



August 14, 2015

The Honorable Ron Johnson
Chairman
Committee on Homeland Security and Governmental Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Johnson:

This letter responds to your June 23, 2015, request that we analyze the involvement of non-career officials in the Department of Commerce Freedom of Information Act (FOIA) response process for the period of January 1, 2007, to the present. Your letter specifically requested that we determine whether non-career official involvement resulted in any undue delay of response to any FOIA request or the withholding of any document or portion of any document that would have otherwise been released; you also asked that we seek a certification from our Department's chief FOIA officer regarding these items.

In summary, nothing came to our attention that suggested non-career officials' involvement resulted in either undue delays or withholding of information. Departmental policies and procedures in place during the period, however, did not include a requirement to track specific individuals and associated career status in the FOIA process—and supporting documentation we reviewed did not contain this information. We also obtained a certification from the chief FOIA officer (enclosed), reflecting her knowledge of the FOIA process during her tenure.

To conduct our review, we interviewed the Department's chief FOIA officer, the Departmental FOIA officer, the Coordinated Review Team¹ (CRT) lead, and bureau FOIA officers.² Due to the quick response required in your letter, we asked bureau FOIA officers to identify specific requests that were potentially delayed by non-career official involvement. Among the 13 bureau FOIA officers, two bureau FOIA officers identified four requests that were potentially delayed by non-career personnel but not considered undue delays. We were able to obtain supporting documentation for all four of the requests. We reviewed this supporting documentation, paying

¹ The CRT is a Departmental team tasked with reviewing responses to selected FOIA requests prior to release in order to provide sufficient time for the Department to prepare for Congressional, media, or other inquiries related to a FOIA response.

² Interviews with FOIA Officers included the following bureaus: Office of the Secretary, Census Bureau, Bureau of Economic Analysis/Economic and Statistics Administration, Economic Development Administration, Bureau of Industry and Security, International Trade Administration, Minority Business Development Agency, National Institute of Standards and Technology, National Technical Information Service, National Telecommunications and Information Administration, National Oceanic and Atmospheric Administration, United States Patent and Trademark Office, and Office of Inspector General.



particular attention to both the content (e.g., statements related to delays and instances of withheld information) and personnel involved in correspondence.³

Our inquiry and review did not reveal more than limited roles for non-career officials in the Department's FOIA process. Non-career officials provide responsive records when in possession of such records and may serve as members of the CRT. We found that—although the CRT review contributed to delays in providing responses to a small number of FOIA requests—neither the FOIA offices nor the CRT tracked non-career officials' involvement in the process. Further, because membership of the CRT includes both career and non-career officials, we could not identify specific non-career individuals contributing to delays.

Non-career Officials Have Limited Roles in the FOIA Process

In interviews with the Departmental and bureau FOIA officers, FOIA personnel stated that involvement of non-career officials is limited to when (1) the FOIA request involves records maintained by non-career officials (as the gathering of responsive documents is generally performed by the record holder) and (2) non-career officials are members of the CRT. We were also informed that there is no Departmental policy requiring or prohibiting non-career officials to review FOIA requests.

FOIA officers are responsible for coordinating FOIA responses and engaging related office personnel in the search for responsive documents. The nature and specifics of the FOIA request dictate the personnel and office that the FOIA officer tasks with providing documents responding to the request. Generally, FOIA officers will either contact record owners directly or work through FOIA liaisons within their bureau to direct requests to specific responsive office personnel. For certain requests, non-career personnel may be in possession of responsive documents—and are then responsible for providing those documents to either a FOIA liaison or directly to the FOIA officer. During our interviews, none of FOIA officers were able to recall any instances of non-career officials contributing to undue delays or withholding responsive information to a FOIA request.

In addition to providing responsive documents to the FOIA officers, non-career personnel also serve on the CRT whose members include individuals from the Offices of General Counsel, Public Affairs, Legislative and Intergovernmental Affairs, Chief of Staff, and the Deputy Secretary.⁴ The CRT reviews a list of open FOIA requests weekly and identifies high-profile or sensitive requests for review prior to release. The request and responsive documents are provided to each member of the CRT for review. The Departmental FOIA officer and the CRT lead maintained that this process has been in place during the entire period under review and does not affect the timing of responses nor information disclosed in response to FOIA requests. However, our review found that the CRT contributed to delays, as discussed below.

³ Supporting documentation reviewed includes contents of the incoming FOIA request, details and documents related to the processing of the response, communications with and clearances received from the CRT, documents ultimately disclosed in interim, and final responses to the requestor.

⁴ Currently, there are two non-career members of the CRT, which is led by a career employee.

CRT Involvement Contributes to Delays but It Is Unclear Whether Non-Career Personnel Were Involved

Review of documentation—supporting four FOIA requests identified as potentially being delayed by non-career officials—disclosed that the CRT contributed to delayed response times. However, it was unclear whether non-career personnel were involved in the delay for these four requests reviewed by the CRT. A review of the files demonstrated that names of individuals involved in the processing of these FOIA requests, including the specific CRT members who reviewed the requests and responsive documents, are not documented. Current Departmental policy does not require bureaus to track individuals involved in the search for responsive documents and review of responses to FOIA requests.

Ultimately we found that, in all four requests, the bureaus were already past the 20-day statutory deadline when the CRT received copies of the responsive documents. As a result, the delays also could not be definitively considered undue or unnecessary. According to bureau personnel, the causes of delays included requests for voluminous documents or requests that involved coordinating responses among multiple offices within or outside the Department. To a lesser degree, FOIA personnel stated that inadequate staffing levels in both the FOIA and responsive bureau offices also contributed to delays in responses to FOIA requests. All of the FOIA officers with whom we communicated asserted that non-career official involvement in the FOIA process did not result in undue delays or withholding of any information in response to FOIA requests. Importantly, all of these FOIA officers expressed their understanding that they hold the ultimate authority in determining what information is released and redacted—and that non-career officials do not have the authority to delay or withhold information on a request.

Although our results indicated limited involvement by non-career officials and contributory delays by the CRT, our review disclosed no instances where non-career official involvement in the FOIA process caused undue delays or withholding of any information in response to FOIA requests. These results are solely based on interviews with selected Departmental officials and our review of information received related to four bureau-identified FOIA requests.⁵ We did not analyze a representative sample of responses to Departmental FOIA requests, nor did we interview or obtain information from other Departmental employees (such as FOIA liaisons) related to the FOIA response process.

⁵ We did not perform tests of the completeness on the data provided.

If you would like to discuss the results of this review, please contact me at (202) 482-4661.

Sincerely,

A handwritten signature in black ink that reads "David Smith". The signature is written in a cursive style with a large, prominent "D" and "S".

David Smith
Acting

Attachment

cc: The Honorable Thomas R. Carper, Ranking Member
Ellen Herbst, Chief Financial Officer and Assistant Secretary for Administration,
Department of Commerce



UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer
Assistant Secretary for Administration
Washington, D.C. 20230

AUG 10 2015

I, Ellen Herbst, am the Chief Financial Officer and Assistant Secretary for Administration at the Department of Commerce (DOC). In my role as Chief Financial Officer and Assistant Secretary for Administration and my role as Chief FOIA Officer, I oversee DOC's Office of Privacy and Open Government.

The Senate Committee on Homeland Security and Governmental Affairs requested by letter on June 23, 2015, that each department or agency's Office of Inspector General conduct a review of its process of complying with requests under the Freedom of Information Act (FOIA) to determine if non-career officials are involved in the FOIA process. I am providing this certification in connection with your review. I hereby confirm, to the best of my knowledge and belief, that from the period of January 1, 2007 to the present, no involvement by non-career officials has resulted in the undue delay of a response to a FOIA request or the inappropriate withholding of information that would have been provided but for the involvement of a non-career official:

A handwritten signature in cursive script that reads "Ellen Herbst", written over a horizontal line.

Ellen Herbst
Chief Financial Officer and
Assistant Secretary for Administration