

## U.S. Office of Special Counsel 2016 Chief FOIA Officer's Report

February 23, 2016

In accordance with U.S. Department of Justice (DOJ) guidelines, the Chief FOIA Officer for the U.S. Office of Special Counsel (OSC) hereby submits the 2016 Chief FOIA Officer's Report. OSC General Counsel **Lisa Terry** is the **Chief FOIA Officer**.

### **Section I: Steps Taken to Apply the Presumption of Openness**

#### **FOIA TRAINING**

1. *Did your FOIA professionals or the personnel at your Agency who have FOIA responsibilities attend any FOIA training or conference during the reporting period, such as that provided by DOJ?*

Yes.

2. *Provide an estimate of the percentage of your FOIA professionals and staff with FOIA responsibilities who attended substantive FOIA training during this reporting period.*

One-hundred percent of OSC's staff whose responsibilities include handling FOIA matters received substantive FOIA training during the reporting period, either by attending outside training or by receiving one-on-one or small-group training. Specific examples of FOIA training attended include OIP's "Best Practices for Small Agencies" and "Advanced Training for FOIA Professionals"; several "Food for Thought" luncheon seminars sponsored by the American Society of Access Professionals (ASAP); and several in-house one-on-one and small-group training sessions.

3. *OIP has directed Agencies to "take steps to ensure that all of their FOIA professionals attend substantive FOIA training at least once throughout the year." If your response to the previous question is that less than 80% of your FOIA professionals attended training, please explain your agency's plan to ensure that all FOIA professionals receive or attend substantive FOIA training during the next reporting year.*

N/A.

#### **DISCRETIONARY RELEASES**

4. *Does your agency have a distinct process or system in place to review records for discretionary release? If so, please briefly describe this process. If your agency is decentralized, please specify whether all components of your agency have such a process or system in place.*

OSC's FOIA operation is centralized. OSC continues its practice of reviewing records for discretionary release as part of its standard review procedures. When a member of OSC's FOIA Team reviews material

that is identified as privileged, they first assess whether any of this material should be considered for discretionary release. The Team then discusses that potential for release with the appropriate (non-FOIA) program and legal staff. Given the nature of OSC's mission and the fact that a majority of requests involve case files which include investigative material and privacy-protected information, the opportunity for discretionary releases is limited. The review of FOIA appeals includes a similar process conducted by the appeals official.

5. *During the reporting period, did your agency make any discretionary releases of information?*

Yes.

6. *What exemption(s) would have covered the material released as a matter of discretion?*

FOIA Exemption 5; specifically, the Attorney Work-Product and Deliberative Process privileges.

7. *Provide a narrative description, as well as some specific examples, of the types of information that your Agency released as a matter of discretion during the reporting year.*

Examples include: portions of memorandums of telephone conversations with complainants and/or witnesses containing information about the calls, the parties and the cases in question; and the front page of a five-page referral memorandum that contained information about the parties and cases involved. Exemption (b)(5), both the deliberative process and attorney work-product privileges, could have been applied to these documents in their entirety.

8. *If your agency was not able to make any discretionary releases of information, please explain why.*

N/A.

9. *If there are any other initiatives undertaken by your agency to ensure that the presumption of openness is being applied, please describe them here.*

In recent years, OSC has included in its FOIA procedures steps to ensure that (non-FOIA) program staff is able to identify any articulable harm before withholding any privileged information. If no harm is identified and no other FOIA Exemptions require withholding, the information is released.

## **Section II: Steps Taken to Ensure that Your Agency has an Effective System in Place for Responding to Requests**

### **PROCESSING PROCEDURES**

1. *For Fiscal Year 2015, what was the average number of days your agency reported for adjudicating requests for expedited processing?*

Seventeen days.

2. *If your agency's average number of days to adjudicate requests for expedited processing was above ten calendar days, please describe the steps your agency will take to ensure that requests for expedited processing are adjudicated within ten days or less.*

OSC added new FOIA personnel in FY 2015 which helped to reduce the average number of days needed to adjudicate requests for expedited processing. OSC's automated tracking tool also contributed to a more efficient processing of these requests. With the addition of part-time staff for FY 2016, OSC expects this trend to continue.

*3. On July 2, 2015, OIP issued new guidance to agencies on the proper procedures to be used in the event an agency has a reason to inquire whether a requester is still interested in the processing of his/her request. Please confirm here that to the extent your agency may have had occasion to send a "still interested" inquiry, it has done so in accordance with the new guidelines for doing so, including affording requesters thirty days to respond.*

When contacting requesters to determine whether or not they would still like us to process their requests, OSC has done so in accordance with OIP's aforementioned guidelines.

### **REQUESTER SERVICES**

*4. Agency FOIA Requester Service Centers and FOIA Public Liaisons serve as the face and voice of an agency. In this capacity, they provide a very important service for requesters, informing them about how the FOIA process works and providing specific details on the handling of their individual requests. The FOIA also calls on agency FOIA Requester Service Centers and FOIA Public Liaisons to assist requesters in resolving disputes. Please explain here any steps your agency has taken to strengthen these services to better inform requesters about their requests and to prevent or resolve FOIA disputes.*

OSC has implemented a procedure in which acknowledgement letters sent to all requesters are sent under the FOIA Public Liaison's signature, and contact information for the FOIA Public Liaison is provided. This ensures that the FOIA Public Liaison is accessible to all requesters at all processing stages of their requests.

*5. If there are any other steps your agency has undertaken to ensure that your FOIA system operates efficiently and effectively, such as conducting self-assessments to find greater efficiencies, improving search processes, eliminating redundancy, etc., please describe them here.*

In Fiscal Year 2015, OSC hired a FOIA contractor to assist with processing backlogged requests. OSC also hired a permanent, full-time "senior" FOIA team lead. Additionally, OSC's FOIA Team meets weekly to set processing priorities and evaluate the effectiveness of the FOIA program. The Team routinely reviews and updates its FOIA SOPs to allow for maximization of limited resources and smoother and more efficient work flow.

### **Section III: Steps Taken to Increase Proactive Disclosures**

#### **POSTING MATERIAL**

*1. Describe your agency's process or system for identifying "frequently requested" records required to be posted online under Subsection (a)(2) of the FOIA. For example, does your agency monitor its FOIA logs or is there some system in place to identify these records for posting?*

When OSC receives a request that appears similar to one we have already received, the FOIA Team searches our tracking system for subjects that seem to come up repeatedly in FOIA requests. The FOIA Team also routinely discusses whether certain types of records should be labeled “frequently requested” at its weekly meetings.

*2. Does your agency have a distinct process or system in place to identify other records for proactive disclosure? If so, please describe your agency’s process or system.*

While processing FOIA requests, FOIA Team members routinely consider whether records are appropriate for possible proactive disclosure. Additionally, OSC leadership regularly considers whether Agency material is suitable for proactive disclosure.

*3. When making proactive disclosures of records, are your agency’s FOIA professionals involved in coding the records for Section 508 compliance or otherwise preparing them for posting? If so, provide an estimate of how much time is involved for each of your FOIA professionals overall. Please note that this question is directed at the efforts of actually posting the records online once all disclosure determinations have been made. For example, effort to load the records in your web content platform or making the releasable documents accessible in compliance with Section 508 of the Rehabilitation Act.*

OSC’s FOIA professionals are not involved with coding the records for Section 508 compliance; this is done by another OSC component.

*4. Has your agency encountered challenges that make it difficult to post records you otherwise would like to post?*

Yes.

*5. If so, please briefly explain those challenges.*

Privacy concerns often present obstacles to publicly posting material.

*6. Provide examples of material that your agency has proactively disclosed during the past reporting year, including links to the posted material.*

OSC has placed our FOIA Logs from Fiscal Years 2008 through 2015 on its FOIA Web site. These can be seen by clicking on the following links: <https://osc.gov/Resources/FY2008-2014%20FOIA%20Logs.pdf> and [https://osc.gov/Resources/FOIA%20Log%20FY2015%20\(October%201%202014-September%2030%202015\).pdf](https://osc.gov/Resources/FOIA%20Log%20FY2015%20(October%201%202014-September%2030%202015).pdf)

Additionally, OSC posted a redacted Prohibited Personnel Practices (“PPP”) report in September 2015. This can be viewed by clicking on the following link:

[https://osc.gov/Resources/PPP%20Report%20FINAL%20Frink\\_Redacted-complete.pdf](https://osc.gov/Resources/PPP%20Report%20FINAL%20Frink_Redacted-complete.pdf)

7. *Did your agency use any means to publicize or highlight important proactive disclosures for public awareness? If yes, please describe those efforts. For example, this can be done through social media or with the offering of E-Mail subscription services.*

OSC has indexed publicly posted materials on its Web site.

#### **OTHER INITIATIVES**

8. *If there are any other steps your agency has taken to increase proactive disclosures, please describe them here.*

OSC will continue to review and post our FOIA Logs on our public Web site in FY 2016.

#### **Section IV: Steps Taken to Greater Utilize Technology**

##### **MAKING MATERIAL POSTED ONLINE MORE USABLE**

1. *Beyond posting new material, is your agency taking steps to make the posted information more usable to the public, especially to the community of individuals who regularly access your agency's web site? Steps can include soliciting feedback on the content and presentation of posted material, improving search capabilities on your agency web site, posting material in open formats, making information available through mobile applications, providing explanatory material, etc.*

Yes.

2. *If yes, please provide examples of such improvements. If your agency is already posting material in its most useful format, please describe these efforts.*

Publicly posted materials are indexed on OSC's FOIA Web site.

##### **OTHER INITIATIVES**

3. *Did your agency successfully post all four quarterly reports for Fiscal Year 2015?*

No.

4. *If your agency did not successfully post all quarterly reports, with information appearing on FOIA.gov, please explain why and provide your agency's plan for ensuring that such reporting is successful in Fiscal Year 2016.*

OSC successfully posted Quarters 1, 2, and 4 and did not realize that Quarter 3 did not post due to a technical malfunction. That problem has been identified and corrected, and all four Quarterly Reports for Fiscal Year 2015 are now posted. OSC does not expect a recurrence in Fiscal Year 2016.

5. *Do your agency's FOIA professionals use E-Mail or other electronic means to communicate with requesters whenever feasible? If yes, what are the different types of electronic means that are utilized by your agency to communicate with requesters?*

OSC's FOIA Team utilizes E-Mail to communicate with requesters as often as is practicable. We also communicate with requesters through our electronic FOIA processing system and on-line Public Access Link ("PAL").

6. *If your agency does not communicate electronically with requesters as a default, are there any limitations or restrictions for the use of such means? If yes, does your agency inform requesters about such limitations?*

N/A.

## **Section V: Steps Taken to Improve Timeliness in Responding to Requests and Reducing Backlogs**

### **SIMPLE TRACK**

1. *Does your agency utilize a separate track for simple requests?*

Yes.

2. *If so, for your agency overall in Fiscal Year 2015, was the average number of days to process simple requests twenty working days or fewer?*

No.

3. *Please provide the percentage of requests processed by your agency in Fiscal Year 2015 that were placed in your simple track.*

Thirty-six percent.

4. *If your agency does not track simple requests separately, was the average number of days to process all non-expedited requests twenty working days or fewer?*

N/A.

### **Backlogs**

### **BACKLOGGED REQUESTS**

5. *If your agency had a backlog of requests at the close of Fiscal Year 2015, did that backlog decrease as compared with the backlog reported at the end of Fiscal Year 2014?*

No.

6. *If not, explain why and describe the causes that contributed to your agency not being able to reduce its backlog. When doing so, please also indicate if any of the following were contributing factors: An*

*increase in the number of incoming requests; a loss of staff; an increase in the complexity of the requests received (if possible, please provide examples or briefly describe the types of complex requests contributing to your backlog increase); any other reasons – please briefly describe or provide examples when possible.*

During Fiscal Year 2015, OSC focused on processing some of its oldest requests, as well as those requests that strictly seek case file records. These types of requests tend to be our most complex and involve a large volume of records. For that reason, while OSC processed more requests than the prior fiscal year, it was not able to reduce its backlog. Additionally, while OSC received fewer requests in Fiscal Year 2015 than in 2014, the complexity of the requests as well as the volume of documents to review increased.

*7.If you had a request backlog, please report the percentage of requests that make up the backlog out of the total number of requests **received by** your agency in Fiscal Year 2015. To calculate your agency's percentage, you must divide the number of backlogged requests reported in Section XII.A. of your Fiscal Year 2015 Annual FOIA Report by the number of requests received in Fiscal Year 2015, which can be found in Section V.A. of your Annual FOIA Report. Once divided, you can multiply that number by 100 to get the percentage.*

One-hundred and thirty-three percent.

### **BACKLOGGED APPEALS**

*8.If your agency had a backlog of appeals at the close of Fiscal Year 2015, did that backlog decrease as compared with the backlog reported at the end of Fiscal Year 2014?*

Yes.

*9.If not, explain why and describe the causes that contributed to your agency not being able to reduce the backlog. When doing so, please also indicate if any of the following were contributing factors: An increase in the number of incoming appeals; a loss of staff; an increase in the complexity of the requests received – if possible, please provide examples or briefly describe the types of complex requests contributing to your backlog increase; any other reasons – please briefly describe or provide examples when possible.*

N/A.

*10. If you had an appeal backlog, please report the percentage of appeals that make up the backlog out of the total number of appeals **received by** your agency in Fiscal Year 2015. If your agency did not receive any appeals in Fiscal Year 2015 and/or has no appeal backlog, please answer with "N/A".*

Two-hundred and thirty-three percent. Note that OSC had seven backlogged appeals at the close of FY 2015.

### **TEN OLDEST REQUESTS**

*11.In Fiscal Year 2015, did your agency close the ten oldest requests that were reported pending in your*

*Fiscal Year 2015 Annual FOIA Report?*

No.

*12. If no, please provide the number of these requests your agency was able to close by the end of the fiscal year, as listed in Section VII.E of your Fiscal Year 2014 Annual FOIA Report. If you had less than ten total oldest requests to close, please indicate that.*

Five.

*13. Of the requests your agency was able to close from your ten oldest, please indicate how many of these were closed because the request was withdrawn by the requester. If any were closed because the request was withdrawn, did you provide any interim responses prior to the withdrawal?*

Five. OSC provided interim responses prior to withdrawal to some of these requests.

### **TEN OLDEST APPEALS**

*14. In Fiscal Year 2015, did your agency close the ten oldest appeals that were reported pending in your Fiscal Year 2014 Annual FOIA Report?*

No.

*15. If no, please provide the number of these appeals your agency was able to close by the end of the fiscal year, as listed in Section VII.C.(5) of your Fiscal Year 2014 Annual FOIA Report. If you had less than ten total oldest appeals to close, please indicate that.*

OSC closed four of its ten oldest appeals that were reported pending in its FY 2014 Annual FOIA Report. OSC had 11 appeals pending at the end of FY 2014.

### **TEN OLDEST CONSULTATIONS**

*16. In Fiscal Year 2015, did your agency close the ten oldest consultations that were reported pending in your Fiscal Year 2014 Annual FOIA Report?*

No consultations were pending at the end of FY 2014.

*17. If no, please provide the number of these consultations your agency was able to close by the end of the fiscal year, as listed in Section XII.C of your Fiscal Year 2014 Annual FOIA Report. If you had less than ten total oldest consultations to close, please indicate that.*

N/A.

### **Additional Information on Ten Oldest Requests, Appeals, and Consultations & Plans:**

*18. Briefly explain any obstacles your agency faced in closing its ten oldest requests, appeals, and consultations from Fiscal Year 2014.*

Factors include a general increase in the complexity of requests processed. Although two additional FOIA officers were added to the team, time and resources were expended to train them and accommodate the need for a “learning curve”.

*19. If your agency was unable to close any of its ten oldest requests because you were waiting to hear back from other agencies on consultations you sent, please provide the date the request was initially received by your agency, the date when your agency sent the consultation, and the date when you last contacted the agency where the consultation was pending.*

N/A.

*20. If your agency did not close its ten oldest pending requests, appeals, or consultations, please provide a plan describing how your agency intends to close those “ten oldest” requests, appeals, and consultations during Fiscal Year 2016.*

The Chief FOIA Officer has designated legal staff to address some of the agency’s most complex requests. These added resources “free up” time of the FOIA staff, allowing them to focus on processing OSC’s oldest pending requests, appeals and consultations in FY 2016. Additionally, OSC’s FOIA Team meets weekly to discuss strategies for closing its oldest requests and appeals, including making “still interested” inquiries when appropriate pursuant to OIP guidance.

#### **Use of the FOIA’s Law Enforcement Exclusions**

*1.-2. Did your agency invoke a statutory exclusion, 5 U.S.C. Sec. 552(c) (1), (2), or (3) during Fiscal Year 2015? If so, please provide the total number of times exclusions were invoked.*

OSC did not invoke any statutory exclusions in FY 2015.

#### **Success Stories**

In calendar year 2015, OSC achieved a nearly 50% increase in processing. The FOIA Team closed 145 requests and appeals compared to 97 in calendar year 2014. The Team also processed an additional seven “interim” responses.

