

2011 Chief FOIA Officer Report Federal Election Commission

I. Steps Taken to Apply the Presumption of Openness

1. *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.*
 - a. *Describe how the President's FOIA Memorandum and the Attorney General's FOIA Guidelines have been publicized throughout your agency.*
 - b. *What training has been attended and/or conducted on the new FOIA Guidelines?*
 - c. *How has your agency created or modified your internal guidance to reflect the presumption of openness?*
 - d. *To what extent has your agency made discretionary releases of otherwise exempt information?*
 - e. *What exemptions would have covered the information that was released as a matter of discretion?*
 - f. *How does your agency review records to determine whether discretionary releases are possible?*
 - g. *Describe any other initiatives undertaken by your agency to ensure that the presumption of openness is being applied.*
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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. We regularly disclose campaign finance related information and campaign finance enforcement matters as a part of the FEC’s core mission.

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

As we indicated in our 2010 report, 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 provided with copies of the directive and guidance and all FOIA staff have been instructed in staff meetings to keep these principles in mind when assembling proposed responses.

The FEC's six presidentially-appointed Commissioners have also recently had occasion to consider the President's FOIA Memorandum and the Attorney General's FOIA Guidelines in their role as the deciding body for all FOIA appeals. In particular, two appeals placed before the Commission shortly after the close of FY 2010 raised issues regarding the application of the President's Memorandum and the Attorney General's guidance, and the FOIA staff's analysis of a significant portion of one of the appeals substantially turned on application of these principles. In that appeal the Commission considered documents related to a particular subject matter, all of which were exempt from release as predecisional under Exemption 5. The analysis focused on distinctions between those documents release of which would involve demonstrable harm to the agency's deliberative processes and which would not.

In addition, outside the context of specific requests the FOIA staff increased awareness about the Memorandum and Guidelines within the Policy Division of the Commission's Office of General Counsel when it advised that division of the Memorandum and Guidelines' implications for a policy memorandum that division prepared for the Commission. The Commission may issue advisory opinions ("AOs") about the application of the campaign finance laws to specific transactions proposed by qualified requestors. 2 U.S.C. § 437f. Factual information submitted in support of these requests is normally proactively disclosed by the Commission on its web site. This year, the agency confronted questions regarding how to deal with factual information submitted by requestors that the requestors claimed was proprietary. The FOIA staff advised OGC Policy about the implications for compliance with the spirit of the President's Memorandum and the Attorney General's Guidelines of various options that were under consideration.

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

The FEC believes strongly in the need to train staff in all areas to include training for FOIA. During the past year we have sent our Administrative Law attorneys and paralegals to FOIA training provided by the Department of Justice. In May 2010, staff members attended DOJ's training titled "FOIA for Attorneys and Access Professionals."

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

In an effort to modify our internal guidance to reflect the presumption of openness we have made clear to staff that an analysis under FOIA should take into consideration the harm that would result in release. Each week the Administrative Law Team holds staff meetings that

include a discussion of FOIA issues. We make clear to staff in those meetings that discretionary disclosure of otherwise exempt information is appropriate where there is little or no harm from release. Also, at each level of review we make sure to flag records that have been deemed to be of little or no harm for potential release on the basis of a discretionary disclosure. We have also instructed staff that unless otherwise told they should release information under a “low 2” analysis due to the trivial nature of the information.

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

Our general impression over the past year has continued to be 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. However, where the applicability of the exemption has been a closer call, but there would be little or no harm from release (i.e. under FOIA Exemptions 2 and, on occasion, under Exemption 5,), then consistent with the guidelines we have released the material rather than advancing aggressive interpretations of the exemptions.

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

In the past year at the FEC our FOIA staff released records as a matter of discretion under FOIA exemptions 2 and 5.

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

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 and ask whether the records reviewed could be released on a discretionary basis. When there is a case where discretionary release is appropriate, FOIA managers discuss the appropriate changes with the staff, thereby reinforcing application of the guidelines and the need to release information that would otherwise be exempt but can be released on a discretionary basis. Since the issuance of the guidelines we have had ongoing discussions with staff and 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.

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

The FEC continues to make sure that the presumption of openness is applied throughout the agency. To that end, we have gone through a thorough review of our records and have placed more documents onto our website in the past year to include Audit Reports and First General Counsel Reports, subject to redactions for exemptions where deemed appropriate.

2. Report the extent to which the numbers of requests where records have been released in full and the numbers of requests where records have been released in part has changed from those numbers as reported in your previous year's Annual FOIA Report.

During Fiscal Year ("FY") 2010, the Commission had a marked increase in the number of processed FOIA requests. The following table shows the relevant statistics:

| | Fiscal Year 2009 | Fiscal Year 2010 |
|--|-------------------------|-------------------------|
| Total Requests Processed | 67 (100%) | 81 (100%) |
| Granted In Full | 10 (14.9%) | 25 (30.9%) |
| Granted In Part | 28 (41.8%) | 21 (25.9%) |
| Denied In Full As Exempt | 2 (3.0%) | 1 (1.2%) |
| Denied: No Responsive Records | 17 (25.3%) | 27 (33.3%) |
| Request Withdrawn | 7 (10.4%) ¹ | 5 (6.2%) |
| Denied: All Records Referred to Another Agency | 3 (4.4%) | 2 (2.5%) |

While the combined percentage of requests granted in full or in part has remained relatively constant, the percentage of requests granted in full increased significantly, from just under 15% in FY 2009 to just under 31% in FY 2010. Some of this is attributable to application of the President's Memorandum and the Attorney General's Guidelines. In particular, we are no longer applying the so-called "low 2" exemption as a routine matter wherever it could be invoked. Some, however, is due simply to the luck of the draw as to the nature of the requests received in FY 2010.

Within the cohort of requests denied, denials due to a lack of responsive records increased from 25% to 33% of all requests. This seems at least in part due to an increased number of requests from requesters who are not familiar with the Commission's limited jurisdiction, which concerns federal campaign finance matters, and not all issues regarding elections. In particular, several requests denied in full in FY 2010 dealt with subject matter such as the President's birth certificate.

The number of requests denied in full as exempt continued to be minuscule.

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

Describe here the steps your agency has taken to ensure that your system for responding to requests is effective and efficient. This section should include a discussion of how your agency has addressed the key roles played by the broad spectrum of agency personnel who work with FOIA professionals in responding

¹ This number was incorrectly calculated last year.

to requests, including, in particular, steps taken to ensure that FOIA professionals have sufficient IT support. 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.

- a. Do FOIA professionals within your agency have sufficient IT support?*
- b. Describe how your agency's FOIA professionals interact with your Open Government Team.*
- c. Describe the steps your agency has taken to assess whether adequate staffing is being devoted to responding to FOIA requests.*
- d. Describe any other steps your agency has undertaken to ensure that your FOIA system operates efficiently and effectively.*

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

Yes, FOIA professionals at the Commission have sufficient support from IT professionals. The FEC 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. Moreover, the IT professionals regularly consult with the FOIA staff regarding new software that could be used to make the agency's FOIA program more efficient.

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

The Commission's Information Technology Division, as the division with ownership of the Commission's website, acts as the Commission's Open Government team. Open government is not new for the Commission; the Commission has been making campaign finance information available to the public for more than 30 years, and continues to try to develop new forms and new information that will help people and groups understand how federal campaigns are funded. The Open Government page of the Commission's website so far has focused on highlighting new ways to look at information the Commission has made available for many years, including interactive maps to aid quick research of financial information for Federal campaigns; links to downloads of filings by campaign committees; e-learning tools to better educate the Commission's regulated community and the public about compliance with the law; and links to agendas and minutes of open Commission meetings, as well as podcasts of the audio files of these meetings.

Because this information has been the focus of the Commission's initial Open Government efforts, and because all of this information has in one form or another been proactively released without redaction for quite some time, interaction between the FOIA professionals acting in that capacity and the Open Government team acting in *that* capacity has been relatively limited to date. Because the Commission is a small agency, all of these roles are collateral duties; the Office of General Counsel's Administrative Law Team and the

Commission's IT professionals are each other's clients, and thus interact with each other on a regular basis.

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

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. In April 2010, the agency undertook a comprehensive review of resources in all of its operations in light of anticipated serious budget constraints in FYs 2010, 2011 and 2012. The exercise was geared towards anticipating increases and decreases in workload, and identifying ways in which the agency could accommodate those changes in a constrained fiscal environment. We noted at that time that during periods of increase in the Administrative Law team's workload, staff typically focus on core functions -- specifically, preparing proactive releases of Commission enforcement matters for the public record and more routine FOIA requests. We also noted that during less busy times, staff focus on more extensive FOIA requests and work to decrease the FOIA backlog. During parts of FY2010 we were impacted by extended leaves taken by some staff and by detail of OGC staff who normally have FOIA responsibilities to other parts of the agency. On the other hand, just before the end of the fiscal year, we added a new GS-11 law clerk to the Administrative Law team, and at the end of the calendar year a Presidential Management Fellow took a permanent position as an attorney on the Administrative Law Team. This should in the future alleviate response time and backlog issues that we have encountered in the past.

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

In FY 2010 we continued to have FOIA processing days for the FOIA staff that process FOIAs as a collateral duty and emphasized to staff the need to establish firm deadlines and timetables for dealing in a realistic manner with backlogged requests. Also, in FY 2010, we continue to leverage the use of technology, such as encouraging document owners to provide documents in electronic, and especially PDF, format where they exist. We have increased attention to FOIA status and processing by sharing monthly reports on the status of pending FOIA requests with the General Counsel and the Commission. FOIA processing will continue to be a matter of increased management emphasis in the remainder of fiscal year 2011.

III. Steps Taken To Increase Proactive Disclosures

Describe here the steps your agency has taken to increase the amount of material that is available on your agency website, including providing examples of proactive disclosures that have been made since issuance of the new FOIA Guidelines. In doing so, answer the questions listed below and describe any additional steps taken by your agency to make proactive disclosures of information.

- a. Has your agency added new material to your agency website since last year?*
- b. What types of records have been posted?*

- 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.*
 - d. What system do you have in place to routinely identify records that are appropriate for posting?*
 - e. How do you utilize social media in disseminating information?*
 - f. Describe any other steps taken to increase proactive disclosures at your agency.*
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a. Has your agency added new material to your agency website since last year?

Yes, since the last report the FEC has added new material to the agency website.

b. What types of records have been posted?

In addition to the Open Government initiatives discussed above, the Commission has returned to its prior practice of including First General Counsel's reports on the public record of closed enforcement matters, and as resources have been available has added to the public record of these matters reports that were not proactively disclosed between 2007 and 2009. The Commission has also expanded the types of documents associated with its audits of political committees that it proactively discloses on its website, as well as adding newly posted final audit reports for audits dating back to the 1986 election cycle, as well as a new search tool for these reports. Soon after the close of the fiscal year the agency rolled out the new Searchable Electronic Rulemaking System, a new search tool designed to enable easier search of the entire dockets of Commission rulemakings.

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.

Other than Open Government initiatives -- which have focused primarily on new formats for data already posted -- see the previous answer.

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

Many documents are already automatically disclosed pursuant to the Federal Election Campaign Act. Moreover, documents that are requested by FOIA requesters at least three times will also be posted on the agency's website. There were no such documents in FY 2010.

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

The FEC continues to use social media to inform the public about the agency and increase their knowledge as to what resources are available to them through the FEC website. During FY 2010, the Commission's Press Office continued to post on the agency web site a "Weekly Digest" of important activity at the Commission with links to relevant documents. As part of a more general website improvement initiative, the FEC also developed a blog, launched just before the start 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. More recently, the Commission has decided to use Twitter as a way to disseminate information both to the general public and FEC staff.

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

See all of the above answers.

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?*
 - b. *To what extent have you increased the number of components doing so since the filing of your last Chief FOIA Officer Report?*
 - c. *What methods does your agency use to receive 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?*
 - b. *To what extent have you increased the number of components doing so since the filing of your last Chief FOIA Officer Report?*
 - c. *What methods does your agency use 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?*
 - b. *To what extent have you increased the number of components doing so since the filing of your last Chief FOIA Officer Report?*
 - c. *What methods does your agency use to process requests electronically?*
4. *Electronic preparation of your Annual FOIA Report:*
 - a. *What type of technology does your agency use to prepare your agency Annual FOIA Report, i.e., specify whether the technology is FOIA-specific or a generic data-processing system.*
 - 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.*

1. Electronic receipt of FOIA requests:

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

We are a relatively small agency and have a centralized FOIA Requester Service Center that does have the capability to receive requests electronically through its FOIA email address which is listed on the Commission's Website.

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

This question is not applicable as we do not have components due to the size of the agency.

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

The agency uses e-mail to receive FOIA requests and has listed the e-mail address on the Commission website at www.fec.gov.

2. Electronic tracking of FOIA requests:

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

The FEC FOIA Requester Service Center uses commercial data processing software to track requests. We do not have components due to the size of the agency.

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

This question is not applicable as the agency does not have components.

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

The FEC currently tracks requests using commercial data processing software, which must be populated manually.

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?

The FEC has a centralized FOIA Requester Service Center that uses commercial redacting software when saving and redacting documents. The agency also uses its e-mail capability to send out requests that agency staff search for records that have been requested from FOIA requesters.

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

This question is not applicable as the FEC does not have more than one component FOIA office.

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

We use both our email capability and our commercial redacting software to process FOIA requests electronically.

4. Electronic preparation of your Annual FOIA Report:

a. What type of technology does your agency use to prepare your agency Annual FOIA Report, i.e., specify whether the technology is FOIA-specific or a generic data-processing system.

The FEC uses generic word processing and spreadsheet software to prepare its Annual FOIA Report. All calculations are done manually.

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.

We have been and continue to look at programs to see if there are programs that will help the agency with its preparation of the annual FOIA report that are not cost prohibitive.

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

1. If your agency has a backlog, report here whether that 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 closed.

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 backlogged increase a result of an increase in the number of incoming requests or appeals?

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

c. Is the backlog increase caused by an increase in the complexity of the requests received?

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

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?*
 - b. *Has your agency increased its FOIA staffing?*
 - c. *Has your agency made IT improvements to increase timeliness?*
 - d. *Has your agency Chief FOIA Officer been involved in overseeing your agency's capacity to process requests?*
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1. *If your agency has a backlog, report here whether that 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 closed.*

It is the goal of the FEC to reduce our backlog every year. In FY 2010, the backlog at the end of the fiscal year decreased by one compared to the prior year, from 11 to 10. For FY 2009 we had 1 FOIA appeal that was on our backlog list and it is the same FOIA appeal that is on our FY 2010 list. It has since been resolved.

With respect to the ten oldest FOIA requests from FY 2009, 7 (63.6%) were closed by the end of FY 2010. All but one have now been closed.

For more information, see the statistics in the Commission's FOIA Annual Report for FY 2010 at <http://www.fec.gov/press/foiareport2010.pdf>.

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 backlogged increase a result of an increase in the number of incoming requests or appeals?*
- b. *Is the backlog increase caused by a loss of staff?*
- c. *Is the backlog increase caused by an increase in the complexity of the requests received?*
- d. *What other causes, if any, contributed to the increase in backlog?*

The FEC has reduced its backlog from FY 2009 to FY 2010, thus this question is not applicable.

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, our agency's Chief FOIA Officer sets goals for the Administrative Law Team and monitors the progress of the FOIA caseload on a weekly basis. Obviously, our goal is to respond to FOIA requesters within the 20 day period. We have instituted procedures to monitor progress from receipt of the FOIA request until the response by the FOIA Requester Service Center to the requester. Moreover, as noted, information on pending FOIA requests, goals, and expected timetables is now reported to the General Counsel and the Commission monthly.

b. Has your agency increased its FOIA staffing?

Yes, in the past year the Administrative Law Team has hired more staff which allows for more staff to work on FOIA's as one of their collateral duties.

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

Yes, we continue to receive updated redaction software.

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

Yes, our Chief FOIA Officer has placed more emphasis on the 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.

Spotlight on Success

*Out of all the activities undertaken by your agency in this last year to increase transparency, describe here one success story that you would like to highlight as **emblematic of your efforts**.*

For many years the Commission's internal legal authority as developed in enforcement matters ("matters under review," or MURs) and in advisory opinions has been available to both the public and to FEC staff, first through microfilm and, in the last decade-plus, on the Commission's web site. However, until last year the Commission's web site contained audit reports only for the most recent election cycles. To the extent audit reports have precedential authority -- especially in the Commission's audit process -- much of this authority was simply not readily available to the public (including treasurers of political committees and legal practitioners), and even Commission staff were highly dependent on the institutional memory of long-time staff members now nearing retirement. This year, the Commission's Information Technology Division and the Audit Division of the Commission's Office of Compliance jointly developed the Audit Report Search System, found at <http://www.fec.gov/auditsearch/auditsearch.do>. This powerful new tool will provide the press and the public with information about the most recent audit reports issued about recent campaigns; will provide academics and researchers with a trove of information both about the campaigns of candidates in past years and

about the evolution of the Commission's audit practice itself; and will provide campaign finance practitioners, as well as Commission staff, with new resources to ensure consistency in audit decision making.