

Department of Energy

Chief Freedom of Information Act (FOIA) Officer Report for FY2011

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 training was provided to DOE field employees with FOIA responsibilities at the American Society of Access Professionals (ASAP) National Training in Las Vegas, March 2011. The Department of Justice (DOJ) Office of Information Policy also conducted training for DOE HQ employees with FOIA responsibilities in July 2011.

2. 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, ASAP and the United States Department of Agriculture Graduate School during this past reporting period.

3. 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 FY2010, Exemption 5 was used 79 times to deny requests in whole or in part. In FY2011, Exemption 5 was used 102 times, a 29% increase from the year before. However, in 97 of those instances, or 95%, it resulted in a partial release, and only five instances, or 5%; it resulted in a full denial.

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

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

5. Describe your agency's process to review records to determine whether 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 warranted.

6. 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.

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

No. The Department reported 826 full releases in the FY 2010 Annual FOIA Report. In the FY 2011 Annual FOIA Report, the Department reported 714 full releases. In FY2011 there was a 14% decrease in full releases. However, full releases accounted for the highest percentage of cases processed in FY2011, or 31% of the total processed.

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

Yes. The Department reported 475 partial releases in the FY 2010 Annual FOIA Report. In the FY 2011 Annual FOIA Report, the Department reported 515 partial releases, a 7% increase. Moreover, partial releases accounted for the second highest percentage of cases processed in FY2011, or 23% of the total processed.

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

Yes. The Chief FOIA Officer is very active in the FOIA Program at the Department. She holds quarterly meetings with individuals who have been designated as the FOIA Manager for their program. She also communicates on a regular basis with these individuals regarding the agency's backlog and progress on responding to requests and ways to improve processing. She continues to address FOIA related issues with senior management including the Deputy Secretary and other senior leaders on a regular basis.

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

The FOIA Office continues 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.

4. 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 budgets are a continuing challenge, some offices have hired additional staff to process requests. The Department has also begun

moving to a more centralized process at Headquarters. As part of this effort, each program office at Headquarters was asked to designate an individual to act as their FOIA Specialist and an individual to act as their FOIA Manager. The FOIA Specialist's role and responsibility is to act as the adviser to their program on FOIA matters regarding search and review of documents and responding to requests. The role of the FOIA Manager is to oversee and ensure that there is cooperation from all program employees with regard to FOIA requests and assisting the FOIA Specialist in preparing draft and final response packages. The Office of the General Counsel also hired additional attorneys to review FOIA responses. The FOIA Specialists and the additional attorneys were trained on FOIA related matters by the DOJ Office of Information Policy.

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

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 has a monthly status meeting with the Office of General Counsel to resolve pending issues. We continue to emphasize 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 in part to assist in 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. 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.

III. Steps Taken to Increase Proactive Disclosures

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

Yes.

2. What types of records have been posted?

Purchase card holder lists at various DOE sites; information related to monkey experiments at the Brookhaven National Laboratory; newly awarded contracts at the Environmental Management Consolidated Business Center (EMCBC);

documents concerning contractor performance at EMCBC; redacted versions of classified material at the National Nuclear Security Administration; videos of demolition and decommissioning work as well as the latest video chapters of the Emmy award winning production “The Hanford Story”; and, applications under the electric Drive Vehicle Battery Component.

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 also posted three new 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.

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

We continue to notify the Open Government Team of records that the FOIA staff has determined to be of greatest interest to the public and make recommendations

for proactive posting on DOE web pages. Periodically, we provide the team with a list of all FOIA requests received. Also at various sites, meetings are conducted with Public Affairs staff to discuss potential records appropriate for posting.

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..?

The Department of Energy has recently consolidated and upgraded several websites into a new department-wide website. Recognized by GovLoop as the best federal website of 2011, the new energy.gov website better organizes information allowing the public to search for documents and resources from within a single search engine. Linking content from several offices, energy.gov utilizes interactive maps and graphics to display information that is more easily understood.

In addition, the Department recently launched an online voting tool seeking input from the public on who should be "America's Next Top Energy Innovator." One can access the voting tool at: <http://energy.gov/americas-next-top-energy-innovator-challenge>. That public also has the opportunity to provide feedback on how to improve the voting tool itself.

Further, the Department seeks input from the public on our web content and Energy Department programs via social media and email. When we re-launched Energy.gov in August 2011, we provided our audiences local information and services: <http://energy.gov/articles/department-energy-relaunches-energygov>.

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

The Department has created a 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 is updated when additional information is released. This allows 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 potential for some future FOIA requests.

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

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 can call the service centers to obtain a status on their request where this capability is not available.

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

The agency is looking into ways its current system may be able to provide the capability department-wide.

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?

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. Budgets considerations play a role, however, in purchasing any new technology, and we are continuing to evaluate options.

6. 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 2011, 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 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. The Department's FOIA backlog increased by 17%, or from 334 in FY2010 to 390 in FY2011. The Department received 2,315 new cases in FY2011 versus 2,206 in FY2010, a 5% increase.

- 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. There was a 160% increase in the number of backlogged administrative appeals between FY2011 and FY2010. In FY2010, there were three backlogged administrative appeals versus eight in FY2011.

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

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 2001 as well as two 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 two 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?

Yes. The increase in backlog was partially due to an increase in the number of requests received. The Department received 2,315 new cases in FY2011 versus 2,206 in FY2010, a 5% increase.

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

Yes. For the Department's National Nuclear Security Administration (NNSA), a loss of 50% of their staff contributed to the increased backlog.

- 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 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?

No.

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

No.

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

No.

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

The increase in the appeal backlog is due primarily to a significant increase in the number of appeals involving classified records. Those appeals must be referred to the Office of Classification for analysis and sometimes required reviews by other agencies before the appeals office can issue a determination.

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 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. The Department continues its aggressive strategy for processing the increased number of requests, which includes advising all Under Secretaries, Assistant Secretaries and other Department heads of the pending cases assigned to their organizations. In addition, the FOIA Officer continues 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 2003-2010 in an effort to close out older cases.

At Headquarters, in order to facilitate a more centralized process, a matrix-management model was instituted, whereby all program offices designate a FOIA Manager and FOIA Specialist for their programs. As stated earlier, the FOIA Specialist's role is to act as an adviser to their program on FOIA matters regarding search and review of documents and responding to requests. The role of the FOIA Manager is to oversee and ensure there is cooperation from all program employees with regard to responding to FOIA requests and assisting FOIA Specialists in preparing response packages for review by counsel.

The agency has also established Measures of Performance (MOP): specific quantitative metrics for gauging success in achieving the Departmental management improvement goals. FOIA backlog reduction is one goal that is measured within the MOP system.

NNSA, a semi-autonomous agency within the Department of Energy, also continues to conduct bi-weekly conference calls. These calls involve working with site office points-of-contacts and with NNSA Headquarters divisions to track the status of pending FOIA requests and to address issues related to processing and closing cases under their jurisdictions. The NNSA also continues to provide a

weekly report to their senior management detailing statistical information on the number of cases received, processed, and overdue by each NNSA division/organization.

2. Has your agency increased its FOIA staffing?

Yes, and will continue to do so as long as there is a need and budgets allow.

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

Yes, we have made IT improvements by deploying FOIA-specific software. Furthermore, we continually provide refresher training in the use of this software to ensure we are utilizing its full capabilities and achieving improved processing time.

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?

The Department has always and continues to treat consultations with the same priority as requests received directly. We communicate with other agencies and try to resolve issues quickly and efficiently. While we do not have any agreements or established guidelines, we work with agencies as each case dictates.

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?

N/A.

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.

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 from the FY 2010 report, a complicated case that had been received in 2001. This effort also resulted in DOE closing two other cases listed on the ten oldest for FY 2010. Overall, during FY 2011, the Department completed 42% of cases previously reported as backlogged and received between 2001 and 2009. We are continuing this aggressive approach to addressing older and complicated requests, and expect our success to continue.