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# U.S. Department of Commerce 2014 Chief FOIA Officer Report Chief FOIA Officer Ellen Herbst



#### Section I: Steps Taken to Apply the Presumption of Openness

The guiding principle underlying the President's FOIA Memorandum and the Attorney General's FOIA Guidelines is the presumption of openness.

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.

#### FOIA Training

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

The Department of Commerce did not hold and agency FOIA conference during this reporting period, but did conduct FOIA training during this reporting period. The Office of the Secretary (OS) held training for new hires, refresher training for multiple components, and FOIAonline training for all agency users. All agency FOIA Officers attend FOIA Roundtable meetings convened by the Departmental FOIA Officer. The Office of the General Counsel, General Law Division, (OGC/GLD) provided training to multiple bureaus of the Department. The Census Bureau held bi-weekly FOIA training sessions for FOIA staff during this reporting period and also held monthly FOIA Lunch and Learns for Census Bureau staff. The Economic Development Administration (EDA) held a Regional Counsel conference in November 2013, which included FOIA training and introduced the regional counsel to FOIAonline. The International Trade Administration (ITA) provided individual training to its staff on specific FOIA issues upon request. The National Institute of Standards and Technology (NIST) FOIA Officer and staff provide training on FOIA practices for new NIST management and conducts FOIA Training upon request to operating units for groups and individuals. NIST records management presentations also include FOIA training as it relates to record retention. The National Oceanic and Atmospheric Administration (NOAA) held four FOIA professional conference calls. The National Telecommunications and Information Administration (NTIA) FOIA personnel train and educate NTIA staff regularly regarding their duties with respect to FOIA. This includes an occasional email to all staff. The Office of Inspector General (OIG), Office of Counsel, held a FOIA training session for the Office of Investigations' staff. The U.S. Patent and Trademark Office (USPTO) conducts FOIA training on an as-needed basis for its business units. During FY 2013, the USPTO held four training sessions, each targeted to the specific business unit being trained.





2. If so, please provide the number of conferences or trainings held, a brief description of the topics covered, and an estimate of the number of participants from your agency who were in attendance.

The OGC/GLD, held 3 trainings during FY 2013. The training covered the scope of the FOIA process, including applying the foreseeable harm standard and the use of exemptions to withhold information. The number of participants in these trainings ranged from 20-75 depending on the size of the bureau. The Departmental FOIA Office held 2 FOIAonline user trainings attended by a total of 50 participants, and 4 FOIA Officer Roundtable meetings attended by a total of 60 participants. Topics presented included: sharing of best practices, FOIA requirements, proactive disclosures, Annual FOIA Report, and discussions on how to improve our agency's FOIA process.

The Census Bureau held four training sessions for FOIA staffs, which were attended by approximately 20 people. Topics presented included: FOIA Training - Back to the Basics, FOIA Exemption 6 - Part 1, FOIA Exemption 6 - Part2, and Interpreting the Request – Learning by Doing. The Census Bureau also held six FOIA Lunch and Learns, which were attended by over 200 personnel. Topics presented included: An Introduction to the FOIA and Open Government Act of 2007, What Every Agency Should Know About the FOIA, FOIA Requests for Title 13 Records, Fees and the FOIA, and The Role You Play in the FOIA.

EDA held one FOIA training during the reporting period. The training included instruction on how to use FOIAonline, the benefits of using the FOIAonline, the agency's annual FOIA report and data, and discussion on how to improve our agency's FOIA processes. EDA held one FOIA training during the reporting period. The training included instruction on how to use FOIAonline, the benefits of using the FOIAonline, the agency's annual FOIA report and data, and discussion on how to improve our agency's FOIA processes.

ITA estimates that it held about 8 individual training sessions during the reporting period. The topics included the FOIA process.

NOAA held four FOIA professional conference calls attended by over 30 people. The topics included recent case law and how to apply locally.

The OIG held one FOIA training session which approximately 35 people attended. The training session included an overview of FOIA exemptions and the FOIA process.

The USPTO FOIA Office conducted four training sessions, each targeted to the specific Business Unit being trained (in other words, the training specifically addressed common types of requests for various departments at the USPTO). (1) FOIA Training for the Office of Policy and International Affairs management team (12 people); (2) FOIA Training for the new Supervisory Patent Examiners (50 people); (3) FOIA Training for Office of the Chief Communications Officer (10 people); (4) FOIA Training for the





Office of Policy and International Affairs (4 people). The USPTO FOIA Office makes itself available at all times for requests for group or one-on-one FOIA training.

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

A broad representation of FOIA professionals from across the Department attended the following training:

- DOJ FOIA Fee and Fee Waiver Provisions Training
- DOJ Introduction to the Freedom of Information Act
- DOJ Advanced Freedom of Information Act Training Seminar
- DOJ FOIA for Attorneys and Access Professionals
- DOJ Refresher Training and Guidance for the FY 2013 Annual FOIA Report and the 2014 Chief FOIA Officers Report.
- DOJ Director's Lecture Series: Overview on Procedures and Exemptions
- DOJ FOIA Roundtables on 1.22.13, 2.20.13, 4.24.13 and 6.13.13
- DOJ Sunshine Week
- OGIS Dispute Resolution Skills Training for FOIA Professionals
- Council of Inspectors General on Integrity and Efficiency Office of the Inspector General FOIA Workgroup Workshops
- American Society of Access FOIA Professionals Training
- 4. Provide an estimate of the percentage of your FOIA professionals who attended substantive FOIA training during this reporting period.

For the Department overall, we estimate 42% of FOIA professionals attended substantive FOIA training during this reporting period.

The following bureaus reported 100% of FOIA professionals attended substantive FOIA training during this reporting period: OS, BIS, Census Bureau, EDA, ESA, NIST, NTIA, NTIS, and the OIG.

ITA reported 70% of FOIA professionals attended substantive FOIA training during this reporting period. The Minority Business Development Agency (MBDA) reported 30 % of FOIA professionals attended substantive FOIA training during this reporting period. NOAA reported 15% of FOIA professionals attended substantive FOIA training during this reporting period. USPTO reported 66% of FOIA professionals attended substantive FOIA training during this reporting period.

5. The Office of Information Policy (OIP) has issued guidance that every agency should make core, substantive FOIA training available to all their FOIA professionals at least once each year. Provide your agency's plan for ensuring that such training is offered to all agency FOIA professionals by March 2015. Your plan should anticipate an upcoming





reporting requirement for your 2015 Chief FOIA Officer Reports that will ask whether all agency FOIA professionals attended substantive FOIA training in the past year.

To ensure that the core, substantive FOIA training requirement is met, the Office of the Secretary, Office of the General Counsel, General Law Division, will conduct an Advanced FOIA Training Seminar at a FOIA Officer Roundtable meeting once each year to be attended by all DOC FOIA professionals.

Additionally, the following bureaus have identified the following plans:

Census Bureau FOIA professionals plan to attend at least one substantive training during 2014. Census Bureau FOIA staff have been scheduled to attend the following DOJ training courses: The Freedom of Information Act for Attorneys and Access Professionals, Advanced Freedom of Information Act Seminar, and The Freedom of Information Act Administrative Forum. The Census Bureau also plans to send Census Bureau FOIA professionals to the American Society for Access Professionals (ASAP) 6<sup>th</sup> Annual Training Conference, which will offer training sessions on important core FOIA topics.

EDA intends to leverage existing FOIA training opportunities and instruction provided by the Department of Commerce, Department of Justice and other Federal agencies. In addition, budget permitting, EDA plans to hold another Regional Counsel conference that will include a FOIA training session.

ITA professionals are scheduling their training for the next fiscal year and are scheduled to take a number of classes offered by DOJ. Pending FY 2014 budget and funding availability, ITA is also looking into attending the American Society of Access Professionals' Annual National Training Conference in Washington.

MBDA will conduct a bureau wide FOIA training refresher course in June 2014, and in June of each year thereafter.

The Office of the Inspector General FOIA Officer will be attending a Department of Justice Training in March 2014.

#### Outreach:

6. Did your FOIA professionals engage in any outreach and dialogue with the requester community or open government groups regarding your administration of the FOIA? If so, please briefly discuss that engagement.

The Department of Commerce Open Government representative attended the quarterly meetings with Open Government Watch Dog Groups. The FOIA Officers throughout the Department work with the DOC Open Government Team on a regular basis. A broad





representation of FOIA professionals from across the Department attended the DOJ FOIA Roundtables on 1.22.13, 2.20.13, 4.24.13 and 6.13.13

#### Discretionary Disclosures:

In his 2009 FOIA Guidelines, the Attorney General strongly encouraged agencies to make discretionary releases of information even when the information might be technically exempt from disclosure under the FOIA. The Department of Justice, OIP encourages agencies to make such discretionary releases whenever there is no foreseeable harm from release.

7. Does your agency have a formal process in place to review records for discretionary release? If so, please briefly describe this process. If your agency is decentralized, please specify whether all components at your agency have a process in place for making discretionary releases.

All FOIA professionals actively engage their operating unit from the outset of the request to help determine whether or not discretionary releases may be made. All components of the Department have a process in place for making discretionary releases.

The Office of the Secretary, ESA, MBDA, NIST, NOAA, and NTIS require the originator of the document or a qualified subject matter expert to conduct document reviews. A secondary document review is conducted by the FOIA Officer or FOIA professional to ensure that the exemption is appropriately applied and with an eye toward presumption of openness. If during the secondary review, a foreseeable harm cannot be identified, the document is referred back to the originator or subject matter expert for additional review. If an agreement cannot be reached, then both the subject matter expert and the FOIA Officer/FOIA professional seek assistance for the Office of the General Counsel.

As a way to ensure that the presumption of openness is being applied, the Census Bureau FOIA Office conducts group reviews of responsive records to which FOIA Exemptions 2, 5 U.S.C. § 552(b)(2), 5, 5 U.S.C. § 552(b)(2), or 7, 5 U.S.C. § 552(b)(7) apply. These types of reviews serve two main purposes: a) they help train FOIA professionals on the definition and application of the presumption of openness, and b) they help to ensure the presumption of openness is being applied, whenever and as much as possible. FOIA staffs are also required to complete a harm analysis and review for the portions of the responsive records to which FOIA Exemptions 2, 5, or 7 apply. Individuals in the offices where the records originated are consulted in determining if any specific harm would be caused by the release.

To determine whether a discretionary release is possible, ITA first requires a document review by a qualified subject matter expert (SME). The SME often created or, at least, maintains control of the record that is being reviewed. The SME conducts a foreseeable harm review of the portions of the record that could be protected under the FOIA.





Afterward, ITA's FOIA Officer conducts a secondary review to see what information could be discretionarily released. The review consists of two steps. First ITA's FOIA Officer inquires why the SME is not requesting information that normally falls under Exemption 5 to be protected. The SME then provides rational on whether: the information would not inhibit open, frank discussion; the draft reflects final agency action; or the information would not cause public confusion. Second, ITA's FOIA Officer reviews the suggested withholdings for possible discretionary disclosure. If the FOIA Officer cannot reasonably identify a foreseeable harm, the portion of the record in question is referred back to the SME for a second review. If an agreement cannot be reached, then both the SME and the FOIA Officer seek assistance from the Departmental Office of Privacy and Open Government and/or the Office of the General Counsel.

All NTIA FOIA requests are processed by the NTIA's Office of the Chief Counsel (NTIA/OCC). All responsive documents are reviewed by an attorney in the Office of the Chief Counsel to ensure that the exemption is appropriately applied to each FOIA requested document. As a part of this process the attorney also determines whether even if an exemption were to apply there would be harm in releasing the record. Finally, these recommendations are reviewed by the Chief Counsel to ensure compliance with the law and these requirements.

The USPTO has a tracking system for marking requests that involve discretionary release in its electronic FOIA tracking system. In other words, each time a request is completed, the program asks the user if a discretionary release was made. It does not, however, have an automatic trigger for identifying records that could be discretionarily released. Instead, the FOIA professionals handling each request manually determine whether there are any records appropriate for discretionary release.

- 8. During the reporting period did your agency make any discretionary releases of otherwise exempt information?
  - The following bureaus reported discretionary disclosures of records that fell within the scope of a FOIA exemption: OS, Census, ITA, MBDA, NIST, NOAA, NTIA, USPTO, and OIG.
  - EDA, ESA, and NTIS reported no requests were received that involved discretionary release of information.
- 9. What exemptions would have covered the information that was released as a matter of discretion?
  - Discretionary releases have been made for information that would have been covered under FOIA Exemption 5, 5 USC § 552 (b)(5).
- 10. Provide a narrative description, or some examples of, the types of information that your agency released as a matter of discretion.





- Emails containing internal communications which could be protected under the deliberative process privilege.
- Internal briefing papers/memoranda which could be protected under the deliberative process privilege.
- Draft reports/documents which could be protected under the deliberative process privilege.
- Communications which could be protected under the attorney-client privilege or attorney-work product privilege.
- Internal FOIA search deliberations and processes documents.
- In addition, although not otherwise subject to an exemption, the USPTO released records in an effort to accommodate requesters where requests were unclear. For example, in one recent request, the USPTO received an unworkable request for certain kinds of arbitration decisions that had a particular outcome. As a precursor to seeking clarification, the USPTO collected all readily available decisions that seemed most responsive to requester's extremely broad request and sent them to the requester.
- 11. If your agency was not able to make any discretionary releases of information, please explain why.

Not applicable

#### Other Initiatives:

12. Did your agency post all of the required quarterly FOIA reports for Fiscal Year 2013? If not, please explain why not and what your plan is for ensuring that such reporting is successfully accomplished for Fiscal Year 2014.

Quarters 1–4 of Fiscal Year 2013 have been posted at: http://www.osec.doc.gov/omo/foia/ereadingroom.htm.

Technical difficulties prevented the reports from appearing on FOIA.gov.

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

When tasking SMEs to review responsive records, ITA attaches the President's FOIA Memorandum and/or the Attorney General's FOIA Guidance as reminder of the presumption of openness.

The NOAA FOIA Office relocated to the Office of the Chief Information Officer (OCIO) in November, 2013. The OCIO houses the NOAA Open Government program.

To ensure that the presumption of openness is appropriately applied in processing FOIA requests, the OIG approaches each FOIA request with a view toward discretionary





disclosure where appropriate. The OIG also makes it a practice to make partial disclosures of documents when full disclosure is not possible under the terms of FOIA.

The USPTO FOIA Office always highlights the presumption of openness in its training materials and training presentations for Business Units and individual employees.

All FOIA search certification memoranda include a foreseeable harm statement, which must be signed by the senior official in the responsible office.

# Section II: Steps Taken to Ensure that Your Agency Has an Effective System in Place for Responding to Requests

As the Attorney General emphasized in his FOIA Guidelines, "[a]pplication of the proper disclosure standard is only one part of ensuring transparency. Open government requires not just a presumption of disclosure, but also an effective system for responding to FOIA requests." It is essential that agencies effectively manage their FOIA program.

Describe here the steps your agency has taken to ensure that your management of your FOIA program is effective and efficient. 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.

#### Personnel:

During Sunshine Week 2012 OPM announced the creation of a new job series entitled the Government Information Series, to address the work performed by FOIA and Privacy Act professionals. Creation of this distinct job series was a key element in recognizing the professional nature of their work.

1. Has your agency converted all of its FOIA professionals to the new Government Information Specialist job series?

No, the Department of Commerce has not converted all of its FOIA professionals to the new Government Information Specialists series.

2. If not, what proportion of personnel has been converted to the new job series?

0%

3. If not, what is your plan to ensure that all FOIA professionals' position descriptions are converted?





The Office of the Secretary and Census Bureau will work with their respective Human Resources Division to begin the process of identifying what FOIA professional positions should be converted to the new GIS series and then convert the positions identified. Currently, OS has one position identified as 0301- FOIA Specialist. Four bureaus of the Department: EDA, MBDA, NTIA, and NTIS, FOIA personnel are attorneys not assigned to full time FOIA duties. The USPTO FOIA personnel are attorneys and paralegals not assigned to full time FOIA duties. Six bureaus of the Department: BIS, ESA, ITA, NIST, NOAA, and OIG, FOIA personnel are not assigned to full time FOIA duties. However, for fiscal year 2015, ITA will consider converting the ITA FOIA/Privacy Officer position to the Government Information Specialist job series. Although some bureaus do not have full time FOIA personnel, all bureaus of the Department will be instructed to work with their respective Human Resources Division to determine if its FOIA professionals should be converted to the Government Information Specialist job series.

#### Processing Procedures:

4. For Fiscal Year 2013 did your agency maintain an average of ten or less calendar days to adjudicate requests for expedited processing? If not, describe the steps your agency will take to ensure that requests for expedited processing are adjudicated within ten calendar days or less.

Yes, on average Commerce adjudicated these requests in less than 10 days.

5. Has your agency taken any steps to make the handling of consultations and referrals more efficient and effective, such as entering into agreements with other agencies or components on how to handle certain categories or types of records involving shared equities so as to avoid the need for a consultation or referral altogether, or otherwise implementing procedures that speed up or eliminate the need for consultations. If so, please describe those steps.

All bureaus of the Department of Commerce (with the exception of the U.S. Patent and Trademark Office) adopted FOIAonline. FOIAonline allows participating agencies to easily and accurately task consultations to other participating agencies. This greatly reduces the time it takes to create a consultation or referral package and insure accuracy of the information be transferred. Although FOIAonline does not eliminate the need for consultations and referrals, it does accelerate the administrative process. For agencies outside of FOIAonline system, correspondence is sent via email or secure file transfer to consult or refer documents. The USPTO has not encountered any frequent consultations and referrals that would necessitate this type of agreement with any other agency.

#### Requester Services:

6. Do you use e-mail or other electronic means to communicate with requesters when feasible?





Yes, we communicate with requesters through the FOIAonline system, through efoia mailboxes, or through email.

7. Does your agency notify requesters of the mediation services offered by the Office of Government Information Services (OGIS) at NARA?

Yes.

8. Describe any other steps your agency has undertaken to ensure that your FOIA system operates efficiently and effectively, such as conducting self-assessments to find greater efficiencies, improving search processes, streamlining consultations, eliminating redundancy, etc.

Within the last year, the Department of Commerce has improved the efficiency of its FOIA program by successfully moving from a paper based records system to nearly an entirely electronic system. The only exception is for responsive records that are classified.

OS FOIA staff meets quarterly to review the status of all pending FOIA requests. We are adopting a time management system, where we allocate specific times each day to work on simple requests to speed their completion and complex requests to move their processing ahead.

The Census Bureau and NIST continually reviews and updates its FOIA business processes to determine where changes, if any, can be made to help its FOIA program run more efficiently and effectively.

EDA staff discussed operational efficiencies and inefficiencies at the Regional Counsel conference held in November 2013.

MBDA has undergone a review of FOIA personnel and has assigned a contact person in each office to handle each FOIA within the office.

The NOAA FOIA Office sends spreadsheets of pending requests quarterly to the program offices, and began entering all requests received outside of FOIAonline to eliminate duplication.

The Office of Chief Counsel (OCC), which oversees FOIA processing for NTIA, meets about quarterly to assess the current status of all pending FOIAs, makes assignments to OCC personnel to complete older complex FOIAs and discusses ways to improve FOIA processing.

The OIG, Office of Administration (OA) took the following steps in conjunction with the Office of Counsel (OC). First, the OIG FOIA Officer documented the steps necessary to complete a FOIA request. Next, the end-to-end FOIA business process requirements were





reviewed by senior level management within the OA and the OC. Following the review, the OA developed a decision flowchart with the various stages involved in replying to FOIA requests. Once the flowchart was completed, the OC provided training to the Office of Investigations on methods of FOIA processing and FOIA law to enhance OIG investigators' understanding of FOIA law and process. A follow up training is under development. Moreover, SharePoint folders were developed by the Office of the Chief Information Officer to provide management access to FOIA processing details when the FOIA Officer is on leave. Also, in order to improve reporting methods, a spreadsheet was developed to provide status of cases. The spreadsheet allows senior level management to easily compare resources with requests received and to assist in the advancement of request processing. This tool also assisted with the Annual FOIA report as some request details recorded within the report, were used to record details to FOIA online.

In additional to continued training for records custodians to increase efficiency, this year, the USPTO FOIA Office re-evaluated its FOIA search process to increase accuracy of searches by custodians. The USPTO FOIA Office previously encountered a few recurring problems involving records custodians not understanding the search requirements for each request. As a result of input from custodians, the USPTO FOIA Office updated its Search Memorandum that goes out to potential custodians of relevant records and the Search Form that custodians complete and return with any responsive records.

Over the past year, the Office of the General Counsel, General Law Division, (OGC/GLD), began to utilize FOIAonline to receive and process FOIA appeals. FOIAonline enables us to share platforms with other agencies participating in FOIAonline in order to perform any necessary consultations or referrals during the appeals process.

### Section III: Steps Taken to Increase Proactive Disclosures

Both the President and Attorney General focused on the need for agencies to work proactively to post information online without waiting for individual requests to be received.

Describe here the steps your agency has taken both to increase the amount of material that is available on your agency website, and the usability of such information, including providing examples of proactive disclosures that have been made during this past reporting period (i.e., from March 2013 to March 2014). In doing so, answer the questions listed below and describe any additional steps taken by your agency to make and improve proactive disclosures of information.

Posting Material:





1. Do your FOIA professionals have a system in place to identify records for proactive disclosures?

Yes. All components have a process in place

2. If so, describe the system that is in place.

All FOIA Officers routinely review FOIA requests to identify types of frequently requested records for proactive posting. All component SMEs in various business units routinely identify parts of records for proactive disclosures. Once identified, these records are uploaded to websites. Additionally, all FOIA professionals provide guidance and training to encourage proactive disclosures whenever possible.

For ITA, there is no centralized system in place that identifies records for proactive disclosures. Each ITA business unit has its own SMEs that determines when and what ITA information is made publicly available. One exception is filings in IA ACCESS. IA ACCESS is the repository for all records filed in anti-dumping and countervailing duty (AD/CVD) proceedings. IA ACCESS provides the capability for registered E-Filers to submit documents to the record of an AD/CVD proceeding, as well as search for and view all public documents and public versions. These E-Filers must produce two set of copies: one that contains no redactions, which is only released to persons that have agreed to an administrative protective order for the proceeding; and another set for public viewing. The public viewing set contains redactions under Exemption 4 and is made publicly available for register users. Registration is free.

NTIA's Office of the Chief Counsel works with program offices, office of public affairs and the webmaster to ensure that records from the programs are routinely made available on the website.

As part of its responsibilities as an oversight agency, the OIG makes proactive releases of its reports and information on its activities to the public through regular postings on the OIG website. The OIG posts new information on its website on a rolling basis as reports and other written products are issued and as new information becomes available. For instance, the website contains Semi-annual reports to Congress, audit, inspection, and evaluation reports, the OIG top management challenges report on issues facing the Department, congressional testimony, information on current and planned activities, and investigative alerts warning the public about scams and other fraudulent activity covering a period of years. The IG Reform Act of 2008 requires the agency to post any report or audit that is subject to public release on its website within three working days of a public release determination. The OIG engages in an ongoing review of information related to investigations to determine the extent to which this information can be proactively released without jeopardizing law enforcement proceedings, consistent with the Privacy Act of 1974, as amended, and the requirement to protect confidential sources.





3. Provide examples of material that your agency has posted this past reporting period, including links to where this material can be found online.

An example of material OS has posted includes the Department of Commerce Premium Class Travel Reports. The link for the Premium Class Travel Reports is located at: <a href="http://www.osec.doc.gov/omo/foia/ereadingroom.htm">http://www.osec.doc.gov/omo/foia/ereadingroom.htm</a>.

An example of material BIS has posted includes all finalized export violations as well as all antiboycott violations. The link for the export and antiboycott violations is located at: http://efoia.bis.doc.gov/index.php/electronic-foia/index-of-documents.

An example of material ESA has posted includes economic briefings and economic reports. The links for the briefings and reports is located at: http://www.esa.doc.gov/economic-briefing; http://www.esa.doc.gov/reports.

An example of material ITA has posted includes the Tariff Tool system that consolidates and distills thousands of pages of U.S. Free Trade Agreement (FTA) tariff commitments down into a simple, online database. Initially, the Tariff Tool included data only for non-agricultural products. In fiscal year 2013, ITA worked to expand the Tariff Tool to include agricultural products. With those enhancements, the FTA Tariff Tool includes data for all products covered under U.S. FTAs. The link for the FTA Tariff Tool is located at <a href="http://export.gov/fta/ftatarifftool/ftamain.aspx">http://export.gov/fta/ftatarifftool/ftamain.aspx</a>.

An example of material NIST has posted includes news, datasets, videos, photos, and computer simulated models. The links for the NIST material is located at: http://wtcdata.nist.gov/; http://www.nist.gov/allnews.cfm.

An example of material NTIA has posted includes Broadband Technology Opportunities Program records, American Recovery and Reinvestment Act records, reports, speeches, testimony, etc. NTIA provides a large amount of documentation on its website regarding its highly visible programs such as the Broadband Technology Opportunities Program (BTOP) and First Responder Authority Network (FirstNet). This includes regular updates to project amendments, letters, environmental documentation, quarterly reports, ARRA reports, filings, meeting minutes, etc. See, <a href="http://www2.ntia.doc.gov/">http://www2.ntia.doc.gov/</a>. NTIA also regularly posts all filings, reports, speeches, testimony, etc. <a href="http://www.ntia.doc.gov/publications">http://www.ntia.doc.gov/publications</a>. In addition, NTIA provides live streaming of certain high profile meetings and also archives those video streams on its website. For example, NTIA has posted meeting minutes, etc. for FirstNet at: <a href="http://www.ntia.doc.gov/other-publication/2013/12172013-firstnet-meeting-documents">http://www.ntia.doc.gov/other-publication/2013/12172013-firstnet-meeting-documents</a>. For another example, this year NTIA began posting grant agreement documents for its State and Local Implementation Grant Program (SLIGP) grant program. These grant award documents for each state are available

at: http://www.ntia.doc.gov/sligp/sligp-awards.





An example of material NTIS has posted includes NTIS Advisory Board Meeting Minutes. The link for the NTIS material is located at: http://www.ntis.gov/pdf/advbrdminutes-Nov13.pdf.

An example of material OIG has posted includes Semi-Annual Reports to Congress, inspections and audits. The link for the OIG material is located at: http://www.oig.doc.gov/Pages/defalut.aspx.

An example of material USPTO has posted includes Patent Trial and Appeal Board decisions, Trademark Trial and Appeal Board decisions. The USPTO FOIA Reading Room was updated in FY 2013 to include all new Patent Trial and Appeal Board decisions (current to date), new Trademark Trial and Appeal Board decisions (current to date), new final disciplinary actions by the Office of Enrollment and Discipline (current to date), new notices of suit filed with U.S. District Courts (current to date), and new intellectual property judicial decisions of interest. Available at: <a href="http://www.uspto.gov/ip/boards/foia\_rr/index.jsp">http://www.uspto.gov/ip/boards/foia\_rr/index.jsp</a>. The USPTO continues to proactively release all frequently requested records and other records of interest such as government contracts (following review by submitters), notices of suit, judicial decisions of interest, and countless data points related to patents and trademarks. Available at: <a href="http://www.uspto.gov/ip/boards/foia\_rr/index.jsp">http://www.uspto.gov/ip/boards/foia\_rr/index.jsp</a>. The USPTO also is in the process of preparing FOIA request logs for the past several years to post in its E-FOIA Reading Room.

#### Making Posted Material More Useful:

4. Beyond posting new material, is your agency taking steps to make the posted information more useful to the public, especially to the community of individuals who regularly access your agency's website, such as soliciting feedback on the content and presentation of posted material, improving search capabilities on the site, posting material in open formats, making information available through mobile applications, providing explanatory material, etc.?

Yes.

5. If so, provide examples of such improvements.

The main Department website provides links to the Commerce Blog, a feed that contains frequently updated content, such as the Secretary's activities and the Spotlight on Commerce Series. The Commerce Blog provides links to all other Department bureau blogs. Blogs provide opportunity for comments.

Previously released records and custom reports may now be found using FOIAonline.





BIS public website contains export violations and antiboycott violations, along with other interesting bureau information such as speeches given by the Under Secretary and Assistant Secretaries posted for public comment.

During fiscal year 2013, ITA piloted Release 3 of IA ACCESS with internal and external users. Release 3 involves the secure access of business proprietary documents by authorized parties. Features include two factor authentication methods for access, expanded search features, as well as encryption and password protection of downloaded documents.

Beyond posting new material, NIST's web site and multimedia tools are available to the public and interested technical audiences to explain in layman's terms what we do at NIST, the results of the work, and solicit input about those results and direction of our work. With the use of Web 2.0 technologies (blogs, wikis, social networks, videos or websites with commenting functions, or research collaboration sites) a two-way conversation with the public is possible.

NTIA has revised its website design to, among other things, highlight topics of public interest for ease of access to agency information. This is accomplished on a dynamic basis where new items of interest arise those are highlighted in rotating box towards the top of the page, for example. The agency also receives feedback through its website regarding content posted.

As part of its responsibilities as an oversight agency, the OIG makes proactive releases of its reports and information on its activities to the public through regular postings on the OIG website. The IG Reform Act of 2008 requires the agency to post any report or audit that is subject to public release on its website within three working days of a public release determination. The OIG engages in an ongoing review of information related to investigations to determine the extent to which this information can be proactively released without jeopardizing law enforcement proceedings, consistent with the Privacy Act of 1974, as amended, and the requirement to protect confidential sources. To ensure that the presumption of openness is appropriately applied in processing FOIA requests, the OIG approaches each FOIA request with a view toward discretionary disclosure where appropriate. The OIG also makes it a practice to make partial disclosures of documents when full disclosure is not possible under the terms of FOIA.

The USPTO FOIA Reading Room provides several options to submit feedback and/or report any problems in an effort to maintain efficiency and utility. The Reading Room has a link to the general USPTO Contact Center as well as a dedicated "webmaster" email address for submitting comments or concerns. In the past, the webmaster has been extremely expedient in letting the FOIA Office know when a member of the public has submitted a comment or is having trouble accessing records. The FOIA team works directly with the Office of General Law IT staff to alleviate the problem or address the suggestion. In addition, an e-mail address and phone number for the USPTO FOIA Office are provided on the website and the FOIA Officer may be reached directly for any questions or concerns. The USPTO FOIA Officer routinely responds to questions from





members of the public related to accessing Agency records. The USPTO also provides several resources related to both understanding the FOIA and accessing other publicly available patent/trademark information.

6. Did your agency use any means to publicize or highlight important proactive disclosures for public awareness? If so, was social media utilized?

Press releases are sometimes utilized to publicize or highlight important proactive disclosures for public awareness, as are postings the website or blogs.

NTIA regularly uses its blog to post and highlight reports or documents made available to the public. For example, NTIA recently posted two reports about spectrum sharing and used a blog to explain and highlight those reports. See, <a href="http://www.ntia.doc.gov/blogs">http://www.ntia.doc.gov/blogs</a>.

NTIS uses Twitter and Facebook for notices to the public about new information in the NTIS Document Collection.

Social media is being used to post news of events and charts which provide the public information of news within OIG.

7. Has your agency encountered challenges that make it difficult to post records you otherwise would like to post? If so, please briefly explain what those challenges are.

BIS has a very interesting and unique mission protecting national security and interests by enforcing export controls on dual-use commodities. The majority of the frequently requested records are not releasable because the information is protected by statute. Aggregated data can be released; however, often requesters wish to obtain the data in different formats.

Available staffing resources are ITA's largest challenge. However, ITA routinely identifies records and information which are of sufficient public interest and routinely posts them on ITA's website or publicly available systems.

Storage capacity of voluminous records is a problem for NIST, especially when making files 508 compliant.

The OIG FOIA Office has encountered some challenges which make it difficult to post records proactively due to privacy concerns.

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

The Open Government team has taken the lead in identifying new ways to make more information publicly available. FOIA Officers routinely attend Department Open Government meetings. The meetings provide insight and increase our ability to post information on line.





The FOIA Officers continue to monitor and examine the nature of FOIA requests received each year on an ongoing basis to determine if and whether it has repeat requests or popular categories that are not already addressed in the FOIA Reading Room. In addition, the USPTO's FOIA Reading Room contains document repositories that are fully text-searchable so that the public can quickly access the records that are proactively disclosed.

#### Section IV: Steps Taken to Greater Utilize Technology

A key component of the President's FOIA Memorandum was the direction to "use modern technology to inform citizens about what is known and done by their Government." In addition to using the internet to make proactive disclosures, agencies should also be exploring ways to utilize technology in responding to requests. Over the past several years, agencies reported widespread use of technology in receiving and tracking FOIA requests and preparing agency Annual FOIA Reports. For 2014, as we have done over the past years, the questions have been further refined and now also address different, more innovative aspects of technology use.

#### Online tracking of FOIA requests:

- 1. Can a FOIA requester track the status of his/her request electronically?
  - Yes.
- 2. If yes, how is this tracking function provided to the public? For example, is it being done through regularly updated FOIA logs, online portals, or other mediums?
  - For USPTO, a requester can track the status of their request by going to: https://foia.uspto.gov/palain.aspx and click the link "Check FOIA Request Status."
  - For all other bureaus of the Department, a requester can track the status of their request by going to FOIAonline, which is located
  - at: https://foiaonline.regulations.gov/foia/action/public/home.
- 3. Describe the information that is provided to the requester through the tracking system. For example, some tracking systems might tell the requester whether the request is "open" or "closed," while others will provide further details to the requester throughout the course of the processing, such as "search commenced" or "documents currently in review." List the specific types of information that are available through your agency's tracking system.
  - For USPTO, the requester can see the stage of their request, which may be any of the following: Received; Assigned for Processing; On Hold-Need Info/Clarification; In Process; Cost Estimate Sent; Completed; or Closed. The requester also sees a key to explain what each of these statuses means.





If requesters submit through FOIAonline, they will know where in the course of processing their requests stand through notifications. The requesters will be notified when they submit their request, when it is being evaluated (scope, fee waiver, expedited processing issues), assigned, processed, and finally closed.

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

For USPTO, the online tracking system does not provide the requester with an estimated date of completion. However, the requester does receive an estimated date of completion in the acknowledgement letter that goes out within 1 to 2 business days of receiving a request.

In FOIAonline each requester is provided with an automated date based on the statutory deadline, and not an estimated date of completion.

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

Not applicable.

*Use of technology to facilitate processing of requests:* 

6. 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?

Yes.

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

The OS and ITA are still using basic electronic search engines but it is interested in exploring more advanced options. Technological improvements through updates and upgrades to the FOIAonline system are being made. OS is scheduled to purchase a second high volume scanner in FY 2014, to be used as a campus scanner for all FOIA professionals located at Department headquarters. We also utilize a Secure File transfer system to share large quantities of documents review and discussion. As for record sharing, FOIAonline is an excellent platform for consultations and referrals. However, it is limited to only the agencies that have adopted the system.

Some programs within NOAA utilize commercial records management software to sort and de-duplicate documents.





The Census Bureau and NTIA's Office of the General Counsel has deployed a document sharing program using SharePoint that could facilitate these advanced capabilities.

The OIG is taking steps to utilize advance technology to facilitate overall FOIA efficiencies. Furthermore, the OIG is migrating records from older technology such as shared drives to SharePoint folders to increase transparency.

The USPTO FOIA Office uses an electronic system, FOIAXpress to manage its FOIA requests. In addition to redaction, FOIAXpress is an effective tool for document sharing and record organization. It allows the FOIA professionals to quickly search for specific requests, requesters, and other request-related information. The USPTO Office of General Counsel has also purchased an electronic discovery management tool called Clearwell. Clearwell has advanced de-duplication, organization, and record search capabilities. At this time, the USPTO FOIA Office is not using Clearwell to respond to FOIA requests, but it may in the future.

8. Are there additional technological tools that would be helpful to achieving further efficiencies in your agency's FOIA program?

Internal digital signatures software and de-duplication software would be helpful.

# Section V: Steps Taken to Improve Timeliness in Responding to Requests and Reduce Backlogs

The President and the Attorney General have emphasized the importance of improving timeliness in responding to requests. This section addresses both time limits and backlog reduction. Backlog reduction is measured both in terms of numbers of backlogged requests or appeals and by looking at whether agencies closed their ten oldest requests, appeals, and consultations.

#### Simple Track Requests:

- 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.
- a. Does your agency utilize a separate track for simple requests?

Yes. The Department utilizes a multi-track processing system. The three tracks are simple, complex, and expedited.





- b. If so, for your agency overall, for Fiscal Year 2012, was the average number of days to process simple requests twenty working days or fewer?
  - Yes. The agency overall average number of days to process simple requests was nine working days.
- c. If your agency does not track simple requests separately, was the average number of days to process non-expedited requests twenty working days or fewer?

Not Applicable.

Backlogs and "Ten Oldest" Requests, Appeals and Consultations:

2. Section XII.A of your agency's Annual FOIA Report, entitled "Backlogs of FOIA Requests and Administrative Appeals" shows the numbers of any backlogged requests or appeals from the fiscal year. Section VII.E, entitled "Pending Requests – Ten Oldest Pending Requests," Section VI.C.(5), entitled "Ten Oldest Pending Administrative Appeals," and Section XII.C., entitled "Consultations on FOIA Requests – Ten Oldest Consultations Received from Other Agencies and Pending at Your Agency," show the ten oldest pending requests, appeals, and consultations. You should refer to these numbers from your Annual FOIA Reports for both Fiscal Year 2012 and Fiscal Year 2013 when completing this section of your Chief FOIA Officer Report.

#### Backlogs

- a. If your agency had a backlog of requests at the close of Fiscal Year 2013, did that backlog decrease as compared with Fiscal Year 2012?
  - No. The backlog of FOIA requests for the agency overall increased by 11 from Fiscal Year 2012. The agency overall number increased from 227 in Fiscal Year 2012 to 238 in Fiscal Year 2013. Of the Department's thirteen bureaus, 5 bureaus had an increase in their backlogs, 4 had a decrease in their backlogs, 2 bureaus remained the same, and 2 bureaus had no backlog.
- b. If your agency had a backlog of administrative appeals in Fiscal Year 2013, did that backlog decrease as compared to Fiscal Year 2012?
  - No. The backlog of administrative appeals for the agency overall increased by 1 from Fiscal Year 2012. The agency overall number increased from 33 in Fiscal Year 2012 to 34 in Fiscal Year 2013.

### Ten Oldest Requests

c. In Fiscal Year 2013, did your agency close the ten oldest requests that were pending as of the end of Fiscal Year 2012?





No.

d. If no, please provide the number of these requests your agency was able to close by the end of the fiscal year, as listed in Section VII.E of your Fiscal Year 2012 Annual FOIA Report. If you had less than ten total oldest requests to close, please indicate that. For example, if you only had seven requests listed as part of your "ten oldest" in Section VII.E. and you closed two of them, you should note that you closed two out of seven "oldest" requests.

No. The agency overall closed out 6 of the 10 oldest requests that were pending as of the end of Fiscal Year 2012.

#### Ten Oldest Appeals

e. In Fiscal Year 2013, did your agency close the ten oldest administrative appeals that were pending as of the end of Fiscal Year 2012?

No.

f. If no, please provide the number of these appeals your agency was able to close, as well as the number of appeals your agency had in Section VI.C.(5) of your Fiscal Year 2012 Annual FOIA Report.

No. The agency overall closed out 9 of the 10 oldest administrative appeals that were pending as of the end of Fiscal Year 2012.

#### Ten Oldest Consultations

- g. In Fiscal Year 2013, did your agency close the ten oldest consultations received by your agency and pending as of the end of Fiscal Year 2012?
  - Yes. In Fiscal Year 2012, the agency overall had a total of 5 oldest consultations. The agency overall closed out 5 of the 5 oldest consultations received as of the end of Fiscal Year 2012.
- h. If no, please provide the number of these consultations your agency did close, as well as the number of pending consultations your agency listed in Section XII.C. of your Fiscal Year 2012 Annual FOIA Report.

Not Applicable.

Reasons for Any Backlogs:





3. If you answered "no" to any of the questions in item 2 above, describe why your agency was not able to reduce backlogs and/or close the ten oldest pending requests, appeals, and consultations. In doing so, answer the following questions then include any additional explanation:

### Request and/or Appeal Backlog

- a. Was the lack of a reduction in the request/appeal backlog a result of an increase in the number of incoming requests?
  - Yes, for requests in part. The agency overall received a slight increase of 16 requests, from 1807 in Fiscal Year 2012 to 1823 in Fiscal Year 2013.
  - No, fewer appeals were received. The agency overall received a decrease of 18 appeals, from 66 in Fiscal Year 2012 to 48 in Fiscal Year 2013.
- b. Was the lack of a reduction in the request/appeal backlog caused by a loss of staff?
  - No. Loss of staff was not an issue with the lack of reduction in backlogged requests. However, there are fewer full time staff processing requests.
  - No. Loss of staff was not an issue with the lack of reduction in backlogged appeals.
- c. Was the lack of a reduction in the request/appeal backlog caused by an increase in the complexity of the requests/appeals received?
  - Yes. Complexity of both requests and appeals contributed to the increase of the backlog.
- d. What other causes, if any, contributed to the lack of a decrease in the request backlog?
  - Complexity of requests and voluminous responsive records were factors contributing to a lack of a decrease in the request and appeal backlog.

#### "Ten oldest" Not Closed

- e. Briefly explain the obstacles your agency faced in closing its ten oldest requests, appeals, and consultations from Fiscal Year 2012.
  - Available staffing resources are a challenge. And an increase in the complexity of requests and voluminous responsive records also slows the processing time.
- f. If your agency was unable to close any of its ten oldest requests or appeals because you were waiting to hear back from other agencies on consultations you sent, please provide the date the request was initially received by your agency, the date when your agency





sent the consultation, and the date when you last contacted the agency where the consultation was pending.

Not Applicable.

Plans for Closing of Ten Oldest Pending Requests, Appeals, and Consultations and Reducing Backlogs:

Given the importance of these milestones, it is critical that Chief FOIA Officers assess the causes for not achieving success and create plans to address them.

4. If your agency did not close its ten oldest pending requests, appeals, and consultations, please provide a plan describing how your agency intends to close those "ten oldest" requests, appeals, and consultations during Fiscal Year 2014.

Commerce plans to devoted more FOIA experts to devote more time to complete complex requests and specifically a special emphasis on closing the then oldest requests, appeals, and consultations during Fiscal Year 2014.

5. If your agency had a backlog of more than 1000 pending requests and did not reduce that backlog in Fiscal Year 2013, provide your agency's plan for achieving backlog reduction in the year ahead.

Not Applicable.

#### *Interim Responses:*

OIP has issued guidance encouraging agencies to make interim releases whenever they are working on requests that involve a voluminous amount of material or require searches in multiple locations. By providing rolling releases to requesters, agencies facilitate access to the requested information.

6. Does your agency have a system in place to provide interim responses to requesters when appropriate?

Yes. All bureaus have a system in place to provide interim responses to requesters when appropriate. Documents are provided as interim responses on a rolling basis as they are processed.

7. If your agency had a backlog in Fiscal Year 2013, please provide an estimate of the number or percentage of cases in the backlog where a substantive, interim response was provided during the fiscal year, even though the request was not finally closed.

24% of agency overall backlogged requests in FY 2013 have received at least one installment of responsive records.





#### **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:

- Did your agency invoke a statutory exclusion during Fiscal Year 2013?
   Yes.
- 2. If so, what is the total number of times exclusions were invoked?

The USPTO invoked exclusion 5 U.S.C. § 552(c)(1)only once during FY 2013.

#### **Spotlight on Success**

Out of all the activities undertaken by your agency since March 2013 to increase transparency and improve FOIA administration, please briefly describe here at least one success story that you would like to highlight as emblematic of your agency's efforts. The success story can come from any one of the five key areas. As noted above, these agency success stories will be highlighted during Sunshine Week by OIP. To facilitate this process, all agencies should use bullets to describe their success story and limit their text to a half page. The success story is designed to be a quick summary of a key achievement. A complete description of all your efforts will be contained in the body of your Chief FOIA Officer Report.

- The Census Bureau implemented a project to transition FOIA/PA cases from being stored/maintained in both paper and electronic formats, which require duplication of effort and unnecessary use of resources, to storing/maintaining files in only electronic format. Moving to electronic record keeping not only freed up resources for other tasks/projects, it also freed up storage space, reduced the costs related to printing case files, and increased the efficiency of case management. This project also entailed increasing communication with requesters via email or the FOIAonline system rather than by standard mail, when possible. Reducing mail-outs helped save time and money, as well as increased customer responsiveness. This satisfied new Department of Justice guidelines for communicating with requesters.
- The NOAA FOIA Office moved to the OCIO in November, 2013. This change allows for better alignment with the bureau's Open Government Program. The NOAA FOIA Officer will share information about the move, FOIAonline and the FOIA to NOAA's workgroup consisting of Chief Information Officers and their staffs from the different program offices. The move also provides management support for increased use of technology in processing FOIA requests.





- The NTIA trained all of the Office of the Chief Counsel personnel to process FOIA requests in order to tackle large complex cases that were on its oldest 10 list. Then each attorney was assigned a single FOIA case to review and provide interim responses on a rolling basis until the FOIA was complete. Through this focused effort to close the older matters by the end of the 2013, NTIA to closed 9 of 10 of its oldest cases. In at least one case, the attorney reviewed over 3000 pages, sent out 6 interim responses, sent several B4 requester notices all in about four months closing the matter.
- The USPTO highlights its updated FOIA search and response process, which streamlined the duties for records custodians into a clear four-step process of (1) searching, (2) identifying, (3) signing a confirmation of search locations, and (4) sending all responsive records for review by the FOIA Office. Although updating instructions is a simple step, we believe that it has resulted in a more thorough and accurate search process by the individuals in the agency that maintain responsive records.