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Requested date:	03-March-2022
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Source of document:	FOIA Officer Office of Inspector General U.S. Department of the Interior 1849 C Street, NW MS-4428 Washington, DC 20240 Fax: 703-487-5432 (Attn: FOIA Officer) Email: FOIA@doioig.gov OIG's online FOIA Request Form

OFFICE OF
INSPECTOR GENERAL
U.S.DEPARTMENT OF THE INTERIOR

VIA EMAIL

March 22, 2022

Re: OIG-2022-00100

This is in response to your Freedom of Information Act (FOIA) request dated March 3, 2022, which was received by our office on March 4, 2022. You requested the following information under the FOIA, 5 U.S.C. § 552: A copy of the investigation report mentioned in Footnote 16 of the recently released report titled "Lack of Tracking and Unclear Guidance Identified in the U.S. Department of the Interior's Awareness Review Process for Freedom of Information Act Requests."

We do not bill requesters for FOIA processing fees when their fees are less than $50.00, because the cost of collection would be greater than the fee collected. See 43 C.F.R. § 2.49(a)(1). Therefore, there is no billable fee for the processing of this request.

We obtained the documents you seek and conducted a review of the material you requested. After reviewing this information, we have determined that we may release 8 pages of responsive documents, with FOIA redactions, pursuant to exemption 5 U.S.C. § 552 (b)(5), (b)(7)(C) and (b)(7(D).

FOIA requires that agencies generally disclose records. Agencies may only withhold requested records only if one or more of nine exemptions apply.

Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party... in litigation with the agency." 5 U.S.C. § 552(b)(5). One privilege available to government agencies is the deliberative process privilege. The deliberative process privilege protects materials that are both predecisional and deliberative. The deliberative process privilege protects the decision-making process of government agencies and encourages the frank exchange of ideas on legal or policy matters by ensuring agencies are not forced to operate in a fishbowl. Several policy purposes have been attributed to the deliberative process privilege. Among the most important are to: (1) assure that subordinates will feel free to provide the decision maker with their uninhibited opinions and recommendations; (2) protect against premature disclosure of proposed policies; and (3) protect against confusing the issues and misleading the public. This privilege covers records that reflect the give-and-take of the consultative process" and may include "recommendations, draft

documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.

The materials that have been withheld under the deliberative process privilege of Exemption 5 are both predecisional and deliberative. They do not contain or represent formal or informal agency policies or decisions. They are the result of frank and open discussions among employees of the OIG. Their contents have been held confidential by all parties and public dissemination of these drafts would have a chilling effect on the OIG's deliberative processes; expose the agency's decision-making process in such a way as to discourage candid discussion within the agency, and thereby undermine its ability to perform its mandated functions.

Exemption 7 allows agencies to refuse to disclose records compiled for law enforcement purposes under any one of six circumstances (identified as Exemptions 7(A) through 7(F)). Law enforcement within the meaning of Exemption 7 includes enforcement pursuant to both civil and criminal statutes.

Exemption 7(C) permits an agency to withhold information contained in files compiled for law enforcement purposes if production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." U.S.C. § 552(b)(7)(C). Thus, the purpose of Exemption 7(C) is to protect the privacy of an individual if one exists. To determine this, we must evaluate not only the nature of the personal information found in the records, but also whether release of that information to the general public could affect that individual adversely. In this case, we find that release of personal information could reasonably be expected to have a negative impact on an individual's privacy. However, even if a privacy interest exists, we must nevertheless disclose the requested information if the public interest outweighs the privacy interest in the information requested. In this instance, you have not established that release of the privacy information of witnesses, interviewee, middle and low-ranking federal employees and investigators, and other individuals name in the investigatory file, would shed light on government operations, and we have not found such a public interest in this case. For this reason, after reviewing the information in question, we have determined that disclosure would be an unwarranted invasion of personal privacy and we must withhold this information under FOIA Exemption 7(C).

Furthermore, FOIA Exemption 7(D) exempts from disclosure records or information compiled for law enforcement purposes which could reasonably be expected to disclose the identity of a confidential source. In this instance we have determined that releasing these documents could reasonably be expected to disclose the identity of a confidential source who provided information under circumstances from which an assurance of confidentiality could be reasonably inferred. Because enforcement of the law depends upon information elicited from these vulnerable sources, they must be protected in order to further effective law enforcement. For this reason, we are withholding information that may identify confidential sources.

We reasonably foresee that disclosure would harm an interest protected by one or more of the nine exemptions to the FOIA's general rule of disclosure.

If you disagree with this response, you may appeal this response to the OIG's FOIA/Privacy Act Appeals Officer. If you choose to appeal, the OIG FOIA/Privacy Act Appeals Officer must receive your FOIA appeal **no later than 90 workdays** from the date of this letter. Appeals arriving or delivered after 5 p.m. Eastern Time, Monday through Friday, will be deemed received on the next workday.

Your appeal must be made in writing. You may submit your appeal and accompanying materials to the OIG FOIA/Privacy Act Appeals Officer by mail, courier service, fax, or email. All communications concerning your appeal should be clearly marked with the words: "FREEDOM OF INFORMATION APPEAL." You must include an explanation of why you believe the OIG's response is in error. You must also include with your appeal copies of all correspondence between you and the OIG concerning your FOIA request, including your original FOIA request and the OIG's response. Failure to include with your appeal all correspondence between you and the OIG will result in the OIG's rejection of your appeal, unless the OIG FOIA/Privacy Act Appeals Officer determines (in the OIG FOIA/Privacy Act Appeals Officer's sole discretion) that good cause exists to accept the defective appeal.

Please include your name and daytime telephone number (or the name and telephone number of an appropriate contact), email address and fax number (if available) in case the FOIA/Privacy Act Appeals Officer needs additional information or clarification of your appeal. The OIG FOIA/Privacy Act Appeals Office Contact Information is the following:

Office of the Inspector General
U.S. Department of the Interior
1849 C Street, NW
MS-4428
Washington, DC 20240
Attn: FOIA/Privacy Act Appeals Office

Telephone: (202) 208-6742
Fax: (202) 219-1944
Email: oig_foiaappeals@doioig.gov

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of FOIA. *See* 5 U.S.C. 552(c). This response is limited to those records that are subject to the requirements of FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration

8601 Adelphi Road - OGIS
College Park, MD 20740-6001

E-mail: ogis@nara.gov
Web: https://ogis.archives.gov
Telephone: 202-741-5770
Facsimile: 202-741-5769
Toll-free: 1-877-684-6448

Please note that using OGIS services does not affect the timing of filing an appeal with the OIG FOIA & Privacy Act Appeals Officer.

However, should you need to contact me, my telephone number is (202) 208-6464 and the email is foia@doioig.gov.

Sincerely,
Sheila Maldonado

Sheila Maldonado
Government Information Specialist

OFFICE OF
INSPECTOR GENERAL
U.S. DEPARTMENT OF THE INTERIOR

Alleged Interference in FOIA Process

OFFICE OF
INSPECTOR GENERAL
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I. EXECUTIVE SUMMARY

We initiated this investigation based on information our Office of Audits, Inspections, and Evaluations (AIE) provided about an ongoing evaluation. AIE is evaluating the U.S. Department of the Interior's (DOI's) awareness review process for Freedom of Information Act (FOIA) requests, a process that provides a heightened review of FOIA-responsive documents containing the names or email addresses of politically appointed employees before the documents are publicly released.[1] During the evaluation, AIE personnel learned that DOI employees had been directed to delay releasing documents responding to a FOIA request that was being litigated in U.S. district court. AIE referred the matter, which is described below, to our Office of Investigations to determine whether that instruction conflicted with the court order.

On February 4, 2019, David Bernhardt was nominated to become the Secretary of the Interior. (b) (7)(C), then Counselor to the Secretary Hubbel Relat directed staff from the DOI's Office of the Solicitor (SOL) and members of the DOI's FOIA staff to temporarily withhold documents related to Bernhardt from an upcoming release of documents under the litigation. The anticipated release of documents was related to civil litigation pending in U.S. district court, in which the court ordered the DOI "to review 1,500 pages of potentially responsive records per month and release the responsive documents." As a result of Relat's direction, 253 pages were withheld from the DOI's February 2019 release. The February 2019 release included 1,228 pages identified as responsive to the plaintiff's FOIA request. The DOI ultimately released most of the 253 pages in December 2019, 7 months after Bernhardt was confirmed as Secretary.[2]

During our investigation, DOI officials asserted that the DOI was allowed to scrutinize what it deemed to be sensitive information before releasing it under FOIA, and that it had discretion—including under the court order—to determine when and how many responsive documents to release. In addition, the U.S. Department of Justice (DOJ) attorney representing the Government in the FOIA litigation told us that the court order did not require the DOI to *release* 1,500 pages per month, only to *review* 1,500 pages per month, and that the DOI had discretion to determine the order in which to release responsive documents. Considering that a court order is in place governing the DOI's review and production of documents, as well as the DOJ attorney's assessment that DOI officials had discretion on the order in which to produce materials, we concluded that the court is the proper venue to determine whether the DOI met its production obligations under its order.

[1] The results of that evaluation will be reported separately.
[2] Of the 253 pages, 215 were released in December 2019. The other 38 pages remain under review by the Government.

Based on our conclusion, we have closed this investigation and are presenting the facts surrounding this specific matter in this report. No response is required, and we are referring our findings to the Chief of Staff for the Office of the Secretary for information only.

II. BACKGROUND

A. The FOIA Litigation

In 2017, the U.S. Department of the Interior (DOI) began a review of (b) (5), (b) (7)(C), (b) (7)(D) (b) (5), (b) (7)(C), (b) (7)(D). Multiple requests were filed under the Freedom of Information Act (FOIA) for documents related to the (b) (5), (b) (7)(C), (b) (7)(D). On (b) (5), (b) (7)(C), (b) (7)(D) filed suit in the United States District Court (b) (5), (b) (7)(C), (b) (7)(D), alleging the DOI had failed to provide records relating to (b) (5), (b) (7)(C), (b) (7)(D) FOIA request (the "FOIA litigation").

On July 2, 2018, the court issued an order setting a monthly requirement for the DOI's review of documents related to the FOIA litigation. Specifically, the court ordered the DOI to "review 1,500 pages of potentially responsive records per month and release the responsive documents." The court order did not set a minimum number of documents the DOI had to release per month.

B. Bernhardt's Nomination and Confirmation as Secretary of the Interior

On February 4, 2019, the President nominated David Bernhardt, the Deputy Secretary of the Interior at the time, to become the new Secretary of the Interior. (b) (5), (b) (7)(C), (b) (7)(D), Hubbel Relat (who is now the DOI deputy solicitor but at the time was the DOI's counselor to the Secretary) directed Office of the Solicitor (SOL) attorney-advisors supporting the FOIA litigation to withhold any documents that were sent to or from Bernhardt, or that referenced him in any way, from upcoming FOIA releases related to the litigation. Relat's direction applied to the upcoming February 2019 document release, which initially included 1,481 pages that had been identified as responsive to the original FOIA request.

In response to Relat's direction, DOI staff removed 253 pages from the upcoming FOIA release, including, among other things, weekly updates to the White House (b) (5), (b) (7)(C), (b) (7)(D) (b) (5), (b) (7)(C), (b) (7)(D) dates to senior DOI leaders, and draft press releases and reports. The remaining 1,228 pages were released on Feb (b) (5), (b) (7)(C), (b) (7)(D) 019.

The U.S. Senate confirmed Bernhardt as Secretary of the Interior on April 11, 2019. In December 2019, the DOI released most of the documents it had initially withheld from the February 2019 FOIA release.

III. INVESTIGATIVE FINDINGS

A. Relat Directed SOL Staff To Temporarily Withhold Documents From the February 2019 FOIA Production

On Feb (b) (5), (b) (7)(C), (b) (7)(D) 19, Relat met with three SOL attorney-advisors who were assigned to assist with the FOIA litigation. According to two of them, Relat told them during this meeting to take

all documents related to Bernhardt—addressed to him, sent from him, or referring to him—out of the court-ordered document production related to the FOIA litigation. The third attorney (b) (7)(C) had received this direction as well, but (b) (7)(C) not recall when or whether it came from Relat.

One attorney wrote a note during the meeting: "Withhold everything to or from Bernhardt until the end." (b) (7)(C) interpreted Relat's direction to mean that they should release the Bernhardt-related documents "later in the production process instead of February 2019."

Another attorney told us (b) (7)(C) recalled someone later telling (b) (7)(C) Relat's direction to withhold Bernhardt-related documents in the FOIA litigation was because Bernhardt was awaiting his confirmation hearing. The attorney also remembered that this direction from Relat was to remain in place until after Bernhardt's confirmation (b) (7)(C) xplained that (b) (7)(C) told the Bernhardt-related releases would require more "scrutiny" from the DOI's FOIA offices, and thus would be withheld until after Bernhardt's confirmation to avoid production delays.

The attorney-advisors confirmed that they eventually received directions to stop withholding Bernhardt-related documents under the FOIA litigation, but all said they did not recall when they were told this or by whom. In December 2019, the DOI released 215 pages of the documents that had been withheld from the February 2019 FOIA litigation release.

B. Senior Career SOL Executive and FOIA Director Knew of Direction To Temporarily Withhold Documents

1. Edward Keable, Associate Solicitor for General Law

Edward Keable, who in his previous role as the DOI associate solicitor for general law was the senior career attorney providing advice on FOIA issues to the DOI, told us he learned about Relat's direction to the SOL attorneys sometime after Relat met with them. Keable said he did not recall personally discussing the direction with Relat or DOI Solicitor Daniel Jorjani. He said, "My recollection is that this was not a 'hold off and don't produce anything' direction so much as a 'let's take a hard look at these documents and make appropriate determinations on what to do with them, based on that careful review.'" According to Keable, he believed that was a legitimate interest the DOI had in evaluating documents for release under FOIA.

When asked whether Relat's direction to withhold Bernhardt-related documents from the February 2019 FOIA litigation production was related to Bernhardt's nomination, Keable replied, "I wouldn't read too much into the timeline. . . . I think it's not enough to look at the timeline to make a judgment about the appropriateness, and certainly the lawfulness, of the matter in which the legal productions were managed." He explained that the court-ordered production was broad in scope, encompassing "hundreds of thousands of pages of material," and the DOI had discretion to decide when to release responsive documents as well as how many to release. He said the releases were "consistent with the schedule obligations" of the court order, and he had never been concerned that the DOI was not meeting its obligations.

2. Rachel Spector, Deputy Chief FOIA Officer and Director of the DOI's FOIA Office

Rachel Spector told us she learned about Relat's direction to the SOL attorneys sometime after it happened. Spector said that she and Keable discussed Relat's direction with both the SOL attorneys and the FOIA officers and told them it was a "legitimate activity to scrutinize" documents before release to "understand what might hit the press or [what] Congress might ask David [Bernhardt] about . . . during the pendency of his nomination." Spector said she told the FOIA officers that as long at the DOI continued to meet its obligations for reviewing and releasing responsive documents, choosing the order of document production was not a "violation of the law."

C. Relat Said He Directed Staff To Temporarily Withhold the Bernhardt-Related Documents

In February 2019, Relat was the counselor to the Secretary. In that capacity, he advised the DOI on FOIA releases. We asked Relat whether he recalled directing SOL attorneys and FOIA officers on Fe(b) (5), (b) (7)(C), (b) (7)(D) 19, to withhold Bernhardt-related documents until after his confirmation and, if so, who decided to give that direction and why. Relat replied:

> [M]y approach was that information that we have a legal obligation to disclose, . . . we disclose . . . and release. No questions asked, . . . but that sensitive information that we're not legally obligated to disclose, we should treat more strategically in terms of when and how . . . it's disclosed. . . . this is an approach that I discussed with Dan Jorjani.

When asked whether he and Jorjani had considered documents related to Bernhardt to be "sensitive information" due to the recent nomination, Relat stated, "I think that's probably a fair characterization." Relat further explained, "[I]n instances where we were producing documents, . . . under court order, to provide a certain number and type of document on . . . a monthly basis, [the rationale was] that we should do so in a way that prioritizes documents that take into account the need to strategically release that information."

According to Relat, he did not know when the direction to withhold Bernhardt-related documents was rescinded. He said he had moved into a different position at the DOI before Bernhardt's confirmation on April 11, 2019.

D. Jorjani Stated That He Thought Relat's Direction Was Proper, and He Accepted Responsibility for It

Daniel Jorjani is the DOI's solicitor (the DOI's chief attorney and the Secretary's principal legal advisor). When asked if he was aware that Relat directed SOL attorneys and FOIA staff to temporarily withhold the release of Bernhardt-related documents in the FOIA litigation, he said, "It sounds quite reasonable to me," and "That sounds perfectly consistent with how I would have approached it." He also said he did not specifically remember discussing the direction with Relat, but he assumed that they had, "because knowing Hubbel [Relat] and his absolute focus on compliance and squaring every corner, he probably wanted to make sure that everything he was doing was fully compliant." Jorjani went on to state, "Either I came up with the idea—and I

would like to think I'm smart enough to do that—or Hubbel [Relat], being proactive, said, 'Oh, can we do this compliantly and consistent with the court's direction,' and then ran it past me. . . . It would be one of those two, I would think."

Jorjani noted that complying with a court order is "more important than a confirmation process," and that consequences could have been serious if the DOI had not complied. He stressed, however, that "to the extent you can comply with the law, comply with the court's mandate, but be aware of the broader surroundings, that strikes me as perfectly reasonable." Jorjani said he was not certain whether Bernhardt was aware of Relat's direction.

Jorjani told us that, as the DOI's top attorney, he owned the decision, not Relat.

E. The U.S. Department of Justice (DOJ) Attorney Said (b) (7)(C) Believed the DOI Had Discretion To Choose the Order of FOIA Documents Released Under the Court Order

The DOJ attorney representing the Government in the FOIA litigation told us that the court order requires the DOI to *review* 1,500 pages of potentially responsive records per month and to release responsive documents based on that review. He explained that a review was an examination of documents "for whether or not those documents are responsive to the FOIA request, and if so, whether or not they're releasable under the FOIA or subject to one or more FOIA exemptions." According to the DOJ attorney (b) (7) (C) elieved that so long as the DOI *reviewed* at least 1,500 potentially responsive pages, it was complying with the court order without needing to actually *release* 1,500 pages. The DOJ attorney noted hypothetically, however, that if an agency were required to review 1,500 pages but released only 10 or 12 pages, the plaintiff in the case would then have the right to request an explanation for the low number.

When we asked about the 253 pages withheld from the February 2019 FOIA release, the DOJ attorney said the DOI could not permanently withhold documents from FOIA releases unless it did so under an identified FOIA exemption (b) (7) (C) aid, however, tha (b) (7) (C) elieved the DOI would be within its discretion to determine the order in which to release responsive documents.

The DOJ attorney also explained that if the plaintiff believed the DOI was not fully complying with its FOIA obligations, the plaintiff needed to seek relief from the DOI before involving the court (b) (7) (C) aid that all of the DOI's decisions pertaining to the FOIA litigation are subject to the court's review, but that "the court is only aware of the issues that are brought to it by the parties" and (b) (7) (C) as not aware of the withheld pages being brought to the court's attention. Therefor (b) (7) (C) said, "All I can say at this juncture is, [(b) (5)] is not contrary to any court order . . . [or] to the FOIA statute or any binding DC circuit case law that I am aware of." The DOJ attorney concluded, "The bottom line is, I believe, it is frankly within the agency's discretion as to how it chooses to process . . . the subject FOIA request."

IV. ANALYSIS

As noted above, the court order in the pending FOIA litigation requires the DOI "to review 1,500 pages of potentially responsive records per month and release the responsive documents." In light of (1) the statements from relevant officials, including the career official leading the DOI's FOIA program and the DOJ attorney representing the DOI in the FOIA litigation, that the

DOI had discretion under the court order to determine when to release the 253 pages it had identified as responsive to the FOIA request, and (2) the fact that the DOI has since released most of the documents that were initially withheld (the remaining 38 responsive pages remain under review by the Government), we concluded that this matter did not warrant further investigation. We note that whether the DOI complied with its obligations under the court order is a matter for the court to decide if and when a party raises it.

V. DISPOSITION

We are providing this report to the Chief of Staff for the Office of the Secretary for his information only.

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