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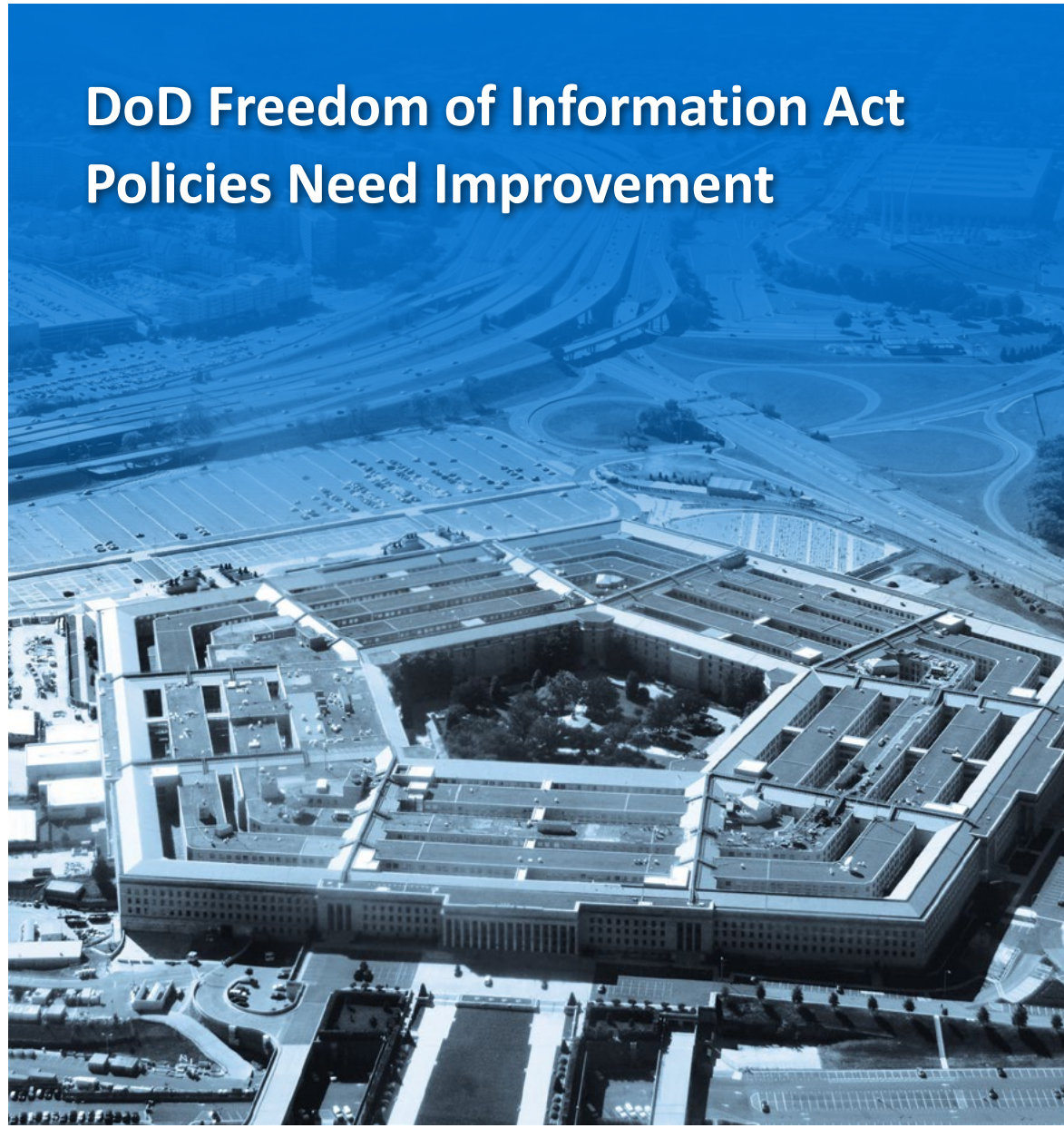
INSPECTOR GENERAL

U.S. Department of Defense

AUGUST 16, 2016



DoD Freedom of Information Act Policies Need Improvement



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Results in Brief

DoD Freedom of Information Act Policies Need Improvement

August 16, 2016

Objective

The Chairman of the Senate Committee on Homeland Security and Governmental Affairs requested that the DoD Office of Inspector General (DoD OIG) determine whether noncareer officials (political appointees or persons nominated by the President and confirmed by the U.S. Senate) were adversely affecting the Freedom of Information Act (FOIA) process at the DoD between January 2007 and July 2015. In response, we determined whether DoD noncareer officials unduly influenced the FOIA response process through unnecessary delays or withholding of information that would have otherwise been released absent the noncareer official's involvement.

Finding

Our evaluation did not disclose any instances of DoD noncareer officials unduly influencing the FOIA response process. On November 9, 2015, we advised the Chairman of the Senate Committee on Homeland Security and Governmental Affairs of our evaluation results (see Appendix D).

During the course of this evaluation, however, we determined that DoD FOIA policies are outdated. The DoD Deputy Chief Management Officer (DCMO) had not updated DoD FOIA policies, as required by DoD Instruction 5025.01, "DoD Issuance Program," to ensure currency and accuracy. The DoD FOIA policies did not include requirements established in Executive Order 13392, "Improving Agency Disclosure of Information," and the "OPEN

Finding (cont'd)

Government Act of 2007." According to the Executive Order and the Act, agencies must review their FOIA processing operations, report on their FOIA improvement plan implementation, and strengthen procedures related to FOIA administration. Additionally, the DCMO did not incorporate guidance being used for "significant" FOIA releases into DoD Regulation 5400.7-R, "DoD Freedom of Information Act Program." A "significant" FOIA request is defined as any FOIA request in which the subject matter of the released documents may be of interest to DoD senior leadership, the public, the media, or Congress.

Recommendations

We recommend that the DCMO:

- Update DoD Directive 5400.07 and DoD Regulation 5400.7-R, "DoD Freedom of Information Act Program," to comply with DoD Instruction 5025.01 and include requirements of Executive Order 13392 and the "OPEN Government Act of 2007."
- Incorporate the notification procedures for "significant" FOIA releases into DoD Regulation 5400.7-R.

Management Comments

The DCMO partially concurred with our recommendations and decided to create a new issuance DoD Manual 5400.07 to replace DoD Regulation 5400.7-R. We believe the creation of a new manual to replace the outdated FOIA guidance satisfies the intent of recommendation 1.a. The DCMO also plans to revise its notification procedures for "significant" FOIA releases once it meets with the DoD Office of General Counsel. We consider the DCMO comments to recommendations 1.a. and 1.b. to be responsive and no further comments are required. Please see the Recommendations Table.

Recommendations Table

| Management | Recommendations Requiring Comment | No Additional Comments Required |
|---------------------------------|--------------------------------------|------------------------------------|
| Deputy Chief Management Officer | | 1.a. and 1.b. |



**INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
4800 MARK CENTER DRIVE
ALEXANDRIA, VIRGINIA 22350-1500**

August 16, 2016

MEMORANDUM FOR DEPUTY CHIEF MANAGEMENT OFFICER/
CHIEF FREEDOM OF INFORMATION ACT OFFICER, DoD

SUBJECT: DoD Freedom of Information Act Policies Need Improvement
(Report No. DODIG-2016-124)

We are providing this report for your review and comment. The Chairman of the Senate Committee on Homeland Security and Governmental Affairs requested that the DoD Inspector General determine whether noncareer officials were adversely affecting the Freedom of Information Act (FOIA) process at DoD between January 2007 and July 2015. Specifically, we evaluated whether noncareer officials in DoD unduly influenced the FOIA response process through unnecessary delays or withholding of information that would have otherwise been released absent the noncareer official's involvement. We conducted this evaluation from July 2015 through May 2016 in accordance with the "Quality Standards for Inspections and Evaluations," published in January 2012 by the Council of the Inspectors General on Integrity and Efficiency.

Our evaluation did not disclose any instances of a noncareer official unduly influencing the FOIA response process. However, we found that the DoD Deputy Chief Management Officer's Transparency Office has not updated DoD FOIA policies to reflect current FOIA requirements, as required by DoD Instruction 5025.01, "DoD Issuance Program." In addition, the Transparency Office issued informal guidance on notification procedures for "significant" FOIA releases that was not incorporated into the DoD Regulation 5400.7-R, "DoD Freedom of Information Act Program."

We considered management comments on a draft of this report. DoD Instruction 7650.03 requires that recommendations be resolved promptly. Comments from the Assistant Deputy Chief Management Officer were responsive and no additional comments are required.

We appreciate the courtesies extended to the staff. Please direct questions to Carolyn R. Hantz at (703) 604-8877 or carolyn.hantz@dodig.mil.

A handwritten signature in black ink, appearing to read "R. Stone", is positioned above the name of the Deputy Inspector General.

Randolph R. Stone
Deputy Inspector General
Policy and Oversight

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Introduction

Objective

As requested by the Chairman of the Senate Committee on Homeland Security and Governmental Affairs,¹ we determined whether noncareer² officials were adversely affecting the Freedom of Information Act (FOIA) process at DoD between January 2007 and July 2015. Specifically, we evaluated whether noncareer officials in DoD unduly influenced the FOIA response process through unnecessary delays or withholding of information that would have otherwise been released absent the noncareer official's involvement. See Appendix A for details on the scope and methodology.

For this evaluation, we:

- Reviewed DoD FOIA-related policies and procedures.
- Sent questionnaires to 32 DoD Component Chief FOIA officers (DoD Component offices are listed in Appendix B) and requested certification that noncareer officials were not involved in or did not unduly influence the FOIA response process.
- Interviewed 5 DoD Component Chief FOIA officers from:
 - Office of the Secretary of Defense and Joint Chiefs of Staff,
 - Department of the Army,
 - Department of the Navy,
 - Department of the Air Force, and
 - Marine Corps.
- Reviewed 62 complaints related to FOIA that the DoD Hotline received since January 2007.

Background

Congress enacted the “Freedom of Information Act” (FOIA) in 1966 giving the American public the right to request records created by Executive Branch departments and agencies. The FOIA allows access to such records as long as the request does not fall within the Act's exempted nine categories (see Appendix F). The FOIA was amended on December 14, 2005, by Executive Order 13392, “Improving Agency Disclosure of Information,” which required each Federal agency

¹ See Appendix C.

² We defined a noncareer official as a political appointee or person nominated by the President and confirmed by the U.S. Senate.

to review its FOIA processing operations and report on both the agency's successes and deficiencies in implementing its FOIA Improvement Plan. Specifically, the Executive Order 13392 required the following actions by agencies:³

- Designate a Chief FOIA Officer,
- Establish FOIA Requester Service Centers,
- Designate Public Liaisons, and
- Review the agency's FOIA administration, draft an improvement plan, and report to the Department of Justice and the Office of Management and Budget.

On December 31, 2007, Congress passed the "OPEN Government Act of 2007," which provided for greater agency transparency and accountability in its FOIA activities by:

- Codifying the requirements of a Chief FOIA Officer, establishing FOIA Requester Service Centers, and designating FOIA Public Liaisons;
- Creating an Office of Government Information Services to assist in increasing agency transparency and to resolve disputes between requesters and agencies;
- Setting time limits for agencies to act on requests to 20 days from date on which the request is first received;
- Defining the term "news"⁴ and recognizing the evolution of methods of news delivery to include electronic dissemination of news and freelance journalists;
- Expanding the term "record" to include any information that would be an agency record when maintained by an agency in any format, including an electronic format; and any information that is maintained for an agency by an entity under Government contract, for purposes of records management;
- Permitting an agency to toll (cease counting days of) the statutory time period of 20 days in circumstances where the agency has made one reasonable request to the requester for information and is waiting the requested information and if necessary to clarify with the requester issues regarding fee assessment⁵;
- Prohibiting an agency from charging fees when a time limit is not complied with, unless unusual or exceptional circumstances exist;

³ The summary of requirements for the Executive Order 13392 and the OPEN Government Act of 2007 was obtained from the US Equal Employment Opportunity Commission website at <https://www1.eeoc.gov/eeoc/foia/hb-2.cfm>

⁴ News is defined as "information that is about current events or that would be of current interest to the public."

⁵ In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

- Requiring individualized tracking numbers for each request to permit requesters to track status of the request via telephone or internet site;
- Requiring attorney fees and costs to be paid from an agency's annual appropriations when a requester substantially prevails; and
- Enhancing reporting requirements to establish greater tracking and transparency of an agency compliance with response times.

DoD FOIA Program

The DoD FOIA Program is decentralized, with 32 separate component FOIA offices. No single FOIA office is responsible for responding to FOIA requests or has access to all DoD records and information. Therefore, a FOIA requester sends a FOIA request to a DoD Component FOIA office, and that FOIA office responds to the request. Within DoD, the Chief FOIA Officer administers the FOIA Program by providing policy direction and program oversight.

DoD FOIA Organization and Responsibilities

In FY 2015, the Office of the Secretary of Defense (OSD) transferred the DoD Chief FOIA Officer function from the Director of Administration and Management to the Office of the Deputy Chief Management Officer (DCMO). The DCMO delegated the DoD Chief FOIA Officer functions to the newly established Oversight and Compliance directorate and its Transparency Office. The Transparency Office provides policy guidance and direction to DoD FOIA components on how to implement their FOIA programs.

DoD FOIA Policies

DoD implements the FOIA policy primarily through:

- DoD Directive (DoDD) 5400.07, "DoD Freedom of Information Act (FOIA) Program," January 2, 2008, certified current through January 2, 2015, and
- DoD Regulation 5400.7-R, "DoD Freedom of Information Act Program," September 1998.

DoD also implements FOIA policy through four OSD memorandums.

- February 1, 2006, Memorandum to all DoD Components, "Executive Order (EO) 13392 on the Freedom of Information Act – DoD Implementation;"
- September 29, 2006, Memorandum to DoD Chief FOIA Public Liaisons, "Standards for DoD Freedom of Information Act (FOIA) Web Sites;"

- December 3, 2008, Memorandum to DoD Chief FOIA Public Liaisons, “OPEN Government Act of 2007,” and
- August 10, 2009, Memorandum to all DoD Components, “Department of Defense (DoD) Freedom of Information Act (FOIA) Program.”

In an August 10, 2009, OSD memorandum, the DoD Chief FOIA Officer established guidance on notification procedures for “significant” FOIA releases to keep DoD leadership informed of any FOIA releases that may be of significance to the public, the media, Congress, or DoD senior officials.

Finding A

Noncareer Officials in DoD Did Not Unduly Influence DoD's Response to FOIA Requests

Our evaluation did not disclose any instances of noncareer officials in DoD unduly influencing any FOIA requests for information.

Undue Influence Defined

For this evaluation, we determined whether noncareer DoD officials unduly influenced the DoD FOIA response process. Based on the request from the Chairman of the Senate Committee on Homeland Security and Governmental Affairs request, we defined undue influence as noncareer DoD official involvement that resulted in any undue delay of a response to any FOIA request or the withholding of any document or portion of any document but for the noncareer official involvement of the FOIA response process.

Questionnaire and Certification Process

In determining whether noncareer officials unduly influenced the DoD FOIA response process, we sent questionnaires and requested each of the 32 DoD Component Chief FOIA officers (DoD Component offices are listed in Appendix B) to certify their understanding of noncareer official involvement in the FOIA response process. Specifically, each Chief FOIA officer certified whether noncareer officials were involved in or unduly influenced the FOIA response process. The 32 DoD Component Chief FOIA officers responded to our FOIA Congressional Request Data Call Questionnaire and certified noncareer official involvement, if any, did not result in undue delay or withholding of information from release.

The Questionnaire (included at Appendix E) requested, in addition to certification of noncareer involvement, information on each FOIA organization's policies and procedures for FOIA processing, and awareness of Transparency Office guidance regarding significant DoD FOIA requests. Concerns related to FOIA policies and Transparency Office guidance are addressed in Finding B.

Interviews of DoD FOIA Officials from the Office of the Secretary of Defense and Military Services

Of the 32 DoD FOIA offices, we interviewed 5 DoD FOIA officials from the Office of the Secretary of Defense and the Military Services. We based our selection of these 5 offices on the likelihood of these offices employing noncareer officials and the volume and type of FOIA requests processed through these offices. The DoD Component Chief FOIA officer from each of the following were interviewed:

- Office of the Secretary of Defense and Joint Chiefs of Staff,
- Department of the Army,
- Department of the Navy,
- Department of the Air Force, and
- Marine Corps.

Our interviews of five DoD Component FOIA officials did not disclose any instances of undue influence by noncareer officials on FOIA request responses.

Review of FOIA Related Hotlines

For our evaluation, we also analyzed 62 DoD Hotline complaints related to FOIA requests received from January 2007 through July 2015. Our rationale for reviewing these complaints was that the complaints might identify instances of noncareer DoD official involvement outside of the DoD Component's normal FOIA processes. We found no complaints or allegations indicating noncareer DoD official involvement in the FOIA process.

One Instance of NonCareer Official Involvement

A DoD Transparency Office official identified during an interview one instance of a noncareer official, outside of DoD, who was involved in a decision on a FOIA release. However, we determined that the noncareer official involvement did not unduly influence how DoD responded to the FOIA request. The FOIA request was for information related to weekly updates on the status of "significant" FOIA requests and "significant" FOIA responses. The weekly updates contained information that pertained to the White House and Department of Justice. The FOIA request was sent to the White House for its review. The noncareer official, on a rotational assignment in the White House counsel's office, approved the release of the FOIA information related to the White House. Also, the noncareer official suggested to the DoD Transparency Office official that he send the FOIA request to the Department of Justice for its review, because the FOIA response involved releasing information that pertained to the Department of Justice.

We interviewed several individuals with knowledge of the circumstances surrounding this noncareer official's involvement in the FOIA response. We also reviewed related e-mails and FOIA case file information. We concluded that the noncareer official's suggestion to send the request to the Department of Justice for its review was reasonable and did not unduly delay the FOIA request. Also, the process used in this instance aligns with DoD FOIA policy for referring FOIA requests to other federal agencies when appropriate. The Department of Justice reviewed and recommended release of the documents, and DoD released the FOIA documents as initially planned.

Conclusion

On November 9, 2015, we advised the Chairman of the Senate Committee on Homeland Security and Governmental Affairs of our evaluation results (see Appendix D). On the basis of our questionnaire, interview results, and analysis of DoD Hotline complaints related to DoD FOIA between January 2007 and July 2015, our evaluation did not disclose any instances of noncareer officials in DoD unduly influencing any FOIA requests for information. One instance of noncareer involvement outside of DoD did not result in undue delay or withholding of information.

Finding B

DoD FOIA Policies Are Outdated and Do Not Reflect Current FOIA Requirements

The DoD Deputy Chief Management Officer's Transparency Office has not updated DoD FOIA policies to reflect current FOIA requirements as required by DoD Instruction 5025.01, "DoD Issuance Program." In addition, the Transparency Office issued informal guidance on notification procedures for "significant" FOIA releases that has not been incorporated into formal DoD policy in six years. The lack of current and accurate FOIA policies, as required by DoD Instruction 5025.01, could impact the administration of DoD's FOIA program.

Outdated DoD FOIA Policies

During our evaluation, we determined that the following two policies governing the DoD FOIA Program are outdated and do not reflect current FOIA requirements of Executive Order 13392 and the "OPEN Government Act of 2007."

- DoD Directive (DoDD) 5400.07, "DoD Freedom of Information Act (FOIA) Program," January 2, 2008, certified current through January 2, 2015, and
- DoD Regulation 5400.7-R, "DoD Freedom of Information Act Program," September 1998.

DoDD 5400.07 is the overarching DoD FOIA policy and DoD Regulation 5400.7-R is the implementing guidance. Although, the DoDD 5400.07 was certified current through January 2, 2015, it did not include some FOIA requirements. For example, the DoDD 5400.07 and DoD Regulation 5400.7-R, do not include the following FOIA requirements.

- FOIA requires the requester to receive the names and titles or positions of each person responsible for denying a request for information.
- FOIA requires the Public Liaison official to assist in the resolution of disputes between the requester and the agency.

Also, the DoD Regulation 5400.7-R had not been updated for seventeen years.

DoD Instruction 5025.01, "DoD Issuance Program," June 6, 2014 states "[i]ssuances published before March 25, 2012, should be updated or cancelled within 10 years of their publication date." According to DCMO's Oversight and Compliance Director, the process to revise and reissue the DoD FOIA policies began in 2007.

The Transparency Office issued three memorandums to supplement FOIA policies.

- February 1, 2006, Memorandum to all DoD Components, “Executive Order (EO) 13392 on the Freedom of Information Act – DoD Implementation.” This memorandum communicates the requirements of the Executive Order, such as establishing FOIA Requester Service Centers, establishing FOIA Public Liaisons, reviewing agency FOIA operations, developing an agency plan to improve FOIA operations, and submitting a report to the Attorney General and OMB Director summarizing results of an agency review.
- September 29, 2006, Memorandum to DoD Chief FOIA Public Liaisons, “Standards for DoD Freedom of Information Act (FOIA) Web Sites.” This memorandum provides procedures for establishing FOIA Requestor Service Center websites and specific information to be included on the website such as mailing address, telephone and facsimile numbers, and email address.
- December 3, 2008, Memorandum to DoD Chief FOIA Public Liaisons, “OPEN Government Act of 2007.” This memorandum provides critical guidance pertaining to changes to the DoD FOIA Program, such as exemptions on partially withheld documents, requests from news media representatives, FOIA requests and status information, DoD FOIA referral procedures, and time limits for DoD Components to act on requests.

In effect, these memorandums are directive type memorandums.

DoD Instruction 5025.01, “DoD Issuance Program,” requires directive type memorandums to be incorporated into a formal DoD policy within 12 months of their issuance. An extension may be granted for a directive type memorandum by the DCMO, but the request for an extension must have a compelling reason to support the extension. As a result, the lack of current and accurate FOIA policies is not in compliance with DoD Instruction 5025.01.

Policies Governing Notification Procedures for “Significant” FOIA Releases

In an August 10, 2009, OSD memorandum and DoDD 5400.07, the DoD Chief FOIA Officer established guidance on notification procedures for “significant” FOIA releases to keep DoD leadership informed of any FOIA releases that may be of significance to the public, the media, Congress, or DoD senior officials. Subsequently, the Transparency Office issued informal guidance for processing

significant FOIA releases in an e-mail attachment without letterhead, signature approval, or evidence of DCMO authorization or approval. The informal guidance defined a “significant” FOIA as:

one where, in the Component’s judgment, the subject matter of the released documents may be of interest or potential interest to DoD senior leadership. Any request involving the current administration, previous administrations, Members of Congress (correspondence, travel, or otherwise), or current or previous DoD leadership would be included.

The informal guidance included detailed procedures for the processing of “significant” FOIA requests and releases, and a requirement for Transparency Office approval prior to the release of “significant” FOIA information. The Transparency Office should have incorporated the informal guidance into DoD formal policy sometime in the past six years.

Conclusion

Our evaluation determined that noncareer DoD officials did not unduly influence the FOIA process. However, we found that DoD FOIA policies are outdated and have not included the three directive type memorandums issued between 2006 and 2008. Additionally, the DCMO needs to incorporate the procedures for “significant” FOIA releases into DoD Regulation 5400.7-R.

Recommendations, Management Comments, and Our Response

Deleted Recommendation

We revised the finding and deleted draft recommendation 1.c. due to management’s responsiveness to recommendation 1.b.

Recommendation 1

We recommend that the Deputy Chief Management Officer:

- a. Update DoD Directive 5400.07 and DoD Regulation 5400.7-R, “DoD Freedom of Information Act Program,” to comply with DoD Instruction 5025.01 and include requirements of Executive Order 13392 and the “OPEN Government Act of 2007.”**

DCMO Comments

The DCMO partially agreed with our recommendation. The DCMO stated that the Directorate for Oversight and Compliance (DO&C) is creating a new issuance, DoD Manual 5400.07, to replace the DoD Regulation 5400.7-R. According to the

DCMO, the DoD Manual will enter the formal coordination stage by the end of July 2016. The DCMO disagreed with the finding that DoD Directive 5400.07 does not include the requirements of Executive Order 13392 and the OPEN Government Act of 2007. The DCMO further stated that DoD Directive has been updated since its release to include the relevant provisions of both authorities. It further provided an example, where both authorities require the Department to appoint a Chief FOIA Officer, and cited paragraph 4.1.1. of DoD Directive 5400.07.

Our Response

The DCMO agreed to create a new issuance DoDM 5400.07 to replace DoD Regulation 5400.7-R. However, the DCMO maintained that the DoD Directive 5400.07 was sufficiently updated. The DCMO further stated that the DoD Directive included relevant provisions of OPEN Government Act of 2007 and Executive Order (EO) 13392. We provide a couple of examples for consideration for inclusion in the new manual that are lacking in the DoDD 5400.07: (1) duties and responsibilities of the FOIA Public Liaisons as identified in Section 10 of the OPEN Government Act and Section 2 of EO 13392; and (2) as discussed in Finding B, section, “Outdated FOIA Policies,” the Transparency Office issued OSD memorandums dated February 1, 2006, September 29, 2006, and December 3, 2008, to comply with both authorities but did not incorporate the directive-type memorandums into the DoD Directive 5400.07 as required by DoDI 5025.01(3)(c). The creation of the new FOIA manual should satisfy the intent of the recommendation and no additional comments are needed.

b. Incorporate the notification procedures for “significant” FOIA releases into DoD Regulation 5400.7-R.

DCMO Comments

The DCMO partially agreed with our recommendation stating that the “significant” FOIA process was established by the DoD Office of the General Counsel (OGC). The DCMO also stated that the Directorate of Oversight and Compliance (DO&C) will be meeting with DoD OGC soon to discuss any necessary revisions to the process described in the 2009 OSD memorandum and the incorporation of such guidance into the new DoD Manual 5400.07.

Our Response

The comments from the DCMO addressed our recommendation, and no additional comments are needed.

Appendix A

Scope and Methodology

We performed this evaluation from July 2015 through May 2016. We conducted this evaluation in accordance with the “Quality Standards for Inspection and Evaluation,” published by the Council of the Inspectors General on Integrity and Efficiency (CIGIE) in January 2012. Those standards require that we plan and perform the review to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings, conclusions, and recommendations based on evaluation objectives. We believe the evidence obtained provides a reasonable basis for our findings, conclusions, and recommendations.

To determine the extent to which noncareer officials were made aware of FOIA requests and participate in the review or decision-making processes, we sent a questionnaire to 32 DoD Component FOIA offices, interviewed five DoD FOIA officials, and reviewed Defense Hotline complaints related to FOIA since January 2007 to July 2015. Our review also included inquiries concerning DoD FOIA offices’ policies and procedures.

Questionnaire, Certification, and Interviews

We developed and sent questionnaires⁶ to 32 chief FOIA officers. These 32 DoD Component FOIA offices are the same FOIA offices that DoD includes in their report on FOIA processing operations to the U.S. Attorney General, as required by the FOIA Act. The questionnaire, included in Appendix E, required certification that noncareer officials were not involved in or did not unduly influence the FOIA response process. In addition, we conducted interviews with chief FOIA officers from the Office of Secretary of Defense and the Military Services. Of the 32 DoD FOIA offices, we selected the five DoD FOIA officials for the Office of the Secretary of Defense and the Military Services based on our assessment that these offices were more likely to employ noncareer officials that could be involved in the FOIA process. Also, they were selected due to the volume and type of FOIA requests processed through these offices.

Hotline Data

To identify cases when FOIA officers may have been unaware of instances in which noncareer official involvement occurred outside of the DoD Component’s normal FOIA processes, we reviewed 62 Defense Hotline complaints related to FOIA. The Defense Hotline facilitates the reporting of allegations of fraud, waste, abuse, or

⁶ See Appendix E for the questionnaire.

mismanagement in DoD programs or operations. In reviewing complaint records related to FOIA dating back to January 2007 through July 2015, we found no complaints indicating noncareer official involvement in the FOIA process.

We relied on the DoD Components' responses to the data collection questionnaire with select verification through interview responses. In addition, for the period of January 2007 to October 2015, we reviewed lists of political appointees within DoD, DoD Component policies and procedures, organizational charts, memorandums written in response to congressional inquiries about FOIA laws and DoD policies, and annual reports to the Attorney General.

Appendix B

List of the 32 DoD FOIA Component Offices

Below is a list of the 32 DoD Component FOIA offices that the Transparency Office oversees.

| | |
|---|--|
| Office of the Secretary of Defense/Chairman of the Joint Chief of Staff | National Security Agency |
| Department of the Army | Defense Threat Reduction Agency |
| Department of the Navy | Defense Information Systems Agency |
| Department of the Air Force | Defense Intelligence Agency |
| Armed Services Board of Contract Appeals | Defense Logistics Agency |
| National Guard Bureau | National Reconnaissance Office |
| U.S. Africa Command | Defense Contract Audit Agency |
| U.S. Central Command | National Geospatial Intelligence Agency |
| U.S. European Command | Defense Security Service |
| U.S. Northern Command | Defense Commissary Agency |
| U.S. Pacific Command | Defense Finance and Accounting Service |
| U.S. Special Operations Command | Defense Contract Management Agency |
| U.S. Southern Command | Defense Health Agency |
| U.S. Strategic Command | Department of Defense Education Activity |
| U.S. Transportation Command | Defense Technical Information Center |
| Department of Defense Inspector General | Joint Personnel Recovery Agency |

Appendix C

Congressional Request Letter

RON JOHNSON, WISCONSIN, CHAIRMAN

JOHN MCCAIN, ARIZONA
BOB PORTMAN, OHIO
RAND PAUL, KENTUCKY
JAMES LANKFORD, OKLAHOMA
MICHAEL B. ENZI, WYOMING
KELLY AYOTTE, NEW HAMPSHIRE
JONI ERNST, IOWA
BEN SASSÉ, NEBRASKA

THOMAS R. CARPER, DELAWARE
CLAIRE McCASKILL, MISSOURI
JON TESTER, MONTANA
TAMMY BALDWIN, WISCONSIN
KEITH HATCHER, NORTH DAKOTA
CORY A. BOOKER, NEW JERSEY
GARY C. PETERS, MICHIGAN

KEITH B. ASHDOWN, STAFF DIRECTOR
GABRIELLE A. BAKEM, MINORITY STAFF DIRECTOR

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6260

June 23, 2015

The Honorable Joni T. Rymer
Inspector General
U.S. Department of Defense
4800 Mark Center Drive
Alexandria, VA 22354

Dear Mr. Rymer:

The Committee on Homeland Security and Governmental Affairs is conducting oversight of how Executive Branch departments and agencies respond to Freedom of Information Act (FOIA) requests. The Committee recognizes the important role that FOIA plays in holding the government accountable to American taxpayers and seeks to ensure that government officials do not interfere with the FOIA process to inhibit transparency. Accordingly, as the Committee examines how departments and agencies comply with FOIA, the Committee is interested in learning about any involvement by non-career officials with the FOIA process at the Department of Defense.

Enacted in 1966, FOIA bestows a right upon the American public to request records created by Executive Branch departments and agencies.¹ FOIA does not require requestors to articulate a reason for the request and creates a presumption of access so long as the request does not encompass any of the nine categories of information exempted from the statute.² This right of openness and transparency guaranteed by FOIA allows the American public to understand how their government is operating—a concept essential to perpetuate a flourishing democracy. FOIA, therefore, is a critical tool available to the American public to learn and understand how their government is acting on their behalf, as well as to hold the government accountable for its actions.

¹ 5 U.S.C. § 552.

² *Id.* at § 552(b). FOIA states that agencies may withhold the following nine categories: (1) information that is classified to protect national security; (2) information related solely to the internal personnel rules and practices of an agency; (3) information that is prohibited from disclosure by another federal law; (4) trade secrets or commercial or financial information that is confidential or privileged; (5) privileged communications within or between agencies; (6) information that, if disclosed, would invade another individual's personal privacy; (7) certain information compiled for law enforcement purposes; (8) information that concerns the supervision of financial institutions; and (9) geological information on wells. *Id.*

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Just one day after taking office, President Obama issued a memorandum to all heads of Executive Branch departments and agencies emphasizing that openness and transparency are fundamental aspects of FOIA.³ President Obama stated:

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.⁴

As described in the President's directive, FOIA is an essential tool vital to furthering transparency within government programs and operations. Department and agency personnel play an important role in ensuring FOIA requests are handled in a timely manner. In addition, Offices of Inspectors General (OIGs) across Executive Branch perform a critical role in providing oversight of agency operations and investigating allegations of misconduct related to the processing of FOIA requests.

Recent media reports indicate prior cases where non-career officials have been substantially involved in the FOIA response process. For example, during Hillary Clinton's tenure as Secretary of State, her staff carefully reviewed and scrutinized politically sensitive documents requested under FOIA—directly affecting what documents or portions of documents were ultimately released to requestors.⁵ Her staff's involvement in the response process led to delays, despite the Department's FOIA officer already having prepared and finalized responses for release.⁶ Additionally, in 2010, former Department of Homeland Security Secretary Janet Napolitano's non-career staff was substantially involved in the Department's FOIA response process by implementing an intricate review and approval process for FOIA responses, including redacting potentially embarrassing information, which compromised transparency and accountability to American taxpayers.⁷ These troubling examples raise particular concerns as the Committee seeks to ensure Executive Branch departments and agencies are following public

³ Memorandum from Pres. Obama to Heads of Executive Departments and Agencies, *Freedom of Information Act* (Jan. 21, 2009), available at https://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act/ (last visited Jun. 23, 2015).

⁴ *Id.*

⁵ Laura Meckler, *Hillary Clinton's State Dep't Staff Kept Tight Rein on Records*, WALL ST. J., May 19, 2013, available at <http://www.wsj.com/articles/hillary-clinton-state-department-staff-kept-tight-rein-on-records-1432081701> (last visited Jun. 23, 2015).

⁶ *Id.*

⁷ *Id.*; see also H. Comm. on Oversight & Gov't Reform, *Staff Report: A New Era of Openness? How and Why Political Staff at DHS Interfered with the FOIA Process*, 112th Cong. (Mar. 30, 2011), available at http://oversight.house.gov/wp-content/uploads/2012/02/DHS_REPORT_FINAL_FINAL_4_01_11.pdf (last visited Jun. 23, 2015).

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records law and that non-career personnel are not adversely affecting the quantity, quality, and timeliness of information provided to the American public through the FOIA process.

In light of previous cases of involvement by non-career officials in the FOIA response process and the critical role that OIGs play in providing oversight of internal agency operations, the Committee wants to ensure that agencies are taking the appropriate steps to fully respond to FOIA requests without unnecessary delay, and that the involvement of non-career officials in the FOIA process does not result in less information being provided to the requestors than otherwise would have been provided. Further, the Committee wants to be sure that honest efforts by departments and agencies to respond to FOIA requests are not frustrated or compromised by the involvement of non-career officials in the FOIA response process.

In order to assist the Committee's oversight obligations, I ask that your office please analyze the involvement of non-career officials' involvement in the FOIA response process at the department or agency, if any, for the period of January 1, 2007, to the present. If non-career officials were involved in the FOIA response process, please analyze whether their involvement resulted in any undue delay of a response to any FOIA request or the withholding of any document or portion of any document that would have otherwise been released but for the non-career official's involvement in the process. If your analysis shows such a result, please provide the following information about each FOIA request:

- a. Contents of the FOIA request;
- b. Recommendation by the department or agency's FOIA officer as to what information should be disclosed in response to the request;
- c. Name(s) and position(s) of non-career personnel who were involved with the response process;
- d. Details and supporting documents related to the processing of the response to the FOIA request;
- e. Documents that were ultimately disclosed in response to the request; and
- f. Documents or information that would have been disclosed in response to the FOIA request absent the involvement of non-career department or agency personnel.

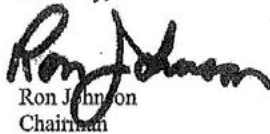
As part of your analysis, I request that you seek a written certification from the department or agency's chief FOIA officer that 1) no non-career officials were involved in the department or agency's response to any FOIA request or 2) if such involvement occurred, the involvement of non-career officials has never resulted in the undue delay of a response to a FOIA request or the provision of less information than would have been provided but for the involvement of the non-career officials. Please provide this certification to the Committee in conjunction with your analysis.

I respectfully request that your office perform this analysis and report back to the Committee within 60 days. If you have any questions about this request, please have your staff contact Caroline Ingram of the Committee staff at (202) 224-4751. Thank you for your attention to this matter.

Congressional Request Letter (cont'd)

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Sincerely,


Ron Johnson
Chairman

cc: The Honorable Thomas R. Carper
Ranking Member

Appendix D

OIG Response to the Congressional Request



INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
4800 MARK CENTER DRIVE
ALEXANDRIA, VIRGINIA 22304-1500

NOV 19 2015

The Honorable Ron Johnson
Chairman
Committee on Homeland Security and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Chairman Johnson:

This is in further response to your letter of June 23, 2015, requesting the DoD OIG analyze the involvement of non-career officials in the Department of Defense (DoD) Freedom of Information Act (FOIA) response process for the period of January 1, 2007, to the present. Specifically, you expressed concern about instances where non-career officials may have unduly influenced the FOIA response process, citing media reports of specific cases at the Department of State and Department of Homeland Security.


In conducting our evaluation, we sent questionnaires and certification forms to 32 DoD FOIA officers to provide us information pertaining to and certify their understanding of non-career officials' involvement in the FOIA process. To ensure a thorough evaluation, we reviewed 62 DoD Hotline complaints related to FOIA requests made to our office from January 1, 2007, to the present and found no allegations that non-career officials attempted to or did unduly influence or delay the FOIA process. Furthermore, we interviewed (under oath) four former and current senior (career) FOIA officials, who testified that non-career officials did not attempt to or unduly influence or delay the FOIA process.

Our evaluation determined that there was one case in which a non-career official made inquiries in the processing of a FOIA request, but the inquiries did not result in any undue delay or the withholding of any documents (or portion of the documents) that would have been released but for the non-career official's involvement.

DoD implements the FOIA department-wide through DoD guidance, including DoD Directive 5400.07, "DoD Freedom of Information Act (FOIA) Program," January 2, 2008, certified current through January 2, 2015, and DoD Regulation 5400.7-R, "DoD Freedom of Information Act Program," September 1998 (Change 1, April 11, 2006). DoD components should develop their policies consistent with and further implementing the DoD guidance. During the course of our evaluation we identified opportunities for improvement in the FOIA Program unrelated to non-career official involvement, and we intend to communicate these to the DoD Chief FOIA Officer for potential improvement to the FOIA Program. Our report is in process and will be provided to you upon issuance.

If you have any questions or need further information, please contact me or Kathie R. Scarrah, Director of the Office of Legislative Affairs and Communications at (703) 604-8324.

Sincerely,


Jon T. Rymer

cc: The Honorable Thomas R. Carper
Ranking Member

Appendix E

FOIA Congressional Request Data Call Questionnaire

1. Provide your organization's policies and procedures for FOIA processing; include your organizational chart for the FOIA office.
2. How long has the Chief FOIA Officer been in his/her position?
 - a. How long has the Chief FOIA Officer been with Organization's FOIA office?
 - b. Has the Chief FOIA Officer held a position with any other DOD FOIA office and how long?
3. List the names and dates of persons that have held the Chief FOIA Officer positions from FY 2007 to present.
4. Provide the number of FOIA requests processed by your organization from FY 2007 to present (Listed by Fiscal Year).
5. Are you aware of the Defense Freedom of Information Policy Office (DFOIPO), now Transparency Office, guidance regarding "significant DoD FOIA Request (see attachments D through F)?"
 - a. If yes, how is this guidance incorporated into your organization's FOIA process?
 - b. How many FOIA request responses has your organization sent to DFOIPO (number of responses listed by Fiscal Year)?
6. Has DFOIPO been involved in your organization's FOIA process from FY 2007 to the present?
 - a. If yes, has DFOIPO had involvement that resulted in any undue delay of a response to any FOIA request (how many instances by fiscal year)?
 - b. If yes, has DFOIPO involvement resulted in withholding of any document or portion of any document that would have been released absent of the involvement of DFOIPO (how many instances by fiscal year)?
7. Has any noncareer official been involved in your organization's FOIA process from FY 2007 to the present?
 - a. If yes, has the noncareer officials had involvement that resulted in any undue delay of a response to any FOIA request (how many instances by fiscal year)?

- b. If yes, has the noncareer official involvement resulted in withholding of any document or portion of any document that would have been released absent of the involvement of the noncareer official (how many instances by fiscal year)?
- 8. Certify to the completeness and accuracy of one of the below statements:
 - a. No noncareer officials were involved in my organization's response to any FOIA request from FY 2007 to present. (Or, based on the time period of the Chief FOIA Officer's service in the organization).
 - b. Noncareer officials were involved in my organization's response to FOIA requests from FY 2007 to present, but that involvement did not result in undue delay of a response or withholding from release any document or portion of any document that would have been released absent the involvement of the noncareer officials.

Appendix F

Nine Categories Exempted from the Freedom of Information Act⁷

1. (A) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
2. Related solely to the internal personnel rules and practices of an agency;
3. Specifically exempted from disclosure by statute (other than section 552b of this title), if that statute-
 - (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
 - (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and
 - (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.
4. Trade secrets and commercial or financial information obtained from a person and privileged or confidential;
5. 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;
6. Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
7. Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information
 - (A) could reasonably be expected to interfere with enforcement proceedings,
 - (B) would deprive a person of a right to a fair trial or an impartial adjudication,
 - (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,

⁷ In accordance with section 552(b), title 5, United States Code (5 U.C.S. § 552(b)).

(D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,

(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or

(F) could reasonably be expected to endanger the life or physical safety of any individual;

8. Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
9. Geological and geophysical information and data, including maps, concerning wells.

Management Comments

Office of the Deputy Chief Management Officer



OFFICE OF THE DEPUTY CHIEF MANAGEMENT OFFICER
9010 DEFENSE PENTAGON
WASHINGTON, DC 20301-9010

27 June 2016

MEMORANDUM FOR DEPUTY INSPECTOR GENERAL, POLICY AND OVERSIGHT

SUBJECT: Comments to Draft Report, "DoD Freedom of Information Act Policies Need Improvement" (Project No. D2015-DAPOCM-0233.000)

This memorandum responds to your request for comments on the recommendations contained in the subject draft audit report issued May 16, 2016. The Department partially concurs with the three recommendations identified as 1a, 1b, and 1c. Our response to the recommendations is provided in the attachment.

We appreciate the opportunity to review and comment on the draft report. If you have any questions, Ms. Cindy Allard is my point of contact for this response. Ms. Allard may be reached by telephone at 703-571-0086 or by email at cindy.l.allard.civ@mail.mil.

TILLOTSON.DAVID.
III.1109966815
David Tillotson III
Assistant Deputy Chief Management Officer

Digitally signed by
TILLOTSON.DAVID.III.1109966815
DN: cn=U.S. Government, ou=DoD, ou=PKI,
ou=OSD, o=TILLOTSON.DAVID.III.1109966815
Date: 2016.06.27 12:56:12 -0400

Attachment:
As stated

Office of the Deputy Chief Management Officer (cont'd)

**DEPARTMENT OF DEFENSE OFFICE OF THE INSPECTOR GENERAL
DRAFT REPORT DATED MAY 16, 2016, PROJECT NO. D2015-DAPOCM-0233.000
"THE DOD FREEDOM OF INFORMATION ACT POLICIES NEED IMPROVEMENT"
OFFICE OF THE DEPUTY CHIEF MANAGEMENT OFFICER (DCMO)
COMMENTS TO DoD IG DRAFT REPORT AND RECOMMENDATIONS**

RECOMMENDATION 1a: Update DoD Directive 5400.07 and DoD Regulation 5400-7-R, "DoD Freedom of Information Act Program," to comply with DoD Instruction 5025.01 and include requirements of Executive Order 13392 and the "OPEN Government Act of 2007."

DCMO RESPONSE: Partially concur. The Directorate for Oversight and Compliance (DO&C) is creating a new issuance, DoDM 5400.07 to replace DoD 5400.07-R. It will enter the formal coordination stage by the end of July 2016. We do not concur with the finding that DoDD 5400.07 does not include the requirements of Executive Order 13392 and the OPEN Government Act of 2007. This Directive has been updated since their release to include the relevant provisions of both authorities; for example, both require the Department to appoint a Chief FOIA Officer, and paragraph 4.1.1. of DoDD 5400.07 meets this requirement.

RECOMMENDATION 1b: Implement the notification procedures for "significant" FOIA releases consistent with the August 2009 OSD memorandum and DoD Directive 5400.07 and incorporate the notification procedures into DoD Regulation 5400.07-R.

DCMO RESPONSE: Partially Concur. Because the significant FOIA process was established by the Office of the General Counsel (OGC), the DO&C will be meeting with OGC soon to discuss any necessary revisions to the process described in the 2009 OSD memorandum and the incorporation of such guidance into the new DoDM 5400.07.

RECOMMENDATION 1c: Discontinue using the informal guidance for the notification procedures for "significant" FOIA releases.

DCMO RESPONSE: Partially concur. DO&C will incorporate new procedures per OGC guidance into the new DoDM 5400.07. Immediate discontinuance of the informal guidance would leave the DoD Components without any guidance at all.

Acronyms and Abbreviations

DCMO Deputy Chief Management Officer

EO Executive Order

FOIA Freedom of Information Act

OSD Office of the Secretary of Defense

Whistleblower Protection

U.S. DEPARTMENT OF DEFENSE

The Whistleblower Protection Ombudsman's role is to educate agency employees about prohibitions on retaliation and employees' rights and remedies available for reprisal. The DoD Hotline Director is the designated ombudsman. For more information, please visit the Whistleblower webpage at www.dodig.mil/programs/whistleblower.

For more information about DoD IG reports or activities, please contact us:

Congressional Liaison

congressional@dodig.mil; 703.604.8324

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