



Office of the Inspector General
United States Department of Justice

A REVIEW OF THE RESPONSE BY THE
DEPARTMENT OF JUSTICE TO
FREEDOM OF INFORMATION ACT REQUESTS
FOR THE WORKPLACE DIVERSITY REPORT

January 29, 2004

A Review of the Response by the Department of Justice to Freedom of Information Act Requests for the Workplace Diversity Report

I. INTRODUCTION

The Office of the Inspector General (OIG) conducted a review of the Department of Justice's (DOJ or Department) handling of Freedom of Information Act (FOIA) requests for its report on diversity in the DOJ attorney workforce, entitled "Support for the Department in Conducting an Analysis of Diversity in the Attorney Workforce" (Diversity Report). The OIG review was initiated in response to a letter from two members of Congress.¹ In particular, the congressmen inquired about the Department's decision to redact material from the Diversity Report before releasing it. In addition, they asked about the process used by the Department for deciding which material to redact and whether the redactions that were made were in conformance with the FOIA. They also inquired about the delay in the Report's release.

As part of the OIG's review, we examined the Report in both its redacted and unredacted forms. We also interviewed the Department employees primarily involved in fashioning the Department's response to the FOIA requests: a Senior Counsel in the Office of the Deputy Attorney General (ODAG); an Associate Deputy Attorney General (ADAG); the two individuals who served as Chief of Staff to the Deputy Attorney General during the relevant period; and the Deputy Director of the Department's Office of Information and Privacy (OIP). We set forth below the results of our review.

In sum, we found that in handling the FOIA request for the Diversity Report, the Department followed its usual procedures for responding to FOIA requests, that the decision not to release the Diversity Report in full was made by officials in the ODAG after consultation with the OIP Deputy Director, and that the decisions regarding which material could be redacted from the Report consistent with the FOIA were made by the OIP Deputy Director and other career OIP employees. We also concluded that the decision to release or redact the Report was a discretionary decision under applicable FOIA law, and the redactions do not appear to violate FOIA law.

¹ Letter from Congressmen John Conyers, Jr. and Jerrold Nadler to Inspector General Glenn A. Fine dated November 3, 2003.

II. BACKGROUND OF THE DIVERSITY REPORT

According to a press release issued by the Department on January 16, 2002, the study that led to the Diversity Report was commissioned by the Department's Strategic Management Council (Council). The press release described the Council as "a board of senior Department officials chaired by [the Deputy Attorney General] which was established in May 2001 to provide direction and leadership on a wide range of Department matters." In the press release, the Department announced that KPMG Consulting and Taylor Cox Associates had been awarded the contract to conduct the study.

As described in the Diversity Report, KPMG and Taylor Cox were commissioned to "analyze [the Department's] human resources management practices for their effect on the Department's ability to recruit, hire, promote, retain, and utilize an attorney workforce that is diverse with respect to gender, race, and ethnicity." In order to conduct this analysis, the consultants interviewed human resource managers, analyzed workforce data, conducted interviews and focus groups with Department attorneys, and administered a survey to the attorney workforce. The consultants also reviewed other organizations, both public and private, for best practices and benchmarks.

In June 2002, KPMG and Taylor Cox delivered to the Department the 129-page Diversity Report and its lengthy attachments. The Report contained explanations of the background and methodology used by the consultants; the raw data that had been collected, including information gleaned from the interviews, focus groups, and the attorney survey; and the consultants' findings and recommendations.

The ODAG Senior Counsel who was most involved with the analysis of the Report told the OIG that in the months following receipt of the Report, she was focused on reviewing its contents and making decisions regarding which of its recommendations should be implemented and how that should be accomplished. She said at this time the ODAG was not considering making the Report public.

According to the Senior Counsel, the Diversity Report was part of a larger Department effort focusing on attorney workforce diversity. She noted that the Department publicly announced a new diversity program in February 2003, and that both the Attorney General and Deputy Attorney General spoke at the announcement event. In a press release issued by the Department at the time, the program was described as "a series of new Department initiatives aimed at strengthening the Department's attorney workforce by intensifying outreach to individuals from different racial, ethnic, economic, and geographic backgrounds, and by creating incentives to enter and remain in public service."

III. FOIA LAW

The FOIA, 5 U.S.C. § 552, generally provides that individuals have a right, enforceable in court, to obtain access to federal agency records, except to the extent such records, or portions thereof, are protected from public disclosure by specific exemptions set forth in the statute. The statute was designed “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976). In accordance with this purpose and with the plain language of the statute, the courts apply “a strong presumption” in favor of disclosure. United States Department of State v. Ray, 502 U.S. 164, 173 (1991).

Among the statute’s exemptions is one that protects material that “would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). This provision, known as Exemption 5, incorporates several privileges, including what is commonly referred to as the deliberative process privilege.

Generally, the deliberative process privilege allows the government to protect from disclosure information that reveals the agency’s decisionmaking process. The purpose of the privilege is to “prevent injury to the quality of agency decisions.” National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975). The theory behind the privilege is that forcing the government to reveal information related to the decisionmaking process would discourage open and frank discussion among government personnel and could thereby harm the quality of agency policy. See, e.g., First Eastern Corp. v. Mainwaring, 21 F.3d 465, 468 (D.C. Cir.1994) (“ [T]he privilege rests most fundamentally on the belief that were agencies forced to operate in a fishbowl . . . the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer.”).

As interpreted by the courts, the privilege protects material that qualifies as deliberative (*i.e.*, recommendations or opinions on policy matters), and not the underlying factual data that may have been considered. This factual/deliberative distinction is not, however, inviolable. Factual material may be withheld if its release would be tantamount to revealing the agency’s deliberations. For example, courts have protected factual recitations that were culled from a larger group of facts, finding that the very act of culling is deliberative in nature. See, e.g., Mapother v. Department of Justice, 3 F.3d 1533 (D.C. Cir. 1993) (protecting factual portions of report prepared to assist Attorney General decision on whether to allow Kurt Waldheim to enter the United States). Courts also have permitted the withholding of facts that are so intertwined with recommendations and opinions that revealing the former would reveal the latter. See, e.g., Quarles v. Department of the Navy, 893 F.2d 390, 392-93 (D.C. Cir. 1990) (protecting cost estimates prepared by Navy officials in connection with selection of home ports for new battleships).

Although FOIA allows the government to claim the deliberative process privilege, nothing in the statute requires the government to assert the privilege in every situation in which it applies. Accordingly, the government may waive the privilege and release protected information. Whether to do so is left to the discretion of the agency.

IV. FOIA REQUESTS FOR THE DIVERSITY REPORT

The first FOIA request for the Diversity Report and certain related material was dated January 30, 2003, and was received by OIP on February 3, 2003. Numerous other requests for the Report soon followed. For purposes of FOIA, the Department's time to respond to the first of these requests – 20 working days – began to run on the date of receipt of the first request.

As it does with all FOIA requests for records located in the ODAG, OIP acted as the initial FOIA processor for these requests.² The requests for the Diversity Report were handled by OIP's Deputy Director – a career Department employee – and career personnel under her direction.

In addition to its processing duties, OIP also advises other Department components and government agencies on questions relating to the interpretation and application of FOIA and handles appeals from initial FOIA decisions made by other Department components. OIP is staffed and headed by career Department employees. The Deputy Director, who is an attorney, has been employed in OIP since April 1983, and assumed her current position in April 1999.

The OIP Deputy Director told the OIG that when she received the FOIA request for the Diversity Report and related materials she acted in accordance with OIP's regular procedure and sent a "search memo" to the ODAG. In this search memo, which was dated February 11, 2003, she informed the ODAG of the initial FOIA request and asked for assistance in locating responsive documents. She said that she received a copy of the Diversity Report from the ODAG on April 15, 2003.³ She reported that this was not an unusually long period of time to wait for a response to an OIP search memo from the leadership offices.

The OIP Deputy Director told the OIG that after sending out the search memo and before she had obtained a copy of the Diversity Report, she received a call from the ODAG Senior Counsel. The Deputy Director said the Senior

² OIP acts as the initial processor for requests for records from the following Department offices: Attorney General; Deputy Attorney General; Associate Attorney General; Legal Policy; Legislative Affairs; Intergovernmental and Public Liaison; and Public Affairs.

³ Because the requestors had since narrowed their requests to exclude the related materials, only the Diversity Report itself was provided by the ODAG.

Counsel inquired about the requirements of FOIA and how they applied to the Diversity Report. The Deputy Director said that she provided the Senior Counsel with a general explanation of Exemption 5, telling her that purely factual material contained in the Report would have to be released but that deliberative information, such as the contractors' conclusions and recommendations, could be withheld pursuant to the exemption. She also explained to the Senior Counsel that the Department could make a discretionary release of the deliberative material if it so desired.

The OIP Deputy Director said that on April 21, 2003, after she had received and reviewed a copy of the Diversity Report, she, the Senior Counsel, and the ADAG met to discuss how to respond to the FOIA requests. The Deputy Director said she repeated the advice she had earlier provided to the Senior Counsel, including the option of making a discretionary release of the privileged portions of the Report.

The Deputy Director told the OIG that the Senior Counsel and the ADAG expressed some concern about the effect a discretionary disclosure might have on the Department's response to future requests for similar material. The Deputy Director said that although she assured them that a decision to make a discretionary release would not constitute a legally binding precedent, they were nevertheless concerned about the practical effect of such a disclosure. Specifically, they were concerned that if the Department made a discretionary release of the Diversity Report, but chose not to release a similar report in the future, it might leave the Department open to the criticism that discretion is exercised only when the protected material is favorable to the Department. Both the Deputy Director and the Senior Counsel told the OIG that the ODAG viewed the Diversity Report as presenting a generally favorable view of the Department's efforts regarding workplace diversity. At the end of this meeting, however, no decision was made regarding release.

The Deputy Director told the OIG that the Senior Counsel and the ADAG asked her to check OIP records for any indication of how the Department had handled similar FOIA requests in the past. She said that she searched OIP records, which go back six years, for requests for similar consultant reports, but she was unable to locate any comparable requests. She said she conveyed this information to the Senior Counsel.

The Deputy Director said she received an electronic mail message from the Senior Counsel on June 9, 2003, informing her that the ODAG had decided against making a discretionary release. Although the e-mail message did not set forth the reasons for the decision, the Deputy Director said she assumed it was based on the concerns the Senior Counsel and the ADAG had expressed at the April meeting.

The Deputy Director told the OIG that OIP staff then went through the Diversity Report to redact material that was exempt from release under Exemption 5. She said the redactions were made by OIP personnel under her direction and based on OIP's knowledge of the applicable FOIA law. She said that no one from the ODAG participated in the decision regarding what information could be redacted under Exemption 5 and what had to be released. The Deputy Director described the redaction process for the Diversity Report as being "very difficult" and said it took OIP a relatively long time to complete. She said that she and her staff went through several different drafts before they reached a final consensus. The Deputy Director reported that in accordance with OIP's standard practice, she sent the Diversity Report with OIP's recommended redactions to the ODAG on July 22, 2003, approximately six weeks after the Senior Counsel had requested that the redactions be made.

The Deputy Director said that, in general, OIP's approach to the redactions was to release all raw data (e.g., statistics regarding minority representation at different grade levels) while withholding the contractors' findings, conclusions, and recommendations. Included in these redactions were any statements in which the contractor characterized the data it had collected (e.g., labeling a particular issue as "significant" or a particular element as "critical"). In addition, facts that were sufficiently intertwined with the findings, conclusions, and recommendations or that otherwise would reveal the contractors' analyses also were redacted.

The Deputy Director said that, after sending the proposed redactions to ODAG, she had one meeting with the Senior Counsel regarding OIP's recommended redactions. According to the Deputy Director, this meeting was prompted by the Senior Counsel's concerns regarding several specific proposed redactions. The Deputy Director told the OIG that the Senior Counsel wanted to be sure that these redactions were based on a consistent application of Exemption 5 law and that no information was being redacted solely because it could be perceived as unfavorable to the Department. The Deputy Director said that she was able to explain to the Senior Counsel the Exemption 5 basis for the recommended redactions and to assure her that in making its recommendations OIP did not consider whether the information was favorable or unfavorable to the Department.

The Deputy Director told the OIG that on September 10, 2003, she received a memorandum from the ODAG concurring in OIP's recommended redactions. No changes to the redactions were requested by the ODAG or made by OIP. The redacted version of the Diversity Report was posted on the Department's website on October 9, 2003, approximately 8 months after receipt of the first FOIA request. The Report was posted pursuant to the FOIA

requirement that agencies make frequently requested records available in their electronic reading rooms. 5 U.S.C. § 552(a)(2)(D).⁴

The ODAG Senior Counsel confirmed the OIP Deputy Director's description of events. She told the OIG that after learning of the initial FOIA request from OIP, she discussed the matter with the OIP Deputy Director, who advised her that factual material from the Report would have to be released but that conclusions and recommendations could be withheld pursuant to Exemption 5. She said the Deputy Director also told her about the option of making a discretionary release of the privileged material. She confirmed that she, the OIP Deputy Director, and the ADAG met to discuss how to respond to the FOIA requests and that they discussed potential future ramifications of making a discretionary release.

The Senior Counsel told the OIG that throughout the process she and the other ODAG personnel involved were aware that their decision regarding discretionary release could set a customary, if not a legal, precedent for future requests. She said that she did not want to do anything that might discourage future Department officials from commissioning the type of consultants' study that led to the Diversity Report for fear that all of the information gathered would have to be released publicly. She said that she believed consultants on future projects might not be as forthcoming as possible if they thought that their recommendations and analyses would become public automatically. She stated, however, that this concern was not based on any specific discussions with the contractors who produced the Diversity Report, but on her general knowledge that contractors often voice concerns about divulging information to competitors.

The ADAG – a career Department attorney who joined the Department in 1965 and has served as an ADAG since 1993 – also described events consistent with the OIP Deputy Director and the Senior Counsel. He described himself to the OIG as a “strong advocate” for invoking the deliberative process privilege. He said that he had advised against making a discretionary disclosure of the privileged portions of the Diversity Report because, in his view, it is difficult to make principled distinctions between documents. He believes that once a decision is made to make a discretionary release for one report, it is difficult for the Department to refuse to make similar releases in the future. He confirmed that he expressed the concern that if the Department made a discretionary

⁴ Because of a technical mistake in the Department's initial web posting of the Diversity Report, a website called thememoryhole.org was able to unmask the redactions from the electronic version posted on the Department's website and reconstruct the full, unredacted Report. The memoryhole.org then posted the full, unredacted Report on its site. When the Department became aware of this, it pulled the original posting from its website and replaced it with a version that could not be similarly “unredacted.” The Department has since replaced the redacted version with a full, unredacted version of the Report.

release of the Diversity Report it could be subject to criticism in the future if it decided not to exercise such discretion with regard to similar documents.

As noted above, the Senior Counsel told the OIG that the general view in the ODAG was that the Diversity Report reflected well on the Department. In her words, she thought that the Report showed the Department to be “ahead of the curve” in the area of workforce diversity. She said it was always understood that the Report would highlight some problem areas and show room for improvement, and that shedding light on these areas was the reason the study was commissioned in the first place. But she said the ODAG’s overall view was that the Diversity Report presented a favorable view of the Department’s diversity efforts.

The Senior Counsel said that she and the ADAG, in consultation with the OIP Deputy Director, made the decision not to make a discretionary release of the privileged material in the Diversity Report. She said that she also consulted with the individual who was then serving as the ODAG Chief of Staff about release of the Report. The Chief of Staff confirmed to the OIG that he discussed the issue of how to respond to the FOIA requests with the Senior Counsel and the ADAG. He stated that he deferred to the ADAG’s view that the Department should claim the applicable deliberative process exemption. He also told the OIG that he did not discuss the issue with the Deputy Attorney General.

The Senior Counsel told the OIG that the decision not to make a discretionary disclosure was based on the concerns regarding precedent discussed above. She confirmed that she conveyed the decision to the OIP Deputy Director and asked the Deputy Director to make the redactions consistent with the requirements of Exemption 5.

The Senior Counsel also confirmed that OIP provided her with a copy of the Diversity Report showing OIP’s proposed redactions and that she met with the OIP Deputy Director to ensure that the Department was taking consistent positions regarding the redactions. She said the Deputy Director was able to allay her concerns about several specific redactions by explaining that the redactions were based not on whether the information was favorable or unfavorable, but on whether it revealed the consultants’ recommendations or thought processes. She said once the Deputy Director assuaged her concerns that redactions were being made on a principled basis according to the law, the ODAG concurred in OIP’s redactions and the Report was released. She also told the OIG that even with the redactions, she believed useful information was being conveyed. In her view, the statistical information that was released would allow the public to gain insight into the state of diversity at the Department.

By the time the ODAG gave final approval to OIP's recommended redactions in September 2003, a different individual had become the ODAG Chief of Staff. He told the OIG that he recalled receiving the memorandum from the OIP Deputy Director with OIP's recommended redactions, discussing the issue with the Senior Counsel and the ADAG, and thereafter signing off on OIP's recommendations. He said he did not discuss the matter with the Deputy Attorney General before approving OIP's recommended redactions.

V. OIG CONCLUSIONS

The OIG's review revealed that the FOIA requests for the Diversity Report were handled in conformance with the Department's normal FOIA process. OIP, the office charged with responding to requests directed to the leadership offices, advised the ODAG regarding the applicable law. OIP's advice was that while the purely factual portions of the Diversity Report had to be released, the deliberative portions (*i.e.*, the findings, conclusions, and recommendations of the consultants), including any factual material that revealed these findings, conclusions, and recommendations, could be withheld pursuant to FOIA Exemption 5. OIP also told the ODAG that it could make a discretionary release of the privileged material.

After consulting with OIP, ODAG officials decided against a discretionary release based on their concerns regarding the effect such a release might have on the Department's willingness and ability to conduct similar studies in the future. Accordingly, the ODAG instructed OIP to redact the Diversity Report consistent with Exemption 5. Career OIP personnel made the decisions regarding which portions of the Report qualified for the exemption, and these decisions were not modified by ODAG personnel.

The OIG had an attorney from its Office of General Counsel – who handles FOIA issues for the OIG and who has considerable experience in FOIA – review OIP's redactions to the Diversity Report. The OIG attorney concluded that the redactions taken by the Department did not appear to be inconsistent with Exemption 5 law in that the underlying factual data collected by the consultants was released while information reflecting their conclusions and recommendations, including their characterizations of the data, was redacted. While one could debate a particular redaction within the Report, generally the redactions appear to be consistent with the framework applied by the OIP staff to only redact material that fit within Exemption 5. The OIG attorney also concluded that the redactions did not appear to be based on an assessment of whether the information was favorable or unfavorable to the Department, but rather on whether it could be characterized properly as deliberative.

Finally, in this report we did not assess the competing policy considerations regarding the Department's discretionary decision to redact this

material. Rather, our review focused on the process used by the Department in handling the FOIA requests. We determined that the Department followed its normal process in reaching its discretionary decision, and that decision did not appear to violate FOIA law.