

U.S. Office of Special Counsel
2013 Chief FOIA Officer Report

In accordance with Department of Justice guidelines, the Chief FOIA Officer for the U.S. Office of Special Counsel (OSC) hereby submits the 2013 Chief FOIA Officer Report. After review by the Office of Information Policy at the Department of Justice, this report will be posted to OSC's website. Lisa Terry, General Counsel, is OSC's Chief FOIA Officer as of March 11, 2013.

Section I: Steps Taken to Apply the Presumption of Openness

Describe the steps your agency has taken to ensure that the presumption of openness is being applied to all decisions involving the FOIA. To do so, you should answer the questions listed below and then include any additional information you would like to describe how your agency is working to apply the presumption of openness.

1. Did your agency hold an agency FOIA conference, or otherwise conduct training during this reporting period?

As reported last year, OSC has one employee (the FOIA Officer) fully-dedicated to processing initial FOIA and Privacy Act requests. As part of his routine practice, the FOIA Officer continues to review FOIA guidance that is published by the U.S. Department of Justice (DOJ) Office of Information Policy (OIP).

If an OSC intern or other staff member provides assistance in the processing of FOIA requests, the FOIA Officer or an Associate General Counsel provides relevant one-on-one training.

2. Did your FOIA professionals attend any FOIA training, such as that provided by the Department of Justice?

On May 8-9, 2012, an attorney from OSC's Office of General Counsel attended an OIP training program entitled "FOIA for Attorney & Access Professionals."

On July 17-18, 2012, OSC's FOIA Officer attended an OIP training program entitled "FOIA for Attorney & Access Professionals."

In his 2009 FOIA Guidelines, the Attorney General strongly encouraged agencies to make discretionary releases of information even when the information might be technically exempt from disclosure under the FOIA. OIP encourages agencies to make such discretionary releases whenever there is no foreseeable harm from release.

3. Did your agency make any discretionary releases of otherwise exempt information?

Yes.

4. What exemptions would have covered the information that was released as a matter of discretion?

FOIA Exemption 5.

5. Provide a narrative description, or some examples of, the types of information that your agency released as a matter of discretion.

While adjudicating an administrative FOIA appeal, OSC reprocessed sixty-five pages (of OSC case information) and released some information throughout them that was previously properly withheld pursuant to FOIA Exemption 5.

6. Describe any other initiatives undertaken by your agency to ensure that the presumption of openness is being applied.

OSC continues its practice of reviewing records for discretionary release as part of the standard FOIA review practice. If the FOIA Officer identifies information that can be considered for discretionary release, he discusses the potential for release with the appropriate program staff. The review of FOIA appeals includes a similar process conducted by the appeal official.

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

Describe here the steps your agency has taken to ensure that its system for responding to requests is effective and efficient. To do so, answer the questions below and then include any additional information that you would like to describe how your agency ensures that your FOIA system is efficient and effective.

1. Do FOIA professionals within your agency have sufficient IT support?

Yes.

2. Do your FOIA professionals work with your agency's Open Government Team?

Yes.

3. Has your agency assessed whether adequate staffing is being devoted to FOIA administration?

Yes.

4. Describe 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, streamlining consultations, eliminating redundancy, etc.

OGC is presently recruiting term assistance through the Presidential Management Fellow (PMF) program. Last year's recruitment effort did not result in a PMF assignment to OGC. This year, OGC expects to obtain a PMF assignment. During his or her rotation at OSC, the selectee will focus on contributing to OSC's FOIA administration.

Section III: Steps Taken to Increase Proactive Disclosures

Both the President and Attorney General focused on the need for agencies to work proactively to post information online without waiting for individual requests to be received.

Describe here the steps your agency has taken both to increase the amount of material that is available on your agency website, and the usability of such information, including providing examples of proactive disclosures that have been made during this past reporting period (i.e., from March 2011 to March 2012). In doing so, answer the questions listed below and describe any additional steps taken by your agency to make and improve proactive disclosures of information.

1. Provide examples of material that your agency has posted this past year.

Such postings include Hatch Act Modernization Act Guidance for State and Local Employees; statements by the Special Counsel regarding passage of the Whistleblower Protection Enhancement Act; OSC's Hatch Act Report regarding HHS Secretary Sebelius; the Special Counsel's Memorandum for Executive Departments and Agencies regarding Agency Monitoring Policies and Confidential Whistleblower Disclosures to the Office of Special Counsel and to Inspectors General; and press releases on issues of importance to OSC's mission.

2. Beyond posting new material, is your agency taking steps to make the posted information more useful to the public, especially to the community of individuals who regularly access your agency's website, such as soliciting feedback on the content and presentation of the posted material, improving search capabilities on the site, creating mobile applications, providing explanatory material, etc.?

Yes.

3. If so, provide examples of such improvements.

OSC previously reached out to stakeholders, and received suggestions that the agency continues to consider.

4. Describe any other steps taken to increase proactive disclosures at your agency.

See items 1 through 3, above.

Section IV: Steps Taken to Greater Utilize Technology

A key component of the President's FOIA Memorandum was the direction to "use modern technology to inform citizens about what is known and done by their Government." In addition to using the internet to make proactive disclosures, agencies should also be exploring ways to utilize technology in responding to requests. In 2010 and 2011, agencies reported widespread use of technology in handling FOIA requests. For 2012, the questions have been further refined and now also address different, more innovative aspects of technology use.

Electronic receipt of FOIA requests:

1. Can FOIA requests be made electronically to your agency?

Yes. OSC receives requests by mail, e-mail, and facsimile.

2. If your agency processes requests on a decentralized basis, do all components of your agency receive requests electronically?

OSC has one unit that receives FOIA requests.

Online tracking of FOIA requests:

3. Can a FOIA requester track the status of his/her request electronically?

No; requesters can obtain status information in several ways, including by e-mail, but OSC does not have an online status tracking tool.

4. If so, describe the information that is provided to the requester through the tracking system. For example, some tracking systems might tell the requester whether the request is "open" or "closed," while others will provide further details to the requester throughout the course of the processing, such as "search commenced" or "documents currently in review." List the specific types of information that are available through your agency's tracking system.

Not applicable.

5. In particular, does your agency tracking system provide the requester with an estimated date of completion for his or her request?

Not applicable.

6. If your agency does not provide online tracking of requests, is your agency taking steps to establish this capability?

Not at the present time.

Use of technology to facilitate processing of requests:

1. Beyond using technology to redact documents, is your agency taking steps to utilize more advanced technology to facilitate overall FOIA efficiency, such as improving record search capabilities, utilizing document sharing platforms for consultations and referrals, or employing software that can sort and de-duplicate documents?

Yes.

2. If so, describe the technological improvements being made.

OSC is continuing to develop and implement a program case management system that should also yield efficiencies related to FOIA searches.

Section V: Steps Taken to Improve Timeliness in
Responding to Requests and Reduce Backlogs

The President and the Attorney General have emphasized the importance of improving timeliness in responding to requests. This section addresses both time limits and backlog reduction. Backlog reduction is measured both in terms of numbers of backlogged requests or appeals and by looking at whether agencies closed their ten oldest requests and appeals. *For the figures required in this Section, please use those contained in the specified sections of your agency's 2012 Annual FOIA Report.*

1. Section VII.A of your agency's Annual FOIA Report, entitled "FOIA Requests – Response Time for All Processed Requests," includes figures that show your agency's average response times for processed requests. For agencies utilizing a multi-track system to process requests, there is a category for "simple" requests, which are those requests that are placed in the agency's fastest (non-expedited) track, based on the low volume and/or simplicity of the records requested. If your agency does not utilize a separate track for processing simple requests, answer the question below using the figure provided in your report for your non-expedited requests.

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

Yes.

- b. If so, for your agency overall, for Fiscal Year 2012, was the average number of days to process simple requests twenty working days or fewer?

No.

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

Not applicable.

2. Sections XII.D.(2) and XII.E.(2) of your agency's Annual FOIA Report, entitled "Comparison of Numbers of Requests/Appeals from Previous and Current Annual Report – Backlogged Requests/Appeals," show the numbers of any backlog of pending requests or pending appeals from Fiscal Year 2012 as compared to Fiscal Year 2011. You should refer to those numbers when completing this section of your Chief FOIA Officer Report. In addition, Section VII.E, entitled "Pending Requests – Ten Oldest Pending Requests," and Section VI.C.(5), entitled "Ten Oldest Pending Administrative Appeals," from both Fiscal Year 2011 and Fiscal Year 2012 should be used for this section.

- a. If your agency had a backlog of requests at the close of Fiscal Year 2012, did that backlog decrease as compared with Fiscal Year 2011?

No.

- b. If your agency had a backlog of administrative appeals in Fiscal Year 2012, did that backlog decrease as compared to Fiscal Year 2011?

No (it remained at eight).

- c. In Fiscal Year 2012, did your agency close the ten oldest requests that were pending as of the end of Fiscal Year 2011?

No. In FY 2012, OSC closed three of the ten oldest requests.

- d. In Fiscal Year 2012, did your agency close the ten oldest administrative appeals that were pending as of the end of Fiscal Year 2011?

No. For 2011, OSC reported nine pending appeals in section VI.C(5). In FY 2012, OSC closed two of those appeals.

3. If you answered "no" to any of the above questions, describe why that has occurred. In doing so, answer the following questions then include any additional explanation:

Request Backlog:

- a. Was the lack of a reduction in the request backlog a result of an increase in the number of incoming requests?

Not in discreet request numbers. In several instances, OSC assigned only one tracking number to requests seeking records in multiple categories. OSC provided a number of interim responses to these requests. Opening such requests under multiple tracking numbers for the various request categories (which OSC does now) would more accurately reflect the volume of request work.

- b. Was the lack of a reduction in the request backlog caused by a loss of staff?

Yes, in part.

- c. Was the lack of a reduction in the request backlog caused by an increase in the complexity of the requests received?

Yes, in part.

- d. What other causes, if any, contributed to the lack of a decrease in the request backlog?

Please see the response to section V.3.h., below, which addresses this question with respect to both FOIA requests and appeals.

Administrative Appeal Backlog:

- e. Was the lack of a reduction in the backlog of administrative appeals a result of an increase in the number of incoming appeals?

No.

- f. Was the lack of a reduction in the appeal backlog caused by a loss of staff?

Yes, in part.

- g. Was the lack of a reduction in the appeal backlog caused by an increase in the complexity of the appeals received?

No.

- h. What other causes, if any, contributed to the lack of a decrease in the appeal backlog?

OSC's OGC manages the agency's FOIA program, along with numerous other duties. During FY 2012, OGC was operating without having hired a fourth attorney to fill a vacancy created by the departure of OSC's former General Counsel at the end of FY 2011. OSC did hire a newly-licensed attorney near the middle of FY 2012, but a senior OGC attorney left the agency during the fiscal year.

- 4. OIP has issued guidance encouraging agencies to make interim releases whenever they are working on requests that involve a voluminous amount of material or require searches in multiple locations. By providing rolling releases to requesters agencies facilitate access to the requested information. If your agency had a backlog in Fiscal Year 2012, please provide an estimate of the number of cases in the backlog where a substantive, interim response was provided during the fiscal year, even though the request was not finally closed.

OSC issued approximately seventeen interim responses in approximately ten requests.

Use of FOIA's Law Enforcement "Exclusions"

In order to increase transparency regarding the use of the FOIA's statutory law enforcement exclusions, which authorize agencies under certain exceptional circumstances to "treat the records as not subject to the requirements of [the FOIA]," 5 U.S.C. § 552(c)(1), (2), (3), please answer the following questions:

1. Did your agency invoke a statutory exclusion during Fiscal Year 2012?

No.

2. If so, what is the total number of times exclusions were invoked?

Not applicable.

Spotlight on Success

Out of all the activities undertaken by your agency since March 2011 to increase transparency and improve FOIA administration, describe here one success story that you would like to highlight as emblematic of your agency's efforts.

OSC has experienced pressing demands on agency resources in several areas. For example, significant increases in the agency's primary mission activities, increased complexity of FOIA requests, and increased administrative reporting requirements all combine to create a significant challenge to an agency the size of OSC. As a result, and as noted above, OSC has worked to provide interim responses when possible. Such responses provide some positive measure of work towards completion of a request, even when the request has moved into backlog status.