

# U.S. DEPARTMENT OF COMMERCE

2023 CHIEF FOIA OFFICER REPORT

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Component Abbreviation	Bureau Operating Unit (Component)
BEA	Bureau of Economic Analysis
BIS	Bureau of Industry and Security
CEN	Census Bureau
EDA	Economic Development Administration
InfoLaw	Information Law Division
IOS	Immediate Office of the Secretary
ITA	International Trade Administration
MBDA	Minority Business Development Agency
NIST	National Institute of Standards and Technology
NOAA	National Oceanic and Atmospheric Administration
NTIA	National Telecommunications and Information Administration
NTIS	National Technical Information Service
OIG	Office of Inspector General
OS	Office of the Secretary
OUSEA	Office of the Under Secretary for Economic Affairs
USPTO	U.S. Patent and Trademark Office

# Section I: FOIA Leadership and Applying the Presumption of Openness

## Section I: Leadership Support for FOIA

1. The FOIA requires each agency to designate a Chief FOIA Officer who is a senior official at the Assistant Secretary or equivalent level. See 5 U.S.C. §552(j)(1) (2018). Is your agency's Chief FOIA Officer at this level?

Yes.

2. Please provide the name and title of your agency's Chief FOIA Officer.

Charles R. Cutshall, Chief Privacy Officer and Director of Open Government

3. What steps has your agency taken to incorporate FOIA into its core mission? For example, has your agency incorporated FOIA milestones into its strategic plan?

The U.S. Department of Commerce (the "Department") incorporates FOIA into its core mission through its bureau operating units' (components) organizational structure (through Department Organization Orders (DOO)) and into its employee's performance plans who have FOIA duties and responsibilities. For example, the Economic Development Administration's DOO 45-1 explicitly delegates FOIA duties and responsibilities to its Office of the Chief Counsel. Also, although not explicitly mentioned in the Department's strategic plan for fiscal years 2022 to 2026, many of the Department's bureau operating units cite *Strategic Goal 5: Provide 21st Century Service with 21st Century Capabilities* as a way to align the administration of the FOIA with the Department's strategic plan.

# Section I: Presumption of Openness

4. The Attorney General's 2022 FOIA Guidelines provides that "agencies should confirm in response letters to FOIA requesters that they have considered the foreseeable harm standard when reviewing records and applying FOIA exemptions." Does your agency provide such confirmation in its response letters?

Most of the Department's components began including confirmation in response letters to FOIA requesters that they have considered the foreseeable harm standard when reviewing records and applying FOIA exemptions as set out in the Attorney General's 2022 FOIA Guidelines. By March 2023, the Department plans to issue formal guidance to all its bureau operating units to begin to include such confirmation in its response letters.

- 5. With respect to Glomar responses, please answer the below questions:
  - a. In addition to tracking the asserted exemption, does your agency specifically track whether a request involved a *Glomar* response?

No.

- b. If yes, please provide:
  - i. the number of times your agency issued a full or partial *Glomar* response (separate full and partial if possible);

N/A

ii. the number of times a *Glomar* response was issued by exemption (e.g., Exemption 7(C) –20 times, Exemption 1 –5 times).

N/A

c. If your agency does not track the use of *Glomar* responses, what would your agency need to do to track in the future? If possible, please describe the resources and time involved.

The Department's FOIA case management system would require customization to track Glomar responses in the future.

6. Optional -- If there are any other initiatives undertaken by your agency to ensure that the presumption of openness is being applied, please describe them here.

Initiatives undertaken by the Department's bureaus to ensure the presumption of openness follow:

EDA provided all items flagged for redaction or withholding under FOIA exemptions for Office of Chief Counsel review, with an emphasis on the presumption of openness.

ITA provided guidance to program staff on the FOIA including the presumption of openness and conducting foreseeable harm reviews. Also, ITA FOIA staff worked with their business units to ensure they are segregating information where possible and reminded them of the presumption of openness.

NOAA engaged with line offices to examine potential proactive disclosures of video conference recordings, to ensure that meetings which do not include any exempt material are made available to the public, when possible.

USPTO provided training on the foreseeable harm standard and discretionary releases. Additionally, USPTO posts an enormous amount of information on its website including most patent applications; Patent Trial and Appeal Board (PTAB)

and Trademark Trial and Appeal Board (TTAB) decisions; and OED disciplinary actions. USPTO is continuously evaluating making more proactive disclosures and posting more data sets on its website.

# Section II: Ensuring Fair and Effective FOIA Administration

## Section II: FOIA Training

 The FOIA directs agency Chief FOIA Officers to ensure that FOIA training is offered to agency personnel. See 5 U.S.C. §552(a)(j)(2)(F). Please describe the efforts your agency has undertaken to ensure proper FOIA training is made available and used by agency personnel.

The Chief FOIA Officer hosts an annual Sunshine Week Event that includes FOIA training sessions available to all agency personnel. Also, the Department makes U.S. Department of Justice's Office of Information Policy (OIP) FOIA training modules available through the Commerce Learning Center, its enterprise-wide training system.

2. Did your FOIA professionals or the personnel at your agency who have FOIA responsibilities attend substantive FOIA training during the reporting period such as that provided by the Department of Justice?

Yes.

3. If yes, please provide a brief description of the type of training attended or conducted and the topics covered.

The Department makes U.S. Department of Justice's OIP FOIA training modules available through the Commerce Learning Center, its enterprise-wide training system.

Department-wide trainings organized and hosted by the Office of Privacy and Open Government (OPOG) and made available to all Department personnel conducted as part of its Sunshine Week Event (March 16, 2022) included:

FOIA/PA History and Overview - A history and overview of the FOIA and Privacy Act;

DOC FOIA 101 - an overview of the administrative FOIA processing at the U.S. Department of Commerce; A session about e-Discovery Tools for FOIA that discussed leveraging e-Discovery tools (including a Relativity demo) to improve FOIA workflow and processes;

A session about strategies to prevent FOIA litigation and minimize litigation risk; and

FOIA/PA Professionals Roundtable, Backlog Reduction: Best Practices - A roundtable discussion that discussed best practices surrounding FOIA backlog reduction.

Personnel from the following bureaus attended either the American Society of Access Professionals National Training Conference (July 19-21, 2022) or the FOIA-Privacy Act Training Workshop (September 7-9, 2022): BEA, CEN, IOS, and OS.

Department personnel attended the following U.S. Department of Justice's OIP-led trainings:

Virtual Processing a Request from Start to Finish (April 19, 2022); Virtual Litigation Workshop (May 11, 2022); Virtual Exemption 1 and Exemption 7 Training (June 1, 2022); Virtual Exemption 4 and Exemption 5 Training (June 14, 2022); Virtual Privacy Considerations Training (July 7, 2022); Virtual Continuing FOIA Education (July 12, 2022); Virtual Annual Refresher and Quarterly Report Training (October 4, 2022); and Chief FOIA Officers Report Training (October 18, 2022).

In addition, the following bureaus either attended or conducted the following trainings:

The Office of the Chief Counsel for Industry and Security (BIS) partnered with the Office of General Counsel to offer FOIA, Privacy and Transparency Training to BIS personnel.

ITA conducted training related to "Processing, redacting, and general FOIA guidance" throughout ITA. The training covered the use of Adobe Acrobat Pro to perform redactions.

NTIS personnel attended National Press Club Journalism Institute FOIA training, "My First FOIA" (April 29, 2022).

4. Please provide an estimate of the percentage of your FOIA professionals and staff with FOIA responsibilities who attended substantive FOIA training during this reporting period.

90%.

5. OIP has directed agencies to "take steps to ensure that all of their FOIA professionals attend substantive FOIA training at least once throughout the year." If your response to the previous question is that less than 80% of your FOIA professionals attended training, please explain your agency's plan to ensure that all FOIA professionals receive or attend substantive FOIA training during the next reporting year.

N/A

6. Describe any efforts your agency has undertaken to inform non-FOIA professionals of their obligations under the FOIA. In particular, please describe how often and in what formats your agency provides FOIA training or briefings to non-FOIA staff; and if senior leaders at your agency received a briefing on your agency's FOIA resources, obligations and expectations during the FOIA process.

Efforts undertaken by the Department to inform non-FOIA professionals of their obligations under the FOIA follow:

BEA collaborated with its non-FOIA professional staff, such as program office managers, and the Office of the Chief Information Officer.

BIS provided both reading materials for FOIA processing training and hands-on reviewing exercises. BIS provides training to any new employees or contractors who may be required to process a FOIA request. FOIA professionals provide BIS Senior leaders training before process begins.

CEN scheduled a "Brown Bag Session" for January 2023.

EDA continuously informs non-FOIA professionals of their obligations under the FOIA. On a regular basis, the EDA FOIA Officer emphasizes the importance of FOIA to non-FOIA professionals through memorandums and FOIA updates communicated to the agency's staff when fanning out a request. In addition, new employees are provided ad hoc training to understand their FOIA responsibilities. The EDA senior leadership team is also briefed by the EDA FOIA Officer on the agency's FOIA resources, obligations, and expectations.

For IOS, OPOG and OGC led the following virtual training session for its office unit contacts: "Freedom of Information Act (FOIA) Overview, Immediate Office of the Secretary.

ITA emphasizes open communication and transparency to ensure compliance with the applicable laws and obligations. Additionally, ITA conducts in-person one-on-one guidance. For example, FOIA Staff conducted training within the Office of the Chief Financial and Administrative Officer to inform its personnel of their FOIA obligations.

NIST emphasizes the importance of openness as a factor to consider when reviewing records in training sessions and when discussing specific requests. In addition, the FOIA Office and the NIST Office of the Chief Counsel carefully review all suggested withholdings, placing a priority on the presumption of openness, and consider the foreseeable harm prior to making a final determination to withhold records or information.

The NTIA Office of Chief Counsel (OCC) developed a training that is provides to all non-FOIA staff. For example, this past year, NTIA/OCC trained all senior staff virtually regarding FOIA. NTIA/OCC has also trained program offices regarding FOIA responsibilities.

NOAA engaged with its General Counsel's Office to ensure dissemination of FOIA requirements and to assist its General Counsel's Office in their incorporation of changes in FOIA case law and DOJ OIP Guidance into OGC's advice for the NOAA client. The NOAA Chief Information Officer Council also received multiple briefings regarding FOIA obligations, budget, and program requirements for transparency. The NOAA FOIA Office also provided reoccurring FOIA briefings for the Office of Human Capital Services Senior Executive Service New Hire Orientations.

OIG has made an electronic FOIA training available to all its employees which includes an overview of the statute and associated responsibilities. In addition to the structured training offered, OIG FOIA Office maintains an open-door policy for questions related to FOIA search, production, and other issues.

OS (through OPOG and OGC) led the following information session regarding "The Privacy Act and Investigations and Threat Management Service" for the following employee resource groups (ERGs): DOC Asian American and Pacific

Islander, NOAA Asian ERG, NOAA NHPI ERG, BBOLD, and Commerce Pride. OS is also planning an office unit training session for the second quarter of Fiscal Year 2023.

USPTO provided joint training with the Records Office and customized training to several regional offices, Trademarks, OED, and Technology Centers. The USPTO FOIA Office will soon also provide specialized training on FOIA Exemption 5 and foreseeable harm. The FOIA Office communicates regularly with the Director's Office about USPTO's FOIA program.

OGC/Info Law participates and leads information and training sessions during the Department's Sunshine Week event. OGC also cross-references FOIA requirements in other trainings when possible, such as during sessions on Controlled Unclassified Information.

MBDA senior leadership received a FOIA training from OGC's Information Law Division, and additional trainings are planned for career leadership and staff.

## Section II: Outreach

7. Did your FOIA professionals engage in any outreach or dialogue, outside of the standard request process, with the requester community or open government groups regarding your administration of the FOIA? Please describe any such outreach or dialogue, and, if applicable, any specific examples of how this dialogue has led to improvements in your agency's FOIA administration.

Yes. Descriptions of outreach and dialogue follow:

BIS proactively engages with requesters and assist them with frequently asked records that could be both releasable and helpful. For example, the BIS FOIA Office often offers the requester our aggregate export license reports which are fully releasable.

NOAA unilaterally engaged with OGIS in mediation, prior to requester instigation, to try to engage with the requester and resolve concerns with processing prior to litigation and to improve transparency and requester outreach.

OIG participates in an informal working group consisting of FOIA professionals within other federal agency OIGs to discuss FOIA developments.

8. As part of the standard request process, do your FOIA professionals proactively contact requesters concerning complex or voluminous requests in an effort to clarify or narrow the scope of the request so requesters can receive responses more quickly? Please describe any such outreach or dialogue, and, if applicable, any specific examples.

Yes. All the Department's FOIA Officers and their respective staffs reach out to requesters concerning complex or potentially voluminous requests to clarify or narrow the scope of requests so requesters can receive responses quicker. Specific examples of those outreach and dialogue efforts follow:

IOS offers requesters suggestions on they might be able to narrow the scope to receive a quicker response to their request as well as asks for specific keywords, names of particular bureaus/office units involved in the request, and specific time frames.

NOAA held a FOIA Roundtable where OGC trained all its professionals on the need and utility of pro-actively reaching out to requesters to narrow the scope and improve timely FOIA responses.

9. The FOIA Improvement Act of 2016 requires additional notification to requesters about the services provided by the agency's FOIA Public Liaison. Please provide an estimate of the number of times requesters sought assistance from your agency's FOIA Public Liaison during FY 2022 (please provide a total number or an estimate of the number).

Approximately 40 times.

## **Section II: Other Initiatives**

10. Has your agency evaluated the allocation of agency personnel resources needed to respond to current and anticipated FOIA demands? If so, please describe what changes your agency has or will implement.

Yes. Changes that have been or will be implemented follow:

CEN is trying to hire more FOIA staff.

ITA is currently reallocating resources to respond to the programs growing demands. Currently, ITA is restructuring the process to provide additional support to the FOIA program.

NIST discusses workload metrics with staff to assess best practices to handle cases.

NTIA is in the process of expanding its FOIA team to include a full-time FOIA person and more staff attorneys assigned to review FOIA matters.

NTIS is mentoring another staffer to assist with processing FOIA requests.

MBDA is in the process of hiring additional FOIA staff.

NOAA utilizes an approach called Tiger Team processing which utilizes a small core group of FOIA professionals that can transition their FOIA processing efforts from office to office as needed depending on caseload and office bandwidth. NOAA notes how beneficial this approach was considering the partial-FTE FOIA Staff at the Staff and Line Offices, to have a dedicated team that can help lift the load when one office is inordinately impacted by shifts in request emphasis. In addition, NOAA has incorporated a single point awareness vetting of high-visibility and litigation items through General Counsel. This has reduced the impediments to visibility and expedited General Counsel involvement to give quick visibility to leadership.

USPTO continuously monitors the staff needed to run an effective FOIA program. Based on the increased complexity and volume of requests, USPTO hired another FOIA attorney in April of 2022.

OGC/Info Law added four (4) non-FOIA professionals to aid the FOIA appeals process.

11. How does your agency use data or processing metrics to ensure efficient management of your FOIA workload? For example, case management reports, staff processing statistics, etc. In addition, please specifically highlight any data analysis methods or technologies used.

All the Department's bureau operating units utilize the FOIA case management system (FOIAonline) except for USPTO, to ensure efficient management of the FOIA workload. Both FOIA case management systems allow for the generation of reports for further analysis, including monitor trends of incoming and processed requests. Additional examples of the Department's use of data or processing metrics follows:

BEA utilizes and updates an internal case tracker for its FOIA Officer, FOIA Public Liaison and administrative staff monthly. This tracker monitors quantity of requests, turnaround times and the complexity of each request.

CEN prepares executive reports at monthly intervals that includes requests received and requests resolved.

IOS provides weekly updates to the Office of the Chief Financial Officer and Assistant Secretary for Administration (OCFO-ASA) regarding numbers of incoming requests as well as updates a list of the 20 oldest requests under IOS purview.

NOAA uses weekly reports, monthly reports, regular notifications to General Counsel, along with meetings with the Undersecretary Office and Communications Office to identify gaps, technology, or methodologies that need improvement or areas where the program needs attention, funding, or support. It was largely through this reporting and collaboration with NOAA leadership that led to inclusion of the FOIA program in the NOAA CIO Direct Bill funding.

OS provides weekly administrative workload reports to its direct reports and management. These reports become part of a monthly trending metric provided to OCFO-ASA on number of requests pending. Also, OS updates a list of the 20 oldest requests under OS purview as well as the Department's overall 10 oldest pending requests.

12. Optional --If there are any other initiatives undertaken by your agency to ensure fair and effective FOIA administration, please describe them here.

The Departmental FOIA/PA Officer chairs a monthly FOIA Council Meeting that consists of the FOIA Officers of their designated representatives as well as OGC representatives. The FOIA Council offers a chance to widely distribute FOIA guidance, information on upcoming trainings, and opportunities to increase efficiency and cooperation within the Department.

# **Section III: Proactive Disclosures**

#### **Section III: Proactive Disclosures**

1. Please describe what steps your agency takes to identify, track, and post (a)(2) proactive disclosures.

The Department's bureaus have taken the following steps to identify, track, and post (a)(2) proactive disclosures:

BEA's mission is to disseminate data; therefore, by default, the process of proactively releasing information is a core role for BEA and considered to be a normal operating procedure. In 2021 less than one (1) percent of FOIA requests required a unique disclosure. BEA's goal is to publish as much of our findings as we can. Also, BEA is working on a new FOIA website to post proactive disclosures, if necessary. Much of BEA's current site effectively discloses information as outlined in DOJ's explanation of 5 U.S.C. section 552(a)(2)(D).

CEN identifies high interest requests, and then posts them on the public information directory on its web page.

IOS works to proactively post the U.S. Secretary of Commerce's calendars at monthly intervals.

NIST works with its Public Affairs Office and Open Government Office to communicate the importance of proactive disclosures for NIST.

NTIA/OCC staff assess each case as it is closed to determine whether it meets the (a)(2) proactive disclosure requirements. NTIA/OCC staff assesses all material posted on its website annually to track and document all proactive disclosures. NTIA also regularly discusses with program offices the need to proactively disclose records that be the subject of future FOIA requests.

NOAA takes records that it believes are of significant public informative value, and routinely places them in its FOIA reading room. This includes records about FOIA guidance, processing, and releases made in other litigations.

OIG proactively disclosed items such as Semi-annual reports to Congress; audit, evaluation, and other reports; the OIG top management challenges report on issues facing the Department; congressional testimony, and information on current and planned activities.

The USPTO FOIA Office meets bi-weekly to discuss frequently requested records and address whether they can be posted publicly.

2. Provide examples of material that your agency has proactively disclosed during the past reporting year, including records that have been requested and released three or more times in accordance with 5 U.S.C. §552(a)(2)(D). Please include links to these materials as well.

All the Department's bureaus make the majority of released records available through the FOIAonline website.

Also, the following examples include of proactive disclosures throughout the Department:

BEA receives many requests for regional and national economic information; however, this information is already publicly available on BEA's website at <a href="https://www.bea.gov/data/economic-accounts/regional">https://www.bea.gov/data/economic-accounts/regional</a> and <a href="https://www.bea.gov/data/economic-accounts/national">https://www.bea.gov/data/economic-accounts/regional</a> and <a href="https://www.bea.gov/data/economic-accounts/national">https://www.bea.gov/data/economic-accounts/regional</a> and <a href="https://www.bea.gov/data/economic-accounts/national">https://www.bea.gov/data/economic-accounts/national</a> and <a href="https://www.bea.gov/data/economic-accounts/national">https://www.bea.gov/data/economic-accounts/national</a>.

IOS posts the U.S. Secretary of Commerce's calendars at monthly intervals as well as the Department of Commerce Overview Briefing Book for the 2020 Presidential Transition Team at <u>https://www.osec.doc.gov/opog/foia/foia\_elibrary.html</u>.

The Tariff Tool system consolidates and distills thousands of pages of U.S. Free Trade Agreement (FTA) tariff commitments down into a simple, online database (available at <u>https://beta.trade.gov/fta/tariff-rates-search</u>).

ACCESS is the repository for all records filed in anti-dumping and countervailing duty (AD/CVD) proceedings. ACCESS provides the capability for registered E-Filers to submit documents to the record of an AD/CVDproceeding and allows the public to view versions of all documents submitted (available at <u>https://access.trade.gov/login.aspx</u>; free registration).

The National Travel and Tourism office within ITA now posts its monthly statistics on arrival and departure information to and from the United States. (available at <a href="https://travel.trade.gov/research/monthly/index.asp">https://travel.trade.gov/research/monthly/index.asp</a>).

NIST provides public access to scientific data through https://data.gov as well as a data portal on NIST's website, https://data.nist.gov. Publications are available within 12 months of publication through the National Institutes of Health's PubMed Central at <u>https://www.ncbi.nlm.nih.gov/pmc/funder/nist</u> and through the Government Publishing

Office's govinfo at <a href="https://www.govinfo.gov/collection/nist">https://www.govinfo.gov/collection/nist</a>. Most programming code written at NIST is developed as part of our research programs and is developed to address specific and unique mission-related research problems. NIST makes its code discoverable on <a href="https://code.nist.gov">https://code.nist.gov</a>, and openly share this software through public Github repositories for potential re-use by its stakeholders. Software is also available from <a href="https://www.nist.gov/services-resources/software">https://www.nist.gov/services-resources/software</a>. NIST has worked with The Internet Archive under an arrangement with the Library of Congress to digitize nearly 25,000 technical reports the agency has published over the last 100+ years. As the publications are digitized, they are made accessible to the public through appropriate sources including: <a href="https://www.worldcat.org">https://www.worldcat.org</a>, <a href="https://www.worldcat.org">https://www.worldcat.org</a>, <a href="https://www.nist.gov/digitalarchives">https://www.nist.gov/services-resources/software</a>, and <a href="https://www.nist.gov/digitalarchives">https://www.nist.gov/digitalarchives</a>, <a href="https://www.nist.gov/digitalarchives">https://www.nist.gov/digitalarchives</a>, <a href="https://www.nist.gov/digitalarchives">https://www.nist.gov/digitalarchives</a>, and <a href="https://www.nist.gov/digitalarchives">https://www.nist.gov/digitalarchives</a>, and <a href="https://www.nist.gov/digitalarchives">https

NTIA has proactively disclosed information regarding its several broadband grant programs. This information is and has been frequently requested. This information includes how to apply for a broadband grant, webinars, technical assistance, NOFOs, blog posts, news articles, training, proposed service areas, information about grants given, etc. In addition, NTIA has posted maps that include the areas that will benefit from these grants. This information is all available at: www.broadbandusa.ntia.doc.gov.

Federal science technical reports and documents in the NTIS collection are free of charge for discovery, searching, and downloading from the NTIS database. This repository is open to the public through the National Technical Reports Library (<u>https://ntrl.ntis.gov/NTRL/</u>).

OIG posts information on their website at <u>http://www.oig.doc.gov/Pages/default.aspx</u>.

OS posts the Department of Commerce Bank Card Listing at quarterly intervals on the OPOG Electronic FOIA Reading Room website at <u>https://www.osec.doc.gov/opog/foia/foia\_elibrary.html</u>.

USPTO posts the file wrappers of most granted patents at <u>https://patentcenter.uspto.gov</u> and trademarks at <u>https://tmsearch.uspto.gov/</u>. USPTO also publishes OED discipline at https://foiadocuments.uspto.gov/oed and of all PTAB decisions <u>https://www.uspto.gov/patents/ptab</u> and TTAB decisions <u>https://ttab-reading-room.uspto.gov</u>.

3. 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?

Yes. Most of the Department's bureaus utilize web analytics, customer feedback, and regular updates to improve the usefulness of posted information.

4. If yes, please provide examples of such improvements. In particular, please describe steps your agency is taking to post information in open, machine-readable, and machine-actionable formats, to the extent feasible. If not posting in open formats, please explain why and note any challenges.

The BEA Communications Staff regularly review a wide array of web analytics, customer feedback, and survey responses to improve web usability and information dissemination.

NTIA has created a new website (Internetforall.gov) to publish and distribute data regarding broadband availability in the United States. This data includes an interactive map and resources to study broadband in the U.S. (available at <a href="https://internetforall.gov/interactive-map">https://internetforall.gov/interactive-map</a>).

USPTO updated the patent application portion of its website to address stakeholder concerns and to make it more user friendly. Additionally, each link that we have provided above provides users with a variety of ways that they can search for information and organize it (e.g., by year, by type of decision).

Currently, ITA's public-facing FOIA specific site provides information about the bureau and information requests. ITA's public facing webpage ties to the Commerce Office of Privacy and Open Government (OPOG) website where requesters can access Frequently Requested Records and view System of Records Notices.

For many years, NIST has provided public access to narrative publications and data that result from our research. Also, NIST developed an infrastructure to support collection of metadata in an inventory and archival of the research products themselves in machine-readable, machine-actionable formats in a secure repository. Data 'authors' are encouraged to make their data available in non-proprietary formats as well. However, they are not prevented from making data available in a proprietary format (e.g., a format employed by a particular piece of lab equipment) if it makes sense to do so. Data, publications, authors, and the organizational structure of NIST itself are associated with persistent identifiers (e.g., digital object identifiers, ORCIDs) that interconnect research outputs (e.g., a paper is associated with the data that underpins it) and their producers.

NTIA provides file types, such as CSV, for NTIA's broadband data for research purposes. Each year, a new data set is posted in November.

NOAA FOIA Office postings within its reading room are largely machine readable. However, some of the files, at the time of posting, are either .jpg, or flattened .pdf format, in order to properly redact exempt information. This renders them non-OCR, and non-machine readable. However, when possible, NOAA releases the records in native format, or OCR capable, to enable machine readability.

The OS FOIA website update is currently undergoing an update slated for completion by March 2023.

USPTO provides a large amount of bulk data products about patents and trademarks and graphical tools that assist in providing visual displays derived from patents data.

5. Does your proactive disclosure process or system involve any collaboration with agency staff outside the FOIA office, such as IT or data personnel? If so, describe this interaction.

Yes. All the Department's bureaus work with the Office of the Chief Information Officer to assist with website postings, email searches to varying degrees.

Also, NOAA collaborated with the National Marine Fisheries Service (NMFS) to identify an IT solution for pro-actively disclosing marine mammal inventory reports. The NMFS offered to provide NOAA with administrative search capabilities within their IT systems to proactively disclose these reports.

6. Optional -- Please describe the best practices used to improve proactive disclosures and any challenges your agency faces in this area.

The EDA FOIA Officer has had discussions with Regional Offices as to what proactive disclosures might be useful and appropriate for EDA stakeholders (conversations are always on-going). EDA has not faced any challenges in this area.

ITA proactively publicizes important disclosures on its website: <u>https://www.trade.gov/</u>. In collaboration with the Office of the U.S. Trade Representative, ITA publishes text and datasets for important trade agreements that impact commercial industries. ITA continues to seek opportunities to expand disclosures of this nature with a focus on transparency and openness.

NTIA is working on a process to post grant related materials for the new grants. The largest challenge is the volume of work to commence these grant programs and then manage. Disclosure of certain grant related information may be delayed due to a lack of resources.

NOAA FOIA program leadership routinely meet with Line Office FOIA professionals to identify frequently requested records and determine the feasibility of proactive disclosure. The size of NOAA's organization requires decisions on records proactive disclosure to be made at the Line Office level, often by non-FOIA staff. Additionally, the Controlled Unclassified Information (CUI) categories do not have a one-to-one correlation to FOIA Exemptions. As such, CUI material will sometimes be non-exempt under the FOIA, but still not be appropriate for proactive disclosure.

# Section IV: Steps Taken to Greater Utilize Technology

## Section IV: Steps Taken to Greater Utilize Technology

1. Has your agency reviewed its FOIA-related technological capabilities to identify resources needed to respond to current and anticipated FOIA demands?

Yes. Due to the sunsetting of FOIAonline by the end of Fiscal Year 2023, the Department identified a new FOIA case management system and plans to transition to it by March 2023. As a result of this transition, the Department's bureau operating units will be able to better meet the needs of the public as well as its FOIA professionals.

2. Please briefly describe any new types of technology your agency began using during the reporting period to support your FOIA program.

NTIA began exploring use of a more comprehensive search tool offered by Microsoft.

USPTO procured Relativity (eDiscovery platform) to assist with de-duplication and key word searches for particularly voluminous requests.

3. Does your agency currently use any technology to automate record processing? For example, does your agency use machine learning, predictive coding, technology assisted review or similar tools to conduct searches or make redactions? If so, please describe and, if possible, estimate how much time and financial resources are saved since implementing the technology.

The following Department bureaus utilize Relativity (eDiscovery platform) to automate record processing: BIS, CEN, IOS, OS, and USPTO.

In addition, the following bureaus currently use the following technology to automate record processing:

ITA is in a pilot program for a new eDiscovery platform which utilizes machine learning in order to de-duplicate record sets. Since we are currently in the pilot program the metrics to determine time and resources saved is still being calculated.

NOAA leverages an eDiscovery platform along with Boolean search filtering for record responsiveness review as well as OCR text recognizable redaction searches. In addition, the automated record processing includes deduplication technology noted by DOC GC as decreasing responsive record identification time by a factor of three to four. The time and financial resources saved by implementing these technologies are a force multiplier effect by allowing NOAA to process voluminous caseloads with a decentralized FOIA program instead of having full time FOIA staff within all staff and line offices. It is estimated that these technologies save between 30% - 50% of staffing resource costs associated with an entirely manual process. If this is extrapolated across NOAA FOIA professional staff this would save NOAA an average of 30% (.3 x \$2,320,319.64 [FOIA costs] = \$696,096 savings) throughout NOAA globally.

4. OIP issued guidance in 2017 encouraging agencies to regularly review their FOIA websites to ensure that they contain essential resources, and are informative and user-friendly. Has your agency reviewed its FOIA website(s) during the reporting period to ensure it addresses the elements noted in the guidance?

Yes.

5. Did all four of your agency's quarterly reports for Fiscal Year 2022 appear on your agency's website and on FOIA.gov?

Yes.

6. If your agency did not successfully post all quarterly reports, with information appearing on FOIA.gov, please explain why and provide your agency's plan for ensuring that such reporting is successful in FY 2023.

N/A

7. The FOIA Improvement Act of 2016 requires all agencies to post the raw statistical data used to compile their Annual FOIA Reports. Please provide the link to this posting for your agency's Fiscal Year 2020 Annual FOIA Report and, if available, for your agency's Fiscal Year 2021 Annual FOIA Report.

https://www.osec.doc.gov/opog/foia/FOIA Reports Annual.html

8. In February 2019, DOJ and OMB issued joint Guidance establishing interoperability standards to receive requests from the National FOIA Portal on FOIA.gov. Are all components of your agency in compliance with the guidance?

Yes.

9. Optional -- Please describe the best practices used in greater utilizing technology and any challenges your agency faces in this area.

The Department is currently reviewing it use of eDiscovery software to respond to FOIA requests and FOIA requests in litigation more efficiently.

In addition, the following bureaus identified the following best practices and challenges faced:

ITA is working with contractors to develop more sophisticated data visualizations (i.e., dashboards) and analytical reporting, using Tableau software, to improve the overall FOIA program operations.

NOAA leverages the Veritas Clearwell eDiscovery platform, which has now been made an Enterprise-wide service available for all Staff and Line Offices to improve deduplication, records processing, and Vaughn indexing. NOAA has a broad, non-centralized FOIA program. As such, most NOAA FOIA analysts are not full time FOIA employee personnel, but rather those whose primary responsibilities are outside of FOIA, but perform FOIA work when assigned. As such, a "per-person" licensing structure is not efficient for decentralized FOIA programs. The alternative is a storage-based license, or other licensing structure for e-Discovery platforms for most vendor-based solutions. This structure can be problematic when there are extremely large, or voluminous requests that are not predictable in terms of productivity, volume or staffing across NOAA.

# Section V: Steps Taken to Remove Barriers to Access, Improve Timeliness in Responding to Requests, and Reduce Backlogs

## **Section V: Remove Barriers to Access**

1. Has your agency established alternative means of access to first-party requested records outside of the FOIA process?

Yes.

2. If yes, please provide examples. If no, please indicate why not. Please also indicate if you do not know.

ITA processes first-party requests dealing with personnel records.

NOAA has established a Bureau Chief Privacy Officer review mechanism with the Office of Human Capital Services in personnel related requests.

USPTO posts a number of trademark and patents materials on its website. Users can access their own trademark and patent application information (if not already public) via their MyUSPTO account.

## Section V: Timeliness

3. For FY 2022, what was the average number of days your agency reported for adjudicating requests for expedited processing? Please see Section VIII.A. of your agency's Fiscal Year 2022 Annual FOIA Report.

Approximately 18 days.

4. If your agency's average number of days to adjudicate requests for expedited processing was above ten calendar days, according to Section VIII.A. of your agency's Fiscal Year 2022 Annual FOIA Report, please describe the steps your agency will take to ensure that requests for expedited processing are adjudicated within ten calendar days or less.

Although this number of days (18) represents a decrease from the previous year in the average number of days to adjudicate requests for expedited processing requests from the previous year (31), the Departmental FOIA Officer will continue to make it a point of emphasis at the Department's monthly FOIA Council Meetings that requests for expedite processing should be adjudicated in 10 calendar days or less.

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

Yes.

6. If your agency uses a separate track for simple requests, according to Annual FOIA Report section VII.A, was the agency overall average number of days to process simple requests twenty working days or fewer in Fiscal Year 2022?

No.

7. If not, did the simple track average processing time decrease compared to the previous fiscal year?

No.

8. Please provide the percentage of requests processed by your agency in Fiscal Year 2022 that were placed in your simple track. Please use the following calculation based on the data from your Annual FOIA Report: (processed simple requests from Section VII.C.1) divided by (requests processed from Section V.A.) x 100.

66%.

## **Section V: Remove Barriers to Access**

9. If your agency does not track simple requests separately, was the average number of days to process all non-expedited requests twenty working days or fewer?

N/A

# Section V: Backlogs - Requests

10. If your agency had a backlog of requests at the close of Fiscal Year 2022, according to Annual FOIA Report Section XII.D.2, did that backlog decrease as compared with the backlog reported at the end of Fiscal Year 2021.

No.

11. If not, according to Annual FOIA Report Section XII.D.1, did your agency process more requests during Fiscal Year 2022 than it did during Fiscal Year 2021?

No.

- 12. If your agency's request backlog increased during Fiscal Year 2022, please explain why and describe the causes that contributed to your agency not being able to reduce its backlog. When doing so, please also indicate if any of the following were contributing factors:
  - An increase in the number of incoming requests.
  - A loss of staff.
  - An increase in the complexity of the requests received. If possible, please provide examples or briefly describe the types of complex requests contributing to your backlog increase.
  - Impact of COVID-19 and workplace and safety precautions.
  - Any other reasons –please briefly describe or provide examples when possible.

The main factors that contributed to the increase of backlog included a combination of an increase in the number and complexity of requests received by most bureau operating units as compared to the previous fiscal year (the following bureaus reported a decrease in the number of requests received in Fiscal Year 2023 as compared to the previous fiscal year: CEN, NTIS, OIG, OS, and USPTO. These factors combined with the loss of staff across most the bureau operating units led to an overall increase in the backlog of 17% (773 to 906).

13. If you had a request backlog please report the percentage of requests that make up the backlog out of the total number of requests received by your agency in Fiscal Year 2022. Please use the following calculation based on data from your Annual FOIA Report: (backlogged requests from Section XII.A) divided by (requests received from Section V.A) x 100. This number can be greater than 100%. If your agency has no request backlog, please answer with "N/A."

51%.

# Section V: Backlogs - Appeals

14. If your agency had a backlog of appeals at the close of Fiscal Year 2022, according to Section XII.E.2 of the Annual FOIA Report, did that backlog decrease as compared with the backlog reported at the end of Fiscal Year 2021?

No.

15. If not, according to section XII.E.1 of the Annual FOIA Report, did your agency process more appeals during Fiscal Year 2022 than it did during Fiscal Year 2021?

Yes.

- 16. If your agency's appeal backlog increased during Fiscal Year 2022, please explain why and describe the causes that contributed to your agency not being able to reduce its backlog. When doing so, please also indicate if any of the following were contributing factors:
  - An increase in the number of incoming appeals.
  - A loss of staff.
  - An increase in the complexity of the requests received. If possible, please provide examples or briefly describe the types of complex requests contributing to your backlog increase.
  - Impact of COVID-19 and workplace and safety precautions.
  - Any other reasons –please briefly describe or provide examples when possible.

The main factor that contributed to an increase in the Department's appeal backlog was a lack of resources devoted to processing FOIA appeals.

17. If you had an appeal backlog please report the percentage of appeals that make up the backlog out of the total number of appeals received by your agency in Fiscal Year 2022. Please use the following calculation based on data from your Annual FOIA Report: (backlogged appeals from Section XII.A) divided by (appeals received from Section VI.A) x 100. This number can be greater than 100%. If your agency did not receive any appeals in Fiscal Year 2022 and/or has no appeal backlog, please answer with "N/A."

286%.

# **Section V: Backlog Reduction Plans**

18. In the 2022 guidelines for Chief FOIA Officer Reports, any agency with a backlog of over 1000 requests in Fiscal Year 2021 was asked to provide a plan for achieving backlog reduction in the year ahead. Did your agency implement a backlog reduction plan last year? If so, describe your agency's efforts in implementing this plan and note if your agency was able to achieve backlog reduction in Fiscal Year 2022?

N/A

19. If your agency had a backlog of more than 1,000 requests in Fiscal Year 2022, please explain your agency's plan to reduce this backlog during Fiscal Year 2023.

N/A

## Section V: 10 Oldest Requests

20. In Fiscal Year 2022, did your agency close the ten oldest pending perfected requests that were reported in Section VII.E. of your Fiscal Year 2021 Annual FOIA Report?

No.

21. 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 2021 Annual FOIA Report. If you had less than ten total oldest requests to close, please indicate that.

Four (4).

22. Beyond working on the ten oldest requests, please describe any steps your agency took to reduce the overall age of your pending requests.

The following Department bureau's processed all of the 10 oldest requests from the prior fiscal year: BEA, EDA, MBDA, NTIA, NTIS, OIG, and OUSEA. The Department's remaining bureaus all prioritize requests based on the order of receipt within each processing track (simple, complex, expedited).

The specific steps that each of the remaining bureaus within the Department has taken to reduce the overall age of pending request follows:

BIS coordinated with the program offices and the Office of the Chief Information Officer to ensure records searches yields accurate results, contacted requesters to narrow the scope of the request when vague, and hired two additional personnel.

CEN is working towards improving its internal processes, placing priority on its oldest requests, and hiring additional personnel.

OS and IOS developed a "20 Oldest Request" lists within OS and IOS (updated monthly) as well as an overall "10 Oldest Requests" list throughout the Department. The Departmental FOIA Officer also met with all the bureau's FOIA Officers or their delegated representatives from throughout the reporting period to better understand bottlenecks in their respective processes and offer/provide assistance where appropriate.

ITA always attempts to prioritize older cases to reduce the overall age of pending requests.

NIST utilizes tiger teams to help concentrate efforts of voluminous and complex requests.

USPTO reaches out to requesters on the older requests to discuss how to narrow and close out their requests as expeditiously as possible. USPTO's FOIA Office has also attempted to utilize Relativity to assist with de-duplication and key word searches, which has made some of our requests less voluminous and less time intensive to process.

## Section V: 10 Oldest Appeals

23. In Fiscal Year 2022, did your agency close the ten oldest appeals that were reported pending in Section VI.C.5 of your Fiscal Year 2021 Annual FOIA Report?

No.

24. If no, please provide the number of these appeals your agency was able to close by the end of the fiscal year, as listed in Section VI.C.(5) of your Fiscal Year 2021 Annual FOIA Report. If you had less than ten total oldest appeals to close, please indicate that.

Three (3).

25. Beyond working on the ten oldest appeals, please describe any steps your agency took to reduce the overall age of your pending appeals.

InfoLaw now has the assistance of four non-FOIA professionals to assist with the appeal backlog.

#### Section V: 10 Oldest Consultations

26. In Fiscal Year 2022, did your agency close the ten oldest consultations that were reported pending in Section XII.C. of your Fiscal Year 2021 Annual FOIA Report?

No.

27. If no, please provide the number of these consultations your agency was able to close by the end of the fiscal year, as listed in Section XII.C. of your Fiscal Year 2021 Annual FOIA Report. If you had less than ten total oldest consultations to close, please indicate that.

Six (6).

#### Section V: Additional Information Regarding 10 Oldest

28. If your agency did not close its ten oldest pending requests, appeals, or consultations, please explain why and provide a plan describing how your agency intends to close those "ten oldest" requests, appeals, and consultations during Fiscal Year 2023.

The Departmental FOIA Officer will identify and work with each of the bureau operating units identified as possessing an overall "ten oldest" request, appeal, and consultation and work on a tailored action plan to close or move towards closure by the end of the fiscal year. Separately, each of the B/OUs will be reminded of the importance of prioritizing the oldest pending

requests, appeals, and consultations and make meaningful progress towards the closure of their own 10 oldest requests in their own bureau operating unit queue.

29. Were any requests at your agency the subject of FOIA litigation during the reporting period? If so, please describe the impact on your agency's overall FOIA request processing and backlog. If possible, please indicate the number and nature of requests subject to litigation, common causes leading to litigation, and any other information to illustrate the impact of litigation on your overall FOIA administration.

In Fiscal Year 2022, seven lawsuits were filed by FOIA requesters encompassing 13 FOIA requests amongst all the bureau operating units except for USPTO. (One lawsuit encompassed 7 requests; the other six lawsuits each corresponded to a single FOIA request.) One additional FOIA lawsuit was filed by the Department of Commerce with the Court of Appeals for the D.C. Circuit, appealing the result of lawsuit over one FOIA request filed in FY2019. Twenty-three FOIA lawsuits were closed during FY2022. At the start of FY2023, there were a total of eighteen lawsuits active in federal district courts (including lawsuits filed in FY2022 that were still open), and the afore-mentioned lawsuit active in the D.C. Circuit. All suits filed by FOIA requesters in FY2022 were brought because a final determination had not been made within 20 business days of the date of the FOIA request, and the requesters deemed the requests denied and that they had attained constructive exhaustion of their administrative remedies. These lawsuits did not significantly impact our agency's overall FOIA request processing and backlog. Our regulations specifically contemplate that administrative processing can continue even after suit is filed, and our usual modus operandi when suit is filed is to continue processing the request administratively until processing is complete, and then deal with any additional issues in litigation. The development of litigation, therefore, means only that additional resources from legal are available to provide guidance to and oversight into the administrative processing of the request. It is likely that litigation resulted in a faster response to 4 of the 13 FOIA requests that entered litigation in FY2022 than would have occurred in the absence of litigation. To the extent that some resources were reallocated to expedite processing of requests in litigation, the additional resultant backlog would not be "significantly" more than the number of additional requests completed as a result of the reallocation of resources. Furthermore, although there is additional burden on FOIA personnel (even outside of the legal team) resulting from the need to respond to issues that arise in litigation (including meet and confers, answering questions, status reports, drafting and reviewing briefs, creating declarations, coming up with production schedules, reviewing demands for attorneys' fees, etc.), the impact on other FOIA processing (and backlog) would probably not arise to the level of being "significant." These additional duties fall under "other duties as assigned."

USPTO had four (4) new FOIA litigations in Fiscal Year 2022. Some of these lawsuits were constructive denials, some challenged the agencies application of exemptions. USPTO did not directly track the amount of time that its FOIA

professionals spent on litigation filed in FY22 but estimate it to be in the hundreds of hours, and this does not include the amount of time that FOIA professionals have spent on open litigation from prior fiscal years. Litigation and court ordered deadlines take priority over all other FOIA matters which has made it difficult for USPTO to close its oldest requests and control its backlog.

30. How many requests during Fiscal Year 2022 involved unusual circumstances as defined by the FOIA? (This information is available in your agency's FY22 raw data).

356.