

Grading the Government: How the White House Targets Document Requesters

In 2010, *The Associated Press* (AP) uncovered how the Department of Homeland Security (DHS) [blatantly politicized the Freedom of Information Act \(FOIA\) process](#) by having senior political appointees review requests. The story read:

For at least a year, the Homeland Security Department detoured requests for federal records to senior political advisers for highly unusual scrutiny, probing for information about the requesters and delaying disclosures deemed too politically sensitive, according to nearly 1,000 pages of internal e-mails obtained by *The Associated Press*.

The department abandoned the practice after AP investigated. Inspectors from the department's Office of Inspector General quietly conducted interviews last week to determine whether political advisers acted improperly.

E-mails obtained by AP through FOIA indicated that documents implicating “White House equities” were sent by DHS to the White House Counsel’s Office for review. But what, precisely, are White House equities? And under what authority is that term defined or is White House review permitted?

In a subsequent hearing before the House Committee on Oversight and Government Reform, Rep. Jason Chaffetz [questioned](#) Mary Ellen Callahan, the Chief Privacy Officer of DHS, about the meaning of White House equities:

Mr. Chaffetz. *Let me read another paragraph. “Two exceptions required White House review, request to see documents about spending under the \$862 billion stimulus law, and the calendars for cabinet members, those required White House review,” is that correct?*

Ms. Callahan. *The calendars—anything that has White House equities would require White House review. That is—*

Mr. Chaffetz. *What is a White House equity? What does that mean?*

Ms. Callahan. *In the circumstances with the Secretary’s calendar to the extent that she was in the White House, or that was a—disclosing some sort of element. This is a typical process of referring FOIA requests to different departments. It may be their underlying records. That is a standard process throughout the—*

Mr. Chaffetz. *The other part of that is under the \$862 billion stimulus; is that correct? Is that part of the White House equity? It says “Two exceptions required White House review. Request to see documents about spending under the \$862 billion stimulus law,” is that correct?*

Ms. Callahan. *That is correct.*

Mr. Chaffetz. *Why? Why does that require a special White House review?*

Ms. Callahan. *Sir, I'm the chief FOIA officer; I'm not a policy person in this area.*

Mr. Chaffetz. *So is that a directive that you got from the White House?*

Ms. Callahan. *I believe I was instructed by the Office of the Secretary to do that, and we processed it—*

Three years after the above testimony, Cause of Action confirmed that Congressman Chaffetz was right about the source of authority that required “special White House review.” In an April 2009 memo that we obtained from the Department of Justice (DOJ) last year, the Counsel to the President reminds department and agency general counsels to send to the White House for consultation all records involving “[White House equities](#)” collected in response to any document request. This unpublicized memo stands in stark contrast to President Obama’s January 2009 [memo on FOIA](#) and transparency, and Attorney General Holder’s [March 2009 FOIA memo](#), each of which were publicly lauded as models of transparency.

THE WHITE HOUSE

April 15, 2009

MEMORANDUM FOR ALL EXECUTIVE DEPARTMENT AND AGENCY GENERAL COUNSELS

FROM: GREGORY CRAIG, COUNSEL TO THE PRESIDENT

SUBJECT: Reminder Regarding Document Requests

This is a reminder that executive agencies should consult with the White House Counsel’s Office on all document requests that may involve documents with White House equities. We ask that such consultation take place well in advance of the deadline for responding.

This need to consult with the White House arises with respect to all types of document requests, including Congressional committee requests, GAO requests, judicial subpoenas, and FOIA requests. And it applies to all documents and records, whether in oral, paper, or electronic form, that relate to communications to and from the White House, including preparations for such communications.

Please be in touch with your points of contact in the White House Counsel’s Office or, if you are uncertain whom to contact, please call Chris Weideman (202-456-3096) or Blake Roberts (202-456-2948). We will respond to your requests promptly.

The practice of sending agency records to the White House for review is not entirely new. In 1993, for example, DOJ instructed agencies to send “White-House-originated” records to the White House Counsel’s Office whenever they were located in response to FOIA requests. However, the current White House consultation policy is substantially broader in scope. First, it expands the types of documents subject to White House review to include “Congressional committee requests, GAO requests, [and] judicial subpoenas.” Additionally, these documents need not “originate” from the White House, as the DOJ instructed in 1993, but need only involve “White House equities,” an undefined term that can be

construed to include any records in which the White House might be interested. Cause of Action continues to investigate the breadth of the term “White House equities” to determine where and when the White House is influencing FOIA and Congressional document requests.

The White House Counsel’s Office is receiving, reviewing, and actually demanding access to information that it previously would not have been able to review under FOIA.

An instructive example of how “White House equities” is construed – and ultimately abused – is the White House’s review of FOIA requests concerning the well-publicized conference spending scandal at the General Services Administration (GSA). E-mails between GSA and the White House Counsel’s Office show that the Administration affirmatively sought to review document requests related to politically-sensitive issues.

In early April 2012, the media reported that GSA had squandered [\\$822,000 taxpayer dollars](#) on a posh conference in Las Vegas -- a scandal that drew heavy criticism for the Administration. Only a few weeks later, on May 1, 2012, Seth Greenfeld, a senior assistant general counsel at GSA, [forwarded five FOIA requests](#) related to the conference to Jonathan Su, a lawyer at the White House Counsel’s Office and Special Assistant to the President. Greenfeld told Su, “Per your request, here are the five FOIA requests that in some manner ask for the 2010 Western Regions Conference website and its contents.”

GSA’s Office of Public Affairs also sends notification of sensitive FOIA requests to the White House Office of the Press Secretary. On January 16, 2013, then-GSA Deputy Press Secretary Dan Cruz [e-mailed](#) White House Assistant Press Secretary Matt Lehrich to alert him of a request from Brad Heath at *USA Today*. The request asked for the job descriptions and responsibilities of employees working in communications for federal agencies.

Outside scrutiny of FOIA requests to GSA is not new, according to a report from the GSA Inspector General (IG). A [March 23, 2010 request](#) from Cox Television was significantly delayed after GSA provided the responsive documents to both the House of Representatives and the White House Counsel’s Office for comment. The request sought e-mails “between the GSA and the staffs of U.S. Representatives Nancy Pelosi, Silvestre Reyes, and Zack Space.” At the time of the IG report in September 2010, the request had been pending for 118 days. The statutory response deadline for FOIA is 20 business days, or 30 business days in unusual circumstances.

The White House also requested to see FOIA requests related to renovations to the Secretary’s bathroom at the Department of the Interior (DOI), as discussed in an [April 12, 2013 e-mail](#) from Greenfeld to Su. The DOI bathroom renovation cost taxpayers \$222,000 and was [widely reported](#) in January 2013.

The fact that the White House actively sought not merely proposed production but actual requests from media requesters provides some evidence that the Administration was sensitive to the media. In fact, the Department of the [Treasury](#), Department of [Defense](#), and the Department of [Housing and Urban Development](#) have their own sensitive review process for media requesters. All the more egregious is the fact that the President has used White House equities to reverse the FOIA process: FOIA is designed to inform the public on government behavior; White House equities allow the government to withhold

information from the media, and therefore the public, by having media requests forwarded for review. This not only politicizes federal agencies, it impairs fundamental First Amendment liberties.

No established law, regulation or guidance defines “White House equities” yet the term is widely used by the Federal Government.

At the Department of the Interior (DOI), the meaning of “White House equities” is unclear even to FOIA specialists. FOIA Specialist Richard Ha described the nature of documents prepared for White House review in a [December 14, 2012 e-mail](#) to DOI FOIA Officer Clarice Julka:

DOI OS FOIA office located and organized responsive electronic mail from 42 [individuals] into 42 pdf files, one pdf file for each individual. Six pdf files had joint DOI-White House records **that could be interpreted as White House equities**. These six pdf files either had electronic mail sent to, from, or cc'ed White House officials; or had some discussion of White House activities.
(emphasis added)

The Department of the Treasury’s Inspector General [described equities](#) as “having an interest in the requested material,” and noted 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.” Under DOJ’s 1993 guidance, it is unclear that e-mails sent to or carbon copied to White House officials would be considered documents “originated” from the White House and eligible for review in a document request. Nevertheless, the Treasury IG found that of [13 requests](#) that Treasury sent to the White House for review, “none of the document sets that [the IG] reviewed appeared to originate with the White House,” with the exception of some e-mail written by White House officials.

Congressional document requests have been significantly delayed by White House review.

Congressional requesters have also had their document productions slowed by White House review, as evidenced by [a FOIA request](#) that Cause of Action sent to the Environmental Protection Agency (EPA) regarding White House review on July 2, 2013. The EPA [responded](#) to our request after 64 business days on September 30, 2013 with internal e-mails showing that White House review delayed an April 10, 2013 joint [document request](#) from the House Oversight and Government Reform Committee and the Senate Committee on Environment and Public Works. In response to our findings, the House Oversight and Government Reform Committee, on [November 8, 2013, subpoenaed](#) the EPA for communications with White House officials regarding the agency’s delay to a congressional document request.

Documents obtained from the DOI show that the National Park Service failed to respond to a Congressional document request after sending documents to the White House for review. The House Oversight and Government Reform Committee asked the National Park Service for documents on [March 27, 2013](#) with a due date of April 10, 2013. The documents were sought in preparation for a [hearing](#) on April 16, 2013 regarding “The Federal Effort to Minimize the Sequester’s Impact on Access to Our Nation’s Capital and National Treasures.” After failing to provide documents for the hearing, DOI’s Deputy Director in the Office of Congressional and Legislative Affairs Jason Buckner [emailed](#) DOI’s Associate Solicitor-General Edward Keable about a possible subpoena for the documents. The documents were collected and sent to White House Counsel Daniel Dominguez, Office of Management and Budget’s Thomas Hitter, and DOJ Office of Legal Counsel’s Paul Colborn for review on April 17, 2013.

After more than six months, the documents still had not been delivered and the Committee issued a [subpoena](#) on October 30, 2013.

White House review delays the release of records and violates both the letter and spirit of FOIA.

The White House Counsel's Office does not passively review or provide only "advice" on agency document requests, but instead is relied upon by the agencies as an authoritative decision-maker. The e-mails Cause of Action obtained from the EPA reveal that agency employees [asked the White House Counsel's Office](#) if they "concur" on the release. One subject line read: "WHO documents to classify for FOIA response," which suggests that the White House Counsel's Office would take part in redacting or withholding documents.

The White House review process predictably delays the agency's ability to timely respond to FOIA requests. Cause of Action obtained first-hand evidence of this from GSA's processing notes pertaining to one of our FOIA requests. These notes indicate that the GSA Office of General Counsel was confused as to why it received the request so late. Specifically, Senior Assistant General Counsel Seth Greenfeld [asked](#) General Counsel Kris Durmer why his office was receiving the request fifteen days after the agency received it, commenting that "our response time is ticking." Durmer replied: "WH Counsel Justin Florence (202) [redacted]."

Re: FYI FOIA 261307

Kris Durmer - L <kris.durmer@gsa.gov>
To: Seth Greenfeld - LG <seth.greenfeld@gsa.gov>

Wed, Dec 11, 2013 at 5:01 PM

WH Counsel Justin Florence (202) (b) (6)

On Wed, Dec 11, 2013 at 3:57 PM, Seth Greenfeld - LG <seth.greenfeld@gsa.gov> wrote:
I am trying to find out why it came in to GSA on November 26 but OGC is just getting it on December 11. Our response time is ticking.

Seth S. Greenfeld
Senior Assistant General Counsel
General Law Division, Office of General Counsel
U.S. General Services Administration
(202) (b) (6)

Delays caused by White House review often extend well beyond fifteen days. For example, DOI's Inspector General [found](#) a series of six-year-old FOIA requests from a *Los Angeles Times* reporter that had been held up in White House review for two years. The requests dealt with "communications between the White House and high-ranking Interior officials on various politically sensitive topics." Despite a clear timeline of political meddling, but citing a lack of definitive proof, the IG concluded that "the considerable delays involved could [only] *indicate* political appointee involvement." (emphasis added)

Because 5 U.S.C. § 552 legally mandates that agencies “promptly” produce documents, FOIA officers are not inclined to inform FOIA requesters that a request has been sent to languish at the White House. Occasionally, however, this is not the case, as with a [request to the Department of Health and Human Services](#) (HHS) by CJ Ciaramella at the *Washington Free Beacon*, which spent 62 business days in White House review. Ciaramella [reported](#):

“Your request was completed and ready to go in October, but it had White House materials,” an HHS FOIA specialist said over the phone in November when asked for an update. “It’s been sent up to them for review.” More than three months later, the Free Beacon received 200 pages of e-mails, nearly every one redacted.

In 2013, Cause of Action sent 20 FOIA requests to various agencies regarding the review of agency records by the Office of White House Counsel. As of March 1, 2014, only 4 agencies have produced documents with a median response time of 63 days.

According to documents from GSA, DOI, and EPA, at least 18 FOIA or other document requests were sent to the White House for review between 2012 and 2013. USDA’s [response](#) to our request was so heavily redacted that even e-mail subject lines were blacked out; there was no way to tell how many or which FOIA requests were sent for White House review.

Cause of Action is still waiting for documents from 16 federal agencies, with the Department of Treasury having the longest pending request of 202 business days. The Department of Energy is a close second at 169 business days. The requests to the Department of Defense and Department of Health and Human Services have been pending for 138 business days.

Complex Request

Response time	Agencies
Within 20 days	0
21-30 days	1
After 30 days	3
Not fulfilled	16

Agency	Request Date	Final Response	Response Time*	Documents
GSA	11/26/2013	1/9/2014	30	PDF
EPA	7/2/2013	9/30/2013	63	PDF
DOI**	8/9/2013	11/8/2013	64	PDF
USDA	11/26/2013	2/27/2014	93	PDF
Education	11/26/2013	Response Pending	73	
Commerce	11/26/2013	Response Pending	73	
DHS	11/26/2013	Response Pending	73	
DOJ	11/26/2013	Response Pending	73	
DOL	11/26/2013	Response Pending	73	
DOT	11/26/2013	Response Pending	73	

HUD	11/26/2013	Response Pending	73
NARA	11/26/2013	Response Pending	73
NASA	11/26/2013	Response Pending	73
SBA	11/26/2013	Response Pending	73
State	11/26/2013	Response Pending	73
VA	11/26/2013	Response Pending	73
DOD**	8/9/2013	Response Pending	147
HHS**	8/9/2013	Response Pending	147
Energy**	6/26/2013	Response Pending	178
Treasury**	5/9/2013	Response Pending	211

Response Complete Days Pending

*As of March 14, 2014

** Government shutdown ran October 1 through October 16, 2013 (10 business days) which is subtracted from pending days.

Requests that Received White House Review 2012-2013:

Based upon the four FOIA productions that we have received thus far, these are the eighteen identifiable document requests were subjected to White House review from 2012-2013.

EPA

1. Congressman Paul Broun, Chairman Subcommittee on Oversight, Committee on Science, Space, and Technology
2. House Oversight and Government Reform, Majority Office
3. James Goodwin, Center for Progressive Reform
4. Unnamed requester for former EPA Administrator Jackson's 2009-2010 schedule
5. Jason Smathers, frequent requester at MuckRock.com
6. Response to Issa/Vitter letter to EPA regarding FOIA practices at EPA
7. Landmark Legal Foundation

DOI

1. Connie Brooks, C.E. Brooks & Associates P.C.
2. House Oversight and Government Reform, Majority Office
3. Michael Kunzelman, *The Associated Press*
4. Buster Johnson, Chairman of the Mohave County Board of Supervisors
5. Earthjustice

GSA

1. All FOIA requests related to GSA Las Vegas scandal
2. Brad Heath, *USA Today*
3. Scott MacFarlane, *Cox Media*
4. Russ Ptacek, *WUSA9*
5. Jennifer Peebles, *Washington Examiner*
6. Kate Bailey, Judicial Watch

Why is “the most transparent administration in history” interfering in the FOIA process?

The Obama Administration cannot credibly claim to be transparent when it publicly issues memos about the presumption of openness in the FOIA process, but then instructs agencies in a non-public memo to forward records with “White House equities” to the White House for review. Not only is the FOIA process significantly stalled by White House review—a fact that agencies zealously keep secret from requesters—but it permits the White House’s political interests to trump the correct application of the FOIA, a disclosure statute whose purpose is ensure an informed citizenry.

Federal agencies and the White House are failing to provide the promised transparency to the American people, but there are changes that would improve the process for FOIA requesters. First, White House review should be strictly limited to “White House-originated” records, as set forth in the [1993 DOJ guidance](#). The Office of White House Counsel should not be able to review documents and requests just because they include politically sensitive information.

Second, agencies should be required to inform requesters in writing whenever records are forwarded to the White House for review. There is ample precedent for this notification. Guidance from [DOJ’s Office of Information Policy](#) suggests that “[w]hen providing updates to requesters on the status of their requests, [agencies should] include information concerning ongoing consultations.” Further, agencies are required to notify requesters when they forward Exemption 4-related records to business submitters pursuant to [Executive Order 12600](#).

Lastly, agencies should be required to identify in their annual FOIA reports the total number of requests involving White House review, including the median processing time. Again, there is precedent for this. Currently, agencies are required to report the total number of consultations they receive from other agencies, including the number of consultations they processed and that remain pending.