

Statement of  
Rachel Spector  
Deputy Chief Freedom of Information Act Officer  
Office of the Solicitor  
U.S. Department of the Interior  
Before the  
Committee on Oversight and Reform  
United States House of Representatives

March 13, 2019

Chairman Cummings, Ranking Member Jordan, Members of the Committee, thank you for the opportunity to appear before you today. My name is Rachel Spector and I am the Deputy Chief Freedom of Information Act Officer (DCFO) in the Office of the Solicitor at the Department of the Interior (Department). As I will explain more fully in a few moments, the DCFO is a newly created position in the Office of the Solicitor that I have held for the past two months.

I have worked in public service the majority of my life, beginning with my employment as a Legislative Assistant to Congressman David R. Obey (D-WI) for approximately eight years. I left that position to attend law school in 1989 and returned to public service in 2002, when I joined the Office of the Solicitor at the Department. During my 17-year tenure in the Solicitor's Office, I have proudly served as a career public servant to both Republican and Democratic administrations, assisting the Department to pursue its great mission in a lawful manner. I am a 2016 graduate of the Department's Senior Executive Service Candidate Development Program and was selected by the current Principal Deputy Solicitor to serve as the Acting DCFO based on my legal expertise regarding the Freedom of Information Act (FOIA) as well as my dedication to good governance, including the principles of transparency and accountability.

The FOIA has been part of my professional portfolio throughout my career in the Office of the Solicitor. For most of that time, I have worked in the Division of General Law providing legal services to the Department and its bureaus on core administrative law matters. In that capacity, I provided legal guidance and training on the FOIA to senior officials and other Department employees and represented the Department as agency counsel in FOIA litigation. Historically, my FOIA-related legal work comprised approximately 20% of my overall portfolio. That percentage changed dramatically during the course of the past two years due to the unprecedented increase in the number of FOIA requests received by the

Department's FOIA offices, many of which are broad requests that require the processing of thousands of pages of records.

The Department's FOIA offices have experienced a 30% increase overall in the volume of incoming FOIA requests since FY2016 with certain FOIA offices hit harder than others. For example, the FOIA office for the Office of the Secretary has experienced a 210% increase in incoming requests since FY2016. The increase in FOIA requests has overwhelmed the Department's FOIA offices such that they are not able to provide timely responses to many of the requests. That situation has resulted in an increase in FOIA litigation in which requesters are suing the Department not because it allegedly has withheld records that are subject to release under the FOIA, but because the requesters have not received timely responses.

The FOIA non-response litigation further hobbles the ability of the FOIA professionals to do their work in a timely and equitable manner because the litigated requests typically jump the queue ahead of the non-litigated requests. As a result, by the time I left my position in the Division of General Law to become the Acting DCFO, FOIA non-response litigation had become more than 75% of my workload as well as the workload of many of my colleagues. Indeed, the Federal courts, United States Attorney's Office, and agency counsel across the Federal government are overrun with these cases that have arisen simply because the FOIA offices do not have the capacity to process the increased level of incoming FOIA requests in a timely manner. The FOIA professionals at the Department are dedicated public servants who are committed to their work on behalf of the American people. These circumstances, however, have led to an environment in which the Department is simply unable to properly serve the FOIA requester community.

Leadership at Interior believes it is imperative to break this unproductive cycle that is frustrating FOIA requesters and FOIA professionals, and wasting taxpayer dollars on litigating and settling FOIA nonresponse cases. To that end, last November Secretary Zinke issued Secretary's Order 3371, a copy of which is included in my written materials to the Committee. The Order underscores the Department's commitment to an equitable FOIA program that ensures compliance with statutory requirements of transparency, accountability, and prompt production.

The Order designates the Solicitor as the Chief FOIA Officer of the Department, a position formerly held by the Department's Chief Information Officer. Notably,

some have misapprehended the purpose behind this change claiming that because the Solicitor is a non-career Presidentially Appointed and Senate Confirmed (PAS) employee the Department is politicizing its FOIA program. This view fails to take into account several important facts. The Solicitor is number three in the Department's leadership succession. Appointing the Solicitor as Chief FOIA Officer significantly increases the visibility and authority of the position and leverages the substantial legal expertise of the Solicitor's Office with respect to the FOIA. In addition, the provision in the FOIA requiring each agency to appoint a Chief FOIA Officer provides that the appointee must be a senior official at the Assistant Secretary or equivalent level. As Assistant Secretaries are routinely non-career PAS officials it is clear on the face of the law that Congress anticipated this, and it is, therefore, entirely appropriate to appoint a non-career PAS to the position. Indeed, this is how Executive Branch agencies work in our Constitutional framework. Political officials in agencies represent the President elected by the people and provide policy direction to career civil servants. I also believe that Interior is in good company, as it is my understanding that the Department of Defense, Department of State, and Department of Justice also have non-career PAS employees serving as their Chief FOIA Officers.

The Order also established the DCFO position as the operational position that will oversee the FOIA program and take meaningful actions to improve the quality, capacity, efficiency, and consistency of the work performed by the FOIA offices. The Department has made the DCFO a career Senior Executive Service (SES) position to ensure that the DCFO will have the necessary visibility and authority within the Department to accomplish the mission of modernizing the Department's FOIA program. In my capacity as Acting DCFO, I am initiating a broad effort to improve the organization and governance of the Department's FOIA program that includes:

- Conducting a baseline assessment of budget, staffing, workload, and processes and technology utilized by the FOIA office;
- Analyzing the baseline data to identify needed improvements and organizational changes;
- Issuing Department-wide standard operating procedures and other needed governing policies;
- Establishing uniform position descriptions and performance standards for FOIA Officers and FOIA professionals and setting appropriate pay grades;
- Establishing hiring requirements for the bureaus to ensure adequate staffing levels and top quality hires;

- Creating a reporting structure between the Departmental FOIA Office and the bureau FOIA offices to ensure that there is adequate oversight and accountability over FOIA programs;
- Creating a robust training program for FOIA officers and FOIA professionals ; and,
- Obtaining and deploying modern and reliable technology for FOIA request tracking and case management, as well as tools for search and collection and document review.

I am proud to lead this important initiative to improve the Department's ability to meet its obligations under the FOIA. I also appreciate the consistent bi-partisan interest of Congress in the FOIA and welcome any insights Members of the Committee may have to assist the Department in meeting this important goal.

Before I conclude my remarks, I would like to address an issue in which the Committee has expressed a particular interest—namely the recent changes Interior has proposed to its FOIA regulations. The Department is carefully considering the more than 65,000 comments it received in response to the Notice of Proposed Rulemaking and my discussion of the proposed rule is not a waiver of the Department's deliberative process privilege as to our consideration of those comments and likely formulation of the final rule. With that caveat, I want to explain the purpose and address the content of the proposed rule.

Although the Department is dedicating increased resources to improving its FOIA program in the ways I have described, it must also take steps to make its FOIA processing procedures more efficient and focused on meeting its statutory obligations. The proposed amendments to the FOIA regulations are a relatively small, but important step in that effort.

Unfortunately, misleading claims have been made about the proposed rule. Some of these claims inaccurately describe the proposed changes. Others exaggerate the negative impact the changes would have on the FOIA requester community and ascribe the worst possible motivations to the Department. The press accounts I have seen also overlook aspects of the proposed changes that clearly benefit the FOIA requester community. That is unfortunate because these types of claims distort the important dialogue that needs to occur between the Department and the FOIA requester community to inform the agency's final rulemaking.

I would like to set the record straight on what the proposed changes to the regulations actually do and do not do. Despite claims to the contrary, the proposed

amendments do not attempt to change the Department's statutory obligations under the FOIA. For example, there have been reports that the Department is proposing to limit the number of FOIA requests a requester may submit in a given month. This is a misunderstanding of what the Department has proposed. The purpose of the proposed changes is to apply monthly per page *processing* limits to requests involving a large number of responsive records to allow processing of other requests. The purpose of this approach is to achieve greater equity among FOIA requesters by preventing a small number of requesters from consuming all of the processing time of the FOIA offices and ensuring that the FOIA office can provide at least some records to the greatest number of FOIA requesters possible each month.

Likewise, the proposed language change referencing "vast quantities of material" was not an attempt to create a new standard under the FOIA. Rather, that language codifies Federal case law where the courts have recognized that "requests may be so broad as to impose an unreasonable burden on the agency" and "require the agency to locate, review redact and arrange for inspection a vast quantity of material."<sup>1</sup> The body of case law that flows from this 1990 D.C. Circuit opinion serves to define the term "vast quantity." It is not the Department's intent to apply the provision in a manner that is inconsistent with that body of case law. The purpose of placing this language in the regulations is to provide notice to requesters that the Department intends to avail itself of this existing court-established standard, when it is appropriate to do so.

I am also aware of reports that the Department is proposing to change the way FOIA requests may be submitted to the FOIA offices in an effort to restrict the ability of requesters to submit requests. This claim is false. The proposed change will enable the Department to replace its homegrown automated FOIA request tracking system with a well-designed portal. We expect this technological upgrade will minimize errors made by FOIA processors and reduce the amount of time FOIA office staff spends on data entry, thereby freeing them up for the substantive activities of FOIA request processing. While there may be some minor inconvenience to requesters who are currently emailing in their requests, the benefits to them should be significant.

---

<sup>1</sup>*America Federation of Government Employee v. Department of Commerce*, 907 F.2d 203, 209 (D.C.Cir. 1990); *Armstrong v. Bush* 139 F.R.D. 547, 553 (D.D.C. 1991).

The Department is also proposing to change when the FOIA offices must consult with the Office of the Solicitor regarding outgoing FOIA releases. The proposed change provides for greater consultation on some matters such as grants of expedited processing, while providing for less consultation with respect to other matters such as the routine use of certain exemptions—for example redacting social security numbers pursuant to Exemption 6. This will help FOIA professionals and the Department’s attorneys use their time more efficiently, which is a net gain to the FOIA requester community as well as the Department.

In sum, the Department’s FOIA process is experiencing significant challenges, and the challenges are impairing our ability to be as transparent as we want to be. The Department is trying to break the unproductive cycle in ways that will result in increased transparency. The goal of the Department is to streamline FOIA processing to increase the efficiency and capacity of its FOIA program thereby limiting delays in FOIA processing.

With that, I conclude my remarks. Thank you again for the opportunity to appear before you today. I am happy to answer any questions you may have.