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XX-XX, dated May 10, 2016

EXECUTIVE SUMMARY

On June 23, 2015, the Senate Committee on Homeland Security and Governmental Affairs requested that Inspectors General analyze the involvement of non-career officials in the FOIA process. The request was for the time period January 1, 2007 to the date of the letter. If non-career officials were involved, the Inspectors General were asked to analyze whether the non-career officials' involvement resulted in an undue delay of a response to a 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.

We initiated this audit to respond to the Congressional Request and to determine if the Agency's FOIA Tracking System was reliable and had effective internal controls.

We determined that there was no documentation that a non-career official's involvement in the Agency FOIA processing resulted in an undue delay of a FOIA response and that there was no evidence that such involvement resulted in the withholding of a document or portion thereof that would have otherwise been released. We also determined that the FOIA Tracking System lacked effective internal controls.

In reaching those findings, we determined that certain limits were placed on the scope of our review. Because we determined that the FOIA Tracking System data was unreliable and that a significant number of FOIA files were missing, we cannot state with any degree of certainty that we reviewed all of the FOIA request files in which a non-career official may have been involved. Additionally, because of the lack of internal controls for the FOIA Tracking System, we could not test the accuracy of the 2014 Annual FOIA Report as part of our internal control testing. We made three recommendations to address the internal control findings.

The management comments generally appear to agree with the findings and recommendations. The comments also attempt to provide excuses for certain findings involving the filing system and other aspects of the FOIA Branch's internal control environment. With regard to statements of fact in the management comments, we express no opinion on the accuracy of the information provided by management. As is required by the auditing standards, in the report we specifically address a portion of management's comments that appear to misstate the basis for our finding involving the FOIA filing system. We have attached the management comments as an appendix to the report.

BACKGROUND

The Freedom of Information Act (FOIA) was enacted in 1966, and provides that any person has a right, enforceable in court, to obtain access to Federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exceptions or by one of three special law enforcement record exclusions. The basic purpose of FOIA is to ensure an informed citizenry, vital to the function of a democratic society and needed to check against corruption and to hold governors accountable to the governed.

At the National Labor Relations Board (NLRB or Agency), the responsibility for processing FOIA requests is delegated to the FOIA Branch, Division of Legal Counsel. Prior to that delegation, FOIA requests were processed by the Office of the Executive Secretary for the Board; Research and Policy Planning Branch, Division of Advice, for the General Counsel; and Regional Offices for records in the field. The centralization of FOIA processing by the FOIA Branch began with a pilot program in July 2014, and was fully implemented in June 2015.

On June 23, 2015, the Senate Committee on Homeland Security and Governmental Affairs requested that Inspectors General analyze the involvement of non-career officials in the FOIA process. The request was for the time period January 1, 2007 to the date of the letter. If non-career officials were involved, the Inspectors General were asked to analyze whether the non-career officials' involvement resulted in an undue delay of a response to a 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.

OBJECTIVE, SCOPE, AND METHODOLOGY

The audit objectives were to: (1) determine whether non-career officials were involved in the Agency's processing of individual FOIA requests; (2) if a non-career official was involved, determine the impact of that involvement on the processing of the FOIA request; and (3) determine whether the FOIA Tracking System (FTS) is reliable and has effective internal controls.

To determine what, if any, impact occurred as the result of a non-career official's involvement, we defined the scope of the universe of requests as all available FOIA request files processed at the Headquarters that resulted in a fully or partially denied determination or that were untimely. Our review of FOIA request files was limited by the Governmentwide Records Retention Schedule that allows for the destruction of FOIA request files after 2 years for fully granted requests and 6 years for requests that were denied in whole or in part.

We reviewed the Freedom of Information Act, as amended, and the Governmentwide guidance on FOIA by the Department of Justice (DOJ) and the National Archives and Records Administration. We obtained and reviewed the Agency's policies and procedures; FOIA Manual; and other internal guidance memoranda used by the FOIA Branch. To determine the non-career positions, we reviewed the Policy and Supporting Positions (Plum Book) issued by Committee on Oversight and Government Reform and the NLRB's organizational charts. We also reviewed the Government Accountability Office (GAO) requirement for internal controls.

We interviewed FOIA officials to identify the FOIA Branch's internal control procedures. To determine the reliability of the data in FTS, on October 5, 2015, we obtained a copy of the database from the Office of the Chief Information Officer. We reviewed the FOIA request files to evaluate whether non-career officials were involved in the FOIA request process and 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.

Our scope for testing the reliability of the FTS database was FOIA requests received and/or closed during FY 2014 and FY 2015 by both the Field and Headquarters. For FOIA request data, because of the large number of requests, we selected a statistical sample of FOIA requests from both FY 2014 and FY 2015. We then determined if the FTS data for those requests was accurate and reliable. Using generally accepted sampling criteria, a 90 percent confidence rate resulted in a sample size of 78 FOIA records. The 90 percent confidence level is consistent with GAO guidance and our expected deviation rate. The results of our tests can be

projected to the population of FOIA requests. For the FOIA appeals data, we tested each of the FY 2014 and 2015 appeal records.

We conducted this audit at NLRB Headquarters in Washington, D.C. We excluded the FOIA requests processed by the Office of Inspector General from the scope of the audit and two FOIA requests involving OIG records that may have had the involvement of non-career officials.

We conducted this performance audit in accordance with generally accepted government auditing standards during the period September 2015 through March 2016. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Scope Limitation

Our intent was to use FTS to test the reliability of the FY 2014 Annual FOIA Report and to narrow the universe of files that would be reviewed to determine non-career official involvement in the FOIA process. If the data in FTS was reliable, we could then test the data against the annual report to determine if the report was accurate. Likewise, we could rely upon FTS to identify the FOIA requests that resulted in an untimely response or the withholding of information. Once those requests were identified, we would then review the associated FOIA request files and other records that might contain information regarding the participation of non-career officials in delaying or withholding information.

As discussed below, we determined that the FTS data was unreliable. We also determined that the universe of FOIA request files was incomplete, given that a significant number of files were missing or lacked required documentation. As a result of these determinations, we cannot test the accuracy of the 2014 Annual FOIA Report as part of our internal control testing.

Because of these determinations, we also cannot state with any degree of certainty that we reviewed all of the FOIA

requests in which a non-career official may have been involved. Additionally, given the state of the Headquarters FOIA request files and the lack of safeguarding of the physical files, we cannot state that the files that we did review were complete.

DATA ACCURACY AND RELIABILITY

The FOIA Branch uses FTS to record data related to the processing of FOIA requests, including the date the request is received; a brief description of the requested records; the response due date; extensions of time and toll dates; the date that the response issued; information related to fees and the amount of time used to process the request; and the disposition -- any exemptions that were used as a basis for withholding information. We observed that FTS has data for the initial processing of the FOIA requests and the appeal of FOIA request determinations.

FOIA Request Data

To determine the reliability and accuracy of FTS FOIA request data, we obtained a statistical random sample of 78 FOIA records in both FY 2014 and FY 2015. We then compared the information in FTS Request database to the electronic files in FTS and the associated paper files. As a result of our testing, we determined that the FTS FOIA request data was unreliable for five of the six categories of information that were essential in the testing of the FY 2014 Annual FOIA Report and for use in our testing of the involvement of non-career officials in the FOIA process. In reaching this determination, we used a tolerable error rate of 10 percent, which is consistent with GAO guidance.

The table below shows the results of our testing by FTS data category:

Fields Tested	FY 2014				FY 2015			
	Data Matches		Data Does not Match*		Data Matches		Data Does not Match*	
	Entries	%	Entries	%	Entries	%	Entries	%
Request Received Date	62	79.5	16	20.5	70	89.7	8	10.3
Final Response Sent Date	69	88.5	9	11.5	69	88.5	9	11.5
Disposition	60	76.9	18	23.1	65	83.3	13	16.7
Reason for Full Denial Other than Exemptions	1	11.1	8	88.9	2	50.0	2	50.0
Fees Charged	72	92.3	6	7.7	72	92.3	6	7.7
Fees Received	6	12.0	44	88.0	3	5.4	53	94.6

(* “Data Does not Match” includes both errors and lack of documentation.)

FOIA Appeal Database

During FY 2014 and FY 2015, there were 46 completed FOIA appeals. Due to the small number of FOIA appeals, we tested all 46 records to determine the reliability of the FTS FOIA appeal data. We used the same methodology as was used for the FOIA request data and compared the FTS FOIA appeal database information in FTS to the electronic files in FTS and the associated paper files. As a result of our testing, we determined that the FTS FOIA appeal data was unreliable for one of the five categories in FY 2014 and three of the five categories in FY 2015. In reaching this determination, we used a tolerable error rate of 10 percent, which is consistent with GAO guidance.

The results of our testing are show in table below:

Data Field Tested	FY 2014				FY 2015			
	Data Matches		Data Does not Match*		Data Matches		Data Does not Match*	
	Entries	%	Entries	%	Entries	%	Entries	%
Date Received	22	91.7	2	8.3	19	86.4	3	13.6
Appeal Closed Date	23	95.8	1	4.2	21	95.5	1	4.5
Disposition	22	91.7	2	8.3	19	86.4	3	13.6
Reason for Full Denial Other than Exemptions	6	85.7	1	14.3	6	50.0	6	50.0
Total Exemptions Applied	26	96.3	1	3.7	15	100.0	0	0.0

(* “Data Does not Match” includes both errors and lack of documentation.)

FOIA FILING SYSTEM

An information system represents the life cycle of information used for the Agency's operation processes that enable the Agency to obtain, store, and process quality information. An information system includes manual and technology-enabled information processes. The use of information technology enables information related to operational process, including FOIA, to become available to the Agency on a timelier basis.

During the course of the audit, FOIA personnel explained the FOIA request files consisted of both the FTS and the FOIA request files. In short, FOIA personnel considered the file to be complete if the information or records were located in either FTS or the FOIA request file.

What was described to the OIG by the FOIA Officer, and the system we observed, do not meet the requirements of a properly designed or managed information system.

The FOIA records Systems of Records Notice (SORN), dated December 2006, states that the FTS is an electronic case tracking system that is used to track FOIA requests and appeals. The SORN describes the purpose of the information in FTS as used to manage Agency resources, create budgets, prepare reports, and provide statistical data to the public. The SORN describes the "Associated Agency Files" as paper files maintained to document FOIA request and appeals. The SORN does not describe FTS as a repository for FOIA documents.

After we completed our review of the FOIA request files, we requested access to the FOIA appeal files. We were told by FOIA personnel that they did not have the files from prior to FY 2013, and that they did not know the location of the files. We were later notified by the Division of Legal Counsel that the appeal files were located. At that time, we were also told that there were electronic records in the form of program database files that were used to process multiple FOIA requests involving voluminous records during FY 2012 and FY 2013. FOIA personnel did not provide information regarding the existence of the program database files when we requested access to the FOIA records, nor did FOIA personnel adequately describe the locations where various documents might be found.

When we met with the Agency official who maintains the program database files for two requests, it was explained that those files contain FOIA processing records for over 100,000 Agency documents. The SORN makes no mention of program database files used to process FOIA requests or the databases that are maintained outside of the control of the FOIA Branch. We observed that the FOIA request files and FTS did not contain a linkage to the program database files used to process significant FOIA requests or other documents maintained by other offices. Additionally, if officials are commingling paper and electronic records, there should be some method of documenting that process so that the information for a file can be retrieved. We found that the linkage is also missing. The effect of the deficiencies is that the FOIA Branch is not able to effectively use information technology to manage its operational processes or make information available to the Agency on a timely basis.

Management Comments

Management commented that the finding regarding the filing system relied in “large part” on the SORN, and that the “FOIA Branch is grateful that it is now obtaining assistance from OCIO to improve the functioning of FTS . . .”

Management comments also stated the following:

The Draft Report does not reflect, however, that the SORN was published in December 2006, and that these additional tools used by the Branch are a relatively recent development stemming from a limited number of FOIA requests involving voluminous documents associated with the influx of electronically–stored information.

OIG Response

We are concerned that the management comments mischaracterize the finding and minimize the impact of the mismanagement by the FOIA Branch’s managers and supervisors.

The finding regarding the filing system relies on the entirety of the mismanagement of the FOIA files. In short, the outdated SORN is not the most significant part of the cause

of the filing system finding. The cause of the finding is that the FOIA Branch lacked control over the FOIA records in that the filing systems, both paper and electronic, lacked a process by which the records could be retrieved in a manner that provided assurances that the records were complete. Also, when we requested access to the FOIA records, the FOIA Branch personnel did not provide the information regarding the existence of the databases or the locations where various documents might exist. The outdated SORN is a part of the cause, but not the “large part.” In fact, the purpose of the SORN is to provide notice to the public of the record system, its uses, and the controls on the information. In order to adequately update the SORN, management must first create an appropriate filing system. Additionally, improving the functioning of FTS will only be effective if adequate record management controls are developed as part of the process.

We are also concerned that management is misstating a fact. The databases were used in FY 2012 and FY 2013 to process significant FOIA requests. Three and four years ago is not “relatively recent.” Despite our concern with the management comments, we added the relevant chronological data to the text of the finding.

INTERNAL CONTROL

Internal controls comprise the plans, methods, policies, and procedures used by an agency to fulfill the agency’s mission, strategic plan, goals, and objectives. The internal control systems also serve as the first line of defense in safeguarding assets. In short, internal control helps managers achieve desired results through the effective stewardship of public resources.

Management establishes control activities through policies and procedures to achieve objectives and respond to risks in the internal control system, including the entity’s information system. Examples of control activities include management reviews, management of human capital, controls over information processing, physical controls over vulnerable assets, proper execution of transactions, accurate and timely recording of transactions, access restrictions and accountability for resources and records, and appropriate documentation of transactions and internal control.

Documentation

Management is to clearly document transactions and other significant events in a manner that allows the documentation to be readily available for examination. To meet this requirement the FOIA Manual sets out the file documentation requirements.

The NLRB FOIA Manual requires that each FOIA request be maintained in a separate file and that the file contain the following:

- Completed Case Progress Sheet from the FTS;
- Communication log and correspondence;
- Time log;
- FOIA inventory;
- Copy of responsive documents within the scope of the request;
- Copy of all disclosures; and
- Copy of the Determination Letter signed by the head of the processing office.

In our review of the random sample of FOIA request files for FY 2014 and FY 2015, we found that following supporting documentation was missing:

Supporting Documentation	FY 2014		FY 2015	
	Missing	%	Missing	%
Request Letter / No Date Stamp	12	15.4%	5	6.4%
Determination Letter	6	7.7%	4	5.1%
Fees Charged/Invoice	4	5.1%	4	5.1%
Proof of Fees Received	21	42.0%	27	48.2%

In our review of the FOIA request files to determine what, if any, impact occurred as the result of a non-career official's involvement, we expected to find 2,914 files at Headquarters for the period of June 26, 2009 through June 23, 2015. We determined that 261 of those files were missing. We considered the file missing if there was no hardcopy file and a hardcopy file could not be created because the electronic file was incomplete. We used this criteria because the FOIA records SORN states that summary information is maintained in FTS and paper records are maintained in the

“Associated Agency File.” This table details the missing files by Fiscal Year:

Fiscal Year	Files Expected to Find	Number of Missing Files
2009 (beginning June 26 th)	63	10
2010	241	31
2011	313	53
2012	204	12
2013	188	22
2014	809	5
2015 (through June 23 rd)	1,096	128
	2,914	261

Although we found that the FTS database was unreliable, it is the only Agency inventory record of FOIA requests that were denied in whole or in part. Because the data error rate for the “Disposition” data field exceeded 10 percent, for FY 2009 through FY 2013, there may be additional FOIA request files that are missing but were coded as fully granted in FTS and destroyed in accordance with the records retention schedule. There may also be files that appear to be missing files, but were actually fully granted and appropriately destroyed despite being coded in FTS as denied in whole or in part.

For the 128 missing FY 2015 FOIA request files, we found that 86 of the missing files were for FOIA requests that were processed in Region 10 or Region 28 after the initiation of the pilot program for the consolidation of the FOIA function at Headquarters. In accordance with the provision of the pilot program, both Region 10 and Region 28 should have forwarded the requests to Headquarters. For those 86 requests, we reviewed the documents in FTS and found that 6 FOIA requests had only an electronic copy of the request; 71 FOIA requests were documented solely using a form that shows the records requested and the response; 4 FOIA requests had an electronic copy of both the form and the responsive documents; and that there were no electronic documents for 5 requests.

We also observed that for the missing FY 2015 FOIA request files, there are seven requests processed in the Regional Offices that have no documentation of a response and the date of the response is not recorded in FTS. For the period

June 26, 2009 through the end of FY 2013, all of the missing files were for requests that were processed at Headquarters.

The result of failing to create and maintain a proper filing system is that the NLRB does not have an accurate record of its activities in administering the FOIA program. Given the importance of making information available to the public in a democracy, this finding is particularly disturbing in that it is impossible to manage the FOIA process without records.

Timeliness of Data Entry

Management should ensure that significant transactions be recorded in an accurate and timely manner. This applies to the entire process or life cycle of the transaction or event from its initiation through its final classification in summary records. This control activity is to ensure that all transactions are completely and accurately recorded. As of September 30, 2015, FTS had 3,651 records indicating a closed FY 2015 FOIA request file. We reviewed the data for those records to determine if the data was entered in a timely manner. Based upon that review, we determined that the data is not entered into FTS in a timely manner. The table below provides the details of our finding:

Data Field	No Entry
Request Received Date	1
Requestor Name/Firm	6
Documents Requested	38
FOIA Type (Written/Fax/Email)	421
Assigned To	494
Date Assigned	74
ID Letter Sent	1,143
Toll End Date (For request that had Toll Start Date Entered)	67
Disposition	75
Fee Category	40
Fees Received	952
Fees Received Date (For Fees Received Entered)	15

Although we reviewed only the FY 2015 FOIA request data for closed requests, the data should be entered as the individual actions occur. It is apparent based on the types of missing data that FOIA personnel are not entering the data as the triggering event occurs.

Overall, the effect of the untimely data entry in FTS is that the managers are not able to use the system to track the progress of FOIA requests and manage the FOIA office employees.

Data Validation

Management should use a variety of control activities for information processing that may include: edit checks of data entered; accounting for transactions in numerical sequences; comparing files totals with control accounts; and controlling access to data, files, and programs. The FOIA Branch supervisor, who prepares the Agency's Annual FOIA Report, stated that the Branch does not have a process to systematically check the FTS data for accuracy and completeness. The supervisor explained that she verifies the data at the time she prepares the report and coordinates the correction of the FOIA data with the Office of the Chief Information Officer. Based upon the data accuracy testing and data entry timeliness finding, it is apparent that the FOIA Branch is not undertaking an appropriate or timely method to validate the FTS data. As a result, FTS is not a reliable system.

Procedural Guidance

Management should clearly document internal control requirements. The documentation may appear in management directives, administrative policies, or operating manuals. Although there is a FOIA Manual that provides some guidance on processing FOIA requests, we found a lack of written procedures that would guide the FOIA personnel in using FTS or maintaining the FOIA request files. For example, when we interviewed the FOIA officials to understand the process of recording fees received in FTS, we were told that when a check payment is received by the FOIA Branch it is recorded in FTS. There are, however, no procedures or standard practices to notify the FOIA Branch when the payment is made by credit card or other electronic methods through the Office of the Chief Financial Officer.

While we found that there are no documented FOIA file maintenance procedures, we observed that the FOIA request files are generally kept in alphabetical order by the requester's last name within each year. Large or voluminous

FOIA request files are stored as “special projects” in a separate file cabinet. There are no written procedures regarding marking that a file has been removed from the file cabinet or that it is stored as a special project. Because the files are kept in alphabetical order, there is nothing to indicate that a removed file is not in the cabinet or that a file is missing. We also observed that it was not apparent that the FOIA request files are not assembled or organized in any particular manner.

As a result of the lack of documented procedures, the FOIA Branch personnel do not have adequate guidance on how to perform the administrative duties related to processing the FOIA requests. Additionally, FOIA Branch personnel are unable to track closed FOIA request files to prevent them from becoming misplaced.

Safeguarding Files and Contents

As an internal control attribute, management establishes the requirements for physical control to secure and safeguard vulnerable assets. Also, management limits access to records to authorized individuals, and assigns and maintains accountability for their custody and use. For the FOIA files, management established those controls in the NLRB-32 System of Records Notice, which states the following:

Access to Agency working and storage areas is restricted to Agency employees who have a need to use the information in order to perform their duties, custodial personnel, Federal Protective Service personnel, and other contractor and security personnel. All other persons are required to be escorted in Agency areas.

Associated Headquarters Files are maintained in staffed or locked areas during working hours. The facilities are protected from unauthorized access during non-working hours by the Federal Protective Service or other security personnel. Those Agency Headquarters employees who telecommute and may possess Associated Headquarters Files (or copies of such files) at alternative worksites or who may access FTS

from alternative worksites are instructed as to keeping such information in a secure manner.

During our review of FOIA request files, we observed an apparent lack of control over the physical files and related papers. In particular, we observed the following:

- FOIA personnel do not regularly monitor the FOIA file room;
- During normal working hours, the keys were inserted into the FOIA file room door locks;
- Tape was placed over the locking plate opening on the door jamb in a manner that would prevent the FOIA file room door from locking when shut;
- The keys to the file cabinet drawers were inserted into the locks for the FOIA file cabinets that are located both in the FOIA file room and a common work area;
- As depicted in this image, FOIA request files were stored both on the floor under the work surface and on top the work surface of a cubicle:



- The general condition of some of the offices and cubicles assigned to the FOIA officials is such that Agency documents are often strewn across work surfaces and that there are many areas in the space

assigned to FOIA officials that were used to store boxes after the Agency's move in July 2015; and

- FOIA request files were stored on top of file cabinets in the open file room.

On February 19, 2016, we returned to Headquarters at approximately 11:00 p.m. At that time, we observed that the FOIA file room was unsecured and that the file drawers were unlocked with the key in the lock. We also observed that the door lock keys were in the file room doors. We observed that the condition regarding the FOIA offices and cubicles existed after hours and that there was an apparent lack of any attempt to secure Agency records. We located and documented that unredacted Agency personnel records with sensitive personally identifiable information (SPII) were in the unsecured FOIA request files.

Additionally, when we requested to review FOIA appeal files from prior to FY 2013, we were told by the Office of Appeals that when the FOIA request processing and appeals functions were consolidated in the Division of Legal Counsel, the files were transferred from the Office of Appeals to the FOIA Branch. When we asked FOIA personnel for the access to the appeals files, she stated that she had no knowledge that the files were transferred to the custody of the FOIA Branch. Management officials in the Division of Legal Counsel later located the files in various offices.

The effect of the failure to properly secure the FOIA records was that the Agency did not have control over those records or the SPII and other sensitive deliberative information contained therein.

On February 22, 2016, we issued a Notice of Findings and Recommendations (NFR) to address this finding. We recommended that the Division of Legal Counsel take immediate steps to secure the FOIA request files and that it provide training on the proper handling of FOIA records to the FOIA Branch personnel. On February 24, 2016, the Division of Legal Counsel responded to the NFR, stating that the recommended action had been implemented. On February 25, 2016, we verified that the FOIA request files were in fact secure both during and after normal working hours.

Competence

Competence is the qualification to carry out assigned responsibilities, and requires relevant knowledge, skills, and abilities. Personnel need to possess and maintain a level of competence that allows them to accomplish assigned responsibilities, as well as understand the importance of effective internal control. The responsibilities of managers and supervisors include establishing and maintaining the organizational structure necessary to enable the entity to plan, execute, control, and assess whether it is achieving its objective. Management also establishes processes to evaluate performance against the entity's expected standards of conduct and address any deviations in a timely manner.

We found that the FOIA Branch lacks the attribute of demonstrated commitment to competence. There is nothing that prevented the FOIA personnel from ensuring that the data was entered into the FTS system in an accurate or timely manner or maintaining a properly organized and secured filing system. Without a reliable system to provide data or the proper documentation of its activities, the FOIA Branch managers and supervisors cannot properly execute their duties related to the day-to-day control of the NLRB's FOIA program. Additionally, the FOIA Branch managers and supervisors could not evaluate the FOIA Branch's performance against the expected standards and address deviations in a timely manner.

We are aware that the FOIA program recently underwent a consolidation of functions from the Field to the Headquarters; however, the deficiencies described in the findings identified above should have been apparent to the FOIA managers and supervisors and appropriately addressed.

We are also aware that not all of the current FOIA Branch managers have held management positions for the entire period within the scope of the audit. To address that issue, we attempt to point out the specific issues directly attributable to the current management and supervisory team by highlighting the basis for the finding in terms of FY 2015. During the course of the audit, we did not observe any impediments existing in FY 2015 that would have

prevented reasonably competent personnel from securing the files, maintaining accurate records, or ensuring that the each FOIA request received at the Headquarters had the required documentation in the FOIA request file.

NON-CAREER INVOLVEMENT IN FOIA PROCESS

We reviewed the Policy and Supporting Positions (Plum Book), issued by Committee on Oversight and Government Reform and the NLRB's organizational charts to determine the universe of non-career personnel between January 1, 2007 and June 23, 2015. By that process we identified the following positions as non-career:

- Board Member (one Member designated Chairman)
- General Counsel
- Chief Counsel
- Deputy General Counsel
- Executive Assistant to the Chairman (Chief of Staff)
- Assistant General Counsel (Legal) (2/2012 to 7/2013)
- Special Counsel for Congressional and Intergovernmental Affairs (2/ 2011 to 4/2013)

We classified the first six positions as non-career because they were Presidentially-appointed, Senate-confirmed positions or filled in a non-competitive process at the Senior Executive Service level (SES). Additionally, the Congressional Affairs position was initially established in the Chairman's office and was a term-limited appointment that was filled in a non-competitive process. We note that during the period we reviewed, three of the Chief Counsel positions were consistently filled by GS-15 career personnel, and that the Deputy General Counsel position was filled by career SES or GS-15 personnel.

There are a number of other non-career positions at the NLRB that we did not include in the scope of our review because they were filled in a competitive process and were in fact encumbered by a career SES official. Those positions include Deputy Chief Counsel; Solicitor; Director, Office of Representation Appeals; and Associate General Counsel, Division of Enforcement Litigation.

As previously discussed, the General Record Schedule for FOIA records allow for the destruction of FOIA requests after 2 years for requests that were fully granted and 6 years for requests that were denied in whole or in part. The FOIA Branch personnel explained that in preparation for the Headquarters' move, they destroyed all records that could be destroyed as of June 26, 2015. Our review then was limited to FOIA requests that were denied in whole or in part between June 26, 2009 and June 23, 2013, as recorded in FTS, and all FOIA requests between June 24, 2013 and June 23, 2015 (the date of the Congressional request). There should have been 2,914 FOIA request files available for our review. We, however, determined that 261 files were missing. Our review of the 2,653 files found the following:

- There was no documentation that a non-career official's involvement resulted in an undue delay of a response to a FOIA request; and
- There was no evidence that a non-career official's involvement resulted in 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.

We reviewed the 2,653 FOIA request files and determined that 26 FOIA request files had documentation that a non-career official participated in the FOIA process beyond providing records for review by the FOIA Branch. Those FOIA requests were between November 2010 and March 2014, with 20 of the 26 in FY 2011 and FY 2012. The requests generally involved significant activity at the NLRB including, but not limited to: the Boeing matter, Representation Rules Making, recess appointments, and litigation.

The following are general observations from the 26 FOIA request files that had notations in the file that one or more non-career officials were involved in the processing of the request:

- Except for providing records in response to FOIA requests, we observed that the Board Members generally were not involved in the FOIA process. We did observe two instances that a Board Member

participated in preliminary meetings to define the scope of the requests. General Counsels were not involved in the FOIA process;

- In addition to providing records in response to FOIA requests, the Acting General Counsel reviewed requests and responses that were brought to his attention, attended meetings to define requests, and was consulted on matters involving the discretionary release of otherwise non-releasable records;
- Generally, the Executive Assistant to the Chairman (Chief of Staff) reviewed requests, participated in meetings that resulted in the determination of the universe of the records that would be within the scope of the request; reviewed response letters; and reviewed the redactions. We observed that from time to time this individual caught errors in redactions and made editorial comments on response letters, but that there was no evidence that his participation resulted in the withholding of records that would have otherwise been properly released. The participation of this individual was generally limited to significant requests involving the Board's activity;
- Generally, the individual in the Assistant General Counsel (Legal) (2/2012 to 7/2013), and later the Deputy General Counsel position (11/2013 to present), performed the same function with regard to significant requests for General Counsel records as did the Executive Assistant to the Chairman (Chief of Staff) for the Board. We also observed, however, that this individual performed similar functions when, as a career official, she was detailed to the Office of General Counsel (2/2011 to 2/2012). The individual also had managerial oversight of the FOIA Branch when she was briefly assigned to the career position of Deputy Associate General Counsel, Division of Legal Counsel.
- With the exception of search for responsive records, we observed that Chief Counsels were rarely involved in FOIA requests, and that their participation did not result in withholding of records that would have otherwise been properly released.

- Generally the Congressional Affairs individual participated in the FOIA requests when the request involved records that were subject to Congressional request or from a Congressional Office. The requests often involved significant activities of the General Counsel or the Board. Our observation is that the individual in this position was active in the processing of FOIA requests, but it is not apparent that his activity resulted in the withholding of records that would otherwise be properly released; and
- The one exception to our general observation was a record of a video involving the Board's representation rules. In that instance, the FOIA Officer asked the then Acting Deputy General Counsel if the records should be released. It is not apparent from the notes if the FOIA Officer made the determination and was seeking the concurrence of the Acting Deputy General Counsel; if she was asking the Acting Deputy General Counsel for a decision regarding a discretionary release; or if the FOIA Officer was allowing the decision regarding the release of the record to be made by the Acting Deputy General Counsel. The FOIA Officer, who has since retired, could not recall this request. As noted above, the Acting Deputy General Counsel at that time was a career SES official.
- We also reviewed the program database records that were created to process the documents for multiple FOIA requests involving the Boeing ULP matter received in FY 2011. By doing so, we observed that two non-career officials used the program database to review potentially responsive documents. The Assistant General Counsel (Legal) made one entry noting two redactions as nonresponsive. The Congressional Affairs official made 43 entries adding 141 redactions, deleting 16 redactions, and changing one redaction code.

It is important to note that in large part our findings and observations were limited to the documents in the FOIA request files. Those documents included handwritten notes that were often cryptic in nature, difficult to read, and at times not sufficient to refresh the recollection of the FOIA official who wrote the notes. Some files contained email

messages with a non-career official, but those messages were largely administrative in nature. When redactions were made, it was not apparent which official made or requested the redaction.

Our interviews with the current FOIA Branch personnel about their notes did not result in the disclosure of any information that would provide a basis for a finding that non-career officials pressured or other improperly influenced the FOIA determinations.

Our interview of a former FOIA Branch official, however, provided a different perspective. That individual described a process in which the senior officials in both career and non-career positions directly managed the FOIA process with regard to requests that were deemed significant. The individual stated that the FOIA responses for the significant issues could be issued after they were approved by the SES official who oversaw the FOIA appeals and the non-career Assistant General Counsel (Legal) in the Office of the General Counsel. The former official described a situation in which the FOIA officials' decisions were overridden by more senior officials, but that the decisions were made based upon what could survive a FOIA appeal or after consulting the DOJ. When asked for specific examples, the former official was not able to recall particular records or requests. The former official did state that there was one situation involving a request that the former official refused to sign a letter, but could not recall relenting or if the issue was resolved.

We cannot base a finding on the statement of one former official without some level of corroboration, and our review of the available documentation does not corroborate the statement with regard to non-career officials. Although the level of involvement we observed is inconsistent with the situation described by the former FOIA official, a reasonable person could review the files for the significant FOIA requests and come to the determination that, when there is a request for records involving in a significant matter, the FOIA process has multiple management layers that include the more senior career and non-career officials. If the decision to withhold a record or a portion of record was, however, based upon what would survive an appeal or determined after consulting with DOJ, we cannot reach a finding that the career or non-career officials withheld information that would otherwise had been released. Rather

a reasonable person could conclude that the more significant the matter, the less confidence the senior managers have that the FOIA Branch will properly perform its function.

Over the course of time that is within the scope of the audit, the FOIA Branch was reorganized into a new organizational unit and there appears to be no activity by non-career officials after March 2014 in the processing of FOIA requests. Nevertheless, we are making recommendations to address the lack of documentation in the FOIA request files and will ensure that the FOIA program can demonstrate that it is free from undue influence by both career and non-career officials to improperly withhold records, and meet the internal control requirement for a properly documented program.

RECOMMENDATIONS

We recommend that the Division of Legal Counsel take the following corrective action:

1. Within 30 days of this report, evaluate the performance of each of the FOIA office managers and supervisors and determine if remedial performance improvement measures are necessary;
2. Develop and implement written policies and procedures that address the entry of the data in FTS and the maintenance of FOIA request files. In implementing this recommendation, consideration should be given to developing procedures for a reoccurring method of validating FTS data; changing the practice of filing FOIA request files by last name to FOIA identification number; developing a method to mark that a closed FOIA request file has been removed; and developing a method to mark that a file is stored separately as a FOIA “special project;”
3. Develop and implement a policy that requires the FOIA processing personnel to clearly document in the FOIA file notes any instance involving the activity of officials outside of the Division of Legal Counsel in the determination of what records will be released in whole or in part; and
4. Update the FTS System of Records Notice to reflect how the FOIA information is used and stored.

TO: David P. Berry
Inspector General

FROM: Barbara A. O'Neill
Associate General Counsel
Division of Legal Counsel

DATE: May 10, 2016

SUBJECT: Response to Draft FOIA Audit Report
Report No. OIG-AMR-78-XX-XX

The Division of Legal Counsel and the Freedom of Information Act Branch have carefully reviewed the above-referenced Draft Report issued by the Inspector General received on April 20, 2016. This memorandum responds to that analysis, findings and recommendations.

The FOIA Branch is committed to its statutory mission to ensure that the Freedom of Information Act is complied with and that everyone who requests information from the Agency receives the records they are legally entitled to receive in a timely manner. Prior to July 2014, the responsibility for processing FOIA requests was given to the Office of the Executive Secretary, for requests for information in the control of the Board; to the Legal Research and Policy Planning Branch, Division of Advice, for requests for information in the control of the General Counsel; and to the various Regional Offices for requests related to field records. A decision was made to centralize all FOIA processing within headquarters in a newly-created FOIA Branch within a newly-created Division of Legal Counsel. A pilot program to implement centralization began in July 2014, with the FOIA Branch handling requests for information from two Regions (Regions 10 and 28), and it was planned to gradually increase the number of Regions being handled by the FOIA Branch. In June 2015, full centralization was effectuated more quickly than anticipated, such that the FOIA Branch went from handling requests for information from approximately half of the Agency's Regions, to handling requests for documents from all Regions. As a result of the full centralization, the Branch has undergone a significant change in the scope of its operations over the course of the past 21 months. The FOIA Branch previously received an average of 57 FOIA requests a month (during the first three months of 2014), and now receives an average of 234 FOIA requests a month (during the first three months of 2016).

Besides the influx of FOIA requests, there were various other factors adding to the "growing pains" associated with the creation of the new Branch and the development of a centralized FOIA process. There was the hiring of additional FOIA processors, all needing training, including for the first time hiring non-attorneys as FOIA processors. In addition, there was a new supervisor and a new branch chief, who was hired from outside the Agency. Further, in the middle of the centralization, the Agency moved its

headquarters in the summer of 2015. The move included a significant reduction of the Agency's footprint (by 1/3) with a commensurate reduction in available space for the FOIA Branch. Thus, the FOIA Branch reviewed offices files, purged in accordance with records retention policies, and re-located the FOIA files from a closed suite solely for FOIA Branch use in the old building, into a new open-concept building that did not allow for a file room and/or cabinets to be used solely by FOIA. Lastly, at this same time, a pre-hearing redaction policy was put into effect to protect personally identifiable information of individuals, which required more labor-intensive redactions for certain documents.

The audit occurred on the heels of all of these changes. Nevertheless, the FOIA Branch appreciates this opportunity to examine and improve its internal operations, and indeed has begun to make improvements to correct deficiencies identified during the audit process. In addition, the FOIA Branch is committed to working with OCIO to improve the FTS system and/or purchase or develop an information system that includes technology-enabled information processes that would facilitate the work of the FOIA Branch and allow the Branch to perform its job functions in the most expeditious and efficient manner.

Our comments with respect to the report are as follows:

FOIA FILING SYSTEM

The Draft Report concludes that the filing system of the FOIA Branch "do[es] not meet the requirements of a properly designed or managed information system." In large part, the Draft Report relies on the Agency's System of Records Notice (SORN) under the Privacy Act of 1974 to make this conclusion. The FOIA Branch agrees that the SORN does not mention certain program database files or other network drives used to process FOIA requests. The Draft Report does not reflect, however, that the SORN was published in December 2006, and that these additional tools used by the Branch are a relatively recent development stemming from a limited number of FOIA requests involving voluminous documents associated with the influx of electronically-stored information. The FOIA Branch believes that the SORN should be amended to accurately reflect these additional tools as well as to anticipate future programs that the FOIA Branch may adopt to process similarly labor intensive requests more efficiently. Additionally, to the extent that deficiencies in the Branch's electronic case tracking system (FTS) were identified, the FOIA Branch is grateful that it is now obtaining assistance from OCIO to improve the functioning of FTS, which will also make processing FOIA requests more efficient.

INTERNAL CONTROL

Documentation/Data Entry

The Draft Report is critical of a number of controls within the Branch. To the extent that there was inadequate/untimely documentation of FOIA processing in FTS, the

FOIA Branch is now striving to use FTS to its capacity (which will be easier to accomplish with anticipated improvements to the system), and will shortly use that system as the only repository of information. Paper files will no longer be maintained. Unlike for the rest of the Agency, FOIA processing was never incorporated into NxGen, and accordingly, there was no directive that FTS must be complete in itself; rather, as the Draft Report notes, the FOIA Branch considered files to be complete if information was contained in either FTS or the paper FOIA file.

The Draft Report was critical of the fact that Regions 10 and 28 continued to process certain FOIA requests after the pilot program had begun, i.e., when the FOIA Branch in headquarters should have been handling those FOIA requests. We note, however, that the initial centralization was a pilot program designed to implement new centralization procedures. The pilot was in its infancy, and all the logistics had not yet been worked out; that is why the initial centralization was termed a “pilot program.” When the error was discovered, the FOIA Branch terminated those Regions’ handling of FOIA requests.

Procedural Guidance

The Draft Report criticizes a lack of documented procedures for internal controls within the Branch. With the anticipated change to the maintenance of its files, that is, maintaining electronic files only, the FOIA Branch plans to document these procedures, as the Draft Report recommends. To the extent that some of these procedures involve other Agency offices, for example, the Finance Branch notifying the FOIA Branch when payments are received through Pay.gov or by credit card, the FOIA Branch recognized this as a problem for quite some time and has been working with the Finance Branch to obtain its cooperation in entering information into FTS in a timely fashion.

Safeguarding Files and Contents

As noted in the Draft Report at page 15, deficiencies found regarding the safekeeping of files were corrected immediately after they were identified. To the extent that the Draft Report points out that many work spaces were used to store boxes after the Agency move, we note that while the Agency moved into the new building in July 2015, not all of the furniture that had been ordered for each office had arrived and for some there was an insufficient amount of file drawer space. It wasn’t until seven months later, in February 2016, that all of the furniture, including additional furniture with file drawers, was delivered. We acknowledge that, despite the lack of cabinets, the files could have been better secured. Moving toward a paperless environment, which is now underway, should resolve this issue.

NON-CAREER OFFICIALS’ INVOLVEMENT IN FOIA PROCESS

The FOIA Branch agrees that any non-career officials’ involvement in FOIA processing did not result in any undue delay of a FOIA response or the withholding of a document

that would have otherwise been released. As the audit process identified this as a potential issue, we will focus on ensuring that no undue involvement of non-career officials occurs in subsequent matters.

Below are our responses to the auditor's specific recommendations:

Recommendation 1: Within 30 days of this report, evaluate the performance of each of the FOIA office managers and supervisors and determine if remedial performance improvement measures are necessary.

The Division of Legal Counsel has already begun the process of evaluating the FOIA managers and supervisors in light of the issues raised by this audit process and will incorporate our thoughts, suggestions, and performance improvements into the annual performance appraisals, covering the period July 1, 2015 through June 30, 2016.

Recommendation 2: Develop and implement written policies and procedures that address the entry of data in FTS and the maintenance of FOIA request files.

As of the beginning of May, 2016, the FTS has been updated and improved to permit, *inter alia*, the automatic generation of a receipt of a FOIA request to the requester, as well as an automatic email acknowledgment, with the immediate assignment of a FOIA ID Number, and the automatic population of data into FTS from that electronic FOIA request. In conjunction with this, the FOIA Branch has initiated a roll out of an electronic file for all requests and it has begun the process of preparing a Desk Manual, including the formulation of Standard Operating Procedures for FOIA's administrative professionals, processors (attorneys and specialists), and managers, as well as a standardized Case Log (with instructions concerning what should be noted in that case log). FOIA is also working toward a more universal case numbering system that does not distinguish between requests sent to the Regions versus requests sent directly to FOIA. And FOIA will work with the new Records Officer to schedule, pack up, and relocate FOIA's paper files, consistent with the Federal Records Retention Policy.

Recommendation 3: Develop and implement a policy that requires the FOIA processing personnel to clearly document in the FOIA file notes any instance involving the activity of officials outside of the Division of Legal Counsel in the determination of what records will be released in whole, or in part.

As noted above in response to Recommendation 2, instructions will be prepared for the Case Log to include such information.

Recommendation 4: Update the FTS System of Records Notice to reflect how the FOIA information is used and stored.

The FOIA Branch will work with the Agency's new Privacy Officer, once selected, on revisions to the FTS SORN in order to accurately reflect how the FOIA information is used and stored.