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House of Representatives

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LAWRENCE J. BRADY
STAFF DIRECTOR

MEMORANDUM

March 30, 2011

To: Democratic Members of the Committee on Oversight and Government Reform

Fr: Democratic Committee Staff

Re: Hearing on Allegations of Politicization in the DHS FOIA Process

On Thursday, March 31, 2011, at 9:30 a.m. in Room 2154 of the Rayburn House Office Building, the Committee will hold a hearing entitled, "Why isn't the Department of Homeland Security meeting the President's standard on FOIA?" This memo summarizes the results of the Committee's investigation to date, including a review of documents and interviews of DHS officials.

I. SUMMARY OF DOCUMENTS AND INTERVIEWS

Chairman Issa has made numerous, broad allegations that Obama Administration appointees at the Department of Homeland Security (DHS) have politicized the process for responding to requests under the Freedom of Information Act (FOIA). For example, in a letter to DHS Secretary Janet Napolitano on July 30, 2010, Chairman Issa asserted:

In effect, the Department of Homeland Security ignored the intent of Congress and politicized the FOIA process.¹

Similarly, on August 25, 2010, Chairman Issa stated:

Getting through a non-partisan bureaucracy to obtain information through FOIA is difficult enough without political appointees inappropriately injecting partisan political considerations into the process.²

¹ Letter from Rep. Darrell Issa to Secretary of Homeland Security Janet Napolitano (July 30, 2010).

² Rep. Darrell E. Issa, *Grassley, Issa Seek Information About FOIA Requests* (Aug. 25, 2010) (online at http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=28447).

To pursue these allegations, Committee staff interviewed six DHS officials. DHS made three document productions in February totaling approximately 3,000 pages before Chairman Issa's staff directed DHS to halt document production on February 18, 2011. Republican Committee staff obtained at least 7,200 pages of documents from an independent source. They shared approximately 1,900 pages with the Democratic staff in February, but they waited to share an additional 5,300 pages until Monday of this week.

A review of these documents and interviews does not support Chairman Issa's allegations that DHS withheld information from FOIA requestors for partisan political purposes. This review also does not support allegations that requestors received different treatment based on their political affiliation or that DHS officials implemented the FOIA review process to further partisan political objectives.

This memo analyzes eight allegations that DHS officials withheld information from FOIA requests. It identifies no instances in which information was withheld without the approval of either the FOIA Office or the Office of the General Counsel. In some cases, this review process resulted in good "catches" of improperly processed documents, corrections to typographical and other production errors, and greater consistency in component responses to the same requestor.

The documents and interviews showed limited delays in responding to some FOIA requests, as well as disputes between career officials in the FOIA Office and the Office of General Counsel about competing interpretations of FOIA.

In a report and testimony for tomorrow's hearing, the DHS Inspector General reached similar conclusions. He stated:

After reviewing information and interviewing FOIA experts, we determined that the significant request review process of DHS ... did not prohibit the eventual release of information. However, the involvement of the Office of the Secretary created some inefficiencies and delayed the eventual release in some cases.³

In the spring of 2010, DHS instituted a new process to improve efficiency and reduce delays. Under this new process, responsive FOIA documents were released three days after being placed onto a shared internal website for review. On March 28, 2011, that review period was reduced to one day. While DHS has significantly improved its process, the Inspector General made six additional recommendations to further reduce delays in responding to FOIA requests.

³ House Committee on Oversight and Government Reform, Testimony of DHS Inspector General Charles K. Edwards, *Hearing on "Why Isn't the Department of Homeland Security Meeting the President's Standard on FOIA?"*, 112th Cong. (Mar. 31, 2011) (available online at http://oversight.house.gov/images/stories/Testimony/Edwards_Testimony_3-31-11.pdf).

II. EXAMINATION OF INDIVIDUAL WITHHOLDING ALLEGATIONS

Democratic staff examined eight specific and non-specific allegations made by DHS officials relating to withholding information in response to FOIA requests. This review was limited, however, because Republican staff withheld the production of thousands of pages of documents they had received until this week. Nevertheless, a review of the documents and interviews relating to these matters does not support Chairman Issa's allegations that DHS withheld information for political purposes.

A. Coast Guard Documents

In an interview with Committee staff on March 2, 2011, Vania Lockett, an Associate Director in the Privacy Office at DHS, explained that, after a review by officials in the Secretary's office, DHS withheld several documents that the Coast Guard had been preparing to release in response to a FOIA request.

Ms. Lockett went on to explain, however, that the withholding was proper in this case. During her interview, she explained:

So one instance I do recall was a request that the Coast Guard was preparing to release, and they were told to hold off for a legitimate reason. They were trying to release records that they just should not have been releasing. They hadn't done a thorough review.⁴

In response to a question about whether the review process "had a somewhat beneficial effect," she responded:

In that instance, it was a legitimate catch. In that instance, it was helpful to have someone, another set of eyes.⁵

B. Swear Words and Comments on the Secretary's Attire

In an interview with Committee staff on March 3, 2011, Catherine Papoi, one of the top career officials in the Privacy Office at DHS, which handles FOIA requests, described two examples in which information was withheld from FOIA responses. She stated:

There was one instance where [Deputy Chief of Staff] Amy Shlossman, I believe she was swearing or she said something she felt was embarrassing, and we were going to release that, but that was withheld.⁶

⁴ House Committee on Oversight and Government Reform, Interview of Vania Lockett, at 23 (Mar. 2, 2011).

⁵ *Id.* at 93.

⁶ House Committee on Oversight and Government Reform, Interview of Catherine Papoi, at 75 (Mar. 3, 2011).

Ms. Papoi also stated:

There were documents – I believe I give an example where someone in the front office had made a comment where they were swearing and there was also a comment about the way that the Secretary dresses, and those were withheld.⁷

Upon further questioning, however, Ms. Papoi clarified that in both of these examples, the Office of the General Counsel, rather than officials in the Office of the Secretary, approved the redactions. Specifically, when Ms. Papoi was asked “whether the General Counsel’s Office signed off on those and permitted those to be redacted,” she responded: “Yes, they did.”⁸

In addition, Ms. Papoi acknowledged that it was “appropriate” for officials in the Secretary’s office to have suggested substantive redactions to these specific documents because they had an “equitable interest” in them.⁹

This evidence does not indicate that the swear words or comments about the Secretary’s attire were political in nature, or that information in these documents was withheld for partisan political purposes. Ms. Papoi acknowledged that the Office of General Counsel approved these redactions.

C. Secretary Clinton’s Official Title

In her interview with Committee staff on March 3, 2011, Ms. Papoi explained that staff in the Secretary’s office requested that a FOIA response be altered to correct a reference to Secretary of State Hillary Clinton, who was mistakenly identified in documents as “Senator” Clinton.

Ms. Papoi explained:

The record in question was the Secretary’s calendar, and [the Secretary’s] scheduler, had referred to Secretary Clinton as Senator Clinton in the record, and they, they being the front office, wanted that changed before the response went out the door and we were pushing back saying that once you cast your net and retrieve a record, you can’t alter a record because of mere embarrassment.¹⁰

In this case, the FOIA office informed the Secretary’s office that the alteration would be inappropriate under FOIA, and the record was released without revisions. In her interview with Committee staff, Ms. Papoi explained that “we released it as Senator Clinton.”¹¹

⁷ *Id.* at 101.

⁸ *Id.* at 102.

⁹ *Id.* at 104-105.

¹⁰ *Id.* at 71.

¹¹ *Id.* at 72.

D. Proposed Edits to FOIA Response Cover Letters

In an interview with Committee staff on March 14, 2011, Mary Ellen Callahan, the DHS Chief Privacy Officer, stated that officials in the Secretary's office proposed changes to cover letters that accompanied FOIA responses. She explained:

Early in the awareness review process, the front office reviewed our FOIA letters, which have boilerplate language in it. We have several different templates, kind of mix-and-match paragraphs that we need to implement and put into the letters, depending on what is going on with the response. A full release has a different paragraph than a full denial, for example. And the FOIA release or response letters were written by lawyers and by people in my office and were very mechanical. ...

The templates were very mechanical. And the Office of the Secretary, the front office thought that they were maybe a little verbose, not realizing that there were several paragraphs that are required by statute to be implemented. And so early in the awareness review, the front office had suggested abridging some of the letters for ease of reading.¹²

Ms. Callahan went on to explain, however, that these edits were not made to the cover letters because the existing language was determined to be necessary to satisfy certain legal requirements. She stated:

[A]fter meeting with the Office of General Counsel to explain that those paragraphs were necessary, we then had a team of the Office of General Counsel review all the template letters. And the template letters now, they have remained the same as they were I think since 2008, but there were suggested edits in that circumstance from the front office that were not taken.¹³

Officials in the Secretary's office did raise concerns about the basic quality of certain FOIA responses, including errors in the cover letters and consistency in the application of exemptions. For example, on December 15, 2009, Deputy Chief of Staff Amy Shlossman sent an e-mail to Mary Ellen Callahan raising concerns about errors. She stated:

[P]art of the timing issue in this review process is my staff ends up making edits to address basic typos in these response letters. Look at the recipient address in the attached - the name of the organization is wrong and the city is misspelled.¹⁴

These concerns continued over the next year. On September 17, 2010, John Sandweg, Counselor to the Secretary, sent an e-mail to Mary Ellen Callahan, which stated:

¹² House Committee on Oversight and Government Reform, Interview of Mary Ellen Callahan, at 19 - 20 (Mar. 14, 2011).

¹³ *Id.*

¹⁴ Email from Amy Shlossman to Mary Ellen Callahan (Dec. 15, 2009).

More troublesome, however, is the fact that Vania and Catherine apparently attempt to avoid legal review or quality control by characterizing an OGC review as being ‘in the front office’ or ‘a front office bottleneck.’ I don't care what the AP or anyone else may have said about the DHS FOIA process, if the FOIA office is unable to redact documents in a consistent manner, or in a way that avoids legal questions, it is my responsibility to ask OGC to weigh in to ensure that things are being done in a lawful manner. OGC is the final legal authority for the Department and FOIA redactions are a legal matter. Simply because there has been some criticism of the process, does not mean that the FOIA office is now the only component that is above OGC review.¹⁵

E. Secretary Napolitano's Schedule

In her interview with Committee staff, Ms. Papoi indicated that Ms. Lockett, an Associate Director in the DHS Privacy Office, had additional details about information withheld by the Secretary's office. She stated:

There are other examples. Vania Lockett is the one that dealt with a lot of the actual documents and the redactions. I think she would have a better sense, when she was working with [a junior front office employee] about some of the withholdings that were recommended and then implemented prior to the documents going out the door.¹⁶

When Committee staff interviewed Ms. Lockett, she provided the example described above relating to Coast Guard documents that were properly withheld. She also had a less clear recollection of an additional example. She stated:

There's another instance that I recall. And I don't recall the particulars of the request itself, but I do recall one instance where I was contacted by Mary Ellen Callahan and told not to release a particular request.¹⁷

Committee staff identified an e-mail exchange that appears to fit Ms. Lockett's description. On August 19, 2010, Ms. Papoi circulated documents in response to a FOIA request for information about the Secretary's schedule. Later that day, Ms. Callahan asked her to hold the release until John Sandweg, Counselor to the Secretary, reviewed the documents. She wrote:

Sandweg said he didn't review this. As we have discussed, for all responses that deal directly with the Front Office (s1, s2, COS), we should be certain to not only get Clint-

¹⁵ Email from John Sandweg to Mary Ellen Callahan (Sept. 17, 2010).

¹⁶ House Committee on Oversight and Government Reform, Interview of Catherine Papoi, at 102 (Mar. 3, 2011).

¹⁷ House Committee on Oversight and Government Reform, Interview of Vania Lockett, at 46 - 47 (Mar. 2, 2011).

level approval but also Sandweg as Counselor to the Secretary. Please pull this back and do not send out until he clears.¹⁸

Ms. Papoi then responded:

Since when do we have to send anything directly to Sandweg?? We have never sent anything directly to Sandweg before!¹⁹

The next day, August 20, 2010, Mr. Sandweg replied:

Sorry for the confusion. No worries here. Initially, however, we were presented with a different set of documents that looked like they contained PII [personally identifiable information]. We wanted OGC [Office of general Counsel] to take a look. In any event, none of those documents are in this package. Thanks for the help.²⁰

F. Paper Versus Electronic Documents

In an e-mail exchange on May 4, 2010, Ms. Papoi alleged that John Sandweg, Counselor to the Secretary, “knew” that a paper set of documents he submitted for review to the FOIA Office included fewer emails than an electronic set of the records compiled by the Office of the Chief Information Officer.²¹

On April 8, 2010, Mark Dorgan, a DHS FOIA Officer, sent an e-mail to Ms. Lockett and Ms. Papoi regarding the review of documents in response to a FOIA request. He wrote:

Mary Ellen [Callahan] called and said that Sandweg said to use hard copies that will be provided by John Sandweg for Mr. Kroloff and Ms. Shlossman’s emails.²²

On May 4, 2010, Ms. Lockett forwarded this e-mail to Ms. Papoi, noting that there were fewer documents in the paper set than the electronic set. She wrote:

We were advised that we should use the hard copies of emails provided by John Sandweg instead of the electronic copies. However, there are significantly fewer documents in the stack of hard copies, and we were not provided with any release recommendations. Do we know how or why certain documents were removed?²³

¹⁸ Email from Mary Ellen Callahan to Vania Lockett and Catherine Papoi (Aug. 19, 2010).

¹⁹ Email from Catherine Papoi to Mary Ellen Callahan and Vania Lockett (Aug. 19, 2010).

²⁰ Email from John Sandweg to Vania Lockett (Aug. 20, 2010).

²¹ Email from Catherine Papoi to Mary Ellen Callahan (May 4, 2010).

²² Email from Mark Dorgan to Vania Lockett (Apr. 8, 2010).

²³ Email from Vania Lockett to Catherine Papoi (May 4, 2010).

Later that day, Ms. Callahan consulted with Mr. Sandweg, who did not realize there was a discrepancy between the number of paper and electronic documents. Ms. Callahan informed Ms. Papoi to use the electronic set:

Talked to John, he thought the documents were the same, so use the electronic documents as the documents to be reviewed.²⁴

Ms. Papoi did not accept this explanation, but instead asserted that Mr. Sandweg knew about this discrepancy. She wrote:

John knew the docs were not the same as he told Mark to give him a copy of the CD.²⁵

Ms. Callahan replied:

John never looked at the disk, which is why he didn't know.²⁶

In an interview with Committee staff on March 7, 2011, Mr. Dorgan, the FOIA Officer who provided Mr. Sandweg with the electronic copies of the documents, affirmed that he did not speak with Mr. Sandweg about this discrepancy. He stated:

I am not sure what he thought. I just – like I say, I just gave him the CD and I took the records with me and then scanned them in and gave them to him.²⁷

When asked whether he ever discussed the issue with Mr. Sandweg, he said, “No.”²⁸

G. Communications with ICE

According to a press account on Monday of this week, a recent FOIA request sought communications between officials in the Secretary's office and U.S. Immigration and Customs Enforcement (ICE). According to the press report, both offices conducted document searches, but ICE located “embarrassing, crude exchanges” that the Secretary's office “never turned over.”²⁹

²⁴ Email from Mary Ellen Callahan to Catherine Papoi (May 4, 2010).

²⁵ Email from Catherine Papoi to Mary Ellen Callahan (May 4, 2010).

²⁶ Email from Mary Ellen Callahan to Catherine Papoi (May 4, 2010).

²⁷ House Committee on Oversight and Government Reform, Interview of Mark Dorgan, at 37 (Mar. 7, 2011).

²⁸ *Id.* at 46.

²⁹ *Emails: Insiders Worried Over Political 'Meddling'*, Associated Press (Mar. 28, 2011).

According to the same press report, William Holzerland, an Associate Director in the DHS Privacy Office, wrote an e-mail to Ms. Papoi in January that stated:

Apparently these embarrassing exchanges didn't get turned over when the (political) front office conducted its search but they did when ICE employees copied on these exchanges coughed up the responsive records.³⁰

According to the press report, Ms. Papoi then responded:

They don't like to abide by the law or be reminded that they are breaking it.³¹

Mr. Holzerland made the same allegation in his interview with Committee staff on March 4, 2011. He stated:

[T]he search conducted at ICE turned up additional records from the DHS front office that the search at the DHS front office did not turn up. So there is a concern of, I mentioned – there is always a concern of adequacy of search, because you know depending on the search terms and other things we want to make sure that we have as few holes in the net as possible or eliminate them to the extent we can.³²

In response, however, DHS explained that the Secretary's office never conducted its own search for documents for this request. The same press report that included these allegations also included a specific response from DHS spokeswoman Amy Kudwa. The press report stated:

Kudwa said on Monday that the department's FOIA unit had never asked Napolitano's political advisers to search their own emails about the immigration enforcement program.³³

H. Additional Non-Specific Allegations

In the course of the Committee's interviews, other non-specific allegations of withholdings were made.

For example, in her interview with Committee staff on March 3, 2011, Ms. Papoi disagreed that withholdings had been approved by either the FOIA Office or the Office of General Counsel. On July 21, 2010, DHS made the following public assertion:

³⁰ *Id.*

³¹ *Id.*

³² House Committee on Oversight and Government Reform, Interview of William Holzerland, at 88-89 (Mar. 3, 2011).

³³ *Emails: Insiders Worried Over Political 'Meddling'*, Associated Press (Mar. 28, 2011).

No information deemed releasable by the FOIA Office or General Counsel was withheld and responsive documents were neither abridged nor edited as part of the FOIA review process.³⁴

When asked whether she agreed with this statement, Ms. Papoi stated, “I would not agree with that.”³⁵ In explaining why she disagreed, Ms. Papoi discussed the two examples described above relating to swear words and comments on the Secretary’s attire, both of which she acknowledged were approved by the Office of General Counsel.

When asked whether she had any personal knowledge of other instances, Ms. Papoi responded:

I know there were instances. Off the top of my head, I can’t recall exactly what they were or what the cases were. But there were numerous times where we were – our hands were pushed to where we would have to withhold certain things because General Counsel asked that we do so. But more often than not, I will say, I mean, when I would push back, eventually they would come around to releasing it. I mean, while this isn’t true, I don’t think it was true very often.³⁶

Ms. Papoi did not provide additional examples, and her statement appears to confirm that the Office of General Counsel in fact approved these redactions. She went on to explain, however, that she had serious issues with the career official in the Office of General Counsel assigned to provide legal advice on FOIA matters.

When Ms. Papoi was asked for her assessment of this career attorney, she stated:

I do not consider him to have expertise in FOIA. There have been several times I have had to educate him on some very basic concepts.³⁷

Although some disputes between career officials in the FOIA Office and career officials in the Office of General Counsel are perhaps inevitable, they do not indicate that information was withheld for partisan political purposes.

³⁴ *Playing Politics with Public Records Requests*, Associated Press (July 21, 2010).

³⁵ House Committee on Oversight and Government Reform, Interview of Catherine Papoi, at 74 (Mar. 3, 2011).

³⁶ *Id.* at 103.

³⁷ *Id.* at 97.

III. INSPECTOR GENERAL REVIEW AND OTHER PROCESS ISSUES

At tomorrow's hearing, the DHS Inspector General will testify about the results of his office's review of the DHS FOIA program. The IG found that DHS "has made some important progress in the administration of FOIA." The IG also provided six recommendations to "build on successes and improve overall efficiency in the DHS disclosure program."³⁸

A. No Political Withholdings

In testimony for tomorrow's hearing, the IG found no instances in which information was withheld by the Secretary's office for partisan political purposes. The IG stated:

During our review, we learned that the Office of the Secretary was involved in examining several hundred FOIA requests prior to disclosure. This process was created so the department would be aware of certain FOIA requests that it deemed to be significant. After reviewing information and interviewing FOIA experts, we determined that the significant request review process of DHS ... did not prohibit the eventual release of information.³⁹

Several DHS officials explained why the current process was developed. For example, in her interview with Committee staff on March 9, 2011, Deputy Chief of Staff Amy Shlossman stated:

Throughout the beginning of the administration early 2009, there were a number of times when significant FOIAs went out of the Department that we had no awareness of. By 'we,' senior leadership of the Department. These were FOIAs that were involved in litigation that had other Federal department equities, White House equities, documents from the previous administration, that we had no awareness of. So we worked with the FOIA Office in order to set up a process where we would gain greater awareness of those documents before we were asked about them by the press or Members of Congress and other members of the public.⁴⁰

Similarly, Chief Privacy Officer Mary Ellen Callahan explained to Committee staff in her interview on March 14, 2011:

[E]arly in this administration, the Office of the Secretary felt blind sided when FOIAs went out involving activities they didn't know because it was the previous

³⁸ House Committee on Oversight and Government Reform, Testimony of DHS Inspector General Charles K. Edwards, *Hearing on "Why Isn't the Department of Homeland Security Meeting the President's Standard on FOIA?"*, 112th Cong. (Mar. 31, 2011) (available online at http://oversight.house.gov/images/stories/Testimony/Edwards_Testimony_3-31-11.pdf).

³⁹ *Id.*

⁴⁰ House Committee on Oversight and Government Reform, Interview of Amy Shlossman, at 10 (Mar. 9, 2011).

administration's, and then it became newsworthy events and discussions. So they spent a couple of days running around trying to find the documents, what was released and what wasn't released, and so on. So the Office of the Secretary has a legitimate right to know the activities of the department and wanted to have visibility into the FOIAs that were being produced.⁴¹

This evidence does not indicate that this process was initiated for partisan political purposes.

B. Limited Delays

The IG review concluded that "the involvement of the Office of the Secretary created some inefficiencies and delayed the eventual release in some cases." The IG explained:

Department officials stated that advance knowledge of significant releases can improve the DHS response to media inquiries that often follow public release of information about DHS activities. While the department has a legitimate need to be aware of media inquiries, we are not persuaded that delaying a FOIA release so that officials can prepare for expected inquiries is the best public policy. Again, the problem is that some of these inquiries unnecessarily delayed the final issuance of some FOIA responses.⁴²

In terms of the magnitude of these delays, Mary Ellen Callahan, the DHS Chief Privacy Officer, stated in her interview with Committee staff on March 14, 2011, that DHS received more than 130,000 FOIA requests in 2009 and more than 138,000 in 2010. Of these, she estimated that only "between 500 to 700 have been part of the awareness review" conducted by officials in the Secretary's office.⁴³ According to DHS, this was less than one half of one percent of all FOIA requests submitted.⁴⁴

According to Ms. Callahan, delay in responding to some of the FOIA requests was due to competing priorities in the Secretary's office. She stated:

⁴¹ House Committee on Oversight and Government Reform, Interview of Mary Ellen Callahan, at 45 (Mar. 14, 2011).

⁴² House Committee on Oversight and Government Reform, Testimony of DHS Inspector General Charles K. Edwards, *Hearing on "Why Isn't the Department of Homeland Security Meeting the President's Standard on FOIA?"*, 112th Cong. (Mar. 31, 2011) (available online at http://oversight.house.gov/images/stories/Testimony/Edwards_Testimony_3-31-11.pdf).

⁴³ House Committee on Oversight and Government Reform, Interview of Mary Ellen Callahan, at 45 (Mar. 14, 2011).

⁴⁴ Department of Homeland Security, *Article Fact Check* (July 2010).

Particularly in the early part of 2010 following the Christmas day attempted bombing, the front office had many different things to be working on. And I believe we discussed at length that the 3-day rule of thumb was missed on several of the FOIAs.⁴⁵

Ms. Callahan explained that she was unaware of any political motivations for delaying FOIA responses. She stated:

It was primarily because they were busy and they didn't get to be able to review the FOIAs for awareness. That is the only reason that I know of.⁴⁶

When Ms. Callahan was asked the impact the additional review process had on FOIA operations across the Department, she responded that it "had a negligible effect on FOIA processing overall."⁴⁷

The IG also described the extent of delays resulting from review by officials in the Secretary's office. He stated:

In many cases, delays under the review process were short – 1 to 4 days. These relatively brief delays still caused the temporary withholding of certain documents that a component was prepared to release. Other releases were delayed longer. In one example, the Office of the Secretary received a component's release on October 16, 2009. The review was delayed at least 10 calendar days because of higher-priority business in the reviewing office.⁴⁸

Information provided to the DHS Inspector General indicates that between October 1, 2009, and June 30, 2010, approximately 85% of FOIA responses submitted to the Office of the Secretary had already surpassed the statutorily mandated 20-day processing deadline before they were submitted to the Office of the Secretary. The median processing time for these requests before they were submitted to the Office of the Secretary was 64 days, and the median number of days pending in the Office of the Secretary was eight days.⁴⁹

⁴⁵ House Committee on Oversight and Government Reform, Interview of Mary Ellen Callahan, at 100 (Mar. 14, 2011).

⁴⁶ *Id.* at 101.

⁴⁷ House Committee on Oversight and Government Reform, Interview of Mary Ellen Callahan, at 60 (Mar. 14, 2011).

⁴⁸ House Committee on Oversight and Government Reform, Testimony of DHS Inspector General Charles K. Edwards, *Hearing on "Why Isn't the Department of Homeland Security Meeting the President's Standard on FOIA?"*, 112th Cong. (Mar. 31, 2011) (available online at http://oversight.house.gov/images/stories/Testimony/Edwards_Testimony_3-31-11.pdf).

⁴⁹ Department of Homeland Security Privacy Office, *Requests Deemed Significant by the Office of the Secretary*, Response to July 6, 2010, Office of Inspector General Document Request (Sept. 22, 2010).

C. Improvements to the Process

The IG found that significant improvements have already been made to the challenging DHS FOIA process. The IG noted that DHS alone received 18% of the federal government's total FOIA requests in Fiscal Year 2009, and the number of FOIA requests increased by 26% in Fiscal Year 2010. Recognizing "the inherent challenges in processing over a hundred thousand requests each year," the IG praised the work of the DHS Privacy Office. For example, the IG stated:

- FOIA Officers we interviewed had positive comments about the Privacy Office. They acknowledged the Privacy Office staff to be helpful in clarifying policy, offering guidance, and assisting FOIA processing efforts.
- FOIA Officers also noted that the Chief FOIA Officer ensures greater communication across the department on FOIA issues, which improves consistency and efficiency in the disclosure of information.
- We determined that the department's FOIA Public Liaison, who reports to the Chief FOIA Officer, has provided important assistance in working with DHS components and the public on FOIA disclosures. Our interviewees praised the FOIA Public Liaison for approachability, thoroughness, and knowledge of FOIA case laws.
- Proactive disclosure is considered as a method of providing certain information online, even if the material has not been requested. This increases the department's level of transparency, while potentially decreasing the number of FOIA requests that the agency receives. The Privacy Officer provided early guidance to components in this area, and we identified progress in the posting of various materials, such as the daily schedules of senior officials.⁵⁰

The IG also noted continuing improvements to the process for making the Secretary's office aware of significant FOIA requests through the use of the "SharePoint" system. The IG explained.

SharePoint is a computer-based system that enables multiple users to view the same information simultaneously. The Privacy Office uses SharePoint to provide multiple users with simultaneous access to significant FOIA responses. We acknowledge that the use of SharePoint is preferable to the abandoned process that delayed dozens of releases for long periods. Under the SharePoint process, the response was held for 3 days and then finalized under a presumed concurrence if there is no response by the Secretary's office. As of March 28, 2011, the response is now held for one day.⁵¹

⁵⁰ House Committee on Oversight and Government Reform, Testimony of DHS Inspector General Charles K. Edwards, *Hearing on "Why Isn't the Department of Homeland Security Meeting the President's Standard on FOIA?"*, 112th Cong. (Mar. 31, 2011) (available online at http://oversight.house.gov/images/stories/Testimony/Edwards_Testimony_3-31-11.pdf).

⁵¹ *Id.*

In her interview with Committee staff on March 3, 2011, Ms. Papoi praised these improvements. She stated:

I have to say, I like the new process of making people aware when documents are going out the door. I think it's important that everyone be aware of what's out there. I just think that maybe there's a way around it so that there isn't a delay and that the appearance of impropriety isn't so jarring. But I do love the fact that, you know, there's a system in place now for awareness. I think that's great.⁵²

D. IG Recommendations

The IG made six specific recommendations relating to the DHS FOIA process. The first three recommendations “relate to building on the FOIA progress that the Privacy Office has made.” The recommendations are:

- (1) We recommended that DHS develop additional policies on proactive disclosure that could help resolve some issues we learned about, such as, methods to ensure protection of proprietary information when contracts are proactively disclosed.
- (2) Also recommended, is formalizing the roles and responsibilities of the Public Liaison, who also has a statutory role, in resolving disputes among requesters and agencies.
- (3) Further, we recommended that the Privacy Office work with components to implement a regular internal review function. This would formalize the process used in some cases to improve FOIA performance in DHS components.⁵³

The next three recommendations propose “expanded use of the statutory authority held by the Chief FOIA Officer to make recommendations to the Secretary.” Under 5 U.S.C. § 552(k)(3), the Chief Privacy Officer is authorized to make recommendations “for such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve implementation of the Act.” The IG recommendations are:

- (4) Recommendation 4 in our report supports establishment of a policy related to the Chief FOIA Officer's use of the (k)(3) authority.

⁵² House Committee on Oversight and Government Reform, Interview of Catherine Papoi, at 87 (Mar. 3, 2011).

⁵³ House Committee on Oversight and Government Reform, Testimony of DHS Inspector General Charles K. Edwards, *Hearing on “Why Isn't the Department of Homeland Security Meeting the President's Standard on FOIA?”*, 112th Cong. (Mar. 31, 2011) (available online at http://oversight.house.gov/images/stories/Testimony/Edwards_Testimony_3-31-11.pdf).

- (5) Recommendation 5 recommends that the Secretary issue guidance on the President's vision that openness should prevail under FOIA.
- (6) Recommendation 6 specifically relates to FOIA staffing and the (k)(3) authority.⁵⁴

IV. WITNESSES

Panel One

- **Mary Ellen Callahan**
DHS Chief Privacy Officer
- **Ivan Fong**
DHS General Counsel

Panel Two

- **Charles Edwards**
DHS Inspector General
- **John Verdi**
Senior Counsel, Electronic Privacy Information Center

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⁵⁴ *Id.*