



U.S. OFFICE OF SPECIAL COUNSEL
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January 15, 2008

Ms. Melanie Ann Pustay
Director
Office of Information and Privacy
U.S. Department of Justice
Washington, DC 20530

Dear Ms. Pustay:

I am writing to advise you of modifications to the U.S. Office of Special Counsel (OSC)'s Freedom of Information Act (FOIA) Improvement Plan developed pursuant to Executive Order 13,392. The modifications affect two improvement areas shown in the plan: (a) Improvement Area 2: Backlog reduction/elimination, and (b) Improvement Area 7: Training. A copy of the plan, as modified (at pp. 4 and 7), is enclosed.

With respect to item (a), above, we submitted FOIA backlog reduction goals to your office via e-mail on October 19, 2007, covering fiscal years (FYs) 2008-2010. A copy of what my office sent is enclosed. Those goals, based on OSC's experience over the past year-and-a-half in implementing the executive order, implicitly revised Improvement Area 2 of the agency's improvement plan. The plan has been modified accordingly, to correspond to the goals sent last October.

With respect to item (b), in view of legislative developments last year, culminating in enactment of the OPEN Government Act of 2007, the plan has been modified to permit affected personnel to attend training likely to address new FOIA provisions and requirements.

If you or members of your staff have any questions or need additional information, please contact me or our FOIA Officer, Christopher Kurt. Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Erin M. McDonnell".

Erin M. McDonnell
Associate Special Counsel for Legal Counsel and Policy

Enclosures: 1 – FOIA Improvement Plan (as modified)
2 – FOIA Backlog Reduction Goals (FYs 2008-2010)

**U.S. OFFICE OF SPECIAL COUNSEL
FISCAL YEAR 2006-2007 FOIA IMPLEMENTATION PLAN
PURSUANT TO
EXECUTIVE ORDER NO. 13,392
("IMPROVING AGENCY DISCLOSURE OF INFORMATION")¹**

Background

The U.S. Office of Special Counsel (OSC) is a small agency within the Executive Branch, responsible for enforcement of laws affecting federal, state and local government employees. The agency's mission is to protect current and former federal employees, and applicants for federal employment, especially whistleblowers, from prohibited employment practices; promote and enforce compliance by federal, state and local government employees with legal restrictions on political activity; and facilitate disclosures by federal whistleblowers about government wrongdoing.²

Agency operating units responsible for carrying out the statutory responsibilities listed above include the Investigation and Prosecution Division, Complaints Examining Unit, Disclosure Unit, Hatch Act Unit, and the USERRA³ Unit. OSC maintains its headquarters office in Washington, DC, and has four field offices (located in Dallas, Texas; Detroit, Michigan; Oakland, California; and Washington, DC). As of May 31, 2006, OSC was staffed with 108 employees.⁴

Freedom of Information Act (FOIA) Program Responsibilities

OSC's Legal Counsel and Policy Division (LC&P) carries out the agency's FOIA program responsibilities, along with other functions. These include serving as the agency's general counsel, providing legal advice and guidance to agency personnel, representing OSC in litigation filed against the agency (including litigation under the FOIA), providing advice and support during planning and implementation of agency policies, and managing the agency's ethics program.

OSC has received an average of 127 FOIA requests per year in the past five years. The vast majority of those requests ask for records and information in the case files associated with the investigations and any resulting litigation conducted by OSC.

¹ As modified on January 15, 2008.

² OSC carries out this mission by: (1) investigating complaints of prohibited personnel practices, especially reprisal for whistleblowing, and pursuing remedies for violations through litigation and other means; (2) providing advisory opinions on, and enforcing Hatch Act restrictions on political activity; (3) operating an independent and secure channel for disclosures of wrongdoing in federal agencies; (4) protecting reemployment and antidiscrimination rights of veterans under the Uniformed Services Employment and Reemployment Rights Act; and (5) promoting greater understanding of the rights and responsibilities of federal employees under the laws enforced by OSC.

³ "USERRA" refers to the Uniformed Services Employment and Reemployment Rights Act.

⁴ Two were part-time employees.

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LC&P faced significant challenges between fiscal years (FY) 2002-2005, as staffing of the positions responsible for FOIA and litigation varied and fluctuated, due primarily to vacancies in the FOIA Officer and litigation counsel positions. Various measures (including details and a reassignment) were undertaken during that period to maintain FOIA operations and to reduce request backlogs, culminating in the hiring during FY 2006 of individuals to serve as the FOIA Officer and Litigation Counsel in LC&P. By May 2006, the division had reached its full professional staff complement of three attorneys – the Associate Special Counsel for LC&P (also the Chief FOIA Officer), a General Law Counsel, and a Litigation Counsel, and a management/program analyst (the FOIA /PA Officer).

The FOIA Officer's primary duties are to receive and process FOIA requests and to participate in development and implementation of FOIA program policies and procedures. He also assists division attorneys, as needed, in connection with non-FOIA responsibilities. The Associate Special Counsel for LC&P is the deciding official on appeals from the FOIA Officer's disposition of initial FOIA requests.

Reviews of FOIA policies and practices

Both before and after the issuance of Executive Order No. 13,392, various aspects of OSC's FOIA operations have undergone internal reviews. Areas selected for review, and results of those reviews, were as follows:

Tracking of FOIA requests

Beginning in 2003, LC&P staff reviewed methods that had been used to track FOIA request activity. Their review indicated that while those methods were generally effective for a FOIA Officer's use in tracking basic request information, their utility for other division staff engaged in FOIA-related responsibilities, for agency management, and for generating ongoing reports on program activity was very limited.

In May of 2004, the division began work with a management analyst and OSC's Information Technology Branch to design and implement a FOIA request tracking capability that could be integrated into the agency's automated case tracking system. A new, comprehensive automated FOIA request tracking system became operational in October 2005. Among its more significant enhancements are that it provides a direct link to agency case file information, the subject of most FOIA requests received by OSC, and that it will for the first time enable the FOIA Officer to electronically generate data needed to produce the annual FOIA report required by the Department of Justice (DOJ).

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Backlog reduction

Fluctuations of and variations in the staffing of key LC&P positions between 2002-2005 made enduring reductions in FOIA request and appeals backlogs difficult to achieve. A temporary allocation of non-LC&P staff to FOIA backlog reduction efforts during 2004 helped to significantly reduce request and appeal backlogs, but a backlog of approximately 40 requests and 11 appeals remains. LC&P has reviewed FOIA processing practices that may be contributing to the backlogs, and identified several measures that may, combined with the recent filling of vacant positions in LC&P, contribute to eventual reduction or elimination of backlogs.

FOIA regulations

OSC's last update of its FOIA regulation occurred in 1989. Review of the regulation indicated that it was in need of updating.

FOIA guidance

While the section devoted to FOIA on OSC's web site (www.osc.gov/foia.htm) provides useful information (*e.g.*, how to make a FOIA request to OSC, records that can be obtained without a FOIA request, types of OSC records that may be withheld under FOIA, how to appeal a denial of a request, and information about possible fees), review of that section indicated that it needs to be updated, and would benefit by the addition of more extensive and user-friendly information.

FOIA correspondence formats

OSC uses correspondence templates for responses to FOIA requests, so that responses tailored to different types of requests can be produced more efficiently. Reviews of correspondence templates have occurred several times in recent years to check for continuing accuracy, completeness, and ease of understanding. Improvements have been made as needed after each review.

Improvement area 1: Automated tracking / reporting capabilities

OSC will continue refinement of the automated system implemented in October of 2005 to record and track the processing of FOIA requests, and to improve the capability of the system to generate reports on FOIA request activities.

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Implementation steps:

LC&P will work with the Information Technology Branch to obtain further refinements/corrections identified during the first nine months of operation and use of the automated FOIA request tracking system.

[Projected completion date: September 30, 2006]

Test automated system's capability to generate accurate and complete data needed to produce the annual FOIA report required by DOJ, starting with the report on FY 2006 activity, due in February 2007; generate first automated report based on data from the FOIA tracking system.

[Projected completion date: December 31, 2006]

Improvement area 2: Backlog reduction/elimination

Assuming that the LC&P staffing situation and the flow of incoming requests remain stable, OSC plans to reduce the number of overage requests and appeals (*i.e.*, requests and appeals in which a request or appeal decision is not issued within 10-20 working days, unless extended).

Implementation steps:

Reduce or eliminate referrals of FOIA requests for case file records received from other agencies back to those agencies for processing.

[Projected completion date: Completed]

Develop criteria for and divide complex requests (the majority of requests received) into two tracks for purposes of processing, distinguishing between those seeking entire case file records, or voluminous non-case information (requiring more extensive searches and/or reviews of case file or other records), and those seeking only specified documents (requiring less time and more focused searches and/or analyses), so that complex requests requiring less work will not stagnate at the end of the queue until older, more work-intensive requests are completed.

[Projected completion date: September 30, 2006]

Reduce backlog of overage FOIA requests and appeals by 50%.

[Projected completion date: July 31, 2007]

Reduce backlog to 10 overage FOIA requests and 10 appeals.

[Projected completion date: September 30, 2008]

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Improvement area 3: FOIA regulations

OSC will revise and update its FOIA regulations at 5 C.F.R. Part 1820.

Implementation steps:

LC&P to draft update of FOIA regulations.

[*Projected completion date: December 31, 2006*]

OSC to publish notice of proposed FOIA rulemaking in the *Federal Register*.

[*Projected completion date: April 30, 2007*]

OSC to publish final FOIA rule in the *Federal Register*.

[*Projected completion date: July 31, 2007*]

Improvement area 4: FOIA web site improvement; FOIA reference guide

To enhance public awareness and facilitate OSC processing of FOIA requests, OSC will update and expand information and guidance available on the FOIA page of its web site (www.osc.gov/foia.htm). Enhancements will include descriptions of the types of records maintained by OSC; links to, or information about, OSC records available without a FOIA request; tips on properly framing requests; description of the process used in answering requests; examples of simple and complex requests; criteria for expedited processing of requests; and steps requesters can take at any time to determine where their request falls in the queue of pending requests.

Implementation steps:

Draft language for updated and expanded FOIA guidance on OSC web site.

[*Projected completion date: September 30, 2006*]

Post interim update and expansion of FOIA guidance on OSC web site.

[*Projected completion date: October 31, 2006*]

Post final update and expansion of FOIA guidance (with revised regulation) on OSC web site.

[*Projected completion date: September 28, 2007*]

Improvement area 5: Affirmative/proactive disclosures

OSC already posts many documents and forms of general interest on its web site (www.osc.gov). It also maintains a public reading room at its headquarters office with

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documents required to be made available to the public pursuant to 5 U.S.C. § 1219. OSC will identify any additional documents suitable and available for posting on its web site.

Implementation steps:

LC&P consultation with other OSC components on identification of reading room and other documents or forms suitable and available for posting on its web site.

[*Projected completion date: October 31, 2006*]

Posting of suitable and available reading room or other documents or forms on OSC web site.

[*Projected completion date: August 31, 2007*]

Improvement area 6: Communication with requesters

OSC will modify the standard acknowledgement letter sent to each requester upon receipt of a new FOIA request or appeal to include status information – *i.e.*, where the new request stands in the queue of pending requests or appeals, and contact information to inquire about the status of requests or appeals thereafter.

Implementation steps:

Modify standard acknowledgement letter to include information about where the requester's request or appeal stands in the queue of pending requests and appeals, and contact information to inquire about the status of the request or appeal thereafter.

[*Projected completion date: July 15, 2006*]

Improvement area 7: Training

Vacancies in the FOIA Officer and Litigation Counsel positions in LC&P have been filled within the past six months. On-the-job training of both new hires is underway. Funds permitting, OSC will provide formal training for both as opportunities are identified and available. Refresher training on FOIA will also be provided on the same basis for other division attorneys.

Implementation steps:

Continue on-the-job training of new FOIA Officer.

[*Projected completion date: February 28, 2007*]

Continue on-the-job training of new Litigation Counsel on FOIA program responsibilities.

[*Projected completion date: July 31, 2007*]

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Provide formal training / refresher training on FOIA to all division staff.

[*Projected completion date: September 30, 2008*]

OVERALL PLAN TIMETABLES	
<i>Projected for completion by 12/31/06</i>	Further refinements/corrections identified during first nine months of operation and use of the automated tracking system
	Generate first automated annual report based on data from the FOIA tracking system
	Develop criteria for and divide complex requests into two tracks for purposes of processing; coordinate with ITB in adjusting the automated tracking system
	Draft update of FOIA regulations
	Draft language for enhanced web-based FOIA guidance
	Interim posting of new FOIA guidance on website
	Internal consultations to identify documents available and appropriate for OSC web site posting
	Add ranking language to FOIA request acknowledgement letter
<i>Projected for completion by 12/31/07</i>	Reduce backlog of overage FOIA requests and appeals by 50%
	Publish notice of proposed FOIA rulemaking in Federal Register
	Post final FOIA guidance on web site
	Publish final FOIA rule in Federal Register
	Posting of additional documents on OSC website
	Continued on-the-job training of FOIA Officer and Litigation Counsel
<i>Projected for completion after 12/31/07</i>	Elimination of backlog
	Formal training/refresher for all division staff



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**FOIA BACKLOG REDUCTION GOALS
 FOR FISCAL YEARS (FYs) 2008-2010**

Requests

FY	No. of pending requests (start of FY)	Est. # of requests incoming during FY	Goal – # of requests processed during FY	Goal – # of requests pending beyond statutory time period (i.e., backlog) at end of FY
2008	14	120	120	10

FY	Projected # of requests pending beyond statutory time period (i.e., backlog) at start of FY	Est. # of requests incoming during FY	Goal – # of requests to be processed during FY	Goal – # of requests pending beyond statutory time period (i.e., backlog) at end of FY
2009	10	120	125	6
2010	6	120	125	4

Appeals

FY	No. of pending appeals (start of FY)	Est. # of appeals incoming during FY	Goal – # of appeals processed during FY	Goal – # of appeals pending beyond statutory time period (i.e., backlog) at end of FY
2008	14	20	20	10

FY	Projected # of appeals pending beyond statutory time period (i.e., backlog) at start of FY	Est. # of appeals incoming during FY	Goal – # of appeals to be processed during FY	Goal – # of appeals pending beyond statutory time period (i.e., backlog) at end of FY
2009	10	20	22	8
2010	8	20	24	6