



Commodity Futures Trading Commission
Chief FOIA Officer Report
March 2010

BACKGROUND

In accordance with the President's directive, on March 19, 2009, Attorney General Holder issued new FOIA guidelines which called on all agencies to reaffirm the government's "commitment to accountability and transparency." The Guidelines stress that the FOIA is to be administered with the presumption of openness called for by the President. The Attorney General strongly encouraged agencies to make discretionary disclosures of information. He also directed agencies not to withhold information simply because they may do so legally and to consider making partial disclosures when full disclosures are not possible.

In his FOIA Guidelines the Attorney General went beyond addressing the principles applicable to applying the presumption of disclosure. He also comprehensively addressed the need for each agency to establish effective systems for improving transparency. In doing so he emphasized that "[e]ach agency must be fully accountable for its administration of the FOIA."

Agency Accountability

The Attorney General highlighted the key role played by each agency's Chief FOIA Officer and emphasized that "[i]mproving FOIA performance requires the[ir] active participation." Accordingly, the Attorney General directed agency Chief FOIA Officers to review "all aspects of their agencies' FOIA administration" and to report each year to the Department of Justice on the steps taken "to improve FOIA operations and facilitate information disclosure."

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.

1. Describe below the steps your agency has taken to ensure that that presumption is being applied to all decisions involving the FOIA. This section should include a discussion of the range of steps taken by your agency to apply this presumption, from publicizing the President's FOIA Memorandum and Attorney General's FOIA Guidelines and providing training on them, to implementing the presumption in response to FOIA requests and administrative appeals, with examples or statistics illustrating your agency's action in making discretionary releases of records or partial releases when full disclosure is not possible.

The Commodity Futures Trading Commission ("CFTC") took the following steps to fully implement the presumption of openness:

- Held a meeting of FOIA compliance staff within the Office of General Counsel ("OGC") to assure familiarity with the President's FOIA Memorandum ("Memorandum") and Attorney General's FOIA Guidelines ("Guidelines").
- Conducted training on the Memorandum and Guidelines for FOIA Liaisons throughout CFTC headquarters. The training also was offered to all Office of General Counsel ("OGC") attorneys.
- Made a discretionary release of drafts of an economic research report covered by Exemption 5 to a media requester. (CFTC FOIA No. 10-0013)
- Redacted correspondence and emails covered by Exemptions 4, 7(A) and 7(C) rather than withholding the documents in their entirety. (CFTC FOIA No. 10-0029)
- Made a partial release of portions of the Division of Enforcement's handbook rather than reflexively withholding the entire document as law enforcement material. (CFTC FOIA No. 09-0039)

2. Report whether your agency shows an increase in the number of requests where records have been released in full or where records have been released in part when compared with those numbers in the previous year's Annual FOIA Report.

The CFTC has not had an increase in the number of requests where records have been released in full or where records have been released in part. In FY 2009, the CFTC made 62 full releases, 30 partial releases and issued 22 full denials. This occurred in a year in which 199 FOIA requests were received and 200 processed. The remaining requests processed were withdrawn or there were no responsive records.

In FY 2008, the CFTC made 63 full releases, 28 partial releases and issued 12 denials based on exemptions. This occurred in a year in which 147 FOIA requests were received and 151 processed. The remaining requests processed were denied based on reasons other than exemptions, e.g., there were no responsive records, the request was withdrawn, etc.

II. Steps Taken to Ensure that Your Agency has an Effective System 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.” Describe here the steps your agency has taken to ensure that your system for responding to requests is effective and efficient. This section should include a discussion of how your agency has addressed the key roles played by the broad spectrum of agency personnel who work with FOIA professionals in responding to requests, including, in particular, steps taken to ensure that FOIA professionals have sufficient IT support.

The CFTC is in the process of acquiring FOIAXpress, a Department of Justice-compliant FOIA tracking system. The FOIA contract was awarded on March 9, 2010. This has been a goal of the FOIA program for several years. When installed, FOIAXpress is expected to increase substantially the program’s overall efficiency. In particular, the time spent compiling annual FOIA reports is expected to decrease significantly. The new system will electronically store, retrieve, redact and print documents. Also, it will keep track of FOIA processing statistics and fees.

The FOIA program otherwise has excellent IT support within the confines of the CFTC’s existing capabilities. For example, responsive documents comprising approximately one gigabyte of computer capacity were identified pursuant to a recent FOIA request, too large a volume for email transmission. CFTC’s IT staff copied the documents to CDs for review by FOIA staff, which began a rolling production. The first tranche of documents were copied to a CD for the requester. IT copied material to disk within 24 hours of receiving the request.

The FOIA program’s use of technology is discussed in more detail under Section IV below.

Initial compliance is staffed by the CFTC’s FOIA Liaison, a baccalaureate paralegal specialist who is resident in OGC. The Liaison works closely with three OGC attorneys, including a Deputy General Counsel who serves as Chief FOIA Officer. The Liaison receives and documents incoming FOIA requests, and transmits them to the appropriate office or Division within the CFTC. The FOIA attorneys consult on various

legal issues that arise in connection with requests. In addition to consulting on substantive issues, FOIA attorneys work to assure thorough and timely responses.

Internal FOIA appeals are handled within a separate section of OGC under the management of a different Deputy General Counsel. A strict firewall is maintained on particular matters, but consultation takes place between the compliance and appeal staff on FOIA law generally.

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 to increase the amount of material that is available on your agency website, including providing examples of proactive disclosures that have been made since issuance of the new FOIA Guidelines.

The most significant proactive disclosure of information is the *Disaggregated Commitments of Traders (COT) Report*, inaugurated in September 2009. COT reports are the most visited site on the CFTC's website: about half of all hits to cftc.gov are to COT reports.¹ Historically, COT reports were issued with data presented in highly aggregated form. The disaggregated reports increase the transparency of market information by separating traders into four categories: Producer/Merchant/Processor/User; Swap Dealers; Managed Money; and Other Reportables. Over the years, the CFTC has improved COT reports in several ways as part of its continuing effort to better inform the public about futures markets. COT reports have been freely available online since 1995. Work on presenting disaggregated COT reports began in 2008, before the Guidelines were issued. The first disaggregated report was posted on September 2009. In the three months after disaggregated reports became available, views of COT reports on the CFTC's website totaled 1.7 million, compared to 334,000 views during the three months preceding the availability of disaggregated reports. This proactive initiative is wholly within the spirit of the Guidelines.

In response to the Guidelines, the Liaison also advises agency employees to not reflexively withhold documents simply because an exemption may apply. As discussed above, in direct response to the Guidelines, the CFTC made a discretionary release of drafts of an economic research report covered by Exemption 5 to a media requester. (CFTC FOIA No. 10-0013); redacted correspondence and emails covered by

¹ Antecedents of the COT reports can be traced back to 1924, when the U.S. Department of Agriculture's Grain Futures Administration (predecessor to the USDA Commodity Exchange Authority, in turn the predecessor to the CFTC), published its first comprehensive annual report of hedging and speculation in regulated futures markets.

Exemptions 4, 7(A) and 7(C) rather than withholding the documents in their entirety, (CFTC FOIA No. 10-0029); and made a partial release of portions of the Division of Enforcement's handbook rather than reflexively withholding the entire document as law enforcement material, (CFTC FOIA No. 09-0039).

CFTC FOIA staff met with each division within the CFTC to discuss the importance of transparency and asked the divisions to post more records and documents on the website to reduce the number of FOIA requests received.

The CFTC has underway a project to completely revamp its website, cftc.gov. A key element of the overhaul is an improved search engine, making available information easier to find.

IV. Steps Taken To Greater Utilize Technology

A key component of the President's 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. For this section of the Chief FOIA Officer Report, please answer the following questions:

1. Does your agency currently receive requests electronically?

Yes. Approximately 90 percent of requests are received electronically.

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

Not Applicable.

3. Does your agency track requests electronically?

The CFTC tracks requests electronically to a limited extent. The Commission's internal FOIA tracking system is used only by the FOIA Compliance Office. The system allows staff to check the name of the requester, the subject of the request, and the dates that the request was received and that a response is due. However, the system does not provide information on the status of an open FOIA request.

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

As stated in section II, the CFTC is in the final stages of acquiring an electronic tracking system, FOIAXpress.

5. Does your agency use technology to process requests?

Yes. Incoming requests are disseminated through the agency by email. Responsive documents may be received in paper or electronic form, depending on how they are maintained.

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

Not Applicable.

7. Does your agency utilize technology to prepare your agency Annual FOIA Report?

No. The Annual FOIA Report is completed in WORD, but statistics are compiled by hand.

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

Currently, significant time is spent by staff to compile the annual report. When FOIAXpress is installed, the Report will be generated electronically.

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

Improving timeliness in responding to pending FOIA requests and reductions in backlogs is an ongoing agency effort. Both the President and the Attorney General emphasized the importance of improving timeliness in responding to requests. Section XII of your Annual FOIA Report includes figures that show your agency's backlog of pending requests and administrative appeals for the previous fiscal year and for this current fiscal year. Your Chief FOIA Officer Report should address the following elements.

- 1. If you have a backlog, report here whether your backlog is decreasing. That reduction should be measured both in terms of the numbers of backlogged requests and administrative appeals that remain pending at the end of the fiscal year, and in terms of the age of those requests and appeals.**

In FY 2008, CFTC had 6 backlogged FOIA requests; the oldest was pending for 70 days beyond the statutory time limits. In FY 2009, CFTC also had 6 backlogged requests with the oldest pending 80 days. Although there was not a decrease in the number of backlogs, there was a decrease in the percentage of backlogged requests to the number of requests received in a fiscal year. In FY 2008, CFTC's backlog was approximately .041% of the total number of request received. In FY 2009, CFTC's backlog was down to .031%.

The Commission did not have an administrative appeals backlog.

2. If there has not been a reduction in the backlog describe why that has occurred and what steps your agency is taking to bring about a reduction.

Many requests that require more than twenty business days to process involve large numbers of investigatory documents. Our experience is that in a few instances, persons with potentially responsive documents may not collect and review them promptly. The Commission's backlog is, in most cases, eliminated before the end of the next fiscal year. For example, no backlog requests from FY 2008 remain open on FY 2009's backlog. In addition, the Commission has closed 4 of the 6 backlog requests reported in its FY 2009 Annual Report.

3. Describe the steps your agency is taking to improve timeliness in responding to requests and to administrative appeals.

Most FOIA requests are processed promptly. As reported in the FY 2009 Annual Report, 147 of 200 processed requests were processed within 20 days, and another 38 were processed within 40 days. The oldest pending request had been pending 80 days. In September 2009, the FOIA compliance staff drafted a memorandum setting forth the importance of prompt compliance and conferred with relevant senior staff on this issue. We are continuing systematic, case by case follow-up. We also anticipate that FOIAXpress will enable the program to generate periodic reports to facilitate follow-up.