



# OFFICE OF THE INSPECTOR GENERAL

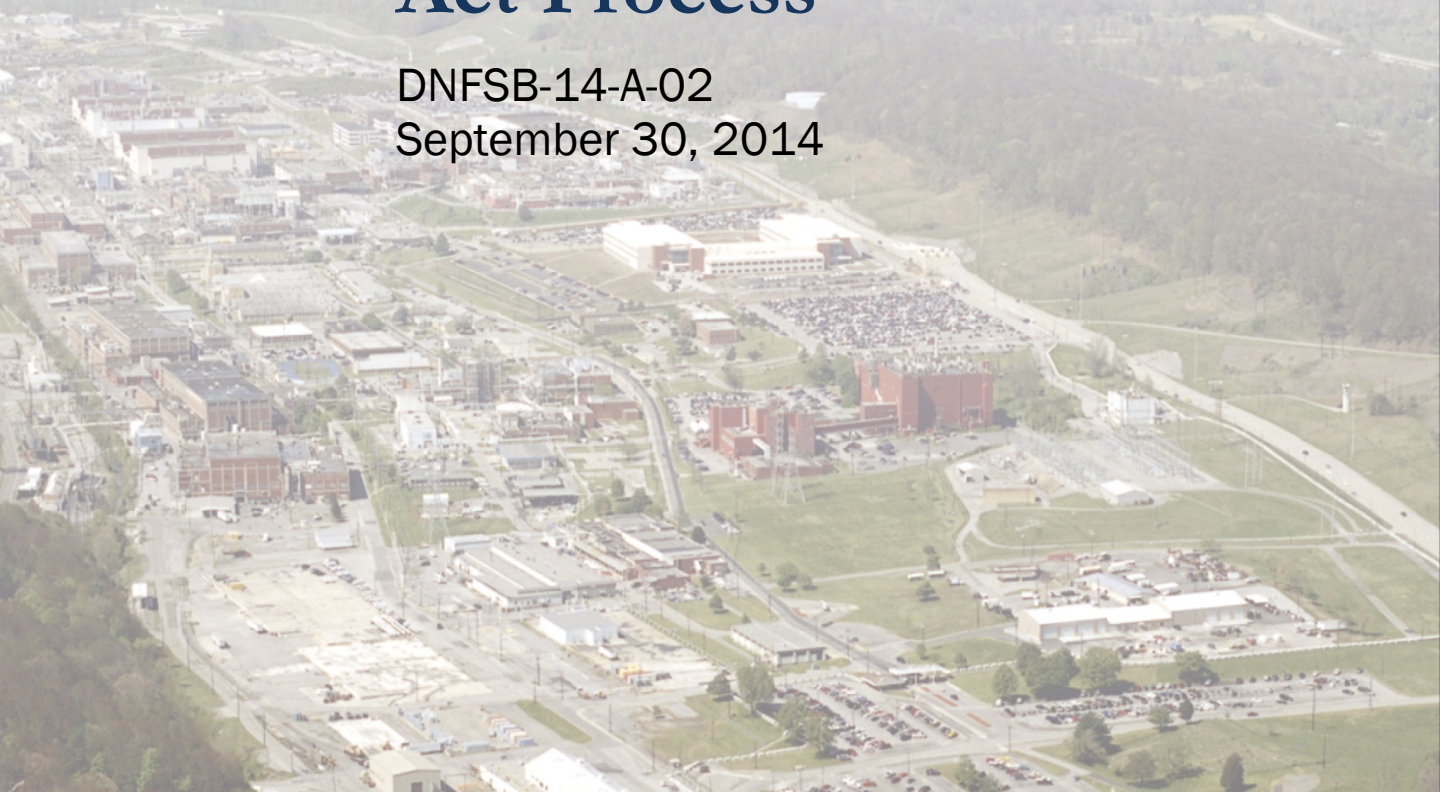
U.S. NUCLEAR REGULATORY COMMISSION

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

## Audit of the Board's Freedom of Information Act Process

DNFSB-14-A-02

September 30, 2014



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**Defense Nuclear Facilities  
Safety Board**  
Washington, DC 20004-2901

**Office of the  
Inspector General**

September 30, 2014

MEMORANDUM TO: Mark T. Welch  
General Manager

FROM: Stephen D. Dingbaum */RA/*  
Assistant Inspector General for Audits

SUBJECT: Audit of the Board's Freedom of Information  
Act Process (DNFSB-14-A-02)

Attached is the Office of the Inspector General's (OIG) audit report titled *Audit of the Board's Freedom of Information Act Process*.

The report presents the results of the subject audit. Following the September 24, 2014, exit conference, Board staff indicated that they had no formal comments for inclusion in this report.

Please provide information on actions taken or planned on each of the recommendations within 30 days of the date of this memorandum.

We appreciate the cooperation extended to us by members of your staff during the audit. If you have any questions or comments about our report, please contact me at (301) 415-5915 or Beth Serepca, Team Leader, at (301) 415-5911.

Attachment: As stated





# Office of the Inspector General

U.S. Nuclear Regulatory Commission  
Defense Nuclear Facilities Safety Board

DNFSB-14-A-02

September 30, 2014

## Results in Brief

### Why We Did This Review

The Freedom of Information Act (FOIA) is a Federal law that provides any person the right to submit a written request for access to records or information maintained by the Federal Government. In response to such written requests, Federal agencies must disclose the requested records, unless they are protected from release under one of the nine FOIA statutory exemptions.

In 2009, the President and the Attorney General each issued memoranda emphasizing that the FOIA "should be administered with a clear presumption: in the face of doubt, openness prevails." The President also directed agencies to "take affirmative steps to make information public" and not to "wait for specific requests from the public."

The General Manager within the Office of the General Manager is the Chief FOIA Officer and manages the Board's FOIA program. During fiscal year 2013, Board staff processed 14 FOIA requests.

The audit objective was to determine whether the Board's FOIA process is efficient and complies with the current laws.

### *Audit of the Board's Freedom of Information Act Process*

#### What We Found

The Board generally meets FOIA timeliness requirements; however, opportunities exist to enhance program efficiency and compliance with Federal and internal guidance by improving internal controls, training, and FOIA document management. Specifically, we found that staff do not always follow FOIA guidance when searching for records and responding to FOIA requests. The Board is required to adhere to Federal and internal FOIA guidance. However, management has not implemented effective internal controls and made FOIA training available to all Board staff. As a result, inaccurate and incomplete FOIA responses have occurred.

We also found that FOIA documentation at the Board is dispersed and not efficiently maintained. The Board has not designed and implemented controls for FOIA documentation management. As a result, inefficiencies exist and there is an increased potential for misplaced or lost FOIA documents at the Board.

#### What We Recommend

To strengthen compliance with FOIA guidance, we make recommendations regarding quality assurance and training. To strengthen the efficiency of Board's FOIA documentation management, we make a recommendation to develop and implement a documentation management plan for FOIA records and communications.

Management stated their general agreement with the findings and recommendations in this report.

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## TABLE OF CONTENTS

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<a href="#"><u>ABBREVIATIONS AND ACRONYMS</u></a> .....	i
I. <a href="#"><u>BACKGROUND</u></a> .....	1
II. <a href="#"><u>OBJECTIVE</u></a> .....	3
III. <a href="#"><u>FINDINGS</u></a> .....	3
A. <a href="#"><u>Noncompliance with FOIA Guidance</u></a> .....	3
B. <a href="#"><u>FOIA Documentation Management</u></a> .....	10
IV. <a href="#"><u>CONSOLIDATED LIST OF RECOMMENDATIONS</u></a> .....	13
V. <a href="#"><u>BOARD COMMENTS</u></a> .....	14
 <b>APPENDIXES</b>	
A. <a href="#"><u>OBJECTIVE, SCOPE, AND METHODOLOGY</u></a> .....	15
B. <a href="#"><u>FOIA Exemptions</u></a> .....	17
 <a href="#"><u>TO REPORT FRAUD, WASTE, OR ABUSE</u></a> .....	18
<a href="#"><u>COMMENTS AND SUGGESTIONS</u></a> .....	18

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## **ABBREVIATIONS AND ACRONYMS**

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Board	Defense Nuclear Facilities Safety Board
CFR	Code of Federal Regulations
DOJ	The Department of Justice's Office of Information Policy
FOIA	Freedom of Information Act
OGC	Office of the General Counsel
OGM	Office of the General Manager
OIG	Office of the Inspector General

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## I. BACKGROUND

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The Freedom of Information Act (FOIA)<sup>1</sup> is a Federal law that provides any person the right to submit a written request for access to records or information maintained by the Federal Government. In response to such written requests, Federal agencies must disclose the requested records, unless they are protected from release under one of the nine FOIA statutory exemptions.<sup>2</sup> FOIA mandates that all agencies shall readily promulgate information, agency rules, opinions, orders, records, and proceedings to the public.

### **Executive Memoranda**

In 2009, President Barack Obama and Attorney General Eric Holder issued memoranda on the FOIA. These statements of FOIA policy emphasized that the FOIA "should be administered with a clear presumption: in the face of doubt, openness prevails." The President also directed agencies to "take affirmative steps to make information public" and not to "wait for specific requests from the public." The Attorney General's Guidelines stressed the need for agencies to accomplish the following:

- Have efficient and effective systems in place for responding to requests.
- Increase proactive disclosures.
- Improve the use of technology.
- Improve timeliness in responding to requests.

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<sup>1</sup> [5 U.S.C. § 552, As Amended](#)

<sup>2</sup> See Appendix B for a listing of the nine statutory exemptions.

## **Federal FOIA Oversight**

The Department of Justice's Office of Information Policy (hereinafter referred to as DOJ) oversees agencies' FOIA implementation. Additionally, DOJ also issues FOIA policy guidance, conducts FOIA-related training programs for Government staff, and is responsible for encouraging compliance.

## **FOIA at the Board**

The Defense Nuclear Facilities Safety Board's (Board) FOIA requirements are conveyed in the Code of Federal Regulations (CFR) under Title 10, Part 1703, *Public Information and Requests*. The Board's FOIA Administrative Directive provides guidance on its FOIA policy and implementation of the FOIA process. The Board is currently updating its Directive and Operating Procedures.

The three offices at the Board are the Office of the Technical Division, the Office of the General Counsel (OGC), and the Office of the General Manager (OGM). The General Manager within OGM is the Chief FOIA Officer and manages the FOIA program. The FOIA Officer and the Records Management Specialist, also within OGM, perform the day-to-day FOIA operations.<sup>3</sup> However, OGC is involved in processing all of the FOIA requests.

The FOIA Officer stated that the Board is a small Government non-regulatory agency that receives an average of approximately 20 FOIA requests in a year and can receive as few as 5 requests on an annual basis. Agencies have a statutory responsibility to make a determination on requests within 20 working days. This type of FOIA request is known as a "simple" request. FOIA also gives agencies the right to extend that time by 10 working days when a given request requires additional search time or consideration. These types of requests are called "complex" requests. The Board typically responds to FOIA requests within the 20-day period and generally does not have a backlog of requests.

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<sup>3</sup> The Records Management Specialist reports to the FOIA Officer.

## II. OBJECTIVE

The audit objective was to determine whether the FOIA process is efficient and complies with the current laws. Appendix A of this report contains information on the audit scope and methodology.

## III. FINDINGS

The Board generally meets FOIA timeliness requirements; however, opportunities exist to enhance program efficiency and compliance with Federal and internal guidance by improving internal controls, training, and FOIA document management.

### **A. Noncompliance with FOIA Guidance**

Staff do not always follow FOIA guidance when searching for records and responding to FOIA requests. The Board is required to adhere to Federal and internal FOIA guidance. However, management has not implemented effective internal controls and made FOIA training available to all Board staff. As a result, inaccurate and incomplete FOIA responses have occurred.

#### ***What Is Required***

##### **Federal and Internal Guidance**

##### **Federal Guidance Regarding Searches and Responses**

FOIA provides agencies guidance for conducting searches and responses. Agencies are required to search for records requested under FOIA. The term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request. FOIA also requires agencies to acknowledge receipt of the request and assign a tracking number when the request is estimated to take longer than 10 days to process. Additionally, agencies



must notify FOIA requesters of their right to appeal adverse determinations.<sup>4</sup>

### Federal Guidance Regarding FOIA Training

*The Open Government National Action Plan for the United States of America*<sup>5</sup> recommends that all agency employees, not just FOIA personnel, have FOIA training in order to efficiently and effectively respond to requests. In addition, DOJ guidance and best practices maintain that each agency should require that its personnel, both FOIA and non-FOIA, attend training to understand FOIA guidelines on transparency.

### Internal Guidance Regarding Searches

The Board's Administrative Directive for FOIA<sup>6</sup> sets forth the guidance in conducting searches. The Board's search procedure requires the following:

- The FOIA Officer prepares and issues a search request letter to all office directors, which includes a date for completing the search and returning a response to the FOIA Officer.
- A response from each office, including a negative response (no material found), regarding FOIA records must be returned to the FOIA Officer.
- All areas where documents could be filed must be searched: electronic files, desks, file cabinets, bookshelves, etc.

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<sup>4</sup> A requester has the right to administratively appeal any adverse determination an agency makes on his or her FOIA request. Adverse determinations include denials of records in full or in part, "no records" responses, denials of requests for fee waivers, and denials of requests for expedited treatment.

<sup>5</sup> This plan, created by the Obama administration in 2011 and updated in 2013, lists a set of commitments and actions that have or will be taken by the Federal Government to create a more efficient, effective, and accountable Government.

<sup>6</sup> Administrative Directive 231.1, *Freedom of Information Act*, September 4, 2001.

## What We Found

### Noncompliance with FOIA Guidance

#### Searches Do Not Adhere to Guidance

The Board does not always adhere to its internal FOIA guidance when conducting FOIA searches. FOIA staff do not typically send search request letters to all offices. As a result, Board staff do not search all areas for potential FOIA records since not all offices are aware of the FOIA requests. Additionally, the FOIA Officer is not receiving negative responses of no material found from all offices as mandated by the Board's internal guidance.

The Technical Director stated that he has only received 2 FOIA search requests since he became the Director in January 2013; however, the Board has received over 30 requests since his selection to the position. The FOIA Officer explained that since some requests are very specific, he may decide the individual best suited to handle the request. All offices do not receive these requests. However, the Board's internal guidance specifically requires sending requests to all offices, and requiring a response back to the FOIA Officer from each office. The FOIA Officer acknowledges that Board staff should follow the guidance by sending requests to all offices because the FOIA staff would not know if other offices have records if they do not ask.

#### *Results from Sample of FOIA Requests*

The Board is not adhering to its internal search procedures. Office of the Inspector General (OIG) staff reviewed a sample of 10 FOIA requests<sup>7</sup> and found that Board staff do not typically send search requests to all offices. OIG also found that the FOIA Officer does not receive responses for record searches from all offices. Specifically,

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<sup>7</sup> From January 11, 2013, through March 11, 2014, the Board received 35 FOIA requests. For this period, OIG selected a judgmental sample of 10 FOIA requests to be reviewed. However, two of the requests were deemed not applicable (N/A): one of the requests was withdrawn by the requester and the other request was a referral from the Department of Energy that did not require the Board to conduct a search for responsive records.

- Only one FOIA search request was sent to all offices.
- None of the search requests were responded to by all offices.

As a result, none of the FOIA requests reviewed were fully compliant with FOIA search guidance. See Figure 1 for the results of the sample.

**Figure 1:**

<b>Compliance with Search Guidance</b>		
<b>FOIA Request</b>	<b>Request Sent to All Offices? (Yes/No)</b>	<b>Response Received From All Offices? (Yes/No)</b>
1	No	No
2	No	No
3	No	No
4	No	No
5	Yes	No
6	N/A	N/A
7	No	No
8	No	No
9	N/A	N/A
10	No	No

**Source:** OIG

#### Responses Do Not Adhere to Guidance

The Board does not consistently notify FOIA requesters of their right to appeal when responding to requests. Federal regulation requires that an agency notify FOIA requesters of their right to appeal any adverse determination from a request. Furthermore, DOJ states that a notification of the requester's right to appeal must be included any time there is an adverse determination. This includes when information is withheld (either in full or part) and also when there are no records found so that the requester is able to challenge the adequacy of the search that was

conducted. In the sample OIG reviewed,<sup>8</sup> the Board notified requesters of their right to appeal only 37.5 percent of the time. See Figure 2 for the results of the sample.

**Figure 2:**

<b>Compliance with Appeal Notification Guidance</b>	
<b>FOIA Request</b>	<b>Did the Board Appropriately Notify the Requester of Their Right To Appeal When Responding to FOIA Requests? (Yes/No)</b>
1	No
2	No
3	No
4	Yes
5	Yes
6	N/A
7	No
8	No
9	N/A
10	Yes

**Source:** OIG

The Board also does not always adhere to Federal guidance when responding to FOIA requests. The Board does not consistently send an acknowledgement of receipt to the requester when a FOIA request is estimated to take longer than 10 days to process. In the sample OIG reviewed, the Board did not send an acknowledgement receipt assigning a tracking number and estimating a completion date when it was required to do so.

<sup>8</sup> Two of the FOIA requests were deemed not applicable (N/A); one request was withdrawn by the requester and the other request did not require a notification of right to appeal because no adverse determination was made.

## ***Why This Occurred***

### **Internal Controls and Training**

#### Internal Controls

Management has not implemented effective internal controls to ensure that staff follow FOIA guidance. FOIA is a small part of the staff's duties at the Board and in all cases is a collateral duty. As a result, management does not monitor if all steps of the FOIA process are completed.

#### FOIA Training

The Board's FOIA training can be improved. There is currently no required FOIA training. Board staff do not have any online FOIA training available and the training requirements for staff do not include FOIA. In addition, staff stated that they have received limited exposure to the FOIA process.

## ***Why This Is Important***

### **Inaccurate and Incomplete FOIA Responses**

#### Inaccurate FOIA Response

The Board recently provided an inaccurate FOIA response to a representative of the news media. Specifically, a request was made for information regarding missing and/or stolen items within the Board during the period 2007 through 2012. The Board replied to the requester with a "no records" found response. However, OIG's review determined that the records did exist. OGC was the only office that searched for the requested records. The request was not provided to the Board's security staff, which is the staff that maintains records pertaining to missing and stolen items. As a result, the Board did not complete a full search of records for the information requested. According to FOIA guidance, staff must conduct a search for records in all offices and all areas where



documents could be located. Therefore, if searches are incomplete, inaccurate FOIA responses may occur.

### Incomplete FOIA Responses

Requesters may receive incomplete information from the Board's responses to FOIA requests. The Board does not consistently comply with the requirement to provide an acknowledgement receipt assigning a tracking number and estimating a completion date to the requester.

The Board also does not consistently include the notifications of the requester's right to appeal when responding to FOIA requests. Improperly processed responses may be indicative of a lack of FOIA training at the Board. By not informing requesters of their right to appeal, requesters with adverse determinations may not know that they have the ability to appeal the Board's FOIA response.

### **Recommendations:**

OIG recommends that the Board

1. Develop and implement a quality assurance process to facilitate compliance with FOIA guidance.
2. Develop and issue guidance for staff on how to respond to a FOIA request.
3. Obtain DOJ or comparable online FOIA training and encourage all Board staff to complete the training through annual Board communications.
4. Require periodic FOIA training for staff who process FOIA requests.

## **B. FOIA Documentation Management**

FOIA documentation at the Board is dispersed and not efficiently maintained. Document management guidance requires maintaining and using records in an effective and efficient manner. However, the Board has not designed and implemented controls for FOIA documentation management. As a result, inefficiencies exist and there is an increased potential for misplaced or lost FOIA documents at the Board.

### ***What Is Required***

#### **Document Management Guidance**

Federal agencies are responsible for establishing and maintaining a records management program that complies with National Archives and Records Administration and General Services Administration regulations and guidance. Agencies must maintain and establish an active, continuing program for the economical and efficient management of the records of the agency. Agencies also must create and maintain authentic, reliable, and usable records and ensure that they remain so for the length of their authorized retention period. A comprehensive records management program provides policies and procedures for ensuring the following:

- Records documenting agency business are created or captured.
- Records are organized and maintained to facilitate their use and ensure integrity throughout their authorized retention period.
- Records are available when needed, where needed, and in a usable format to conduct agency business.

An agency must carry out its Federal records management responsibilities and recordkeeping requirements by instituting controls to ensure all records, regardless of format or medium, are properly organized, classified or indexed, and described, and made available for use by all appropriate agency staff. Additionally, the Board requires that all Board

records shall be created, maintained, and used in an effective, efficient, and authorized manner.

## ***What We Found***

### **Documentation Dispersed and Not Efficiently Maintained**

#### FOIA Records in Different Locations

FOIA documentation at the Board is dispersed in different locations and not efficiently maintained. There is no official location specifically designated for FOIA records. Staff initially stated that the official FOIA records are located in hardcopy in a binder. However, OIG subsequently determined that FOIA records are dispersed in the following locations:

- A hardcopy binder.
- The Records Management Specialist's personal Outlook folder.
- An OGM restricted access computer drive.

Furthermore, staff did not have readily accessible FOIA records to comply with an OIG request for records. Staff had to query other offices to obtain FOIA records to comply with OIG's document request.

#### Records Are Disorganized

FOIA records are disorganized at the Board. OIG requested documentation for 10 FOIA requests and asked the Board to respond within a week. However, it took the Board 15 days to provide the requested documents. There is an inefficient management of the records at the Board as these records should have been organized, maintained, and available throughout their authorized retention period.

There is also no centralized tracking of FOIA requests for all staff involved in the FOIA process. Staff stated that OGC plays a large role processing and reviewing requests at the Board. However, OGC staff stated that they are sometimes uncertain of what stage in the process a request is in and

have to clarify with the FOIA staff. OGC staff expressed that it would be helpful to know the status of the requests as FOIA requests are processed.

### ***Why This Occurred***

#### **No FOIA Records Management Procedures**

The Board does not have procedures for records management related to FOIA. Management has stated that records management needs to be improved at the Board and there needs to be a common structure to manage records for every office.

### ***Why This Is Important***

#### **Potential for Misplacing or Losing FOIA Documents**

There is a high potential for misplacing or losing FOIA documents without proper documentation management. According to Federal guidance, the Board should create and maintain authentic, reliable, and usable records. Therefore, when FOIA records are difficult to locate and inefficiently maintained, the likelihood of misplacing or losing documents significantly increases.

### **Recommendation**

OIG recommends that the Board

5. Develop and implement a documentation management plan for FOIA records and communications.

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## **IV. CONSOLIDATED LIST OF RECOMMENDATIONS**

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OIG recommends that the Board

1. Develop and implement a quality assurance process to facilitate compliance with FOIA guidance.
2. Develop and issue guidance for staff on how to respond to a FOIA request.
3. Obtain DOJ or comparable online FOIA training and encourage all Board staff to complete the training through annual Board communications.
4. Require periodic FOIA training for staff who process FOIA requests.
5. Develop and implement a documentation management plan for FOIA records and communications.



## **V. BOARD COMMENTS**

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A discussion draft of this report was provided to the Board prior to an exit conference held on September 24, 2014. Board management provided supplemental information that has been incorporated into this report, as appropriate. As a result, Board management stated their general agreement with the findings and recommendations in this report and opted not to provide formal comments for inclusion in this report. Additionally, Board management expressed their commitment to ensuring their FOIA program is highly effective and fully compliant with the act at the exit conference and prior to the issuance of this report.

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## OBJECTIVE, SCOPE, AND METHODOLOGY

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### OBJECTIVE

The audit objective was to determine whether the FOIA process is efficient and complies with the current laws.

### SCOPE

The audit reviewed the Board's activities related to FOIA with special emphasis on process and compliance with current laws. OIG conducted this performance audit from April 2014 through August 2014 at the Board's headquarters. Internal controls related to the audit objective were reviewed and analyzed. Throughout the audit, auditors were aware of the possibility of fraud, waste, and abuse in the program.

### METHODOLOGY

To address the audit objective, OIG auditors interviewed 19 individuals. These interviews included Board management and staff at headquarters. OIG auditors also contacted DOJ and reviewed DOJ guidance and best practices. OIG reviewed Federal and internal agency guidance, including the following:

- Freedom of Information Act (5 U.S.C. § 552).
- 10 CFR 1703, *Freedom of Information Act Regulations*.
- 36 CFR Part 1220, *Federal Records*.
- Board's Administrative Directive, *Freedom of Information Act*.
- Board's Administrative Directive, *Records Management Program*.
- 2009 Presidential Memorandum for the Heads of Executive Departments and Agencies.
- Attorney General Memorandum for the Heads of Executive Departments and Agencies.
- *Second Open Government National Action Plan for the United States of America*.

OIG auditors reviewed a judgmental sample of FOIA requests and assessed how FOIA requests were processed. OIG also conducted a review and analysis of FOIA

- Timeliness statistics.
- Training requirements.
- Search requirements.
- Response requirements.
- Appeal requirements.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

The audit was conducted by Beth Serepca, Team Leader;  
Robert Woodward, Audit Manager; and Jenny Cheung, Auditor.

## FOIA Exemptions

Exemption number	Matters that are exempt from FOIA
(1)	(A) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to the Executive Order.
(2)	Related solely to the internal personnel rules and practices of an agency.
(3)	Specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that matters be withheld from the public in such a manner as to leave no discretion on the issue or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.
(4)	Trade secrets and commercial or financial information obtained from a person and privileged or confidential.
(5)	Interagency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.
(6)	Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.
(7)	Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:
(A)	could reasonably be expected to interfere with enforcement proceedings;
(B)	would deprive a person of a right to a fair trial or impartial adjudication;
(C)	could reasonably be expected to constitute an unwarranted invasion of personal privacy;
(D)	could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by confidential source;
(E)	would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or
(F)	could reasonably be expected to endanger the life or physical safety of an individual.
(8)	Contained in or related to examination, operating, or condition of reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.
(9)	Geological and geophysical information and data, including maps, concerning wells.

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## TO REPORT FRAUD, WASTE, OR ABUSE

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### Please Contact:

Email: [Online Form](#)

Telephone: 1-800-233-3497

TDD 1-800-270-2787

Address: U.S. Nuclear Regulatory Commission  
Office of the Inspector General  
Hotline Program  
Mail Stop O5-E13  
11555 Rockville Pike  
Rockville, MD 20852

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## COMMENTS AND SUGGESTIONS

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If you wish to provide comments on this report, please email OIG using this [link](#).

In addition, if you have suggestions for future OIG audits, please provide them using this [link](#).