

Department of Energy

Chief Freedom of Information Act (FOIA) Officer Report for FY2012

Ingrid A.C. Kolb, Director, Office of Management

I. Steps Taken to Apply the Presumption of Openness

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

The agency did not conduct an agency wide FOIA conference. However, the Office of Hearings and Appeals in tandem with the FOIA Office conducted monthly training via conference calls for the field and Headquarters. The training covered a broad area of topics. The FOIA Office also conducted periodic conference calls with field personnel to discuss FOIA issues and developments. The Department of Justice (DOJ) Office of Information Policy also provided a training session for DOE HQ employees with FOIA responsibilities in December 2012.

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

DOE FOIA professionals have attended training provided by DOJ, and the American Society of Access Professionals (ASAP). Some have also attended training provided by OGIS on FOIA Dispute Resolution.

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

Yes. The Department has made discretionary releases of information that were exempt because it was determined there would be no harm in making the information available.

There was an increase this year in our use of Exemption 5 which protects from disclosure, inter-agency or intra-agency communications that are protected by legal privilege. As stated in the Annual Report for FY2011, Exemption 5 was used 102 times to deny requests in whole or in part. In FY2012, Exemption 5 was used 106 times, a .03% increase from the year before. However, in 101 of those

instances, or 95%, it resulted in a partial release, and only five instances, or 5%; it resulted in a full denial.

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

Exemption 5 – Both deliberative process/pre-decisional information, attorney work-product and attorney-client information.

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

50 year old draft letter; records related to deliberative discussions regarding quotes, price reasonableness and other requirements for blade server purchase; records related to purchase orders including deliberative information on signing dates, effective dates, prices/amounts, and “8(a) set-aside” status; records related to deliberative information contained in the Energy Efficiency and Conservation Block Grant program comments, evaluative comments regarding activity strengths and weaknesses, and deliberative evaluation comments made by peer reviewers; attorney-work product and attorney-client information; performance evaluation reports on contractor award fee grants; information related to the decision making on hydro operations; and deliberative internal discussions between agency staff.

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

At the Department, the FOIA Offices continue to communicate with records holders and subject matter experts on sensitivities contained in responsive documents and the possibility of discretionary release. Legal counsel reviews and must concur on all withholdings using a FOIA exemption. If it is determined by the cognizant office/record holder that information in response to a request should be protected from release by an exemption, the documents and rationale for withholding are provided to counsel for review. Counsel reviews the documents to first determine if the material meets the threshold of the exemption that is identified. If the information can in fact be protected by the exemption, counsel then looks at whether there is a justifiable harm in releasing the information. If there is no justifiable harm, counsel advises the cognizant office/record holder that release is warranted.

We continue to include language in our response letters referencing the Attorney General's memorandum, our commitment to openness and our responsibility to segregate releasable information and provide as much information as possible to the requester when full disclosure is not possible.

II. Steps Taken to Ensure that Your Agency has an Effective System in Place for Responding to Requests

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

Yes, FOIA professionals at the Department have sufficient IT support.

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

Yes, our FOIA professionals continue to work with and advise the Open Government Team on the types of requests the agency is receiving. We identify types of records that appear to be of greatest interest to the public and recommend those records be proactively disclosed. We also communicate efforts to reduce the backlog at the Department and updates on goals in the Open Government Plan and other internal goals related to FOIA reduction.

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

Yes, at the Department, we advise senior management of the current workload, complexity of requests, barriers to success regarding responsiveness, litigation, and openness. While budgets remain a continuing challenge, some offices including the Headquarters FOIA Office have hired additional staff to process requests. The Department also continues its efforts to centralize more of the FOIA process at Headquarters. The Headquarters FOIA Office hired a team of contractor attorneys with a background in FOIA processing as part of this effort. The offices that participate in this program are only required to conduct the search for responsive documents, validate the search efforts, and provide information regarding sensitivities that may be contained in the information. Our FOIA team then reviews the documents, prepares final packages, consults with the subject matter experts, works with counsel and finalizes the case for response. This has improved the process for these offices. We are continuing to expand this model at Headquarters and include additional offices.

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.

The Department continues to strive for ways to improve our process. Issues are discussed at meetings between the Chief FOIA Officer, FOIA staff and FOIA Managers. The FOIA Office continues its monthly status meeting with the Office of General Counsel to resolve pending issues. We communicate and provide suggestions to the contractor on ways to improve the FOIA software utilized at the Department.

We work closely with the IT support group in the Office of Management that provides technical support for the FOIA tracking system. The Department continues to hold monthly conference calls with Departmental FOIA Officers, during which individual requests, as well as the overall process, are discussed. A desk reference guide is provided to employees with FOIA responsibilities to ensure that they are knowledgeable about procedures for processing FOIA requests. In addition, we continue to request bi-weekly status reports on all open cases.

While the Department has not conducted a formal study we did review our current processes to determine where there were inefficiencies and determined there were areas that needed improvement. One of the areas is the time spent searching for documents. We have and continue to educate offices on how to conduct searches. We believe this will help to decrease the time it takes record holders to conduct searches. We have also reviewed systems that allow electronic searches to be conducted over broad range of departmental files, thus leading to a more expeditious search. We have identified issues in the amount of review time and layers of review of FOIA requests at Headquarters and are re-evaluating the importance and necessity of these reviews for every case. The idea is to impose a more risk based approach to the reviews.

With regard to consultations, we review each independently to determine how we can efficiently take action. This includes contacting the originating agency for further guidance/instruction and in some cases arranging to have documents shipped electronically. We have also reviewed our process for documents that require consultations with other agencies. For example, if a document that contains equities of another agency(s) is being withheld in its entirety by our office, a consult may not be necessary, thus eliminating unnecessary processing days.

At the NNSA weekly “TEAM” knowledge sharing meetings are routinely accomplished. The primary objective of the meetings, are to improve standardization of all business functions that include the identification of work center redundancies and the implementation of efficient FOIA concepts.

III. Steps Taken to Increase Proactive Disclosures

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

Information pertaining to the Joint Outreach Team efforts; Transmission Infrastructure Program updates; environmental assessments and impact assessments; contracts; purchase card holder lists at various DOE sites; performance report cards for all of the Office of Science national laboratories; information related to Chinese-manufactured drywall research at Lawrence Berkeley National Laboratory; information pertaining to the Solar Decathlon; NREL M&O contract; the Office of Scientific and Technical Information (OSTI) uploaded 124,631 bibliographical citations and 18,088 full text records for viewing and downloading on many of its publicly available web based products and services; photos and details about Hanford cleanup of the various projects on site; information on the Hanford Advisory Board, to announce public meeting dates, times and topics, to publicize the local and national budget rollouts;

Various sites of the Department continue to post safety standards; National Environmental Policy Act (NEPA) documents; performance reports; records related to weapons; historical information on activities and operations of interest to current and former workers, their families and residents of the east Tennessee region; Environmental Impact Statements; Citizen Advisory Board presentations; and responses to FOIA requests.

The Department continues to monitor and update these major data sets on its Open Government Page: (1) **Deepwater Horizon Response Datasets:** Due to the high level of interest in the oil spill in the Gulf of Mexico, Data.gov is featuring data from the Department of Energy (DOE), the Environmental Protection Agency (EPA), the National Oceanic and Atmospheric Administration (NOAA), the Department of the Interior (DOI), and the states of Florida and Louisiana related to the spill, its effects, and the cleanup effort. Data include oil and gas flow and recovery measurements, air and water sample data, oil spill-related exposure information, and other data of interest to scientists, recovery workers and citizens; (2) **DOE Patents Database:** Department of Energy's central collection of patent information contains bibliographic data for a database of patents resulting from sponsored research by the Department of Energy and predecessor agencies. This data service allows the downloading of bibliographic

records in a format that can be used to load the records into other databases or search tools. A request for data returns the first one hundred records. See Technical Documentation for instructions on obtaining additional records; and (3) **Geothermal Technologies Database:** Contains geothermal technical and programmatic reports dating from the 1970's to present day. These "legacy" reports are among the most valuable sources of DOE-sponsored information in the field of geothermal energy technology. This data services allows the downloading of bibliographic records in formats that can be used to load the records into other databases or search tools. A request for data returns the first twenty-five records. See Technical Documentation for instructions on obtaining additional records.

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.

Energy.gov, the Department of Energy's flagship website, continues to be a leader in the digital government sphere. The Department is continuing its work to consolidate and migrate internal offices into the Energy.gov platform, creating a more intuitive, seamless experience for users. As offices continue to come onto Energy.gov, their content becomes searchable using our SOLR internal search tool that allows for filtering by office and by content type. Additionally, offices are able to make use of Energy.gov enhancements that make finding information easier, including aggregation of related content, location tagging, interactive maps and graphics.

Energy.gov has invested heavily in improving its internal search capability through improved filtering, highlighting high-traffic content, and adding summaries and thumbnails to search results. Full PDF searching is now being integrated into the internal search function and should be available in February 2013.

Based on feedback from the user community, the OSTI instituted semantic search capabilities. This allows the user to receive results that will facilitate the exploration of more narrow concepts, related concepts, or broader concepts. OSTI has also recently implemented Data Identification Service across the DOE

complex. Through the OSTI Data ID Service, Digital Object Identifiers (DOIs) are assigned to research databases, and then registered with Data Cite to establish persistence. This initiative makes the DOE datasets findable in commercial search engines, federated search portals, and global search engines.

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

The Department continues to update its FOIA portal found at <http://foiportal.energy.gov/>. The portal provides access to documents previously released under FOIA. The portal is full text searchable and allows the public to conduct key word searches and locate information released by the Department. The Hanford website features a “whats new” link which allows frequent visitors to access the most recently posted information on the site. The DOE Information Center (DOEIC) was relocated to OSTI where professional resources are available to help the public gain access to materials quicker and in the format most useful to them. At OSTI, a [Science.gov](http://www.science.gov) mobile site and mobile app have increased the OSTI presence in the mobile world. Along with providing increased search capabilities was the release of a Spanish language version of the site, including a Spanish language search capability.

IV. Steps Taken to Greater Utilize Technology

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

Yes. The agency has an electronic FOIA request form.

2. If your agency is decentralized, can FOIA requests be made electronically to all components of your agency?

Yes.

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

Some components of the agency have the capability to allow requesters to track their requests electronically by posting information on the webpage. Requesters also can call the service centers to obtain a status on their request where this capability is not available. However, requester interaction with our tracking system to obtain status is not a capability we currently have with our tracking system.

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.

This is not a function we currently have with our tracking system.

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

The tracking system we utilize does capture the estimated completion date for each case. However, access by the public is not a capability of our current tracking system.

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

Yes. The agency has surveyed several vendor technologies that offer this capability. Budget considerations, however, play a role in purchasing new technology and we continue to evaluate options.

7. 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?

The Department is not currently utilizing any new technology to facilitate overall FOIA efficiency. However, we have surveyed several vendor technologies that offer the capability to improve search capabilities, sort, de-duplicate and redact. Again, budget constraints are an issue regarding the ability to utilize such technologies. We continue, however, to evaluate options.

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

N/A

V. **Steps Taken to Improve Timeliness in Responding to Requests and Reduce Backlogs**

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 request separately, was the average number of days to process non-expedited requests twenty working days or fewer?

N/A.

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 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. The Department's FOIA backlog increased by 19%, or from 384 in FY2011 to 456 in FY2012.

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

Yes. There was a 50% decrease in the number of backlogged administrative appeals between FY2012 and FY2011. In FY2011, there were eight backlogged administrative appeals versus four in FY2012.

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

No. The agency did not close all of the ten oldest from the previous report. However, we did complete the oldest case which was received in 2003 as well as three others from the ten oldest.

- 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. The agency did not close all ten of the oldest appeals. However, the agency did complete the oldest appeal and all but three other appeals from the ten oldest.

- 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?

No.

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

No.

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

Yes. Requesters are asking for any and all records in some cases or the subject of the requests typically are complex in nature, classified, or may require searches and reviews by multiple components or agencies or involve a voluminous amount of material.

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

Budget considerations across the Department continue to affect the ability of programs to hire personnel dedicated to, and experienced in, processing FOIA cases. With the exception of the HQ FOIA Office and a handful of other offices, most personnel processing FOIA cases within the Department do so as a collateral duty.

Administrative Appeal Backlog:

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

N/A. There was a reduction in the administrative backlog.

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

N/A.

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

N/A.

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

N/A.

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.

The DOE Headquarters and field sites with the exception of the NNSA issue partial responses whenever possible. By providing partial responses a requester is aware that his/her case is proactively being processed. This fosters a positive relationship with the requester community. We estimate that partial responses have been made in at least 45% of the backlogged cases.

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?

N/A.

Spotlight on Success

Out of all the activities undertaken by your agency since March 2012 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.

The Department's continued efforts to address the cases that had been languishing for more than a year, engaging both the most senior leadership at DOE and other agencies, as necessary. As a result, we were able to close the oldest pending case from the FY 2011 report, a complicated case that had been received in 2003. This effort also resulted in DOE closing three

other cases listed on the ten oldest for FY 2011. We are continuing this aggressive approach to addressing older and complicated requests, and expect our success to continue.