

Federal Housing Finance Agency  
Office of Inspector General



# **FHFA Non-Career Employees Have Not Been Involved in FHFA's Freedom of Information Act Process**

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August 6, 2015

## Executive Summary

The Freedom of Information Act (FOIA) was enacted to promote transparency in the operations of the federal government and has been called “the law that keeps citizens in the know about their government.” FOIA requires federal agencies, such as the Federal Housing Finance Agency (FHFA/Agency), to make available to the public various policy statements, determinations, and other records. Recently, members of the media and Congressional representatives have questioned whether some agencies have withheld or delayed the production of information sought pursuant to FOIA for political reasons.

On June 23, 2015, the FHFA Office of Inspector General (FHFA-OIG or OIG) was asked by the Senate Committee on Homeland Security and Governmental Affairs (the Committee) to determine: (1) whether “non-career” FHFA officials (defined in this report as presidential appointees who are confirmed by the Senate, as well as officials appointed pursuant to Schedule C of the excepted service) have been involved in the Agency’s FOIA process; and (2) if so, whether their involvement had an adverse impact upon the quantity, quality, and timeliness of the information provided to the public through the FOIA process. To respond, FHFA-OIG launched a special review. We found no evidence of involvement by non-career officials in the Agency’s FOIA process from 2009 (when FHFA established its FOIA office) to the present. Specifically:

- FHFA’s General Counsel, Chief FOIA Officer, and FOIA Officer (all career officials) each stated, unequivocally, that to the best of their knowledge, non-career officials have never attempted to involve themselves in the Agency’s FOIA process. Each stated that non-career officials never caused or attempted to cause them to redact, withhold, or delay the release of any information through the FOIA process.
- OIG tested the assertions of these Agency officials by reviewing a sample of 20 FOIA requests that were partially denied or denied during the service of non-career officials at FHFA. We found no evidence that non-career officials influenced or attempted to influence FHFA’s FOIA office’s decisions in these cases, or caused any delays in the processing of the requests.
- OIG also analyzed all of the FOIA-related litigation brought against FHFA to date. None of the plaintiffs in these cases alleged that they were denied information due to the involvement of non-career officials in the Agency’s FOIA process. Our examination of the pleadings, papers, and decisions in these cases found no allegations, statements,



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or judicial findings of fact that suggested that non-career officials were involved, or attempted to be involved, with the Agency's FOIA process.

For these reasons, OIG concludes that non-career officials have not been involved in FHFA's FOIA process. FHFA provided technical comments on a draft of this report.

The report was prepared by David M. Frost, Assistant Inspector General, with assistance from Wesley M. Phillips, Senior Policy Advisor, and Andrew Geger, Jr., Senior Auditor. It has been distributed to Congress, the Office of Management and Budget, and others, and will be posted on our website, [www.fhfaoig.gov](http://www.fhfaoig.gov). We appreciate the assistance provided by officials from FHFA in completing this special project.

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## BACKGROUND .....

### The Freedom of Information Act

Enacted in 1966, FOIA was created to enable the public to obtain information and records from federal executive agencies. Signing the bill into law, President Johnson stated “that freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted.”<sup>1</sup> More recently, President Obama stated that FOIA “is the most prominent expression of a profound national commitment to ensuring an open Government.”<sup>2</sup> FOIA cannot fulfill that commitment if it is administered in such a way as to protect political interests, rather than the public’s access to information.

Federal agencies are required to disclose any information requested under FOIA unless it falls under one of nine specific exemptions.<sup>3</sup> An agency is required to respond to a request for information within 20 business days from the date upon which the request is received by the agency’s FOIA office. Under certain circumstances, the agency can extend the response time by 10 business days. A requestor may file an administrative appeal from any aspect of the agency’s handling of a request. Thereafter, the requestor may challenge the agency’s action in federal court.<sup>4</sup>

### FHFA’s FOIA Office

FHFA’s FOIA Office<sup>5</sup> began operations in 2009.<sup>6</sup> For administrative purposes, that office is situated within the Office of General Counsel. It consists of a Chief FOIA Officer, a FOIA Officer, and a FOIA Appeals Officer. The Chief FOIA Officer, who is primarily responsible

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<sup>1</sup> Statement by President Johnson on signing FOIA. Online at [www.presidency.ucsb.edu/ws/?pid=27700](http://www.presidency.ucsb.edu/ws/?pid=27700).

<sup>2</sup> Online at [www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct).

<sup>3</sup> The exemptions are as follows: (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. 5 U.S.C. § 552(b).

<sup>4</sup> 5 U.S.C. § 552(a)(6); 5 U.S.C. § 552(a)(4)(B). *See also* 12 CFR Part 1202.

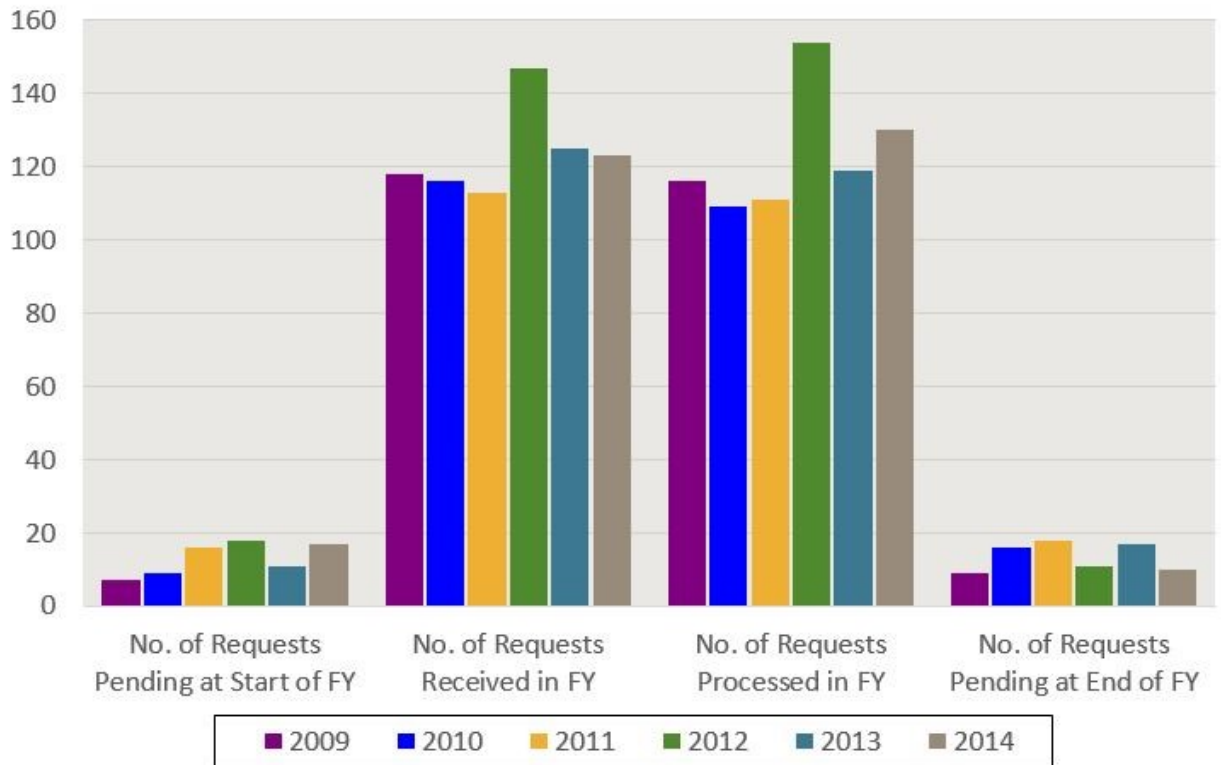
<sup>5</sup> FHFA-OIG maintains its own FOIA process. This report is confined to FHFA’s FOIA process.

<sup>6</sup> The FHFA FOIA office began operation in 2009. Prior to that, FHFA, which came into existence on July 30, 2008, processed FOIA requests under the existing Office of Federal Housing Enterprise Oversight structure and regulations.

for the Agency’s FOIA program, reports to the Agency’s General Counsel. All of these employees are career government officials.

The Office handles well over 100 FOIA requests per year, and processes them in accordance with the Agency’s FOIA regulations, set forth at 12 CFR Part 1202. Figure 1, below, shows the volume of FHFA’s annual FOIA activities for Fiscal Years 2009 through 2014, including the number of requests pending at the start of the year, the number received, the number processed, and the number still pending at year end.<sup>7</sup>

**FIGURE 1. FHFA FOIA ACTIVITY, FY 2009 THROUGH FY 2014**



Source: FOIA.gov.

<sup>7</sup> FHFA’s FOIA web page contains, among other things, an introduction to the FOIA and information about how to make a FOIA request to FHFA and FHFA-OIG. Online at [www.fhfa.gov/AboutUs/FOIAPrivacy/Pages](http://www.fhfa.gov/AboutUs/FOIAPrivacy/Pages).

## FHFA’s Non-Career Officials<sup>8</sup>

Since it was created by Congress in 2008, FHFA has had a total of eight non-career officials.<sup>9</sup> Of these eight, two were non-supervisory personnel who served as confidential assistants, as opposed to policy-determining officials. Figure 2 below reflects the positions and dates of employment of each non-career official at FHFA.

**FIGURE 2. TITLES AND APPOINTMENT DATES OF NON-CAREER OFFICIALS, 2008 – PRESENT**

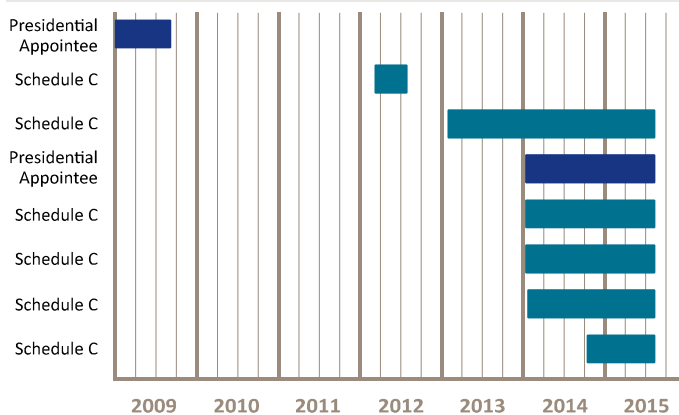
Title and Grade of Non-Career Employee	Dates of Employment as Non-Career Staff	Type of Appointment
Director, EX-02	7/30/2008 – 8/31/2009	Presidential Appointee
Confidential Executive Assistant, EL-11	3/14/2012 – 7/8/2012	Schedule C
Confidential Assistant, EL-7	1/28/2013 – Present	Schedule C
Director, EX-02	1/6/2014 – Present	Presidential Appointee
Special Advisor/Acting Chief of Staff, LL-01	1/7/2014 – Present	Schedule C
Special Advisor/Industry, LL-01	1/17/2014 – Present	Schedule C
Special Advisor/Intergovernmental, LL-01	1/19/2014 – Present	Schedule C
Chief of Staff, LL-01	10/6/2014 – Present	Schedule C

Source: FHFA.

FHFA’s FOIA Office began operations in 2009. As Figure 3 shows, there have been significant periods of time from 2009 to the present when FHFA had no non-career officials.

For the period July 2008 (when FHFA came into existence) through August 2009, the Agency’s first director was the only non-career official at FHFA. From September 1, 2009 until March 14, 2012 – a period of over two and a half years – there were no non-career officials at the Agency: Acting Director DeMarco was a career federal employee who was

**FIGURE 3. TENURES OF NON-CAREER OFFICIALS, 2009 TO PRESENT**



Source: FHFA.

<sup>8</sup> Following discussions with the Committee staff, OIG determined that, for purposes of this inquiry, “non-career” employees would include those Agency employees, exclusive of OIG, who are presidentially appointed and Senate confirmed, as well as those appointed under Schedule C of the excepted service, 5 CFR § 213.3301 (noncompetitive positions which are “policy-determining or which involve a close and confidential working relationship with the head of an agency or other key appointed officials”).

<sup>9</sup> This total excludes the two presidentially appointed Inspectors General at OIG.

neither appointed by the President nor confirmed by the Senate. From March 14, 2012 until January 6, 2014, when Director Watt assumed his commission, there were only two non-career officials at FHFA, both of whom were in non-supervisory positions as confidential assistants to career employees.

In December 2013, the Senate confirmed FHFA’s current director, and on January 6, 2014, he took the oath of office. Director Watt has appointed four non-career officials to assist him in administering the Agency. As reflected in Figures 2 and 3, above, there are now six non-career officials at FHFA.

### The Committee’s Concerns

In its letter to OIG, the Committee explains that its concerns about FOIA arise from recent media reports about the involvement of non-career officials in their respective agencies’ FOIA processes. The reports detail, among other things, occasions on which non-career officials allegedly:

- “reviewed and scrutinized politically sensitive documents requested under FOIA—directly affecting what documents or portions of documents were ultimately released to requestors,” causing delays by their involvement;<sup>10</sup> and,
- “implemented an intricate review and approval process for FOIA responses, including redacting potentially embarrassing information . . .”<sup>11</sup>

The Committee’s concerns are consistent with those expressed by other stakeholders in the FOIA process, such as journalists and other members of Congress. For example, at a recent hearing, a reporter testified that, “[T]he Freedom of Information Act or FOIA should be one of the most powerful tools of the public and the press in a free and open society. Instead, it’s largely a pointless, useless shadow of its intended self.”<sup>12</sup> At the same hearing, a member of Congress remarked, “I’m just concerned that these agencies under whatever directives, be it from the White House or whatever authorities, were deliberately delaying and obstructing

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<sup>10</sup> Letter from Rep. Ron Johnson to Laura Wertheimer, Inspector General, Federal Housing Finance Agency Office of Inspector General (June 23, 2015).

<sup>11</sup> *Id.*

<sup>12</sup> *Ensuring Transparency Through The Freedom of Information Act (FOIA): Hearing Before the H. Comm. on Oversight and Government Reform*, 114th Cong. (2015) (statement of Sharyl Attkisson).



FOIA requests in order to hide politically sensitive information or whatever information they simply don't want the public to have.”<sup>13</sup>

The Committee asked OIG to determine whether non-career officials have been involved in FHFA's FOIA process and, if so, whether their involvement resulted in any undue delay in the Agency's response to a FOIA request, or the withholding of any document or portion of a document that would have been provided but for their involvement.

## OIG REVIEW .....

OIG thoroughly reviewed FHFA's FOIA process and found no evidence that non-career officials have been involved in it.<sup>14</sup> As we now discuss, our conclusion is based on interviews of Agency officials who administer the FOIA process (all of whom are career officials), a review of a sample of FOIA requests that FHFA denied in whole or in part, and an analysis of all FOIA-related litigation brought against the Agency to date.

### **The Career Officials Who Administer FHFA's FOIA Program State that Non-Career Officials Have Not Been Involved in It**

FHFA's FOIA Office is staffed entirely with career officials, as is the Office of the General Counsel, in which the FOIA Office is situated. At FHFA, there are no non-career officials within the FOIA Office or involved in the FOIA process.

OIG interviewed FHFA's Chief FOIA Officer and its General Counsel. Both stated during their interviews and confirmed, unequivocally and under oath, that to the best of their knowledge, a non-career official has never blocked, or attempted to block, the release of any record or portion of a record requested under FOIA, and that no non-career official ever attempted to negotiate the assertion of a FOIA exemption.

OIG also interviewed the Agency's FOIA Officer, the line official who processes FOIA requests under the supervision of the Chief FOIA Officer. She stated that no non-career official has ever influenced, or attempted to influence, her work in any FOIA matter.

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<sup>13</sup> *Ensuring Transparency Through The Freedom of Information Act (FOIA): Hearing Before the H. Comm. on Oversight and Government Reform*, 114th Cong. (2015) (statement of Rep. Jody Hice, Member, H. Comm. on Oversight and Government Reform).

<sup>14</sup> Our review does not preclude the possibility that, at some point, a non-career official may have improperly withheld a potentially responsive document from the FOIA office, although we have found no evidence of such an occurrence.

## **OIG's Analysis of a Sample of FOIA Files Found No Evidence of Involvement by Non-Career Officials in the FHFA FOIA Process**

We tested the statements of the career officials who administer the Agency's FOIA process by analyzing a random sample of FOIA requests denied in whole or in part by FHFA. The universe from which we drew our sample consisted of all FOIA requests denied by FHFA in whole or in part during times that non-career officials served at the Agency between 2012 and 2015. From this universe, we selected at random 20 files to review.

We analyzed the 20 files to identify the process used by FHFA to deny, in whole or in part, requests for information, as well as the employees involved in those denials. Specifically, we analyzed internal and external correspondence, certain administrative data, e.g., timelines and logs, documents concerning the assertion of a FOIA exemption or legal privilege, and materials withheld by the Agency. We also looked for references to non-career officials at FHFA as well as suggestions that such an official may have been involved in the processing of a request.

We found no evidence that non-career officials had been involved in, or attempted to influence, the processing of any of these FOIA requests or the assertion of a FOIA exemption or legal privilege that would preclude the release, in whole or in part, of an Agency record;<sup>15</sup> neither did we find any suggestion that FHFA non-career officials participated in, or attempted to influence, any decision to assert an exemption that would preclude, in whole or in part, the release of an Agency record. We found no evidence of involvement, or attempted involvement, on the part of a non-career official that delayed the Agency's response to a FOIA request, or resulted in the denial of information sought pursuant to FOIA.<sup>16</sup>

## **OIG Analysis of FOIA-Related Litigation Involving FHFA Revealed No Evidence of Involvement by Non-Career Officials in the Agency's FOIA Process**

As discussed earlier, a FOIA requestor may seek judicial review of an agency's handling of its request in a federal district court when, for example, the agency denies the request in whole or in part. The documents filed in such a case could provide evidence of the involvement of non-career officials in the agency's FOIA process, especially in the assertion

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<sup>15</sup> Agency FOIA officials told us that when a non-career official was found to be in possession of material that was potentially responsive to a FOIA request, the official was treated in the same manner as a career official in possession of such material. That is, the non-career official was informed that the materials would be released, but the official was not consulted in the decision to do so. We did not find evidence to the contrary in our review of the files in our random sample.

<sup>16</sup> Although our review does not prove conclusively that non-career officials were never involved in or influenced the processing of a FOIA request, its results are corroborative of the interview and sworn statements of the career officials who administer the Agency's FOIA process.

of an exemption or legal privilege, redaction of documents, or delay in the release of information through the FOIA process.

We determined that, since the inception of the Agency, FHFA has been a defendant in five FOIA-related civil actions filed in federal district court.<sup>17</sup> We reviewed relevant documents from each civil action, including pleadings, moving papers and allied documents, and interim and final judicial orders and decisions.

We found that the plaintiffs in these lawsuits did not allege that non-career officials were involved in the decision to deny their FOIA requests. We found no documents which suggested to us that the actions of non-career officials adversely affected the quantity, quality, or timeliness of the information provided to the plaintiffs in these cases.

## CONCLUSION.....

For these reasons, OIG concludes that FHFA non-career officials have not been involved in, or attempted to influence, the processing of any FOIA requests or the assertion of a FOIA exemption or legal privilege that would preclude the release, in whole or in part, of an FHFA record.

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<sup>17</sup> We verified the number of FOIA-related civil actions with FHFA’s Chief FOIA Officer.

## OBJECTIVE, SCOPE, AND METHODOLOGY .....

In order to conduct this study, the Office of Compliance & Special Projects took the following actions:

1. Obtained the names, positions, and dates of employment of all non-career FHFA employees who served at FHFA since the inception of the Agency, i.e., since 2008.
2. Obtained declarations under oath regarding possible interference by non-career officials in the Agency's FOIA process from FHFA's FOIA office, i.e., the General Counsel (who has overseen the Agency's FOIA process since the Agency was established) and the Chief FOIA Officer. We also interviewed the Agency's Freedom of Information Act Officer.
3. Obtained, under the guidance of our senior statistician, a purposive sample of FOIA requests processed by the Agency during those times when non-career officials were employed at FHFA. We reviewed the contents of these files to determine whether they contained any indication that non-career employees had any involvement in, or impact upon, the Agency's FOIA process. Specifically, we reviewed:
  - a. Documents (email messages, notes, memoranda, etc.) for mentions of involvement by a non-career official in the processing of FOIA requests; or
  - b. Assertions of the exemption in 5 U.S.C. § 552(b)(5), especially to interpose the deliberative process privilege.

If a case reflected either of the above concerns, then we pursued the matter further; that is, we reviewed the contents of the file more extensively to determine whether the available information tended to show that a non-career employee exerted undue influence over the FOIA process. Our review did not reveal the existence of such information.

4. Assessed FOIA litigation in which FHFA was involved during the period 2008 to the present to determine whether key documents in these cases indicated that non-career officials at the Agency influenced the denial or partial denial of the FOIA requests then at issue. Specifically, we reviewed pleadings, moving papers and allied documents, and final and interlocutory judicial decisions for suggestions of any such influence. Again, our review did not reveal evidence indicating that non-career officials influenced the Agency's FOIA process in any of these cases.

We conducted our review under the authority of the Inspector General Act and in accordance with the Quality Standards for Inspection and Evaluation (January 2012) that were promulgated by the Council for the Inspectors General on Integrity and Efficiency. FHFA provided technical comments on a draft of this report, which were included in the final report.

## ADDITIONAL INFORMATION AND COPIES.....

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