secretary and her staff have, in my view, clear statutory authority to ask questions of, review and manage the operations of all parts of the Department, including the privacy office and its elements that handle the FOIA process.

Similarly, the Attorney General's 2009 guidance states in relevant part, that responsibility for effective FOIA administration belongs to all of us, it is not merely a task assigned to an agency's FOIA staff. It is, therefore, my view that it is not only legally permissible, but sound managerial practice for the Office of the Secretary to be informed of, and in coordination with the chief FOIA officer to play a role in overseeing the Department's FOIA processes.

As my colleague, Ms. Callahan, has just described the significant FOIA review process has evolved over time to become more streamlined and more efficient. Despite some challenges in the early implementation of the review and those problems have been acknowledged and remedied, the Office of the General Counsel will continue to engage with the Department's chief FOIA officer and staff across the Department to help ensure that we continue to disclose responsive records properly, and promptly, and in the spirit of cooperation that adheres to the letter and spirit of the President's direction. Thank you very much, Mr. Chairman.

Chairman ISSA. Thank you.

[The prepared statement of Mr. Fong follows:]



Statement of

Ivan K. Fong

Office of the General Counsel

U.S. Department of Homeland Security

Before the

United States House of Representatives

Committee on Oversight and Government Reform

March 31, 2011

Good morning Chairman Issa, Ranking Member Cummings, and distinguished Members of the Committee. My name is Ivan Fong. I am the General Counsel of the Department of Homeland Security (DHS). I appreciate the opportunity to appear before you today to discuss the Department of Homeland Security's Freedom of Information Act (FOIA) process and policy.

DHS's Office of the General Counsel (OGC) is responsible for providing legal advice and services to the Department as it carries out its important missions and statutory responsibilities. The Homeland Security Act defines the General Counsel as "the chief legal officer of the Department," 6 U.S.C. § 113(a)(10). In that role, I am ultimately responsible for all legal determinations within the Department and its components. The General Counsel is also the Department's regulatory policy officer, managing the rulemaking program and ensuring that the Department's regulatory actions comply with relevant statutes and executive orders.

As General Counsel, I also lead and oversee a law department of more than 1,800 lawyers in our headquarters and component legal offices. In my leadership capacity, I emphasize the important role DHS lawyers play in advising and ensuring compliance with the law and in setting high standards for professional and personal integrity across the Department. My staff and I oversee the work of departmental lawyers in each headquarters law division and component legal office in their rendering of expert legal advice and counsel in support of the Department's day-to-day operations, and OGC lawyers help ensure that the Department's efforts to secure the nation are consistent with the civil rights and liberties of all citizens. Our lawyers also identify legal requirements that apply to departmental policies and procedures and assist in policy and operational initiative planning, as well as review and develop proposed legislation.

In the course of performing our duties, the Office of General Counsel is also called upon to construe the Freedom of Information Act. As you know, FOIA is a federal statute enacted in 1966 that generally provides that any person has a judicially enforceable right to access to federal agency records, subject to certain exemptions and exclusions set forth in the statute. As the Supreme Court has observed, “[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”<sup>1</sup>

FOIA thus establishes a presumption that records in the possession of agencies and departments of the Executive Branch of the U. S. government are accessible to the people, except to the extent the records (or portions thereof) are protected from disclosure by one of nine statutory exemptions contained in the law or by one of three special law enforcement record exclusions. The nine exemptions included in FOIA reflect Congress’ recognition that the goal of an informed citizenry must sometimes be balanced against other important societal goals, such as protecting the confidentiality of sensitive personal, commercial, and governmental (including classified) information. FOIA therefore provides a framework for balancing and appropriately protecting these competing interests, while placing primary emphasis on disclosing information.

As you also know, this Administration has taken significant steps to increase openness in government. On January 21, 2009, President Obama issued two important memoranda to the heads of Executive Departments and Agencies concerning government transparency. In his *Transparency and Open Government Memorandum for the Heads of Executive Departments and*

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<sup>1</sup> *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); see also *Milner v. Dep’t of the Navy*, No. 09-1163, slip op. at 1-2 (U.S. Mar. 7, 2011) (“Congress intended FOIA to ‘permit access to official information long shielded unnecessarily from public view.’”) (citation omitted); *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (“Official information that sheds light on an agency’s performance of its statutory duties falls squarely within that statutory purpose.”).

*Agencies*, he committed this Administration to an “unprecedented level of openness in government,” 74 Fed. Reg. 4,685 (Jan. 21, 2009), and in his *Freedom of Information Act Memorandum for the Heads of Executive Departments and Agencies*, he stressed the importance of FOIA, stating that it is “the most prominent expression of a profound national commitment to ensuring an open government,” 74 Fed. Reg. 4,683 (Jan. 21, 2009). The latter memorandum makes clear that FOIA “should be administered with a clear presumption: In the face of doubt, openness prevails.” Agencies were thus directed to respond to requests “promptly and in a spirit of cooperation,” to take “affirmative steps to make information public,” and to use “modern technology to inform citizens about what is known and done by their Government.”

To buttress the Administration’s commitment to transparency, Attorney General Holder issued a guidance memorandum in March 2009 that, among other things, established a “foreseeable harm” standard for disclosure. Under that standard, to withhold an agency record, an agency must determine that (1) it reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions; or (2) disclosure is prohibited by law. The Attorney General’s memorandum also reiterates the President’s call for proactive disclosure in anticipation of public interest, thus requiring agencies to proactively and promptly make information available to the public without request. The Attorney General’s memorandum also requires agencies to consider making partial disclosures, whenever full disclosure of a record is not possible, and to create and maintain effective systems for responding to requests.

Against this backdrop, the Department’s lawyers provide day-to-day legal advice to the Department’s Chief FOIA Officer, her staff, and others in headquarters and our components who are responsible for responding to FOIA requests. In doing so, the lawyers who practice in this

area provide legal advice on specific requests and potentially responsive records, and they do so based on their best legal analysis and interpretation of the FOIA statute, relevant case law, and applicable guidance such as the President's January 2009 memorandum, articulating a "presumption of openness," and the Attorney General's March 2009 guidance. Moreover, to provide their legal analysis and advice, the career attorneys who specialize in FOIA matters at DHS regularly monitor developments in the law relating to FOIA and consult with their subject-matter expert colleagues at the Department of Justice and other agencies.

With respect to the involvement by the Office of the Secretary and other senior Department leaders in being informed of significant events affecting the Department, including the release of significant departmental information, the Secretary and her staff have clear statutory authority to ask questions of, review, and manage the operations of all parts of the Department, including the Privacy Office and its elements that handle the FOIA process.<sup>2</sup> The regulations that implement FOIA at DHS expressly contemplate a decision-making role for heads of components and thus are consistent on this point as well.<sup>3</sup> Similarly, the Attorney General's March 2009 guidance memorandum states in relevant part that "responsibility for effective FOIA administration belongs to all of us—it is not merely a task assigned to an agency's FOIA staff." Accordingly, it is not only legally permissible, but sound managerial practice, for the Office of the Secretary to be informed of and, in coordination with the Chief FOIA Officer, to play an active role in overseeing the Department's FOIA processes.

The significant FOIA review process has evolved over time to become more streamlined and efficient. Despite some challenges in the early implementation of the significant FOIA

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<sup>2</sup> See 6 U.S.C. § 102 ("The Secretary is the head of the Department and shall have direction, authority, and control over it").

<sup>3</sup> See 6 C.F.R. § 5.4(b) ("The head of a component ... is authorized to grant or deny any request for a record of that component").

review process that have been acknowledged and since been remedied, the Office of General Counsel will continue to engage with the Department's Chief FOIA Officer and staff across the Department to help ensure that we continue to disclose information promptly and in a spirit of cooperation that adheres to the letter and the spirit of the President's direction.

At this time, I welcome further discussion of the Department's FOIA process and hope that I may be of assistance in answering your questions.

Chairman ISSA. I will now recognize myself for 5 minutes.

Ms. Callahan, is AP on your enemies list? I'll take that as a no, unless you want to answer. I mean, you know, there has been this talk about—in your opening statement about, you know, political, political. Yes, there were Members of Congress and others who wanted it who have Rs and Ds after their name, but it appears as though your office wanted to know if the Associated Press wanted something. You wanted days to prerelease, or to spin or to decide to take information that was sensitive or embarrassing and get it out in some format. You wanted days before the Associated Press would have they waited weeks or months for.

So let me just understand this. The words you used, because I want to make sure that the words are very careful, because what you said to the committee turned out not to be completely accurate some time ago. You used the word "eventual" repeatedly. "Eventual" means that a right delayed is not a right denied. Do you stand by that position that 3 days, 6 days, 90 days, they are all OK as long as eventually you comply with FOIA? Yes or no, please. Is "eventual" good enough? Is a delay of 3 days, 30 days or 90 days OK and still compliant with FOIA, in your opinion.

Ms. CALLAHAN. The initial FOIA review process had—

Chairman ISSA. Answer the question please.

Ms. CALLAHAN. We have made great strides to—

Chairman ISSA. Is a 3-day, 30-day or 90-day all acceptable as FOIA compliant? Because you used the word "eventual" but, in fact, there were clear delays produced by this policy a pre alerting as to who wanted what so the political appointees could do what they wanted before it got out in some other way. So is 3 days, 30 days or 90 days an acceptable delay and still compliant with FOIA, yes or no?

Ms. CALLAHAN. I have very high standards and that did not meet my standards.

Chairman ISSA. Mr Fong, you're not answering the question.

Ms. CALLAHAN. I did, sir. That did not meet my standards.

Chairman ISSA. OK. So you didn't meet the standards, you were causing delay, and "eventual" should not be a wiggle word here in your statement. The fact is, there were delays. The IG is saying it did not stop eventual delay, didn't change the fact that you were delaying, and it did meet your standards. And if the IG were doing their job, you would clearly have the need to stop eventual and make it prompt.

Mr. Fong, you were aware that there were delays produced as a result of political appointees receiving this information. Did you do anything about it? Did you consider it a problem that 3 days, 30 days or 90 days of additional delay occurred because political appointees were evaluating the sensitivity of a piece of maybe embarrassing information or politically sensitive information becoming public?

Mr. FONG. I believe that it is important for FOIA responses to be promptly disclosed. I believe also, though, that the Secretary's office has a legitimate interest.

Chairman ISSA. So you believe that a delay in order to evaluate the political ramifications and potentially release something some-

one has waited for 90 or 180 days for, release it before you even give it to them is OK under FOIA?

Mr. FONG. No.

Chairman ISSA. That's what was—that's what was possible as a result of this policy, wasn't it?

Mr. FONG. With all respect, Mr. Chairman, that's not what I said. I said that it is important for releasable records to be released, but I believe though also that the Secretary's office has an interest in knowing what is—

Chairman ISSA. Mr. Fong, I asked about the interference, I did not ask about the interest. Nobody on this dais, I believe, today, will assert that if as a FOIA request was going out simultaneously, even the evening before the morning it was sent to the offices so they would be aware and be able to develop appropriate responses if the very next day it appeared on the front page of the New York Times.

Bottom line, though, is your offices had them days or weeks or months beforehand, and in some cases, clearly could have spun the story before the facts were given out.

Let me move on to one thing, put up slide No. 1, there will be more slides today, but this one is—it is very hard to read that. Do we have—do you have a copy?

Ms. CALLAHAN. No, we don't.

Chairman ISSA. OK. Would you please give the witnesses a copy. Essentially you have an exemption for predecisional communication. On the left, you will see the redacted version. On the right, you will see—and this was the type of information the AP was looking for that they felt this policy confounded. It says and, this is for you, Mary Ellen Callahan, "Were you concerned that the forwarding of every request on a weekly report to the Secretary's political staff would burden the staff?" In other words, that's one of the things redacted.

Or more specifically it says, "Not sure what the confusion is, but please know this request is coming directly from the front office. NOAA is 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."

Now that was redacted. So basically you made a decision, the decision is to forward it. A newspaper agency wants information, and what I read here is we're redacting about not a predecisional process, but a decision that has been made. And this was exactly what they wanted to understand. The AP wanted to know, and had a right to know, a constitutional obligation under freedom of the press, they wanted to know if you were doing exactly what you were doing and that information was redacted in this. Now you have a copy of it. Please respond and my time has expired so we will be brief.

Ms. CALLAHAN. Actually, Mr. Chairman, with regard to the AP request about FOIA processing, my office was recused as is the normal practice with—if my office is the direct subject of the FOIA request, and so my office did not make that B5 determination. The Office of the General Counsel did.

Chairman ISSA. OK. So Mr. Fong, you redacted actual substantive information that clearly was exactly what the AP was

looking for, you redacted it, and when they tried to get the information, it was not predecisional, it was not executive privilege, but it clearly was what they had a right know and we are finding out about here today. Would you explain why?

Mr. FONG. Well, Mr. Chairman, I was not personally involved in making this decision, my staff, though, does have expertise in this area. I cannot speak to this particular redaction or other redactions that were or were not made. I can say, though, that there is an administrative appeals process that exists precisely to correct such issues and to correct any mistakes. My understanding is that these records are going through such an appeal, and I believe it would be premature therefore for me to opine.

Chairman ISSA. OK. Well, my time has expired. We're going to go to the ranking member and—but what I will do is I'm going to have copies of all of this delivered to you so you can look through them and know them in advance because we have a number of these types of records.

And I think the ranking member would agree with me that, quite frankly, it is very hard to appeal a redaction because you don't know what you don't know. I yield to the ranking member.

Mr. CUMMINGS. Thank you very much, Mr. Chairman. Let me—one of the things I have seen in this committee before, and it is something that I'm very concerned about is when people come before us and you're not allowed to try to answer the question that you've been asked.

So I'm going to go to you, Ms. Callahan, because I realize that this is not an easy process, that you're coming before a committee and you're probably a little nervous, and people are watching this, and there is life after this moment, and you have a reputation. And I want to give you a chance to answer the question. You tried to, but you weren't permitted to. You stated that delays do not meet your high standards, and during the delays that Chairman Issa discussed, were officials weighing partisan political concerns to your knowledge?

Ms. CALLAHAN. To my knowledge they were not, sir. And that was confirmed by the inspector general's report.

Mr. CUMMINGS. And what were they doing—

Ms. CALLAHAN. Sir—

Mr. CUMMINGS [continuing]. To your knowledge?

Ms. CALLAHAN. To my knowledge, the front office was wanting to have awareness of significant FOIA activities in order to engage the public on the underlying merits of the debate. They were not delaying it, they may have not had the opportunity to review it in a timely fashion, and that did not meet my standards, which is why we shifted to the SharePoint system described in more detail in my written testimony.

Mr. CUMMINGS. Now, was it—was the general counsel reviewing documents for legal sufficiency so they could meet the standards?

Ms. CALLAHAN. There were at times as I understand some documents that had been identified as being insufficiently or inappropriately processed. And for that, they went to the Office of the General Counsel for a further review as is the typical process in the Department of Homeland Security.

Mr. CUMMINGS. And let me ask you this: Were you taking your time in order to “spin” stories prior to release of documents?

Ms. CALLAHAN. No, sir. To my knowledge, the Department was not engaging in spin. They wanted just awareness of the underlying issues in the FOIA releases that they did not modify. They just wanted to know what was in the documents.

Mr. CUMMINGS. And I want to thank you for saying, and I know you mean it that you have high standards. We understand that you’re one person, and you have people who work with you; is that correct?

Ms. CALLAHAN. That is correct, sir.

Mr. CUMMINGS. Mr. Fong and Ms. Callahan, the chairman has repeatedly stated that DHS officials make FOIA decisions based on partisan political factors. Last summer, he said political appointees inappropriately injecting partisan political considerations into the process. And in his report yesterday, he said political considerations were an important factor in your FOIA decisions. These are serious, very serious, very serious allegations. But based on our review of the documents and interviews, we could not identify any instances where this actually happened.

So let me ask you directly, are either of you aware of any case in which DHS withheld information from FOIA requesters based on partisan political considerations?

Ms. CALLAHAN. I’ll answer first, no, sir, I am aware of no such circumstance.

Mr. CUMMINGS. Mr. Fong.

Mr. FONG. And I am not aware of either.

Mr. CUMMINGS. The inspector general who will testify on the next panel also refuted this allegation. In his report—and this is the inspector general, he says, “after reviewing information and interviews the DHS FOIA experts we determined that the significant request review process did not prohibit the eventual release of information.” He also said this, “No FOIA officers said that requesters were disadvantaged because of their political party or area of interest.” Are you familiar with the IG’s finding and do you agree with him?

Ms. CALLAHAN. Sir, I am familiar the IG’s findings and I do agree with them, and I appreciate their inspection in this matter.

Mr. CUMMINGS. Well, let me turn to what I think was the real problem. Our review found that your two officers were not working together as efficiently and effectively as they could. In fact, we found there was real tension between the FOIA’s office and the general counsel’s office. And let me give an example. On March 3rd, our staff interviews Catherine Papoi?

Ms. CALLAHAN. Papoi, sir.

Mr. CUMMINGS. Papoi, who works in Ms. Callahan’s office. She told our staff that she had serious issues with an attorney who handles FOIA requests in your office, Mr. Fong. And when Ms. Papoi was asked to describe the problem, she said this, “I do not consider him to have expertise in FOIA. There have been several times I have had to educate him on some very basic concepts.”

Mr. Fong, how do you respond to her concern that the attorney in your office was not qualified to work on FOIA requests?

Mr. FONG. I disagree with the view, Congressman, that this attorney in question was not qualified to respond to her requests. As you know, FOIA's a very technical and complex area. It is true that he did not practice in this area full-time, but he oversees a group of lawyers who do. And he has, I believe, very good judgment and applied his best understanding of the statute and exercised good faith and reasonable judgments to the questions that he was presented with.

Mr. CUMMINGS. So let me be clear. This has nothing to do with political issues, these are two career employees who seem to have difficulty working together. I think we see that all the time, even here on the Hill.

Ms. Callahan, how about you? How can we expect a FOIA process to work when career officials in your office and Mr. Fong's office can't work together?

Ms. CALLAHAN. Sir, we are working to address what our reasonable disagreements among others, and I think it is important to make sure that we put personality aside and try to work to solve this problem. So we recognize it to be a concern and we are working diligently on it.

Mr. CUMMINGS. And finally, let me back this up, as the leaders of your two offices, is it your job to get your employees to rise above these current tensions and rebuild the trust level? And what is your plan to do that? And how do you plan to resolve substantive disputes between your officers in the future?

Ms. CALLAHAN. I strive to be a good manager. I make sure that indeed these types of issues are not impacting the effectiveness of our offices and I have—will work diligently to attempt to address that through individual consultations, as well as, perhaps, collective ways to resolve personality issues not dealing with substance issues.

Mr. CUMMINGS. Mr. Fong.

Mr. FONG. Thank you, Mr. Chairman. Those who worked with me know that I take my leadership and management responsibilities very seriously. I have spent a lot of time in my almost 2 years at the Department insuring that our lawyers work well with their clients and others around them. I have taken specific actions to remedy issues that have arisen. And as you said earlier, this is very—this is not unusual for career professionals who care deeply about what they do, who are very dedicated, hard-working professionals to disagree at times. And as you said, I believe they should try to rise above their disagreements.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

Chairman ISSA. Thank you. For the record we have been informed that the AP's 9-month old application under the administrative objection has not yet been heard. With that, we recognize the gentleman from Utah, Mr. Chaffetz.

Mr. CHAFFETZ. Thank you, Mr. Chairman.

Ms. Callahan, I'm going to refer in part to the Associated Press report of July 21, 2010. I'd like to read some statements from that and get your reaction to them. Tell me if you believe them to be true or false. "If a Member of Congress sought such documents, employees were told the specify Democrat or Republican."

Ms. CALLAHAN. Sir, that is how Congressmen are referred to ordinarily. In fact, under the——

Mr. CHAFFETZ. But this is a new policy, correct?

Ms. CALLAHAN. If I could, sir. It actually is not a new policy, it was a policy established in 2006, and it is, in fact, during the significant—the weekly report in which we report these elements.

Mr. CHAFFETZ. To the White House, correct?

Ms. CALLAHAN. Actually, no, to the Department. And then the Department summarizes, it may or may not report specific elements to the White House. We——

Mr. CHAFFETZ. Sorry, but I want to clarify this.

Ms. CALLAHAN. Yes, sir.

Mr. CHAFFETZ. A report that was putting together second sentence of your July 7, 2009 issuance from you says, “The privacy office FOIA leadership integrates the information into its weekly report to the White House liaison.” So it was for the White House, correct?

Ms. CALLAHAN. And by integrating it—I don’t know what goes on with the integration process.

Mr. CHAFFETZ. But it was for the White House.

Ms. CALLAHAN. It may or may not include——

Mr. CHAFFETZ. It was for the White House, correct?

Ms. CALLAHAN. That’s the front office process. I did want to point out for this weekly significant reporting process, in the 2 years that I’ve been here, I believe a Member of Congress has been listed on it once.

Mr. CHAFFETZ. Let me read this, starting in the first paragraph, “For at least a year, the Homeland Security Department detoured requests for Federal records to senior political advisors for highly unusual scrutiny.”

Ms. CALLAHAN. I disagree with that assessment, sir, as demonstrated in my—more thoroughly, in my written testimony. It was a process to provide awareness to the senior leadership.

Mr. CHAFFETZ. Let me keep going. “Probing for information about the requesters and delaying disclosures deemed too politically sensitive. According to nearly 1,000 pages of internal e-mails obtained by the Associated Press.”

Ms. CALLAHAN. As I have discussed with the ranking member and as indicated in the inspector general’s report, there were indeed management challenges with the initial way that we tried to do this awareness process. However, political affiliation, parties of interest did not play a factor. It was logistical issues rather than management challenges, and that’s demonstrated throughout this inspection.

Mr. CHAFFETZ. It certainly seems to be inconsistent with your directive of July 7, 2009. Let me read another sentence, “The Department abandoned the practice after the Associated Press investigated,” is that true?

Ms. CALLAHAN. It is not true, absolutely not. The awareness came—the awareness process continues today.

Mr. CHAFFETZ. You answered the question, I have a certain amount of time.

Ms. CALLAHAN. Sorry.

Mr. CHAFFETZ. Let me keep going. "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 organizations where they worked." Is that true or false?

Ms. CALLAHAN. Again, this has been a process since 2006 to provide awareness and to significant issues that may become in the public domain.

Mr. CHAFFETZ. Let me read another paragraph. "Two exceptions required White House review, request to see documents about spending under the \$862 billion stimulus law, and the calendars for cabinet members, those required White House review," is that correct?

Ms. CALLAHAN. The calendars—anything that has White House equities would require White House review. That is—

Mr. CHAFFETZ. What is a White House equity? What does that mean?

Ms. CALLAHAN. In the circumstances with the Secretary's calendar to the extent that she was in the White House, or that was a—disclosing some sort of element. This is a typical process of referring FOIA requests to different departments. It may be their underlying records. That is a standard process throughout the—

Mr. CHAFFETZ. The other part of that is under the \$862 billion stimulus; is that correct? Is that part of the White House equity? It says "Two exceptions required White House review. Request to see documents about spending under the \$862 billion stimulus law," is that correct?

Ms. CALLAHAN. That is correct.

Mr. CHAFFETZ. Why? Why does that require a special White House review?

Ms. CALLAHAN. Sir, I'm the chief FOIA officer; I'm not a policy person in this area.

Mr. CHAFFETZ. So is that a directive that you got from the White House?

Ms. CALLAHAN. I believe I was instructed by the Office of the Secretary to do that, and we processed it—

Mr. CHAFFETZ. So the Secretary—who directed you to do that? Is that a document that you can provide for us?

Ms. CALLAHAN. I believe it is in the production. I believe it was the deputy chief of staff.

Mr. CHAFFETZ. Dep—if it is not in the record, will you provide that for us?

Ms. CALLAHAN. Certainly. I believe it is in the record. And it was the deputy chief of staff who instructed us to do so and we did so.

Mr. CHAFFETZ. One last question. Calendars—let me see, my time has expired.

Chairman ISSA. Will the gentleman yield?

Mr. CHAFFETZ. Yes.

Chairman ISSA. Who was that one Member of Congress that was sent to the White House?

Ms. CALLAHAN. It wasn't sent to the White House, sir, it was listed on the weekly report.

Chairman ISSA. Who was it?

Ms. CALLAHAN. It was I believe Senator Grassley when he was asking for a request, we ended up modifying it and not answering via FOIA, but through a different process. Members of Congress actually don't file FOIA requests very often, so the issue on the Members of Congress is a relatively moot point.

Chairman ISSA. Except, of course, that the White House has told us to file FOIA when we're in the minority and not responded otherwise.

We now recognize the former chairman of the full committee, Mr. Towns, for 5 minutes.

Mr. TOWNS. Thank you very much, Mr. Chairman. Let me begin by—first of all, Ms. Callahan, thank you very much for your service, we've had an opportunity to follow your record and you've done some great things down through the years, and want to thank you for that.

You've been asked many questions about acceptance of delays in responding to FOIA. Can you please explain to this committee what circumstances or what situations that might delay you in responding to FOIA?

Ms. CALLAHAN. Yes, sir. As you know, we take our FOIA responsibilities seriously. At the same time, there are several processes and steps that I detail in my written testimony that describe the process that every FOIA, the 130,000 FOIAs that the Department received last year, each FOIA must go through these steps to make sure that, indeed, we have identified the Federal records, we have identified the parties who may have the information, that we have applied the appropriate exemptions, that we have looked at legal issues therein, that the process has been reviewed to make sure that indeed there isn't any information that is inappropriately disclosed or inappropriately redacted.

And so despite having high standards, the average processing time for FOIAs in the Department is 95 days. That is, right now, several days more efficient than the Department of Justice at 113 days, but it is a standard that we are trying to achieve and surpass. So delays are not appropriate for any FOIA, and we are trying to mitigate that problem.

Mr. TOWNS. Are any of these delays caused by political involvement?

Ms. CALLAHAN. Sir, as I had described in my initial testimony and my written testimony, there were some processes that were involving the awareness review for the Department, but did not involve political activities or instigations as the inspector general has indicated. The initial way that we started to give the front Office of the Secretary awareness into some of the significant FOIAs that may make media attention was not up to my standards, and therefore, we have modified that process, and I believe now we have a best practice in terms of providing awareness, not only to the front office, but also to the other FOIA officers, if indeed there are FOIA requests that may impact their equities.

Mr. TOWNS. Ms. Callahan, can you explain the 2006 directive in which FOIA requests are referred to the Secretary's Office, could you explain that? And I'm not going to tell you give it to me in a yes or no.

Ms. CALLAHAN. Sir, I can't explain it because I wasn't here in 2006, but I understand that it is the ordinary process of all administrations to have awareness into significant activities in each of the components. My Privacy Office provides actually two weekly reports, one on the activities of the entire office, and then separately on FOIAs that have been provided that may meet these standards for awareness for the front office, but I understand it is a typical practice, not only across the administrations, but also across the Federal Government.

Mr. TOWNS. Thank you. Mr. Fong, what do you feel could be done to eliminate some of the delays?

Mr. FONG. I think a lot of what can be done has been done in terms of the significant review process. Having it on the SharePoint system for 1 day gives time for awareness but does not add to delay the process of releasing the documents. I think, in general, if we were more coordinated as a Department, I think we spend a lot of time as a relatively new Department, trying to figure out who may be relevant component program individuals, what documents need to get to whom for the FOIA professionals to review. Our lawyers are very busy, they are hard working, but their plates are full. It takes time to do an analysis to gather facts, to make judgments.

I would also say that while I agree that it is important to be prompt, there has been much made of the 20-business day timeline which, in my view, is a misnomer if one thinks of it as a violation, it merely provides that the agency must make a determination within 20 business days, after which a requester may appeal, or may seek judicial redress if such a determination is not made.

There are provisions that permit an agency to request an extension. And as Ms. Callahan indicated, many agencies take, on average, longer than 20 business days to respond to a FOIA request.

So I just want to make clear that while we have an interest in releasing promptly, this is a process that courts and others have recognized as the Federal Government has become more and more complex inherently takes time.

Mr. TOWNS. Thank you very much and thank you both for your service. I yield back.

Mr. MCHENRY [presiding]. I thank the former chairman. And now I recognize Mr. Meehan for 5 minutes.

Mr. MEEHAN. Thank you, Mr. Chairman. And thank you, Ms. Callahan and Mr. Fong, for your appearance here today before our committee.

Ms. Callahan, thank you for your service, you do not have an easy job. It's a complex job particularly with a great scope of information that is associated not just with the free flow, but also at times information that may relate to investigations or other kinds—it is not an easy job, but I do note that at least the AP has reported in December 2009, that you found that there was a level of scrutiny. I think we have had the base established here through prior testimony, you understand what I'm talking about in the form of the oversight of political appointees. You say "that this level of attention is crazy. I really want someone to FOIA this whole damn process." What did you mean?

Ms. CALLAHAN. Sir, if I could, that of course was a communication with my staff, and I was attempting to support them in this process. As I've indicated earlier, the initial process for the awareness review was not efficient, and it had its management challenges. At the time—therefore, that's why we have moved to the SharePoint system that Mr. Fong has referenced and I detail in my testimony. And I think that's an important element. We were not even technologically able to do that in December 2009. In fact, SharePoint didn't come on to my office until March 2010. So at the time my—I was discussing not about the awareness review, because I continue to believe that the Secretary does have important equities and having awareness into this, but that the level of detail and paying attention to it perhaps was not where I would have put my emphasis.

Mr. MEEHAN. Is it your testimony then that was purely process?

Ms. CALLAHAN. Yes.

Mr. MEEHAN. It was just a question of process?

Ms. CALLAHAN. Not a question about—not a question—not questioning the review itself, but the level of detail, thus missing the 3-day window.

Mr. MEEHAN. But we established that there is a level of review now that goes on in the form of responsibilities for political appointees to have to affirmatively indicate as to whether or not information is to be released.

Ms. CALLAHAN. Sir, let me be clear, that process has been modified, and we no longer have that process at all. That was the initial process. As I have indicated, that has significant management challenges. That did not meet my standards and that is why the process is modified.

Mr. MEEHAN. What's the difference? Well—so this doesn't happen at all now? There is no affirmative review by anybody?

Ms. CALLAHAN. Absolutely not. There is an FYI review. So what had happened before is previously, we had no way of sharing the FOIAs not only between the front office and my office, but also between the components except by e-mail.

Mr. MEEHAN. Well, are you making the calculations with respect to sensitive information or other kinds of things? Let's suppose there is no politics being played here, but there is a security interest. Are you responding to this based exclusively on the issue of what is in that document from a FOIA perspective or is there anybody looking at redaction or other kinds of issues?

Ms. CALLAHAN. So sir, with regard to—the current system, if I could just describe the current system it may help explain it. The current system we now have an intranet-based system where we can upload it, and the FOIA officer can upload it directly. And then not only can the people with equities review it, but also the other FOIA officers can review it if they have equities in it as well. It is accessible in a centralized base. And in that way, we send out a notification and say that this is—the request has been made let's say—

Mr. MEEHAN. So it's a notification process?

Ms. CALLAHAN. It is a notification—

Mr. MEEHAN. There is no more a thumbs-up or affirmative by virtue of any other kind of person above you?

Ms. CALLAHAN. That is correct, sir. And that was changed in July 2010. And we believe that this process, it's just a notification process. People can look at the underlying documents and that has happened a couple of times. Going to your question where people have caught either predecisional information that may have been sent out, inaccurate, or incorrect, or insufficient redactions. It only happened a handful of times since July 2010, that's a much more efficient and better process.

Mr. MEEHAN. So it would be your testimony that there is no longer any delay associated as there had been in the past where something would have been prepared for release by you, but it would have taken an additional period of time to flow up the chain before you got the affirmative approval by the political appointee?

Ms. CALLAHAN. The new SharePoint system has the documents unloaded 1 day and they are sent out the next day. So there is arguably a 1-day delay, but as Mr. Fong pointed out, that is to make sure that we don't disclose law enforcement sensitive or other predecisional information inappropriately.

Mr. MEEHAN. Mr. Fong, what level of—I'm out of time, but what level of training or many engagement do you have with those political appointees about their responsibilities and their obligations under the Freedom of Information Act who participate with you in the review of these documents?

Mr. FONG. I just want to be clear what your question is when you refer to the political appointees.

Mr. MEEHAN. Those—those who in the past, in the past must have had to affirmatively indicate this complex area and you appreciate that. They were doing the affirmative indication. What—and now presumably, that's no longer the case I'm happy to hear that. I'm concerned with moving forward. Notwithstanding if they are still participating with you in that, to what extent do those individuals, do they have any say, may they be able to reach back to you and tell you whoa, wait a second, do not release that yet.

Mr. FONG. Of course that is part of the process, then and now, that the attorneys in our office who have experience and expertise in this area stand ready to be consulted at any time, whether it is the FOIA professionals or the political appointees or the program managers who will have a much better sense of the impact of a disclosure as is required to be assessed under the Attorney General's guidance memo. All of that information is relevant to making a legal determination, and our lawyers are involved in making those determinations.

Mr. MCHENRY. The gentleman's time has expired. Mr. Tierney of Massachusetts is recognized for 5 minutes.

Mr. TIERNEY. Thank you, Mr. Chairman. I'm a little bit surprised you have a hearing here where allegations of politicization are being made in one direction, yet I look behind the chairman's desk and I see nothing but pure politics and nonsense up there. And I would hope in the seriousness, or to be taken seriously as a committee the majority would begin to act that way and take that material down and approach this with the degree of seriousness to which it probably deserves.

With that said, Ms. Callahan, I want to thank you and Mr. Fong for your testimony. I do want to note, Mr. Chaffetz is gone, but he

was referring to an AP story. And I know that eventually the AP story said they were unable to substantiate the most serious allegations made in the AP story or subsequent public comments. So just put that in context. But I was concerned with what I thought at one point in his testimony was that events involving the ARRA, Recovery Act. There seemed to be some indication that it had to be sent to the White House. But I asked the staff to go back and get the interview with the associate director of privacy, Vania Lockett, who basically told us that at one point she thought she was advised that all requests needed to be sent to the White House, but since then, she was advised directly from the White House that was not the case. Does that comport with your understanding, Ms. Callahan?

Ms. CALLAHAN. Thank you for that clarification. And that does refresh my recollection, that indeed, that is the case, thank you.

Mr. TIERNEY. Now I note also that the Department of Homeland Security in just last year 2010 alone received 130,000 Freedom of Information Act requests, is that accurate?

Ms. CALLAHAN. That's correct, sir.

Mr. TIERNEY. And about 600 of those were considered significant enough to require additional review, is that right?

Ms. CALLAHAN. That required to be even put on the weekly report for notification purposes, sir.

Mr. TIERNEY. The inspector general did indicate that he thought approximately 85 percent of those responses had already surpassed statutorily mandated 20-day processing deadline before they were submitted to the Office of the Secretary. And he also said about the delays that the ones that were under the review process were short, 1 to 4 days delayed. These relatively brief delays still caused temporary withholding of certain documents that a component was prepared to release. Do you agree with that assessment?

Ms. CALLAHAN. I do agree with that assessment, but that, of course, was under the original awareness process that I discussed with Representative Meehan, and therefore with have modified that process to make it a notification-only system. So I believe we have mitigated the inspector general's concerns in that way.

Mr. TIERNEY. Now, I also note that when this administration took office a couple years ago, they already had a backlog in the Department of more than 74,000 FOIA requests; is that correct.

Ms. CALLAHAN. That is correct. The highest FOIA backlog we had was 98,000 in fiscal year 2006. The highest in the Federal Government's history, sir. But we've gotten it down to 11,000 FOIA request backlog, an amazing effort by serious and professional career FOIA professionals throughout the Department.

Mr. TIERNEY. It strikes me in a time of fiscal austerity here that you have to hire some 40 more full-time positions in the Freedom of Information Act division to actually deal with this enormous number of requests for information.

Ms. CALLAHAN. Well, sir, I believe that indicates the Department's commitment to FOIA to increase the number of hires during the administration by over 50 positions.

Mr. TIERNEY. I think it deals with serious—we have a lot of challenges to make here in Congress and a lot choices to make with respect to the budget and there seems to be somewhat of a commit-

ment there to take 40 full-time positions and allocate it toward freedom of information with all of the other competing interests we have on that.

Now the thing that strikes me is that H.R. 1, the bill put forward by the majority this year would actually make across-the-board cuts to the Office of Secretary, significant cuts, 9 percent. The President was going to raise it 9 percent. H.R. 1 was going to take that away and make more cuts. What's that going to do to your attempts to get a transparency issue here and be more responsive to the FOIA requests?

Ms. CALLAHAN. Sir, I believe it could significantly hinder it. I have been able to double the size of my own FOIA staff since I've been there, and the Department has shown commitment around FOIA across the board as you notified, as you indicated, but I am concerned that these cuts will significantly impact our FOIA processing and the FOIA officers throughout the Department discussed that with me yesterday.

Mr. TIERNEY. Mr. Fong, do you agree with that?

Mr. FONG. I can't speak directly to the impact it would have, but I concur with Ms. Callahan's judgment that any time one has to reduce resources, there is likely to be an impact. We are trying to make our processes at the department as efficient as possible but there is an inevitability about such a drastic reduction as you indicated.

Mr. TIERNEY. I thank you both for your testimony.

I yield back.

Mr. MCHENRY. I thank the gentleman for yielding back.

At this point, Mr. Lankford is recognized for 5 minutes.

Mr. LANKFORD. Thank you very much, and thank you both for being here.

The SharePoint system, as you've been discussing, it does sound like a very efficient system, and that seems like that is working well, and you're comfortable with the process on that. I understand how this is going to be a lot better than e-mailing documents back and forth, uploading and be able to pick them up, and you'll have a chance to gather and review them there. Does that increased efficiency help in the budget area as well? Does it help with the number of staff members that are required to handle that? You've seen an increase in efficiency in the communication. Does it increase efficiency anywhere else?

Ms. CALLAHAN. That's an interesting question. I hadn't thought about it before, but I think that because it is a centralized system and because the labor is actually disbursed because the component FOIA officer will upload the information, and then my office will just do the notification to across the Department that it probably does make it more efficient for labor as well as for awareness.

Mr. LANKFORD. Great. You mentioned before there was a 1-day, basically the day before front office gets it, and they can have this uploaded before it actually gets sent out to the requester itself. Have you had, at any moment, someone that once the notification that has been made, there's been a contact back saying, hang on to that one for a minute, we need to be able to check it for other areas or for whatever reason. Have those slowed?

Ms. CALLAHAN. Yes, sir. Just to clarify, the SharePoint system started in July 2010, as I indicated. At that point, it was a 3-day notification system. We have moved subsequently to a 1-day notification system. But since July, we have had a handful of times, including one that I caught last month that involved perhaps international equities that were inconsistently redacted.

So I looked at it. I said oh, wait a second. This needs to be reviewed and make it—to check for consistency. So I did a “reply all” to the list and said this needs to be checked. I instructed my director to have it reprocessed and it’s in the process of doing it.

But it’s only been a handful of times by my recollection since the SharePoint system has started. But each time they have been, indeed, good catches and have caught information that otherwise would have been inappropriate to disclose.

Mr. LANKFORD. So your testimony is that none of those times that it was caught and slowed down wasn’t for a political reason or was a hey, we need to get our story straight before this goes out or that kind of issue?

Ms. CALLAHAN. Absolutely not.

Mr. LANKFORD. The issue you brought up several times about catching up, which is great, to be able to catch up on, obviously a lot of people want to request a lot of information. And it is great to be able to start getting caught up on some of the backlog that has been there.

The document that I had received talking about a report from DHS, and just the annual Freedom of Information reports to the Attorney General of the United States makes a comment about the length of time that it takes in 2009 versus 2010. Are you familiar with that report and some of the timing on it?

Ms. CALLAHAN. I believe I issued that report. I am not familiar with that exact quote, but I am familiar with the report.

Mr. LANKFORD. Well, let me run a couple of things back to you. It talks about the median number of days to grant a FOIA information request. It talked about 45 days in 2009. It is now 93 in 2010. And in 2009, the average number of days was 74 days; in 2010, it was 120 days. So it’s processing through whether it is the SharePoint system is eventually coming on line, do you see a lot of the backlog that is occurring there in the early parts of 2010. Now it’s catching up and it’s getting better. But you had mentioned you’re getting a lot faster on it, but based on this report it looks like it’s slowing down somewhat.

Ms. CALLAHAN. If I can clarify a few things.

First, with regard to the awareness review, it was a very small number of requests themselves that were impacted, so they should have no impact at all on the processing. The number of days that you quoted is not—that does not—that is not consistent with my recollection of the report, so perhaps there was some numbers that I am not familiar with.

Mr. LANKFORD. We’ll get a chance to pull this and be able to share this with you so you can give a response back. Once you take a look at it, if you have an opportunity to get us a written response to say here are what the actual numbers are and that would be terrific.

Ms. CALLAHAN. I would be happy to clarify that. If—

Mr. LANKFORD. What is the decision on making a what is called a significant request. I've heard about that a couple of times. What is the criteria that you set saying this one's significant?

Ms. CALLAHAN. The criteria for significant reporting, as I said, has essentially stayed the same since 2006 and it is to essentially be issues that will be discussed in the media so that we know they are going on. As has been discussed several times, we receive an extraordinary amount of FOIAs each year, but there are only a handful of those that we would want to know that oh, this has been filed, incidentally this is going on.

That weekly report is sent to the front office but it's also sent to all of the FOIA's officers so that they too can see that oh, by the way, this component got the same request as another component, so it's for awareness purposes on essentially sensitive topics, priorities and litigation.

Mr. LANKFORD. If a private citizen made that and then handed it over to the media, that may or may not rise up. Some of it is the requester itself, or some is it the topic?

Ms. CALLAHAN. It's the topic. It's the topic that would be of interest, but of course, if the media's requested it, then we assume that is a topic of media interest so that would—the media is a default usually to be included just for notification purposes, that this request has been made.

Mr. LANKFORD. Great. Thanks very much.

Mr. MCHENRY. The gentleman's time has expired. At this point, we will recognize Mr. Welch for 5 minutes. You arrived at the correct time, my friend.

Mr. WELCH. Thank you.

You know, this question of transparency is an important one, but my understanding is that you get overwhelmed with requests, and your position is that you are transparent, you're doing your job the best you can; is that right?

Ms. CALLAHAN. That is correct, sir. I try.

Mr. WELCH. Just to elaborate just I want to give you an opportunity to explain why you believe you are meeting that standard, which is one we share, in what you have been doing, and what your specific response is to some of the assertions that have been made about your failure to do that.

Ms. CALLAHAN. Thank you, sir.

As we've discussed previously, the Department and the FOIA professionals therein have made Herculean efforts to get the FOIA backlog down from its high of 98,000 to 74,000 when I started to 11,000 FOIA backlog. They are under amazing pressure and they do amazing work all the time. In addition to reducing the backlog, in addition to providing the service—

Mr. WELCH. I am going to interrupt you for a minute, because I actually—here's what would be helpful, I think, for us and for you, is to explain all right the backlog was X and now it's X minus. The number of requests was X and now it's 2X and you've reduced it by whatever. But the more specific you can be, the better, because I think all of us really respect and appreciate the hard work that you and your fellow workers are doing. So the more concrete you can be with us I think the more helpful it is for the whole committee to be able to come to the right conclusion here.

Ms. CALLAHAN. Absolutely, sir. As I indicated in fiscal year 2009, we had a FOIA backlog of 74,000 FOIA requests. That has been reduced to—that has been reduced 84 percent in the past 2 years to an 11,383 FOIA backlog requests. In addition, we have received 102,000 FOIA requests last year while processing—this is fiscal year 2009—while processing 160,000 FOIA requests. That work is primarily the work of the U.S. Citizenship and Immigration Services in addressing and being more efficient and more transparent and getting their alien files processing out. The U.S. Citizenship and Immigration Services accounts for 70 percent of FOIAs that are processed in the Department. They alone receive between 8,000 and 10,000 FOIA requests each month, and have been able, through commitment, by the USCIS to be able to reduce that.

Mr. WELCH. Let me ask you this: There are some allegations in the majority's report, new era of openness that the front office of DHS was interfering with FOIA requests by correcting errors with outgoing FOIA responses. Obviously, a somewhat troublesome assertion. And I want to give you an opportunity to tell the committee exactly what type of specific errors did the front office review, help to correct?

Ms. CALLAHAN. So as I've described previously and as detailed in my testimony, the front office reviewed both the cover letter as well as the underlying FOIA response. They did not make any changes to the FOIA responses, but they did identify several times where there were typographical errors and other elements that were not consistent with professionalism standards that I would like. And they have caught those in their overall awareness review of the documents.

Mr. WELCH. OK. And then according to the inspector general's report on page 12, the IG provided that in response to allegations by the AP of a "political filter being applied to FOIA responses at DHS," the IG stated we were not able to substantiate the most serious allegations made by the AP story or subsequent public comments. However, we've determined the review process led to inefficiencies and slower processing of certain FOIA responses.

Based on that finding, what were some of the inefficiencies that you observed and what steps were taken by DHS management, including your front office, general counsel's office, and your office to reduce any of these inefficiencies and has the response time improved?

Ms. CALLAHAN. Absolutely, sir. We take these issues quite seriously. We had identified these problems ourselves and have self-corrected it. The initial original awareness process was done via e-mail, and it was a relatively cumbersome process. As soon as we had a technology solution where we could provide an Internet-based system where everyone could access, we moved from the e-mail system to the Internet-based system, and that process has been much more efficient, and I believe is actually right now a leader in the Federal Government.

Mr. WELCH. Thank you. I yield back.

Chairman ISSA. The gentleman from North Carolina, Mr. McHenry.

Mr. McHENRY. Thank you.

I wanted to point out to my colleague, Mr. Tierney, he questioned the posters behind the chair's dais. And he says—questioned why there are political statements on the back wall. If the gentleman actually read the briefing document, he would know that political statement is actually the title of the hearing.

I just wanted to point that out so folks who obviously are in the audience have looked at the title of the hearing and see it on the wall, and that is not a coincidence, although some of my colleagues may think it is.

With that, I would be happy to yield the balance of my time to Mr. Gowdy.

Mr. GOWDY. I thank the gentleman from North Carolina.

Ms. Callahan, what's the purpose of FOIA?

Ms. CALLAHAN. The purpose of FOIA is, of course, to inform the public of the workings of the Federal Government.

Mr. GOWDY. What are the elements that you would apply just determining whether or not something were discoverable or not?

Ms. CALLAHAN. Discoverable is not quite the right term.

Mr. GOWDY. Well, you know what I mean.

Ms. CALLAHAN. No, that's OK. I used to be a lawyer.

Mr. GOWDY. Me, too. But whether or not it should be produced?

Ms. CALLAHAN. Well, as Mr. Fong has indicated, this administration has applied the presumption of disclosure unlike the previous administration.

Mr. GOWDY. I was not asking for a political comment. I am simply asking for the elements that you apply to determine whether not, which administration is better than another, the legal elements that you apply in determining whether or not you should turn something over.

Ms. CALLAHAN. FOIA applies to all Federal records, and we seek to find all responsive records. And we look at those Federal records, presume that Federal records should be disclosed, but look in case that there are specific exemptions. There are nine discreet exemptions that may need to be applied to documents or elements of the documents.

Mr. GOWDY. So it should be turned over unless there is an exemption?

Ms. CALLAHAN. Yes, sir.

Mr. GOWDY. OK. Then why would the employment of the person seeking the record matter?

Ms. CALLAHAN. It doesn't matter at all.

Mr. GOWDY. Why would that have been part of the calculus that was used?

Ms. CALLAHAN. Sir, it was not part of the calculus that was used. The weekly report that summarizes anything that may be of media interest—

Mr. GOWDY. How do we know it wasn't part of the calculus that was used?

Ms. CALLAHAN. I believe the inspector general's report actually indicates that political calculations were not part of the process.

Mr. GOWDY. I am not even getting to political calculations yet. I'm just asking about residency and employment. What does it matter whether or not someone is a private person or whether they're a reporter?

Ms. CALLAHAN. It does not matter at all in terms of FOIA requests.

Mr. GOWDY. Can you be both?

Ms. CALLAHAN. Yes.

Mr. GOWDY. So why would you track that information?

Ms. CALLAHAN. It is only summarized because it may become part of media interest or attention.

Mr. GOWDY. Why? Why keep whether or not it is a private citizen that's requesting the information or reporter?

Ms. CALLAHAN. So it's actually a requirement to disclose who has requested—it is a requirement in the Freedom of Information Act to disclose FOIA logs, actually say the name of the person who's requesting it unless it's a Privacy Act request. That is disclosed.

Mr. GOWDY. And the employment of the person is disclosed as well?

Ms. CALLAHAN. That is not disclosed usually but sometimes the media affiliation may be part of the FOIA log, and we have our FOIA logs posted on our Web site.

Mr. GOWDY. What about the political affiliation of the person requesting it? Why is that part of the calculus?

Ms. CALLAHAN. It is not part of the calculus at all, sir.

Mr. GOWDY. You don't track whether it's a Republican or Democrat that requests the information?

Ms. CALLAHAN. As I indicated earlier, under the FOIA we've only gotten one FOIA request from a Member of Congress during my tenure.

Chairman ISSA. Would the gentleman yield?

Mr. GOWDY. Yes, sir.

Chairman ISSA. You said, though, that when Senator Grassley, when his had gone through the whole process, it was ripe, it was delivered to the political review system in the Office of the Secretary that you took care of his request through other fashion.

Ms. CALLAHAN. No, I am sorry if that's what you had interpreted.

Chairman ISSA. No. That's what you said. You said that, in fact, you took care of Senator Grassley's request through another system, but of course, you didn't know about it until you were informed that a Republican Senator had a FOIA request that was ready to go out.

Ms. CALLAHAN. No, sir. It wasn't ready to go out. It was the initial incoming. So the weekly report summarizes the incoming requests that come in, so they are just summarizing what the request is. So Senator Grassley may or may not have been on the weekly report, but as I said, we never processed his response. So pursuant to FOIA, we addressed through other means.

Chairman ISSA. OK so I apologize. I yield back.

Ms. CALLAHAN. That's OK.

Chairman ISSA. It's clear that you take care of politicians differently in the one case but go ahead.

Mr. GOWDY. So this statement, if a Member of Congress sought documents, employees were told to specify Democrat or Republican, that is an inaccurate comment?

Ms. CALLAHAN. According to our weekly report elements, we are supposed to indicate which is the Democrat. But as I said—which is a Republican, which is a Democrat, but it hasn't happened.

Mr. GOWDY. Why? Why?

Ms. CALLAHAN. I think that's the way you guys are usually addressed. I don't know why it was a recommendation by my career staff to add that into the standards from 2006 so the standards from 2006 were modified slightly based off of career FOIA recommendations.

Mr. GOWDY. Mr. McHenry, Mr. Chairman, therefore, my time has expired.

Chairman ISSA. I thank the gentleman. We now recognize the distinguished gentleman from Illinois, Mr. Davis.

Mr. DAVIS. I pass.

Chairman ISSA. I apologize.

We will next go to the gentleman, the distinguished but junior gentleman from Mr. Virginia, Mr. Connolly.

Mr. CONNOLLY. Thank you, Mr. Chairman, and since I celebrated a birthday yesterday, I particularly appreciate the "junior."

And thank you both for being here today.

I am not quite sure of frankly why we're here today because correct me if I am wrong, either Mr. Fong or Ms. Callahan, but I thought the inspector general's report found that actually there was a lot more transparency at DHS in this administration than in the previous administration. Is that true?

Ms. CALLAHAN. I believe that is indeed one of the conclusions by the inspector general. One of the things that my office established in August 2009 is a policy of proactive disclosure to attempt to put up the frequently requested documents, to put up elements that may be part—people may want to seek, for example, FOIA logs. I know that the chairman sought FOIA logs for several departments. We put our FOIA logs up for the entire department for 2009, 2010 and now we've just updated it to 2011.

Mr. CONNOLLY. Thank you. And which, by the way, at least speaking for this Member, I continue to find the signs behind the chairman and ranking member offensive and propagandist. And one of these signs is framed, of course, in the most biased way. It's not an intellectually honest question. It is why doesn't DHS deliver on the President's transparency promises.

And in fact, what you just said, your testimony, Ms. Callahan, and the report of the inspector general suggest the answer to that question. He did. Would that the previous administration had been so transparent, and would that this committee, especially some on the other side of the aisle, had been equally as concerned about transparency and backlog and politicization at DHS under the Bush administration.

Now, backlog. What was the backlog? How high did it reach, and was it true that the backlog of FOIA requests under the previous administration hit 98,000 at one point?

Ms. CALLAHAN. That is correct.

Mr. CONNOLLY. And by the time that administration left office, it was down to 74,000?

Ms. CALLAHAN. That is correct.

Mr. CONNOLLY. What is it now?

Ms. CALLAHAN. Eleven thousand.

Mr. CONNOLLY. Eleven thousand. So it's one-ninth of its height under the previous administration; is that correct?

Ms. CALLAHAN. Yes, sir.

Mr. CONNOLLY. The idea of politicization showing, horrors, that somebody's political affiliation from Congress, when did that practice begin?

Ms. CALLAHAN. Sir, it was a recommendation from my career FOIA staff to add it. But I don't think it's material because as I indicated, we don't usually receive FOIA requests from Members of Congress.

Mr. CONNOLLY. That is correct.

And in terms of notifying political leadership, if that's what you can call it, namely the non-career political appointees, the leadership picked by the President often confirmed by the Senate, notifying them just of the status of FOIA requests, again, horrors, when did that practice begin?

Ms. CALLAHAN. In terms of notifying that responses went out, that actually has been a longstanding process.

Mr. CONNOLLY. In other words, it began in the previous administration?

Ms. CALLAHAN. The awareness review and having a systematic process actually started in this administration, sir.

Mr. CONNOLLY. This administration?

Ms. CALLAHAN. It did start in this administration and I believe we have a now state-of-the-art solution to it.

Mr. CONNOLLY. You know, I was the chairman of Fairfax County one of the largest counties in the United States before I came here. And Virginia actually has one of the most open sunshine laws and vigorous FOIA laws, at least at the local level of government in the United States. E-mails, phone logs, any correspondence, all memos are subject to FOIA and very strict time lines in terms of getting FOIA requests fulfilled by the media or others.

Now I was chairman of the county, and it was absolutely routine practice that our legal counsel's office would notify the political leadership of pending requests so that we weren't caught surprised. I find it shocking that some of my colleagues apparently think that's an untoward development. I think personally, that's responsible management. Just to make sure that they're aware of it.

Is there any evidence, though, and maybe this is the nature of their concern of political interference once made aware in responding to FOIA requests?

Ms. CALLAHAN. No, sir. I have no knowledge of any political interference with regard to the awareness review and I believe the inspector general made the same conclusion in his report.

Mr. CONNOLLY. Thank you. Mr. Fong, are you aware of such political interference?

Mr. FONG. I agree that the inspector general's report which took a close look at this issue did not find any evidence of improper political interference.

Mr. CONNOLLY. Would it be fair in your assessment, Mr. Fong, looking at the backlog progress and looking at the policies regarding transparency and the lack of political interference, one could conclude that as a matter of fact the transparency of DHS in this administration has significantly improved over the previous?

Mr. FONG. I think that's a fair statement.

Mr. CONNOLLY. Thank you. So we've answered that question behind the chairman's head.

I would yield back.

Chairman ISSA. The chair recognizes the distinguished gentleman from South Carolina, Mr. Gowdy.

Mr. GOWDY. Ms. Callahan, if I can summarize this.

There is a presumption in favor of disclosure. There are exemptions which you may avail yourself to. You do not believe there's been any political interference. Would you concede that slow walking or taking your time in complying with an otherwise legitimate FOIA request could be interference?

Ms. CALLAHAN. There are many steps to FOIA processing that could create delays.

Mr. GOWDY. Including slow walking something, taking your time in reviewing it and deciding when to disclose it.

Ms. CALLAHAN. I hope that wouldn't have happened, but that could be one of the many possibilities of delay for FOIA.

Mr. GOWDY. And that would constitute, you would concede, interference.

Ms. CALLAHAN. Our FOIA professionals take their responsibilities quite seriously.

Mr. GOWDY. That was not my question. My question is even simpler than that. Is slow walking or delaying the disclosure of information interference?

Ms. CALLAHAN. It is delay, yes.

Mr. GOWDY. What about an overuse of exemptions in the redaction process?

Ms. CALLAHAN. That is also something that would give me pause. The inspector general's report raises an issue that I had not previously identified, which is that the Department has been using the exemption B5 perhaps more—it has been using it increasingly throughout the past several years starting in 2006.

Mr. GOWDY. Perhaps. You used "perhaps."

Ms. CALLAHAN. It has been increasing since 2006.

Mr. GOWDY. Where in B5 do you find an exclusion or exemption for the phrase, "this is bananas?"

Ms. CALLAHAN. Sir, I would be happy to defer to my legal colleague, but B5 is for predecisional and deliberative material.

Mr. GOWDY. Can you see any way where a B5 exemption would apply to an e-mail that said, This is bananas?

Ms. CALLAHAN. I think we would have to look at the context, sir.

Chairman ISSA. Would the gentleman suspend?

Mr. GOWDY. Yes, sir.

Chairman ISSA. We provided documents to you, and I would ask that the gentlelady be given an opportunity to review the document that you're asking and then we will restart. Thank you.

Mr. GOWDY. Yes, sir.

Ms. CALLAHAN. Do you know where in the package it is? I'm sorry.

Chairman ISSA. Slide 3, I'm told.

Ms. CALLAHAN. I don't have slides here, sir. I am sorry.

Chairman ISSA. Take care of making sure they have them.

Ms. CALLAHAN. And Congressman, if the question is about the FOIA production, this looks like this is the FOIA production to the

Associated Press. As I indicated to the chairman, my office did not process this request. Under typical process, typical standards, we were recused from the processing and the Office of General Counsel made the determinations in this specific FOIA.

Mr. GOWDY. Well, I can still ask you, right? You're still an expert in FOIA. Can you possibly find a B5 exemption for the phrase, "This is bananas?"

Ms. CALLAHAN. Part of the purpose of B5 is to have a vigorous and dialog debate and a reasonable dialog and perhaps it was the determination of the Office of the General Counsel that was part of the deliberative process rather than a final decision. But as I said, I wasn't involved in this redaction.

Mr. GOWDY. What about, Nope, they entirely change our response. Spoke with Jordan, and he is going to confer with OGC. Would that be a B5 exemption?

Ms. CALLAHAN. Sir, that also is part of the FOIA request from the Associated Press. I was not part of the process, but I do know the underlying facts in this circumstance. The Office of the Secretary had initially made some recommendations to modify our boilerplate FOIA responses, to make them more streamlined, and they did not understand that indeed, several of the paragraphs were required by law. And therefore, after consulting with the Office of the General Counsel, we decided to use the same standards so therefore, that was indeed a predecisional document because we did not make the changes that were recommended by the Office of the Secretary. So in that case, again, I did not make the determination, but my opinion the exemption would be appropriate.

Mr. GOWDY. You do think a B5 exemption would be appropriate for the phrase, "They entirely change our response. Spoke with Jordan and he is going to confer with OGC?"

Ms. CALLAHAN. In this factual circumstance, that's because they did not—the response indeed was not changed.

Mr. GOWDY. Well, for those that may not be familiar, what is the process if you are redacting an impermissible way, who gets to review that?

Ms. CALLAHAN. Well—

Mr. GOWDY. How do we know what we don't know. If you are redacting something, who gets to decide if the redaction was appropriate or not?

Ms. CALLAHAN. As in my written testimony, I detailed the entire FOIA process, including the possibility of consulting with counsel. And then once the requester receives the response, they have several alternative appeal options and administrative appeal, and also going to court.

Mr. GOWDY. I can't see edits. Are they useful? Now why would that be a B5 exemption.

Ms. CALLAHAN. I am sorry sir, again, I am concerned about the overuse of B5 in this Department. Mr. Fong and I have discussed it and we're going to look at a systemic solution to the issues that the Inspector General raised with regards to B5.

Mr. GOWDY. "We know it was coming. They are trying to substantially edit our letters." Why is that a B5 exemption?

Ms. CALLAHAN. Sir, again, I do not have knowledge of the FOIA processing for this element so I am sorry I won't be able to continue to answer these questions.

Mr. GOWDY. Would you agree with me that's not an appropriate use for the B5 exemption?

Ms. CALLAHAN. Again, sir, this was not my processing.

Chairman ISSA. The gentleman's time has expired.

Now we go to the distinguished gentleman from Illinois for 5 minutes.

Mr. DAVIS. Thank you very much, Mr. Chairman, and you know, since I sit next to the other gentleman from Illinois, I just wasn't certain.

But so since both Ms. Callahan and Mr. Fong have testified neither are aware of any political interference in respondent to FOIA requests, I am going to yield the balance of my time to the ranking member, Mr. Cummings.

Mr. CUMMINGS. I thank the gentleman for yielding.

Ms. Callahan, I want you to—one of the—first of all, I think you admit, and the IG will agree, that the system, things are not perfect. By the way, none of our offices are perfect. We've got great people, but they're not perfect.

And I am concerned about this. You know as the IG was concerned, he said his recommendation No. 5, it says to recommend the Secretary—that the Secretary issue written guidance to the Department on the President's reiteration and embarrassment and extract fears and exposure of failure are not grounds to examine the information under FOIA. And you just said that you and Mr. Fong were working on addressing the issue of exemption number 5.

Tell me what you are planning to do. I mean, what do you see? You expressed concerns. You said you're trying to do some things. How do you address that? Because one of my colleagues on the other side said how do we go forward now and I've got to tell you, when you said that you all had reduced by 90 percent, the backlog—80 percent, whatever, let me tell you something, that's phenomenal.

Now, but we want to do even better. This President has said he wants to do better and I want you to address that issue.

Ms. CALLAHAN. Sir, I want to do better as well. And one way with regard to this identification of B5 using in the Department, as I said, I had not identified this as a systemic problem until the inspector general brought it to my attention. Mr. Fong and I have not had a chance to do a thorough plan, but I think it obviously is going to look at the specific elements of B5, how it's being applied, and also obviously, training and materials and education will help to make sure that when exemption B5 is being used, it is being used appropriately. And it should not be used for embarrassment purposes and so on. So I completely concur with that.

Mr. CUMMINGS. How long have you been in your position, Ms. Callahan?

Ms. CALLAHAN. Two years, sir.

Mr. CUMMINGS. Were you in the Department before that?

Ms. CALLAHAN. No, sir. I was in the private sector.

Mr. CUMMINGS. Well, let me ask you this: You referred back to 2006. You referred back to 2006 two or three times. And I was just looking at some guidelines, FOIA sections of DHS cabinet report to the White House, dated August 4, 2006, and it talks about, it says select FOIA requests for submission in one of the following criteria. Under that it says one is the FOIA request is for congressional correspondence, the FOIA request is from a Member of Congress, the FOIA request is from a member of the media. Has that—so that's been a policy since 2006?

Ms. CALLAHAN. Without change, yes, sir.

Mr. CUMMINGS. And when you came in and you're trying to do this more transparency have an effort to make things more transparent, I take it you go back and review these kinds of things so you know what the guidelines are?

Ms. CALLAHAN. I did, sir. And I relied heavily on my career FOIA professionals with this regard. We looked at the 2006 guidance. Decided to issue it as a memorandum from me to show its importance, but also added some ministerial and formatting elements to it to be quite frankly more professional and consistent with how we refer to things. But the substance of the submission guidelines have not changed since 2006.

Mr. CUMMINGS. So in other words, there was nothing between 2006 and when you came in?

Ms. CALLAHAN. Yes, sir. That is correct.

Mr. CUMMINGS. So that's what you had to go back to?

Ms. CALLAHAN. Yes, sir.

Mr. CUMMINGS. So is it safe to say that during the latter, I guess, the Bush years, President Bush's years, 2006 through 2008, that these were the guidelines; is that right?

Ms. CALLAHAN. That is correct, sir. And they remain essentially the guidelines today.

Mr. CUMMINGS. I see.

Now, Mr. Fong, the attorney, the IG made some complaints about your department such as Department's commitment to producing documents is in question. DHS assertions about resources dedicated to complying with document productions are suspect. Made a number of allegations. And since you are not going to be here to answer those, but you are familiar with them, I think it would benefit the entire committee for us to know what your responses are to those because they were rather serious.

Mr. FONG. To clarify, you may have inadvertently referred to the inspector general.

Mr. CUMMINGS. I meant the inspector general.

Mr. FONG. You meant the——

Chairman ISSA. I ask the gentleman have an additional 1 minute.

Mr. CUMMINGS. Talking about the Republican staff report. I'm sorry.

Mr. FONG. Yes, thank you for giving me an opportunity to respond.

I have not had an opportunity to read the entire report in depth, but I did carefully review the allegations made concerning attorneys in my office, including career attorneys who have worked there with great success for some time. I confess that when I first

saw the section heading, my initial reaction was one of concern because as you indicate, they make very serious allegations about lawyers I know well. And I take very seriously, as I should, any allegation of wrongdoing by my staff.

Upon further examination of the portion of the report dealing with the OGC lawyers, however, my concern, frankly turned into indignation because I believe the report paints an unfair, and if I may say, an irresponsible portrait of certain people and events. The report reads more like an advocacy piece rather than a sober substantive, dispassionate, investigative report. In that sense, the portion of the report that focuses on the Office of the General Counsel is quite unlike the inspector general's report, which resulted from a serious fact-finding effort and makes six constructive recommendations, all of which the Department has concurred with.

Chairman ISSA. Thank you. We've gone 2 minutes past. I think he's fully answered his opinion. We now go to the gentleman from Michigan, Mr. Walberg, for 5 minutes.

Mr. WALBERG. Thank you, Mr. Chairman.

Ms. Callahan, in your written testimony, and I hope I am not going back over a question that I missed while I was out in another committee for a brief period of time, but in your written testimony, you state that 2 years ago, the Department faced a backlog of more than 74,000 FOIA requests. Under this administration, you go on to state, we reduced the backlog by 84 percent or more than 63,000 requests.

In his interview with the committee, William Huzerland, a member of your staff, pointed out that about 30,000 records were transferred to the Department of State. According to Mr. Huzerland, "Literally boxes on pallets were dumped on the State Department when we had done our portion of the processing."

Do you feel that it's fair to take credit for backlog reductions that have simply been transferred to another agency and the records remain in the Federal Government?

Ms. CALLAHAN. If I can clarify exactly what that process is. I am familiar with incident.

As I had testified earlier, the U.S. Citizenship and Immigration Services has done an amazing job of processing their files. They receive between 8,000 and 10,000 FOIA requests a month for primarily immigration files and alien files. Under FOIA, each department processes their own records, so once USCIS had finished processing the DHS documents, or the USCIS documents, they then go through a process that is typical in the Federal Government of referral.

So because the USCIS was so successful in getting their backlog down in fiscal year 2009, and for that I commend them, unfortunately the Department of State was the beneficiary of that, because in some of those records, there were not only DHS documents, but also Department of State documents. We are attempting to—that is, I think a one-time circumstance because of CIS's success in getting the backlog down.

One way we could mitigate this is for CIS to sign a memorandum of understanding with the Department of State to process the Department of State documents, and I believe that's in discussion.

Mr. WALBERG. But again, this backlog wasn't reduced by your Department, by your office?

Ms. CALLAHAN. No. It's been reduced throughout the Department by all the FOIA professionals, the 420 FOIA professionals that work hard every day.

Mr. WALBERG. That may be the case. But the credit seems to be at a different spot in addition. According to a recent AP report, a significant portion of the reductions achieved across DHS was a result of a Federal contract signed under the previous administration, the Bush administration, in light of the fact that a private company completed this work under contract signed during the previous administration, is it not, somewhat disingenuous for you to credit these reductions to this administration?

Ms. CALLAHAN. The reductions are the reductions, and as I indicated, USCIS has made an incredible effort, and they have done so in coordination with contracts, and that is certainly the case. And I applaud them for applying such a significant priority to getting that backlog down. They have done an amazing effort.

Mr. WALBERG. Credit where credit is due.

Ms. CALLAHAN. Yes, sir.

Mr. WALBERG. And politics where politics is due.

Let me ask another question here.

During their interviews, your FOIA officer stated that the front office approval was needed before they could release FOIA responses. Your deputy chief FOIA officer testified, and I quote, they, front office 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. Do you disagree that approval policy was, in fact, in place?

Ms. CALLAHAN. The original part of the awareness process was indeed an affirmative acknowledgment of that they have received the FOIA and that they had reviewed the FOIA. That had management challenges. I have admitted that, and I believe that we attempted to mitigate that immediately. We have now moved to a system which is a notification system, and I believe it is much more efficient.

Chairman ISSA. Would the gentleman yield?

Mr. WALBERG. I yield.

Chairman ISSA. So just to review.

You took credit for a big reduction that \$7.6 million worth of Bush-era money paid for a contract and reduced it. You took credit for 30,000 records that were transferred to another workload of other people. Now, you have some really hardworking people, and I appreciate that. But how do those people feel about the day after our whistleblower and others giving testimony, the whistleblower gets taken out of her office, moved to an inferior office, inferior title, and has her job narrowed in scope, and then, quite frankly, I am told she's now on a basically health leave.

I am listening to all of this and I'm saying, isn't that the most chilling effect anyone could ever have to see that if you tell the truth to Congress, the next day your job is reduced and your office is changed, and it's not called a demotion but it sure as hell looks like one?

Ms. CALLAHAN. Sir, there are several elements of the process that I cannot speak to here. But I am happy to have a nonpublic briefing about certain personnel issues.

Chairman ISSA. My time is expired. We don't do nonpublic issues when a whistleblower is penalized, and hundreds of hardworking people see the effect of testifying honestly under oath before Congress. My time has expired.

I yield back.

Does the ranking member request a second round.

OK. We'll have a second round. And I'll begin.

Mr. Fong, basically Ms. Callahan has said she was recused in the process. But you were not recused. Your department was not recused. You're a political appointee. Many of the people in your department are political appointees. And the general counsel's office regularly does redacting, including 5B, isn't that true?

Mr. FONG. I am not familiar with the specifics of the process.

Chairman ISSA. I will make it simpler. You're a political appointee, right?

Mr. FONG. Correct.

Chairman ISSA. Other people in your department are political appointees?

Mr. FONG. A few.

Chairman ISSA. Your department does redacting. That's already been testified to.

Mr. FONG. The Department does.

Chairman ISSA. The general counsel's office.

Mr. FONG. We may adjudicate or interpret the statute.

Chairman ISSA. You add things which get black lines over them; isn't that true?

Mr. FONG. We provide legal advice to determinations made by the Office of Privacy.

Chairman ISSA. OK. So in the case of the AP's fairly sensitive request, constitutional, first amendment in addition to FOIA, they, in fact, found you doing the redaction of the material delivery. Your office headed by a political appointee, did the actual redactions that are being talked about here today. Isn't that true. Your office. People under your control? Yes or no is all we need to know.

Mr. FONG. No.

Chairman ISSA. OK. Who did the redactions that we're talking about here today that Ms. Callahan is saying she was recused from, but we're seeing some pretty absurd redactions here. Who did them?

Mr. FONG. I do not know who made the specific redactions. I do know that a senior career lawyer was involved in giving legal advice to those who made the redactions. I can't speak to the specifics.

Chairman ISSA. I am going to ask kind of a closing question on this subject.

The President said, and was unambiguous on his first day in office that he wanted to err on the side of disclosure. If you had a recused department on a particular request, the AP request, why wouldn't it have been appropriate to meet the spirit of the President's own words to simply say to the FOIA career professionals, we're not going to second guess this one. We'll err on the side of

openness. You do what you think is right. You deliver it, and we won't have it further reviewed by those in your office and others that might have suggested further redactions, some of which look like covering up embarrassments, or if you will, deliberative cover-up conversation.

The meaning of these items which we are releasing today, it's a very small part of the discovery, have never been given to the Associated Press. They've been denied the Associated Press for 9 months. Why is it it wouldn't have been appropriate in either one of your answers, yes, or no, to have erred on the side as the President said, and had the career professionals do it and take your chances that maybe just once something would get out that wouldn't be perfect, even though it was done by the career professionals.

Mr. FONG. Mr. Chairman, it would not have been appropriate because the President's memorandum did not say to ignore the law. The law includes exemptions. We are duty bound.

Chairman ISSA. OK. I've heard enough of a political appointee who interfered clearly with career professionals. We have a whistleblower who your organization has punished that was part of an overall disclosure that we have become aware of. Let me just close because my time too is limited.

We're not done with this. The minority may think that this is not right. Our expectation is from this day forward, we want the rest of the documents that were requested. We want to see them all.

Additionally, I am putting you on notice that as we view the AP request which is 9 months delayed, they have not had their day in court to get some of the things that we're seeing here today. We're going to have additional hearings so that we fully understand, line item by line item, each redaction that they're waiting to see 9 months later and haven't seen.

So I would ask, quite frankly, that you do what you need to do to ensure that we don't have another hearing. Make an expeditious decision on this appeal. You know, 9 months with the Associated Press to want to know about something that in your own words have led to changes, material changes in how you do business in the FOIA section. And 9 months later, the AP is still waiting on responses to these. And the only answer we got here today is well, I didn't review them, I was recused. I didn't actually work on it, but we can't actually explain why "it's bananas" in fact gets redacted.

That's something the American people, they expect every day that the press asks and the press gets answered. And if FOIA statute is unambiguous that, in fact, it's only through narrow exemptions. And if those exemptions have been abused once and it's deliberate, then they have been abused.

With that, I yield to the ranking member.

Mr. CUMMINGS. Thank you very much.

Mr. Fong, as a lawyer, and I used to represent lawyers when they got in trouble. And I know that license to practice law is very, very important. And we are held to a very high standard as officers of the court, and I could—when I asked you about the allegations in the report, I could tell that you got a little bit emotional, and probably you share what I share. I know the feeling.

I want to give you a chance to respond to some of these allegations, because there's something that while the chairman, and rightfully so, is concerned about people demoted, I'm concerned about that, too, but I am also concerned about people's reputations. And lawyers, you know, we have a high standard to set. You started talking about the lawyers in your office. There have been allegations that have been made that could possibly lead down the road to some serious problems for those lawyers.

So I want you to respond. And by the way, most of the lawyers I would guess could be making a lot more money if they were in private practice or doing something other than government work. But they're dedicated employees and I refuse to allow them to just be under a blanket of negative allegations to be placed upon them without at least or giving you a chance to respond.

Mr. FONG. Thank you very much, Congressman, for giving me this opportunity to supplement my answer to your earlier question.

It is, as you indicate, truly unfortunate that the attorneys who are the subject of the majority report are, in fact, career attorneys, a line attorney in one instance and a senior attorney for the Department to have their names dragged into a public report simply for performing their duties as attorneys for the U.S. Department of Homeland Security.

I've reviewed their performance in representing the agency in this investigation, and continue to do so. I have not found any indication of unethical activity or improper practice of law. The DHS attorneys I know are hardworking dedicated professionals. The report has some salacious headlines, but this report simply does not describe the attorneys I know and work with.

I also want to underscore that I believe we have fully cooperated and acted in good faith with respect to this investigation.

I thank you for this opportunity to respond.

Mr. CUMMINGS. Ms. Callahan, I would like to give you the opportunity to finish what you were saying, again, again, chairman talks about fairness, talks about people's reputations, talks about the motions. But there have been some serious allegations made here. And I don't know what the truth is to be honest with you. But I'd like for you to at least be able to answer the question.

Ms. CALLAHAN. Yes, thank you very much, sir.

Catherine Papoi remains in the same position that she's held in this office, director disclosure in FOIA, and in fact, she competed for a promotion, a new SES position that I was given by the Department demonstrating the importance of FOIA by this Department. The competition was open. It was a laborious and detailed process involving several different career SES panels. Ms. Papoi was not selected, and that was confirmed by the Office of Personnel Management.

Mr. CUMMINGS. When was that decision was made?

Ms. CALLAHAN. The initial selection of the proposed new SES was December 14–17, 2010.

Ms. Papoi was informed that she was to—had not received the promotion on January 10, 2011, and then we were working on onboarding the new SES. That process takes a while. It goes through security. The new SES cleared security on February 24th, but was not released from her department until officially March 2nd.

On March 2nd, we received notification that her department had released her. That's required in order to have her move on. And we were informed by the Office of the Chief Human Capitol Officer that, indeed, her first start date would be March 14th. We then took the first opportunity we attempted to notify Ms. Papoi on March 4th, which would have been the day after her testimony, but it was in order to give her notice that this was happening. She certainly was aware that the new SES was coming on board. She did not know the date certain. So we were attempting to tell her with as much time as possible so that she could move offices.

The office moves are comparable offices. I had made the decision to have the new SES closer to me because now the new SES is one of the two people who report to me directly.

Mr. CUMMINGS. Thank you.

Chairman ISSA. I thank the gentleman.

We will take a 5-minute recess to set up for the second panel.

I am sorry. Mr. Walberg, did you want a second round? I apologize.

We will recognize the gentleman.

Mr. WALBERG. I did, and I appreciate the opportunity.

Chairman ISSA. And you do.

Mr. WALBERG. And I get it, right?

Moving from Ms. Papoi, I want to go to exhibit 7, if we could have that shown. In this e-mail to Amy Shlossman, the deputy chief of staff, you explain why the FOIA office must repeat the requester's language verbatim to minimize legal liability. Amy Shlossman responds by saying or writing legally we have to repeat allegations in FOIAs. Can we get a read on that prior to tomorrow, the meeting tomorrow? What does Shlossman mean "can we get a read?"

Ms. CALLAHAN. I am not sure. I believe she's addressing two people. I was not copied on this portion of the e-mail.

Mr. WALBERG. But you responded to it.

Ms. CALLAHAN. No, sir. I believe I was the original e-mail and then she forwarded it on to two colleagues asking for their response.

Mr. WALBERG. What do you think she might mean by can we get a read?

Ms. CALLAHAN. I believe she was asking whether or not my summarization was full and complete.

Mr. WALBERG. You're the chief privacy officer and a lawyer.

Ms. CALLAHAN. I am not a lawyer in this position. I just need to clarify that.

Mr. WALBERG. Well, I am a minister and I am always a minister. You are a lawyer and are always a lawyer. We can't get away from it.

Ms. CALLAHAN. That may be true. That may be true, sir.

Mr. WALBERG. Why did she have to go to the Office of General Counsel?

Ms. CALLAHAN. As with any office there certainly are reasonable disagreements on different positions, and she was just confirming, indeed, that what I had said she was probably making sure that was indeed accurate and I believe she received that confirmation.

Mr. WALBERG. Do you believe that the front office staff had an appropriate understanding or appreciation of FOIA statute and processes?

Ms. CALLAHAN. I believe they have a much more robust understanding of FOIA than when they first arrived.

Mr. WALBERG. So that's changing.

Ms. CALLAHAN. I hope so.

Mr. WALBERG. I yield my time.

Chairman ISSA. Would the gentleman yield?

Mr. WALBERG. Yes, I would.

Chairman ISSA. Because I believe the next panel is going to be very different. I would like to summarize a couple of things about this hearing that I think have come to light.

One is this hearing has never been about the reduction in the backlog of FOIA. Whether that was produced by contractors paid over \$7 million by new equipment, or by transferring to other departments. This has been about somewhere north of a thousand requests that were politically sensitive that involved the press in most cases, many cases, in one case a Member of Congress. Those are the only ones we've ever really talked about. If they don't get special handling as we're well aware, the Office of General Counsel often has no impact on thousands and thousands of requests. The career professionals receive them, make decisions and send them out.

Those are the ones that this committee in our oversight role are pleased with. We're pleased with the vast majority. We're pleased with the thousands of FOIA professionals throughout the Federal Government. So I just want to make clear in closing this is not about the reduction or the increase, and as a matter of fact, it is not about the very, very great and positive words that President Obama said on day one when he wanted to make a statement that there would be more openness, and that effectively, in my words, you err on the side of disclosure that, in fact, we don't want to err on the side of secrecy, particularly at Homeland Security. This would be important.

So as we go into the second panel, we meet with the IG and others, hopefully we will all understand that we want to limit this to only the portion that is by definition controversial. The forwarding and SharePoint is a great piece of software. I am very familiar with it. Is a good investment. But forwarding it so that somebody can make a decision which we can only know in their own minds their deliberative process has to be scrutinized by this committee because we are the committee of all of the questions of abuse and we're the overseer of the Hatch Act and other laws designed to keep politics out of the policy of the executive branch.

I thank the gentleman for yielding.

We will now take a 5-minute recess to reset.

[Recess.]

Chairman ISSA. Thank you all for your patience as we reset. We now recognize the second panel of witnesses. Mr. Charles Edwards is acting inspector general of the Department of Homeland Security, welcome. And Mr. John Verdi is senior counsel and director of open government project at EPIC.

Pursuant to as you saw in the first round to the committee rules, would you please rise, raise your right hands to take the oath.

[Witnesses sworn.]

Chairman ISSA. Let the record reflect that all witnesses answered in the affirmative, please be seated.

Since you were patient through the first round I won't re-recite anything. With that we recognize Mr. Edwards for his opening statement.

**STATEMENTS OF CHARLES EDWARDS, ACTING INSPECTOR GENERAL, U.S. DEPARTMENT OF HOMELAND SECURITY; AND JOHN VERDI, SENIOR COUNSEL, DIRECTOR OF OPEN GOVERNMENT PROJECT, ELECTRONIC PRIVACY INFORMATION CENTER**

**STATEMENT OF CHARLES K. EDWARDS**

Mr. EDWARDS. Good morning, Chairman Issa and Ranking Member Cummings, and members of the committee. I am Charles K. Edwards, acting inspector general for Department of Homeland Security, DHS. Thank you for the opportunity to discuss DHS's efforts to disclose information under the Freedom of Information Act [FOIA]. My testimony today focuses on our review of the DHS's FOIA program, as well as the March 2011 report the, DHS privacy office implementation of the Freedom of Information Act.

During the review, we found that the Office of the Secretary's involvement in the FOIA process creates delays and causes the Department to violate the 20 business day statutory response requirement. DHS has a substantial FOIA caseload. In fiscal year 2009, it received 103,093 FOIA requests, or 18 percent of the Federal Government's 557,825 requests.

In fiscal year 2010, the number of requests increased by 26 percent to 130,098. Under the guidance of the chief FOIA officer, the DHS Privacy Office staff processed requests for the privacy office and eight headquarters offices, while most of the Department's major components processed requests under the guidance of their own FOIA officers.

The privacy office also promotes proactive disclosure which increases the Department's level of transparency while potentially decreasing the number of FOIA requests that the agency receives. However, despite our positive findings, there were certain aspects of DHS FOIA process that caused concern. Specifically, they determined that the Office of the Secretary's involvement in the FOIA process created inefficiencies that hampered full implementation of the FOIA process.

Although components have been required to notify the Office of the Secretary of certain FOIA cases since 2005, this policy did not require that the Office of the Secretary review the action FOIA releases. Instead, the process provided information about what was being disclosed. However, in September 2009, with respect to these FOIA cases, components were required to provide all the material intended for release to the Office of the Secretary for review and concurrence. And to such time, the components were prohibited from releasing the FOIA responses. This additional level of review and concurrence delayed the release of materials, and in some

cases, caused the Department to violate the statutory time line. Department officials have stated that advanced knowledge of significant releases can improve the DHS's response to media inquiries. That's often followed the public release of information about DHS activities.

Although we understand the Department's reasoning, we do not consider that delaying a FOIA release is the best public policy, particularly when such delays lead to the violation of the statutory deadline.

We make several recommendations in our report that promote the privacy officers proposals and initiative. We recommend that DHS first develop additional policies on proactive disclosure; second, formalize the roles and responsibilities of the public liaison; and third, implement the internal review function to maximize efficiencies and improve the administration of FOIA operations.

In addition, we recommend that the chief FOIA officer regularly make recommendations to the Secretary for adjustments to agency practices, policies, personnel and funding as necessary to improve implementation of the DHS FOIA program, reduce the Department's exposure to legal risks, and implement the President's vision as articulated in the 2009 guidance.

In conclusion, the Department has made some important progress in administration of the FOIA. We recognize the challenges involved in processing a large number of FOIA requests each year, especially in a timely manner. By implementing our recommendations, we trust the Privacy Office can improve the overall efficiency in the DHS FOIA disclosure program. We look forward to additional collaboration during the corrective action process.

Mr. Chairman, this concludes my remarks and I would be happy to answer any questions that you or the committee members may I have.

Chairman ISSA. Thank you, Mr. Edwards.

[The prepared statement of Mr. Edwards follows:]

**STATEMENT OF CHARLES K. EDWARDS**

**ACTING INSPECTOR GENERAL**

**U.S. DEPARTMENT OF HOMELAND SECURITY**

**BEFORE THE**

**COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM**

**U.S. HOUSE OF REPRESENTATIVES**

**March 31, 2011**



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

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

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

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

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

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

#### The Act and the 2009 Executive Branch Guidance

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

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

#### The DHS FOIA Program

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

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

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

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

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

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

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

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

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

#### The Significant Request Review Process

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

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

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

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

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

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

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

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

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

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

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

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

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

#### FOIA Experts Had Some Concerns Related to the Review Process

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

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

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

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

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

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

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

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

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

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

#### Conclusion

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

Chairman ISSA. Mr. Verdi.

# **STATEMENT OF JOHN VERDI**

Mr. VERDI. Good morning, Mr. Chairman, Ranking Member Cummings, and members of the committee, thank you for the opportunity to testify today. My name is John Verdi, and I'm senior counsel at the Electronic Privacy Information Center, commonly called EPIC. I'm director of EPIC's open government project. We have a longstanding interest in open government, particularly in the power of transparency to ensure accountability for executive agencies.

Since EPIC's establishment in 1994, we have filed Freedom of Information Act requests with Federal agencies, including the Department of Homeland Security, concerning domestic surveillance programs and emerging electronic privacy topics. FOIA has helped to guarantee the public's right to know for generations of Americans.

President Obama made open government and transparency a hallmark of his administration on his first day in office, stating that, "The Freedom of Information Act should be administered with a clear presumption. In the face of doubt openness prevails." But political review of FOIA request is antithetical to the fundamental values that undergird the act.

In EPIC's history of successful FOIA practice, we have never encountered policies like the DHS program at issue at today's hearing. EPIC often clashes with agencies of the application of exemptions. We battle agencies' failure to comply with statutory deadlines. We frequently litigate, challenging agencies' alleged legal basis for withholding specific records. But we have never observed practices that flag FOIA requests for political review. We are not aware of any other program that has singled out FOIA requests based on politically sensitive content or the identity of the requester. In our experience this program is unique, and it is uniquely harmful.

Political review delays the release of records and raises the specter of wrongful withholdings. EPIC's experience with DHS from 2009 through this morning has been almost exclusively characterized by improper delays. Since 2009, the Department of Homeland Security has failed to comply with FOIA deadlines in 100 percent of requests filed by EPIC. It has failed to comply with multiple deadlines regarding some single requests. These delays pose real frustrations for even the savviest FOIA requesters. For the majority of FOIA requesters, delays can prevent the disclosure of records in a useful timeframe, or they can preclude the disclosure at all. Federal law simply does not permit agencies to select FOIA requests for political scrutiny of either the request or of the requester.

The political review process raises the specter of political influence over disclosure, it is unlawful. Unless records fall within one of nine narrow statutory exemptions, anyone who seeks documents under FOIA is entitled to receive them. No provision of the act allows an agency to deny a FOIA request or delay its response for political reasons. In fact, the law requires expedited processing of

records concerning ongoing Federal activities, just the sort of disclosures that were delayed by DHS's political review.

Although DHS alleges that political vetting no longer occurs, there has been no formal publication confirming an end to the policy. And the inspector general's report describes ongoing political review. We are troubled that political vetting apparently continues at DHS. And we are deeply concerned that such unlawful review might be practiced by other executive agencies.

Finally, I wish to highlight another DHS policy, unilateral administrative closures that contravenes the FOIA, thereby reducing transparency and hindering accountability. Based on EPIC's experience, EPIC has four recommendations. First, DHS should immediately cease political review of FOIA requests; second, DHS should immediately disclose all agency records responsive to FOIA requests including the request by the AP that were subject to political review; third, all other executive agencies should immediately cease political review of FOIA requests and report to this committee the extent to which they engaged in such review; and fourth, all agencies should certify as part of their annual FOIA reporting requirements that no FOIA requests were reviewed by political appointees.

I thank you for your interest and will be pleased to answer your questions.

[The prepared statement of Mr. Verdi follows:]



**ELECTRONIC PRIVACY INFORMATION CENTER**

Testimony and Statement for the Record of

John Verdi  
Senior Counsel, EPIC  
Director, EPIC Open Government Project

"Why Isn't The Department Of Homeland Security Meeting The President's Standard On  
FOIA?"

Before the

House Committee on Oversight and Government Reform

March 31, 2011  
2154 Rayburn House Office Building  
Washington, DC

### Introduction

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today on “Why Isn’t The Department Of Homeland Security Meeting The President’s Standard On FOIA?” My name is John Verdi and I am Senior Counsel at the Electronic Privacy Information Center (EPIC) and Director of EPIC’s Open Government Project. I am co-editor of *Litigation Under the Federal Open Government Laws*, the leading litigation handbook concerning open government litigation and administrative practice.<sup>1</sup>

EPIC thanks the Committee for holding today’s hearing. We appreciate your work exercising oversight concerning the Department of Homeland Security’s political review of Freedom of Information Act (FOIA) requests. The agency’s policies have harmed requesters, including EPIC, by delaying the disclosure of documents and raising the specter of unlawful withholdings. The Committee’s oversight has played, and continues to play, a critical role in illuminating this deeply troubling program.

Political review of FOIA requests is antithetical to the fundamental values that undergird the FOIA. The FOIA is founded on non-partisan, apolitical principles. The Supreme Court has recognized the FOIA’s basic premise: “to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”<sup>2</sup> To accomplish that end, “[d]isclosure, not secrecy, is the dominant objective of the Act.”<sup>3</sup> Senators Patrick Leahy and John Cornyn, co-sponsors of the most recent amendments to the FOIA statute, call FOIA “the nation’s foremost open government law.”<sup>4</sup> “The Act remains an indispensable tool for shedding light on government policies and abuses that would otherwise remain hidden public knowledge. FOIA has helped to guarantee the public’s right to know for generations of Americans.”<sup>5</sup>

### Summary

In EPIC’s many years of FOIA practice, we have never encountered policies like the DHS program at issue at today’s hearing. EPIC often clashes with agencies over the application of statutory exemptions. We battle agencies’ failure to comply with statutory deadlines. We often litigate, challenging agencies’ alleged legal bases for withholding specific records. But we have never observed agency practices that flag FOIA requests for political review. We are not aware of any other program that has singled out FOIA

<sup>1</sup> LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS (Harry Hammitt, John Verdi et al. eds., 2010).

<sup>2</sup> *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

<sup>3</sup> *Department of the Air Force v. Rose*, 425 U.S. 352 (1976).

<sup>4</sup> Leahy, Cornyn Celebrate Sunshine Week With FOIA Legislation, March 17, 2009.

<sup>5</sup> LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS i, (Harry Hammitt, John Verdi et al. eds., 2010).

requests based on politically sensitive content or the identity of the requester. In our experience, this program is unique. And it is uniquely harmful.

In my statement this morning, I will outline EPIC's experience filing and litigating FOIA requests, educating requesters, and advocating for greater transparency and accountability. I will discuss EPIC's efforts to determine the scope of federal agencies' political review of FOIA requests. I will detail how this political review unlawfully delayed DHS's disclosure of records to EPIC in response to EPIC FOIA requests. And I will highlight an additional DHS policy – administrative closures – that contravenes the FOIA, thereby reducing transparency and hindering accountability.

Based on EPIC's experiences, it is our view that: 1) DHS should immediately cease political review of FOIA requests; 2) DHS should immediately disclose all agency records responsive to FOIA requests that were subject to political review; 3) all other executive agencies should immediately cease political review of FOIA requests and report to the Committee the extent to which they engaged in such review; and 4) all agencies should certify, as part of their annual FOIA reporting requirements,<sup>6</sup> that no FOIA requests were reviewed by political appointees.

#### About EPIC

EPIC is a non-partisan research organization, focused on emerging privacy and civil liberties issues. We have a longstanding interest in open government, particularly in the power of transparency to ensure accountability for executive agencies.

Since EPIC's establishment in 1994, we have filed Freedom of Information Act (FOIA) requests with federal agencies, including the Department of Homeland Security (DHS), concerning domestic surveillance programs and emerging electronic privacy topics. EPIC routinely files FOIA lawsuits, forcing agencies to comply with their statutory obligations and disclose agency records. The cases range from 1994, when an EPIC FOIA lawsuit forced the disclosure of documents detailing U.S. Secret Service investigations into computer security experts, through the present, including EPIC's ongoing FOIA lawsuit against DHS concerning key documents detailing the operation of airport body scanners.

For the past 17 years, EPIC has pursued FOIA requests and lawsuits concerning the most critical online privacy issues. We have testified before lawmakers in support of broad disclosure of agency records and strong rights for FOIA requesters. We have opposed expansion of FOIA exemptions and policies that would increase agency secrecy.

Several successful EPIC FOIA matters are detailed in Appendix 1. These cases highlight EPIC's ability to successfully employ FOIA requests and litigation to force

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<sup>6</sup> 5 U.S.C. § 552(e) (2010).

disclosure of agency records. EPIC often obtains records in response to FOIA requests. If we encounter agency recalcitrance, we file detailed administrative appeals. And if agencies fail to meet statutory deadlines or unlawfully withhold records, EPIC routinely files lawsuits that result in the disclosure of records that inform the public, press, and policymakers.

#### President Obama's Commitment to Promote Open Government

President Obama made open government and transparency a hallmark of his administration by issuing a memorandum about its importance on his first day in office. "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails."<sup>7</sup> He directed agencies to be more proactive in their disclosure and act cooperatively with the public. He explained, "At that heart of that commitment [to transparency] is the idea that accountability is in the interest of the Government and the citizenry alike."<sup>8</sup>

To further his goals, President Obama directed the Attorney General to issue new guidelines for implementing FOIA and the Director of the Office of Management and Budget to issue guidelines for the agencies as they "increase and improve information dissemination to the public."<sup>9</sup> The guidelines issued by Attorney General Holder establish a "presumption of openness" governing federal records.<sup>10</sup> The guidelines state that the Department of Justice will defend denial of a FOIA request only if disclosure would harm an interest protected by one of FOIA's statutory exemptions or if disclosure is prohibited by law.<sup>11</sup>

#### EPIC's Efforts to Determine the Scope of Executive Agencies' Unlawful Political Review of FOIA Requests

For many years, EPIC has filed FOIA requests with federal agencies to obtain records concerning a variety of emerging issues. EPIC routinely obtains agency records, analyzes the contents, posts the key documents on our web site – [epic.org](http://epic.org) – and features the records in the EPIC Alert – our online newsletter that reaches approximately 20,000 subscribers.

Since DHS was created in 2002, EPIC has filed numerous FOIA requests with the agency. In 2010, the Associated Press (AP) made public records detailing DHS's unlawful policy of subjecting FOIA requests to vetting by political appointees. EPIC

<sup>7</sup> President Barack Obama, Memorandum, "Freedom of Information Act," Jan. 21, 2009.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* For the guidelines developed by OMB in compliance with President Obama's directive, *see* <http://www.whitehouse.gov/omb/open>.

<sup>10</sup> Memorandum for Heads of Executive Departments and Agencies, Attorney General Eric Holder, Mar. 19, 2009, <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

<sup>11</sup> *Id.*

analyzed the released documents, which indicate that EPIC's requests were improperly delayed by DHS's unlawful policy.

On December 8, 2010, EPIC wrote to the Office of Government Information Services (OGIS), stating, "EPIC's review of the released documents demonstrates that DHS required political appointees to review the determinations of FOIA career staff to certain requests before documents were disclosed by the agency." Appendix 2 at 1. EPIC observed that "at least two of EPIC's FOIA requests were inappropriately flagged for review by political appointees and were consequently delayed in processing" and noted that the agency practice violates the FOIA's statutorily mandated deadlines for processing requests. *Id.*; 5 U.S.C. 552(a)(6)(A), (B).

EPIC's December 8 letter noted:

As FOIA Ombudsman, OGIS is authorized to review policies and procedures of administrative agencies, review compliance by administrative agencies, and recommend policy changes to Congress and the President. § 552(h)(2). OGIS is also required to conduct audits of agencies' FOIA implementation and issue reports. § 552(i).

EPIC urged OGIS to investigate the practices involved in DHS's impermissible use of political appointees to vet the processing of FOIA requests. EPIC identified six critical questions that should form the basis of such an investigation:

- Were responsive documents withheld from FOIA requesters as a result of political appointees' review?
- Has the DHS in fact abandoned its policy of effectively exercising a political veto over FOIA disclosures?
- Do other agencies have similar improper policies?
- How many FOIA requests have been impermissibly delayed because of vetting by political appointees?
- To what extent have people and organizations who are legally entitled to request DHS records been denied that access because political appointees at the DHS decided that it was not politically expedient to process those requests?
- Under what authority does the DHS claim the right to require that FOIA requests be vetted by political appointees?

EPIC also asked OGIS to advise DHS that the agency lacks the legal authority to require that political appointees approve, deny, or delay FOIA requests. EPIC

recommended additional training be provided to DHS FOIA staff regarding implementation of FOIA. Finally, EPIC requested that OGIS publish a report of its findings and issue guidance to all executive agencies making clear that the processing of FOIA requests is not subject to review or approval by political appointees.

On February 15, 2011, EPIC (joined by twenty other groups and eight individual experts) wrote to this Committee, supporting the Committee's decision to investigate DHS's FOIA policies and procedures. Appendix 3. EPIC's letter describes the DHS political review policy, notes that the policy is "contrary to federal law and Supreme Court holdings," and objects to "DHS efforts to circumvent the FOIA process." *Id.*

#### EPIC's Freedom of Information Act Requests to the Department of Homeland Security

Prior to 2009, EPIC used FOIA requests to obtain numerous records concerning programs operated by DHS and its components. A 2002 EPIC FOIA request obtained records demonstrating that the Immigration and Naturalization Service, a DHS component, purchased personal information from the national ID databases of several Latin American countries from a private data broker. The same year, EPIC's FOIA request to the Transportation Security Administration (TSA), also a DHS component, revealed a proposed passenger profiling model that would incorporate biometric identification and extensive data mining of unknown government and private sector databases to develop profiles and identify potentially "risky" travelers. In 2003 and 2005, EPIC FOIA requests obtained records detailing widespread errors on TSA air travel watch lists. A 2004 EPIC FOIA revealed that DHS improperly obtained census data on Americans of Arab ancestry.

Despite EPIC's expertise and history of successful FOIA practice, our experience with DHS from 2009 through the present has been primarily characterized by improper agency delays. Further, DHS has wrongfully withheld agency records under the guise of inapplicable FOIA exemptions. And EPIC has repeatedly needed to sue the agency in order to receive any substantive response at all to our FOIA requests. Despite these obstacles, we have forced disclosure of critical agency records that inform the policy debate. However, EPIC's experience indicates deeply flawed practices at DHS that have led to the agency's failure to comply with statutory requirements and guidance promulgated by the President Obama and Attorney General Holder.

Between January 2009 and my testimony today, EPIC pursued twelve FOIA requests before DHS.<sup>12</sup> A more detailed discussion of EPIC's twelve FOIA matters before the agency is attached at Appendix 4. DHS failed to comply with statutory deadlines concerning all twelve EPIC requests. Often, the agency failed to comply with

<sup>12</sup> EPIC submitted eleven FOIA requests between January 1, 2009 and the date of this hearing. EPIC submitted one request in December 2008, and continued to actively pursue it post-January 2009.

multiple statutory deadlines while processing a single request.<sup>13</sup> DHS failed to disclose any responsive documents *at all* in response to six of the twelve requests. In other cases, the DHS improperly asserted FOIA exemptions to withhold agency records. EPIC filed four lawsuits challenging DHS's failures to comply with the FOIA. No court has found the agency's noncompliance with the statute to be justified.

All FOIA requests filed by EPIC during this period were subject to unlawful delays or the agency's improper refusal to disclose records.

For example, EPIC filed two FOIA requests concerning airport full body scanners with DHS in 2009. The requests followed DHS's public indication that it intended to subject all air travelers to full body scans as primary, mandatory screening at U.S. airports. EPIC sought documents regarding the capabilities of the technology, as well as training manuals, images, and traveler complaints. DHS referred both requests to TSA, which failed to disclose any documents within the statutory deadlines. EPIC filed administrative appeals in both cases, and again TSA failed to disclose any records within the statutory deadlines.

EPIC filed lawsuits in both cases, which were consolidated. DHS failed to file an Answer to EPIC's Complaint by the deadline set forth in the Federal Rules of Civil Procedure, and EPIC moved for entry of a default judgment. During the course of litigation, EPIC obtained some of the requested documents. However, TSA refused to make all of the requested documents public. The litigation regarding 2,000 naked body scanner images and 376 pages of training manuals in possession of the agency continues more than a year later. The agency has refused to disclose the documents despite the fact that DHS's primary alleged basis for withholding – FOIA exemption b(2)-high – was struck down by the U.S. Supreme Court earlier this month.

By further way of example, EPIC filed two FOIA requests concerning "automated target recognition" – a technology related to airport body scanners – with DHS in 2010. The agency unilaterally extended its statutory deadline to make a determination concerning EPIC's requests, yet failed to process the requests within the extended period. EPIC appealed the agency's failure to comply with FOIA deadlines. DHS responded by unlawfully placing EPIC's administrative appeals in a queue for processing FOIA requests. EPIC sued the agency in February 2011. The lawsuit is presently pending.

All of EPIC's FOIA matters pending from January 2009 through the date of my testimony are described in detail in Appendix 4.

<sup>13</sup> *E.g.* in EPIC Case Nos. 09-04-14 DHS and 09-07-02 DHS, DHS failed to make a timely determination concerning EPIC's FOIA request, failed to timely process EPIC's administrative appeal, and failed to timely Answer EPIC's Complaint in D.C. District Court. These matters are discussed in more detail at Appendix 4.

DHS Political Appointees Unlawfully Delayed Two EPIC FOIA Requests in 2009

EPIC's review of available records confirms that in 2009 alone, at least two of EPIC's FOIA requests to DHS were referred to political appointees. In both cases involving improper political review, the agency's response to EPIC was delayed, violating statutory deadlines.<sup>14</sup>

*DHS Failed to Timely Respond to EPIC's June 2009 Request for the Calendar of Mary Ellen Callahan, DHS Chief Privacy Officer*

In June 2009, EPIC filed a FOIA request seeking the calendar of DHS Chief Privacy Officer Mary Ellen Callahan.

EPIC organizes and hosts the monthly meetings of the Privacy Coalition, a nonpartisan coalition of consumer, civil liberties, educational, family, library, labor, and technology organizations. At the Privacy Coalition's monthly meetings, guests are invited to discuss topics of interest to the coalition. The Privacy Coalition frequently invites federal Privacy Officers to speak at its meetings. Several previous Privacy Officers from DHS had addressed the coalition. The Privacy Coalition extended an invitation to Mary Ellen Callahan shortly after she was named Chief Privacy Officer in March 2009.

Ms. Callahan was scheduled to appear at the May 29, 2009 Privacy Coalition meeting. She cancelled days before the visit, citing a scheduling conflict. EPIC attempted to reschedule the visit, but was unable to obtain a commitment from Ms. Callahan.

EPIC submitted a FOIA request on June 25, 2009 for Ms. Callahan's calendar. The request sought copies of the following agency records:

1. All agency records concerning appointments and meetings between Mary Ellen Callahan, Chief Privacy Officer for the Department of Homeland Security, and all nongovernmental individuals or entities from the date of her appointment, March 9, 2009, to the present. Such nongovernmental individuals and entities include, but are not limited to, trade associations, industry representatives, and/or business owners. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.
2. All agency records concerning Ms. Callahan's appointments and meetings for May 29, 2009. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.

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<sup>14</sup> DHS's political review of EPIC's FOIA requests is set forth in more detail, with references to the underlying primary documents, in Appendix 2.

The FOIA required DHS to disclose responsive agency records to EPIC's request within 20 working days—by July 24, 2009. On July 2, 2009, DHS responded to EPIC's request by invoking the 10-day extension pursuant to 5 U.S.C. § 552(a)(6)(B). DHS claimed that EPIC's simple request for Ms. Callahan's calendar sought "numerous documents" that would "necessitate a thorough and wide-ranging search." Consequently, the deadline for a lawful response was pushed back to August 7, 2009.

On July 9, 2009, EPIC received another letter from DHS stating that its request had been referred to the DHS Office of the General Counsel (OGC).

The DHS Office of the General Counsel provided an interim response to the request on July 30, 2009, but failed to disclose all responsive agency records. The response, which included heavily redacted documents, stated that DHS required even more time to find records related to Mary Ellen Callahan's calendar. The OGC stated that it would be able to complete its review on or before August 7, 2009. But the agency failed to do so.

The OGC wrote to EPIC on August 25, 2009, stating that it had completed its review. The OGC had "located a total of 84 pages." The agency "determined that 40 pages can be released in their entirety and 44 pages can be partially released, but with certain information withheld pursuant to Title 5 U.S.C. § 552 (b)(2)(low), (b)(5), and (b)(6).

On September 17, 2009, EPIC filed an administrative appeal based on DHS's failure to disclose responsive records in its possession and DHS's overly broad assertion of statutory exemptions in the records it did disclose.

On September 18, 2009, DHS acknowledged receipt of EPIC's appeal. Through the date of my testimony this morning, DHS has failed to make a determination concerning EPIC's appeal.

*DHS Failed to Timely Respond to EPIC's June 2009 Request for National Security Presidential Directive 54*

In June 2009, an EPIC FOIA request sought documents relating to National Security Presidential Directive 54. The directive sets forth DHS's legal authority to conduct cybersecurity operations, but has not been made public.

Specifically, EPIC requested:

1. The text of the National Security Presidential Directive 54, otherwise referred to as the Homeland Security Presidential Directive 23.

2. The full text, including previously unreported sections, of the Comprehensive National Cybersecurity Initiative, as well as any executing protocols distributed to the agencies in charge of its implementation.
3. All privacy policies related to either the Directive or the Comprehensive National Cybersecurity Initiative, including but not limited to, contracts or other documents describing privacy policies for information shared with private contractors to facilitate the Comprehensive National Cybersecurity Initiative.

On June 26, 2009, the DHS Management Directorate wrote to EPIC to acknowledge receipt of EPIC's FOIA request and to announce a referral of the request to the DHS Headquarters & Privacy Office. The DHS did not make any determination regarding EPIC's FOIA request at that time.

On July 9, 2009, the DHS Headquarters & Privacy Office wrote to EPIC, acknowledging receipt of EPIC's FOIA request, and referring the request to the DHS National Protection and Programs Directorate ("NPPD"), but did not make any determination regarding the substance of EPIC's FOIA request.

EPIC then appealed, on August 4, 2009, the DHS's failure to make a timely determination regarding EPIC's FOIA request. Through the date of my testimony this morning, DHS has failed to make a determination concerning EPIC's FOIA request, failed to respond to EPIC's administrative appeal, and failed to disclose responsive agency records.

*DHS Political Appointees Impermissibly Delayed the Agency's Responses to EPIC's June 2009 FOIA Requests*

On June 29, 2009, the DHS Special Assistant to the Chief of Staff, Jordan Grossman, sent FOIA staff a list of questions requesting a status update and detailed information about a number of FOIA requests. Among them were EPIC's June 2009 requests for Mary Ellen Callahan's calendar and for the National Security Presidential Directive 54. Mr. Grossman was a political appointee, and has no legal authority to routinely review FOIA requests.

Mr. Grossman, in reference to the request for Ms. Callahan's calendar, asked "Do we know why they [EPIC] are interested in 5/29/2009 specifically?" He then asked about EPIC's request for National Security Presidential Directive 54. "What does this Directive say? Is this Directive unclassified?"

On June 30, 2009, Vania T. Lockett, CIPP/G, Acting Departmental Disclosure Officer, responded with an update to Mr. Grossman's improper requests.

Regarding the request for Ms. Callahan's calendar, Ms. Lockett wrote, "PRIV: Compiling records and issuing acknowledging letter to the requester. EPIC's Privacy Coalition invited the CPO to their monthly meeting on 5/29/2009, to which the CPO did not attend. EPIC wishes to see what the CPO had on her agenda that prevented her from attending."

Ms. Lockett then updated Mr. Grossman about EPIC's request for National Security Presidential Directive 54. She wrote, "MGMT: This request was referred to PRIV for direct response on 6/26/2009. This directive is classified Top Secret and concerns a series of efforts to protect Government systems and reduce potential vulnerabilities, protect against intrusion attempts, and anticipate future threats through cyber security and monitoring."

The Agency's Unlawful Political Review of FOIA Requests Fails to Promote Transparency, Accountability, and Open Government

Despite DHS protestations that the policy of politically vetting FOIA requests has been retracted, there has been no publication confirming the existence and nature of a new policy nor an end of the old policy.

The FOIA was intended to further the public interest and awareness, not politics. *See Wash. Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 74, 76 (D.D.C. 2006) (citing *Jacksonville Port Auth. v. Adams*, 556 F.3d 52, 59 (D.C.Cir.1977) (recognizing "an overriding public interest ... in the general importance of an agency's faithful adherence to its statutory mandate").

The FOIA does not permit agencies to select FOIA requests for political scrutiny of either the request or the requester. The Supreme Court has clearly stated that disclosure of documents under FOIA will not depend on either the identity of the requester nor the reasons for the request. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 170, 172 (2004); *see also United States Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 89 U.S. 749, 771 (1989) (stating that the requester's identity has "no bearing on the merits of his...FOIA request").

As discussed above, DHS unlawfully reviewed both factors concerning EPIC's 2009 FOIA requests. Though the Grossman and Lockett emails do not prove that documents were ultimately kept secret as a result of the 2006 and 2009 DHS directives, they demonstrate that the agency policies unlawfully delayed the agency's response. And at least in the case of EPIC's 2009 FOIA requests, it is clear that DHS failed to meet its statutory deadlines in response to FOIA requests that were referred for political review. The political review process also raises the specter of political influence over disclosure.

Political review of FOIA requests and requesters is simply unlawful. Unless records fall into one of the specified statutory exemptions, anyone who seeks documents under FOIA is entitled to receive them. No FOIA provision allows an agency to deny or delay its response to a FOIA requester for political reasons.

DHS's FOIA Policies Concerning Administrative Closure of FOIA Requests Fails to Promote Transparency, Accountability, and Open Government

On November 24, 2010, EPIC filed a FOIA request with DHS for documents concerning the agency's development and deployment of "body scanner" technology by law enforcement agencies in surface transit facilities and street-roaming vans. EPIC's FOIA request described the technology, identified manufacturers, and cited press reports concerning law enforcement use of the scanners.

EPIC's FOIA request sought:

1. All documents detailing plans by federal law enforcement agencies to implement body scanner technology in the surface transportation context.
2. All contracts, proposals, and communications with private transportation and shipping companies (including, but not limited to NJ PATH, Amtrak, and Greyhound) regarding the implementation of body scanner technology in surface transit.
3. All contracts, proposals, and communications with states, localities, tribes, and territories (and their subsidiaries or agencies) regarding the implementation of body scanners in surface transportation.
4. All documents detailing plans by federal law enforcement agencies to use "Z Backscatter Vans" or similar technology.
5. All contracts, proposals, and communications with the manufacturers of the "Z Backscatter Vans" or similar technology.
6. All contracts, proposals, and communications with states, localities, tribes, and territories (and their subsidiaries or agencies) regarding the implementation of "Z Backscatter Vans" or similar technology.

DHS referred the request to two components: the TSA and the Science and Technology Directorate.

On February 7, 2011, the TSA wrote to EPIC, alleging that EPIC's request did not reasonably describe agency records.<sup>15</sup> This, despite the fact that the Science and Technology Directorate, based on the same request, had already identified responsive records.

The TSA asserted the authority to "administratively close" EPIC's request unless EPIC modified the request within 20 days. EPIC contacted the agency, disputed the TSA's allegation that EPIC's request was insufficiently specific, and challenged the agency's alleged right to administratively close FOIA requests without the consent of the requester. The TSA subsequently withdrew its February 7, 2011 letter, agreeing to process EPIC's FOIA request as submitted, without modification.

### Conclusion

EPIC has pursued FOIA requests and lawsuits for more than 17 years. We publish the leading handbook concerning litigation under the FOIA. We use the open government laws to obtain and make public agency records that impact emerging electronic privacy issues and inform the policy debate. EPIC is, by all accounts, a sophisticated FOIA requester.

Yet DHS's practice of politically vetting FOIA requests delayed the agency's response to at least two EPIC FOIA requests. Since 2009, the agency has failed to comply with FOIA deadlines in 100% of requests filed by EPIC. These delays pose real frustrations to savvy requesters like EPIC. The majority of FOIA requesters are much less experienced. In those cases, the delays can prevent the disclosure of records in a useful timeframe or preclude any disclosure at all. DHS's practices concerning unilateral administrative closures can be a nearly insurmountable hurdle to many requesters. EPIC is deeply worried that political review of FOIA requests continues at DHS. We are also troubled by the prospect that such unlawful review might be practiced by other executive agencies.

Thank you for your interest. I will be pleased to answer your questions.

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<sup>15</sup> The TSA letter is attached at Appendix 5.

### **Appendix 1 – EPIC's FOIA Expertise**

EPIC is a strong advocate of open government, and has made frequent use of the FOIA to obtain information from the government about a wide range of policy issues, including computer security, consumer privacy, electronic surveillance, encryption controls and Internet content regulation.

For more than 17 years, EPIC has conducted a successful open government project that requests, obtains, and disseminates important federal records that agencies previously kept secret. Highlights of EPIC's successful FOIA work discussed below.

EPIC publishes the authoritative FOIA litigation handbook, *Litigation Under the Federal Open Government Laws*.<sup>16</sup> We also routinely publish agency records obtained under FOIA on our web site – [epic.org](http://epic.org).<sup>17</sup> EPIC highlights important documents and provides analysis concerning the records' relationship to emerging privacy and civil liberties issues.<sup>18</sup>

EPIC often testifies before Congress concerning open government and FOIA.<sup>19</sup>

In 2000, EPIC successfully sued to obtain an FBI report titled "Impact of Emerging Telecommunications Technologies on Law Enforcement." The report called

<sup>16</sup> Senator Patrick Leahy authored the forward to the 2008 edition of *Litigation Under the Federal Open Government Laws*, praising EPIC's work: "the EPIC FOIA litigation manual will help ensure that those who are pursuing open government requests understand their rights, and the best strategies to pursue their requests." Professor David Vladeck said, "The EPIC FOIA litigation manual remains the one indispensable tool for any lawyer ... thinking about bringing a FOIA case against the government. [It] is invaluable to practitioners." The 2010 edition incorporates President Obama's open government memorandum and Attorney General Holder's guidance to executive agencies.

<sup>17</sup> EPIC publishes "FOIA Notes," an online newsletter that gives subscribers fast access to important documents obtained by EPIC under the Freedom of Information Act.<sup>17</sup> The publication provides images and information about the government's latest disclosures, as well as links to other FOIA resources. [http://epic.org/foia\\_notes/](http://epic.org/foia_notes/)

<sup>18</sup> EPIC also publishes annual "FOIA Galleries," highlighting the most significant disclosures in a given year. E.g. [http://epic.org/open\\_gov/foiagallery2011.html](http://epic.org/open_gov/foiagallery2011.html)

<sup>19</sup> In 2000, EPIC testified before the House Committee on Government Reform, Subcommittee on Government Management, Information and Technology, urging lawmakers to avoid adopting "[o]verly broad new exemptions" that would "adversely impact the public's right to oversee important and far-reaching governmental functions." [http://epic.org/security/cip/hr4246\\_testimony.html](http://epic.org/security/cip/hr4246_testimony.html). In 2002, EPIC testified twice before Congress (once before the Senate Committee on Governmental Affairs and once before the House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations) about a proposed FOIA exemption for information concerning critical infrastructure protection. [http://epic.org/security/infowar/sobel\\_testimony.html](http://epic.org/security/infowar/sobel_testimony.html); [http://epic.org/security/infowar/07\\_02\\_testimony.htm](http://epic.org/security/infowar/07_02_testimony.htm). EPIC criticized the proposed exemption as overly broad, and "urge[d] the Committee and the Congress to preserve the public's fundamental right to know." The proposed exemption was not enacted. In 2008, EPIC testified before the House Committee on Homeland Security, Subcommittee on Transportation Security and Infrastructure Protection on the topic of Ensuring America's Security: Cleaning Up the Nation's Watchlists. EPIC described concrete examples of FOIA problems at the agency. [http://epic.org/privacy/airtravel/watchlist\\_test\\_090908.pdf](http://epic.org/privacy/airtravel/watchlist_test_090908.pdf)

"Why Isn't The Department Of Homeland Security Meeting The President's Standard On FOIA?"  
House Oversight Committee

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for a national policy prohibiting cryptography that did not ensure real-time access to law enforcement. The release of this document played a significant role in the public debate over the now-defunct "Clipper Chip" encryption initiative.

In 2001, an EPIC FOIA request revealed that law enforcement agencies were spending millions of taxpayers dollars to purchase databases from information brokers while circumventing Privacy Act obligations. These databases provided desktop access to the details of the private lives of Americans. EPIC's FOIA request provided the first insight into the scope of the program.

A 2002 EPIC FOIA lawsuit forced disclosure of an internal FBI memo that revealed agency abuses of Foreign Intelligence Surveillance Act authority. The memo detailed agents illegal videotaping of suspects, interception of e-mails without court permission, unauthorized recording of phone conversations, and electronic surveillance operations continued beyond their legal deadline. The existence of the memo was first revealed in documents that EPIC obtained through FOIA litigation.

In 2003, EPIC used FOIA to obtain 11,000 consumer complaints to the Federal Communications Commission concerning telemarketing abuse. The complaints demonstrated the need for a national Do-Not-Call Registry, and were used to buttress the Federal Communications Commission's operation of the registry in the face of a legal challenge to the program brought by corporations in federal court.

A 2004 EPIC FOIA lawsuit revealed that the FBI acquired one year's worth of passenger data from Northwest Airlines after the September 11, 2001 terrorist attacks. The story was reported in newspapers across the country, including on the front page of the New York Times and in the Washington Post and Wall Street Journal. EPIC's FOIA detailed the FBI's acquisition of 257.5 million Passenger Name Records following 9/11, and the Bureau's permanent incorporation of the travel details of tens of millions of innocent people into its investigative databases.

In 2005, an EPIC FOIA request obtained documents concerning the National Security Agency's controversial warrantless surveillance program. The documents included emails and a memo from a former high-level Justice Department official expressing doubt about the legality of the program. EPIC also obtained internal messages from the NSA's director to agency staff, discouraging employees from discussing the issue with the news media.

In 2009, an EPIC FOIA lawsuit obtained contracts and technical specifications for airport body scanners. The documents included 250 pages of technical data. They revealed that scanners can record, store, and transmit images of Americans stripped naked. This contradicts assurances made by the Transportation Security Administration.

Last year, EPIC's FOIA lawsuit against the State Department produced a report detailing security breaches of passport data for three Presidential candidates. Federal investigators

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prepared the report in the wake of March 2008 breaches that exposed Barack Obama, Hillary Clinton, and John McCain's personal information. Previously secret sections state "the Department was ineffective at detecting possible incidents of unauthorized access," and criticized the agency's failure to "provide adequate control or oversight." EPIC testified before the Senate in 2008 concerning the security breaches, urging lawmakers to limit employee and contractor access to personal data.

**Appendix 2 – EPIC's December 8, 2010 Letter to the Office of Government  
Information Services**

ELECTRONIC PRIVACY INFORMATION CENTER



December 8, 2010

Miriam M. Nisbet, Director  
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Dear Ms. Nisbet:

We write to the Office of the Government Information Services, as the FOIA Ombudsman, to request an independent investigation into the Department of Homeland Security's ("DHS") unlawful policy of subjecting FOIA requests to vetting by political appointees. At least two EPIC FOIA requests submitted to the DHS were subject to review by White House officials prior to processing by the agency.

The Freedom of Information Act ("FOIA") requires agencies to process FOIA requests in accordance with clear statutory obligations.<sup>1</sup> The FOIA does not permit agencies to select certain categories of FOIA requests for political scrutiny. Further, in the case of EPIC's FOIA requests, the DHS failed to timely disclose agency records responsive to those requests. The FOIA does not permit agencies to add an extra, politically motivated step to FOIA processing.

Furthermore, the Supreme Court has consistently held that FOIA does not permit agencies to investigate either FOIA requesters or their reasons for submitting requests. "As a general rule, withholding information under FOIA cannot be predicated on the identity of the requester." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 170 (2004). The Court held as well that "As a general rule, citizens seeking documents subject to FOIA disclosure are not required to explain why they seek the information." *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").

The DHS policy of White House review came to light after the Associated Press ("AP") submitted a FOIA request in January 2010 to DHS.<sup>3</sup> The AP sought "all

<sup>1</sup> 5 U.S.C. §552(a). *See generally*, H. HAMMITT, G. MCCALL, M. ROTENBERG, J. VERDI & M. ZAID, LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS (EPIC 2010).

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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." *See* Appendix 1. The AP sought documents dating from January 1, 2009 to the present. *Id.* OGIS mediated disputes between the AP and the agency concerning the AP's FOIA request, securing the disclosure of more than 1,000 pages of agency records.

EPIC's review of the released documents demonstrates that DHS required political appointees to review the determinations of FOIA career staff assessments to certain requests before documents were disclosed by the agency. The documents indicate that EPIC's requests were improperly delayed by the Department of Homeland Security's unlawful policy.

At least two of EPIC's FOIA requests were inappropriately flagged for review by political appointees and were consequently delayed in processing. This is a violation of the FOIA's statutorily mandated deadlines for processing requests. 5 U.S.C. 552(a)(6)(A), (B).

#### DHS Political Appointees Impermissibly Vetted FOIA Requests

Beginning in February 2005, DHS FOIA and Privacy career staff were directed by the Chief Privacy Officer to compile and submit a weekly report to the Privacy Office. The report collected information 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." SORNS, PIAs, and FOIAs in progress were also to be reported.

This weekly report was submitted to the Secretary. It subsequently formed "the basis for developing the Department's weekly report to the White House." *See* Appendix 2.

In August 2006, the Privacy Office FOIA leadership was directed to begin integrating the information from the weekly report, now called the "FOIA Section of the DHS Cabinet Report to the White House," into its report to the White House Liaison. *See* Appendix 3. This directive to report to the White House Liaison is an impermissible requirement to vet FOIA requests by political appointees.

The February 2005 directive merely required the inclusion of all SORNS, PIAs, and FOIAs. The 2006 directive identified specific types of FOIA requests to be included in the weekly report. The 2006 directive provides that political appointees should vet FOIA requests if they fall into any of the following categories:

<sup>3</sup> Kim Zetter, "Report: Political Appointees Vetted DHS Public Records Request," *wired.com*, July 22, 2010, <http://www.wired.com/threatlevel/2010/07/foia-filtered/>.

- 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.

See Appendix 3.

The 2006 directive described the list as "suggestive—not exclusive." Privacy Office and FOIA staff were further directed that if they were in doubt about whether to include a report, they should "please submit." *Id.*

The DHS's practice of subjecting FOIA requests to political approval was again expanded in a 2009 directive. See Appendix 4. The 2009 directive required DHS career staff to provide Secretary Napolitano's political staff with detailed information about the people and organizations making FOIA requests. The directive required that career staff

- 1. Identify the requester's name, city and state (spell out name of state).
- 2. Identify the requester by affiliation (private citizen, organization membership, etc.).
- 4. Provide a brief description of any lesser-known organization's mission.

*Id.*

The August 2006 and July 2009 directives clearly violate Supreme Court precedent stating that disclosure of documents under FOIA will not depend upon either the identity of the requester nor the reasons for the request. *Nat'l Archives & Records Adm'n. v. Favish*, 541 U.S. 157, 170, 172 (2004).

Additionally, though Chief Privacy Officer Mary Ellen Callahan characterized the political vetting process as a "review," see Appendix 5, the emails obtained by the AP, see Appendix 1, make clear that documents were withheld until a political appointee approved the disclosures. This approval process often significantly delayed document releases. See Appendix 6. The approval process also violated clear statutory obligations under FOIA. 5 U.S.C. 552(a)(5)(A), (B).

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DHS Political Appointees Impermissibly Delayed Two EPIC FOIA Requests in 2009

In 2009 alone, at least two of EPIC's FOIA requests to DHS were referred to political appointees.

*DHS Failed to Timely Respond to EPIC's June 2009 Request for the Calendar of Mary Ellen Callahan, DHS Chief Privacy Officer*

In the first instance when White House officials impermissibly intervened in the processing of EPIC's FOIA requests, EPIC sought the calendar of DHS Chief Privacy Officer Mary Ellen Callahan.

EPIC organizes and hosts the monthly meetings of the Privacy Coalition, a nonpartisan coalition of consumer, civil liberties, educational, family, library, labor, and technology organizations. At the Privacy Coalition's monthly meetings, guests are invited to discuss topics of interest to the coalition. The Privacy Coalition frequently invites federal Privacy Officers to speak at its meetings. Several previous Privacy Officers from DHS had addressed the coalition. The Privacy Coalition extended an invitation to Mary Ellen Callahan shortly after she was named Chief Privacy Officer in March 2009. *See* Appendix 7.

Ms. Callahan was scheduled to appear at the May 29, 2009 Privacy Coalition meeting. She cancelled days before the visit, citing a scheduling conflict. *See* Appendix 7. EPIC attempted to reschedule the visit, but was unable to obtain a commitment from Ms. Callahan. *See* Appendix 8.

EPIC submitted a FOIA request on June 25, 2009 for Ms. Callahan's calendar. The request sought all copies of the following agency records:

1. All agency records concerning appointments and meetings between Mary Ellen Callahan, Chief Privacy Officer for the Department of Homeland Security, and all nongovernmental individuals or entities from the date of her appointment, March 9, 2009, to the present. Such nongovernmental individuals and entities include, but are not limited to, trade associations, industry representatives, and/or business owners. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.
2. All agency records concerning Ms. Callahan's appointments and meetings for May 29, 2009. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.

*See* Appendix 9.

The FOIA required DHS to disclose responsive agency records to EPIC's request within 20 working days—by July 24, 2009. On July 2, 2009, DHS responded to EPIC's request by invoking the 10-day extension pursuant to 5 U.S.C. § 552(a)(6)(B). DHS claimed that EPIC's simple request for Ms. Callahan's calendar sought "numerous documents" that would "necessitate a thorough and wide-ranging search." *See* Appendix. Consequently, the date for an expected response was pushed back to August 7, 2009.

On July 9, 2009, EPIC received another letter from DHS stating that its request had been referred to the DHS Office of the General Counsel (OGC). *See* Appendix 11.

The DHS Office of the General Counsel provided an interim response to the request on July 30, 2009, but failed to disclose all responsive agency records. The response, which included heavily redacted documents, stated that DHS required even more time to find records related to Mary Ellen Callahan's calendar. The OGC stated that it would be able to complete its review on or before August 7, 2009. *See* Appendix 12.

The OGC wrote to EPIC on August 25, 2009, stating that it had completed its review. The OGC had "located a total of 84 pages." The agency "determined that 40 pages can be released in their entirety and 44 pages can be partially released, but with certain information withheld pursuant to Title 5 U.S.C. § 552 (b)(2)(low), (b)(5), and (b)(6)." *See* Appendix 13.

On September 17, 2009, EPIC filed an appeal based on DHS's failure to disclose responsive records in its possession and DHS's overly broad assertion of statutory exemptions in the records it did disclose. *See* Appendix 14.

On September 18, 2009, DHS acknowledged receipt of EPIC's appeal. *See* Appendix 15. Through the date of this letter, DHS has failed to make a determination concerning EPIC's appeal.

*DHS Failed to Timely Respond to EPIC's June 2009 Request for National Security Presidential Directive 54*

In the second instance when White House officials impermissibly intervened in the processing of EPIC's FOIA requests, EPIC sought documents relating to National Security Presidential Directive 54.

In January 2008, President George W. Bush issued National Security Presidential Directive 54, otherwise referred to as The Homeland Security Presidential Directive 23 ("NSPD 54"), but it was never released to the public.<sup>4</sup> Under this Directive, the Comprehensive National Cybersecurity Initiative ("CNCF") was formed to "improve how

<sup>4</sup> Jill R. Aitoro, *The Comprehensive National Cybersecurity Initiative*, NEXTGOV, June 1, 2009, [http://www.nextgov.com/the\\_basics/tb\\_20090601\\_8569.php](http://www.nextgov.com/the_basics/tb_20090601_8569.php).

the federal government protects sensitive information from hackers and nation states trying to break into agency networks.”<sup>3</sup>

On June 25, 2009, EPIC submitted, *via* facsimile, EPIC’s FOIA request to the DHS Management Directorate documents regarding NSPD 54. The letter contained a request for expedited processing. *See* Appendix 16. This request was re-transmitted on June 26, 2009, on the request of DHS. *Id.*

Specifically, EPIC requested:

1. The text of the National Security Presidential Directive 54, otherwise referred to as the Homeland Security Presidential Directive 23.
2. The full text, including previously unreported sections, of the Comprehensive National Cybersecurity Initiative, as well as any executing protocols distributed to the agencies in charge of its implementation.
3. All privacy policies related to either the Directive or the Comprehensive National Cybersecurity Initiative, including but not limited to, contracts or other documents describing privacy policies for information shared with private contractors to facilitate the Comprehensive National Cybersecurity Initiative.

*Id.*

On June 26, 2009, the DHS Management Directorate wrote to EPIC to acknowledge receipt of EPIC’s FOIA request and to announce a referral of the request to the DHS Headquarters & Privacy Office. *Id.* The DHS did not make any determination regarding EPIC’s FOIA request at that time.

On July 9, 2009, the DHS Headquarters & Privacy Office wrote to EPIC, acknowledging receipt of EPIC’s FOIA request, and referring the request to the DHS National Protection and Programs Directorate (“NPPD”), but did not make any determination regarding the substance of EPIC’s FOIA request. *Id.*

EPIC then appealed, on August 4, 2009, the DHS’s failure to make a timely determination regarding EPIC’s FOIA request.

<sup>3</sup> “The CNCI – officially established in January when President Bush signed National Security Presidential Directive 54 / Homeland Security Presidential Directive 23 – is a multi-agency, multi-year plan that lays out twelve steps to securing the federal government’s cyber networks. DHS has been tasked to lead or play a major role in many of these tasks. This bold, much-needed approach to cyber security will lead to a fundamental shift in the way the Department approaches the security of U.S. networks.” Letter from Joseph I. Lieberman, Chairman, and Susan M. Collins, Ranking Member, United States Senate Committee on Homeland Security and Governmental Affairs to Michael Chertoff, Secretary, Department of Homeland Security (May 1, 2008), available at [http://hsgeo.senate.gov/public/\\_files/3108LiebermanCollinsLettertoChertoff.pdf](http://hsgeo.senate.gov/public/_files/3108LiebermanCollinsLettertoChertoff.pdf).

*DHS Political Appointees Impermissibly Delayed the Agency's Responses to EPIC's June 2009 FOIA Requests*

On June 29, 2009, the DHS Special Assistant to the Chief of Staff, Jordan Grossman, sent FOIA staff a list of questions requesting a status update and detailed information about a number of FOIA requests. Among them were EPIC's June 2009 requests for Mary Ellen Callahan's calendar and for the National Security Presidential Directive 54. *See* Appendix 17. Mr. Grossman was a political appointee, and has no legal authority to routinely review FOIA requests.

Mr. Grossman, in reference to the request for Ms. Callahan's calendar, asked "Do we know why they are interested in 5/29/2009 specifically?" He then asked about EPIC's request for National Security Presidential Directive 54. "What does this directive say? Is this Directive unclassified?" *Id.*

On June 30, 2009, Vania T. Lockett, CIPP/G, Acting Departmental Disclosure Officer, responded with an update to Mr. Grossman's improper requests. *See* Appendix 18.

Regarding the request for Ms. Callahan's calendar, Ms. Lockett wrote, "PRIV: Compiling records and issuing acknowledging letter to the requester. EPIC's Privacy Coalition invited the CPO to their monthly meeting on 5/29/2009, to which the CPO did not attend. EPIC wishes to see what the CPO had on her agenda that prevented her from attending." *Id.*

Ms. Lockett then updated Mr. Grossman about EPIC's request for National Security Presidential Directive 54. She wrote, "MGMT: This request was referred to PRIV for direct response on 6/26/2009. This directive is classified Top Secret and concerns a series of efforts to protect Government systems and reduce potential vulnerabilities, protect against intrusion attempts, and anticipate future threats through cyber security and monitoring." *Id.*

The FOIA was intended to further the public interest and awareness, not politics. *See Wash. Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 74, 76 (D.D.C. 2006) (citing *Jacksonville Port Auth. v. Adams*, 556 F.3d 52, 59 (D.C.Cir.1977) (recognizing "an overriding public interest ... in the general importance of an agency's faithful adherence to its statutory mandate").

Though the Grossman and Lockett emails do not definitively prove that documents were ultimately kept secret as a result of the 2006 and 2009 DHS directives, they demonstrate that the agency policies unlawfully delayed the agency's response. And at least in the case of EPIC's 2009 FOIA requests, it is clear that DHS failed to meet its statutory deadlines in response to FOIA requests that were referred for political review. Such review is unlawful. Unless records fall into one of the specified statutory exemptions, anyone who seeks documents under FOIA is entitled to receive them. No

FOIA provision allows an agency to deny or delay its response to a FOIA requester for political reasons.

*DHS Has Been Impermissibly Allowing Political Appointees to Vet FOIA Requests Filed by Activist Groups, Watchdog Organizations, and Special Interest Groups in Violation of the FOIA.*

The above referenced DHS 2009 directive required DHS career staff to provide Secretary Napolitano's political staff with detailed information about the people and organizations making FOIA requests. The emails show that the documents were withheld until a political appointee approved the disclosures. This approval process often significantly delayed document releases.

Though the July 2009 directive was not officially promulgated until after EPIC's two June 2009 requests were made, it is clear that DHS had been working under an informal policy to vet FOIA requests from activist groups since the promulgation of the August 2006 directive, referenced above.

EPIC Requests the Following Assistance from the FOIA Ombudsman

As FOIA Ombudsman, OGIS is authorized to review policies and procedures of administrative agencies, review compliance by administrative agencies, and recommend policy changes to Congress and the President. § 552(h)(2). OGIS is also required to conduct audits of agencies' FOIA implementation and issue reports. § 552(i).

As a frequent FOIA litigant, EPIC has a strong interest in ensuring that that FOIA requests are processed in a timely, lawful, and responsive manner. In addition, as the publisher of the leading FOIA litigation handbook, *Litigation Under the Federal Open Government Laws*, EPIC has expertise regarding FOIA's statutory requirements and deadlines.

EPIC therefore urges OGIS to investigate the practices raised by DHS's impermissible use of political appointees to vet the processing of FOIA requests. Were responsive documents withheld from FOIA requesters as a result of political appointees' review? Has the DHS in fact abandoned its policy of effectively exercising a political veto over FOIA disclosures? Do other agencies have similar improper policies? How many FOIA requests have been impermissibly delayed because of vetting by political appointees? To what extent have people and organizations who are legally entitled to request DHS records been denied that access because political appointees at the DHS decided that it was not politically expedient to process those requests? Under what authority does the DHS claim the right to require that FOIA requests be vetted by political appointees?

EPIC requests that the FOIA Ombudsman advise the Department of Homeland Security that DHS lacks the legal authority under FOIA to require that political appointees approve, deny, or delay FOIA requests. EPIC recommends additional training

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be provided to DHS FOIA staff regarding implementation of FOIA as required by the DHS's FOIA regulations.

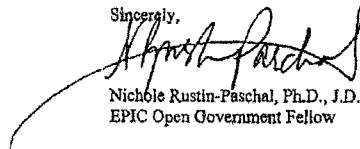
EPIC requests that the OGIS publish a report of its findings in this matter. In addition, OGIS should issue guidance making clear that the processing of FOIA requests is not subject to review or approval by political appointees.

Privacy Consent Statement

In accordance with the Privacy Act of 1974 as amended, EPIC hereby authorizes the Office of Government Information Services to make inquiries on its behalf, including the right to review all documentation that OGIS deems necessary in connection with EPIC's request for assistance regarding the Freedom of Information Act appeal that it has referenced above. EPIC understands that any documents it provides to OGIS may be copied and forwarded to officials of the referenced agency as a part of the mediation/resolution process. EPIC authorizes any Federal department, agency or component to release to OGIS information and records related to its Freedom of Information Act request.

Thank you for your attention to this matter. We look forward to your continued work on this issue.

Sincerely,



Nichole Rustin-Paschal, Ph.D., J.D.  
EPIC Open Government Fellow

John Verdi  
Director, EPIC Open Government Project

**Appendix 3 – EPIC’s February 15, 2011 Letter to the House Oversight Committee**

ELECTRONIC PRIVACY INFORMATION CENTER



February 15, 2011

The Hon. Darrell E. Issa (R-CA), Chairman  
House Committee on Oversight and Government Reform  
Washington, DC 20510

The Hon. Elijah Cummings (D-MD), Ranking Member  
House Committee on Oversight and Government Reform  
Washington, DC 20510

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www.epic.org

Dear Chairman Issa and Ranking Member Cummings,

We are writing to support the House Committee on Oversight and Government Reform’s decision to examine FOIA oversight by investigating the Department of Homeland Security’s (“DHS”) FOIA policies and procedures. The broad coalition of privacy and civil liberties groups signing on to this letter has a shared interest in open government policies and procedures.

We understand that your investigation intends to focus primarily on DHS’s practice of vetting FOIA requests through political appointees before they are processed. We suggest that your investigation of DHS policy begin from the creation of the agency, because, as we note later in this letter, the policy of political vetting of FOIA requests has been in place for many years.

We would ask in addition that, in order to facilitate FOIA oversight in the future, your hearing also inquire into the scope of authority allowed the Office of Government Information Services (“OGIS”) and the Government Accountability Office (“GAO”) to conduct investigations of FOIA practices at government agencies.

**Open Government and Transparency Issues**

President Obama made open government and transparency a hallmark of his administration by issuing a memorandum about its importance as his first executive action. “The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails.”<sup>1</sup> He directed agencies to be more proactive in their disclosure and act cooperatively with the public. He explained, “At that heart of that commitment [to transparency] is the idea that accountability is in the interest of the Government and the citizenry alike.”<sup>2</sup> To further his goals, President Obama directed the Attorney General to issue new guidelines for implementing FOIA and the

<sup>1</sup> President Barack Obama, Memorandum, “Freedom of Information Act,” Jan. 21, 2009.

<sup>2</sup> *Id.*

EPIC, Coalition, 02/15/2011

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Director of the Office of Management and Budget to issue guidelines for the agencies as they "increase and improve information dissemination to the public."<sup>3</sup>

Unfortunately, under a DHS policy in effect since 2006, political appointees have received detailed information about the identity of FOIA requesters and the topics of their requests in weekly reports before FOIA career staff could complete the processing of the requests.<sup>4</sup> The policy requires DHS career staff to provide Secretary Napolitano's political staff with information, including where a requester lives, the requester's affiliation, and descriptions of the requesting organization's mission. Despite DHS protestations that the policy has been retracted, there has been no publication about the new policy or the end of the old policy.

This policy is contrary to federal law and Supreme Court holdings, as the FOIA does not permit agencies to select FOIA requests for political scrutiny of either the request or the requester. The Supreme Court has clearly stated that disclosure of documents under FOIA will not depend on either the identity of the requester nor the reasons for the request. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 170, 172 (2004); *see also United States Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 89 U.S. 749, 771 (1989) (stating that the requester's identity has "no bearing on the merits of his...FOIA request").

The DHS policy of requiring political review came to light after the Associated Press ("AP") submitted a FOIA request in January 2010 to DHS seeking agency documents from 2009 directing FOIA staff to submit FOIA requests to political appointees prior to processing the requests.<sup>5</sup> OGIS mediated disputes between the AP and the agency concerning the AP's FOIA request, securing the disclosure of more than 1,000 pages of agency records. The over 1,000 agency documents released reveals a persistent agency practice of flagging FOIA requests from watchdog organizations for referral to political appointees.

EPIC's review of the released documents demonstrates that DHS required political appointees to review the determinations of FOIA career staff assessments to certain requests before documents were disclosed by the agency. EPIC discovered that the policy had been ongoing since 2006. The documents indicate that requests by EPIC and other watchdog groups were improperly flagged for review by political appointees and likely delayed in processing as a result, by the Department of Homeland Security's unlawful policy. This is a violation of the FOIA's statutorily mandated deadlines for processing requests. 5 U.S.C. 552(a)(6)(A), (B).

<sup>3</sup> *Id.* For the guidelines developed by OMB in compliance with President Obama's directive, *see* <http://www.whitehouse.gov/omb/open>.

<sup>4</sup> *See* "FOIA Section of the DHS Cabinet Report to the White House Submission Guidelines Updated August 4, 2006," and "Guidelines for Reporting a Significant FOIA Activity for Inclusion in the Cabinet Report to the White House July 7, 2009."

<sup>5</sup> Kim Zetter, "Report: Political Appointees Vetted DHS Public Records Request," *wired.com*, July 22, 2010, <http://www.wired.com/threatlevel/2010/07/foia-filtered/>.

The inefficiencies of the DHS FOIA process have already come under scrutiny. The Government Accountability Office ("GAO") assessed DHS's FOIA program in a report published in March 2009, covering the period from May 2008 to January 2009. The GAO explained that the guiding principles of FOIA had changed since the law was enacted in 1966. The report states:

Before [FOIA], the government required individuals to demonstrate "a need to know" before granting the right to examine federal records. FOIA established a "right to know" standard, under which an organization or any member of the public could receive access to information held by federal agencies without demonstrating a need or reason. The "right to know" standard shifted the burden of proof from the individual to government agencies and required agencies to provide proper justification when denying requests for access to records.<sup>6</sup>

The GAO recommended DHS increase its internal monitoring and oversight as one way to reduce the agency's backlog of FOIA requests.<sup>7</sup> However, the GAO did not intend the monitoring and oversight to include vetting of requests by political appointees. The GAO also recommended increasing and specializing the training that DHS FOIA staff received as another way to increase efficiency.<sup>8</sup> The GAO noted that "[w]hile DHS has made advances in ensuring compliance and oversight among its components...opportunities exist for further improvements."<sup>9</sup>

#### Scope of Authority Issues:

EPIC has submitted a request to OGIS seeking an independent investigation of the above referenced DHS policy of vetting FOIA requests by political appointees. EPIC also urged OGIS to investigate whether other agencies have similar policies. However, as indicated by a response from the Director of OGIS, Miriam Nisbet,<sup>10</sup> there is uncertainty as to the scope of authority for OGIS to undertake the type of investigation recommended by EPIC. Director Nisbet suggests that the GAO may have the better authority to conduct such an investigation. EPIC and the coalition of privacy organizations request that the Committee examine this issue in a public hearing.

FOIA was amended in 2007 to create the Office of Government Information Services ("OGIS") within the National Archives and Records Administration. Since 2009, OGIS, acting as the FOIA Ombudsman, has mediated disputes between FOIA requesters and Federal agencies, reviewed agency compliance with FOIA as well as agency policies and procedures for administering FOIA. OGIS is authorized to recommend policy changes to Congress and the President to improve the administration of FOIA. § 552(h)(2), (i)

<sup>6</sup> Government Accountability Office, *Freedom of Information Act: DHS Has Taken Steps to Enhance Its Program, but Opportunities Exist to Improve Efficiency and Cost-Effectiveness*, March 20, 2009, <http://www.gao.gov/new.items/d09260.pdf>

<sup>7</sup> *Id.* at 14.

<sup>8</sup> *Id.* at 16.

<sup>9</sup> *Id.* at 25.

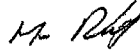
<sup>10</sup> Miriam Nisbet, Letter to EPIC, January 2011, attached.

The GAO serves as the "congressional watchdog" by investigating, among other activities, "how well government programs and policies are meeting their objectives....[The GAO] advise[s] Congress and the heads of executive agencies about ways to make government more efficient, effective, ethical, equitable and responsive."<sup>11</sup> Further, the GAO is authorized to conduct audits of agency operations and investigate alleged illegal or improper activities.


We object to DHS efforts to circumvent the FOIA process. The effectiveness of FOIA depends on agencies adhering to the principles of open government and transparency. Agencies must operate under the "right to know" standard. To ensure the accountability of agencies under this standard, the jurisdictions of OGIS and GAO must be clear so that they might effectively investigate FOIA procedures and advise the Congress and the President.

The House Committee on Oversight and Government Reform must hold rigorous hearing to review these issues.

Sincerely,



Marc Rotenberg  
Executive Director, EPIC



Nichole Rustin-Paschal, Ph.D., J.D.  
Open Government Fellow, EPIC

American Association of Law Libraries  
American Library Association  
Association of Research Libraries  
Bill of Rights Defense Committee  
Center for Financial Privacy & Human Rights  
Center for Media & Democracy  
Common Cause  
Consumer Action  
Defending Dissent Foundation  
Doctor-Patient Medical Association  
Essential Information  
Electronic Privacy Information Center  
Government Accountability Project  
Identity Project  
Liberty Coalition  
National Coalition Against Censorship  
National Workrights Institute

<sup>11</sup> About GAO, <http://www.gao.gov/about/index.html>.

Patient Privacy Rights  
Privacy Rights Clearinghouse  
UNITED SIKHS  
World Privacy Forum

Experts:

Steven Aftergood  
Grayson Barber  
David H. Flaherty  
Pablo Molina  
Dr. Deborah C. Peel  
Chip Pitts  
Bruce Schneier  
Edward Hammond, Former Director of the Sunshine Project

CC:

Senator Patrick J. Leahy (D-VT), Chairman  
Senate Committee on the Judiciary

Senator John Cornyn (R-TX)  
Senate Committee on the Judiciary

Senator Joseph Lieberman (ID) (CT), Chairman  
Senate Committee on Homeland Security & Governmental Affairs

Senator Susan M. Collins (R-ME), Ranking Member  
Senate Committee on Homeland Security & Governmental Affairs

Miriam Nisbet  
Director, Office of Government Information Services

Elizabeth Johnston,  
Government Accountability Office

/Attachment

EPIC, Coalition, 02/15/2011

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**Appendix 4 – EPIC FOIA Requests to DHS, January 2009 to Present**

This appendix details FOIA requests pursued by EPIC DHS between January 1, 2009 and present. They are presented in chronological order by date filed.

**EPIC's FOIA REQUESTS TO THE DHS**

**1. EPIC Case No. 08-12-4/DHS (DHS Case No. DHS/OS/PRIV 09-165)  
*E-Verify Contracts and Related Documents***

*Summary:*

After the DHS purchased advertising on National Public Radio (“NPR”) for the agency’s E-Verify program, EPIC sent a FOIA request on December 4, 2008, for records concerning the agency’s promotion of E-Verify. Vania T. Lockett, DHS Associate Director of Disclosure & FOIA Operations, wrote EPIC a letter dated December 11, 2008 in which she stated that she was referring EPIC’s request to United States Citizenship and Immigration (“USCIS”) FOIA Officer Jill Eggleston after determining that the request was under the purview of USCIS. On January 8, 2009, EPIC submitted an appeal to USCIS noting that the agency had failed to meet its statutory deadlines because “neither the DHS nor the USCIS ha[d] made any determination regarding” the request within the prescribed time periods.

EPIC received two letters from USCIS dated January 15, 2009. One letter denied EPIC’s request for expedited processing. The other stated that EPIC’s request was “deemed to constitute an agreement to pay any fees that may be chargeable up to \$25.00,” constructively denying EPIC’s request for “news media” status and a fee waiver. That letter set forth the duplication fee schedule and stated that the agency intended to charge EPIC fees. On March 13, 2009, EPIC submitted another appeal to USCIS contesting the agency’s denial of expedited processing and news media status and its “failure to timely respond to the substance of [the] request.”

On January 28, 2010, Brian J. Welsh, Acting Associate Counsel of USCIS, sent a letter to EPIC regarding EPIC’s March 13, 2009 appeal. USCIS affirmed its decision to deny expedited processing but granted EPIC’s request for a fee waiver. On February 24, 2010, EPIC received documents from USCIS.

*Documents sought:*

1. All records, including contracts and related documents, between DHS and NPR concerning the E-Verify promotion that began in November, 2008.
2. All records, including contracts and related documents, involving DHS and other media outlets concerning the promotion of E-Verify

*Status:*

More than one year after EPIC's FOIA request, DHS, through USCIS, released responsive records.

2. **EPIC Case Nos. 09-04-14 DHS and 09-07-02 DHS** (DHS Case Nos. DHS/OS/PRIV 09-548 and DHS/OS/PRIV 09-806; TSA Case Nos. TSA09-0510 and TSA10-0260, respectively)  
*Airport Body Scanner Documents*

*Summary:*

On April 14, 2009, following the news that DHS would make Full Body Scanners (then called "Whole Body Imaging" or "WBI" by the agency) the primary screening technique in US airports, EPIC immediately filed a FOIA request (the "First Request") with DHS for documents regarding the capabilities of its WBI technology. On July 2, 2009, EPIC filed another FOIA request (the "Second Request") seeking training manuals, images, and complaints relating to WBI technology. DHS referred both requests to TSA, which failed to disclose any documents within the statutory deadlines. EPIC filed administrative appeals in both cases, and again TSA failed to disclose any records within the statutory deadlines.

EPIC filed lawsuits in both cases, which were consolidated. The DHS failed to file an Answer to EPIC's Complaint by the deadline set forth in the Federal Rules of Civil Procedure, and EPIC moved for entry of a default judgment. During the course of litigation, EPIC obtained some of the requested documents. However, TSA refused to make all of the documents sought public. The litigation regarding some 2,000 naked body scanner images and 376 pages of manuals in possession of the agency continues more than a year later.

*Documents sought:***In Case No. 09-04-14 DHS:**

1. All documents concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals;
2. All contracts that include provisions concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals; and
3. All instructions, policies, and/or procedures concerning the capability to passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals.

**In Case No. 09-07-02 DHS:**

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- a. All unfiltered or unobscured images captured using Whole Body Imaging Technology;
- b. All contracts entered into by DHS pertaining to WBI systems, including contracts for hardware, software or training;
- c. All documents detailing the technical specifications of WBI hardware, including any limitations on image capture, storage or copy;
- d. All documents, including but not limited to presentations, images and videos used for training persons to use WBI systems;
- e. All complaints related to the use of WBI and all documents relating to the resolution of those complaints;
- f. All documents concerning data breaches of images generated by WBI technology.

*Status:*

The Court granted DHS's motion for summary judgment regarding 2,000 body scanner images and training manuals. On March 7, 2011, the U.S. Supreme Court struck down the legal doctrine ("Exemption b(2)-high") on which the Court based its holding. EPIC filed a motion for reconsideration, which is pending. The DHS continues to withhold 2,000 naked body scanner images and 376 pages of manuals in possession of the agency.

**3. EPIC Case No. 09-6-24/DHS** (DHS Case No. DHS/OS/PRIV 09-765)  
Chief Privacy Officer Callahan's Calendar

*Summary:*

On March 9, 2009, Mary Ellen Callahan became the Chief Privacy Officer (CPO) of DHS. The DHS Privacy Office, which Ms. Callahan has been running since then, is statutorily required to "sustain privacy protections and transparency of government operations, while achieving the mission of the Department of Homeland Security." One of the ways the Privacy Office claims to further its purpose is "communicating with the public through published materials, formal notice, public workshops, and meetings." The Privacy Coalition, which EPIC has organized since 1995, provides a venue for the federal privacy officials to conduct public meetings with privacy advocates and experts. DHS officials and chief privacy officers from other agencies have addressed the Privacy Coalition on previous occasions. Ms. Callahan was scheduled to appear at the May 29, 2009 Privacy Coalition meeting but cancelled the visit, claiming a scheduling conflict.

On June 25, 2009, EPIC submitted a FOIA request to DHS FOIA Officer Catherine M. Papoi seeking all "agency records concerning appointments and meetings between Mary Ellen Callahan, Chief Privacy Officer for the Department of Homeland Security, and all nongovernmental individuals or entities" between March 9 and June 25 of 2009. In addition, EPIC requested "all agency records concerning Ms. Callahan's appointments and meetings for May 29, 2009." EPIC sought this information to determine the exact circumstances of Ms. Callahan's "scheduling conflict" and whether

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she had met with private firms or other public interest groups working on privacy issues as well as any other public outreach activities in which she might have been engaged.

On July 2, 2009, DHS wrote EPIC a letter acknowledging the request, informing EPIC of a possible delay in its processing and invoking a 10-day extension of the 20-day statutory processing deadline pursuant to 5 U.S.C. § 552(a)(6)(B). The letter also informed EPIC that its fee waiver request would be “held in abeyance pending the quantification of responsive records.” On July 9, 2009, DHS wrote EPIC a follow-up response to the FOIA request informing EPIC that it had “identified records” that it was transferring to Charlie Borrero, FOIA Officer at the DHS Office of General Counsel for processing and direct response to EPIC.

On July 30, 2009, David J. Palmer, Deputy Associate General Counsel for DHS, wrote EPIC a “first interim response” to its FOIA request. Citing “the voluminous amount of records that must be located,” Palmer claimed to need “additional time to search for possible responsive records and, to the extent these records are found, to make a determination about production of those records.” He stated that he expected to complete his review by August 7, 2009. He did not, however, cite any section of the FOIA or any other law in support of his decision to delay processing the request. Finally, Palmer stated that in DHS’s “preliminary search for records responsive to the multi-part request,” it had located “a total of 16 pages” of which it had “determined they can be partially released but with certain information withheld pursuant to [FOIA exemptions] b(2)(low), and (b)(6).”

On August 25, 2009, Palmer wrote EPIC a “final response” to its FOIA request in which he stated that DHS had identified “a total of 84 pages” of which it had determined 40 could be “released in their entirety” and 44 could only be “partially released, but with certain information withheld pursuant to [FOIA exemptions] (b)(2)(low), (b)(5), and b(6).”

On September 17, 2009, EPIC submitted to DHS its appeal of the agency’s “failure to disclose records in full and its assertions of exemptions.” In that appeal, EPIC also noted DHS’s failure “to comply with the open government directive that the President set out in January [2009] and the specific, and directly applicable determination made recently by the White House with respect to the records of agency officials who meet with members of the public.” On September 18, 2009, DHS wrote EPIC a letter confirming receipt of the appeal and assigning it a new tracking number, DHS09-139. EPIC never received a response to the appeal.

*Documents Sought:*

1. All agency records concerning appointments and meetings between Mary Ellen Callahan, Chief Privacy Officer for the Department of Homeland Security, and all nongovernmental individuals or entities from the date of her appointment, March 29, 2009, to [June 25, 2009]. Such nongovernmental individuals and entities

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include, but are not limited to, trade associations, industry representatives, and/or business owners. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.

2. All agency records concerning Ms. Callahan's appointments and meetings for May 29, 2009. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.

*Status:*

The DHS failed to respond to EPIC's administrative appeal and has not released unredacted version of the records at issue.

**4. EPIC Case No. 09-06-25/DHS (CNCI)**  
National Security Presidential Directive 54 & the Comprehensive  
National Cybersecurity Initiative

*Summary:*

In January 2008, President George W. Bush issued the National Security Presidential Directive 54 (NSPD-54), but it was never released to the public. Under this Directive, the Comprehensive National Cybersecurity Initiative ("CNCI") was formed to "improve how the federal government protects sensitive information from hackers and nation states trying to break into agency networks." In February 2009, President Obama appointed Melissa Hathaway as the head of a 60-day review of the government's cybersecurity efforts ("the Hathaway Report"). In April 2009, Senator Jay Rockefeller (D-WV) introduced to Congress the Cybersecurity Act of 2009 (S. 773), still pending in the Senate Committee on Commerce, Science, and Transportation.

Despite a 2008 power struggle over the CNCI, the Department of Homeland Security ("DHS") was ultimately charged to oversee the details, with operational functions split between the National Security Agency (NSA), the Central Intelligence Agency (CIA), and the Federal Bureau of Investigation's (FBI) Cyber Division. Each agency under DHS is responsible to "investigate intrusions by monitoring Internet activity and . . . capturing data for analysis." However, DHS acts as the lead agency on cybersecurity, as well as many other areas of Internet regulation.

Although the CNCI has been the primary source of cybersecurity rules since 2008, neither it nor the authorizing Directive have been released in full. Gregory Garcia (then DHS Assistant Secretary of Cybersecurity and Telecommunications) stated in February 2009 that "too much was kept secret." The policy goals in the Directive, and the implementation of those goals in the CNCI, have directed virtually all cybersecurity regulation.

On June 25, 2009, EPIC submitted a FOIA request via fax to DHS seeking the text of NSPD-54, the full text of the CNCI, any executing protocols distributed to the

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agencies in charge of CNCI's implementation, and all privacy policies related to either NSPD-54 or CNCI.

On June 26, 2009, the DHS Management Directorate wrote to EPIC to acknowledge receipt of EPIC's FOIA Request and to announce a transfer of the request to the DHS Headquarters & Privacy Office. The DHS did not make any determination regarding EPIC's FOIA Request at that time.

On July 9, 2009, the DHS Headquarters & Privacy Office wrote to EPIC, acknowledging receipt of EPIC's FOIA Request, and notifying EPIC of its determination to refer the request to the DHS National Protection and Programs Directorate ("NPPD"), but did not make any determination regarding the substance of EPIC's FOIA Request.

On August 4, 2009, EPIC submitted an appeal of DHS's failure to make a timely determination regarding EPIC's FOIA request and a request for expedited processing via fax to DHS. DHS never responded to the appeal.

*Documents Sought:*

1. The text of the National Security Presidential Directive 54, otherwise referred to as the Homeland Security Presidential Directive 23.
2. The full text, including previously unreported sections, of the Comprehensive National Cybersecurity Initiative, as well as any executing protocols distributed to the agencies in charge of its implementation.
3. All privacy policies related to either the Directive or the Comprehensive National Cybersecurity Initiative, including but not limited to, contracts or other documents describing privacy policies for information shared with private contractors to facilitate the Comprehensive National Cybersecurity Initiative.

*Status:*

The DHS has failed to make a determination concerning EPIC's FOIA request, failed to respond to EPIC's administrative appeal, and failed to disclose responsive agency records.

5. **EPIC Case No. 10-03-11 DHS** (DHS Case Number DHS/OS/PRIV 10-0511)  
EINSTEIN 3

*Summary:*

Having learned that DHS was conducting a test of its intrusion prevention deep-packet inspection program, EINSTEIN 3, EPIC filed a FOIA request on March 11, 2010

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for 1) the exercise's Privacy Impact Assessment (PIA) and 2) any contracts, legal opinions, security analyses, and risk assessments concerning EINSTEIN 3. The FIOA request sought expedited processing based on the need to discuss cybersecurity legislation pending in Congress, namely the Cybersecurity Act of 2009, in light of current government cybersecurity programs.

On March 18, 2010, DHS published an unclassified PIA for the EINSTEIN 3 test. This unclassified PIA was not a declassified version of the PIA for the exercise, but rather a separate document written for public release. On March 24, 2010, EPIC received an email from DHS asserting that the unclassified PIA was responsive to part 1) of EPIC's request. EPIC disagreed, informing DHS in a phone call in April that part 1) of EPIC's request extended to the classified PIA.

On July 8, 2010, nearly three months after the last action on EPIC's FOIA request, DHS responded with the classified PIA, redacted according to DHS's assertion of FOIA exemptions, as well as 41 pages of documents that DHS determined to be responsive to part 2) of EPIC's FOIA request.

*Documents Sought:*

1. The Privacy Impact Assessment for the pilot exercise of the most recent version of the EINSTEIN network security program, also known as EINSTEIN 3; and
2. All contracts with private vendors, legal opinions, security analyses, and risk assessments concerning EINSTEIN 3.

*Status:*

Nearly four months after EPIC's FOIA request, DHS disclosed responsive records.

6. **EPIC Case No. 10-06-11 DHS** (No reply/No DHS case number assigned)  
*Fusion Center Training Manuals*

*Summary:*

Fusion centers are local or state entities meant to gather information from distributed sources, both public and private, for the purpose of collection, retention, analysis, and dissemination.

DHS is responsible for providing training to privacy officers at these fusion centers in order to ensure that the privacy and civil liberties policy of the center comports with Federal, State, and local law. In a June 11, 2010 FOIA request, EPIC sought the documents DHS uses for this training, portions of which have been withheld from the public.

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EPIC's FOIA request was sent on June 11, 2010. As of August 4, 2010, no response had been received, even though the statutory deadline for DHS to make a legal determination on EPIC's FOIA lapsed on July 12, 2010. On August 2, 2010, EPIC filed an administrative appeal of DHS's failure to make a legal determination regarding this FOIA request.

*Documents sought:*

1. All documents used by DHS to train fusion center privacy officers.
2. All documents used by DHS to train the twelve fusion centers referenced by Ms. Callahan on May 25, 2010 at the DPIAC meeting. (The training referenced is developed and administered by DHS and is required of fusion center privacy officers before the fusion center can receive federal grant money.)
3. All documents used by fusion center privacy officers for internal training of fusion center staff and personnel.
4. All documents used by DHS and fusion centers to evaluate the implementation of such training for determining individual fusion center eligibility for federal grants and all other evaluative purposes.
5. All correspondence and communications between DHS and fusion centers regarding the receipt, use, or implementation of training and evaluation documents.

*Status:*

EPIC's August 2, 2010 administrative appeal is pending. The DHS has failed to make any determination concerning EPIC's FOIA request or administrative appeal. The agency has failed to disclose any responsive records.

7. **EPIC Case No. 10-06-11** (DHS Case No. DHS/OS/PRIV 10-0785; TSA 10-0610; S&T 10-0003.35)

*Airport Body Scanners – Operational Testing*

*Summary:*

On June 11, 2010, EPIC sent a FOIA request to DHS seeking the results of TSA's operational testing, which was completed in 2009 according to a GAO report. The request asked for expedited processing because of TSA's impending implementation of full body scanning as the primary on-site security screening method for domestic airport security. The request was received by DHS on June 18, 2010.

DHS referred EPIC's FOIA request to TSA on June 24, 2010. TSA acknowledged receipt of the request on the same date; however, as of August 5, 2010, TSA has not made a legal determination on EPIC's request for expedited processing, nor has TSA made any legal determination on EPIC's FOIA request.

EPIC's FOIA request was also referred by DHS to its Science and Technology Directorate ("S&T"). On July 13, 2010, S&T acknowledged EPIC's FOIA request and asked that EPIC clarify whether its request was limited only to the two deployed types of FBS devices. EPIC replied that its request was not so limited. On July 27, 2010, EPIC sent a clarification letter to S&T. S&T then called EPIC on July 28 for a second clarification regarding the scope of "all communications" sought by EPIC's FOIA request. During that phone conversation, EPIC and S&T agreed that "pre-decisional" communications were not the subject of EPIC's FOIA request. On July 29, 2010, S&T sent a letter acknowledging EPIC's clarification and referencing the telephone conversation.

Both TSA and S&T informed EPIC of their intent to charge EPIC duplication fees in fulfilling EPIC's request, despite acknowledging EPIC's status as a news media organization and request for fee waiver.

*Documents sought:*

1. All documents and communications concerning testing of "Advanced Imaging Technology" in control and operational settings.

*Status:*

The agency has failed to disclose any records in response to EPIC's FOIA request, and has failed to comply with statutory deadlines.

**8. EPIC Case Nos. 10-6-15/TSA, 10-10-05/DHS** (TSA Case No. TSA 10-0609, TSA 11-0023; DHS/OS/PRIV 11-0042, TSA11-0080, TSA11-0257)

*TSA—Automated Target Recognition*

*Summary:*

In April 2010, EPIC sent a petition to the Transportation Security Administration (TSA) and DHS Secretary Janet Napolitano requesting that TSA and DHS suspend the Full Body Scanner (FBS) program at use in several American airports. TSA responded by denying all of the allegations EPIC made about the program that, if true, would have warranted suspension of it. In its letter, the TSA disclosed that it had "worked closely" with Dutch authorities and automated target recognition (ATR) manufacturers and included a letter to Senator Susan Collins further detailing the timetable for ATR deployment. TSA did not explicitly describe the specifications it requested from ATR manufacturers but merely stated that ATR technology did not currently meet its needs.

On June 15, 2010, EPIC submitted a FOIA request to TSA for: the specifications that the agency had given ATR manufacturers; records related to the letter to Senator Collins; and communications between the TSA and Dutch authorities regarding ATR technology.

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On June 24, 2010, TSA wrote EPIC a letter acknowledging the request. The letter stated that EPIC's request for expedited treatment was "currently under consideration." It then warned of a likely delay in processing the request. TSA invoked a 10-day extension of the 20-day statutory processing deadline pursuant to 5 U.S.C. § 552(a)(6)(B). The letter stated that TSA would charge EPIC "for records in accordance with the DHS interim FOIA regulations as they apply to media requestors," thus constructively denying EPIC's request for a fee waiver.

On October 5, 2010, EPIC filed an administrative appeal concerning the TSA's denial of a waiver of duplication fees and non-responsiveness. This appeal was received by TSA on October 12, 2010.

On October 5, 2010, EPIC also filed an additional related FOIA request seeking more documents concerning software modifications to airport body scanners. DHS referred the request to the TSA and the TSA acknowledged the request with the same form extension letter with which it responded to the first request.

On October 18, 2010, TSA sent EPIC a letter acknowledging its initial appeal and assigning the request reference number TSA11-0023. The letter also invoked a 10-day extension of the 20-day statutory processing deadline pursuant to 5 U.S.C. § 552(a)(6)(B) and invited EPIC to "narrow the scope of your request." On November 2, 2010, the TSA sent EPIC an undated letter in further response to EPIC's administrative appeal. The letter stated that "[a]lthough the FOIA permits you to appeal a constructive denial of your request, [the TSA] cannot act until an initial determination has been made as to whether any responsive records may be released." This letter, along with the October 18 letter, unlawfully placed EPIC's appeal in a queue for processing FOIA requests.

On December 14, 2010, EPIC appealed the TSA's failure to disclose records in response to EPIC's second FOIA request. The TSA acknowledged this appeal on December 27, 2010 with the same letter described above, again unlawfully placing EPIC's appeal in a queue for processing FOIA requests.

On February 2, 2011, EPIC filed lawsuits in both cases, which were consolidated. The TSA filed their answer on March 16, 2011.

*Documents Sought*

**In Case 10-6-15/TSA:**

1. All specifications provided by TSA to automated target recognition manufacturers regarding automated target recognition systems.
2. All records concerning the capabilities, operational effectiveness, or suitability of automated target recognition systems, as described in Secretary Napolitano's letter to Senator Collins.
3. All records provided to TSA from the Dutch government concerning automated target recognition systems deployed in Schiphol Airport, as described by Secretary Napolitano's letter to Senator Collins
4. All records evaluating the FBS program and determining automated target recognition requirements for nationwide deployment, as described in Secretary Napolitano's letter to Senator Collins.

**In Case 10-10-05/DHS:**

1. All records provided from L3 Communications or Rapiscan in support of the submission or certification of ATR software modifications;
2. All contracts, contract amendments, or statements of work related to the submission or certification of ATR software modifications;
3. All information, including results, of government testing of ATR technology, as referenced by Greg Soule of the TSA in an e-mail to Bloomberg News, published September 8, 2010.

*Status:*

EPIC filed suit on February 2, 2011 to force disclosure of agency records.

9. **EPIC Case No. 10-6-15/DHS** (DHS Case No. DHS/OS/PRIV 10-0795):  
*Homeland Security Presidential Directive 24/Facial Recognition/Biometrics*

*Summary:*

On June 5, 2008, President Bush issued Homeland Security Presidential Directive 24 (HSPD-24): Biometrics for Identification and Screening to Enhance National Security, calling for reports due on June 5, 2009, from the Attorney General, the Secretaries of State, Defense, and Homeland Security, and the heads of other appropriate agencies, on the implementation of a common system for the use of biometrics.

On June 15, 2010, EPIC submitted a FOIA request via certified mail seeking the DHS's report concerning biometrics produced in response to HSPD-24 and related agency records concerning facial recognition technology.

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On July 1, 2010, DHS wrote EPIC a response letter in which it denied EPIC's request for expedited processing. The letter then warned of a likely delay in processing the request. The TSA invoked a 10-day extension of the 20-day statutory processing deadline pursuant to 5 U.S.C. § 552(a)(6)(B). Finally, the letter stated that DHS would hold EPIC's request for a fee waiver in abeyance "pending the quantification of responsive records."

On July 27, 2010, EPIC submitted an administrative appeal to DHS citing the agency's failure to make a timely determination concerning EPIC's FOIA request.

On September 13, 2010, DHS sent a "final response" to EPIC's FOIA request. DHS sent 428 pages of documents, out of a total of 721 responsive documents located. DHS also determined that some of the responsive documents were under the purview of other DHS components and the request was transferred to them (National Protection and Programs Directorate, Management Directorate). Additional offices and components were also tasked to search for responsive records and EPIC's request was referred to those offices as well (TSA, Secret Service, Coast Guard, FEMA, and ICE).

On September 16, 2010, FEMA acknowledged receipt of EPIC's request and assigned case number FEMA 10-763. FEMA stated that it would hold EPIC's fee request in abeyance "pending the quantification of responsive records." Also on September 16, 2010, DHS Management Directorate sent a final response to EPIC's FOIA request consisting of 64 pages of documents.

On September 30, 2010, the US-VISIT Program of DHS responded to EPIC's FOIA request with the release of 116 pages of documents.

On November 8, 2010, the U.S. Coast Guard wrote to EPIC that it could not find any responsive records. On December 16, 2010, FEMA also responded to EPIC that it could not find any responsive records. No other DHS components responded.

*Documents Sought:*

1. The DHS's report in response to Homeland Security Presidential Directive 24.
2. All agreements between DHS and any other entity, dated between June 5, 2009 and June 15, 2010, concerning facial recognition systems.
3. All procurement specifications dated between June 5, 2009 and June 15, 2010 concerning facial recognition systems.
4. All reports dated between June 5 2009 and June 15, 2010 concerning facial recognition systems.

*Status:*

The TSA failed to make a determination concerning EPIC's FOIA request by the statutory deadline, but subsequently disclosed records.

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**10. EPIC Case No. 10-07-13 DHS** (DHS/OS/PRIV 10-0869, TSA10-0674, S&T 10-0003.42)  
Health Risks of Body Scanner Radiation

*Summary:*

In response to concerns raised by health experts and scientists regarding the danger to air travelers posed by exposure to radiation through use of full body or whole body image scanning technology, EPIC filed a FOIA request on July 13, 2010 with DHS seeking tests regarding body scanners and radiation emission or exposure. EPIC requested expedited processing on the grounds that TSA is expanding its body-imaging program to be the primary screening method in all domestic airports. On July 29, 2010, DHS sent EPIC a letter acknowledging receipt of the request and informing EPIC that the request would be referred to the Transportation Security Administration ("TSA") and the DHS Science and Technology Directorate ("S&T").

On August 12, 2010, TSA wrote to EPIC, denying EPIC's requests for expedited processing and a fee waiver. EPIC filed an administrative appeal of TSA's decision on August 27, 2010. On September 21, 2010, the TSA wrote to acknowledge receipt of EPIC's appeal.

On September 3, 2010, S&T responded to EPIC, denying EPIC's request for a fee waiver. On September 8, 2010, S&T responded to EPIC, stating that S&T had identified agency records that are in S&T's possession and are responsive to EPIC's FOIA request. However, S&T failed to disclose the responsive records, ostensibly because the records "belong to the Transportation Security Administration (TSA)."

On October 21, 2010, EPIC transmitted a written administrative appeal to TSA regarding the TSA's failure to make a determination regarding EPIC's FOIA request. On November 5, 2010, TSA sent EPIC a letter that acknowledged receipt of EPIC's appeal and then further stated that it "may encounter some delay in processing your request" and invited EPIC to "narrow the scope of your request." This letter was an explicit or constructive denial of EPIC's appeal to TSA, purporting to respond to EPIC's appeal but instead unlawfully placing EPIC's appeal in a queue for processing FOIA requests – a queue in which TSA states "there are currently 50 open requests ahead of yours." The TSA has failed to make a determination concerning EPIC's FOIA request.

On October 21, 2010, EPIC appealed S&T's failure to disclose records, as well as S&T's denial of EPIC's request for a fee waiver. S&T has failed to make a determination concerning EPIC's appeal and has not disclosed a single agency record.

On November 19, 2010, EPIC filed suit against DHS for failure to disclose documents in response to EPIC's July 13, 2010 FOIA request and failure to comply with statutory deadlines.

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On November 24, 2010, the TSA wrote to EPIC in response to EPIC's August 27<sup>th</sup> appeal regarding fees and expedited processing. TSA affirmed their initial expedited processing denial but agreed to a fee waiver.

On December 22, 2010, TSA sent an interim response to EPIC's original FOIA request indicating that it is "currently being processed." The response also stated that certain requested records were available publicly on the TSA's web site, and that appeal rights were not provided because of ongoing litigation.

*Documents sought:*

1. All records concerning TSA tests regarding body scanners and radiation emission or exposure.
2. All records concerning third party tests regarding body scanners and radiation emission or exposure.

*Status:*

The agency has not yet made a determination concerning EPIC's FOIA request and has failed to disclose responsive records. EPIC's lawsuit to force disclosure is pending.

**11. EPIC Case No. 10-11-23/DHS** (DHS Case Nos. DHS/OS/RIV 11-0214, S&T 10-0003.55; TSA11-0229):

**Mobile Body Scanners**

*Summary:*

On November 24, 2010 EPIC filed a FOIA request with DHS for documents concerning the agency's development and deployment of "body scanner" (or "Whole Body Imaging," "Advanced Imaging Technology," "Millimeter Wave," or "Backscatter") technology by law enforcement agencies in surface transit and street-roaming vans. The request followed news reports that, in 2009, the DHS had tested the technology on travelers using the New Jersey PATH Train and other news stories in 2010 reporting that vans known as "Z Backscatter Vans," which are capable of seeing through vehicles and clothing and routinely store the images generated, had been deployed on public roadways. In March 2010, DHS released a Surface Transportation Security Priority Assessment, which detailed the agency's plans to conduct risk assessment and implement new technology in America's surface transportation systems, including "Mass Transit, Highways, Freight Rail, and Pipelines..."

DHS acknowledged receipt of the request on December 10, 2010 and stated that the request would be forwarded to two separate DHS components: the Transportation Security Administration and the Science and Technology Directorate.

Despite receiving EPIC's request on December 14, 2010, the Science and Technology Directorate, the component invoked its right to a 10-day extension of the statutory deadline on January 11, 2011. On February 4, 2011, the component again stated that though responsive documents had been located, it was "experiencing a delay in processing [EPIC's] request." The component released documents to EPIC on February 16, 2011.

On February 7, 2011, the TSA acknowledged receipt of EPIC's forwarded request, which it received on December 21, 2010. The TSA alleged that EPIC's request did not reasonably describe agency records. The TSA asserted the authority to "administratively close" EPIC's request unless EPIC modified the request within 20 days. EPIC contacted the agency, disputed the TSA's allegation that EPIC's request was insufficiently specific, and challenged the agency's alleged right to administratively close FOIA requests without the consent of the requester. The TSA subsequently withdrew its February 7, 2011 letter, agreeing to process EPIC's FOIA request as submitted, without modification.

*Documents sought:*

7. All documents detailing plans by federal law enforcement agencies to implement body scanner technology in the surface transportation context.
8. All contracts, proposals, and communications with private transportation and shipping companies (including, but not limited to NJ PATH, Amtrak, and Greyhound) regarding the implementation of body scanner technology in surface transit.
9. All contracts, proposals, and communications with states, localities, tribes, and territories (and their subsidiaries or agencies) regarding the implementation of body scanners in surface transportation.
10. All documents detailing plans by federal law enforcement agencies to use "Z Backscatter Vans" or similar technology.
11. All contracts, proposals, and communications with the manufacturers of the "Z Backscatter Vans" or similar technology.
12. All contracts, proposals, and communications with states, localities, tribes, and territories (and their subsidiaries or agencies) regarding the implementation of "Z Backscatter Vans" or similar technology.
13. All images generated by the "Z Backscatter Vans" or body scanner technology that has been used in surface transit systems.

*Status:*

The Science and Technology Directorate released some of the requested records to EPIC; many documents were withheld in their entirety. The TSA has not

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communicated with EPIC since acknowledging the errors contained in its February 7, 2011 letter.

**12. EPIC Case No. 10-12-22/USSS (US Secret Service Case No. 20110021-20110022):**  
*WikiLeaks Donor Identities*

*Summary:*

On December 22, 2010, EPIC filed a request for disclosure of U.S. Secret Service (USSS) agency records regarding its investigation into the identities of donors to WikiLeaks or the identities of Internet users who accessed data from WikiLeaks. The request followed reports that, after WikiLeaks released confidential American diplomatic cables on its website wikileaks.org, the U.S. Government opened an investigation into the organization. The investigation attempted to identify users who accessed WikiLeaks documents and included at least one letter to a payment processor requesting information. The investigation prompted web hosts and payment processors to terminate their relationships with WikiLeaks.

On February 10, 2011, the U.S. Secret Service acknowledged receipt of the request.

*Documents Sought:*

1. All communications or agreements between the U.S. government and corporations (including but not limited to: Paypal, Visa, and Mastercard) regarding the personal information (including, but not limited to, the identities) of donors to WikiLeaks.
2. All communications or agreements between the U.S. government and corporations (including, but not limited to, Amazon.com, EveryDNS, internet service providers, and website hosting companies) regarding the personal information (including, but not limited to, the identities) of individuals who accessed or attempted to access the WikiLeaks web site or the November release.

*Status:*

The agency has failed to disclose any records or make a substantive determination concerning EPIC's request despite the expiration of the relevant FOIA deadline.

**Appendix 5 – February 7, 2011 Letter from TSA to EPIC**

U.S. Department of Homeland Security

Freedom of Information Act Office  
401 South 12<sup>th</sup> Street  
Arlington, VA 22204-6010



Transportation  
Security  
Administration

February 7, 2011

Ms. Ginger McCall  
1718 Connecticut Ave., NW Suite 200  
Washington, DC 20009

Re: TSA11-0229

Dear Ms. McCall:

This acknowledges receipt of your Freedom of Information Act (FOIA) request to the Transportation Security Administration (TSA), dated November 24, 2010, regarding documents concerning all detailing plans by federal law enforcement agencies to implement body scanner technology in the surface transportation context.

1. All contracts, proposals, and communications with private transportation and shipping companies (including, but not limited to NJ PATH, Amtrak, and Greyhound) regarding the implementation of body scanner technology in surface transit.
2. All contracts, proposals, and communications with states, localities, tribes, and territories (and their subsidiaries or agencies) regarding the implementation of body scanners in surface transportation.
3. All documents detailing plans by federal law enforcement agencies to use "Z Backscatter Vans" or similar technology.
4. All contracts, proposals, and communications with the manufacturers of the "Z Backscatter Vans" or similar technology.
5. All contracts, proposals, and communications with states, localities, tribes, and territories (and their subsidiaries or agencies) regarding the implementation of "Z Backscatter Vans" or similar technology.
6. All images generated by the "Z Backscatter Vans" or body scanner technology that has been used in surface transit systems.

Your request was received in this office on December 21, 2010.

Please resubmit your request containing a reasonable description of the records (contract numbers) you are seeking. Upon receipt of a perfected request, you will be advised as to the status of your request.

If we do not hear from you within 20 days from the date of this letter, we will assume you are no longer interested in this FOIA request, and the case will be administratively closed. Please be advised that this action is not a denial of your request and will not preclude you from filing other requests in the future.

Your request has been assigned reference number TSA11-0229. Please refer to this identifier in any future correspondence. You may contact this office at 866-364-2872.

Sincerely,

TSA FOIA Office  
Freedom of Information Act

[www.tsa.gov](http://www.tsa.gov)

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Chairman ISSA. Thank you. And I think you both set a record, each of you stayed under the 5 minutes.

At this time, I'm going to recognize the gentleman from Michigan for his 5-minute questions. Mr. Walberg.

Mr. WALBERG. Thank you, Mr. Chairman. I am surprised to be sitting this far down on the dais and have the opportunity to question first, that's great.

Chairman ISSA. Sir, you're No. 1 with me.

Mr. WALBERG. Thank you, thank you. That's why I like this committee. I serve on Homeland Security as well, so this, of course, is very, very interesting to me. Because not only are we responsible for making sure that our homeland is secure, but that those who are making our homeland secure are secure in the fact that we want to know, and ought to have that information. Thank you to the witnesses for being here today.

Mr. Verdi, you made several statements about the political appointee review process. You used some words like antithetical, harmful, but the word that really caught my attention was "unlawful." That you believe it is unlawful for political appointees to be involved in the FOIA review process, why?

Mr. VERDI. I believe it to be unlawful for political appointees to be involved in the political review process at DHS for this reason: The criteria under which those appointees were reviewing requests includes criteria including the identity of the requester on the subject matter of the request. And the Supreme Court, in two cases, one is National Archives versus Favish, and one is DOJ versus Reporters Committee in 1989 has held that neither the identity of the requester nor the content of the request is relevant to the agency's obligations under FOIA.

So these political criteria, the identity of the requester, whether or not the request relates to a Presidential agency or priority, the content of the request. The Supreme Court has spoken and has said that unless the request implicates documents concerning one of nine narrow exemptions, that those records must be disclosed. And that's why I believe this political review process to be unlawful. It considers factors that the U.S. Supreme Court has stated are simply irrelevant.

Mr. WALBERG. Mr. Edwards, would you concur and why?

Mr. EDWARDS. Can you repeat the question?

Mr. WALBERG. On the political review process being unlawful, I mean, we heard the words "antithetical," "harmful." It is all negative, but unlawful steps up to a higher plane.

Mr. EDWARDS. Well, unnecessarily bureaucratic hurdles have no place in the new era of open government the President has proclaimed. So we think that the significant review process just delays, and there should be no delay. The Secretary has overall authority over her personnel. So we don't think it is unlawful, yet we don't like any delays. Because when the career FOIA personnel has finished reviewing it, it should be going out the door.

Mr. WALBERG. Thank you.

Mr. Verdi, would you consider the DHS awareness process a review?

Mr. VERDI. My understanding of the, quote, unquote, awareness process as it was described today is that it continues to flag FOIA

requests for special consideration based on political factors, factors that have nothing to do with the FOIA statute or the application of exemptions. So as far as I can tell that to review the committee's report and the inspector general's report and I believe Ms. Callahan's testimony earlier today indicates that if political staff identifies issues that they want to see resolved before a FOIA request goes out that they can halt the disclosure during that 1-day review period. So that strikes me as certainly constituting a review and not simply an awareness process.

Mr. WALBERG. OK. The July 2009, directive from Mary Ellen Callahan—and I pose this to Mr. Verdi—that directive referenced in EPIC's letter to OGIS specifies that the FOIA office must provide to the front office the requester's name, city, State, affiliation and description of organization, if not widely known. Is it lawful for DHS to require this information about FOIA requesters?

Mr. VERDI. I do not believe it to be lawful. I believe under binding Supreme Court precedent that the requester's name, city, State, affiliation, a brief description of any lesser-known organization's mission is irrelevant to the disclosure. Now, whether this information is incidentally collected throughout the process, obviously, a FOIA requester must identify him or herself to the agency, right? And typically they identify their city and State so that they may receive records, but the use of this criteria for the processing, redaction, or withholding of records I think is plainly unlawful.

Mr. WALBERG. Thank you.

Chairman ISSA. I thank the gentleman.

The ranking member is recognized for 5 minutes.

Mr. CUMMINGS. Mr. Edwards, just tell me something. Can you tell us whether the—over the wires now they've got something the chairman said earlier today. He said, this whole thing reeks of a Nixonian enemies list. And I was just wondering, in your review, in fairness to everybody, did you find that to be the case? Did you find any evidence of that kind of atmosphere?

Mr. EDWARDS. No, and I would like to explain, if I could.

Mr. CUMMINGS. Yes, please.

Mr. EDWARDS. Our scope of our investigation or inspection was to look at the process. We looked at the process from the beginning to the end, and we found we had some heartburn over the significant review process. The job that you have me to do is to look to see if DHS's programs and operations add value, and that's all I did.

Mr. CUMMINGS. Well, let me ask you this. Did you find that questions concerning the identity of the requester were asked in order to impact the amount of information that would be disclosed?

Mr. EDWARDS. I only looked at the processor, and I cannot comment on that.

Mr. CUMMINGS. Well, I want to be fair to everyone. Again, on page 11 of your report, you said this: After reviewing the information and interviewing DHS FOIA experts, we determined that the significant request review process did not prohibit the eventual release of information.

Is that accurate?

Mr. EDWARDS. That's correct, sir. But if you look at the Attorney General's March 2009, memo: Unnecessary bureaucratic hurdles

have no place in the new era of open government that the President has proclaimed.

And, also, if you look at the January 2009, President's memo: In responding to requests under FOIA, executive branch agencies should act promptly in a spirit of cooperation, recognizing that such agencies are servants of the public. So we should not have any delays——

Mr. CUMMINGS. Right.

Mr. EDWARDS. But, however, when we looked at it, we did not find anything that was changed or abstracted from sending things out.

Mr. CUMMINGS. Did you find that anybody was disadvantaged, to your knowledge?

Mr. EDWARDS. Well, you are exposing the Department to go beyond this 20-day statutory timeline, and also we are exposing the Department to legal risk. I haven't done any legal analysis on that, however.

Mr. CUMMINGS. Let me tell you why I'm asking you that. In your report on page 20 you say, no FOIA officer said that requesters were disadvantaged because of their political party or particular area of interest. Is that accurate?

Mr. EDWARDS. That's accurate.

Mr. CUMMINGS. Now your report highlights several initiatives that DHS has already taken to implement the President's and Attorney General's FOIA guidance on proactive disclosure and the presumption of disclosure that are not fully discussed in your written testimony. Can you elaborate on the steps the Department has taken to improve the FOIA operations since January 2009——

Mr. EDWARDS. Yes, sir.

Mr. CUMMINGS [continuing]. As discussed in your report?

Mr. EDWARDS. Yes, sir. DHS's privacy officer/FOIA officer have taken several steps toward this proactive measure. They have bi-weekly meetings, because it is a decentralized FOIA process. The components have their own FOIA offices, and the headquarters office as well as the privacy office is serviced by the chief privacy officer. They have training. They have biweekly conference calls. They send staff to help out. So there are a number of things that the FOIA officer has taken into consideration to improve the process.

And, also, there are eight methods, posting calendars and historical information, FOIA logs. All of them are posted, and they also have the electronic reading room in place as well. So they have it done a number of things, and we credit them for that, but they need to go even further.

Mr. CUMMINGS. And, Mr. Verdi, just one question. You were saying that certain political review was inconsistent with Supreme Court decisions, is that right? Is that what you said?

Mr. VERDI. Yes, it is inconsistent with Supreme Court——

Mr. CUMMINGS. So when Mr. Fong—you were here when he testified, right?

Mr. VERDI. I was.

Mr. CUMMINGS. The general counsel. When he says it is not only legally permissible it is sound managerial practice for the Office of the Secretary to be informed of an inclination with the chief FOIA officer to play an active role in overseeing the Department's FOIA

processes, that's not inconsistent with that, that is what you're saying?

Mr. VERDI. I believe that statement is correct, but I believe that the criteria used in this circumstance are unlawful. The general statement that those individuals may play a role in such review I think is uncontroversial. The criteria, however, that it's political criteria, as opposed to statutory legal criteria based on the exemptions, that is where I differ as to this specific program.

Mr. CUMMINGS. My time has expired.

Chairman ISSA. I thank the gentleman.

We now go to the gentleman from Arizona, Mr. Gosar.

Mr. GOSAR. Thank you, Mr. Chairman.

Mr. Verdi, on a previous subcommittee we heard testimony from Mr. Earl Devaney from the RAT Board decided three agencies for most noncompliant with fraud, waste, and abuse, the second one being DHS. How does this go along with the process—

Hold on 1 second. Let's go a step further.

We actually heard Ms. Callahan talk about the Herculean efforts going to catch up on some of the bureaucracy or trying to catch up on some of these FOIA requests. And I'm having a hard time here. I'm a businessman. I'm a dentist. I actually watch government. Seven groups have to hang my television, when I am perfectly capable to do it myself. How does this process and how do these delays cause increased costs to the American taxpayer?

Mr. VERDI. Well, it's clear that these sorts of delays result in increased litigation. EPIC has been forced to litigate FOIA requests to obtain the disclosure of records that we otherwise could have obtained directly from the agency without litigation costs and through the normal FOIA process if the deadlines had been met. And the way that this impacts across the American taxpayer is that the FOIA statute contains a fee-shifting provision and a cost-shifting provision. And what that means is that when FOIA requesters are required by the agency to go to litigation to force disclosure of records, they can obtain fees from the agency.

EPIC litigates our own cases, and we have recovered fees from agencies on this basis. Those fees come directly from agency budgets; and they, at the end of the day, are funded by the taxpayer.

Mr. GOSAR. So we were building up a bureaucracy within a bureaucracy, right?

Mr. VERDI. It is. And those costs are avoidable. If agencies work with requesters to meet statutory deadlines, then there is no need for litigation and there is no need to invoke that fee-shifting provision.

Mr. GOSAR. Do you see a reason if an individual—aside privacy issues, if an individual is given a FOIA why it shouldn't just be broadcast to anybody?

Mr. VERDI. I see no reason, and I think affirmative disclosure by the agency can be a powerful tool for increasing transparency and increasing open government.

Mr. GOSAR. So once we go through one individual it could be used like in a mass media aspect where we allow the individuals all around America to pick and choose through—like technology driven.

Mr. VERDI. There are many technologies that enable one to many communications that the Department could leverage in order to better publicize the documents that are requested by individual FOIA requesters and make them more widely available.

Mr. GOSAR. So a definite streamlining process should be in order.

Mr. VERDI. I agree.

Mr. GOSAR. Mr. Edwards, these FOIAs have had a kind of a chilling effect—or these delays have had a chilling effect on the FOIA requests. I'm also from Arizona, and we've got a lot of problems with our southern border. We've got a lot of violence. How do you think this could have implicated the process particularly of FOIA in maybe getting proper information out to the proper authorities?

Mr. EDWARDS. Without getting into specific FOIA cases, my team went ahead and did a review of the FOIA process. And what we found was, even though in 2009 there was 103,000 and 2010 there was 130,000, 70 percent of that was immigration alien files. There was still a number of FOIAs that, once they are completed, they could have gotten out of the door and they still ended up in the review process. The 1, 1½ percent they are talking about, the 662 which ended up in the significant review process, that also should not have been delayed. So I cannot really speak to the specific FOIA case, but this is what was our scope, and this is what we observed.

Mr. GOSAR. Were there potential cases involving our border patrol law enforcement on our southern border that could have been implicated by a FOIA? Do you know of such?

Mr. EDWARDS. I don't know of such, sir.

Mr. GOSAR. I yield back the balance of my time.

Chairman ISSA. I thank the gentleman.

Mr. ROSS, are you prepared?

Mr. ROSS. Yes, sir.

Chairman ISSA. Then I yield you 5 minutes.

Mr. ROSS. Thank you, Mr. Chairman.

Mr. Verdi, I understand your organization's made a few requests in the past. I guess over the years you've had some adequate responses and some inadequate responses. My question to you is that, based on your experience, have you seen an improvement in the last year for your FOIA requests or has it been declining or stayed the same?

Mr. VERDI. Sadly, we have maintained a 100 percent noncompliance rate or, rather, the agency has maintained a 100 percent noncompliance rate with EPIC's requests over the past year in terms of meeting statutory deadlines. So we have neither seen an improvement nor I think degradation in the response.

Mr. ROSS. And these have been based on just grammatical errors. Have there been substantive errors? Why have the requests not been granted in a timely fashion?

Mr. VERDI. They simply have either not responded to the request, they have asserted exemptions again outside the statutory period that we then had to challenge through the administrative process. But, in any case, we did not receive documents prior to the 20-working-day deadline.

In many cases, the agency also violated the deadlines for processing administrative appeals; and in one circumstance the agency missed its deadline to answer a lawsuit in which we were trying to force disclosure of documents.

Mr. ROSS. So, in other words, there has been absolutely no change, other than maybe worse.

Mr. VERDI. I have not seen a material change, no.

Mr. ROSS. OK. Recently, there has been—since President Obama entered office, he has issued three memorandums relating to transparency and open government issues. Two of those memorandums, one regarding the Freedom of Information Act and one regarding transparency and open government, were released on the President's first full day in office. And then Attorney General Eric Holder instructed by memorandum the chief FOIA officer to support career staff by ensuring that they have the tools necessary to respond promptly and efficiently to FOIA requests.

The President has emphasized on several occasions the need and requirement that there be an efficient and immediate response and transparency to FOIA requests. In fact, in January 2009, he stated, in the face of doubt, openness prevails. The government 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 interest of government officials at the expense of those they are supposed to serve.

My question to each of you is, do you feel that the Department's front-office review process comports with the President's objectives to FOIA?

Mr. Edwards, I'll start with you.

Mr. EDWARDS. Well, as we looked through the process, particular interest came to us about the significant review process, because that had changed from the 2005 practice. So starting September 2009, there was a review on concurrence—

Mr. ROSS. Right.

Mr. EDWARDS [continuing]. Which really delayed the process. We have brought this to their attention, and we have a number of recommendations, and the Department has taken efforts to put the SharePoint site in place. It was 3-day notice, and now it has changed as of this Monday to a day. So I think the Department has made a number of changes.

Mr. ROSS. Just recently?

Mr. EDWARDS. Just recently.

Mr. ROSS. Mr. Verdi.

Mr. VERDI. I think that the basic act of flagging specific requests based on this criteria—this politically sensitive criteria is inconsistent with the President's commitment in this area.

Mr. ROSS. I yield back, Mr. Chairman.

Chairman ISSA. Would the gentleman yield?

Mr. ROSS. Yes, sir.

Chairman ISSA. Mr. Verdi, I would like you to elaborate on that. You earlier said, if I understood correctly—I will just paraphrase—that sending information to political appointees so that they are aware—let's just say a press office—sending them as they

go out or substantially as they go out would not violate FOIA so that essentially the press office could respond when the press, now having this information, asks questions. That part is just fine, right?

Mr. VERDI. Correct.

Chairman ISSA. So it's really the advanced notice and with the ability to act that really distorts the process. Whether they act to spin beforehand or they act to actually change the material release for both of you, that's where the line's crossed, isn't it?

Mr. VERDI. Yes, it is. It is the combination of delay, which is unlawful insofar as it violates the statutory deadlines, and the use of criteria that have been labeled irrelevant by courts and by lawmakers to make a determination of a FOIA request. Those are the two aspects that I believe are objectionable in this circumstance.

Chairman ISSA. I thank you gentleman.

And I guess I'm the last, so I will yield myself 5 minutes. This will be the close.

First of all, for both of you, you're really dealing with 662—to use the number that apparently is the most accurate number today. Those are the ones subject to delay or interference, not the rest of the files, as far as we know; is that right?

Mr. EDWARDS. Yes.

Chairman ISSA. As to the IG and that's—

Mr. VERDI. As far as I know based on the committee report.

Chairman ISSA. That has nothing to do with excess redacting that you may find in those process.

Mr. VERDI. They talked about redacting. In your experience, how often have you prevailed when you finally get through the process of what you originally got versus what you ultimately are entitled to after you object to the amount of redacting? What's the ratio? How often do you prevail?

Mr. VERDI. We almost universally prevail on at least some redactions.

Chairman ISSA. But there is a pervasive problem, clearly—and I think the IG would agree—that if redacting is over relative to secondary review, even when it doesn't involve the 662, that says something about getting from where prior Presidents have been to where this President rightfully said he wanted to go; is that right?

Mr. VERDI. I think that overredaction is a real problem. It is a clear problem for FOIA requesters like EPIC. I think it is an even larger problem for FOIA requesters who have less legal expertise and are less able to challenge those redactions in the administrative process and the litigation process.

Chairman ISSA. Thank you.

Mr. Edwards—by the way, thank you for your report. I realize the scope of your investigation was limited, very different than ours, but I thought it was, overall, very, very good work.

Did you look at SharePoint and how it works in your investigation?

Mr. EDWARDS. No, sir. We became aware of the SharePoint system, the new platform, and the 3 days where people can—the components can submit the responses and after 3 days they can get it out of the door. And that changed to a day this Monday. We have not had—

Chairman ISSA. Coincidence of our hearing notwithstanding.

Mr. EDWARDS. We have not had an opportunity to assess the system because our scope was to look at the——

Chairman ISSA. Do you plan on looking at that, SharePoint?

Mr. EDWARDS. If that's something the chairman wants us to do.

Chairman ISSA. I think the chairman and ranking member both would like you to look at it.

One of my companies that I was affiliated with in the past has SharePoint. So I'm aware that one of the things that it actually has the power to do—and you'll have to see whether the version you bought as it is implemented—is in fact it can partial share. It's designed so that you can look at—for example, that political review could be limited so it wouldn't see the source of who it is from, at least in the macro sense.

So I'd like you to look into it and give us a view on whether or not SharePoint could meet your high standards of eliminating this 1-day delay altogether, eliminating any chance that information, although publicly required and publicly disclosed, later when this material is put on the Web site could be not available to those doing the review.

As the ranking member said, it smacks of the Nixonian era, who are my enemies—and if your enemy is Mr. Verdi or it is the Associated Press, the question is, why does a political appointee need to do it if in fact they are just reviewing on behalf of making sure the Secretary is informed?

The question that remains, did your investigation—you're familiar with the deputy chief of staff to the Secretary having done her own reviews? In other words, doing her own searches for FOIA discovery. Are you familiar with that?

Mr. EDWARDS. No, sir.

Chairman ISSA. That would be the other one that I am interested in. We found that, in some cases, rather than FOIA professionals, political appointees did their own reports. My understanding, and I think all of us who have ever done Google search understand, that the results are only as good as the input. So if you input less than would be responsive, you get back less than what a FOIA professional would get in order to fully disclose as the President envisioned.

So although those were not the main topics today, I would appreciate it if you would look into them.

I am particularly concerned with the idea that you have all these career professionals who are very capable of doing full disclosure and making redacting decisions, and then you have some of the material eventually delivered to the press and others having been self-selected by people. And whether they are political appointees or, as I found with the Minerals Management Service, what they thought was important to Congress to know and we found out with the British Petroleum problem was much less than we should have known.

So those areas I would appreciate your looking into it as you see it fit and let us know.

I want to take this moment to thank both of you. You did a lot of good work. Your report is good work. This committee has a special place in its heart for two groups. Sunlight people, who serve

no purpose other than getting the truth out of government, which we benefit from; and the IGs, who are absolutely essential. We wouldn't even know about 90 percent of what we ultimately become interested in if not for your fine work in your field.

So I want to thank you all. This was an important hearing. It is not the last Freedom of Information hearing. It is not the last sunset—sunlight type of a hearing but was an important one.

I thank you, and we stand adjourned.

[Whereupon, at 12:20 p.m., the committee was adjourned.]

[The prepared statements of Hon. Edolphus Towns and Hon. Gerald E. Connolly follow:]

**Committee on Oversight and Government Reform  
Hearing on March 31, 2011, at 9:30 a.m.  
“Why isn’t the Department of Homeland Security meeting the  
President’s standard on FOIA?”**

**Statement of Mr. Towns**

On March 17, 2011, this Committee examined how the Freedom of Information Act was working to improve transparency of our government. I am committed to making our government accessible to the public and I recognize that the Obama Administration is also committed to that goal. The President has made it clear to government agencies processing FOIA requests, “When in doubt, openness prevails.”

Today we are examining the Department of Homeland Security’s FOIA policies. There have been complaints that some responses to significant FOIA requests were subject to prolonged delays in violation of the law. The DHS Inspector General felt that the problem was serious enough that the matter was investigated for more than a year.

Mr. Charles Edwards, the Acting Inspector General, has submitted written testimony which offers encouraging news about progress DHS has made in the last year on its FOIA procedures. Mr. Edwards states that delays in FOIA responses were caused by a policy that began in 2005, in which some requests were reviewed by the Secretary’s office before documents were disclosed. Some delays were as short as one day but others were as long as 15 days as a result of the review process.

The Acting Inspector General determined that “the significant request review process **did not prohibit** the eventual release of information.” Further, the process of significant review has been modified down to three days since 2010 and down to one day as of March 2, 2011. Hence, there is little danger of this process resulting in prolonged delays. The IG concludes on a high note, that “The Chief FOIA Officer and the FOIA staff in the Privacy Office has improved the FOIA process at DHS.”

I am pleased to see that the Department is continuing to make progress in reaching the President’s standard on open government. I look forward to the testimony of our witness and other suggestions on how we can improve this process.

Statement of Congressman Gerald E. Connolly  
Committee on Oversight and Government Reform  
March 31<sup>st</sup>, 2011

Chairman Issa, if the Committee is going to waste its time on fishing expeditions like this one then the recent renovation of this hearing room should have included construction of a firing range which would be suitable for pumpkin shooting and other political stunts.

It is extraordinary that you are holding a hearing to attack the Obama Administration's performance when, at your last hearing on FOIA and government transparency, non-partisan witnesses noted that this is the most transparent administration *ever*. In fact, the only reason this hearing might have any resonance is because the Department of Homeland Security hasn't quite yet met the exceptionally high standard of transparency that was set by President Obama. On his very first day in office, President Obama directed agencies to reverse Bush Administration policies of withholding information in favor of "presumption in favor of disclosure." According to the DHS Inspector General, the agency has complied with this objective.

The only "mistake" DHS made was to ensure that agency leadership was aware of high profile FOIA requests. As the Inspector General testimony before us notes, there was not a single case in which agency leadership attempted to block the release of any agency information. The agency leadership simply wanted to know about it.

This actually represents laudable agency coordination, and a notable deconstruction of the usual bureaucratic stovepipes. If we assume that FOIA requests can serve as a proxy for public interest in certain issues on which an agency is working, then agency knowledge about those requests means that the agency can be more responsive to the public it serves. If an agency is getting scores of FOIA requests about a high profile issue, then the agency leadership *should* be aware of them so the agency can respond to popular concerns. This is a simple democratic principle.

There is always room for improvement in agency processes, and the Inspector General makes several recommendations to expedite FOIA responses. It would be disingenuous, however, to imply that DHS can reply to each of its 103,093 FOIA requests (the number it received in FY 2009) immediately. We should work with the agency to reduce delays, but should not attack it for merely being responsive without being perfect.

It is a sad day when the Administration is attacked for setting a high standard. Of course stretch goals won't be realized immediately. The important thing is to set a noble goal and then give everything one has to reach it. This Administration is doing that, and, ironically, this fishing expedition would discourage any future Administration from engaging in a similar endeavor because Chairman Issa has chosen to attack progress on the grounds that it isn't yet perfection.