

# Chief FOIA Officer Report for the Federal Election Commission Fiscal Year 2009

## I. Steps Taken to Apply the Presumption of Openness

### 1. Description

As a preliminary matter, we note that per the instructions for this report the phrase “presumption of openness” refers specifically to President Obama’s direction to agencies to administer the FOIA with a clear presumption of disclosure, resolve doubts in favor of openness, and not withhold information based on “speculative or abstract fears.” We note that FOIA itself is based on a presumption of openness. FOIA’s basic rule at 5 U.S.C. § 552(a)(3)(A) is that each agency, upon any request for records that reasonably describes the records and is made in accordance with published rules, shall make the records promptly available to any person. Only if the records are described in one of the exemptions in 5 U.S.C. § 552(b) may they be withheld. This structure is, in essence, a presumption of openness – all documents are to be released unless exempt. The Federal Election Commission (“FEC” or “Commission”) has always complied with this statutory structure. The question asked here is what the agency has done to ensure that the President’s direction has been applied to FOIA decisions.

All of the Commission’s FOIA staff have been informed of the President’s directive and of the Attorney General’s guidance stipulating that the Department of Justice will not defend an agency in FOIA litigation even where an exemption is applicable unless release will cause some demonstrable harm to the interests the exemptions are meant to protect. All FOIA staff have been instructed to keep these principles in mind when assembling proposed responses. Each proposed response is reviewed by the Assistant General Counsel for Administrative Law (who also serves as the Commission’s FOIA public liaison), and, in the case of legally complicated or otherwise sensitive requests, by the Chief FOIA Officer. These managers apply the principles articulated in the guidelines to proposed responses. Where changes to the proposed responses are necessary in order to conform to the guidelines, FOIA managers discuss the appropriate changes with the staff, thereby reinforcing application of the guidelines. Since the issuance of the guidelines and the first discussions with staff, it has been apparent that the staff is incorporating the presumption of openness referred to in the guidelines to draft responses provided to the Liaison and the Chief FOIA Officer for final review.

Our general impression has been that the President’s directive and the Attorney General’s guidelines have had their largest impact not in cases where material was obviously exempt from disclosure, but in cases where it was a closer call whether the material was exempt. Where material has been obviously exempt the potential harm from disclosure has also been obvious (except for the so-called “low 2” exemption, involving material so trivial as to be of little or no public interest, such as routing slips,

etc.). However, where the applicability of the exemption has been a closer call, but there would be little or no harm from release, then consistent with the guidelines we have released the material rather than advancing aggressive interpretations of the exemptions.

## 2. Disclosure Comparisons

During Fiscal Year (“FY”) 2009, the Commission did not show an increase in the number of FOIA requests where records had been released in full or where records had been released in part. However, the percentage of requests where records were released in part increased. The following table shows the relevant statistics:

|  | <b>Fiscal Year 2008</b> | <b>Fiscal Year 2009</b> |
|--|-------------------------|-------------------------|
| Total Requests Processed                       | 82 (100%)               | 67 (100%)               |
| Granted In Full                                | 16 (19.5%)              | 10 (14.9%)              |
| Granted In Part                                | 29 (35.4%)              | 28 (41.8%)              |
| Denied In Full As Exempt                       | 1 (1.2%)                | 2 (3.0%)                |
| Denied: No Responsive Records                  | 27 (32.9%)              | 17 (25.3%)              |
| Request Withdrawn                              | 8 (9.75%)               | 7 (11.3%)               |
| Denied: All Records Referred to Another Agency | 1 (1.2%)                | 3 (4.4%)                |

Both the number of requests granted in full and the number granted in part decreased in FY 2009, as did the overall number of requests processed. The percentage of all processed requests granted in full decreased, but the percentage of all processed requests granted in part increased. The total percentage of all processed requests granted either in full or in part increased slightly, from 54.9% of all processed requests in FY 2008 to 56.7% in FY 2009. In both years the number of requests denied in full as exempt was minuscule.

## **II. Steps Taken to Ensure that the Agency has an Effective System for Responding to Requests**

Even before the President’s FOIA memorandum, the FEC took steps to leverage information technology to improve the efficiency and effectiveness of its FOIA program. Manual redaction has been replaced by the use of high-quality, user-friendly redaction software that complies with recent FOIA amendments requiring that specific claims of exemption be marked on redacted documents. Moreover, all FOIA personnel received widescreen computer monitors that improved the efficiency of FOIA document review by allowing easy readability of multiple pages at once. The FEC also has an IT Help Desk, which is run by full-time support staff and provides technical support for hardware and software utilized by all agency personnel, including those involved in the FOIA process.

However, not all of our technology initiatives have been fruitful. In particular, request tracking is still handled by manual entry into an Excel spreadsheet, and statistical

compilations for the FOIA annual report and other reports such as this one are conducted by hand. In the wake of the OPEN Government Act of 2007, many commercial providers offered new software products designed to assist with case tracking and the additional reporting requirements provided by that statute. Unfortunately, our examination of these products indicated that the ones containing the software features we desired were designed for the needs of very large agencies that handle hundreds and even thousands of requests a year. These came with hardware requirements and prices that were prohibitive for small agencies such as the Commission.

The FEC has no full-time dedicated FOIA staff; all FOIA responsibilities are handled by the Administrative Law Team of the General Law and Advice Division of the Commission's Office of General Counsel. Competing priorities have been the principal obstacle to a more effective FOIA program. FOIA processing will be a matter of increased management emphasis in the remainder of Fiscal Year 2010. We plan to encourage focused FOIA processing days for the FOIA staff that process FOIAs as a collateral duty, establish firm deadlines and timetables for dealing in a realistic manner with backlogged requests, and continue to leverage the use of technology, such as encouraging document owners to provide documents in electronic, and especially PDF format where they exist.

### **III. Steps Taken To Increase Proactive Disclosures**

Disclosure of campaign finance information relating to Federal elections is one of the Commission's core missions under the Federal Election Campaign Act ("FECA"). Accordingly, the Commission has always proactively disclosed a large volume of information on its website, including reports disclosing the financial activity of the campaigns of candidates for federal office, political party committees, and other political committees. The Commission also routinely posts on its website Commission advisory opinions and files in closed enforcement matters.

In FY 2009, the FEC took a number of steps to increase the material available on its website, all of which came to fruition during the fiscal year or early in FY 2010. First, the Commission's Press Office began in FY 2009 to post on the web site a "Weekly Digest" of important activity at the Commission with links to relevant documents. Second, as part of a more general website improvement initiative, the FEC developed a blog, launched just after the end of the fiscal year, targeted to experienced users of campaign finance disclosure information. The goals of the blog include: helping users with the mechanics of using FEC campaign finance disclosure data; giving updates on progress and plans for new disclosure data sets; soliciting customer ideas for new disclosure tools; and providing a forum for the sharing of ideas and techniques for working with campaign finance disclosure data.

The FEC also took steps in FY 2009 to develop two important enhancements to the data available on its website about closed enforcement matters. First, the FEC scanned and placed on its website files of enforcement matters that closed between the Commission's establishment in 1975 and 1999. Prior to 2009, this data was available

only on microfilm located in the agency's Office of Public Records. Second, the FEC added to its Enforcement Query System – which is the searchable retrieval system on the website for more recent enforcement matters – the ability to search files of Administrative Fines (“AF”) matters. AF matters are the enforcement matters that deal with failure to file or late filing of campaign finance disclosure reports; they are handled under a special set of streamlined procedures. In the coming year, the FEC hopes to make audit reports dating back to 1975 available on the website.

Lastly, in FY 2009 the Commission considered reversing its prior practice of withholding First General Counsel's Reports from public disclosure in closed enforcement matters; it determined early in FY 2010 to take this step. Pursuant to this policy change, the FEC is now placing all First General Counsel's Reports on the public record in closed enforcement matters, prospectively and retroactively, while reserving the right to redact portions of such documents consistent with the FECA, the principles articulated by the Court of Appeals in *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003), and subject to the Commission's authority to withhold material under an exemption set forth in the FOIA.

#### **IV. Steps Taken To Greater Utilize Technology**

1.) *Does the agency currently receive requests electronically?*

Yes, via email.

2.) *If not, what are the current impediments to the agency establishing a mechanism to receive requests electronically?*

We are currently exploring ways to accept requests via the FEC website. When we previously explored implementing this function on the website, we were advised that the receipt of requests via electronically fillable forms could cause technical problems that would compromise the Commission's IT security. We have continued to work with IT professionals to determine whether these security concerns can be overcome to allow receipt of requests via our website.

3.) *Does the agency track requests electronically?*

As noted above, the FEC currently tracks requests using Excel spreadsheets, which must be populated manually.

4.) *If not, what are the current impediments to the agency utilizing a system to track requests electronically?*

See response to Part II above.

5.) *Does the agency use technology to process requests?*

Yes, the agency uses the redaction tools available through the Adobe 8 software program to excise information from documents that have been scanned into .pdf files. The agency also uses enlarged monitors to facilitate the redaction process.

6.) *If not, what are the current impediments to the agency utilizing technology to process requests?*

See the answer to question IV.2, above.

7.) *Does the agency utilize technology to prepare the agency's Annual FOIA Report?*

The agency does not use any FOIA-specific software to prepare its Annual FOIA Report.

8.) *If not, what are the current impediments to the agency utilizing technology in preparing your Annual FOIA Report?*

See response to Part II above.

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

### **1. Backlog Status**

While it is our goal to reduce our backlog every year, the FEC had a FOIA request backlog of 11 requests for FY 2009, an increase of 5 requests as compared to the 2008 backlog total of 6. The date of the oldest pending request as of the end of FY 2008 and FY 2009 is March 29, 2007. The number of backlogged administrative appeals remained constant at 1. The date of the oldest pending appeal as of the end of both FY 2008 and FY 2009 is July 22, 2008. For more information, see the statistics in the Commission's FOIA Annual Report for FY 2009 at <http://www.fec.gov/press/foiareport2009.pdf>.

### **2. Backlog Reduction Steps**

As we stated in the FY 2009 annual report, due to the press of other business, limitations on resources, and a handful of particularly voluminous requests, the agency was not able to process as many FOIA requests as expected in FY 2009. A number of FOIA requests in FY 2009 were for First General Counsel's Reports in closed FEC enforcement matters. Because the FEC has determined to return to its prior practice of including these reports in its proactive release of closed matters, we anticipate a reduction in the number of requests received in the coming year, which should permit more time to devote to backlogged requests. The agency is also placing more emphasis on the FOIA program by encouraging focused FOIA processing days for the FOIA staff that process FOIAs as a collateral duty, and by encouraging the use of technology, such as receiving

PDFs of responsive documents from document owners, to improve the efficiency of the FOIA process.

### **3. Steps to Improve Timeliness**

The agency intends to take the same steps it plans to take to reduce its backlogged FOIAs to improve timeliness in responding to requests and administrative appeals. Namely, the agency is placing more emphasis on the FOIA program by encouraging focused FOIA processing days for the FOIA staff that process FOIAs as a collateral duty, and by encouraging the use of technology, such as receiving PDFs of responsive documents from document owners, to improve the efficiency of the FOIA process.