



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

The Director

December 16, 2008

The Honorable Richard B. Cheney  
President of the Senate  
United States Senate  
Washington, D.C. 20510

Dear Mr. President:

Section 11 of the OPEN Government Act of 2007 (Public Law 110-175, December 31, 2007) required the U. S. Office of Personnel Management (OPM) to submit a report to Congress on:

**(1) whether changes to executive branch personnel policy could be made that would –**

- (A) provide greater encouragement to all Federal employees to fulfill their duties under section 552 of title 5, United States Code; and**
- (B) enhance the stature of officials administering that section within the executive branch.**

OPM staff met with Freedom of Information Act (FOIA) officials from the Department of Justice (DOJ) and the Department of Defense (DoD) to discuss the human capital challenges faced by the FOIA community and to explore possible solutions, including those contemplated in the OPEN Government Act. The challenges identified by the FOIA community center around lack of senior leadership support. These issues are appropriately addressed through management direction and are within the control of individual agencies. Changes to executive branch personnel policies would not resolve these concerns. Support for FOIA must come from individual agency heads. With respect to the particular policy considerations the OPEN Government Act required us to address, we provide the following response.

**(2) whether performance of compliance with section 552 of title 5, United States Code, should be included as a factor in personnel performance evaluations for any or all categories of Federal employees and officers.**

Agencies are responsible for establishing employee performance plans (5 U.S.C. 4302), including performance standards, related to job requirements. We do not believe it would be appropriate to establish a mandatory performance element which may not be related to the requirements of all positions. Agency officials are more knowledgeable about job requirements and performance goals and should therefore retain the responsibility for identifying such elements.

**(3) whether an employment classification series specific to compliance with sections 552 and 552a of title 5, United States Code, should be established.**

OPM maintains the Federal occupational structure and establishes new occupations when necessary. For example, if emerging work does not fit into the current structure and is therefore inappropriately evaluated, resulting in inaccurate grade levels, OPM might establish a new occupational series and grading criteria. Most FOIA positions are properly classified in the Miscellaneous Administration and Program Series, 0301. For positions in the 0301 series, agencies are currently authorized to establish position titles such as "FOIA Officer" and "FOIA Specialist." OPM can issue clarifying guidance on the classification of FOIA work requiring the exercise of analytical ability, judgment, discretion, and personal responsibility, the application of a substantial body of knowledge of law and regulations, and skill in research and writing, as distinct from clerical work distributing and tracking FOIA responses. FOIA officials from DOJ and DoD indicated such guidance would be very helpful.

Based on our discussions with DOJ and DoD, it became apparent the FOIA community needs improved recruitment and selection practices, rather than new classification policy. Managers are concerned about the quality of candidates referred for selection. This concern would not be resolved by establishing a new occupation and grading criteria, but could be appropriately addressed through improved recruiting practices and selection criteria. We would be happy to assist the FOIA community by developing a standard, streamlined vacancy announcement template. We also recommend the community work together to develop common position descriptions which can be used across agencies. Finally, we recommend establishing consistent quality ranking factors to identify and focus on the best sources of well-qualified applicants.

**(4) whether the highest level officials in particular agencies administering such sections should be paid at a rate of pay equal to or greater than a particular minimum rate.**

OPM does not recommend establishing a minimum rate of pay for Chief FOIA Officers. First, it is important to note that Executive Order 13392 and Public Law 110-175 did not create a new position of Chief FOIA Officer, but merely required that a Chief FOIA Officer be identified within each agency. Chief FOIA Officers must be Assistant Secretaries or in positions equivalent to an Assistant Secretary. This requirement arguably reflects the assumption that a certain pay level is appropriate for Chief FOIA Officers. However, while the law requires all Chief FOIA Officers to be Assistant Secretaries (or equivalent), not all agencies have Assistant Secretaries, and some may not have any positions that are precisely equivalent to an Assistant Secretary. Chief FOIA Officers who are in Assistant Secretary positions are generally paid the rate for EX-IV (\$149,000 in 2008). Chief FOIA Officers who are in positions equivalent to Assistant Secretary positions (i.e., positions outside of the Executive Schedule) are paid based on the operative pay system within each agency, which could be more or less than the rate for EX-IV. The addition of Chief FOIA Officer duties to any of these positions may not warrant reclassifying the job in a way that would result in a higher rate of pay than these individuals are currently receiving. Therefore, we do not recommend requiring a specific rate of pay that would apply to all Chief FOIA Officers, without regard to the full scope of their duties, which are not limited to their FOIA Officer duties.

**(5) whether other changes to personnel policies can be made to ensure that there is a clear advancement track for individuals interested in devoting themselves to a career in compliance with such sections.**

The 0301 series provides a career advancement track for individuals interested in devoting themselves to a career in administering FOIA, while also providing opportunities for individuals to provide the analytical and management skills learned in this career to other programs. Agencies have the flexibility to provide career development and opportunities within existing personnel policies; therefore, we do not recommend policy changes in this area.

**(6) whether the executive branch should require any or all categories of Federal employees to undertake awareness training of such sections.**

Section 4101 of title 5, U.S. Code, establishes that the purpose of Government training for Federal employees is to assist in achieving an agency's mission and performance goals by improving employee and organizational performance. Agency officials are responsible for ensuring that their organizations' training needs are identified, programs are established to meet those needs, lines of authority are clearly identified, and all training programs contribute to the overall efficiency and effectiveness of the Federal service. While it would not be appropriate for OPM to require employees to undertake FOIA awareness training, agencies experiencing problems with compliance with section 552 of title 5 could establish FOIA awareness training to improve organizational performance.

I appreciate the opportunity to provide our findings on whether personnel policy changes would encourage FOIA compliance and enhance the stature of Government employees administering the FOIA.

A similar letter is being sent to the Speaker of the House of Representatives.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael W. Gaver", is written over the typed name and title.

Michael W. Gaver  
Acting Director

