



OFFICE OF
INSPECTOR GENERAL
U.S. DEPARTMENT OF THE INTERIOR

Lack of Tracking and Unclear Guidance Identified in the U.S. Department of the Interior's Awareness Review Process for Freedom of Information Act Requests



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Memorandum

To: Robert Anderson
Solicitor

From: Kathleen R. Sedney *Kathleen Sedney*
Assistant Inspector General for Audits, Inspections, and Evaluations

Subject: Final Evaluation Report – *Lack of Tracking and Unclear Guidance Identified in the U.S. Department of the Interior’s Awareness Review Process for Freedom of Information Act Requests*
Report No. 2019-ER-057

This report presents the results of our evaluation of possible impacts the U.S. Department of the Interior’s (DOI’s) awareness review process may have had on processing Freedom of Information Act (FOIA) requests. Although the DOI has discontinued the process and rescinded the policy governing it, we are sharing our findings and suggesting possible considerations if the DOI establishes a similar process in the future.

Because we are not offering recommendations, we do not require a response to this report. We will notify Congress about our findings, and we will summarize this work in our next *Semiannual Report to Congress*, as required by law. We will also post a public version of this report on our website.

If you have any questions, please contact me at 202-208-5745.

Attachment

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Results in Brief

What We Evaluated

The Freedom of Information Act (FOIA) gives the public the right to access records (with certain exceptions) from any Federal agency in the executive branch.¹ At the U.S. Department of the Interior (DOI), FOIA requests are processed through FOIA offices in the DOI's bureaus and offices. When responding to FOIA requests, the DOI follows processes established in a number of policies and secretarial orders. We evaluated the impact one of these policies, which governed a review process known as awareness reviews, had on the DOI's processing of FOIA requests.

The DOI required awareness reviews—additional reviews of certain FOIA records—between May 2018 and January 2021.² If FOIA records contained the names or email addresses of certain political appointees, FOIA professionals³ would forward these records to designated senior DOI employees for an awareness review before releasing the records to the FOIA requester. Awareness reviews were intended to inform decision makers about records that were about to be released to the public. We sought to review a sample of awareness reviews to determine the impact on FOIA requests subject to this process, including (1) processing times, (2) whether records that were to be produced were changed as a result of the review, and (3) whether awareness reviewers were involved in any such changes and whether attorneys from the DOI's Office of the Solicitor were consulted on the changes. Although the awareness policy itself did not draw significant distinctions between different types of FOIA requests and contexts, we note that the awareness process was applied to responses to FOIA requests made to the DOI as well as in FOIA matters that had moved into the litigation phase.⁴

Our ability to select a sample to review was hampered by the absence of any central tracking system. We were accordingly unable to identify how many such reviews occurred and were not able to self-select a representative sample from any overall group of FOIA requests subject to the review process. Instead, to meet some of our objectives, we reviewed 15 requests that had undergone awareness reviews that were provided to us by Congress, non-Government organizations, and FOIA professionals as examples of challenging requests.

We provided the DOI an opportunity to review and comment on our draft report. Based on its response, we updated our report as appropriate. The full response is included as Appendix 3, and our comments on the response are included as Appendix 4.

¹ 5 U.S.C. § 552.

² For purposes of the additional review, the phrase “political appointees” refers to employees who are presidentially appointed and Senate confirmed, noncareer senior executives, or Schedule C employees (employees who are excepted from competitive Federal service because they determine policy or serve in a confidential relationship to a key official), and to former employees in these categories who left the DOI within 3 months of the FOIA request.

³ We use the phrase “FOIA professionals” to differentiate FOIA processors, supervisors, and other staff with FOIA responsibilities from other employees who occasionally interacted with FOIA offices and staff.

⁴ For ease of reference, we describe all such reviews as “awareness reviews.”

What We Found

We could not determine awareness reviews' impact on overall FOIA processing times because the DOI did not centrally track FOIA requests during the awareness reviews. Our review of the 15 FOIA requests determined that the DOI's awareness policy lacked clarity and that, in several cases, the reviews contributed to delays in or changes to the records that were ultimately released as well as confusion on the part of some FOIA professionals.

During our evaluation, we learned that FOIA officials had rescinded the awareness policy and discontinued awareness reviews. If the DOI considers implementing a similar policy in the future, our report offers suggestions to help ensure that requests undergoing similar reviews meet the statutory goals of processing FOIA requests transparently and promptly.

Introduction

Objective

The objective of our evaluation was to determine the impact that awareness reviews—an additional level of review that, until January 2021, the U.S. Department of the Interior (DOI) completed for certain Freedom of Information Act (FOIA) requests—had on processing FOIA requests at the DOI. See Appendix 1 for the evaluation’s scope and methodology.

Background

The Freedom of Information Act and the FOIA Improvement Act

Since 1967, FOIA has given the public the right to access Federal agencies’ records. Agencies are required to respond to FOIA requests by disclosing the requested records unless the records, or any portions of the records, are protected from public disclosure by one of nine exemptions. These exemptions include, for example, documents containing classified national security information, internal policy documents, and documents related to deliberative or policy-making processes. The exemptions were established to allow agencies to withhold information that could harm national security, personal privacy, law enforcement proceedings, or other matters.

After receiving a request for records under FOIA, a Federal agency is generally allowed up to 20 days to collect and review records that may respond to the request⁵ and to determine whether it can release them. Under FOIA, the agency can establish its own policies for processing requests, and agencies frequently use “multitrack processing” to distinguish simple requests from more complex ones on the basis of estimated number of workdays needed to process the request. Within each track, requests are usually processed on a first-in, first-out basis, and many agencies have a backlog of pending requests.

The FOIA Improvement Act of 2016 contained several substantive and procedural changes to FOIA.⁶ One change was to codify the U.S. Department of Justice’s foreseeable harm standard, which provides that agencies may withhold information only if they reasonably foresee that disclosing it would harm an interest protected by an exemption or if the disclosure is prohibited by law.

DOI internal guidance incorporates these standards and provides that a responsive record, or a portion of such a record, can be withheld only if a FOIA exemption applies and the employee processing the record request decides that foreseeable harm would result from the record’s release.⁷ Pursuant to the policy, if a FOIA employee decides to withhold a record or part of one, the employee “must consult with” the DOI’s Office of the Solicitor (SOL), with limited exceptions. “[S]eeking additional information from a [subject matter expert] (. . . for relevant

⁵ Such documents are commonly described as “responsive records.”

⁶ These statutory revisions are also codified at 5 U.S.C. § 552.

⁷ DOI memorandum titled *Foreseeable Harm Standard*, dated December 29, 2017.

facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.”

The FOIA Process at the DOI

In 2018, a secretarial order designated the DOI’s solicitor as the DOI’s chief FOIA officer.⁸ The order also created the role of a deputy chief FOIA officer, who reports to the chief FOIA officer and oversees the DOI’s FOIA program. According to the order, this deputy can also assume control over any aspect of any FOIA request in the DOI.⁹

In addition, the DOI’s bureaus maintain their own FOIA offices, and the FOIA requests for various offices and divisions in the Office of the Secretary of the Interior (OS) are managed by the OS FOIA office. Each of these FOIA offices is led by a FOIA officer who reports to both the deputy chief FOIA officer and the head of the bureau or office. The FOIA officers oversee the functions of their offices, including the work of FOIA professionals who review FOIA requests and release records that respond to those requests.

According to the DOI’s FOIA handbook, when a DOI bureau or office receives a FOIA request, the FOIA professionals in that office determine, for example, whether the request was sent to the correct bureau and whether it reasonably describes the records being sought. The request is then processed: FOIA professionals search for responsive records, decide whether to withhold any records under the FOIA exemptions, make any necessary redactions to the records they plan to release, and collaborate with the SOL, if needed, to ensure that the redactions are appropriate and legal. The final package is then released to the requester.

The DOI’s FOIA Awareness Review Process and Policy

In certain circumstances, responsive FOIA records underwent another level of review, known as awareness reviews, before they could be released. Awareness reviews were used if responsive FOIA records included emails, email attachments, or calendar entries containing the names or email addresses of certain political appointees. When responsive records produced as a result of a request to the agency or in matters related to litigation were subject to awareness reviews, the FOIA professional processing the FOIA request would give the full set of redacted records to both the assigned SOL attorney and to a designated awareness reviewer.¹⁰

From May 2018 until January 2021, the DOI’s awareness review process and awareness reviewers’ responsibilities were defined by a policy that replaced a number of informal practices

⁸ Secretarial Order No. 3371, dated November 20, 2018.

⁹ The order acknowledged that it did not apply to the Office of Inspector General. Requests to our FOIA office are managed separately from requests to the other DOI offices.

¹⁰ Reviews were conducted by designated senior DOI career and politically appointed employees. To provide additional information on this topic, we have identified the status of the awareness reviewers in the case studies that follow based on our review of 15 FOIA requests that had undergone awareness reviews.

during previous administrations.¹¹ According to the awareness policy, FOIA requests and litigations at the DOI had increased substantially in recent years, and awareness reviews were intended to ensure consistency and effectiveness in the DOI's practice of notifying DOI leadership (and the SOL, if needed) of "impending FOIA responses." SOL and FOIA officials explained to us that the policy, like the informal practices that predated it, were also intended to better coordinate the DOI's FOIA program with SOL programs and to ensure that senior DOI leadership was aware of any controversial or sensitive material released through FOIA.¹² Further, the DOI had an interest in aligning FOIA responses across DOI offices and bureaus with responses to congressional requests.

The DOI revised its awareness policy in February 2019. Among other changes, the revisions were intended to clarify the roles and processes of awareness reviewers. The revisions also extended the awareness review period from 72 hours (3 calendar days) to 3 workdays. The policy was also modified to state explicitly that "the reviewer and/or SOL attorney may follow up as necessary to understand the basis of the proposed [FOIA] production." Both versions of the awareness policy allowed reviewers to request a "reasonable amount of additional time" to complete a review, if needed.

Neither version of the awareness policy included detailed guidance on employee roles and responsibilities; instead, both referred to the *Departmental Manual* for this guidance. The *Departmental Manual*, however, did not at any time specifically address the awareness process. We discuss these issues in detail in our "Findings" section.

¹¹ DOI memorandum titled *Awareness Process for Freedom of Information Act Productions*, dated May 24, 2018, and updated February 28, 2019. As stated in the memorandum, the awareness process, in its entirety, did not apply to the Office of Inspector General's FOIA personnel or processes.

¹² Such reviews are not unique to the DOI's FOIA program. We learned during our evaluation that other Federal agencies, including the Consumer Financial Protection Bureau (CFPB) and the U.S. Department of Homeland Security (DHS), perform similar reviews for records involving high-visibility or sensitive subjects. One CFPB official said the CFPB has conducted awareness reviews for at least the last 5 years. The DHS began these types of reviews at least as early as 2009, and its most recent policy is from 2018.

Findings

We found the DOI did not centrally track FOIA records as they went through the awareness review process. We also found that unclear language in the awareness policy contributed to delays in reviews or changes to several of the 15 FOIA requests we reviewed as well as to confusion on the part of some FOIA professionals.

Because the DOI did not track records that went through awareness reviews, it could not provide data on the FOIA requests that underwent the reviews. Therefore, we could not determine the overall impact of awareness reviews on the processing times of FOIA productions,¹³ nor could we select a representative sample of requests for this evaluation. Instead, we reviewed 15 requests that FOIA professionals, Congress, and non-Government organizations had identified as examples of challenging requests involving awareness reviews. These case studies are not representative of all awareness reviews or FOIA requests.

Although the DOI has rescinded the awareness policy and discontinued awareness reviews, we are sharing our findings and suggesting a number of actions in case the DOI considers implementing similar reviews in the future.

FOIA Offices Did Not Consistently or Centrally Track FOIA Requests During Awareness Reviews

As awareness reviews evolved from an informal practice to a formal process, the DOI did not implement any central tracking system. The DOI's electronic FOIA tracking system was primarily developed to track information required for external reporting and was never used to incorporate information pertaining to internal awareness reviews. The FOIA offices that we examined in our evaluation either used decentralized and inconsistent methods to track awareness reviews or did not track them at all. One FOIA office piloted a more robust tracking system that included the awareness reviews, but a FOIA official told us that staff rejected the system as too burdensome, and it was never formally implemented.

The awareness policy did not explicitly require awareness reviews to be tracked, and a FOIA program official told us that there was no expectation that the bureaus would do so.

Tracking activities throughout a process is, however, one aspect of an effective internal control system and, in this situation, could have provided additional accountability and compliance with the policy's 3-day period to complete awareness reviews. In addition, the Federal Managers' Financial Integrity Act of 1982, as defined by the U.S. Government Accountability Office in the *Standards for Internal Control in the Federal Government*, requires all agencies to implement

¹³ The FOIA officers in 8 of the 12 DOI FOIA offices in our review said that the process had no impact on their offices, while 4 of the 12 expressed the opinion that the awareness review process impacted their offices' productivity and timeliness. Because awareness reviews lacked centralized tracking, the officers were unable to provide data to quantify the overall impact. Moreover, requests that underwent awareness reviews were not evenly distributed among FOIA offices, and we noted that the FOIA offices that processed more FOIA requests or that self-identified as having a high number of requests undergo awareness reviews tended to report an impact to processing.

and operate effective internal control systems and to monitor and evaluate how well those systems work.

Without tracking records as they went through awareness reviews, the DOI could not:

1. Confirm that awareness reviews were initiated and completed when required
2. Account for the status of records as they moved through the awareness review process
3. Monitor and evaluate the effectiveness of the review process itself
4. Determine any impact these reviews may have had on the FOIA program's primary objective of processing FOIA requests in compliance with the statutory requirements of transparency, accountability, and promptness

Unclear Language in the Awareness Policy Led to Inefficient, Inconsistent FOIA Processing

We found the awareness review policy was vague and unclear, particularly with regard to the roles of reviewers and expectations about how they would proceed. For example, the policy stated that an awareness reviewer could “follow up as necessary to understand the basis of the proposed [FOIA] production,” but neither version of the policy specified what actions a FOIA professional or reviewer was authorized to take when comments, questions, or suggestions arose about records intended for release. In addition, a reviewer could request a “reasonable amount of additional time” to complete a review, but the policy provided no guidance regarding how to make this assessment or what steps to take if an extension was provided. Moreover, neither version provided guidance on how to mediate disagreements between FOIA professionals and reviewers about such records.

This lack of clear guidance led in some cases to longer processing times. Disagreements between FOIA professionals and reviewers during some awareness reviews led to redactions of responsive records or to records being reevaluated for responsiveness and removed, which extended processing times. Additionally, confusion on the part of some FOIA professionals about whether the policy required reviewers to approve the release of records also led to delays. We provide case studies that illustrate some of these concerns below.¹⁴

Extensions to Time for Processing FOIA Requests

In several of the cases reviewed, we found that awareness reviews extended processing times for FOIA requests. Both versions of the awareness policy allowed reviewers to request a “reasonable amount of additional time” beyond the 3 workdays (and previously the 72 hours) the policy allotted to review responsive records, but neither explicitly defined “reasonable” or explained what factors should go into this determination.

¹⁴ Nine of the 15 requests we reviewed are described in these case studies; some case studies illustrate more than one aspect of the policy's lack of clarity. Appendix 2 provides brief summaries of the remaining requests, in which the lack of clarity did not appear to have substantially affected FOIA processing.

We provide three examples in which the reviews extended well beyond the 3 days provided in the policy.

Records Released After 141 Days in Awareness Review

This awareness review, initiated in November 2018, lasted 141 days altogether, exceeding by 138 days the 72-hour deadline in place when the review began. The review did not result in corrections to the FOIA records, and no reason for the lengthy delay was documented.

On November 13, 2018, the National Park Service (NPS) received a request for NPS records. Two weeks later, on November 29, 2018, the NPS FOIA office coordinated an awareness review with three political appointees and one senior career employee.

After receiving the records on November 29, the career reviewer asked the NPS FOIA office whether one of the records was a deliberative document¹⁵ such that it was exempted from FOIA release. The next day, an NPS FOIA professional asked the career reviewer to prepare an explanation of the foreseeable harm of releasing the record and informed the reviewer that the record would be released if no harm could be identified. At the reviewer's direction, however, the office did not produce the responsive records to the requester pending resolution of the issue.

NPS FOIA professionals contacted all of the awareness reviewers as well as FOIA and SOL officials about the foreseeable harm analysis, but the career reviewer never provided one. The reviewer did not authorize the release until May 24, 2019—138 days after the 72-hour time limit ended.

According to the career reviewer, a response was delayed because the reviewer had seen inconsistencies in how the NPS and the U.S. Fish and Wildlife Service (FWS) handled releases of certain types of documents (e.g., secretarial briefing papers) and was seeking clarification of the policy. The career reviewer approved the release after discussing the issue with an OS official—a political appointee—who was “more familiar with the new FOIA awareness [review] process” than the reviewer was.

The career reviewer also contacted the deputy chief FOIA officer, who at the time was newly established in that role, for guidance. The deputy chief FOIA officer acknowledged to us that the career reviewer had never received guidance and that this release “fell through the cracks.” The deputy chief FOIA officer also noted that no formal process had ever been in place for coordinating FOIA requests involving multiple DOI bureaus or offices.

Senior Advisor Conducting Awareness Reviews Issued Instruction That Affected the Timing of Release of Specific Records

¹⁵ “Deliberative” refers to the most commonly invoked privilege incorporated within FOIA Exemption 5, the deliberative process privilege, which is designed to protect the decision-making processes of government agencies.

This 2019 release of records was one of a series of monthly FOIA releases required under litigation. The senior advisor, who was also an awareness reviewer, in this instance was a political appointee—namely, the counselor to the Secretary of the Interior.

On February 5, 2019, the day after Deputy Secretary of the Interior David Bernhardt was nominated as Secretary, the senior advisor who was serving as an awareness reviewer directed SOL staff not to include responsive records mentioning Bernhardt in this release. As a result, 253 pages of records were removed from the 1,481-page package of records (the remaining 1,228 pages were released). Most of the 253 pages were ultimately released in December 2019, approximately 8 months after Bernhardt was confirmed in April 2019.¹⁶

Review of Records During the Awareness Process Exceeded 40 days Due to Questions

This 2019 FOIA request for communications between then Secretary Bernhardt and a Bureau of Reclamation official took 47 days from the initial awareness review to the final release. During that time, the awareness reviewers questioned the completeness of the proposed release and the responsiveness of the records provided.¹⁷

On March 28, 2019, the FOIA professional and the assigned SOL attorney sent the responsive records for an awareness review, requesting a response by April 2, 2019. On April 2, the awareness reviewer, a political appointee in the OS, raised concerns in an email that some of the records were deliberative and thus exempt from release. The reviewer's email copied another SOL attorney, who suggested redacting the Secretary's email address and later asked to extend the awareness review period because he was not certain whether some of the records were responsive.

At the end of the extension, the second attorney raised further concerns because some email attachments had not been included in the original records. After the FOIA professional sent the attachments for review, the records were sent back through awareness review. They were released on May 15, 2019, with the redaction described above, 47 days after entering the awareness review process.

Awareness Reviews Led to Changes to Records That FOIA Staff Had Determined To Be Responsive

As noted previously, the awareness policy did not provide guidance to FOIA offices regarding how to handle questions, concerns, or requests for additional information from awareness reviewers. This created challenges, particularly when reviewers and FOIA professionals disagreed about whether to release records. We provide examples in which the awareness review led to changes to records that FOIA professionals had identified as responsive.

¹⁶ We referred our findings for this case study to our Office of Investigations to determine whether the instruction to remove records involving the Secretary conflicted with the requirements ordered under the litigation. The investigation concluded that the court would be the proper venue to decide whether the DOI had met its obligations under the court order. [A report on this investigation](#) is available on our website.

¹⁷ Ultimately, the only change to the initial set of records was to redact the Secretary's email address.

Political Appointee Changed Search Method for Records

During the awareness review for this 2018 release of email records, a political appointee directed FOIA professionals to run a second search for responsive emails; this search required a different search tool, which reduced the number of responsive records from the 96 pages found in the original search to 16.

This FOIA request was for copies of emails between an NPS congressional liaison and the wife of then Secretary of the Interior Ryan Zinke, in which the Secretary's wife asked the NPS congressional liaison to coordinate a national park tour for an official from another Federal agency and the official's family. Using its standard email search tool for FOIA records, the NPS identified 96 pages of responsive documents. An SOL attorney then reviewed and approved redactions in the records.

The NPS' FOIA office coordinated an awareness review by two political appointees, but another political appointee, the DOI press secretary—who was not one of the designated awareness reviewers—informed the FOIA office by email that “[a] number of pages in this are non-responsive” because some emails were between the congressional liaison and the Federal official's spouse rather than the Secretary's wife. A FOIA professional explained to the press secretary that these conversations were included because they were part of the larger email thread between the Secretary's wife and the congressional liaison. According to emails, a FOIA supervisor confirmed with the SOL that the records were responsive.

The press secretary asked to discuss the matter. A fourth political appointee was included in this discussion and was then designated as the awareness reviewer for the records. Soon afterward, this political appointee communicated with the NPS FOIA office about removing the same “non-responsive material.” Because using the standard search tool for a second search would have yielded the same records, the FOIA office ordered a new search using a different tool, which at the time required approval from a senior FOIA official.

The new search collected 16 pages of original messages between the Secretary's wife and the Federal official's spouse. The search excluded some repetitive content that had been in the original 96-page record, but it also left out content that the FOIA professional and others determined to be responsive: namely, 18 email exchanges between the NPS congressional liaison and the Federal official's spouse that had originated with conversations between the spouse and the Secretary's wife. The political appointee approved the release of the 16-page record.¹⁸

Three Pages of Records Redacted Under FOIA Exemption Without Documented Analysis of Foreseeable Harm

This FOIA request concerned a 2018 request to the OS FOIA office for records involving nonpublic U.S. Geological Survey (USGS) information. As a result of the awareness review, three pages in the responsive records were redacted under the FOIA exemption for deliberative

¹⁸ When we interviewed this political appointee, he stated to us that he had not asked for the changes but also explained that this situation had occurred during his first week on the job.

or policy-making documents. However, no one documented the analysis required by the DOI's 2017 policy to determine the foreseeable harm of releasing the three pages.

On August 7, 2018, the date these records were scheduled to be released, an awareness reviewer instructed the FOIA office to postpone the release until he could discuss the request with the office. However, we found no record of such a conversation taking place, no written explanation for why the three pages were redacted as deliberative, and no foreseeable harm analysis.

When we interviewed the OS FOIA officer and the awareness reviewer, both said they could not recall the details of this case and therefore could not explain what the foreseeable harm in releasing the three pages would have been. The deputy chief FOIA officer told us she was working on procedures that would ensure proper documentation of foreseeable harm analyses.

Four Pages of Records Removed but Later Released

As a result of an awareness review, four pages were removed from records responding to another 2018 USGS FOIA request. These records were later released to the requester pursuant to a separate request, as no exemptions applied and no foreseeable harm was identified.

On March 16, 2018, a requester asked for all correspondence sent to and from certain USGS and DOI officials within a specific date range. On April 26, 2018, with the requester's consent, the request was amended to exclude email cc's, bcc's, and attachments, but to include all communications about the resignation of one USGS official and the retirement of another.

On February 1, 2019, the USGS FOIA office coordinated an awareness review of the responsive records. The awareness reviewer (who was a political appointee) and the USGS FOIA officer discussed the records on February 6, 2019, and they agreed that the 92-page package of records contained some records that did not directly respond to the amended request. In an email to the political appointee, however, the FOIA officer noted that the package did contain "records responsive to the original request," and told him, "We believe the records peripherally respond to the general nature of the amended request." The FOIA officer also told the political appointee that he believed the records were likely to become the subject of future requests and that he was therefore inclined to release them proactively in what he described as the "spirit" of the FOIA Improvement Act.

The FOIA officer told us he contacted the departmental FOIA officer to mediate this discussion, and he was instructed to prepare a "scope analysis"—an explanation of how each page in the package was responsive. The FOIA officer said he ultimately found he could not make the argument that four of the pages in the package were responsive, and he agreed to have those pages removed from the release.

In our interview with the awareness reviewer, he said he did not recall this specific FOIA request. He stated that his role as an awareness reviewer was to raise questions, but, he said, decisions and final determinations would still be made by the FOIA officer. He also explained that as an awareness reviewer he would not have been asked to prepare a foreseeable harm analysis.

Confusion About Approval Requirements

In several of the cases we reviewed in which the first version of the awareness policy was in place, we observed a misconception among FOIA professionals that they needed approval from an awareness reviewer before they could release responsive records. We could not determine whether this misconception was a result of unclear directions, a lack of formal training, or a continuation of informal practices that were in place before the policy. Regardless of the cause, waiting for approval delayed processing and contradicted the awareness policy, which stated that if a reviewer did not respond within the time the policy permitted, their silence would “be taken as an affirmation that [the reviewer] has concluded [the] review.”

Release of Records Delayed by 8 Days

This FOIA request involved internal communications regarding oil and gas sales in 2017. One release, a production for active litigation, was delayed by 8 days while the FOIA professional awaited an affirmative response from the awareness reviewer, a senior political appointee.

Release of Records Delayed by 20 Days

The FOIA professional handling this litigation-related request stated in an email to the deputy chief of staff that he understood that she had to clear this release because it was related to the Secretary of the Interior, even though the awareness policy stated that silence from awareness reviewers was considered affirmation that the records could be released. Because of the FOIA professional’s confusion, this release was delayed by 20 days.

FOIA Professional Requested Approval Before Releasing Records

We identified a case in which a FOIA professional incorrectly believed approval from the awareness reviewer was needed before responsive records could be issued. Two sets of records, totaling over 3,200 pages, were prepared for awareness review. Before each set of records was released, the FOIA professional emailed the deputy chief of staff, who was one of the awareness reviewers, to request an “affirmative response” that he could release the records.

In one email, the FOIA professional wrote that the OS FOIA officer had informed FOIA professionals of “a supplemental awareness policy” for any materials involving the Secretary of the Interior or the Secretary’s chief of staff and told them that “affirmative response [was] required” before they could release such records. The deputy chief of staff replied, “[T]hese can go,” but did not confirm or contradict the statement about requiring approval. To our knowledge, no such formal supplemental awareness policy existed.

Conclusion

As stated in the awareness policy, the intended purpose of awareness reviews was to make DOI leadership and the SOL “aware of impending FOIA responses on a case-by-case basis” and to enable them to “efficiently respond to queries and legal ramifications arising from FOIA responses.” We found that the DOI did not track FOIA requests that underwent awareness reviews, so it could not monitor the awareness review process or determine whether it affected the FOIA program’s timeliness, transparency, and accountability. We also found that the awareness policy contained unclear language, which led to review-related delays and disagreements about records and to confusion about the policy’s requirements, representing a departure from the policy’s intent. We also noted that, as to some of the case studies that we addressed, FOIA professionals expressed the belief to us that actions taken pursuant to the awareness policy were prompted by political considerations. The policy’s lack of clarity and the lack of guidance on how it should be applied may well have contributed to this perception.

If the DOI contemplates establishing a similar review process in the future, it should consider incorporating the following suggestions:

- Track the reviews, including timeliness, identity of reviewers, and changes made to responsive records, in a centralized system
- Draft a policy that clearly states:
 - Whether, and how much, additional time is permitted to complete an awareness review (consider instituting a maximum time allowed or a formal request process that documents justifications for additional review time)
 - Expectations for responding to reviewers’ comments or questions and whether such discussions should be allowed to affect the redaction or removal of records (require documented justification of those modifications)
 - A formal process for coordinating FOIA requests that involve multiple DOI bureaus, offices, and components
- Establish a point of contact to manage and coordinate awareness reviews and to resolve any questions, comments, or issues that arise during reviews to ensure timely responses
- Train FOIA professionals and awareness reviewers on the policy

Appendix 1: Scope and Methodology

Scope

We evaluated the U.S. Department of the Interior's (DOI's) awareness review process from December 1, 2017, to July 31, 2019, which allowed us to consider cases both before and after the official implementation of the awareness policy.

Our objective was to determine what impact awareness reviews had on processing Freedom of Information Act (FOIA) requests. We undertook this evaluation in response to requests from Congress and non-Government organizations and sought to determine whether:

- DOI political appointees and noncareer staff improperly influenced the process, resulting in unwarranted delays or withholding of information that career FOIA professionals would have otherwise routinely released to the public
- The awareness review process resulted in document redactions or removals that were inappropriate or did not meet criteria for FOIA exemptions
- The awareness review process improved or inhibited the DOI's ability to meet deadlines for records released under FOIA as well as deadlines resulting from litigation related to FOIA

Methodology

We conducted our evaluation in accordance with the *Quality Standards for Inspection and Evaluation* as put forth by the Council of the Inspectors General on Integrity and Efficiency. We believe that the work performed provides a reasonable basis for our conclusions and recommendations. To meet our objective, we:

- Reviewed laws, regulations, policies, and procedures related to FOIA
- Reviewed policies and procedures related to the DOI's awareness review process
- Interviewed an official at the National Archives' Office of Government Information Services (OGIS) to learn how other agencies handle political awareness practices
- Coordinated with the OGIS and interviewed:
 - FOIA officials from the Consumer Financial Protection Bureau and the U.S. Department of Homeland Security to learn about their awareness review policies and practices

- A FOIA official from the U.S. Citizenship and Immigration Service’s National Records Center to learn about best practices for tracking data and measuring FOIA program performance
- Interviewed Departmental FOIA Office staff to:
 - Understand the awareness review process’ policy and practices
 - Obtain for sample selection any existing data reflecting the processing time for all FOIA requests subject to awareness reviews during the project’s scope period
 - Obtain documented analyses and metrics developed to assess the effectiveness of awareness reviews
- Interviewed the FOIA officers from the DOI’s bureaus and offices to understand the awareness review process’ implementation and to obtain any existing data for tracking the awareness reviews; in the absence of data, FOIA officers provided examples of FOIA requests that underwent awareness reviews
- Interviewed Office of the Secretary FOIA professionals who handled FOIA productions during our review period to learn about implementing awareness reviews and any practices in place before the official awareness policy
- Reviewed 15 FOIA requests—identified by FOIA professionals, Congress, and non-Government organizations as examples of challenging requests that involved awareness reviews—and developed a case study and a timeline for each; as described in the report, we used this approach because the DOI did not track awareness reviews, so our review results do not represent the entire universe of awareness reviews during the period we reviewed
- Reviewed and analyzed records provided by the FOIA professionals for our case studies to determine the duration of the awareness review, whether changes were made to records, and if so, whether an awareness reviewer was involved and an Office of the Solicitor (SOL) attorney consulted on the decision
- Reviewed the identified FOIA requests, including copies of the FOIA requests and productions for each of the four stages of FOIA processing (clean, unredacted copy of responsive documents; documents sent for awareness reviews with proposed FOIA redactions; any changes resulting from the awareness review; and the final FOIA release) and copies of all correspondence between the agency and the bureau contact for awareness review, SOL attorney or attorneys, and any other records pertinent to the awareness review; we used our best judgment to determine which records needed to be independently verified:
 - With cases that did not have sufficient documentation to allow us to establish an awareness review timeline or determine changes made, we pulled email records

stored in DOI systems to ascertain relevant details and establish a timeline where possible

- Interviewed FOIA professionals, SOL attorneys, and awareness reviewers involved in the identified FOIA requests
- Consulted with our Office of General Counsel for guidance in cases where questions surfaced about redactions that occurred based on an awareness reviewer's input

Appendix 2: Case Studies Not Discussed in Our Report

The nine Freedom of Information Act (FOIA) case studies included as examples in our report are most illustrative of the unclear or incomplete information in the awareness policy. This appendix summarizes the other six case studies we reviewed.

Domestic Energy Report

This request was for records related to the development of a U.S. Department of the Interior (DOI) report titled *Review of the Department of the Interior Actions that Potentially Burden Domestic Energy*. The request was subject to monthly release requirements due to litigation, ultimately requiring seven different awareness reviews. Reviewers identified several pages of one release as deliberative, and these pages were subsequently redacted and held back from release, with agreement by the FOIA processor and the assigned Solicitor's Office (SOL) attorney.

Communications Between the Office of the Secretary and the Senate

This was a request for communications between the Office of the Secretary and the office of Senator Rob Portman (R – OH). After 589 days in the record search process, the production was sent for awareness review, during which the awareness reviewer (who was also the custodian of the records) realized the search was incomplete and that a new search was needed. The new search identified a significantly larger set of records; these then underwent awareness review and were released within the 3-day timeframe.

Alaska National Petroleum Reserve Secretarial Order

This request was related to the DOI's Secretarial Order No. 3352, *National Petroleum Reserve – Alaska*, issued by then Secretary of the Interior Ryan Zinke on May 31, 2017. The U.S. Geological Survey's FOIA office released four sets of records to the requester, and the third and fourth underwent awareness reviews. The third was conducted within the policy's 72-hour timeframe and released in its entirety. The awareness review for the fourth set of records did not result in changes, but the process took 19 days, exceeding the policy's 72-hour timeframe by 16 days.

Mining and Conservation Efforts (Three Requests)

We reviewed three requests for similar documents. Two came from the same requester for records related to a mine project. The DOI handled both requests at about the same time. A third request, made by a different requester, resulted in a similar release.

The awareness review was completed in 5 days and resulted in an attorney-client privilege exemption based on input from a political appointee. The SOL attorney assigned to the case agreed with the redaction. We found that during the awareness review, the political appointee raised concerns to the U.S. Fish and Wildlife Service's FOIA officer and an SOL attorney about a number of pages, describing foreseeable harm such as confusion to the public, chilling of speech, and inconsistencies between selecting which records had been approved for this release and similar records that been held back in other requests. The SOL attorney confirmed that many of the pages had already been released, so that issue became moot; however, the awareness review did result in a redaction under the attorney-client privilege exemption.

We reviewed additional awareness reviews for separate monthly releases, which took 8 and 7 days to complete, respectively, but did not result in changes to records.

The FOIA professional and the assigned SOL attorney said the third request involving this subject matter did not go through an awareness review because the material had been reviewed in the past.

Appendix 3: The U.S. Department of the Interior's Response to Draft Report

The U.S. Department of the Interior's response to our draft report follows on page 20.



United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

To: Mark Lee Greenblatt, Inspector General

From: Rachel Spector, Deputy Chief FOIA Officer and Director, Departmental
Freedom of Information Act Office *Rachel Spector*

Re: Draft Evaluation Report – *Lack of Tracking and Unclear Guidance
Identified in the U.S. Department of the Interior’s Awareness Review
Process for Freedom of Information Act Requests*
Report No. 2019-ER-057

Date: January 18, 2022

Thank you for the opportunity to comment on the above-referenced Office the Inspector General (OIG) Draft Evaluation Report (“Draft Report”). The Departmental Freedom of Information Act (FOIA) Office (DFO) appreciates the OIG’s careful evaluation of the awareness review process implemented by Department leadership during the prior administration and provides the following comments to help ensure that the factual assertions and characterizations in the Draft Report are as accurate as possible.

Under the caption “Results in Brief” on page one, the Draft Report states that “it appears the policy was sometimes used in response to congressional inquiries.” The DFO is not aware of the awareness review policy, which by its terms applied only to the processing of certain FOIA requests, being applied to congressional requests. We, therefore, urge the OIG to consult with the Office of the Executive Secretariat as well as the Office of Congressional and Legislative Affairs (if it has not already done so) before making that assertion.

The caption “Records Released After 141 Days in Awareness Review” that appears on page eight of the Draft Report appears to be somewhat misleading. In the instance described under that caption, the initial awareness review of the proposed FOIA release package revealed issues regarding foreseeable harm and inconsistencies with processing determinations between different bureaus. Those errors and inconsistencies were corrected during the 141-day period. Yet the caption suggests that the FOIA release package was simply trapped in limbo in the awareness review process during that time.

Under the caption “Awareness Reviewer: Instruction Affected the Timing of Release of Specific Records” on page nine, we note that there is no indication

that the instruction described was either given as part of the awareness review process or because of the employee's status as an awareness reviewer.

On page nine, the caption “Records Were in Awareness Review for More than 40 Days Due to Questions” appears to be somewhat misleading. In that instance, the initial awareness review of the proposed FOIA release package revealed that attachments to emails had been omitted. That error was corrected and a second awareness review of the complete FOIA release package was conducted within the 40-day period. Yet, as with the caption on page eight discussed above, this caption suggests that the FOIA release package was simply trapped in limbo in the awareness review process during that time.

The caption on page eleven that states “Three Pages of Records Redacted Under FOIA Exemption Without Required Analysis of Foreseeable Harm” does not appear to be clearly supported by the underlying facts. In that instance the bureau FOIA Officer who was interviewed by the OIG was unable to remember the rationale for a particular foreseeable harm determination. In our view, that does not support the conclusion that a foreseeable harm analysis was never conducted.

Finally, in the last full paragraph on page eleven, the OIG describes an instance where non-responsive documents were discovered during the awareness review process and removed from the FOIA release package. We note that FOIA release packages should not include non-responsive records, when such records are reasonably segregable, and this instance is another example of the awareness review process uncovering and facilitating the resolution of a processing error.

Please let me know if you would like to discuss any of these points in more detail and, again, thank you for the opportunity to comment.

Appendix 4: Office of Inspector General's Reply to the U.S. Department of the Interior's Response to Draft Report

In response to the Office of Inspector General's (OIG's) draft of this report, the U.S. Department of the Interior (DOI) acknowledged the OIG's findings and requested that the OIG make clarifying edits to the report (see Appendix 3). We reviewed the response and edited the report as appropriate. Below is a summary of the DOI's comments and our reply.

1. **DOI Comment:** The DOI stated that “the DFO is not aware of the awareness review policy, which by its terms applied only to the processing of certain FOIA [Freedom of Information Act] requests, being applied to congressional requests.”

OIG Reply: Based on additional review, we removed the sentence from the final report. Although interviews with a FOIA official led us to understand that there was some effort to coordinate release of records under both FOIA and congressional requests, we did not specifically review any congressional requests that went through the awareness review process and accordingly believe that this change is appropriate.

2. **DOI Comment:** The DOI stated that the subheading on page 8 “appear[ed] to be somewhat misleading.” Specifically, the DOI stated that “the initial awareness review of the proposed FOIA release package revealed issues regarding foreseeable harm and inconsistencies with processing determinations between different bureaus,” and that “those errors and inconsistencies were corrected during the 141-day period.” The DOI further stated, “This caption suggests that the FOIA release package was simply trapped in limbo in the awareness review process during that time.”

OIG Reply: We made no change to the report on the basis of comment. The subheading accurately described the length of time that the document was in the awareness review process, and we note that the DOI did not disagree with the factual description of the process as set forth in the subsequent text.

3. **DOI Comment:** The DOI stated that, regarding a subheading on page 9, “there is no indication that the instruction described was either given as part of the awareness review process or because of the employee's status as an awareness reviewer.”

OIG Reply: We made a minor edit to the subheading to clarify the senior advisor's role. We also included clarifying language in the related text.

4. **DOI Comment:** The DOI stated that the subheading on page 9 “appear[ed] to be somewhat misleading.” Specifically, the DOI stated, “In that instance, the initial awareness review of the proposed FOIA release package revealed that

attachments to emails had been omitted. That error was corrected and a second awareness review of the complete FOIA release package was conducted within the 40-day period.” The DOI further stated that “this caption suggests that the FOIA release package was simply trapped in limbo in the awareness review process during that time.”

OIG response: We made minor modifications to the subheading to acknowledge that there were questions that prompted the lengthy awareness process. We disagree that the existing language was misleading, however, as it accurately described the length of time that this matter was in the awareness process.

5. **DOI Comment:** The DOI stated that the subheading on page 11 “does not appear to be clearly supported by the underlying facts.” Specifically, the DOI stated, “In that instance the bureau FOIA Officer who was interviewed by the OIG was unable to remember the rationale for a particular foreseeable harm determination. In our view, that does not support the conclusion that a foreseeable harm analysis was never conducted.”

OIG response: We modified the subheading to “Three Pages of Records Redacted Under FOIA Exemption Without Documented Analysis of Foreseeable Harm.” As noted in the text of the report, during our review, we found no documented conversations between the awareness reviewer and the FOIA officer and neither could recall why certain material was redacted. We also found no documentation of a foreseeable harm analysis to support the redaction.

6. **DOI Comment:** The DOI stated that “FOIA release packages should not include non-responsive records, when such records are reasonably segregable, and this instance is another example of the awareness review process uncovering and facilitating the resolution of a processing error.”

OIG response: No change was made based on this comment, and we note that the DOI did not disagree with the factual description included in the report. We also note that this subsection of the report provided examples of situations in which awareness reviews led to modifications in records that FOIA staff had determined to be responsive and that the overall discussion in this portion of the report addressed the extent to which unclear language in the awareness policy led to inefficient and inconsistent FOIA processing.

Report Fraud, Waste, and Mismanagement



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By Mail: U.S. Department of the Interior
Office of Inspector General
Mail Stop 4428 MIB
1849 C Street, NW.
Washington, DC 20240