

This document is subject to the provisions of the Privacy Act of 1974, and may require redaction before disclosure to third parties. No redaction has been performed by the Office of Inspector General. Recipients of this report should not disseminate or copy it without the Inspector General's approval.



REPORT OF INVESTIGATION

**UNITED STATES SECURITIES AND EXCHANGE COMMISSION
OFFICE OF INSPECTOR GENERAL**

Case No. OIG-543

**Investigation Concerning the Role of Political Appointees in the SEC's
Response to Record Requests Pursuant to the Freedom of Information
Act and From Members of Congress**

December 3, 2010

REDACTION KEY

PII = Personal Identifying Information
Protected by FOIA Exemptions (b)(6) & (b)(7)(C)

This document is subject to the provisions of the Privacy Act of 1974, and may require redaction before disclosure to third parties. No redaction has been performed by the Office of Inspector General. Recipients of this report should not disseminate or copy it without the Inspector General's approval.

REPORT OF INVESTIGATION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION OFFICE OF INSPECTOR GENERAL

Case No. OIG-543

Investigation Concerning the Role of Political Appointees in the SEC's Response to Record Requests Pursuant to the Freedom of Information Act and From Members of Congress

Introduction and Results of Investigation

On September 2, 2010, the Securities and Exchange Commission ("SEC" or "Commission") Office of Inspector General ("OIG") opened an investigation in response to an August 23, 2010 letter from Senator Charles Grassley and Congressman Darrell Issa, requesting that OIG conduct an inquiry into the SEC's Office of Freedom Of Information Act ("FOIA") Services to determine whether, and if so, the extent to which, political appointees are made aware of information requests and have a role in request reviews or decision-making. This letter from Senator Grassley and Congressman Issa cited a press report that the Department of Homeland Security political appointees reviewed requests for federal records by lawmakers, journalists, activist groups or watchdog organizations.

The OIG investigation did not find evidence that political appointees at the SEC have played an improper role in the agency's review of or response to FOIA requests. Although the OIG investigation found that the SEC's responses to requests by members of Congress for OIG reports are subject to review and approval by the agency's five Commissioners, who are political appointees, the OIG did not find the limited role played by the Commissioners in this process to have had a political impact on the SEC's responses to requests for the OIG reports.

Scope of Investigation

The OIG requested the e-mails of employees who may have sent, received, or been copied on e-mails relevant to this investigation, for the time period pertinent to the investigation. The e-mails were searched using specialized computer search tools

This document is subject to the provisions of the Privacy Act of 1974, and may require redaction before disclosure to third parties. No redaction has been performed by the Office of Inspector General. Recipients of this report should not disseminate or copy it without the Inspector General's approval.

throughout the course of the investigation. The OIG estimates that it obtained and searched over 137,000 e-mails during the course of its investigation.

The OIG took the sworn, on-the-record testimony of the following current SEC employees:

1. FOIA Empl. 1 [REDACTED], Branch Manager, Office of FOIA Services, taken on October 15, 2010, (FOIA Empl. 1 [REDACTED] Testimony Tr.) attached as Exhibit 1.
2. FOIA Empl. 3 [REDACTED], Branch Manager, Office of FOIA Services, taken on October 18, 2010, (FOIA Empl. 3 [REDACTED] Testimony Tr.) attached as Exhibit 2.
3. FOIA Empl. 4 [REDACTED], Office of FOIA Services, taken on October 18, 2010, (FOIA Empl. 4 [REDACTED] Testimony Tr.) attached as Exhibit 3.
4. CHMN Empl. 2 [REDACTED] Office of the Chairman, taken on October 19, 2010, (CHMN Empl. 2 [REDACTED] Testimony Tr.) attached as Exhibit 4.
5. FOIA Empl. 2 [REDACTED] Branch Manager, Office of FOIA Services, taken on October 20, 2010, (FOIA Empl. 2 [REDACTED] Testimony Tr.) attached as Exhibit 5.
6. FOIA Empl. 5 [REDACTED] Office of FOIA Services, taken on October 26, 2010, (FOIA Empl. 5 [REDACTED] Testimony Tr.) attached as Exhibit 6.
7. CHMN Empl. 1 [REDACTED] Senior Advisor to the Chairman, Office of the Chairman, taken on October 27, 2010, (CHMN Empl. 1 [REDACTED] Testimony Tr.) attached as Exhibit 7.
8. Celia Winter, FOIA Officer, Office of FOIA Services, taken on October 28, 2010, (Winter Testimony Tr.) attached as Exhibit 8.
9. Barry Walters, Chief FOIA/Privacy Act Officer, Office of FOIA and Records Management Services, taken on October 28, 2010, (Walters Testimony Tr.) attached as Exhibit 9.
10. OGC Empl. 1 [REDACTED] Office of the General Counsel, taken on November 4, 2010, (OGC Empl. 1 [REDACTED] Testimony Tr.) attached as Exhibit 10.

This document is subject to the provisions of the Privacy Act of 1974, and may require redaction before disclosure to third parties. No redaction has been performed by the Office of Inspector General. Recipients of this report should not disseminate or copy it without the Inspector General's approval.

11. OLIA Empl. 1 [REDACTED] Office of Legislative and Intergovernmental Affairs, taken on November 4, 2010, [REDACTED] OLIA Empl. 1 Testimony Tr.) attached as Exhibit 11.
12. Elizabeth Murphy, Secretary, Office of the Secretary, taken on November 12, 2010, (Murphy Testimony Tr.) attached as Exhibit 12.
13. SECY Empl. 1 [REDACTED] Office of the Secretary, taken on November 15, 2010, SECY Empl. 1 Testimony Tr.) attached as Exhibit 13.

In addition, the OIG obtained and reviewed numerous documents from the Office of FOIA Services (“FOIA Office”), including documents describing the process for responding to FOIA requests and a list of FOIA liaisons throughout the agency. The OIG also obtained and reviewed a list of all SEC political appointees from the Office of Human Resources (“OHR”).

Relevant Legal Standard

The Commission’s regulations require its employees to perform their duties impartially and independently, without regard to partisan or popular demands. 17 C.F.R. § 200.58 states:

[T]his is an independent Agency, and in performing their duties, members should exhibit a spirit of firm independence and reject any effort by representatives of the executive or legislative branches of the government to affect their independent determination of any matter being considered by this Commission. A member should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety.

In addition, 17 C.F.R. § 200.735-2(a) states:

The Securities and Exchange Commission has been entrusted by Congress with the protection of the public interest in a highly significant area of our national economy. In view of the effect which Commission action

This document is subject to the provisions of the Privacy Act of 1974, and may require redaction before disclosure to third parties. No redaction has been performed by the Office of Inspector General. Recipients of this report should not disseminate or copy it without the Inspector General's approval.

frequently has on the general public, it is important that members, employees and special Government employees maintain unusually high standards of honesty, integrity, impartiality and conduct. They must be constantly aware of the need to avoid situations which might result either in actual or apparent misconduct or conflicts of interest and to conduct themselves in their official relationships in a manner which commands the respect and confidence of their fellow citizens.

Results of the Investigation

I. The FOIA Process

As noted on the SEC's public website, FOIA provides that any person has the right to request access to federal agency records or information. See "SEC FOIA/PA Program," <http://www.sec.gov/foia.shtml>, attached as Exhibit 14, at 1. All agencies of the United States government are required to disclose records in response to a written request, except for those records that are protected from disclosure by the nine exemptions and three exclusions of FOIA. *Id.*

This section discusses the routine process employed by the SEC to respond to most FOIA requests. The OIG found the SEC's process for responding to FOIA and Congressional requests for OIG reports to differ from the process for other FOIA requests. Sections II. and III. below address the agency's process for responding to requests for OIG reports.

A. The Role of the FOIA Office

The SEC's intranet website describes the FOIA Office as "responsible for receiving and responding to requests for nonpublic records under the Freedom of Information Act." "Office of Freedom of Information Act (FOIA) and Records Management Services," http://intranet.sec.gov/divisions_offices/hqo/ofrms/ofrms-home.html, attached as Exhibit 15. SEC FOIA Officer Celia Winter testified that the FOIA process at the SEC is centralized and that every FOIA request "that comes into the agency comes into the FOIA office." Winter Testimony Tr. at 8-9.

This document is subject to the provisions of the Privacy Act of 1974, and may require redaction before disclosure to third parties. No redaction has been performed by the Office of Inspector General. Recipients of this report should not disseminate or copy it without the Inspector General's approval.

FOIA Branch Manager [FOIA Empl. 1] testified that, upon receiving a FOIA request from the public, Winter or one of the four FOIA Office branch managers reviews the request to make sure it qualifies as a FOIA request. [FOIA Empl. 1] Testimony Tr. at 12. Next, the FOIA Office categorizes the FOIA request by type of request and type of requester, at which point Winter assigns an individual in the FOIA Office to respond to the request. Walters Testimony Tr. at 12, 14; Winter Testimony Tr. at 9; [FOIA Empl. 1] Testimony Tr. at 12-13; [FOIA Empl. 3] Testimony Tr. at 10; [FOIA Empl. 2] Testimony Tr. at 8. The FOIA Office then gathers the responsive records, analyzes the records for FOIA exemptions, and releases the records that the FOIA Office does not find to be privileged. Walters Testimony Tr. at 12-13; Winter Testimony Tr. at 9; [FOIA Empl. 5] Testimony Tr. at 10; [FOIA Empl. 3] Testimony Tr. at 11; [FOIA Empl. 2] Testimony Tr. at 8. FOIA [FOIA Empl. 5] testified that he determines whether information should be redacted from a response to a FOIA request by using the standards set out in the FOIA statute. [FOIA Empl. 5] Testimony Tr. at 11.

As noted above, as part of this investigation, the OIG requested and received from OHR a list of all SEC employees who are political appointees. List of Political Appointees, attached as Exhibit 16. The list of political appointees provided by OHR indicates that none of the FOIA employees or managers were politically appointed. Exhibit 16.

B. The Role of the Office of the General Counsel in the FOIA Process

The Office of the General Counsel ("OGC") adjudicates appeals of initial FOIA determinations by the FOIA Office. Walters Testimony Tr. at 15; [FOIA Empl. 3] Testimony at 12-14; [FOIA Empl. 4] Testimony Tr. at 14; [FOIA Empl. 2] Testimony Tr. at 9-10. In addition, Chief FOIA/Privacy Act Officer Barry Walters and FOIA Branch Manager [FOIA Empl. 3] testified that the FOIA Office occasionally consults with OGC in making its redaction determinations. Walters Testimony Tr. at 15; [FOIA Empl. 3] Testimony at 13.

[FOIA Empl. 5] testified that, from his perspective, in matters in which OGC plays a role, OGC's involvement tends to delay the response to FOIA requests, in that "[s]ometimes I have a hard time getting a response, depending on what I need." [FOIA Empl. 5] Testimony Tr. at 42. Winter also testified that the participation of OGC tends to slow the SEC's response to a FOIA request. Winter Testimony Tr. at 45-46.

The list of political appointees provided by OHR indicates that none of the OGC employees or managers involved in the FOIA process were politically appointed. Exhibit 16.

This document is subject to the provisions of the Privacy Act of 1974, and may require redaction before disclosure to third parties. No redaction has been performed by the Office of Inspector General. Recipients of this report should not disseminate or copy it without the Inspector General's approval.

C. The Role of the Office of the Chairman in the FOIA Process

CHMN Empl. 2 [REDACTED] for the Office of the Chairman, testified that CHMN Empl. 2 is responsible for coordinating responses to FOIA requests that are referred to the Office of the Chairman from the FOIA Office. CHMN Empl. 2 [REDACTED] Testimony Tr. at 10. [REDACTED] CHMN Empl. 2 testified that these referrals are only for FOIA requests for documents that may be in the possession of the Office of the Chairman. *Id.* CHMN Empl. 1 [REDACTED] CHMN Empl. 1 [REDACTED] to the Chairman and the supervisor of the PII [REDACTED] PII [REDACTED] testified that he does not see FOIA requests for documents unless they are for records in the custody of the Office of the Chairman. CHMN Empl. 1 [REDACTED] Testimony Tr. at 9-10, 18.

CHMN Empl. 2 [REDACTED] CHMN Empl. 2 testified that CHMN Empl. 2 has never had a situation in which someone in the Office of the Chairman told her that a record should not be produced in connection with a FOIA request. CHMN Empl. 2 [REDACTED] Testimony Tr. at 16. CHMN Empl. 1 [REDACTED] testified that the Office of the Chairman decided that the FOIA Office, not the Office of the Chairman, would make the redaction decisions with respect to documents in the possession of the Office of the Chairman requested through FOIA. CHMN Empl. 1 [REDACTED] Testimony Tr. at 17-18.

Winter testified that the Office of the Chairman is only consulted in connection with a FOIA request if the Office of the Chairman needs to conduct a search for responsive records. Winter Testimony Tr. at 15-16. Walters testified that the Office of the Chairman does not play any role in the FOIA process, and that he is not aware of any situation in which a Commissioner or anyone in the Office of the Chairman has ever dictated to him about the release of a document he was reviewing in connection with the FOIA exemptions. Walters Testimony Tr. at 15, 46. Office of Legislative and Intergovernmental Affairs ("OLIA") [REDACTED] OLIA Empl. 1 [REDACTED] testified that OLIA Empl. 1 [REDACTED] did not have any knowledge or information about Chairman Schapiro, the Commissioners, or any political appointees at the Commission playing any role in influencing any decision by the SEC staff relating to FOIA. OLIA Empl. 1 [REDACTED] Testimony Tr. at 8, 9.

FOIA Empl. 1 [REDACTED] FOIA Empl. 1 [REDACTED] testified that FOIA Empl. 1 [REDACTED] did not recall any situations in which the Office of the Chairman reviewed a FOIA matter that did not involve documents in the Office of the Chairman's possession or control. FOIA Empl. 1 [REDACTED] Testimony Tr. at 22. FOIA Empl. 1 [REDACTED] testified that, to FOIA Empl. 1 [REDACTED] knowledge, none of the FOIA requests that FOIA Empl. 1 [REDACTED] has been involved with were reviewed by the Commissioners. *Id.* at 30. FOIA Empl. 3 [REDACTED] testified that the FOIA Office does not usually interact with the Office of the Chairman concerning FOIA matters unless the Office of the Chairman possesses the records at issue in the FOIA request. FOIA Empl. 3 [REDACTED] Testimony Tr. at 13-14, 17. FOIA Branch Manager FOIA Empl. 2 [REDACTED] testified that he has not had a situation

This document is subject to the provisions of the Privacy Act of 1974, and may require redaction before disclosure to third parties. No redaction has been performed by the Office of Inspector General. Recipients of this report should not disseminate or copy it without the Inspector General's approval.

in which the FOIA Office notified the Office of the Chairman about a FOIA request unless it involved records belonging to the Office of the Chairman. FOIA Empl. 2 Testimony Tr. at 11. FOIA Empl. 4 [REDACTED] testified that he was not aware of any requirement or suggestion that the Commission approve responses to FOIA requests. FOIA Empl. 4 [REDACTED] Testimony Tr. at 17.

The list of politically appointed individuals provided by OHR includes the SEC's Chief of Staff, Didem Nisanci, and its Director of Communications, Myron Marlin, both of whom work in the Office of the Chairman. Exhibit 16. Based upon its review of documents and testimony of witnesses, the OIG did not find Nisanci or Marlin to have played any role in the SEC's process of responding to FOIA requests. Walters, Winter, FOIA Empl. 3 FOIA Empl. 2 FOIA Empl. 4 [REDACTED] and FOIA Empl. 5 [REDACTED] all testified that they have not had any contact with Nisanci or Marlin concerning FOIA matters. Walters Testimony Tr. at 20; Winter Testimony Tr. at 20-21; FOIA Empl. 3 [REDACTED] Testimony Tr. at 18; FOIA Empl. 2 [REDACTED] Testimony Tr. at 16; FOIA Empl. 4 [REDACTED] Testimony Tr. at 17; FOIA Empl. 5 [REDACTED] Testimony Tr. at 34-35. CHMN Empl. 1 [REDACTED] testified that Marlin is given notice of responses to FOIA requests prior to their release by the SEC, but he could not recall any instance in which Marlin voiced concerns about releasing information. CHMN Empl. 1 [REDACTED] Testimony Tr. at 22-23. FOIA Empl. 5 [REDACTED] testified that he has never known Chairman Schapiro to have played a role in the release of a FOIA report. FOIA Empl. 5 [REDACTED] Testimony Tr. at 35. Winter testified that she has never communicated with Chairman Schapiro regarding FOIA matters. Winter Testimony Tr. at 22.

OGC Empl. 1 [REDACTED] who has played a role in the redaction process for OIG reports requested by members of Congress, testified that he has never had a conversation with Chairman Schapiro or Nisanci about redactions to documents sought under FOIA or through Congress. OGC Empl. 1 [REDACTED] Testimony Tr. at 8, 51-52. OGC Empl. 1 [REDACTED] also testified that he did not recall ever having a conversation with Marlin concerning redactions to documents, but that it was possible that such conversations occurred. *Id.* at 51. [REDACTED] testified that the Office of the Chairman has not been involved in the redaction process for reports requested either by Congress or under FOIA, apart from involvement by Kayla Gillan, SEC Deputy Chief of Staff, "at a very collateral or high level." *Id.* Winter testified that Gillan was involved in FOIA matters for a period time during a transition period for one of the FOIA Office managers. Winter Testimony Tr. at 21. Winter testified that Gillan's concern was with consistency and communication issues, not particular redactions or FOIA requests. *Id.* at 21-22. Walters testified that when he first began in his position as Chief FOIA/Privacy Act Officer, he may have discussed a FOIA matter with Gillan, but that neither Gillan nor anyone else in the Office of the Chairman has expressed to him that certain information should or should not be redacted or released pursuant to a FOIA request. Walters Testimony Tr. at 21.

This document is subject to the provisions of the Privacy Act of 1974, and may require redaction before disclosure to third parties. No redaction has been performed by the Office of Inspector General. Recipients of this report should not disseminate or copy it without the Inspector General's approval.

The OIG confirmed that Gillan, who was not included on the list of SEC political appointees provided by OHR, was both originally appointed as a Senior Advisor and promoted to Deputy Chief of Staff pursuant to Schedule A Excepted Service appointing authority. See February 15, 2009 and March 15, 2009 Notification of Personnel Actions, attached as Exhibit 17.¹

D. The Role of the Office of Legislative and Intergovernmental Affairs in the FOIA Process

Winter testified that OLIA is sometimes notified of FOIA responses but is not consulted for their input on exemptions. Winter Testimony Tr. at 18. FOIA Empl. 3 testified that OLIA is given notice of requests from a member of Congress. FOIA Empl. 3 Testimony Tr. at 16. FOIA Empl. 3 testified that the FOIA Office does not seek guidance concerning FOIA redactions from OLIA, but rather that the FOIA Office decides what records to withhold or release on its own. *Id.*

The only political appointee in OLIA, according to the list of political appointees provided by OHR, is OLIA Empl. 1 Exhibit 16. Based upon its review of documents and testimony of witnesses, the OIG did not find OLIA Empl. 1 to have played any role in the SEC's process of responding to FOIA requests. OLIA Empl. 1 testified that OLIA Empl. 1 is not a FOIA liaison and that OLIA Empl. 1 has not played any role in reviewing releases under FOIA or redacting documents released under FOIA. OLIA Empl. 1 Testimony Tr. at 8. OLIA Empl. 1 further testified that OLIA Empl. 1 has not participated in the redaction process for documents released pursuant to a Congressional request, nor has OLIA Empl. 1 participated in any decision whether to release a document requested by Congress. *Id.* at 9. FOIA Empl. 5 testified that he has never had any interactions with OLIA Empl. 5. FOIA Empl. 5 Testimony Tr. at 58. OGC Empl. 1 testified that OGC Empl. 1 did not think that OGC Empl. 1 had ever met with OLIA Empl. 1 concerning redactions to documents requested through FOIA or by a Congressman. OGC Empl. 1 Testimony Tr. at 69.

E. The Role of the Office of Public Affairs in the FOIA Process

Walters,⁵ and FOIA Empl. 2 testified that the FOIA Office routinely gives to the Office of Public Affairs ("OPA") a copy of the FOIA Office's intended response to a FOIA request from the media. Walters Testimony Tr. at 18; FOIA Empl. 2 Testimony Tr. at 58;

¹ The Office of Personnel Management's ("OPM's") website explains that Schedule A must be used by Federal agencies to hire attorneys because, by law, OPM cannot develop qualification standards or examinations for attorney jobs. OPM Webpage, "Excepted Service Appointing Authorities," attached as Exhibit 18. OPM's website also distinguishes Schedule A from the explicitly political excepted service appointment, Schedule C (the form of appointment for Nisanci and Marlin). *Id.*

This document is subject to the provisions of the Privacy Act of 1974, and may require redaction before disclosure to third parties. No redaction has been performed by the Office of Inspector General. Recipients of this report should not disseminate or copy it without the Inspector General's approval.

FOIA Empl. 2 Testimony Tr. at 11-12. Winter and FOIA Empl. 5 testified that OPA has not taken an active role in determining how documents should be redacted or released in the FOIA process. Winter Testimony Tr. at 16; FOIA Empl. 5 Testimony Tr. at 58-59 OGC Empl. 1 testified that he was not aware of any communications or consultation with OPA concerning the redaction process. OGC Empl. 1 Testimony Tr. at 70. Walters testified that he does not know of any situations in which OPA provided advice on whether a document should be redacted or released. Walters Testimony Tr. at 18-19.

FOIA Empl. 3 FOIA Empl. 3 testified that neither OPA nor any other SEC office has asked the FOIA Office to reconsider a withholding or release decision in response to a FOIA request.

FOIA Empl. 2 Testimony Tr. at 17-18. FOIA Empl. 2 testified that he is not aware of any occasions in which it received feedback from OPA concerning a response to a FOIA request. FOIA Empl. 2 Testimony Tr. at 12. FOIA Empl. 4 testified that although the FOIA Office gives notice to various offices such as OGC, OLIA, OPA, or the Office of the Chairman before responding to certain FOIA requests "as a courtesy," the FOIA office makes the final decisions as to how to respond to a FOIA request. FOIA Empl. 4 Testimony Tr. at 19-20.

The list of political appointees provided by OHR indicates that none of the OPA employees or managers were politically appointed. Exhibit 16.

II. The Process for Responding to Congressional Requests for OIG Investigative Reports

On August 30, 2010, OGC Empl. 1 circulated a protocol ("the protocol") to the FOIA office, OGC, OLIA, OPA, and other offices, titled "Procedures for Responding to Congressional Requests for OIG Investigative Reports." August 30, 2010 E-mail from OGC Empl. 1 to Barry Walters, attached as Exhibit 19. The protocol states that it has been prepared by OGC and the FOIA Office, in consultation with OIG, OLA and OPA. *Id.*

Winter testified that either Gillan or General Counsel David Becker suggested that the SEC have a protocol to handle Congressional requests for documents, because congressional requests were being processed differently from FOIA requests. Winter Testimony Tr. at 24. OGC Empl. 1 testified that he believed that Becker had directed that this protocol be prepared. OGC Empl. 1 Testimony Tr. at 18. OGC Empl. 1 testified that, to the best of his knowledge, no Commissioner reviewed or gave feedback on this protocol. *Id.* at 19-20.

This document is subject to the provisions of the Privacy Act of 1974, and may require redaction before disclosure to third parties. No redaction has been performed by the Office of Inspector General. Recipients of this report should not disseminate or copy it without the Inspector General's approval.

The protocol states that it is intended to establish informal procedures for responding to Congressional requests for OIG reports "where the request does not come from a Committee or Subcommittee and where the requested reports have not previously been publicly released under [FOIA]." Exhibit 19 at 1. Walters testified that he did not recall seeing a request from a Congressional committee since coming to work at the SEC in October 2009. Walters Testimony Tr. at 29. ^{FOIA Empl. 1} [REDACTED] testified that requests by a member of Congress on behalf of a constituent are treated as FOIA requests and are processed in the same manner as other FOIA requests. ^{FOIA Empl. 1} [REDACTED] Testimony Tr. at 36-37.

A. The Role of the FOIA Office and OGC in Responding to Congressional Requests for OIG Investigative Reports

The protocol states that, upon receipt of a Congressional request for an OIG report, the FOIA Office should prepare a draft redacted report within 14 calendar days of receipt of the request. Exhibit 19 at 1. The protocol further states that OGC should review the proposed redacted report, and that when OGC and the FOIA Office have reached agreement on the redactions, OGC should provide a copy of the proposed releasable report to the OIG for review. *Id.* at 2.

^{FOIA Empl. 5} [REDACTED] the FOIA Office's ^{PII} [REDACTED] is assigned to respond to requests for OIG reports, among other FOIA requests. ^{FOIA Empl. 5} [REDACTED] Testimony Tr. at 10; Walters Testimony Tr. at 14; ^{FOIA Empl.} [REDACTED] Testimony Tr. at 14, 25; ^{FOIA Empl. 3} [REDACTED] Testimony Tr. at 10; ^{FOIA Empl. 4} [REDACTED] Testimony Tr. at 12, 21; ^{FOIA Empl. 2} [REDACTED] Testimony Tr. at 9. ⁵ [REDACTED] testified that the protocol dictates the process for responding to Congressional requests for OIG reports. ^{FOIA Empl. 5} [REDACTED] Testimony Tr. at 12. ^{FOIA Empl. 5} [REDACTED] testified that whenever there is either a FOIA request or a request from a member of Congress for an OIG report, the FOIA Office consults with OGC. ^{FOIA Empl.} [REDACTED] Testimony Tr. at 12-13. In describing the collaborative effort by OGC and the FOIA Office to redact an OIG report released to Congress and the public in April of this year, ^{FOIA Empl. 5} [REDACTED] testified that the redactions to this report were "done by the four corners of the FOIA." ^{FOIA Empl.} [REDACTED] Testimony Tr. at 47.

^{FOIA Empl. 5} [REDACTED] also testified that OGC determined the redactions for the response to one particular Congressional request for an investigative report issued by the OIG in September of this year. ^{FOIA Empl.} [REDACTED] Testimony Tr. at 17. ^{FOIA Empl.} [REDACTED] testified that in that instance, he had "zero" input in the redaction process for this OIG report, and that he was not aware of the FOIA Office playing a role in these redactions. *Id.* at 19. ^{FOIA Empl.} [REDACTED] testified, however, that there were no FOIA requests for this report, only a Congressional request. *Id.* at 17. ^{FOIA Empl.} [REDACTED] testified that he thought that the FOIA Office should have had some involvement with the redaction process for this OIG report at the beginning of the

This document is subject to the provisions of the Privacy Act of 1974, and may require redaction before disclosure to third parties. No redaction has been performed by the Office of Inspector General. Recipients of this report should not disseminate or copy it without the Inspector General's approval.

process, “[b]ecause the protocol says you should have involvement in the beginning.” *Id.* at 20. ^{FOIA Empl. 5} [redacted] testified that he believed there was a “lack of observance” of the “Procedures for Responding to Congressional Requests for OIG Investigative Reports” protocol in the lack of involvement of the FOIA Office in redacting the response to the request for this report. *Id.* at 38.

B. The Standard Applied to Responses to Congressional Requests for OIG Investigative Reports

According to the protocol, OGC and the FOIA Office should propose redactions that are consistent with FOIA, the Privacy Act, and the 2009 directives of the President and the Attorney General that agencies should administer FOIA with a presumption in favor of disclosure and strive for open government and transparency. Exhibit 19 at 2. The protocol also stated that, “OGC and the FOIA Office should seek to identify and preserve all privileged information, such as law enforcement, deliberative process, and third-party non-public financial material.” *Id.* The protocol further states that, “[i]n consultation with the OLA, the OGC may recommend (or the Commission may direct) that the staff release certain non-public, privileged information that the Commission could in its discretion withhold.” *Id.*

^{OGC Empl. 1} [redacted] testified that he understood OGC to use FOIA principles in determining what information to redact from OIG reports requested by a member of Congress. ^{OGC Empl. 1} [redacted] Testimony Tr. at 28-29, 47. ^{OGC Empl. 1} [redacted] also testified that there have been times where OGC has “taken, to the extent that it didn’t harm Commission operations, a generous view of what could be released under the deliberative process,” and that such decision are made by OGC “in heavy consultation with the appropriate divisions” at the SEC “about where we can draw the line without impairing, for instance, general law enforcement procedures or … a specific law enforcement matter.” *Id.* at 47-48. ^{FOIA Empl. 5} [redacted] testified that, “[f]rom what I see, when I have teamed up [with OGC] it’s generally a FOIA standard” that is applied to responses to Congressional requests from information. ^{FOIA Empl. 5} [redacted] Testimony Tr. at 22. ^{FOIA Empl. 5} [redacted] testified that, from his perspective, he applies FOIA exemptions to reports that are the subject of a Congressional request in the same manner that he applies them to FOIA requests. *Id.* at 56-57.

^{OGC Empl. 1} [redacted] testified that he did not know whether the Commission is legally required to provide any information in connection with a request by a Congressman, but that he thought that, at a minimum, a member of Congress is entitled to what a member of the general public is entitled to under FOIA. ^{OGC Empl. 1} [redacted] Testimony Tr. at 29-30. Winter testified that, although “FOIA redactions really don’t apply in a congressional release,” OGC and

This document is subject to the provisions of the Privacy Act of 1974, and may require redaction before disclosure to third parties. No redaction has been performed by the Office of Inspector General. Recipients of this report should not disseminate or copy it without the Inspector General's approval.

other offices may apply other exemptions to records requested by Congress. Winter Testimony Tr. at 25, 29-30. Walters testified that the SEC cannot withhold portions of a document requested by a member of Congress on the basis of FOIA, but that the SEC does withhold information in such circumstances by “conceptually using the same theories that … were it to get out into the public, it would have harm on an ongoing investigation, or it would invade somebody’s personal privacy, or reveal classified information.” Walters Testimony Tr. at 27. ^{FOIA Empl. 3} [REDACTED] testified that it is “a little curious” for an agency to produce a document to Congress with the same redactions under FOIA as that produced to the media, because it was his understanding that Congress can demand to see agency documents while media request responses are governed by FOIA exemptions. ^{FOIA Empl. 3} [REDACTED] Testimony Tr. at 26-27.

5 U.S.C. § 552(d) of FOIA states: “This section is not authority to withhold information from Congress.” However, some Federal departments and agencies have interpreted this exemption from FOIA to only apply to requests from a Congressional committee or subcommittee, not to requests from individual members of Congress. See, e.g., June 24, 2002 letter from the United States Environmental Protection Agency Inspector General to Representative John D. Dingell, attached as Exhibit 20; “Congressional Access Under FOIA,” FOIA Update, Vol. V, No. 1 (1984), attached as Exhibit 21.

C. Commission Review of Congressional Requests for OIG Investigative Reports

The protocol also sets forth the procedure for Commission review of proposed responses to Congressional requests for OIG reports. According to the protocol:

OGC should draft an action memorandum for seriatim circulation to the Commission that seeks Commission approval for release of the redacted report to the Congressional requester, any FOIA requesters, and under certain circumstances, the general public. If the views of the OIG have not been fully accommodated to the OIG’s satisfaction, the OGC should afford the OIG the opportunity to include a rider with the action memorandum that identifies and explains any of the OIG’s disagreements. Nothing should be released until the Commission has authorized the disclosure of the report. In the event that the staff is recommending the Congressional requester be

This document is subject to the provisions of the Privacy Act of 1974, and may require redaction before disclosure to third parties. No redaction has been performed by the Office of Inspector General. Recipients of this report should not disseminate or copy it without the Inspector General's approval.

provided a version of the report with fewer redactions than a version that has been or will be provided to someone who has requested the same document under the FOIA, the Commission should be so informed.

Exhibit 19 at 3. [OGC Empl. 1] testified that these action memorandum recommendations to the Commission are usually a combination of the work of Walters, Associate General Counsel Richard Humes, and Deputy General Counsel Mark Cahn. [OGC Empl. 1] Testimony Tr. at 14.

[OGC Empl. 1] testified that it had been his experience that, even prior to this protocol's circulation, responses to Congressional requests for an OIG report had been reviewed by the Commission before release, apart from one report in early 2010 for which staffing shortages had delayed release of a redacted version of this OIG report to a member of Congress in a timely fashion. *Id.* at 15-16. [OGC Empl. 1] testified that this OIG report, which addressed allegations of a conflict of interest, improper use of non-public information, and a failure to take sufficient action against Allied Capital Corporation ("Allied OIG Report"), was released under the authority delegated by regulation to OGC. *Id.* at 15-16. [OGC Empl. 1] wrote in a March 17, 2010 e-mail to Walters that this delegated authority derives from 17 C.F.R. § 200.30-14(j)(1). March 17, 2010 E-mail from [OGC Empl. 1] to Barry Walters, attached as Exhibit 22. The regulation states, in part:

[T]he Securities and Exchange Commission hereby delegates, until the Commission orders otherwise, the following functions to the General Counsel of the Commission, to be performed by him or her or under his or her direction by such person or persons as may be designated from time to time by the Chairman of the Commission: ... To administer the provisions of 240.24c-1 of this chapter; provided that access to nonpublic information as defined in such section shall be provided only with the concurrence of the head of the Commission division or office responsible for such information or the files containing such information.

17 C.F.R. § 240.24c-1(b) states, in part:

The Commission may, in its discretion and upon a showing that such information is needed, provide nonpublic

This document is subject to the provisions of the Privacy Act of 1974, and may require redaction before disclosure to third parties. No redaction has been performed by the Office of Inspector General. Recipients of this report should not disseminate or copy it without the Inspector General's approval.

information in its possession to any of the following persons if the person receiving such nonpublic information provides such assurances of confidentiality as the Commission deems appropriate: (1) A federal, state, local or foreign government or any political subdivision, authority, agency or instrumentality of such government.

...

OGC Empl. 1 [REDACTED] wrote in his e-mail to Walters that, “we have consistently interpreted the cross-reference involving CFR 240.24c-1 to include Congress and its members.” *Id.*

OGC Empl. 1 [REDACTED] testified that, although OGC released the Allied OIG report pursuant to its delegated authority “with sort of a tacit approval of the Commissioners, … a number of Commissioners voiced their concern” that they did not want OIG reports to be released without Commission review on a repeated basis. OGC Empl. 1 Testimony at 15-16. OGC Empl. 1 testified that either the Secretary or the Deputy Secretary informed him that the Commissioners were concerned about OGC using its delegated authority to release OIG reports in response to Congressional requests without Commission review. *Id.* at 55-57.² OGC Empl. 1 [REDACTED] also testified that one of the Commissioners’ counsels may have expressed interest in reviewing responses to Congressional requests because of “the Privacy Act concern and the potential to impede ongoing law enforcement matters.” *Id.* at 57. In a March 30, 2010 e-mail to Walters and others concerning the release of another OIG report pursuant to a request by a member of Congress, OGC Empl. 1 wrote: “I do not believe GC will be using its delegated authority on this matter given the sensitivities the Commissioners have expressed for OIG reports.” March 30, 2010 E-mail from OGC Empl. 1 [REDACTED] to Barry Walters, attached as Exhibit 23.

OGC Empl. 1 [REDACTED] testified that, as part of the Commission review process of responses to Congressional requests for OIG reports, Commissioners have had discussions with OGC,

² SEC SECY Empl. 1 [REDACTED] testified that [REDACTED] recalled a conversation with OGC Empl. 1 in which [REDACTED] told OGC Empl. 1 that [REDACTED] understanding was that OIG reports needed to go through the Commission for approval, that the delegated authority to OGC was limited to FOIA requests, and that OGC Empl. 1 should get an opinion from Associate General Counsel Richard Humes’ group as to whether that delegation of authority applied to other requests for nonpublic information. SECY Empl. 1 Testimony Tr. at 19-20. SECY Empl. 1 testified that SECY Empl. 1 could not recall ever having a conversation with a Commissioner or Commissioner’s counsel about whether OIG reports should be released with or without Commission approval, and that SECY Empl. 1 statements to OGC Empl. 1 on this topic were not based upon any information that SECY Empl. 1 had received from a Commissioner or a Commissioner’s counsel. SECY Empl. 1 Testimony Tr. at 18-20. SEC Secretary Elizabeth Murphy testified that she did not make any communication to OGC Empl. 1 expressing the preference of one or more Commissioners to review requests from Congress for OIG reports. Murphy Testimony Tr. at 11-12.

This document is subject to the provisions of the Privacy Act of 1974, and may require redaction before disclosure to third parties. No redaction has been performed by the Office of Inspector General. Recipients of this report should not disseminate or copy it without the Inspector General's approval.

particularly about privacy and whether the identity of certain individuals should be left unredacted. ^{OGC Empl. 1} Testimony Tr. at 35-36. ^{OGC Empl. 1} testified that, to the best of his knowledge, the only objections raised by Commissioners to proposed redactions or requests made for additional redactions to a report requested by both Congress and a FOIA requester have concerned the identity of employees "falling within the Privacy Act's sphere." *Id.* at 35.

On March 3, 2010, ^{OGC Empl. 1} wrote in an e-mail concerning the response to a FOIA request for an OIG report that "several of the Commissioners have expressed the view that even a heavily redacted version of this report would be inappropriate for public release." March 3, 2010 E-mail from ^{OGC Empl. 1} to Joan McKown, attached as Exhibit 24. ^{OGC Empl. 1} testified that, based upon his observations of the Commission review process for OIG reports requested by a member of Congress, the only concerns expressed by the Commissioners relate to whether materials might "impair law enforcement functions or the Privacy Act interest of individuals." *Id.* at 57. ^{OGC Empl. 1} testified that none of the Commissioners or their counsel have asked about the party affiliation of the requester of the document, and that he did not find the Commission review to constitute a political review. *Id.* at 58-59.

The OIG found ^{OGC Empl. 1} testimony that the concerns expressed by Commissioners in connection with release of OIG reports to members of Congress were limited to the privacy of individuals and the compromise of ongoing law enforcement matters to be supported by other documents and testimony in this investigation. In connection with the approval of the release of an OIG report in April of this year, ^{OGC Empl. 1} wrote in an e-mail to a counsel to Commissioner Elisse Walter:

Kayla [Gillan] ended up talking directly with Commissioner Walter. What we have decided to do is redact junior level [non-SEC] employees who have not been publicly named in a Government or Commission action, and who are not otherwise already publicly associated with the ... matter. That means that approximately 7 of the 18 [non-SEC] employees identified in the OIG report will have their names redacted.

April 15, 2010 E-mail from ^{OGC Empl. 1} to ^{COMR Empl. 1} attached as Exhibit 25. On one occasion, Commissioner Troy Paredes added a rider to the action memorandum authorizing release of the redacted version of this OIG report that was approved by the Commissioners and incorporated into the authorization, resulting in the

This document is subject to the provisions of the Privacy Act of 1974, and may require redaction before disclosure to third parties. No redaction has been performed by the Office of Inspector General. Recipients of this report should not disseminate or copy it without the Inspector General's approval.

redaction of the name of certain junior-level non-SEC employees. April 15, 2010 E-mail from [OGC Empl. 1] to [CHMN Empl. 3] attached as Exhibit 26; [OGC Empl. 1] Testimony Tr. at 63-65.

III. The Process for Responding to FOIA Requests For OIG Investigative Reports

A. The Process for Responding to FOIA Requests for an OIG Investigative Report When There Is No Congressional Request for the Same Report

[FOIA Empl. 5] testified that he was not aware of any separate written guidance governing the process for FOIA requests for OIG reports. [FOIA Empl. 5] Testimony Tr. at 13. [FOIA Empl. 5] testified that if there is a FOIA request for an OIG report for which there is no Congressional request, the SEC's response is a collaborative process between the FOIA Office and OGC. *Id.* at 15. Walters testified that when reviewing an OIG report for release under FOIA, he applies the FOIA exemptions in preparing a response. Walters Testimony Tr. at 31.

[OGC Empl. 1] testified that, if there is a FOIA request for an OIG report for which there is no Congressional request, the request "proceeds through the FOIA process" and the responsive documents "are released under the authority of the FOIA Office to release matters to the general public, pursuant to the appropriate redactions under law." [OGC Empl. 1] Testimony Tr. at 16. Walters testified that he did not know of an occasion in which the Commissioner reviewed or was consulted concerning a document for release in connection with a FOIA request in which there was no Congressional request. Walters Testimony Tr. at 33, 35. [PII] to the Chairman [CHMN Empl. 1] testified that he has not had any involvement in the process to determine what information to redact from a response to a FOIA request for an OIG report. [CHMN Empl. 1] Testimony Tr. at 19.

B. The Process For Responding to FOIA Requests for an OIG Investigative Report When There is a Congressional Request for the Same Report

The protocol states: "Once disclosure has been made to a member of Congress ..., the FOIA Office will provide an identical redacted version to any FOIA requesters (albeit with citations to the appropriate FOIA exemptions) unless the Commission determines

This document is subject to the provisions of the Privacy Act of 1974, and may require redaction before disclosure to third parties. No redaction has been performed by the Office of Inspector General. Recipients of this report should not disseminate or copy it without the Inspector General's approval.

that an alternate version of the report is appropriate in response to FOIA requests.” Exhibit 19 at 4. The protocol further states:

If the FOIA Office has received more than 3 requests for the report, or believes that the public interest is sufficient, the FOIA Office should consult with OPA, which will consult with the Chairman’s Office as appropriate to determine whether the redacted report should be posted on the Commission’s web page.”

Id.

Walters testified that his understanding of the SEC’s current position in situations where there are both a Congressional request and a FOIA request for a document was to ensure that the same redacted document is released to Congress as that released to the FOIA requester. Walters Testimony Tr. at 29. Walters testified that this understanding is primarily based on conversations with Gillan. *Id.* Winter and ^{FOIA Empl.}₅ testified that, in situations where there are both a Congressional request and a FOIA request for a document, “the goal” is for the same redacted document to be released to both Congress and the FOIA requester. Winter Testimony Tr. at 24-25; ^{FOIA Empl.}₅ Testimony Tr. at 20-21. Winter testified that although the SEC has in the past released a differently redacted version of an OIG report to a Congressional requester than that released to a FOIA requester, the SEC has not done so since the protocol was circulated. Winter Testimony Tr. at 51. ^{OGC Empl.}₁ testified that, in cases where there is a Congressional request and a FOIA request for the same document, the same redacted document is released to both Congress and the FOIA requester. ^{OGC Empl.}₁ Testimony Tr. at 16-17.³

Conclusion

The OIG investigation did not find evidence that political appointees at the SEC have played an improper role in the review of or response to FOIA requests for SEC records. The OIG investigation found that the SEC’s responses to requests by members of Congress for OIG reports are subject to review and approval by the agency’s five Commissioners, who are political appointees, and that, because of the agency’s effort to

³ ^{FOIA Empl.}₂ testified that, in his experience at the ^{PII}_{██████████} as a FOIA Officer, if there were both a FOIA request and a request from a Congressional committee or committee member for the same document, the process for the FOIA request would be handled by the FOIA Office, while the request from the Congressional committee or committee member would be handled in a different process, most likely by the Office of Legislative Affairs. ^{FOIA Empl.}₂ Testimony Tr. at 24-25.

This document is subject to the provisions of the Privacy Act of 1974, and may require redaction before disclosure to third parties. No redaction has been performed by the Office of Inspector General. Recipients of this report should not disseminate or copy it without the Inspector General's approval.

provide the same response to FOIA requesters as that provided to members of Congress requesting an OIG report, the Commission's review process of requests by members of Congress for OIG reports affects the responses to FOIA requests for these same OIG reports. However, the OIG investigation did not find that the limited role played by the Commissioners in the process of responding to requests by members of Congress for OIG reports to have had a political impact on the SEC's response to these requests.

A copy of this report is being provided for informational purposes to the Deputy Chief of Staff to the Chairman, Commissioner Paredes, Commissioner Walter, the General Counsel, the Chief Operating Officer, and the Chief FOIA/Privacy Act Officer.

OIG Empl. 1

Submitted:

Date: 12/3/10

OIG Empl. 2

Concur:

Date: 12/3/2010

Approved:



H. David Kotz

Date: Dec. 3, 2010