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Description of document: Three Federal Labor Relations Authority (FLRA) Inspector General (OIG) reports, 2002

Appeal date: 07-October-2010

Released date: 09-November-2010

Posted date: 19-January-2015

Source of document: FOIA Request
Federal Labor Relations Authority
Office of the Inspector General
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Washington, DC 20424
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Note: Some records undated

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

November 9, 2010

OFFICE OF THE CHAIRMAN

Re: Freedom of Information Act Administrative Appeal, No. 11 APPEAL 001

This responds to your Freedom of Information Act (FOIA) appeal, dated October 7, 2010, and received by the Federal Labor Relations Authority (FLRA) on October 13, 2010. Your initial request was for copies of 26 specific OIG reports dating from 1990 through 2007. On October 5, 2010, the FLRA's Inspector General (IG) responded by releasing, in their entirety, 15 of the requested reports. As for the remaining reports, the IG explained that one report was being withheld in part pursuant to Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6), and that four reports were being withheld in their entirety pursuant to Exemptions 2, 5, and 6 of the FOIA, 5 U.S.C. § 552(b)(2), (5), and (6). The IG also explained that four of the reports could not be located and that the remaining two reports, which were produced before 1999, no longer were required to be retained because they were beyond the FLRA's 10-year required retention period for IG reports.

In your appeal, you seek reconsideration of the IG's decision regarding the following five reports:

1. Report No. 91-02 – Review of Consulting Services, Lobbying Activity, and Employees Detailed to Legislative Committees, November 1991 (“Report 1”);
2. 1992-1993 OIG Report: Policy and Administrative Issues Requiring Immediate Action (“Report 2”);
3. Summary of Work Analysis Issues Regarding FLRA Management Positions, Memorandum dated May 10, 2002 (“Report 3”);
4. Inspector General Evaluation of FLRA’s Compliance with the President’s Management Agenda Government-Wide Standards (“Report 4”); and
5. Information on Litigation and Inspector General Independence (two internal memoranda) (“Report 5”).

For the reasons that follow, your request is granted as to Report 1, denied as to Reports 2 and 3, granted in part as to Report 4, and denied as to Report 5.

Reports 1 and 2

Despite an initial thorough search of her records, the IG could not locate copies of Reports 1 and 2. However, following a search of other offices of the FLRA, she was able to locate Report 1 (attached) but not Report 2.

Report 3

In the cover memorandum to Report 3, the then-IG states that the report contains analysis that “is not yet completed” and refers to a “final report” that she will draft in the future. There is no indication in FLRA’s records that a final report was prepared. As such, Report 3 is a draft analysis that was not finalized and, thus, Exemption 5 of the FOIA protects it from disclosure.

Under 5 U.S.C. § 552(b)(5), the disclosure requirements of the FOIA are inapplicable to “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.” *Id.* This provision has long been interpreted to protect documents covered by the deliberative process privilege. *See Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (“*Coastal States*). The deliberative process privilege shields from disclosure records the government demonstrates to be both “predecisional,” that is “generated before the adoption of an agency policy,” and “deliberative,” that is, “reflective of the give-and-take of the consultative process.” *Id.* Exemption 5 “covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Id.* Factual material is not protected under the deliberative process privilege “unless it is ‘inextricably intertwined’ with the deliberative material.” *Judicial Watch v. Dep’t of Justice*, 432 F.3d 366, 372 (D.C. Cir. 2005). However, factual material is protected if its disclosure would expose deliberative process. *Nat’l Wildlife Fed’n v. U.S. Forest Serv.*, 861 F.2d 1114, 1119 (9th Cir. 1988); *Mead Data Cent. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977).

Report 3 is a draft analysis from the then-IG to a former FLRA Chairman containing the then-IG’s personal opinions regarding the possible restructuring of certain management positions at the FLRA. There is no indication in the FLRA’s records that these opinions were adopted as FLRA policy. Although the draft contains some facts regarding the responsibilities of the positions and the experience levels of the incumbents, I find that disclosure of the then-IG’s choice of facts to include in the document would expose deliberative process. Accordingly, I conclude that Exemption 5 protects the entirety of Report 3.

Your appeal suggests, nonetheless, that the FLRA should release Report 3 for the reason that “[g]iven the problems that FLRA has experienced, the public interest greatly outweighs any negligible potential harm.” The suggestion is not well taken. As explained above, whether it is appropriate for an agency to invoke Exemption 5 and the deliberative process privilege depends on the record in question, not on the history of the agency that owns the record. Further, it is well established that the harm

arising from the disclosure of deliberative process is more than “negligible.” The deliberative process privilege was primarily designed to “enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government.” *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8-9 (2001). It further serves to prevent premature disclosure of proposed policies and avoids “misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency’s action.” *Coastal States*, 617 F.2d at 866. Therefore, your appeal does not persuade me to release Report 3.

Report 4

Report 4 is the then-IG’s self-initiated and internal evaluation of the FLRA’s compliance with the President’s Management Agenda government-wide standards. The report, intended to share the then-IG’s views with FLRA senior management, was sent only to a former Chairman of the FLRA and not also to the Office of Management and Budget or to Congress. It contains the then-IG’s personal opinions on the FLRA’s performance under the standards. As such, I uphold the IG’s decision, pursuant to Exemption 5, regarding the deliberative process portions of Report 4. However, Report 4 also contains factual material, such as the government-wide standards, themselves, that can be segregated from the deliberative process material. Therefore, I am releasing the factual portions of Report 4.

Report 5

Report 5 consists of two memoranda between the then-IG and a former FLRA Chairman exchanging opinions on the scope of the IG’s authority to communicate with FLRA employees who have litigation pending against the agency regarding the pending litigation. The communications appear to have arisen from the then-IG’s conversation with a named FLRA employee who filed an employment discrimination complaint against the agency, and they contain information about the complaint. The IG withheld the memoranda under Exemption 5. Although the memoranda contain factual information, I find that the factual information is inextricably intertwined with the deliberative process material and that its release would expose the deliberations.

Thus, I uphold the IG's decision to withhold the entirety of the memoranda under Exemption 5.

The President's and the Attorney General's Memoranda Regarding the FOIA

As you note, on January 21, 2009, the President of the United States released a Memorandum on the FOIA. In the Memorandum, the President instructed the heads of executive departments and agencies to administer the FOIA "with a clear presumption: openness prevails." Pursuant to the President's directive, the Attorney General issued new FOIA guidelines on March 19, 2009. The guidelines reiterate the presumption of openness and instruct agencies not to withhold information simply because they may do so legally and to make partial disclosures whenever possible. At the same time, however, the Attorney General's guidelines recognize that "the disclosure obligation under the FOIA is not absolute," and that the FOIA provides exemptions to protect, among others, "privileged records." My decision here is made in accordance with the President's and Attorney General's Memoranda.

You will not be charged for access to the enclosed information. If you disagree with this decision, you may seek judicial review in a United States District Court in accordance with 5 U.S.C. § 552(a)(4) of the FOIA.

Sincerely,

A handwritten signature in cursive script, appearing to read "Carol Waller Pope".

Carol Waller Pope
Chairman

Enclosures



UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF THE INSPECTOR GENERAL

WASHINGTON, D.C. 20424-0001

April 18, 2002

TO: Dale Cabaniss
Chairman, FLRA

FROM: Francine Eichler
Inspector General

SUBJECT: Inspector General Evaluation of FLRA's Compliance with the President's Management Agenda Government- Wide Standards

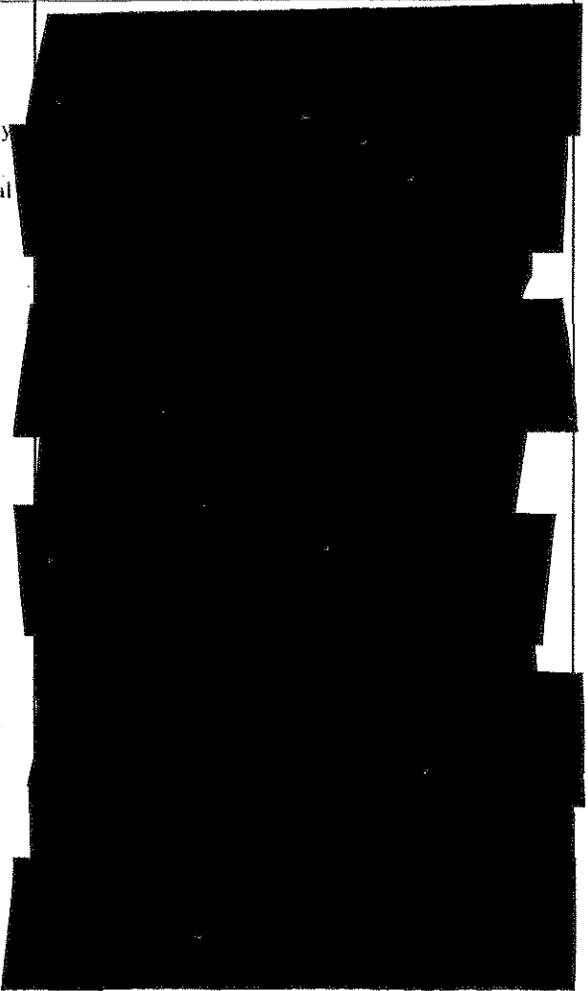
The Evaluation of Standards for Success is an evaluation document created by the Office of Management and Budget (OMB) which was used to evaluate and report to Congress how well larger Federal Agencies were complying with the President's Management Agenda government-wide standards. Although the FLRA was not required to submit this evaluation to OMB, the FLRA Inspector General thought it would be helpful to senior management to conduct an objective evaluation of FLRA's current status relative to these government-wide standards. Therefore, this is an internal document and will not be released externally unless specifically requested from the Inspector General by Congress or the Office of Management and Budget.

Attached you will find the FLRA Inspector General's evaluation of FLRA's compliance with the government-wide standards defined by the President's Management Agenda. Please note to be rated "Green," all core criteria of the standard must be met. "Yellow" indicates that some but not all core criteria are met and no "red" conditions exist. Conditions for a "red" evaluation are specifically listed on the evaluation sheet. While the FLRA overall rating is [REDACTED] is the opinion of the Inspector General that [REDACTED]

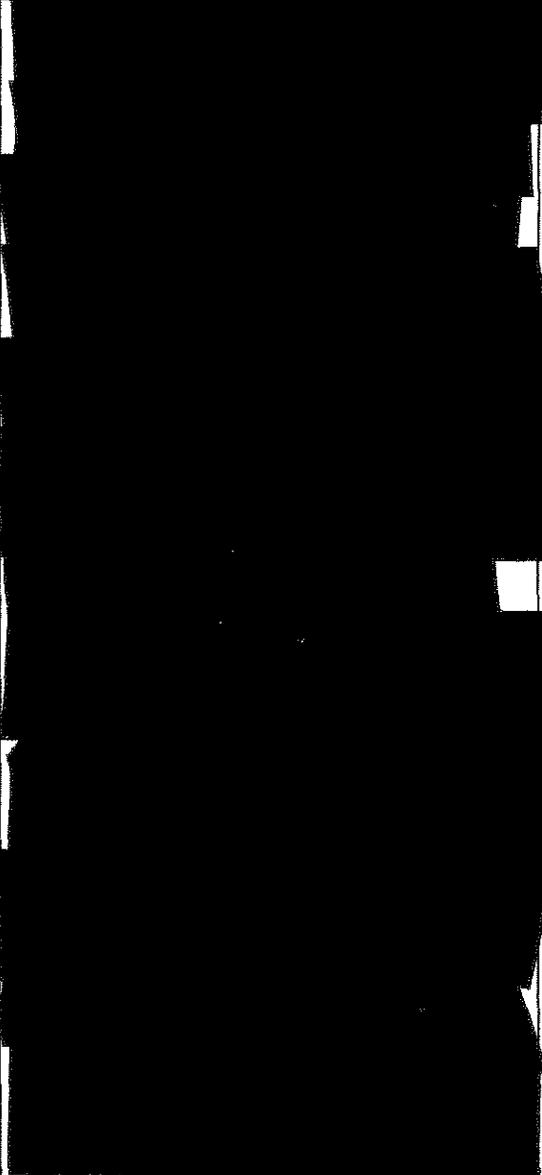


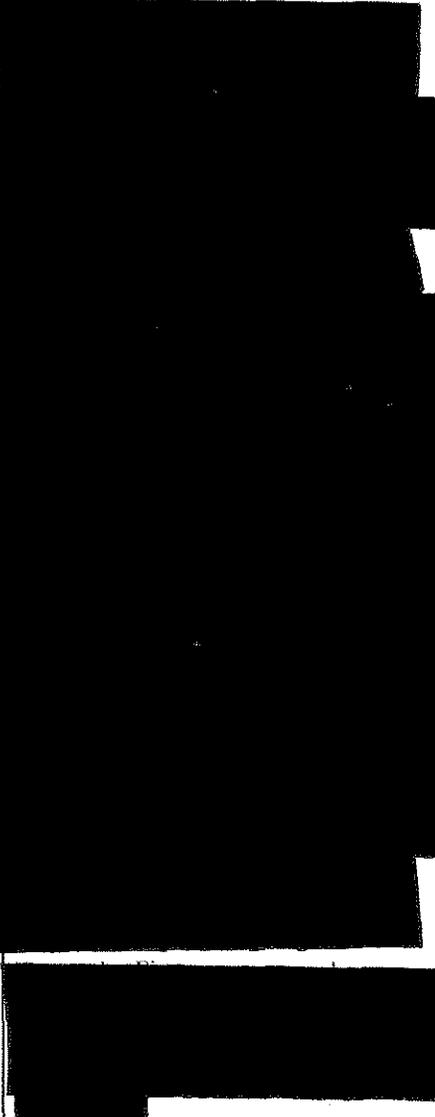
Should you wish further discussion, feel free to contact me at Extension 217.

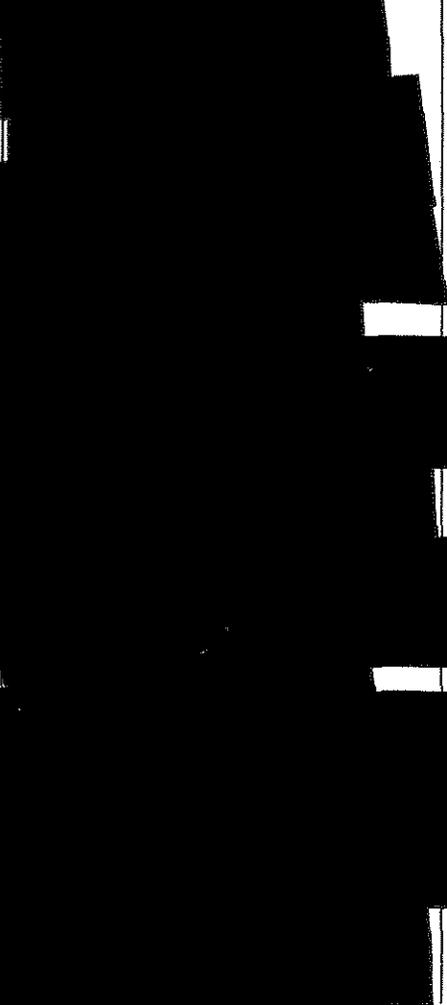
Inspector General
Standards for Success - Human Capital ●

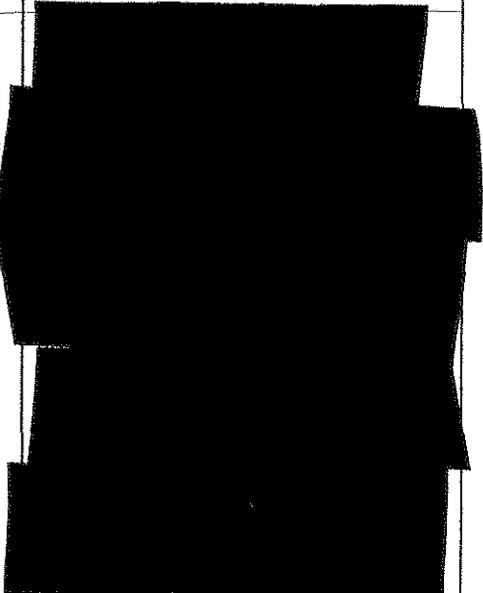
G		R	IG Comments
<p>Must Meet All Core Criteria:</p> <p>1. Agency human capital strategy is aligned with mission, goals, and organizational objectives: 1) integrated into Budget and Strategic Plans; 2) consistent with OPM's human capital scorecard (issued by December 1, 2001); and 3) complies with standards for internal accountability systems to ensure effective merit-based HRM.</p> <p>2. Agency has a citizen-centered organizational structure that is delayed and oriented toward performing the mission assigned to it.</p>	<p>Achievement of Some but not All Core Criteria; No Red Conditions</p>	<p>Has Any One of the Following Conditions:</p> <p>1. Agency human capital strategy is not aligned to support the mission, goals, and organizational objectives and is not integrated into Budget and Strategic Plans.</p> <p>2. Agency organizational structure is not citizen-centered and not delayed.</p>	

G		R	IG Comments
<p>3. Agency 1) sustains high-performance workforce that is continually improving in productivity; 2) strategically uses existing personnel flexibilities, tools, and technology; and 3) implements effective succession plans.</p> <p>4. No skill gaps/deficiencies exist in mission critical occupations.</p>		<p>3. Agency does not 1)strategically use existing personnel flexibilities, tools, and technology; and 2) implement succession plans.</p> <p>4. Agency is not addressing Skill gaps/deficiencies in mission critical occupations.</p>	 The IG Comments column is almost entirely redacted with black boxes. Only the text from the 'R' column is visible through the redaction.

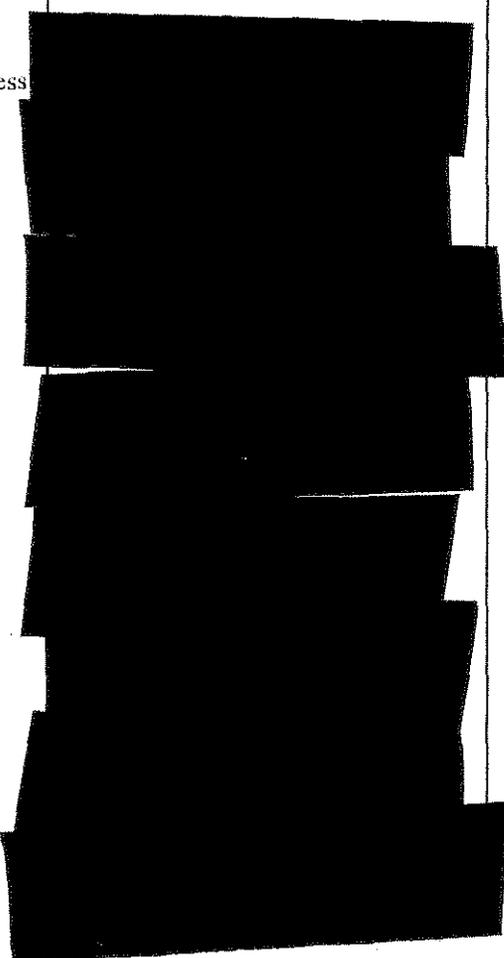
G		R	IG Comments
<p data-bbox="176 245 636 331">5. Agency differentiates between high and low performers through appropriate incentive and rewards.</p> <p data-bbox="176 630 646 748">6. Changes in agency workforce skill mix and organizational structure reflect increased emphasis on e-government and competitive sourcing.</p>		<p data-bbox="1031 245 1346 331">5. Agency fails to reward high performers and fails to address low performance.</p> <p data-bbox="1031 609 1373 789">6. Agency outsources without training and deploying adequate contract management staff, and/or without appropriate planning to accommodate displaced employees.</p>	

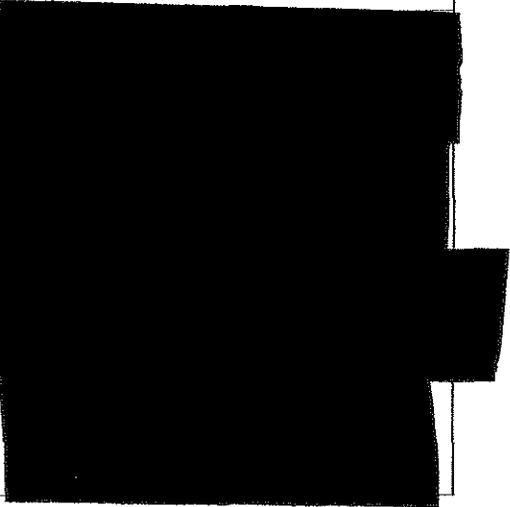
G		R	IG Comments
<p>2. IT Program Performance: On average, all major IT projects operating within 90% of Form 300 cost, schedule, and performance targets.</p> <ul style="list-style-type: none"> • E-government and GPEA implementation: (must show department-wide progress or participation in multi-agency initiative in 3 areas) <ul style="list-style-type: none"> a. Citizen one-stop service delivery integrated through Firstgov.gov, cross-agency call centers, and offices or service centers. 		<p>2. On average, all major IT projects operating less than 70% of Form 300 cost, schedule and performance targets.</p> <ul style="list-style-type: none"> • Fulfills not more than one of the following: <ul style="list-style-type: none"> a. Citizen one-stop service delivery integrated through Firstgov.gov, cross-agency call centers, and offices or service centers. 	

G		R	IG Comments
<p>b. Minimize burden on business by re-using data previously collected or using ebXML or other open standard to receive transmissions.</p> <p>c. Intergovernmental: Deploying E-grants or Geospatial Information one-stop.</p>		<p>b. Minimize burden on business by re-using data previously collected of using ebXML or other open standards to receive transmissions..</p> <p>c. Intergovernmental: Deploying E-grants or Geospatial Information one-stop.</p>	

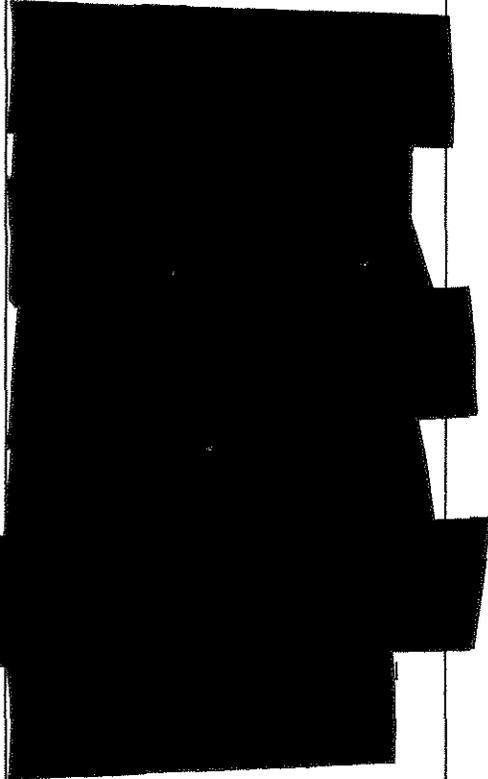
G		R	IG Comments
d. Obtaining productivity improvements by implementing customer relationship management, supply chain management, enterprise resource management, or knowledge management best practices.		d. Obtaining productivity improvements by implementing customer relationship management, supply chain management, enterprise resource management, or knowledge management best practices.	 The IG Comments column contains a large black redaction box covering the entire text area.

Inspector General
Standards for Success - Competitive Sourcing

G		R	IG Comments
<p>Must Meet All Core Criteria:</p> <p>1. Completed public-private or direct conversion competition on not less than 50 percent of the full-time equivalent employees listed on the approved FAIR Act inventories.</p> <p>2. Competitions and direct conversions conducted pursuant to approved competition plan.</p>	<p>Achievement of Some but not All Core Criteria; No Red Conditions.</p>	<p>Has Any One of the Following Conditions:</p> <p>1. Completed public-private or direct conversion competition on less than 15 percent of the full-time equivalent employees listed on the approved FAIR Act inventories.</p> <p>2. Competitions and direct conversions are not conducted in accordance with approved competition plan.</p>	

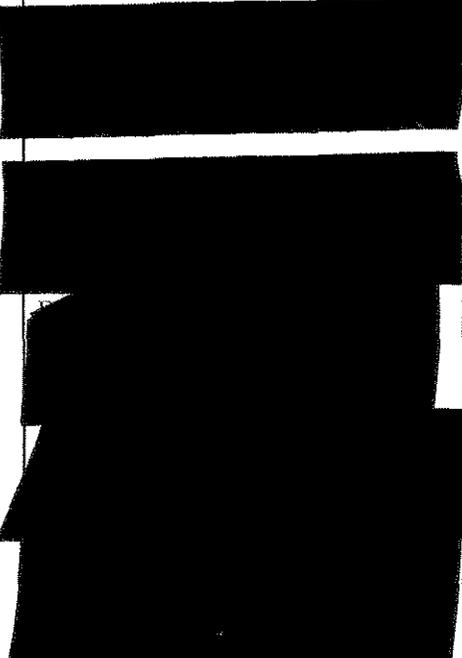
G		R	IG Comments
3. Commercial reimbursable support service arrangements between agencies are competed with the private sector on a recurring basis.		3. No commercial reimbursable support service arrangements between agencies are competed with the private sector.	

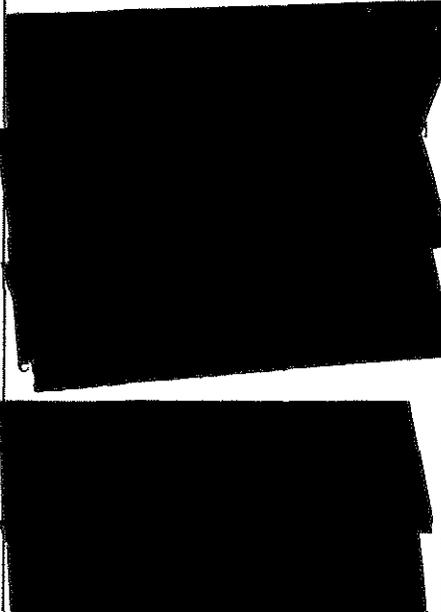
Inspector General
Standards for Success - Financial Management

G		R	IG Comments
<p>Must Meet All Core Criteria:</p> <ol style="list-style-type: none"> 1. Financial management systems meet Federal financial management system requirements and applicable Federal accounting and transaction standards as reported by the agency head. 2. Accurate and timely financial information. 3. Integrated financial and performance management systems supporting day-to-day operations. 4. Unqualified and timely audit opinion on the annual financial statements; no material internal control weaknesses reported by the auditors. 	<p>Achievement of Some but not All Core Criteria: No Red Conditions</p>	<p>Has Any One of the Following Conditions:</p> <ol style="list-style-type: none"> 1. Financial management systems fail to meet Federal financial management systems requirements and applicable Federal accounting standards as reported by the agency head. 2. Chronic or significant Anti-deficiency Act violations. 3. Agency head unable to provide unqualified assurance statement as to systems of management, accounting, and administrative controls. 4. Auditors cite material non-compliance with laws and regulations, or repeat material internal control weaknesses; or are unable to express an opinion on the annual financial statements. 	

Inspector General
Standards for Success - Integrating Budget and Performance

G		R	IG Comments
<p>Must meet all core criteria:</p> <ol style="list-style-type: none"> 1. Integrated planning/evaluation and budget staff work with program managers to create an <u>integrated</u> plan/budget and to monitor and evaluate its implementation. 2. Streamlined, clear, integrated agency plan/budget sets forth outcome goals, output targets, and resources requested in context of past results. 	<p>Achievement of Some but not All Core Criteria; No Red Conditions.</p>	<p>Has Any One of the Following Criteria:</p> <ol style="list-style-type: none"> 1. Planning and budgeting separate with little collaboration. Levels of organization have little and formal communication. Focus on getting funds for independent use. 2. Traditional budget request with little attempt to tie resources to results or communicate with other than budget technicians. 	<div style="background-color: black; width: 100%; height: 100%; min-height: 300px;"></div>

G		R	IG Comments
<p>3. Budget accounts, staff, and specifically program/activities are aligned to support achieving program targets.</p> <p>4. Full budgetary cost is charged to mission accounts and activities. Cost of outputs and programs is integrated with performance in budget requests and execution.</p>		<p>3. Excessive numbers of accounts, historical anomalies, accounts that fund illogical parts of programs. Centralized accounts that fund program resources; accounts that fund multiple programs with little in common.</p> <p>4. No attention to charging cost to the right bureau, let alone the activity. Substantial costs "mixed up" at the agency or bureau level. Program managers lack authority over resources.</p>	 The IG Comments column contains two paragraphs of text that have been completely redacted with black boxes. The first paragraph is redacted in the top half of the cell, and the second paragraph is redacted in the bottom half of the cell.

G		R	IG Comments
<p>5. Agency has documented program effectiveness. Analyses show how program outputs and policies affect desired outcomes. Agency systematically applies performance to budget and can demonstrate how program results inform budget decisions.</p>		<p>5. Focus on getting money for a good cause. Justification by anecdote. Little focus on outcomes, or how programs influences them.</p>	 The IG Comments column contains two large black redaction boxes. The top box covers the majority of the text in this column, and the bottom box covers the remaining text.