Department of Energy

Chief Freedom of Information Act (FOIA) Officer Report for FY2010

I. <u>**Steps Taken to Apply the Presumption of Openness**</u>

1. Description

    a. Describe how the President's FOIA Memorandum and the Attorney General's FOIA Guidelines have been publicized throughout your agency.

    The Secretary of Energy issued a message to all DOE federal and contractor employees institutionalizing the Department's commitment to openness and promptness in responding to FOIA requests. In addition, the Chief FOIA Officer notified the Heads of all Departmental elements of their responsibilities regarding the President's and Attorney General's guidance on FOIA. The memos have also been placed on Departmental websites, including Powerpedia, a collaboration space consisting of a wiki site designed to facilitate information sharing and coordination among DOE program offices.

    b. What training has been attended and/or conducted on the new FOIA Guidelines?

    In FY09, the Department instituted training for all DOE federal and contractor employees with FOIA responsibilities. The training covered the direction provided in the memoranda including the proper application of exemptions and FOIA procedures.   Since that time, DOE employees with FOIA responsibilities have also attended training provided by the Department of Justice and the American Society of Access Professionals.

    c. How has your agency created or modified your internal guidance to reflect the presumption of openness?

    At the Department, there is constant communication with record holders about openness; as this is a change in culture, we strive to communicate that message at every opportunity.   Posing the question, what can be released versus what should be withheld is part of our process. This paradigm is also reiterated in the internal guidelines we have issued on Powerpedia for the FOIA program at the Department.

d. To what extent has your agency made discretionary releases of otherwise exempt information?

Consistent with guidance in the memoranda, draft and pre-decisional material is being more closely reviewed and, in many cases, more information is being released. The Department no longer withholds draft material in its entirety without determining whether segregation is possible. Line by line reviews are often conducted of draft material to determine any material that can be released.

There was an increase in our use of Exemption 5 this year. Exemption 5 protects from disclosure, inter-agency or intra agency communications that are protected by legal privilege. As stated in the Annual Report for FY2009, Exemption 5 was used 60 times to deny requests in whole or in part. In FY2010, Exemption 5 was used 79 times, a 32% increase from the year before. However, in 70 of those instances or 89%, it resulted in a partial release, and only nine instances or 11% resulted in a full denial.

For instance, the Department's Oak Ridge Office cited two incidents where they released attorney-client work products and deliberative information when they determined that the potential risk did not outweigh the public's interest in disclosure.

The Department also had a decrease in the use of Exemption 2. Exemption 2 protects from disclosure, information related to internal agency rules and practices. In the Annual Report for FY2009, Exemption 2 was used 48 times to deny requests in whole or in part. In FY2010, Exemption 2 was used 34 times, a 29% decrease from the year before. Moreover, each time Exemption 2 was used it resulted in a partial release.

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

Exemption 5.

f. How does your agency review records to determine if discretionary releases are possible?

At the Department, 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 that release is necessary.

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

In addition to the Secretary's message to all DOE employees institutionalizing the Department's commitment to openness, language has also been included 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.

2. Disclosure Comparisons

The Department reported 684 full releases and 289 partial releases in the Annual FOIA Report for FY2009. In the Annual FOIA Report for FY2010, the Department reported 826 full releases and 475 partial releases. In FY2010 there was a 17% increase in full, and 39% increase in partial releases from the previous year. Moreover, full and partial releases accounted for the majority of cases processed in FY2010, or 61% of the total processed. Full releases accounted for 39%, and partial releases 22%, of the total processed.

There was a 1% decrease in full denials, which accounted for only 1% of total processed in FY2010. Seen another way, fewer cases were closed in 2010 as a result of a full denial; 27 cases were closed in FY2009 versus 25 cases in FY2010. The remaining 38% of requests processed in FY2009 were resolved through alternative means, including transferring requests to other agencies; determinations of no responsive records; requests being withdrawn by requesters; duplicate requests from the same requesters; or requests which did not reasonably describe the documents sought.

II. <u>Steps Taken to Ensure that Your Agency has an Effective System for Responding to Requests</u>

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

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

b. Describe how your agency's FOIA professionals interact with your Open Government Team.

The FOIA Office advises 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 as the types of records to consider for proactive disclosure in the future. We also communicate to the team our efforts in reducing the backlog at the Department and provide updates on our goals in the Open Government Plan.

c. Describe the steps your agency has taken to assess whether adequate staffing is being devoted to responding to FOIA requests.

Across the Department senior management is routinely advised of the current workload, complexity of requests, barriers to success regarding responsiveness, litigation, and openness. While budget is a continuing challenge, some offices have hired additional staff to process requests. At Headquarters, we are moving from a decentralized process to a centralized process. As part of this change, additional staff will be hired for the FOIA Office and the Office of the General Counsel. Centralizing the process will provide more consistent responses to requesters, and improve the timeliness of processing requests by increasing the overall number of dedicated staff processing requests.

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

One step the Department took to ensure its system for responding to requests is effective and efficient was to conduct a four day training conference in FY09 for all DOE federal and contractor employees with FOIA responsibilities. At the conference, the key roles various agency personnel (e.g., Office of the General Counsel/Chief Counsel, Classification, Office of Hearings and Appeals, records holders/Information Technology [IT]) play with regard to processing requests were discussed in detail. The training also emphasized the importance of maintaining communications with requesters to clarify requests, updating the status of requests, and providing interim responses to show progress in responding to the request.

We work closely with the IT support group in the Office of Management that was created last year to assist in the technology management and to provide technical support for the FOIA tracking system. The Department also holds monthly conference calls with Departmental FOIA Officers, during which individual requests, as well as the overall process, are discussed. The 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 and have initiated

monthly status meetings between the FOIA Office and the Office of General Counsel.

III. Steps Taken to Increase Proactive Disclosures

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

Yes.

    b. What types of records have been posted?

Various contracts including the WIPP Management and Operating contract, Carlsbad Technical Assistance Contract and the TRANSCOM contract; CERCLA reviews; safety standards; 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 community and east Tennessee region; declassified documents; Tax reports; RODS; I-5 Corridor Reinforcement Project documents; Environmental Impact Statements; Citizen Advisory Board presentations; information related to the Transmission Improvement Process; FY09 DOE reviews of Chicago's M&O Lab performance; and responses to FOIA requests.

The Department also posted three major data sets on its Open Government Page: (1) DOE Research and Development Project Summaries XML Data Service (This service allows users to download records describing ongoing or recently completed projects performed by the DOE laboratories and research facilities); (2) Energy Citations Database XML Data Service (This service allows users to download over 2.6 million bibliographic citations to science research); and (3) Information Bridge XML Data Service (This service allows users to download U.S. Department of Energy bibliographic citations and associated detailed full text scientific and technical reports at no cost). Each of these datasets is updated periodically.

The Department also posted the U.S. Department of Energy Categorical Exclusion (CX) Determinations Database on Data.gov. This database provides a searchable, user-friendly database, for people interested in DOE NEPA actions. It is the first NEPA-specific tool registered with Data.gov. It contains DOE Program, Field, and Site Office CX determinations required to be posted online under DOE policy, and also some for which documentation and posting are optional (certain classes of actions or determinations made before November 2, 2009). Users can browse the determinations posted in the comprehensive database or search by state, CX applied, data range, DOE program, Field, or Site

Office, keyword, or whether the CX determination is for a project related to the American Recovery and Reinvestment Act of 2009. Links to the CX determinations are provided within the database. A raw data file of all records in the database is also available for direct download.

c. Give examples of the types of records your agency now posts that used to be available only by making a FOIA request for them.

Various contracts including the WIPP management and operating contract; Carlsbad Technical Assistance contract and the TRANSCOM contract ; responses to prior FOIA requests; weapons records; declassified documents from the 1940's; NEPA documents; RODS, I-5 Corridor Reinforcement Project documents; Environmental Impact Statements; Citizen Advisory Board presentations; reviews of Chicago's M&O Lab performance; declassified documents; information related to DOE Research and Development Project Summaries; bibliographic citations to science research; and bibliographic citations and associated detailed full-text scientific and technical reports.

d. What system do you have in place to routinely identify records that are appropriate for posting?

We notify the Open Government Team of records that the FOIA staff has determined to be of greatest interest to the public and make recommendations that they be considered by the record holders for proactive posting on DOE web pages. Periodically we provide a listing of all FOIA requests received to the team as well. Also at various sites, meetings are conducted with Public Affairs to discuss potential records appropriate for posting.

e. How do you utilize social media in disseminating information?

The Secretary of Energy maintains a personal Facebook account, through which he routinely provides information to the public sharing his perspective on matters involving the Department. The Department also has an enterprise level presence on Facebook, Twitter, YouTube, and Flickr, all of which are updated regularly in order to provide access to services and information, amplify the goals of the Department and facilitate an open discussion with the public.

Many program offices also have a social media presence they utilize to promote initiatives, provide customer oriented information and reach out to key stakeholders. A full listing of these social media sites will soon be made available at http://energy.gov/socialmedia.

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

The Department has created a FOIA portal. This portal will go live in March 2011. In the initial phase of the portal, it will provide documents released under the FOIA and will be full text searchable. It will be updated when additional information is released. This will allow the public to conduct key word searches and locate information released by the Department. The goal for the portal is to make more information available in a central repository thus eliminating the need for some future FOIA requests.

IV. Steps Taken to Greater Utilize Technology

1. Electronic receipt of FOIA requests:

   a. What proportion of the components within your agency which receive FOIA requests have the capability to receive such requests electronically?

   All components have this capability.

   b. To what extent have you increased the number of components doing so since the filing of your last Chief FOIA Officers Report?

   All components have previously had this capability.

   c. What methods does your agency use to receive requests electronically?

   The Department established an online FOIA request form for requesters to submit FOIA requests electronically.

2. Electronic tracking of FOIA requests:

   a. What proportion of components within your agency which receive FOIA requests have the capability to track such requests electronically?

   All components have the capability to track requests electronically through a procured FOIA-specific software.

   b. To what extent have you increased the number of components doing so since the filing of your last Chief FOIA Officers report?

   All components have previously had this capability.

   c. What methods does your agency use to track requests electronically?

The agency uses a procured FOIA-specific software to track requests electronically.

3. Electronic processing of FOIA requests:

    a. What proportion of components within your agency which receive FOIA requests have the capability to process such requests electronically?

    All components have the capability to process requests electronically.

    b. To what extent have you increased the number of components doing so since the filing of your last Chief FOIA Officers report?

    All components have previously had this capability.

    c. What methods does your agency use to process requests electronically?

    The agency uses a procured FOIA-specific software to process requests electronically. The software allows the user to electronically assign requests for action, has a built-in redaction capability that allows for the electronic review and redaction of documents. It also facilitates the use of templates.

4. Electronic preparation of your Annual FOIA Report:

    a. What type of technology does your agency use to prepare your agency Annual FOIA Report?

    The Department uses a procured FOIA-specific software to generate its FOIA Annual Report.

    b. If you are not satisfied with your existing system to prepare your Annual FOIA Report, describe the steps you have taken to increase your use of technology for next year.

    N/A

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

1. If your agency has a backlog, report here whether the backlog is decreasing. That reduction should be measured in two ways. First, report whether the number of backlogged requests and backlogged administrative appeals that remain pending at the end of the fiscal year decreased or increased, and by how many, when compared with last fiscal year. Second, report whether your agency closed in

Fiscal Year 2010 the ten oldest of those pending requests and appeals from Fiscal Year 2009, and if not, report how many of them your agency did close.

The Department successfully closed many of its oldest FOIA requests in FY2010 which reduced the average age of simple backlogged requests. Due primarily to an increase in the number of new cases, the closure of these older requests did not result in a reduction in the overall backlog. The Department's FOIA backlog increased by 13%, or from 297 in FY2009 to 334 in FY2010. The Department received 1809 new cases in FY2009 versus 2206 in FY2010, a 22% increase.

The Department closed the oldest pending case reported in the FY2009 report. That case had been received on February 7, 2000. In addition, DOE also closed four other cases listed on the ten oldest for FY2009. The oldest case reported in the Annual FOIA Report for FY2010 was received on February 14, 2001. During FY2010, the Department completed 51% of cases that were reported as backlogged and that were five or more years old.

There was a 33% increase in the number of backlogged administrative appeals between FY2009 and FY2010. In FY2009, there were two backlogged administrative appeals versus three in FY2010. There was, however, a reduction in the age of backlogged administrative appeals. In the Annual FOIA Report for FY2009, the Department reported its oldest administrative appeal as being received on June 20, 2007. This case was completed in FY2010. In FY2010, the Department successfully reduced the age of backlogged requests and administrative appeals.

2. If there has not been a reduction in the backlog as measured by either of these metrics, describe why that has occurred. In doing so, answer the following questions and then include any other additional explanation:

   a. Is the backlog increase a result of an increase in the number of incoming requests or appeals?

   Yes. The Department had a 22% increase in new FOIA requests and a 46% increase in administrative appeals in FY2010.

   b. Is the backlog increase caused by a loss of staff?

   No.

   c. Is the backlog increase 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 are complex in nature, classified or may require searches and reviews by multiple components or agencies.

d. What other causes, if any, contributed to the increase in backlog?

N/A

3. Describe the steps your agency is taking to reduce any backlogs and to improve timeliness in responding to requests and administrative appeals. In doing so answer the following questions and then also include any other steps being taken to improve timeliness.

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

Yes. We continue our aggressive strategy for processing the increased number of requests that included advising all Under Secretaries, Assistant Secretaries and other Department heads of the pending cases assigned to their organizations. In addition, the FOIA Director and his staff continue to conduct bi-weekly FOIA meetings/conference calls with every program office/record holder regarding the status, issues and progress made in processing the requests they have been assigned. The Department is currently focusing on all backlogged cases and administrative appeals from 2001-2009 in an effort to close out older cases.

At Headquarters, the initiative to centralize the FOIA process is underway. One of President Obama's top priorities is to make the federal government more open and accessible to the American people. Secretary Chu has demonstrated the Department's commitment to open government by significantly expanding the amount of information available about our programs, funding opportunities, and accomplishments as well as valuable data about our Nation's clean energy future and cutting-edge scientific research.

A key element in achieving the goals of open government is the Department's commitment to improving the process for responding to Freedom of Information Act (FOIA) requests. In our Open Government Plan, published in June 2010, we committed to improving our FOIA performance by favoring disclosure and transparency, working cooperatively with FOIA requesters, anticipating interest in records before requests are made, and making requested records available promptly.

To accomplish these ambitious goals and better coordinate our Departmental responses to FOIA requests, we are centralizing and standardizing the processing of all Headquarters FOIA requests.

The National Nuclear Security Administration (NNSA) Service center in Albuquerque, NM, which processes a significant number of the Department's FOIA cases, also continues to conduct bi-weekly conference calls with site offices' points-of-contacts and with NNSA Headquarters divisions to track the status of pending FOIA requests and to address issues with processing and closing cases under their jurisdiction. The NNSA also is providing a weekly report to their senior management detailing statistical information on the number of cases received, processed, and overdue cases by each NNSA division/organization.

b. Has your agency increased its FOIA staffing?

Yes, as stated earlier, some Headquarters offices and agency components have increased their FOIA staffing. The centralization effort will also require increased FOIA staffing.

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

Yes, by implementing the FOIA-specific software. Since its implementation during the previous reporting period, the Department is utilizing more of its capabilities, such as the electronic review and redaction tool. In some instances, cases were processed more timely because we began utilizing this tool.

d. Has your agency Chief FOIA Officer been involved in overseeing your agency's capacity to process requests?

Yes. The Chief FOIA Officer (CFO) is very involved in the agency's FOIA program. The CFO maintains constant communication with the FOIA Director and stays abreast of case load of the Department. The CFO is very instrumental in obtaining attention at high levels of the Department and advising senior management of their responsibilities in helping to reduce the backlog and processing time for requests.

<div align="center">Spotlight on Success</div>

The Department made a strong push to address the cases that had been languishing for many years, 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 reported in the FY2009 report, a case that had been received on February 7, 2000. This effort also resulted in DOE closing four other cases listed on the ten oldest for FY2009. Overall, during FY2010, the Department completed 51% of

cases that were reported as backlogged and that were five or more years old. We are continuing this aggressive approach to addressing requests and expect our success to continue.