

U.S. Office of Special Counsel
2012 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 2012 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.

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?

No. 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 reviews FOIA guidance that is published by the U.S. Department of Justice (DOJ) Office of Information Policy (OIP).

OSC interns provide periodic assistance in the processing of FOIA requests. The FOIA Officer and/or the Acting General Counsel provide relevant one-on-one training to interns in such instances.

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

On May 3, 2011, OSC's Disclosure and Administrative Law Counsel co-taught the Procedural Requirements session at a training conference hosted by OIP.

On May 17, 2011, OSC's FOIA Officer attended OIP's training session regarding the proper application of FOIA Exemption 2 in light of the Supreme Court's decision in Milner v. Department of the Navy, 131 S. Ct. 1259 (2011).

Also on May 17, 2011, OSC's FOIA Officer attended the FOIA Fee Summit, an OIP-sponsored training event.

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?

No. OSC determined that, for the exemptions applied in this reporting period, withholding was necessary.

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

Not applicable.

5. Describe your agency's process to review records to determine whether discretionary releases are possible.

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 rather than the FOIA Officer.

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

In addition to the review process described in item 5, above, the responses to items 1 and 2, above, support the application of a presumption of openness.

In Section V.B.(1) of your agency's Annual FOIA Report, entitled "Disposition of FOIA Requests – All Processed Requests" the first two columns list the "Number of Full Grants" and the "Number of Partial Grants/Partial Denials." Compare your agency's 2011 Annual FOIA Report with last year's Annual FOIA Report, and answer the following questions:

7. Did your agency have an increase in the number of responses where records were released in full?

No (not in the number of responses). OSC's full grants increased, however, from 23% to 30% as a proportion of total responses from FY 2010 to FY 2011. Full denials decreased from 17% to 13% of total responses during the same period.

8. Did your agency have an increase in the number of responses where records were released in part?

No.

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. Is there regular interaction between agency FOIA professionals and the Chief FOIA Officer?

Yes.

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

Yes.

4. Describe the steps your agency has taken to assess whether adequate staffing is being devoted to FOIA administration.

OSC's Office of General Counsel (OGC) manages, among numerous other duties, the agency's FOIA program. OGC is presently comprised of an Acting General Counsel, a defensive litigation attorney, a general law attorney, a FOIA Officer, and two part-time interns. OSC has not hired a fourth attorney to replace the vacancy created by the departure of the long-serving General Counsel at the end of FY 2011.

OGC is presently recruiting term assistance through the Presidential Management Fellow program. During his or her rotation at OSC, the selectee will focus on processing FOIA appeals and requests. OGC is also recruiting for a part-time administrative assistant to fill a vacancy from last year. OGC hopes that adding this staff will provide for a greater level of resource application to FOIA matters.

5. Describe any other steps your agency has undertaken to ensure that your FOIA system operates efficiently and effectively.

The steps that OSC has undertaken are predominantly related to staff recruitment measures, and they are discussed in question 4, above. During the pendency of that recruitment process, OSC has taken the additional steps of assigning some FOIA matters to an OGC attorney who primarily handles other duties. OSC has also assigned some FOIA review and initial recommendation duties to the part-time OGC interns.

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. Has your agency added new material to your website since last year?

Yes.

2. Provide examples of the records, datasets, videos, etc., that have been posted this past year.

Such postings include an amicus brief that OSC filed before the Merit Systems Protection Board, statements by the Special Counsel regarding whistleblower protection legislation and Hatch Act legislation, and press releases on issues of importance to OSC.

3. Describe the system your agency uses to routinely identify records that are appropriate for posting.

Agency leadership regularly considers which program-related information is appropriate for public release.

4. Beyond posting new material, is your agency taking steps to make the 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, providing explanatory material, etc.?

OSC has reached out to stakeholders in order to learn how OSC can make improvements. For example, OSC reached out to non-profit good government groups for input on how the agency can improve its website. These groups provided detailed suggestions that OSC is currently considering or working to implement.

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

See items 1 through 4, 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?

OSC receives requests by mail and facsimile. On occasion in recent years, OSC has received requests by e-mail. OSC will plan to implement a formal system to receive electronic requests.

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?

Requesters can obtain status information in several ways, including by e-mail, but OSC does not have an online status tracking tool.

4. If not, is your agency taking steps to establish this capability?

Not at the present time.

Use of technology to facilitate processing of requests:

5. 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.

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

OSC is presently developing 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 2011 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 2011, was the average number of days to process simple requests twenty working days or fewer?

Yes (the average was three days).
 - 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 2011 as compared to Fiscal Year 2010. 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 2010 and Fiscal Year 2011 should be used for this section.

- a. If your agency had a backlog of requests at the close of Fiscal Year 2011, did that backlog decrease as compared with Fiscal Year 2010?

No (it increased to thirty-nine requests).

- b. If your agency had a backlog of administrative appeals in Fiscal Year 2011, did that backlog decrease as compared to Fiscal Year 2010?

No (it increased to eight appeals).

- c. In Fiscal Year 2011, did your agency close the ten oldest requests that were pending as of the end of Fiscal Year 2010?

No. For 2010, OSC reported five pending requests in section VII.E. In FY 2011, OSC closed two of those five requests.

- d. In Fiscal Year 2011, did your agency close the ten oldest administrative appeals that were pending as of the end of Fiscal Year 2010?

No. For 2010, OSC reported seven pending appeals in section VI.C(5). In FY 2011, OSC closed one of those seven 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?

Yes, in part.

- 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 2011, OGC was comprised of a General Counsel, a defensive litigation attorney, a general law attorney, a disclosure and administrative law attorney (for most, but not all, of FY 2011), and a FOIA Officer. OGC also had a law student intern during the summer of 2011, and a part-time administrative assistant (which position became vacant in June 2011). A vacancy in the disclosure and administrative law attorney position during the first months of FY 2011, the non-FOIA demand placed on OGC attorneys throughout FY 2011, and the vacancy in the administrative support position for nearly four months at the end of FY 2011, all contributed to the increase in the request backlog and the non-reduction of the appeals backlog.

While the agency did not hire a fourth attorney to fill the attorney vacancy left when the General Counsel departed at the end of FY 2011, OGC is presently recruiting temporary assistance through the Presidential Management Fellow (PMF) program. During his or her rotation at OSC, the PMF selectee will focus on processing FOIA appeals and requests. OGC is also recruiting for a part-time administrative assistant to fill the administrative support vacancy from last year.

OGC hopes that adding this staff will provide for a greater level of resource application to FOIA matters.

Section VI

All agencies should strive to both reduce any existing backlogs or requests and appeals and to improve their timeliness in responding to requests and appeals. Describe the steps your agency is taking to make improvements in those areas. In doing so, answer the following questions and then also include any other steps being taken to reduce backlogs and to improve timeliness.

1. Does your agency routinely set goals and monitor the progress of your FOIA caseload?

Yes.

2. Has your agency increased its FOIA staffing?

No.

3. Has your agency made IT improvements to increase timeliness?

The agency's Information Technology Branch developed a tool for the FOIA officer to use when compiling information for the annual FOIA Report. OSC hopes that this will decrease the amount of time necessary to create the report, and will result in more time available for FOIA processing during the annual reporting season.

4. If your agency receives consultations from other agencies, has your agency taken steps to improve the efficiency of the handling of such consultations, such as utilizing IT to share the documents, or establishing guidelines or agreements with other agencies on the handling of particular information to speed up or eliminate the need for consultations?

Not applicable. OSC rarely receives consultations from other agencies. For example, OSC received only one consultation during this reporting period. OSC did not receive any consultations in FY 2010.

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 2011?

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.

Carolyn Lerner, the new Special Counsel, took office in June 2011, and the agency's Senior Communications Analyst arrived in the months that followed. As a result of the Special Counsel's leadership and public outreach, OSC is now better able to keep the public apprised of the agency's mission-critical efforts.

For example, Special Counsel Lerner has increased transparency at OSC by providing several news interviews that discuss the administration of OSC as well as significant cases being handled by the agency. The OSC website contains links to her interviews with CNN and National Public Radio. Additional steps taken to increase transparency, discussed above in section III.2, include the posting of materials related to litigation, statements, and press releases on matters of importance to OSC.