



OFFICE OF GOVERNMENT INFORMATION SERVICES

COMPLIANCE REVIEW OF THE

TRANSPORTATION SECURITY ADMINISTRATION'S

FREEDOM OF INFORMATION ACT PROGRAM

MANAGEMENT OVERSIGHT, TRAINING ON TECHNOLOGY USE, AND CLEAR COMMUNICATION WITH REQUESTERS NEEDED

A Message from the Director

The OPEN Government Act of 2007 established the Office of Government Information Services (OGIS), codified at 5 U.S.C. § 552(h), and mandated that the office review agencies' Freedom of Information Act (FOIA) policies, procedures and compliance. This report is the third of six reviews we are conducting of components of the Department of Homeland Security (DHS). At the completion of our reviews, we will also release a final report to DHS with our findings and recommendations.

Since OGIS opened in 2009, we have been a resource for both FOIA requesters and federal agencies as we work to improve the FOIA process. This assessment of the Transportation Security Administration's (TSA) FOIA program is in line with this purpose.

This report addresses TSA's compliance with FOIA and is based on interviews with employees and officials of the agency, direct observation of TSA's FOIA case files, and a review of applicable documents.

We developed the recommendations herein using our office's knowledge of the FOIA statute and best practices, and discussed, in draft, with those responsible for the program. We hope this report and our recommendations will assist TSA in fulfilling its FOIA responsibilities. We note that TSA has already begun implementing some of our recommendations. We will follow up with appropriate individuals about the status of these recommendations in 120 days.

JAMES V.M.L. HOLZER
Director

Executive Summary

What OGIS Found

The Freedom of Information Act (FOIA) request backlog at the Transportation Security Administration (TSA) grew by almost 70 percent between Fiscal Year (FY) 2013 and FY 2014—from 546 requests to 924 requests. The growth of the backlog during this period occurred despite the number of incoming requests decreasing by 5.5 percent during those two fiscal years. The increase in backlogged requests can be attributed to processing decreasing by approximately 58 percent—from 851 requests processed in FY 2013 to 491 requests processed in FY 2014.

Several factors contributed to the processing decrease and backlog growth. Most significantly, in FY 2014, the FOIA office had several senior-level vacancies which TSA was unable to fill until FY 2015. At the same time, TSA switched case management and processing systems. While the new system adds efficiencies and improves reporting functions, moving files and training employees took time, and in the early stages of deployment, the system did not interact with other TSA information technology.

Recently, TSA made several changes to its FOIA program to improve its processes, including instituting a triage system and an intake process to help the office respond more quickly to simple requests, including those that might be answered with publicly available records.

Still, the agency has room for improvement in processing complex requests that may help to reduce its backlog in the short and long term. Specifically, TSA may consider ways it can better use its tracking and processing system. Timeliness also is an issue for TSA; failure to respond has been a factor in nine of the 10 FOIA lawsuits filed against TSA since 2009, costing the agency \$238,020 in litigation-related expenses.

OGIS's three primary findings are:

- Weak management controls are affecting the FOIA process;
- Lack of adoption of FOIA tracking system is affecting efficiency and creating duplication of efforts; and
- Greater emphasis on customer service and communication is needed.

What OGIS Recommends

While TSA has taken steps to improve management of its FOIA process, OGIS recommends, among other things, that the agency continue to closely monitor its backlog and track the number of cases closed and the volume of pages reviewed by each FOIA processor and set data-driven goals that will result in reducing the backlog and improving timeliness. We recommend all TSA offices review the feasibility that all FOIA reviews use the same tracking and processing system. Finally, we recommend

that the TSA FOIA branch proactively communicate with requesters to alert them to the status of their requests.

Introduction

The Freedom of Information Act (FOIA)¹ directs OGIS to review agency FOIA policies, procedures and compliance, 5 U.S.C. §§ 552(h)(2)(A) and (B). OGIS’s compliance assessments are independent and systematic evaluations of an agency’s compliance with FOIA, and include the design, implementation and results of an agency’s FOIA operations, programs and policies. The assessments provide 1) factual and analytical information, 2) review compliance with the law, regulation, and policy, and 3) share best practices. The assessments also include recommendations for improvement.

We conduct compliance assessments of individual agency FOIA programs by visiting agencies and reviewing regulations, internal guidance for processing requests, agency request and appeal files, annual reports to the U.S. Department of Justice (DOJ), and litigation, among other sources. The assessments are collaborative in nature and help the agency identify strengths and weaknesses in their FOIA programs. The overall objective of the review is to assess compliance with FOIA.²

Background

Transportation Safety Administration’s (TSA) mission is “to protect the nation’s transportation systems to ensure freedom of movement for people and commerce.”³ The TSA FOIA program is part of the Office of Civil Rights and Liberties, Ombudsman and Traveler Engagement, which is responsible for “ensuring that TSA employees and the traveling public are treated in a fair and lawful manner consistent with federal laws and regulations protecting privacy.”⁴ TSA’s FOIA Officer reports to the Director of the Office of Traveler Engagement.

TSA’s FOIA branch consists of eight employees: one FOIA Officer, one Operations Manager, and six processors. All FOIA processors are Government Information Specialists, the Office of Personnel Management occupational series 0306.⁵ TSA employees are on a “SV” grading system, which is different from the general schedule (GS) grading system that most Federal agencies use to determine salary ranges. The FOIA Officer and Operations Manager are on SV pay band J, the equivalent of a GS-14. Three senior processors are pay band I, which is the equivalent of a GS-13, and three junior processors are pay band G, which is the equivalent of a GS10/11. The branch has two vacant positions due to internal promotions. It has taken TSA more than a year to fill these positions. The open positions are for one senior and one junior processor. In addition, the five

¹ The Freedom of Information Act (FOIA) requires Federal Government agencies to make records available to the public upon request, unless specifically exempted. 5 U.S.C. § 552.

² The Freedom of Information Act, 5 U.S.C. § 552(h)(2)(B).

³ “Mission,” accessed September 24, 2015, <https://www.tsa.gov/about/tsa-mission>.

⁴ “Civil Rights & Liberties, Ombudsman, & Traveler Engagement,” accessed September 24, 2015, <https://www.tsa.gov/leader-bios/office-civil-rights-and-liberties-ombudsman-and-travel-engagement>.

⁵ “Handbook of Occupational Groups & Families,” accessed November 13, 2015, <https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/occupationalhandbook.pdf>.

offices within the Traveler Engagement Division, including the FOIA branch, have 10 contactors who are available to work on certain FOIA administrative tasks as needed. TSA's contractors manage the FOIA intake process, respond to requester questions, send search requests to program and field offices and upload responsive documents into the tracking and processing system. One of the 10 contractors works on FOIA full-time. In FY 2014, TSA reported a FOIA budget totaling \$1.1 million including litigation costs.

What We Reviewed

This report is the result of interviews with FOIA officials and staff; direct observations of initial request and appeal case files; results of an online survey; and a review of DHS FOIA regulations,⁶ which govern TSA FOIA operations, TSA's FOIA website,⁷ and other written material including agency FOIA litigation since 2009. On July 7, 2015, we interviewed TSA's FOIA Officer,⁸ a FOIA processor, and other staff who handle intake and triage of incoming FOIA requests. We also attended a triage meeting. On July 14, 2015, October 13, 2015, and November 5, 2015, we interviewed and subsequently followed up with the Director of Traveler Engagement, who manages several programs including the FOIA branch, and a Program Analyst in the Office of Traveler Engagement

Before our visit, TSA provided us with a list of its FOIA cases closed in FY 2014. Using data from the Department of Homeland Security 2014 Freedom of Information Act Annual Report to the Attorney General of the United States⁹ (hereafter referred to as the 2014 Annual Report), we chose a non-generalizable sample of 50 case files to review, selecting cases based on exemption use, fees issues, referrals, appeals and other topics that would give us a broad view of the TSA FOIA program. TSA provided us with access to those case files. We reviewed the case files on July 7-8, 2015.

TSA Processing and Reporting of FOIA Requests

TSA's FOIA process is centralized; the agency's headquarters receives requests and sends them to the agency's 29 program offices and 300 field offices to search for responsive records. TSA's contractors are responsible for managing incoming FOIA requests and working with the branch's FOIA Officer and Operations Manager to ensure requests are submitted in accordance with DHS regulations¹⁰ before they are logged into TSA's tracking system.

⁶ 5 U.S.C. § 552(6)(D)(i) & (ii) and DHS Freedom of Information Act and Privacy Act Procedures; Interim Final Rule, 6 CFR § 5.5(b), accessed July 9, 2015, http://www.dhs.gov/xlibrary/assets/FOIA_FedReg_Notice.pdf. (Note that DHS, on July 29, 2015, published in the Federal Register a Notice of Proposed Rulemaking, Freedom of Information Act Regulations.)

⁷ "Freedom of Information Act," accessed September 24, 2015, <https://www.tsa.gov/FOIA>.

⁸ Regina McCoy, 1-866-FOIA-TSA or 571-227-2300, foia@tsa.dhs.gov, accessed October 30, 2015, <http://www.dhs.gov/foia-contact-information>.

⁹ DHS "2014 Freedom of Information Act Report to the Attorney General of the United States," February 2015, accessed August 10, 2015, http://www.dhs.gov/sites/default/files/publications/dhs-foia-annual-reports-fy-2014_0.pdf, hereafter referred to as 2014 Annual FOIA Report.

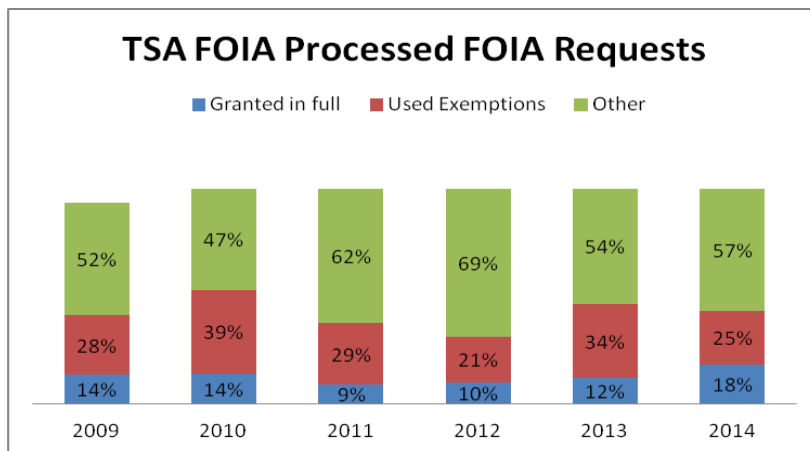
¹⁰ DHS Freedom of Information Act and Privacy Act Procedures; Interim Final Rule, 6 CFR § 5.5(b), accessed July 9, 2015, http://www.dhs.gov/xlibrary/assets/FOIA_FedReg_Notice.pdf. (Note that DHS, on July 29, 2015, published in the Federal Register a Notice of Proposed Rulemaking, Freedom of Information Act Regulations.)

The contractors also are responsible for answering requests for status updates from requesters and sending requests to program and field offices to search for records. TSA FOIA specialists process the responsive records and the operations manager and FOIA officer review them before release/response to the requester.

Frequently requested records pertain to incidents at airports, the No-Fly List, internal and external investigations, and contracts. In FY 2014, TSA released records in full in response to 89 requests; released records in part in response to 113 requests; and withheld records in their entirety in response to nine requests.¹¹ When TSA withholds records in part or in full, it most frequently invokes FOIA Exemptions 3, 5 and 6. Exemption 3 protects records specifically exempted from disclosure by another statute; TSA’s most frequently used Exemption 3 statute is Title 49 U.S.C. Section 114(r) which protects Sensitive Security Information (SSI).¹² Exemption 5 allows withholding of inter- or intra-agency records that are normally privileged in the civil discovery context, while Exemption 6 protects personal information, the release of which would invade the privacy interests of individuals.¹³

TSA denied or partially denied information to requesters in approximately 25 percent of the 491 FOIA/Privacy Act¹⁴ requests processed in Fiscal Year 2014.¹⁵ This is a decrease from FY 2013 when TSA denied or partially denied information to requesters in approximately 34 percent of the 851 FOIA/Privacy Act requests processed.¹⁶ Notably, a review of the 2014 Annual Report indicates more than 57 percent of FOIA/Privacy Act requests processed in Fiscal Year 2014 were closed for miscellaneous reasons such as no records, not reasonably described, or the request was withdrawn.

Figure 1 TSA Processed FOIA Requests, 2009 – 2014



¹¹ FY 2014 Annual Report.

¹² 5. U.S.C. § 552(b)(3).

¹³ 5. U.S.C. § 552(b)(5), (b)(6).

¹⁴ First-party requests are often processed under the FOIA and the Privacy Act to ensure maximum access to records.

¹⁵ FY 2014 Annual Report.

¹⁶ Ibid.

TSA FOIA responses go through between two to five levels of review before records are released, depending, in part, on the nature of the records (see Figure 3, page 11). The FOIA Officer, the Operations Manager, or a senior processor is the first level of review. TSA’s FOIA Officer also reviews and signs all responses before they are sent. TSA records might also require review by the Sensitive Security Information (SSI) office before they are processed under FOIA: TSA has the authority, by regulation, to withhold any information that could be deemed harmful to the traveling public;¹⁷ the SSI office requires that subject matter experts in the SSI branch review any documents responsive to a FOIA request that might contain SSI.¹⁸ About 90 percent of requests that have responsive records must go through SSI review, according to the TSA FOIA branch. Depending on the sensitivity and complexity of the responsive records, the Office of Chief Counsel (OCC) might also require additional reviews after the FOIA review is complete, and the DHS FOIA Office also requires that TSA notify headquarters on any responses to “significant requests” 24 hours before the release.

Finding 1: Weak management controls are affecting the FOIA process.

Despite staff shortages in the FOIA office, the staff kept TSA’s backlog steady during Fiscal Year 2014. TSA has several standard operating procedures but lacks a comprehensive standard operating procedure and quality control measures for the entire FOIA process. The TSA FOIA Office does not track volume of pages processed and does not have data-driven goals that will result in reducing the backlog and improving timeliness. Although TSA’s FOIA office recently improved its FOIA process by instituting an intake and triage process and using multi-track processing, it does not have a plan to effectively reduce its FOIA backlog.

Backlog and Delay

TSA’s FOIA leaders cited the request backlog as the office’s greatest challenge. Between FY 2013 and FY 2014, TSA’s backlog grew by almost 70 percent, from 546 requests to 924 requests.¹⁹ The backlog grew in FY 2014, in part, because the number of requests processed by TSA during that year fell by 58 percent—from 851 to 491 requests.

From FY 2009 to FY 2013 the number of requests for TSA records remained relatively constant, ranging from about 700 requests to 900 requests per year; TSA’s backlog increased steadily during the same period.²⁰

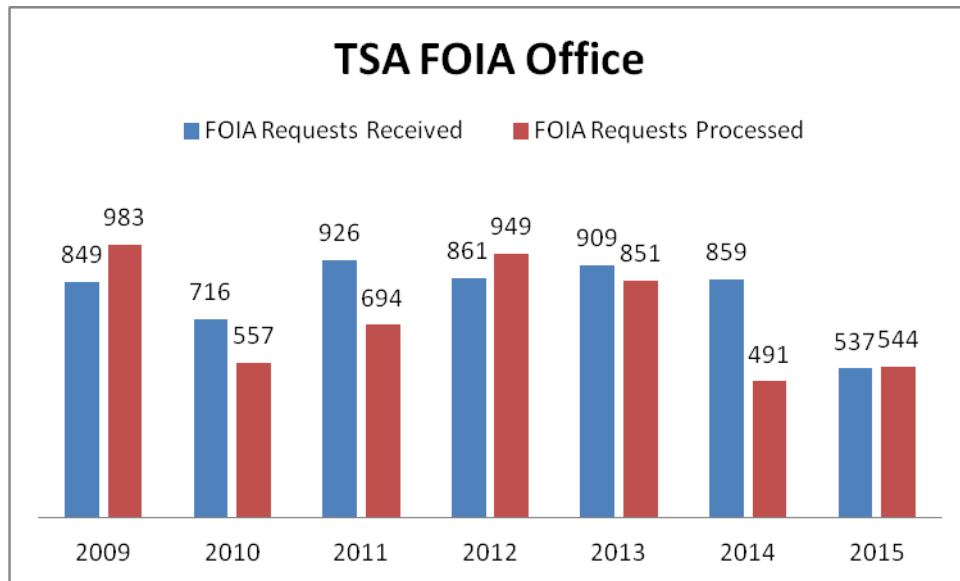
¹⁷ Protection of Sensitive Security Information of October 1, 2010. *Code of Federal Regulations*, title 49 (2010): 1520, https://www.federalregister.gov/articles/2004/05/18/04-11142/protection-of-sensitive-security-information#print_view. SSI designation by TSA has existed since the promulgation of the SSI regulations in 2004. TSA and the Department of Transportation issued an interim final rule clarify preexisting SSI provisions on May 18, 2004, https://www.federalregister.gov/articles/2004/05/18/04-11142/protection-of-sensitive-security-information#print_view.

¹⁸ SSI is a category of information that the law defines as “information obtained or developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would ... be detrimental to transportation security;” SSI is not classified national security information, but it is subject to certain handling procedures.

¹⁹ Report on TSA FOIA backlogs FY 2013 – FY 2014, www.foia.gov, accessed September 11, 2015.

²⁰ Report on TSA FOIA requests FY 2009 – FY 2014, www.foia.gov, accessed September 11, 2015.

Figure 2 TSA FOIA Office – FOIA Requests Received and Processed, FY 2009 - 2015²¹



Given TSA’s backlog and the number of requests that the office generally receives each year, the FOIA branch would need to close a total of about 140 requests per month, or about 35 requests *per week*, to eliminate the backlog and keep up with current processing; in FY 2014, TSA processed about 41 cases per month. TSA FOIA leaders informed us that the FOIA branch is expected to close 10 cases per week; at this rate, TSA is unlikely to reduce its backlog.

A review of FOIA program statistics that TSA provided to the DHS Privacy Office between FY 2012 and FY 2015 showed that the age of TSA’s backlog also is growing: during FY 2014 and FY 2015, the proportion of TSA’s backlog that is more than 181 working days old—or almost one calendar year—grew from about 52 percent of the backlog at the end of FY 2014 to about 71 percent of the backlog at the end of FY 2015. TSA FOIA leaders noted that the age of cases in its backlog contributes to the agency’s comparatively high average processing time for a complex case. Of all of the DHS components, TSA reported one of the highest average numbers of days it took to process complex requests in FY 2013 and FY 2014, 288 days and 260 days, respectively.

TSA’s FOIA leaders explained that one of the factors contributing to the age of requests in TSA’s backlog is that the agency did not use multi-track processing until 2014; multi-track processing allows agencies to close relatively simple cases more quickly, since they do not languish in the queue behind cases involving voluminous records. TSA reported that it is now using multi-track processing. Complex requests are those that require a search of multiple field offices or are likely to require SSI review; all other requests are categorized on a case-by-case basis. The case’s track is re-evaluated once the FOIA office receives records from program offices. Despite the growth in the age of the backlog overall, TSA reported progress toward closing old requests: by the end of FY 2015, TSA closed its 10 oldest cases, all

²¹ FY 2015 is an estimate based on monthly reports to the DHS FOIA Office.

of which were from 2010. TSA processed records for eight of the 10 requests. In one case, the agency administratively closed the request after the requester obtained the requested documents through a lawsuit against the agency that was unrelated to FOIA. The agency administratively closed the other backlogged request after it could not locate the requester.

While closing out the agency's 10 oldest requests is admirable, TSA's delay in responding to all of the aging requests in its backlog creates a risk for litigation against the agency: failure to respond to a request was a factor in nine of the 10 FOIA lawsuits filed against TSA since 2009,²² costing the agency \$238,020 in litigation-related expenses.²³ We recommend that TSA's FOIA leaders develop a data-driven strategy to begin reducing the size and the age of the backlog.

Staffing Challenges

The TSA FOIA branch cited turnover and other personnel issues as a major factor in the growth of the agency's backlog.²⁴ The number of TSA's full-time FOIA employees fell from a high of 12 in FY 2013 to eight in FY 2014.²⁵ TSA's FOIA branch also informed us that during this period two employees from the FOIA branch were detailed to another office and one processor was on extended leave.

TSA monitors its backlog daily and produces a weekly report for TSA leadership on the backlog, number of cases opened, and number of cases closed. TSA's FOIA processors' performance goals are also tied to the number of cases the processor closes. TSA's FOIA leaders reported that they occasionally monitor the volume of records processed, but that the tracking and processing system makes it difficult to monitor the total number of pages reviewed. TSA informed us that since our review, the FOIA branch is working to develop an appropriate and accurate method for measuring volume of work completed by an individual analyst. TSA's FOIA leadership expects that once new staff is hired, TSA will be able to begin reducing the backlog.

To ensure that TSA's backlog does not grow, we recommend that TSA continue to closely monitor employee performance, specifically the number and type (e.g., simple vs. complex) of cases closed by each processor. We also recommend that TSA begin tracking the volume of records processed by each processor and set data-driven goals that will result in reducing the backlog and improving timeliness. If the tracking and processing system TSA uses is not capable of tracking this type of data, we recommend TSA develop another way to track and monitor such metrics and incorporate them into the branch performance assessments.

²² American Federation of Government Employees, *AFL-CIO v. TSA*, 1:2011-cv-00790, D.C.C.; *Naji Awdat Hamdan v. United States DOJ, et al.*, 2:10-cv-06149, C.C.D.C.; *Skuro v. United States Dept of Homeland Security*, 1:2011-cv-01296, D.D.C.; *Electronic Privacy Information Center v. TSA*, 653 F.3d (D.C. Cir. 2011); *Donald Louis Salem Jr. v. DHS*, 2:12-cv-03450, C.C.D.C.; *Miller v. TSA*, 1:2013-cv-00244, D.D.C.; *Pickering et al v. United States DOJ*, 1:2013-cv-00674, N.Y.W.D.C.; *Sai v. TSA*, No.14-0403, 2014 -WL-3029217, D.D.C.; *ACLU, et al. v. TSA*, 1:2015-cv-02061, S.D.N.Y.

²³ Report on TSA FOIA administration FY 2009 – FY 2014, accessed September 14, 2015, www.foia.gov.

²⁴ OGIS's survey found that 50 percent of respondents reported being at TSA for 1 year to less than five years, while 25 percent reported working in the FOIA program for less than a year.

²⁵ Report on TSA FOIA administration FY 2013 – FY 2014, accessed September 11, 2015, www.foia.gov.

As noted above, TSA's backlog contributes heavily to the agency's delay in responding to requests and creates the possibility of litigation against the agency. While TSA's FOIA branch expects that bringing on two additional processors will help the agency begin to reduce the backlog, reducing the agency's backlog in the short-term requires that the agency take additional steps. We recommend that TSA explore strategies to increase or redistribute its staffing to achieve targeted backlog reduction, including through the use of contractors.

Intake System, Triage, Search, Processing and Release

During FY 2014, the TSA FOIA office implemented a new case management and processing system. The new system has storage and emailing capabilities that the old software did not, and has reporting and metrics functions that improve annual report and program oversight. During Fiscal Years 2014 – 2015, implementing the new system took significant investment of staff time for training and related administrative support. TSA's firewalls caused certain updates to the system to malfunction and initially the system was slow and crashed multiple times a day. The DHS FOIA Office worked with TSA IT staff to fix issues and at the time of this report, TSA reported most of these concerns are resolved.

As previously mentioned, TSA's contractors are responsible for managing incoming FOIA requests and working with the branch's FOIA Officer and Operations Manager to ensure requests are perfected before they are logged into TSA's tracking system. Under previous office management, triage meetings were held once a week by a senior processor with staff from the Office of the Chief Counsel (OCC). Few actions or decisions were documented under this process.

TSA revamped its intake process and triage of its FOIA requests in 2015. Incoming requests are discussed at a daily triage meeting, attended by the FOIA Officer, the Operations Manager, a Program Analyst from Traveler Engagement, and the Team Lead FOIA contractor. The length of triage meetings depends on how many requests the agency received the day before; five cases were discussed during the approximately 30-minute long triage meeting observed by OGIS. TSA processors sometimes attend the meetings, and new processors attend the meetings for training purposes.

During the triage meeting, participants discuss each of the incoming requests using an intake sheet that documents whether the request needs to be perfected; whether the request is simple or complex; whether expedited processing was requested; and which search terms and program offices should be used in the records search. The sheets help in creating cases in TSA's FOIA tracking and processing system. Once a case is created, another contractor compares the electronic case information to the intake sheet for quality control. While TSA has guidance to help contractors use and create files in TSA's tracking and processing system, there is no single document that explains what should happen during triage and who has certain responsibilities.

The triage team reviews all requests for expedited processing during the triage meeting; once a decision is made to grant or deny the request for expedited processing, the triage team uses a standard template to respond to the requester from the TSA FOIA email. TSA does not monitor requests for fee waivers

because the office is not charging fees. TSA reported no fee waiver requests granted or denied in FY 2014, according to its FY 2014 Annual Report.

The FOIA branch uses a record request tracking sheet to request records from other TSA offices. The tracking sheet provides the office search terms, and provides space on the back for the office to document its search, including the types of records searched. The office is expected to fill out the form to report if there are no records found, and given an option to recommend a full release or reasons for withholding. The form also directs the office to indicate if the records include any SSI or personally identifiable information and to password protect the documents sent to the FOIA office. Offices are also asked to report the amount of time spent on search and to recommend other TSA offices that should be searched.

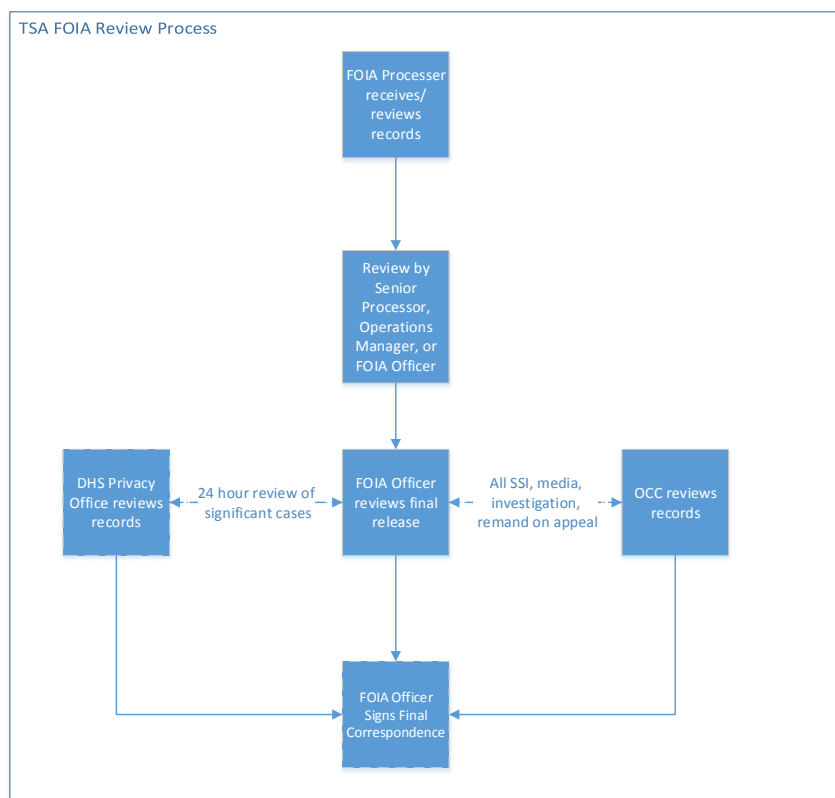
The FOIA branch asks that program offices send responsive records back to the office within five working days. According to TSA's FOIA leaders, the response time from program offices varies greatly; however, a program office's delay in sending responsive records rarely adds to the amount of time the FOIA branch needs to process the request because of the length of time records stay in the agency's backlog. TSA currently has an informal process to follow-up on unanswered search requests: the TSA FOIA office runs a weekly report on open requests for records and follows up with programs that have several open search requests for records or particularly old unanswered search requests. When the program office responds, it must document on the search tracking sheet why the office recommends any withholding. As noted previously, in recent years TSA has reported one of the highest average processing times for complex cases among DHS components. Most of TSA's cases are categorized as complex; simple cases include no records responses and requests for publicly available records.

After records are received from the program and field offices, the triage team re-evaluates if the case should be in the simple or complex queue and the triage team sends any records that include SSI to the SSI office for review. The SSI office reviews the documents line-by-line and identifies information that should be withheld in accordance with Title 49 U.S.C. Section 114(r). The SSI office also has to review documents from other program offices, for example reviews for Public Affairs for website posting or for Congressional review. On average, an SSI review takes five to 10 days. Once the triage team receives all documents from the program offices, and SSI reviews are completed (as needed), the FOIA officer assigns cases to processors. Cases are generally assigned on a first-in, first-out basis. The FOIA Officer assigns each processor a mix of simple and complex cases, based on the processors' ability level. Every employee's performance plan for FY 2016 has the goal of closing 25 percent of their assigned simple cases within 20 days of receipt of assignment.

TSA's FOIA processors use the office's processing and tracking system to review records and apply redactions. TSA does not require its processors to document any foreseeable harm analysis, half of the respondents to OGIS's survey said the agency does not have a process in place for conducting a step-by-step analysis of the harm that would be caused if information is released that might otherwise be

withheld under an exemption.²⁶ The processor also prepares a response to the requester. At the end of the letter, after the signature line, is a summary section which tallies the number of pages released in part or in full, the number of withheld in full, and the number of pages referred. Following the summary is a checklist of applicable exemptions. If exemptions are used, TSA provides an additional enclosure which explains the exemptions. The response can be sent via email from the tracking and processing system.

Figure 3 TSA’s FOIA Review Process



Once a processor has completed review of the documents, the request enters the review process. First, a request is sent to either a senior processor, the Operations Manager, or the FOIA officer for review. In particular complex cases, it is also sent to OCC for review. After addressing any issues with the request, the FOIA officer reviews and signs the release. As noted in a March 2011 DHS Inspector General (IG) report,²⁷ DHS components—including TSA— must make DHS aware 24 hours before the response to a “significant” request is sent out.

TSA FOIA leaders informed us that OCC previously reviewed all responses but now reviews only complex responses involving SSI and/or investigative records; responses to media requesters; and

²⁶ Fifty percent of respondents to OGIS’s survey reported that the agency does not have a process in place for conducting a step-by-step analysis of the harm that would be caused if information is released that might otherwise be withheld under an exemption (for example, Exemption 5).

²⁷ Page 31, DHS Office of Inspector General, The DHS Privacy Office Implementation of the Freedom of Information Act, Report No. OIG-11-67, March 2011.

responses processed after being remanded on appeal. TSA also informed us that FOIA is a collateral duty for OCC attorneys and it takes OCC 20 to 30 working days to review a FOIA response, depending on the complexity and number of responsive records. We recommend TSA leaders continue to work with OCC to reduce the number of cases going to OCC for review and to create standards for the types of requests that OCC must review.

TSA makes interim releases on a case-by-case basis and uses a template letter for the releases. TSA reported that SSI review complicates interim releases because what TSA considers SSI can depend heavily on context. The FOIA branch explained that in order to ensure consistency and ensure that SSI is protected, the SSI Office generally needs to review all records at once. TSA tries to make interim releases in cases where the requester has asked for multiple mostly unrelated items, some of which are easier to process.

TSA receives a relatively small number of appeals: During FY 2014, TSA received 35 appeals, and processed 36. When the FOIA office receives an appeal, it is assigned to a particular processor who also handles initial requests. The processor writes a draft response letters for review by OCC. After reviewing the response, the OCC returns it to the FOIA office for any necessary discussion before the FOIA office makes a recommendation on the determination. The Director of the Traveler Engagement Division presents the determination recommendation to the agency Appeals Officer, the Assistant Administrator for the Office of Civil Rights and Liberties, Ombudsman and Traveler Engagement, who makes the final decision.

When cases are remanded to the FOIA office it is returned to the triage team. The triage team assigns it to different processor from the initial processor, who then processes the request with a fresh pair of eyes. Appeals are placed in a queue separate from initial requests. In FY 2014, the agency reported the average number of days for processing an appeal was 147 days.

None of the respondents to OGIS's survey reported that TSA informs requesters about OGIS's mediation services in its final appeal determination letter, which it now does. DOJ issued guidance in 2010 directing FOIA offices to make requesters aware of OGIS services,²⁸ and DHS's recently proposed regulations include a similar requirement.²⁹

TSA FOIA branch informed us that it has several standard operating procedures in place for various parts of the FOIA process. Given the importance of the FOIA process and the complexity of TSA's operation, it is crucial that all employees—new and existing— have a comprehensive standard operating procedure to include all parts of the FOIA process.³⁰

²⁸ "Notifying Requesters of the Mediation Services Offered by OGIS." Last modified June 16, 2015,

<http://www.justice.gov/oip/blog/foia-post-2010-oip-guidance-notifying-requesters-mediation-services-offered-ogis>.

²⁹ 5 U.S.C. § 552(6)(D)(i) & (ii) and DHS Freedom of Information Act and Privacy Act Procedures; Interim Final Rule, 6 CFR § 5.5(b), accessed July 9, 2015, http://www.dhs.gov/xlibrary/assets/FOIA_FedReg_Notice.pdf. (Note that DHS on July 29, 2015, published in the Federal Register a Notice of Proposed Rulemaking, Freedom of Information Act Regulations.)

³⁰ Fifty percent of respondents to OGIS's survey reported that they are dissatisfied or very dissatisfied with the organization's policies and procedures on how to process a FOIA request.

Training

All four respondents to OGIS's survey reported having at least five years of experience in FOIA. TSA's FOIA leaders told us that although it can be difficult to obtain funding for training, all of the office's employees have a goal related to training in their yearly performance plan, and all processors are required to attend one training session per year. The FOIA office also asks processors to train fellow team members based on what they have learned at training.

TSA's FOIA leaders informed us that they work to raise awareness of FOIA throughout the agency. TSA's FOIA leaders told us that in July 2015, the office created online FOIA training that is now available for all employees, though it is not mandatory. The Director of the Traveler Engagement Division, with the help of OCC, developed the content for the training. The FOIA branch also annually briefs points of contacts in program offices on the agency's responsibilities under FOIA; about 60 field office employees participated in the FOIA office's latest training session. Additionally, the FOIA branch conducts FOIA training for TSA headquarters personnel twice per year; about 20 people generally attend these trainings.

Finding 2: Lack of full adoption of FOIA tracking system is affecting efficiency and creating duplication of efforts.

TSA is not fully using its FOIA processing software to improve FOIA processing or data quality. Information entered into TSA's tracking and processing system sometimes does not match the case file. TSA's SSI Review Office does not use the agency's FOIA tracking and processing system, which duplicates processing. TSA's security requirements challenge the FOIA branch and the office struggles to make records available in native formats.

Use of FOIA Tracking and Processing System

TSA's FOIA request files are managed using DHS's FOIA enterprise-wide FOIA tracking and processing system. TSA's FOIA leaders note that the FOIA tracking and processing system introduced efficiencies into the system and improved the office's ability to track processing. Additionally, the system being used by TSA includes 13 best practices recommended by the Department of Commerce, the Environmental Protection Agency, and the National Archives and Records Administration to enhance FOIA processing and address Section 508 requirements.³¹

However, our review revealed several instances in which the data about the FOIA exemptions that were used to withhold records from the case file did not match what was entered into the tracking and processing system. For example, we noted several cases in which TSA indicated in the tracking and processing system that it used certain exemptions when the records show those exemptions were not used. Administrative records are important to the agency because they capture the agency's decision-

³¹ DHS GAO Report- GAO-15-82, Freedom of Information Act, DHS Should Take Steps to Improve Cost Reporting and Eliminate Duplicate Processing, November 2014, page 35, accessed August 10, 2015, <http://www.gao.gov/products/GAO-15-82>.

making process, which a court will review if litigation occurs. We recommend that TSA work to ensure that the information that is entered into the tracking and processing system is correct, and create a mechanism to spot check the entries for accuracy.

The fact that the SSI Office is not using the same redaction software to process and redact records containing SSI makes it difficult for the FOIA office to track where a request is in the FOIA process and means the FOIA office has to manually re-apply the redactions made by the SSI office, increasing the likelihood of human error into the system. We understand that TSA's FOIA leaders are discussing bringing the SSI review onto the same system while adhering to SSI standards from DHS and the National Security Agency.³² We recommend that those discussions continue with the goal of resolving inefficiencies and duplication of efforts.

Password Protection and Native Formats

A TSA-wide policy requires program offices password protect any file which potentially contains SSI prior to emailing the information to the FOIA branch. According to TSA's FOIA leaders, this can create an issue for the FOIA branch if the password that the program office supplies is incorrect, or if the FOIA branch loses the passwords before the record is ready for processing. The requirement to password protect files also complicates the program office's ability to send the FOIA branch files that are in formats other than a PDF. For example, we understand that this requirement is one of the reasons that TSA has not been able to use a software product it purchased to help it automatically de-duplicate text from email messages that need to be processed. In order to use the software, email records must be processed in their native format unencrypted; however, TSA's program offices convert emails into a PDF in order to password protect the documents. At the time of our review, the TSA FOIA office was testing the use of a shared drive or file-sharing service that would allow program offices to share records without password protection. We recommend that TSA continue to examine this issue and find a resolution as soon as possible.

During our review, we also noted TSA converted all records into a PDF format prior to processing, making it difficult for TSA to meet FOIA's requirement that agencies provide records "in any form or format requested by the person if the record is readily reproducible by the agency in that form or format."³³ PDF is an image format; converting a spreadsheet or information from a database into a PDF

³² Protection of Sensitive Security Information of October 1, 2010. *Code of Federal Regulations*, title 49 (2010): 1520, https://www.federalregister.gov/articles/2004/05/18/04-11142/protection-of-sensitive-security-information#print_view. SSI designation by TSA has existed since the promulgation of the SSI regulations in 2004. TSA and the Department of Transportation issued an interim final rule clarify preexisting SSI provisions on May 18, 2004, https://www.federalregister.gov/articles/2004/05/18/04-11142/protection-of-sensitive-security-information#print_view. Department of Homeland Security. 2006. Sensitive Security Information (SSI). DHS Management Directive (MD) No. 11056.1, Washington, DC: Nov. 3. https://www.dhs.gov/xlibrary/assets/foia/mgmt_directive_110561_sensitive_security_information.pdf.

Transportation Security Administration. 2008. SSI Program, TSA Management Directive 2810.1 Washington, DC: Sept. 15. National Security Agency, Reduction of PDF Files Using Adobe Acrobat Professional X, https://www.nsa.gov/ia/files/vtechrep/i73_025r_2011.pdf.

³³ The Freedom of Information Act, 5 U.S.C. § 552(a)(3)(B).

is akin to taking a page-sized picture of the information. In order for all of the information in the record to be seen in the PDF, the FOIA processor must make sure that text is not hidden by another cell and that the text fits within the page's margins. Converting databases into PDFs also limits their use to the public, because the data in the record cannot be sorted or combined with other sources. In one particular instance, we noted a requester had specifically asked for a database in a "non-PDF" format; the requester specifically mentioned formats that would allow him or her to sort or otherwise use the data. TSA provided the requester with an alternative image-based format—TIFF, a format that is generally less searchable than PDF. We recommend that TSA look into how records can be processed and released in their native format when requested and incorporating any new processes into its SOPs.

TSA FOIA Library

TSA's Public Affairs maintains the majority of the agency's FOIA website. However, the TSA FOIA Library is hosted on the DHS website; TSA links to the DHS-hosted FOIA library from its web page. In order to add documents to the library, the TSA FOIA operations manager contacts the DHS Privacy Office and the Privacy Office posts the documents, usually within 24 hours. Under "frequently requested records," TSA provides links to Advanced Imaging Technology Documents, agency policy statements, FOIA logs, procurement awards and orders, and "Throughput" Reports (weekly statistics on how many people go through airport security hourly). Other links to "frequently requested records" on the page appear to be broken. The randomly selected sample of records downloaded from TSA's FOIA Library did not include proper metadata tags.

Finding 3: Greater emphasis needed on customer service and communication.

TSA Has taken steps to communicate with FOIA requesters, but a greater emphasis on communicating with requesters could help reduce litigation. TSA's use of "still interested" letters to administratively close requests is not in line with current policy.

Lack of Communications and Customer Service

As previously noted, TSA's failure to respond to a FOIA request was a factor in nine of the 10 FOIA lawsuits filed against the agency since 2009,³⁴ costing \$238,020 in litigation-related expenses.³⁵ Proactively communicating with requesters might have helped TSA avoid these lawsuits. We recommend updating requesters regularly about their requests by informing them of the status of their requests' place in the queue and proactively providing estimated dates of completion.

³⁴ American Federation of Government Employees, AFL-CIO v. TSA, 1:2011-cv-00790, D.C.C.; Naji Awdat Hamdan v. United States DOJ, et al., 2:10-cv-06149, C.C.D.C.; Skuro v. United States Dept of Homeland Security, 1:2011-cv-01296, D.D.C.; Electronic Privacy Information Center v. TSA, 653 F.3d (D.C. Cir. 2011); Donald Louis Salem Jr. v. DHS, 2:12-cv-03450, C.C.D.C.; Miller v. TSA, 1:2013-cv-00244, D.D.C.; Pickering et al v. United States DOJ, 1:2013-cv-00674, N.Y.W.D.C.; Sai v. TSA, No.14-0403, 2014 -WL-3029217, D.D.C.; ACLU, et al. v. TSA, 1:2015-cv-02061, S.D.N.Y.

³⁵ Report on TSA FOIA administration FY 2009 – FY 2014, accessed September 14, 2015, www.foia.gov.

TSA responds to requests for an estimated date of completion by providing requesters with a link to a page hosted by DHS that allows requesters to check the status of their FOIA requests. At the time of our review, any requester who entered his or her tracking number into the page was given an estimated date of completion of 20 working days as required by the statute—even if the request was older than 20 working days. TSA employees manually changed the estimated dates of completion once requests were older than 20 days. We understand that DHS has adjusted the tracking tool so that an extra 30 days are added to any unanswered requests once the estimated date of completion passes. We recommend that TSA work with DHS to continue to refine the tracking tool so that the estimated date of completion is more useful to requesters.

Plain Language

We observed a general lack of clarity in TSA’s final response to requests. We noted that later in FY 2014 the office began using a standard form to note the number of pages released and withheld, and briefly describe the FOIA exemptions it cited. We understand that the TSA FOIA branch adopted this practice to help streamline FOIA correspondence and eliminate the kinds of format and grammatical errors that we observed in letters from FY 2014. In order to improve requesters’ understanding of why the agency used certain exemptions, we recommend that the agency expand the description of the exemptions used in the checklist and that TSA add language explaining why the exemption applies to certain types of frequently requested records.

Still Interested Letters

TSA FOIA leaders informed us that the FOIA Office uses “still interested” letters for requests that are four or more years old. The letters give requesters 10 days to respond to the agency indicating their continued interest in the requested records. Almost all requesters respond within those 10 days, according to TSA.

TSA’s practice of providing requesters with 10 days to respond to a “still interested” letter is shorter than the number of days provided by other DHS components. Additionally, DOJ recently issued guidance instructing agencies to provide requesters with at least 30 days to respond and emphasizing that a requester should not be disadvantaged if he/she misses the deadline: the agency should re-open the request when contacted by the requester, and the request should be placed in the queue at approximately the same place it was had the “still interested” letter not been sent.³⁶ We recommend that TSA change its practice to follow DOJ guidance. We note that since our review, the FOIA Branch informed us that it has created standard operating procedures regarding the use of “still interested” letters in accordance with DOJ guidance and DHS practice.

³⁶ “Limitations on Use of ‘Still-Interested’ Inquiries,” last modified August 21, 2015, <http://www.justice.gov/oip/oip-guidance-8> .

Checklist of OGIS Recommendations for the TSA FOIA Program

Management

- Monitor the number of cases closed and volume of pages reviewed by each processor and set data-driven goals to reduce the backlog and increase timeliness
- Develop a standard operating procedure (SOP) for the entire FOIA process
- Continue to work with the Office of Chief Counsel (OCC) to reduce the number of requests OCC reviews

Tracking and Processing System

- Fully implement the tracking and processing system
- Ensure all information in the tracking and processing system is accurate and complete
- Continue discussions with SSI office regarding resolving inefficiencies and duplication of efforts
- Work with the DHS Privacy Office to find a solution that allows records to be processed and released in their native format
- Continue to refine the online tracking tool so that the estimated date of completion is more accurate

Customer Service

- Proactively communicate with requesters and alert them to the status of their requests
- Follow DOJ guidance and DHS practice on the use of “still interested” letters
- Add a brief explanation of the exemptions to the FOIA response checklist
- Add language to the standard email which acknowledges requests
 - Highlight the checklist and the need for a response
 - Include contact information for office

Scope and methodology³⁷

OGIS Review Team Lead Kirsten Mitchell along with Team members Amy Bennett and Kate Gastner assessed TSA's FOIA program. This report is the result of interviews with TSA FOIA officials and staff; direct observations of initial request and appeal case files; results of an online OGIS survey completed by TSA FOIA processors;³⁸ and a review of DHS FOIA regulations, which govern TSA, the agency's FOIA website and other written material including agency FOIA litigation. On July 7, 2015, we interviewed TSA's FOIA Officer and the agency's FOIA Public Liaison, and we attended a triage meeting with all TSA FOIA staff. We also conducted follow-up interviews with the Division Director and the Program Analyst, Office of Travel Engagement, on July 14, 2015. On October 13, 2015, and on November 5, 2015, we had follow-up discussions with the Director of Traveler Engagement and a Program Analyst in the Office of Traveler Engagement. TSA granted us access to its case files and allowed us to view the system the agency uses to process requests and appeals. Before our visit, TSA provided us with a list of its FOIA cases closed in FY 2014. We reviewed the list to determine categories of cases including but not limited to exemptions, fees, referrals, appeals and other topics that would give us a broad view of the TSA FOIA program and, based on data from the agency's Annual FOIA Report to DOJ, chose a non-generalizable sample of 50 case files to review. We reviewed the case files on July 7-8, 2015 and based our findings on OGIS's elements of an effective FOIA program, and

- the FOIA statute;
- Office of Management and Budget Guidelines for Fees;
- Presidential Memorandums;
- Attorney General Memorandums;
- Guidance from the Department of Justice's Office of Information Policy, including DOJ's Guide to the Freedom of Information Act;
- OGIS Best Practices; and
- Inconsistencies and non-compliance observed during OGIS's mediation services.

³⁷ Please direct questions to OGIS at ogis@nara.gov or 202-741-5770.

³⁸ Four FOIA processors started the survey and four completed it, for a 100 percent completion rate.