Organization for Competitive Markets

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Via electronic mail to FOIASTAFF@oig.usda.gov.

Re: FOIA Appeal, OIG FOIA Log No. 13-00077

July 2, 2013

Dear Inspector General Fong,

On behalf of the Organization for Competitive Markets (OCM), I hereby submit this FOIA appeal for administrative review of the above-referenced matter. On April 11, 2013, OCM submitted a FOIA request to the Office of Inspector General (OIG) for records related to Audit Report No. 01099-0001-21. OCM further requested a fee waiver because disclosure of the information would be "likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). Despite the FOIA's specific provisions relating to statutory deadlines and mandatory determinations, OIG has failed to comply with its disclosure obligations in several key respects, detailed below. As such, OCM files this appeal to correct the referenced compliance defects and avoid the need for judicial review to resolve this matter.

I. Background

On April 11, 2013, OCM submitted a FOIA request seeking records related to OIG's recently released audit of the Agricultural Marketing Service (AMS) oversight of the beef checkoff program.[1] By letter dated April 16, 2013, the OIG acknowledged receipt of the April 11th request and assigned OIG Log No. 13-00077.

On May 7, 2013, OIG sent an email to OCM to "provide a status update" that indicated, among other things, that the agency "qualifies for an additional 10 working days

[1] *See* Attachment 1.

to respond" to the OCM request.[2] The email also inquired whether OCM would consider modifying its request or extend the timeline for OIG to provide records. OCM and OIG spoke by telephone later that week, after which OIG sent a supplemental email on May 13th. The email again requested a new timetable and asked whether OCM would consider modifying its request to include only records in its "official work paper file," which it indicated contained 7,751 pages at that point.

OCM responded by email the following morning, May 14th, indicating that it would not be able to narrow the request by the type of record (e.g., work paper file), rather than by the substance of the information within the records. The organization did, however, indicate that it would be open to discussing a "reasonable alternate time frame" for receipt of the records. OCM further indicated that it would be happy to receive records in electronic format, rather than hard copy, to facilitate easier processing and disclosure of the records. *See* 5 U.S.C. § 552(a)(3)(B).

Following OCM's response, OIG issued a notice that same day stating that the 7,751 pages in the work paper file were being transferred to AMS for processing. The notice stated that "[u]nder FOIA, the agency which created the record is responsible for processing."[3] No reference to OCM's message earlier in the day was made nor was there any indication of the reason for the five week delay before deciding to transfer the records to AMS.

On May 21, OIG sent another email to OCM providing several estimated time frames for processing the FOIA request, ranging from a low of four months to a high of one year.[4] Among the records that OIG indicated were being gathered for the request were another 3,000 pages that it planned to again transfer to AMS for processing.[5]

OIG further stated that it intended to provide records in paper form, not electronically, and that it had "not yet made a determination with respect to the request for a fee waiver."[6] As of the date of this appeal, no determination has been issued.

Two days later, on May 23rd, OIG issued its first release of records.[7] However, of the more than 3,000 pages identified as responsive to OCM's request, OIG released only 101 and withheld the rest in their entirety. While the statutory section on which the exemptions

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[2] *See* Attachment 2, Email correspondence between OIG and OCM.
[3] *See* Attachment 3.
[4] OIG does not indicate how the time frame was calculated or the intervals at which it will make rolling disclosures. Further, in calculating the number of pages OIG has to review in the estimated time frame, the agency appears to include the 7,751 pages that have been transferred to OIG for review.
[5] AMS has acknowledged receipt of the records and assigned a new FOIA number (as if this were a separate request). Despite OIG's previous exhaustion of the one-time FOIA option to take a ten-day "unusual circumstances" extension for processing, AMS recently notified OCM that it too would be attempting to exercise the extension. USDA cannot avoid FOIA's mandated timelines simply by switching the request among divisions with the agency. As of the date of this appeal, none of the transferred records have been received.
[6] *See* Attachment 2.
[7] *See* Attachment 4.

were claimed was cited in the letter, no explanation of how these records qualified for the exemption or why they couldn't be released in any type of redacted form.

II. Grounds for Appeal

A. There is no legally supportable basis for OIG's sweeping claims of exemptions.

Despite statements in earlier communications that it was collecting "drafts" of the report in response to our request, OIG withheld *every one* of these documents in its entirety. In its May 21st email, OIG indicated that it had collected several thousand pages of drafts and additional emails related to the drafts. Just two days later, however, OIG notified OCM that it was withholding all *3,120 pages* of audit report drafts and 125 pages of emails that would have been covered by OCM's request. Of the 3,346 pages of records identified in its May 23rd letter, OIG released 101 pages—just *three percent*—and withheld the rest of the records in their entirety.

Without specific explanation, OIG cited FOIA exemptions (b)(5) and (b)(6) as a basis for withholding the records. However, the agency has a general duty to disclose reasonably segregable non-exempt information. As the Court of Appeals has explained, "[t]he focus in FOIA is information, not documents." *Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 907 (D.C. Cir. 1999); *see also* 5 U.S.C. § 552(b). Thus, in processing a FOIA request the agency is obligated to disclose all reasonably segregable non-exempt information. 5 U.S.C. § 552(b). Ultimately, to demonstrate its compliance with this requirement, OIG would have to provide a federal district court with a "detailed justification" – including a "line-by-line review of each document withheld in full" – in order "to demonstrate that all reasonably segregable material has been released." *Johnson v. Exec. Office of U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002). In its response to our FOIA request, however, USDA failed to demonstrate that it has even considered, much less complied with its obligation to release all reasonably segregable, non-exempt information.

The significance of this improper categorical exemption of documents critically impacts the credibility of the audit report. For example, the audit report references a conclusion that reflects OIG's position on the lawfulness of the relationship between the Beef Board and its primary contractor, the National Cattlemen's Beef Association (NCBA), but does not provide either an explanation or the data on which that conclusion was made. It is exactly this kind of unsupported statement—in the face of factual evidence that the checkoff is not being managed lawfully—that has created such distrust in the program among producers and the public. OIG's refusal to release more than 3,000 pages of audit drafts *in their entirety* does nothing to produce the kind of transparency in the checkoff program that it claims is crucial to gain that producer support.

Courts have stated in no uncertain terms that "draft" documents are not presumptively exempt from FOIA. *See Judicial Watch, Inc. v. USPS*, 297 F. Supp. 2d 252, 261 (D.D.C. 2004); *Arthur Andersen & Co. v. IRS,* 679 F.2d 254, 257 (D.C.Cir.1982).

Regardless of the designated document label, the key question is whether the information at issue it is truly "deliberative" and contains opinions or recommendations on legal or policy matters. At the very least, any records (e.g., decision memos, reports, etc.) that reflect or support the agency's adoption of the above "determination" about the Board's relationship with NCBA (or that provide the factual basis for the conclusion) would not be covered by the deliberative process exemption and should be publicly disclosed.

It is concerning that OIG would *include* the page counts for the audit drafts and related emails in the totals when justifying the extended time it would need to process OCM's request, yet just two days later *exclude* them in their entirety from disclosure. It is difficult to understand how more than 3,000 pages of drafts and resulted in a final report of just 17 pages (including exhibits). It is even more difficult to understand how OIG can support a claim that *not a single piece of information* from any of those 3,120 pages can be publicly released.

This appeal requests that the agency make specific determinations about the information contained in those "draft" records and emails, redact only those portions that are truly "deliberative" expressions of opinion or recommendation, and release the rest in accordance with the letter and spirit of FOIA's mandate for open government.

B. OIG has not complied with the FOIA's statutory deadline for making compliance determinations.

The language of FOIA is "unambiguous" that "[a] determination must be made within 20 working days." *Bensman v. Nat'l Park Service*, 806 F. Supp. 2d 31 (D.D.C. 2011), *citing* 5 U.S.C. § 552(a)(6)(A)(ii)(II). Thus, OIG had 20 working days from the date of OCM's request (April 11th) to make its determination regarding disclosure of records and approval of the public interest fee waiver. Adding the additional ten working days indicated by OIG in its May 7th email changes the deadline, but not the result, since that revised deadline was also missed.

The OPEN Government Act of 2007 ("2007 Amendments") made clear that there are only two circumstances that can toll the agency's response deadline, and they are each quite narrow. In each case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period. The first circumstance by which the agency may toll the fee waiver determination is the only one relevant to the facts of this matter. FOIA provides that "the agency may make *one* request to the requester for information and toll the 20-day period while it is awaiting such information that it reasonably requested from the requester." 5 U.S.C. § 552(a)(6)(A)(ii)(I) (emphasis added). In its May 7th email, OIG suggested limiting the scope of the request and asked whether OCM would "agree to a different timetable" for processing the request. After discussing the issue by phone later that week, OIG sent a follow-up email on May 13, 2013.

OCM responded by email the next morning on May 14th, indicating that it wouldn't be able to "narrow the request by the type of record, rather than by the relevance of the

information it contains."[8] Thus, even the using the earliest OIG request for an extended timetable on May 7th, the May 14th response by OCM ended the tolling period.[9] The 2007 Amendments expressly provide that an "agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period." 5 USC § 552(a)(6)(A).

There is simply *no computation* that OIG could use here to avoid the expiration of the statutory deadline for making the required determinations for OCM's FOIA request. OIG confirmed in its May 21st email that it had not yet made a determination on OCM's request for a fee waiver. As of the date of this appeal—*nearly three months after making its request*—OCM has still received no determination and is awaiting determinations on records disclosures.

Consequently, OIG's failure to make these determinations within permissible time period triggers the provision of the 2007 Amendments that preclude an agency from charging fees. The 2007 Amendments reflect "a strong desire by Congress to curb agencies' delays in processing FOIA requests." *Bensman* at 37. Correcting for the backlog of FOIA requests and the restoring of meaningful deadlines were a large part of what Congress sought to remedy and one of the major ways it did so was with an amendment that "[a]n agency shall not assess search fees . . . if the agency fails to comply with *any time limit.*" §552(a)(4)(A)(viii) (emphasis added); *Bensman* at 38. Thus, for purposes of resolving the immediate issues, on the basis of the agency's failure to comply with its statutorily mandated deadline to make responsive determinations, *OCM may not be assessed fees for its request in this matter.*[10]

C. The transfer of records to AMS was improper.

It should hardly be surprising that OCM would be troubled by OIG's transfer of records to AMS for processing. The agency under scrutiny in the audit should not be placed in charge of deciding which records to make public. OIG is the agency that gathered and maintained these records and is the only agency in a position to properly process the specific requests made by OCM.

OIG's purported reason for the transfer—that FOIA directs the agency that created the record to process the request for it—is simply not an accurate statement of law. FOIA contains no such requirement. OCM directed its request to OIG, which in this case was not just the custodian of the relevant records but also their creator. That is, the records at issue *became* OIG records (despite originating at AMS or elsewhere) when OIG gathered and

[8] OCM further offered to consider a reasonable alternate timetable "for receipt of the records." No direct response was made to this offer, although the same day the OIG received the response from OCM, it issued a notice indicating that it was transferring the 7,751 pages in the work paper file to AMS for processing.

[9] The second circumstance by which an agency may toll its fee waiver determination is "if necessary to clarify with the requester issues regarding fee assessment." 552(a)(6)(A)(ii)(II). OIG has not sought any such clarification in this matter.

[10] OCM sufficiently provided information in its request to qualify for a public interest fee waiver. The FOIA remedies referenced here establish an additional basis for waiving fees as a consequence of the agency's failure to meet the statutory deadlines.

maintained them for use in the creation of its report. This is certainly evident by the fact that OIG did not transfer the actual FOIA request, but instead gathered the responsive records (that it had been maintaining) and just sent them over to AMS to decide which to disclose.

Had OIG not been the correct agency to process the records request, the FOIA provides ten days to transfer the request to the appropriate agency component before the statutory time clock begins to run. *See* 5 U.S.C. § 552(a)(6)(A). In this case, however, the transfer decision did not come until *five weeks* after OCM's request and was only made after OCM declined to limit its request to certain specific records. Both as the custodian of the responsive records and the only agency in a position to determine which information was gathered and/or relied upon for the audit at issue, it is OIG's obligation to process the request and determine disclosure of its records in accordance with FOIA, not to transfer that responsibility to another department unnecessarily.

The transfer is particularly troubling here, where the transfer was made to the agency that was the subject of the audit at issue. Asking the agency being audited to determine which records should be publicly released is hardly a mechanism for ensuring public confidence in government operations. AMS appears further to be treating the transfer as an independent FOIA request, and recently issued a notice of intent to seek a 10-day response extension after OIG had already exhausted that one-time option.[11] OIG's improper transfer places an added burden on OCM because it forces the organization to monitor, correspond, prepare and file appeals, and potentially seek judicial review for disclosure decisions made in a single properly directed request. While OIG certainly has the authority to consult with AMS or other departments on records in which they have a "substantial interest," it cannot avoid its processing obligations by transferring records that it maintains to another agency entirely and simultaneously increasing the burden on the requestor seeking records.[12]

Despite affirming April 11th as the date OCM submitted its request to OIG, AMS has released no records, provided no information about an expected disclosure date or whether it will make any claims of exemption. OCM appeals the transfer of records to another agency, which results in a significant increase in time and burden on OCM to obtain records that are maintained by OIG and specifically relate to OIG operations.

III. Conclusion

The agency's emphasis on transparency in the beef checkoff program to build producer trust is remarkably ironic in light of its refusal to release such a large percentage of records. OIG asks producers and the public to be satisfied monitoring government

[11] Letter from AMS to OCM, June 11, 2013.

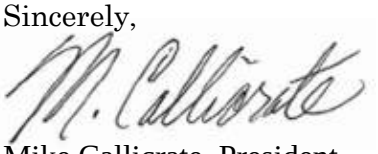
[12] While this case involves just two agencies, the problematic position taken by OIG here could include any number of other departments depending on how broad the audit at issue is. Thus, any FOIA inquiry to OIG could subject the requestor to numerous and protracted communications with different divisions of the same agency, and include multiple appeals on issues like the ten-day extension or fee waivers, as well as judicial review multiple times over for various agency determinations, even though they all relate to records gather by OIG for a single report.

operations through a peephole. FOIA, however, requires that the government's door be thrown open as widely as possible. This means that OIG must segregate and redact only specific parts of documents that meet the exemption requirements and disclose the rest. OCM is, of course, prepared to seek judicial review if necessary, at which point the burden would be on the government to index the contents of the records and justify withholding any portions of them.

Additionally, the agency's processing of OCM's records request must also comply with the mandates of FOIA and avoid placing added obstacles on the requestor to obtain records. The transfer of records to AMS for processing was improper here and the failure to make fee waiver and exemption disclosure determinations within the mandated deadlines triggers the fee waiver provisions of the 2007 FOIA Amendments and authorizes the immediate right to judicial review. *See also*, 7 C.F.R. 1.17. Nevertheless, in an effort to resolve the matter directly, OCM submits this administrative appeal to the OIG before proceeding further.

OCM requests that the agency rule on this appeal within twenty (20) working days as provided in 5 U.S.C. § 552(a)(6)(A)(ii). If you have any questions regarding any aspect of this request, please contact me by telephone (402-817-4443) or e-mail (callicrate@competitivemarkets.com) in order to facilitate the most expeditious resolution of these matters. Thank you for your assistance.

Sincerely,



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