



**AMTRAK** | Office of  
Inspector General  
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## **GOVERNANCE:**

Non-Career Officials Were Not Involved in Responding to  
Freedom of Information Act Requests

**Audit Report OIG-A-2015-014 | August 21, 2015**




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# Memorandum

**To:** Eleanor D. Acheson  
Executive Vice President/Chief Legal Officer/Corporate Secretary

**From:** David R. Warren   
Assistant Inspector General, Audits

**Date:** August 21, 2015

**Subject:** *Governance: Non-Career Officials Were Not Involved in Responding to Freedom of Information Act Requests (Audit Report OIG-A-2015-014)*

This report responds to a letter dated June 23, 2015 from the Chairman of the Senate Committee on Homeland Security and Governmental Affairs (see Appendix C). He asked that we analyze whether non-career officials were involved in the process of responding to Freedom of Information Act (FOIA) requests at Amtrak (the company) from January 1, 2007, to June 30, 2015. Specifically, he asked whether there was any undue delay of a response to any FOIA request or whether any document or portion of any document was withheld that would have otherwise been released but for the involvement of non-career officials in the process. He also requested that we seek from the Chief FOIA Officer one of the following certifications:

- (1) No non-career officials were involved in the company's response to any FOIA request.
- (2) If such involvement occurred, the involvement of non-career officials has never resulted in any undue delay of a response to a FOIA request or the provision of less information than would have been provided but for the involvement of the non-career officials.

The only non-career officials at the company are members of the Board of Directors. The members are appointed by the President and confirmed by the Senate. The Chief Executive Officer is also a Board member but he is an employee appointed by the Board and therefore is not a non-career official. Our audit objective was to review the involvement of non-career employees in the company's FOIA process.

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## **SUMMARY OF RESULTS**

Our work shows that non-career officials were not involved in responding to FOIA requests made to the company. We reviewed all closed FOIA requests for Board of Directors' information from January 1, 2007, through June 30, 2015, and found that non-career officials were not involved in responding to those requests. We also reviewed selected responses to FOIA requests related to the company's operations during the same time and found that non-career officials were not involved. Also, the company's Chief FOIA Officer certified that no non-career officials were involved in the company's response to any FOIA request; the certification is in Appendix B to this report.

The company's Chief Legal Officer, General Counsel & Corporate Secretary agreed with a draft of this report.

## **THE COMPANY'S FOIA PROCESS**

The company's Law department has staff cognizance over the FOIA process. There, the aptly-named "FOIA Office" conducts day-to-day management of all FOIA requests made to the company using written policies and procedures as the basis for their actions. Those policies, which appear to be comprehensive in scope and substance, include step-by-step processing and record keeping requirements. As detailed below, the policies make no mention of "Board of Directors" involvement. Requests are routinely staffed to relevant departments, such as Operations, Information Technology, and Human Capital for review and the Board's Corporate Secretary when Board material is requested.

Generally, the FOIA Office uses the following steps to process a FOIA request:

1. The Law department's lead FOIA specialist reviews all requests to ensure that they provide an adequate description of the records being requested.
2. If the request provides an adequate description, the lead FOIA specialist forwards it to the FOIA coordinators in the company's departments that have the requested records.
3. The department coordinators collect the records and send them to the FOIA office along with any objections the departments may have to the release of the records.
4. The lead FOIA specialist reviews the records and any objections, if asserted, to ensure that the company is in compliance with FOIA regulations and guidelines.

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5. The lead FOIA specialist consults with legal counsel to ensure that any exemptions asserted are appropriate and that all legal issues have been addressed.
6. Once these concerns are satisfied, the lead FOIA specialist sends the records to the requester or explains why the records are not being provided.

## NON-CAREER EMPLOYEES WERE NOT INVOLVED

From January 1, 2007 to June 30, 2015, the company responded to 1692 FOIA requests. The company provided all the information requested for 415 requests (24.5 percent); partial information for 314 requests (18.6 percent); no information based on FOIA exemptions for 104 (6.1 percent); and no information based on other reasons for 859 requests (50.8 percent), as seen in Table 1.

**Table 1. Disposition of FOIA Requests from January 1, 2007 to June 30, 2015**

| <b>Fiscal Year</b> | <b>Full Grants</b> | <b>Partial Grants/<br/>Partial Denials</b> | <b>Full Denial<br/>Based on<br/>Exemptions</b> | <b>Full Denial<br/>For Other<br/>Reasons<sup>c</sup></b> | <b>Total</b> |
|--------------------|--------------------|--|--|--|--------------|
| 2007 <sup>a</sup>  | 38                 | 25   | 4  | 103  | 170          |
| 2008               | 35                 | 28   | 12   | 165  | 240          |
| 2009               | 40                 | 45   | 10   | 105  | 200          |
| 2010               | 53                 | 26   | 12   | 85   | 176          |
| 2011               | 59                 | 34   | 9  | 69   | 171          |
| 2012               | 58                 | 39   | 15   | 107  | 219          |
| 2013               | 52                 | 52   | 16   | 67   | 187          |
| 2014               | 51                 | 42   | 19   | 88   | 200          |
| 2015 <sup>b</sup>  | 29                 | 23   | 7  | 70   | 129          |
| <b>Total</b>       | <b>415</b>         | <b>314</b>                                 | <b>104</b>                                     | <b>859</b>   | <b>1692</b>  |
| <b>Percent</b>     | <b>24.5</b>        | <b>18.6</b>                                | <b>6.1</b>                                     | <b>50.8</b>  | <b>100</b>   |

Source: Law department FOIA Office

Notes:

<sup>a</sup> Data from January 1, 2007 to September 30, 2007

<sup>b</sup> Data through June 30, 2015

<sup>c</sup> The 859 denials were for reasons such as requester would not agree to pay a fee, request withdrawn, no records, records not reasonably described, and duplicate requests.

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Our analysis identified no instance in which a member of the Board of Directors was involved in the FOIA response process. Specifically, we:

- Reviewed documentation contained in all 14 closed cases in which the FOIA request involved matters related to the Board of Directors and found no evidence that members of the Board were involved in responding to those requests. These requests were referred to the Corporate Secretary, a company employee, for action.
- Reviewed documentation contained in 71 other closed cases from January 1, 2007, to June 30, 2015, and found no evidence that members of the Board of Directors were involved in responding to those requests.
- Interviewed the Executive Vice President/Chief Legal Officer/Corporate Secretary, the Chief FOIA Officer, and the lead FOIA specialist, who all told us that they could not recall any instance of a member of the Board of Directors being involved in responding to a FOIA request.

In addition, the company's Chief FOIA Officer certified that no non-career officials were involved in the company's response to any FOIA request. (See Appendix B)

## **MANAGEMENT COMMENTS**

In an email commenting on a draft of this report the company's Chief Legal Officer, General Counsel, & Corporate Secretary agreed with the draft report.

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## **Appendix A**

### **Scope and Methodology**

This report addresses whether non-career officials at Amtrak (the company) were involved in the process for responding to requests under the Freedom of Information Act (FOIA). The scope of our work included FOIA requests received by the company from January 1, 2007, to June 30, 2015. Our work was confined to the Law department, which includes the FOIA office and office of the Corporate Secretary. We performed our audit work from July to August 2015 in Washington, D.C.

Our methodology to determine whether non-career officials were involved in the process of responding to FOIA requests involved reviewing selected closed cases and interviewing Law department officials involved in the FOIA process. Specifically, we reviewed all 14 closed cases in which the FOIA request involved a matter related to the Board of Directors. In addition, we reviewed 71 other cases closed from January 1, 2007, to June 30, 2015, in which the request was denied in full or in part because of one or more exemptions in the act, or for other reasons. We selected cases for each 4-month period starting in January 2007 through June 2015. The results of our review of these cases cannot be projected statistically. For each request, we reviewed case files to determine if there was any evidence of involvement by non-career officials.

We also interviewed the Executive Vice President/Chief Legal Officer/Corporate Secretary, whose responsibilities include supporting Board of Director related activities, the Chief FOIA Officer, and lead FOIA specialist to determine if they were aware of any involvement of non-career officials in the FOIA process.

We conducted this performance audit in accordance with generally accepted government auditing standards. 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.

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## **Internal Controls**

We reviewed the company's management controls for responding to FOIA requests. We focused on the controls for requesting information from the various departments to respond to a FOIA request and the review process within the Law department. As noted in this report, adequate controls were in place to respond to FOIA requests, and records were complete and readily available for review.

## **Computer-Processed Data**

We did not use computer-processed data.

## **Prior Reports**

In performing our audit, we reviewed the following report:

- *Report Card on Federal Government's Efforts to Track and Manage FOIA Requests*, Committee on Oversight and Government Reform, U.S. House of Representatives (Staff Report, March 15, 2012)



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**Appendix B**

**Chief FOIA Officer Certification**

NATIONAL RAILROAD PASSENGER CORPORATION  
60 Massachusetts Ave, NE, Washington, DC 20002



August 3, 2015

Thomas Howard  
Inspector General  
Amtrak Office of Inspector General  
10 G St., NE, Suite 3-300  
Washington, D.C. 20002

Re: Amtrak Office of Inspector General Audit Request Pursuant to U.S. Senate Committee on  
Homeland Security and Governmental Affairs Letter of June 23, 2015

Dear Inspector General Howard:

This is to certify in my capacity as Chief FOIA Officer of National Railroad Passenger  
Corp./Amtrak that no non-career official (by which I mean no non-employee of the company)  
has been involved in the Company's response to any FOIA request.

Please do not hesitate to contact me with any further questions about this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Diane L. Herndon".

Diane L. Herndon  
*Vice President, Managing Deputy  
General Counsel*

Cc: Eleanor D. Acheson  
*Executive Vice President, Chief Legal Officer,  
General Counsel & Corporate Secretary*  
Sharron Hawkins  
*Lead FOIA Specialist*

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**Appendix C**

**Letter from Chairman, Senate Committee on  
 Homeland Security and Governmental Affairs**

RON JOHNSON, WISCONSIN, CHAIRMAN

|                             |                              |
|-----------------------------|------------------------------|
| JOHN MCCAIN, ARIZONA        | THOMAS R. CARPER, DELAWARE   |
| ROB PORTMAN, OHIO           | CLAIRE McCASKILL, MISSOURI   |
| RAND PAUL, KENTUCKY         | JON TESTER, MONTANA          |
| JAMES LANKFORD, OKLAHOMA    | TAMMY BALDWIN, WISCONSIN     |
| MICHAEL B. ENZI, WYOMING    | HEIDI HEITKAMP, NORTH DAKOTA |
| KELLY AYOTTE, NEW HAMPSHIRE | CORY A. BOOKER, NEW JERSEY   |
| JONI ERNST, IOWA            | GARY C. PETERS, MICHIGAN     |
| BEN SASSÉ, NEBRASKA         |                              |

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

**United States Senate**

COMMITTEE ON  
 HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
 WASHINGTON, DC 20510-6250

June 23, 2015

Mr. Tom Howard  
 Inspector General  
 National Railroad Passenger Corporation (Amtrak)  
 10 G Street NE, Suite 3W-300  
 Washington, DC 20002

Dear Mr. Howard:

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

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

<sup>1</sup> 5 U.S.C. § 552.

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

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

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

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

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

<sup>3</sup> Memorandum from Pres. Obama to Heads of Executive Departments and Agencies, *Freedom of Information Act* (Jan. 21, 2009), available at [https://www.whitehouse.gov/the\\_press\\_office/Freedom\\_of\\_Information\\_Act/](https://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act/) (last visited Jun. 23, 2015).

<sup>4</sup> *Id.*

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

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*; see also H. Comm. on Oversight & Gov't Reform, *Staff Report: A New Era of Openness? How and Why Political Staff at DHS Interfered with the FOIA Process*, 112th Cong. (Mar. 30, 2011), available at [http://oversight.house.gov/wp-content/uploads/2012/02/DHS\\_REPORT\\_FINAL\\_FINAL\\_4\\_01\\_11.pdf](http://oversight.house.gov/wp-content/uploads/2012/02/DHS_REPORT_FINAL_FINAL_4_01_11.pdf) (last visited Jun. 23, 2015).

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

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

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

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

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

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

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Sincerely,



Ron Johnson  
Chairman

cc: The Honorable Thomas R. Carper  
Ranking Member

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**Appendix D**

**OIG Team Members**

Michael Kennedy, Senior Director, Lead

John Borrelli, Senior Auditor

Michelle Navitsky, Auditor

## OIG MISSION AND CONTACT INFORMATION

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### **Mission**

The Amtrak OIG's mission is to provide independent, objective oversight of Amtrak's programs and operations through audits and investigations focused on recommending improvements to Amtrak's economy, efficiency, and effectiveness; preventing and detecting fraud, waste, and abuse; and providing Congress, Amtrak management, and Amtrak's Board of Directors with timely information about problems and deficiencies relating to Amtrak's programs and operations.

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Phone: 800-468-5469

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### **Contact Information**

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