



**Statement of**

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**U.S. Department of Homeland Security**

**Before the**

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**Committee on Oversight and Government Reform**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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