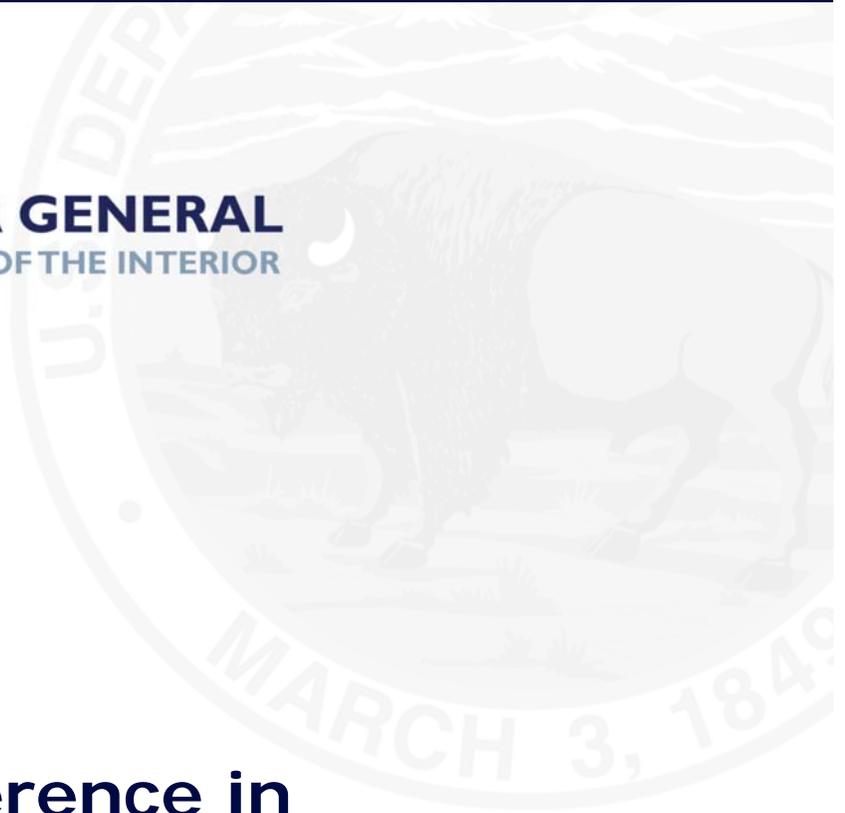




OFFICE OF
INSPECTOR GENERAL
U.S. DEPARTMENT OF THE INTERIOR



Alleged Interference in FOIA Litigation Process

This is a revised version of the report prepared for public release.

I. EXECUTIVE SUMMARY

We initiated this investigation based on information our Office of Audits, Inspections, and Evaluations (AIE) provided about an ongoing evaluation that was initiated in response to a congressional request. AIE is evaluating the U.S. Department of the Interior's (DOI's) awareness review process for Freedom of Information Act (FOIA) requests, a process that provides a heightened review of FOIA-responsive documents containing the names or email addresses of politically appointed employees before the documents are publicly released.¹ During the evaluation, AIE personnel learned that DOI employees had been directed to delay releasing documents responding to a FOIA request that was being litigated in U.S. district court. AIE referred the matter, which is described below, to our Office of Investigations to determine whether that instruction conflicted with the court order.

On February 4, 2019, David Bernhardt was nominated to become the Secretary of the Interior. Soon afterward, then Counselor to the Secretary Hubbel Relat directed staff from the DOI's Office of the Solicitor (SOL) and members of the DOI's FOIA staff to temporarily withhold documents related to Bernhardt from an upcoming release of documents under the litigation. The anticipated release of documents was related to civil litigation pending in U.S. district court, in which the court ordered the DOI "to review 1,500 pages of potentially responsive records per month and release the responsive documents." As a result of Relat's direction, 253 pages were withheld from the DOI's February 2019 release. The February 2019 release included 1,228 pages identified as responsive to the plaintiff's FOIA request. The DOI ultimately released most of the 253 pages in December 2019, 7 months after Bernhardt was confirmed as Secretary.²

During our investigation, DOI officials asserted that the DOI was allowed to scrutinize what it deemed to be sensitive information before releasing it under FOIA, and that it had discretion—including under the court order—to determine when and how many responsive documents to release. In addition, the U.S. Department of Justice (DOJ) attorney representing the Government in the FOIA litigation told us that the court order did not require the DOI to *release* 1,500 pages per month, only to *review* 1,500 pages per month, and that the DOI had discretion to determine the order in which to release responsive documents. Considering that a court order is in place governing the DOI's review and production of documents, as well as the DOJ attorney's assessment that DOI officials had discretion on the order in which to produce materials, we concluded that the court is the proper venue to determine whether the DOI met its production obligations under its order.

Based on our conclusion, we closed this investigation, and we are presenting the facts surrounding this specific matter in this report. We referred our findings to the Chief of Staff for the Office of the Secretary for his information only.

¹ The results of that evaluation will be reported separately.

² Of the 253 pages, 215 were released in December 2019. The other 38 pages remain under review by the Government.

II. BACKGROUND

A. The FOIA Litigation

In 2017, multiple requests were filed under the Freedom of Information Act (FOIA) for documents related to a U.S. Department of the Interior (DOI) initiative. A requestor later filed suit in U.S. district court, alleging the DOI had failed to provide records relating to their specific FOIA request, which concerned the DOI initiative (the “FOIA litigation”).

In 2018, the court issued an order setting a monthly requirement for the DOI’s review of documents related to the FOIA litigation. Specifically, the court ordered the DOI to “review 1,500 pages of potentially responsive records per month and release the responsive documents.” The court order did not set a minimum number of documents the DOI had to release per month.

B. David Bernhardt’s Nomination and Confirmation as Secretary of the Interior

On February 4, 2019, the President nominated David Bernhardt, the Deputy Secretary of the Interior at the time, to become the new Secretary of the Interior. Also in February, Hubbel Relat (who is now the DOI deputy solicitor but at the time was the DOI’s counselor to the Secretary) directed Office of the Solicitor (SOL) attorney-advisors supporting the FOIA litigation to withhold any documents that were sent to or from Bernhardt, or that referenced him in any way, from upcoming FOIA releases related to the litigation. Relat’s direction applied to the upcoming February 2019 document release, which initially included 1,481 pages that had been identified as responsive to the original FOIA request.

In response to Relat’s direction, DOI staff removed 253 pages from the upcoming FOIA release, including, among other things, weekly updates to the White House, updates to senior DOI leaders, and draft press releases and reports. The remaining 1,228 pages were released in mid-February 2019.

The U.S. Senate confirmed Bernhardt as Secretary of the Interior on April 11, 2019. In December 2019, the DOI released most of the documents it had initially withheld from the February 2019 FOIA release.

III. INVESTIGATIVE FINDINGS

A. Relat Directed SOL Staff To Temporarily Withhold Documents From the February 2019 FOIA Production

In early February 2019, Relat met with three SOL attorney-advisors who were assigned to assist with the FOIA litigation. According to two of them, Relat told them during this meeting to take all documents related to Bernhardt—addressed to him, sent from him, or referring to him—out of the court-ordered document production related to the FOIA litigation. The third attorney recalled receiving this direction as well, but did not remember when or whether it came from Relat.

One attorney wrote a note during the meeting: “Withhold everything to or from Bernhardt until the end.” The attorney interpreted Relat’s direction to mean that they should release the Bernhardt-related documents “later in the production process instead of February 2019.”

Another attorney recalled being told later that Relat's direction to withhold Bernhardt-related documents in the FOIA litigation was because Bernhardt was awaiting his confirmation hearing. The attorney also remembered that this direction from Relat was to remain in place until after Bernhardt's confirmation. The attorney recalled being told the Bernhardt-related releases would require more "scrutiny" from the DOI's FOIA offices, and thus would be withheld until after Bernhardt's confirmation to avoid production delays.

The attorney-advisors confirmed that they eventually received directions to stop withholding Bernhardt-related documents under the FOIA litigation, but all said they did not recall when they were told this or by whom. In December 2019, the DOI released 215 pages of the documents that had been withheld from the February 2019 FOIA litigation release.

B. Senior Career SOL Executive and FOIA Director Knew of Direction To Temporarily Withhold Documents

1. Edward Keable, Associate Solicitor for General Law

Edward Keable, who in his previous role as the DOI associate solicitor for general law was the senior career attorney providing advice on FOIA issues to the DOI, told us he learned about Relat's direction to the SOL attorneys sometime after Relat met with them. Keable said he did not recall personally discussing the direction with Relat or DOI Solicitor Daniel Jorjani. He said, "My recollection is that this was not a 'hold off and don't produce anything' direction so much as a 'let's take a hard look at these documents and make appropriate determinations on what to do with them, based on that careful review.'" According to Keable, he believed that was a legitimate interest the DOI had in evaluating documents for release under FOIA.

When asked whether Relat's direction to withhold Bernhardt-related documents from the February 2019 FOIA litigation production was related to Bernhardt's nomination, Keable replied, "I wouldn't read too much into the timeline. . . . I think it's not enough to look at the timeline to make a judgment about the appropriateness, and certainly the lawfulness, of the matter in which the legal productions were managed." He explained that the court-ordered production was broad in scope, encompassing "hundreds of thousands of pages of material," and the DOI had discretion to decide when to release responsive documents as well as how many to release. He said the releases were "consistent with the schedule obligations" of the court order, and he had never been concerned that the DOI was not meeting its obligations.

2. Rachel Spector, Deputy Chief FOIA Officer and Director of the DOI's FOIA Office

Rachel Spector told us she learned about Relat's direction to the SOL attorneys sometime after it happened. Spector said that she and Keable discussed Relat's direction with both the SOL attorneys and the FOIA officers and told them it was a "legitimate activity to scrutinize" documents before release to "understand what might hit the press or [what] Congress might ask David [Bernhardt] about . . . during the pendency of his nomination." Spector said she told the

FOIA officers that as long as the DOI continued to meet its obligations for reviewing and releasing responsive documents, choosing the order of document production was not a "violation of the law."

C. Relat Said He Directed Staff To Temporarily Withhold the Bernhardt-Related Documents

In February 2019, Relat was the counselor to the Secretary. In that capacity, he advised the DOI on FOIA releases. We asked Relat whether he recalled directing SOL attorneys and FOIA officers in February 2019 to withhold Bernhardt-related documents until after Bernhardt's confirmation and, if so, who decided to give that direction and why. Relat replied:

[M]y approach was that information that we have a legal obligation to disclose, . . . we disclose . . . and release. No questions asked, . . . but that sensitive information that we're not legally obligated to disclose, we should treat more strategically in terms of when and how . . . it's disclosed . . . this is an approach that I discussed with Dan Jorjani.

When asked whether he and Jorjani had considered documents related to Bernhardt to be "sensitive information" due to the recent nomination, Relat stated, "I think that's probably a fair characterization." Relat further explained, "[I]n instances where we were producing documents, . . . under court order, to provide a certain number and type of document on . . . a monthly basis, [the rationale was] that we should do so in a way that prioritizes documents that take into account the need to strategically release that information."

According to Relat, he did not know when the direction to withhold Bernhardt-related documents was rescinded. He said he had moved into a different position at the DOI before Bernhardt's confirmation on April 11, 2019.

D. Jorjani Stated That He Thought Relat's Direction Was Proper, and He Accepted Responsibility for It

Daniel Jorjani is the DOI's solicitor (the DOI's chief attorney and the Secretary's principal legal advisor). When asked if he was aware that Relat directed SOL attorneys and FOIA staff to temporarily withhold the release of Bernhardt-related documents in the FOIA litigation, he said, "It sounds quite reasonable to me," and "That sounds perfectly consistent with how I would have approached it." He also said he did not specifically remember discussing the direction with Relat, but he assumed that they had, "because knowing Hubbel [Relat] and his absolute focus on compliance and squaring every corner, he probably wanted to make sure that everything he was doing was fully compliant." Jorjani went on to state, "Either I came up with the idea—and I would like to think I'm smart enough to do that—or Hubbel [Relat], being proactive, said, 'Oh, can we do this compliantly and consistent with the court's direction,' and then ran it past me. . . . It would be one of those two, I would think."

Jorjani noted that complying with a court order is "more important than a confirmation process," and that consequences could have been serious if the DOI had not complied. He stressed, however, that "to the extent you can comply with the law, comply with the court's mandate, but be aware of the broader surroundings, that strikes me as perfectly reasonable." Jorjani said he was not certain whether Bernhardt was aware of Relat's direction.

Jorjani told us that, as the DOI's top attorney, he owned the decision, not Relat.

E. The U.S. Department of Justice (DOJ) Attorney Believed the DOI Had Discretion To Choose the Order of FOIA Documents Released Under the Court Order

The DOJ attorney representing the Government in the FOIA litigation told us that the court order requires the DOI to *review* 1,500 pages of potentially responsive records per month and to release responsive documents based on that review. The attorney explained that a review was an examination of documents “for whether or not those documents are responsive to the FOIA request, and if so, whether or not they’re releasable under the FOIA or subject to one or more FOIA exemptions.” According to the DOJ attorney, so long as the DOI *reviewed* at least 1,500 potentially responsive pages, it was complying with the court order without needing to actually *release* 1,500 pages. The DOJ attorney noted hypothetically, however, that if an agency were required to review 1,500 pages but released only 10 or 12 pages, the plaintiff in the case would then have the right to request an explanation for the low number.

When we asked about the 253 pages withheld from the February 2019 FOIA release, the DOJ attorney said the DOI could not permanently withhold documents from FOIA releases unless it did so under an identified FOIA exemption. The attorney said, however, that the DOI would be within its discretion to determine the order in which to release responsive documents.

The DOJ attorney also explained that if the plaintiff believed the DOI was not fully complying with its FOIA obligations, the plaintiff should seek relief from the DOI before involving the court. The attorney said that all of the DOI’s decisions pertaining to the FOIA litigation are subject to the court’s review, but that “the court is only aware of the issues that are brought to it by the parties” and the attorney was not aware of the withheld pages being brought to the court’s attention. Therefore, the DOJ attorney said, “All I can say at this juncture is, [processing certain pages at a later date] is not contrary to any court order . . . [or] to the FOIA statute or any binding DC circuit case law that I am aware of.” The DOJ attorney concluded, “The bottom line is, I believe, it is frankly within the agency’s discretion as to how it chooses to process . . . the subject FOIA request.”

IV. ANALYSIS

As noted above, the court order in the pending FOIA litigation requires the DOI “to review 1,500 pages of potentially responsive records per month and release the responsive documents.” In light of (1) the statements from relevant officials, including the career official leading the DOI’s FOIA program and the DOJ attorney representing the DOI in the FOIA litigation, that the DOI had discretion under the court order to determine when to release the 253 pages it had identified as responsive to the FOIA request, and (2) the fact that the DOI has since released most of the documents that were initially withheld (the remaining 38 responsive pages remain under review by the Government), we concluded that this matter did not warrant further investigation. We note that whether the DOI complied with its obligations under the court order is a matter for the court to decide if and when a party raises it.

V. DISPOSITION

We provided our report to the Chief of Staff for the Office of the Secretary for his information only.

