



OFFICE OF
INSPECTOR GENERAL

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

November 19, 2010

The Honorable Charles E. Grassley
Ranking Member
Committee on Finance
United States Senate
219 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Grassley:

In a joint letter with Representative Darrell Issa, dated August 23, 2010, you described a new layer of political review in certain agencies' responses to requests under the Freedom of Information Act (FOIA), 5 United States Code, Section 552. You requested that we conduct an inquiry into Treasury's FOIA procedures to determine whether political appointees are made aware of information requests and have a role in request reviews or decision-making and, if so, the extent to which this occurs.

We have completed our inquiry into the FOIA procedures of Treasury. The preponderance of the evidence indicated that Treasury bureaus—the Bureau of Engraving and Printing, the Office of Thrift Supervision, the Office of the Comptroller of the Currency, the Financial Crimes Enforcement Network, the Financial Management Service, the U.S. Mint, the Treasury Inspector General for Tax Administration, the Special Inspector General for the Troubled Asset Relief Program, the Office of Inspector General, the Internal Revenue Service, the Bureau of the Public Debt, and the Alcohol and Tobacco Tax and Trade Bureau—have no procedures within their FOIA request and review process intended to, or tending to, make political appointees aware of information requests or offering them an opportunity to comment or influence the release of information.

However, in late 2009 Treasury Departmental Offices established a formal level of review above the disclosure officer for "sensitive information." "Sensitive information" includes internal correspondence, memoranda, e-mails, drafts, calendars, and travel logs of the Secretary, the Deputy Secretary, the Chief of Staff, the Deputy Chief of Staff, the Executive Secretary, Under Secretaries, Assistant Secretaries, legal advisors, senior advisors, and counselors. News media inquiries about any of the sensitive information or the positions involved also meet the general definition of "sensitive information." A small percentage of the documents subject to the sensitive information review process have been provided to the White House Office of Counsel for review and comment. Although that office made some comments and recommendations as a result of its reviews,

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White House involvement appears to have been minimal and limited in scope. We identified no comments or proposed redactions that appeared to be made in bad faith or based on an inapplicable FOIA exemption. Aside from review by White House Counsel, we have found no indications that political appointees are involved in the Treasury FOIA review process.

We are providing copies of our report to Ranking Member Issa, as well as Chairmen Baucus and Towns. If we may provide further information regarding the inquiry, please call me at (202) 622-1090, or a member of your staff may contact my counsel, Rich Delmar, at (202) 927-3973.

Sincerely,

A handwritten signature in black ink, appearing to read 'EMT', with a long horizontal line extending to the right.

Eric M. Thorson
Inspector General

Enclosure

REPORT OF INQUIRY

TREASURY FREEDOM OF INFORMATION ACT REQUEST REVIEW

Background and Summary:

By letter dated August 23, 2010, Senator Charles Grassley, Ranking Member, Senate Committee on Finance, and Representative Darrell Issa, Ranking Member, House Committee on Oversight and Government Reform, requested that the Department of the Treasury Inspector General inquire into the procedures applicable to consideration of and disclosures of information pursuant to a Freedom of Information Act (FOIA) request. Their inquiry noted that they were concerned about the Department of Homeland Security's practice of directing that certain types of inquiries be reviewed by political appointees prior to any disclosures. Referring to this practice, Senator Grassley and Congressman Issa asked that the Treasury Inspector General "conduct an inquiry into the agency's FOIA office to determine whether, and if so, the extent to which political appointees are made aware of information requests and have a role in request reviews or decision-making." This office conducted the requested review, and this report sets forth our findings and conclusions.

The preponderance of the evidence obtained during the inquiry indicated that Treasury bureaus—the Bureau of Engraving and Printing, the Office of Thrift Supervision, the Office of the Comptroller of the Currency, the Financial Crimes Enforcement Network, the Financial Management Service, the U.S. Mint, the Treasury Inspector General for Tax Administration, the Special Inspector General for the Troubled Asset Relief Program, the Office of Inspector General, the Internal Revenue Service, the Bureau of the Public Debt, and the Alcohol and Tobacco Tax and Trade Bureau—have no procedures within their FOIA request and review process intended to, or tending to, make political appointees aware of information requests or offering them an opportunity to comment or influence the release of information. The inquiry did determine that in late 2009, Treasury Departmental

Offices established a formal level of review above the disclosure officer for "sensitive information." A small percentage of the documents subject to the sensitive information review process have been provided to the White House Office of Counsel for review and comment. Although that office made some comments and recommendations as a result of its reviews, White House involvement appears to have been minimal and limited in scope. The inquiry identified no comments or proposed redactions that appeared to be made in bad faith or based on an inapplicable FOIA exemption.

Scope of Inquiry:

We spoke with 17 witnesses, including the General Counsel of the Department of the Treasury and the officials in charge of the FOIA programs of the Treasury Departmental Offices (DO), the Financial Management Service (FMS), the Alcohol and Tobacco Tax and Trade Bureau (TTB), the Office of the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS), the Bureau of Engraving and Printing (BEP), the Bureau of the Public Debt (BPD), the Financial Crimes Enforcement Network (FinCEN), the Internal Revenue Service (IRS), the U.S. Mint, the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) and the Treasury Inspector General for Tax Administration (TIGTA). We also reviewed the Department of Justice FOIA guidelines and over 2,000 pages of documents, including meeting agendas, FOIA requests, proposed disclosures, and redactions.

Standards:

Title 5, United States Code (USC), Section 552, "Public information; agency rules, opinions, orders, records, and proceedings," paragraph (3)(A) states, in pertinent part,

. . . each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

31 Code of Federal Regulations Part 1, "Disclosure of Records,"

Appendix A, "Departmental Offices," states the following:

The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

The President's Memorandum for the Heads of Executive Departments and Agencies, subject: "Freedom of Information Act," dated January 21, 2009, similarly states the following:

The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

Facts:

Witnesses with knowledge of their bureau's or office's FOIA procedures generally stated that there was no additional level of review by or notification of political appointees of certain FOIA requests.

Specifically, representatives of BPD, BEP, FMS, FinCEN, OTS, the U.S. Mint, SIGTARP, and TIGTA stated that FOIA inquiries in those bureaus were subject to no notification or review beyond that of the FOIA disclosure office. Likewise, this Office has no procedures for additional review by political appointees. All FOIA inquiries in these bureaus were treated equally, whether they came from news media or individuals. These witnesses stated that they knew of no cases in which a

senior official or appointee had attempted to intervene in the FOIA disclosure process or to influence consideration of a request in any manner.

SIGTARP's Program Specialist for FOIA stated that the Chief Counsel, not a political appointee, was the release authority. SIGTARP received FOIA requests forwarded from Treasury DO. The Program Specialist stated that she would retrieve the requisite records and complete redactions and documents for the Chief Counsel's signature. She stated that all requests were treated equally and that there was no additional sensitive review process for any request.

TTB's FOIA manager stated that she did notify the bureau's public affairs office when she received requests from news media outlets but that TTB's process and proposed responses to FOIA requests were never reviewed or changed by senior officials or appointees. She stated that in no instance had a political or higher management official directed her to change, delay, or refuse a response.

OCC's senior FOIA specialist stated that although OCC had no formal requirement to refer particular requests higher up the command chain within OCC, or to any other office within Treasury, her supervisor did send a weekly report to the Deputy Comptroller for Public Affairs showing what the witness described as "hot items," such as FOIA requests from news media outlets. However, she said that she had never seen or heard of any instance in which a FOIA response was delayed, ignored, or specially treated, or any instance in which anyone outside her office directed redactions or withholding beyond what her office had decided was appropriate.

The Public Liaison for IRS headquarters and the IRS Tax Check Office, who is also an authorized disclosure officer, stated that a sensitive case report would be prepared for FOIA requests from a "major media" requestor. The witness stated that "major media" requestors could include not only traditional news media, but also web loggers ["bloggers"] and web logging sites. She defined a sensitive case as a request for information from a major media requestor that was likely to attract news media or congressional interest, involved large dollar amounts, or involved unique or novel issues. The sensitive case report would be forwarded to both the

Chief Disclosure Officer and the Director of Communications, Liaison, and Disclosure of the IRS Small Business/Self-Employed Division. The Director of Communications, Liaison, and Disclosure would then decide whether the proposed material was being appropriately disclosed. The witness stated that that, with the exception of sensitive cases, requests and disclosures were only rarely reviewed by the Director of Communications, Liaison, and Disclosure. Requests from private individuals or other non-major media requestors did not go through the additional review that inquiries from media outlets did. The witness stated that the careful review of proposed disclosures through sensitive case reports ensured that such disclosures were correctly decided, particularly if the releasers decided to aggregate and release information that otherwise might be exempted from disclosure¹. However, she testified, no political appointees were involved in the process.

The witnesses from DO stated that there was a formal level of review for FOIA requests above that of the disclosure officer. A witness provided a copy of an undated document, Proposed Policy for Executive Level Clearance of Sensitive Information Under [the] FOIA Process. The policy contained the following definition of sensitive information:

Controlled unclassified information materials including internal correspondence, memoranda, emails, drafts, calendars, and travel logs of the Secretary, the Deputy Secretary, the Chief of Staff, the Deputy Chief of Staff, the Executive Secretary, the Under Secretaries, Assistant Secretaries, legal advisors, senior advisors, and counselors. Press inquiries about any of the sensitive information or the positions involved also meet the general definition of "sensitive information."

The policy's stated purposes were to ensure the appropriate review of all sensitive information; ensure that the appropriate offices were fully informed that sensitive materials were in the process of being reviewed for possible release; inform the designated review office staff of applicable exemptions that might apply

¹ The witness provided an example of a request which would require documents bearing personally identifying information: such releases are subject to exemption, but if the requestor's goal can be fulfilled by collating the information, or aggregating numerous sources to provide a generalized and non-personally identifiable response, this will be done.

to the materials; provide a discreet and specific process step for the designated review offices to assess and review the possible release of information; and ensure that all applicable statutes, regulations, and internal guidelines were followed in the review and release of materials.

The Director of DO's Office of Disclosure Services stated that the sensitive review process was initiated in late 2009, when his supervisor asked him for it. He said that once a request was determined to be sensitive under the policy, the process was the same for each such request: a review committee would review each request and the responsive records. He stated that there were as many as 46 separate offices in DO, which could be broken down into an even larger number of components. The sensitive review process was intended to provide a coordinated DO response to FOIA requests for sensitive information.

The DO review committee typically consisted of representatives from the Office of Public Affairs, Office of Legislative Affairs, Office of General Counsel, and Office of the Executive Secretary. The witness stated that none of the members of the committee was a political appointee. He explained that when DO received a sensitive request, the FOIA point of contact (POC) for the responsive office/department involved within DO would generally obtain the requested records, and the POC or someone with specific expertise on the records would then make a presentation on the records to the committee. The proposed redactions made by the POC or subject-matter expert were shared on the "Sharepoint" information-sharing and content management system so that each office could review the material individually. Once the committee made a determination on the scope of exemptions, the records were passed back to the office with primary responsibility for release. According to the witness, from December 2009 through September 2010, the Office of Disclosure Services received and reviewed 740 FOIA requests, which included imperfect requests, as well as those that were referred to other agencies, offices, or bureaus. A total of 336 information requests were issued to DO offices for response. Of these, 74 went into sensitive review, and 54 completed sensitive review. Some are still pending.

The DO witness stated that he would not characterize the time a FOIA request spent in the sensitive review process as "additional time," because the process was intended to get various offices involved to coordinate the response. He said that he did not know the degree of influence or involvement by political appointees but acknowledged that documents involving "White House equities"² were sent to the Office of White House Counsel for review and suggested treatment.³

If the records requested were not sensitive, he stated, the POC for the responsive office or department would generally hand off the search for records to someone with FOIA experience. Some offices used contractors for assistance with redactions. The recommended redactions would be given to the POC, who would review them and determine whether there were other "equities" involved. If the records retrieved belonged to another agency, said the witness, the request might be referred to that agency.⁴ The witness stated that for non-sensitive FOIA requests, someone in the office who was a custodian of records or another responsible government official would usually send the records to the requestor.

Treasury's Deputy General Counsel stated that DO's sensitive review policy had been started in 2009, prior to his arrival at Treasury, by the previous Executive Secretary. He stated that the purpose of the review committee was not to "vet" exemptions. Instead, he said, its purpose was to determine when information was going to be released and to look after intra-office interests because release might affect "the equities of other offices" --that is, of offices other than the responsive office. He stated that the policy was a means to ensure that each office with an interest in the requested documents had an opportunity to review and comment prior to disclosure. The Deputy General Counsel stated that various time-saving initiatives, such as electronic processing, enabled the process to be streamlined and

² The witness explained that "addressing the equities" meant "to coordinate" with other offices having an interest in the requested material.

³ Our review of the documents indicated that "White House equities" were involved when a member of the White House staff was a recipient or a commenter in an e-mail chain.

⁴ This is consistent with Treasury FOIA practice; see 31 C.F.R. § 1.5(c).

handled on a more efficient, biweekly basis. The DO witness recalled no documents that should legally have been released but had not been.

The Chief of Staff, who at the time of the interview was also serving as Executive Secretary, stated that although there were agendas of the meetings, the committee did not keep minutes of the proceedings. He stated that he rarely told the Secretary about pending disclosures. The information on committee agendas tracked the status of document sets that were to undergo the sensitive review process but contained no detailed comments on the results of these reviews.

The Deputy Assistant Secretary for Privacy, Transparency, and Records within DO provided us with an Excel spreadsheet that listed 31 FOIA requests subject to committee review. The spreadsheet indicated that 13 of these requests were forwarded to the White House, which is by its nature a political venue. Hence, we requested and reviewed all 13 of the requested information sets in order to evaluate the type of review and commentary provided by committee members and White House contributors.

The Associate Attorney General's FOIA Memo on White House Records, dated October 3, 1993, required that records originating with any part of the "White House Office" be forwarded to the Office of White House Counsel for recommendation or comment, including any assertion of privilege, prior to the agency's response to the FOIA requestor. None of the document sets we reviewed appeared to originate with the White House; however, they did include e-mails and some commentary written by White House personnel.

A note on one FOIA request considered by the committee indicates that the White House opined that 3 of 8 pages sent to the White House for review by Treasury were "not responsive" and that 10 pages of the original 13-page document retrieval contained information withheld under a (b)(5)⁵ and presidential privilege exemption. We reviewed all of the documents concerned, as well as

⁵ 5 U.S.C. § 552(b)(5) protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The provision has been interpreted to exempt documents that are normally privileged in the civil discovery context.

contemporaneous e-mails of the redacting disclosure officer indicating that the officer took reasonable steps to ascertain the validity of the claimed exemption. We found that 10 pages were withheld as deliberative process documents under (b)(5) but did not involve a presidential communications privilege.

Of the 13 "sensitive review" requests sent to the White House for review, 3 were from Bloomberg News, 2 were from Judicial Watch, and the remaining 8 were from separate and unrelated requestors.

Conclusion:

The preponderance of the evidence indicated that BEP, OTS, OCC, FinCEN, FMS, U.S. Mint, TIGTA, SIGTARP, OIG, BPD, IRS, and TTB had no procedures within their FOIA request and review process tending to make political appointees aware of information requests or offering them an opportunity to comment on or influence the release of information. Likewise, we found no evidence that these bureaus' procedures granted any political appointee a role in either reviewing the request or making decisions on it. Although some of the bureaus had additional procedures for review or notification for requests from news media outlets, the additional procedures did not include political appointees or give a right of decision to either appointees or other individuals with no substantive concern in correct application of FOIA exemptions.

DO's formalized "sensitive review" FOIA processing procedures did not, with the exception of referrals to the Office of White House Counsel, include review by a political appointee. Although the Office of White House Counsel made some comments and recommendations in the "sensitive review" process, White House involvement appeared minimal and limited in scope. Our review of the material and proposed redactions did not indicate that material was improperly redacted or refused release; however, the White House review was responsible in several cases for adding a significant processing delay, affecting Treasury's ability to meet FOIA's mandate of prompt disclosure.

Our review indicated that the redactions made to documents subject to White House review were generally appropriate in scope and detail. We found

some instances where redactions might have been made and were not, but we did not find instances in which information was improperly protected from release because it was improperly designated as excluded material or because of a potential political motive. For comparison, we reviewed a small sample of the non-White House "sensitive review" document sets and found the exemptions similarly legitimate.