



Commodity Futures Trading Commission
Chief FOIA Officer Report
March 2012

President Obama's FOIA Memorandum

On his first full day in office, President Obama demonstrated his commitment to the ideals of transparency and openness by issuing a Memorandum to the heads of all Executive Branch departments and agencies calling on them to "renew their commitment to the principles embodied in FOIA." The President directed all agencies to administer the FOIA with a clear presumption in favor of disclosure, to ensure that requests are responded to in "a spirit of cooperation," that disclosures are made timely, and that modern technology is used to make information available to the public even before a request is made.

Attorney General Holder's FOIA Guidelines

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 Attorney General strongly encouraged agencies to make discretionary disclosures of information and to consider making partial disclosures when full disclosures are not possible.

In his FOIA Guidelines the Attorney General also comprehensively addressed the need for each agency to ensure that it has in place an effective system for responding to requests. The Attorney General stressed the importance of proactive disclosures of information and use of technology, as well as the need to respond to requests promptly. Significantly, in his FOIA Guidelines the Attorney General emphasized that "[e]ach agency must be fully accountable for its administration of the FOIA."

Agency Accountability

The Attorney General has highlighted the key role played by each agency's Chief FOIA Officer and emphasized that "[i]mproving FOIA performance requires [their] 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

Describe the steps your agency has taken to ensure that the presumption of openness is being applied to all decisions involving the FOIA.

1. Training offered by FOIA unit. During the reporting period, the Commodity Futures Trading Commission's ("CFTC") newly hired FOIA attorney provided training to staff in the CFTC's New York regional office, with particular emphasis on Exemption 5. The training also covered the importance of timeliness and provided techniques for rapid and effective review. The FOIA training was provided in conjunction with e-Discovery training. Similar training will be provided throughout the agency in the coming months. In addition, the FOIA attorney participated as a panelist at a government-wide E-Discovery conference. The attorney addressed how the creation of synergies among an agency's FOIA, records and E-Discovery functions can improve FOIA compliance.

2. Training taken by FOIA unit. The agency's FOIA paralegal attended two Department of Justice ("DOJ") training sessions (basic FOIA training and Annual 'Report training). In addition, the FOIAXpress representative have provided on-site training to FOIA staff to enable increased use the system's functionalities.

3/4. Discretionary releases of otherwise exempt information. The agency completed rolling production of documents responsive to a media request for documents involving certain economic analyses. In its final release, the agency gave the requester 223 pages, most of which were covered by Exemption 5. Rolling production began in 2010. (CFTC FOIA No. 10-0013). The agency has made others releases pursuant to Exemption 5.

Since November, the agency has received approximately 16 requests concerning MF Global, a matter which has received widespread and ongoing media coverage. The CFTC has released a number of documents subject to Exemptions 5 and 7(A).

5. Review process to determine whether discretionary releases are possible. The FOIA unit routinely advises program offices that exemptions 5 and 7 must be applied selectively and not automatically. Document reviewers make initial determinations as to whether these exemptions apply to a document or category of documents. The reviewers then make a second determination as to whether the document may be appropriate for discretionary release. The final determination is made by Office of General Counsel attorneys, which may include participation by the General Counsel.

6. Other initiatives to insure openness.

- As was the case last year, the CFTC's most significant openness initiatives relate to rulemakings undertaken pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank Act"). The Dodd-Frank Act, which substantially overhauled derivatives regulation, requires the CFTC to promulgate more than 30 new rules. Given the interest in and impact of these rulemakings, the CFTC adopted a transparency policy regarding meetings with outside organizations, which is prominently posted on the Commission's website. Pursuant to the policy, all meetings are listed, together with the topics of the meetings, attendees and any materials presented to the CFTC can be found here.
- In addition, the Commission determined to deliberate and vote on proposed Dodd-Frank Act rulemakings at public meetings rather than by seriatim vote. During the reporting period, 12 such meetings were held and 24 have been held since the policy was announced in 2010. Meetings are accessible via webcast of conference call and transcripts are posted promptly.
- To facilitate public input on the proposed rules, the Commission, among other things, created an interactive online comment form.
- In addition, the CFTC has held 12 public roundtables on major industry issues during the reporting period. Conference call access is provided.
- The CFTC's Chief Privacy Officer established an interdivisional Social Media Working Group to maximize the effectiveness of the Commission's presence on Facebook, Flickr, YouTube and Twitter.
- The CFTC also continues to make available widely watched market data, especially Commitments of Traders (COT) reports, which continue to account for about half of all hits to the CFTC's website.

7/8. FOIA responses in which requested records were released in full or in part. There was no increase in such responses. The Annual FOIA Report for F2011 listed 145 FOIA requests processed, with 44 full grants, 28 partial grants and 17 full denials based on exemptions. The numbers of full grants and partial grants are slightly lower than in FY2010. In that year, the CFTC processed 153 FOIA requests, with 61 full grants and, 34 partial grants and 10 full denials. We note, however, that in FY2011, the number of full denials for reasons other than exemptions included 15 requests for public records and no requests were listed in this category in FY2010. Therefore, the number of requesters who were able to obtain all of the information they wanted was about the same.

II. Steps Taken to Ensure an Effective System for Responding to Requests

1. IT Support for the FOIA program. The FOIA program has had a transformative increase in IT support. FOIA staff work closely with the CFTC's e-Law team. In particular, the above-mentioned newly hired FOIA attorney works closely with the CFTC's E-discovery specialist attorney. Both work on a daily basis with e-Law information technology ("IT") staff. Two IT staff members work on e-Discovery and FOIA matters on a dedicated basis. Documents for all complex requests are collected through backend forensic searches to assure a thorough FOIA-compliant search. Documents are then reviewed and redacted electronically on FOIAXpress or Concordance. In addition, the CFTC substantially expanded its FOIAXpress capacity during the reporting period.
2. Interaction with the Chief FOIA Officer. The Chief FOIA Officer is an integral part of the FOIA program and performed basis FOIA compliance work during a period of extreme staffing constriction in the FOIA unit. The Chief FOIA Officer participates in weekly status meetings with the FOIA professionals.
3. Interaction with Open Government Team. FOIA staff met with the CFTC's web-design staff to discuss improvements to the FOIA page on the agency's website. Otherwise, there has been limited interaction this year. Because of the CFTC's small size – about 600 employees – there is a great deal of informal information sharing.
4. Steps take to assure adequate staffing. As stated above in the response to II.1, the CFTC hired a new FOIA specialist attorney (who began in October), who has extensive experience in managing a larger FOIA program at another agency. In addition, the program is staffed by a full-time paralegal and an attorney who works part-time on FOIA matters. Other attorneys are available on a matter-by-matter basis. The program also has the temporary assistance of an intern. Also, as described above, the FOIA program is assisted by the e-Law IT team. The FOIA program hopes to hire another paralegal if funding is available.
5. Other steps undertaken to assure that the FOIA system operates efficiently and effectively. A weekly status report is generated from FOIAXpress and weekly meetings are held to determine the status of pending matters.

III. Steps Taken to Increase Proactive Disclosures

1. Was new material added to the agency website? The FOIA page of the agency website is being redesigned and has not been updated except to post the Annual Report and Chief FOIA Officer Report. As was the case last year, the most significant proactive disclosures to the agency website have been made in connection with the Dodd-Frank rulemakings. Links to these are provided on the CFTC's homepage.

2. Examples of new records, datasets, videos, etc. Pursuant to its transparency policy, the Commission continues to list all meetings with outside stakeholders. More than 50 such meetings were held in the month of February alone. The Commission also has posted a list of rulemakings and interpretations it anticipates considering in 2012. Videos added to the Commission's YouTube page include public roundtables, Federal Advisory Commission meetings and media interviews. Additional postings are described above under Question I.6.

3. System used to routinely identify records that are appropriate for posting.

Frequently requested information may be placed on the website. Also, prior to issuance of the President's Memorandum and the Guidelines, Appendix A to the CFTC's FOIA Rules listed information directly available from a program office without the need for a FOIA request. For the past several years, the CFTC has been making the great majority of that information available on cftc.gov.

4. Other steps taken to make information more useful to the public.

The CFTC most recently upgraded its website in 2010 to improve the presentation and readability of information throughout cftc.gov. The upgrades enhanced the homepage to feature easy access to important information and events at the CFTC; improved site navigation and implemented dynamic dropdown menus for primary and secondary navigation; and provided greater transparency with the implementation of Web pages dedicated to transparency. The CFTC continues to refine its website. Visitors frequently receive automatic prompts to give feedback.

A longstanding feature of the website is the "CFTC Glossary," which is intended to assist the public in understanding some of the specialized words and phrases used in the futures industry since many of these terms are not found in standard reference works. The Glossary now includes a link that allows readers to email the CFTC if they cannot find the term they are looking for.

5. Other steps taken to increase proactive disclosure.

The CFTC's program offices routinely provide updated market data, industry filings and information about new regulatory developments. For instance, the Dodd-Frank Act created new entities, Swap Data Repositories ("SDRs"), to provide a central facility for swap data reporting and recordkeeping. The Commission's website includes a page on these entities, including FAQs and instructions on how to apply for SDR status.

IV. Steps Taken to Greater Utilize Technology

Electronic receipt of FOIA requests

1. Can FOIA requests be made electronically? Yes, more than 90 percent of requests are received electronically.
2. Decentralization. Not applicable. Requests are process on a centralized basis.

Online tracking of FOIA requests

3. Can a requester track the status of a request electronically? No. FOIAXpress has this capacity but it has not been implemented.
4. Is the CFTC taking steps to establish this capability? As the staff gains increasing familiarity with FOIAXpress, we anticipate implementing this feature.

Use of technology to facilitate processing of requests:

5/6. Yes, advanced technology is used to facilitate overall FOIA efficiency. As noted above, the FOIA program has begun to search and collection documents for complex requests through backend forensic searches. Documents are then reviewed and redacted electronically on FOIAXpress or Concordance. We are also hoping to acquire new technology that has enhanced de-duplicating capabilities.

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

1. FOIA request response times

- a. Does the agency use a separate track for simple requests? Yes, the CFTC classifies requests by simple and complex.
- b. Was the average number of days to process simple requests in FY2011 20 days or fewer? No. The average processing length was 28.39 days. The median processing length was 13.5 days.
- c. Not applicable.

2. Backlogged Requests/Appeals

- a. Did the FY2011 backlog decrease compared to FY2010? No. The agency had 25 matters backlogged as of the end of FY 2011, an increase of 12 matters backlogged as of the end of FY 2010.

- b. Did the backlog of FY2011 administrative appeals increase compared to FY2010? No. The agency had one backlogged administrative appeal at the end of FY2011 and one at the end of FY2010.
 - c. In FY2011, did the agency close the ten oldest requests pending at the end of FY2010? No. The agency closed 8 of its 10 oldest such requests.
 - d. Not applicable. The agency's one backlogged administrative appeal pending at the end of FY 2010 was closed in FY 2011.
3. If any questions were answered "no," describe why that occurred.

Request backlog

- a. The increased backlog in FY2011 did not result from an increase in the number of incoming requests. There were 145 new requests in F2011 compared to 158 new requests in FY2010. As of this filing, there has been a 30 percent increase in requests in FY2012 compared to the same point in FY2011. The increased FOIA docket in FY2012 has affected our ability to reduce the backlog.
- b. The backlog increased as a result of loss of staff. As stated last year, the FOIA unit lost a senior FOIA attorney who has been detailed to the Office of the Chairman. In addition, in December 2010, the unit lost to another agency its long-time FOIA paralegal who was most familiar with the day-to-day operation of the program. She also was the only person who had begun to use FOIAXpress, which only recently was installed at the agency. The CFTC authorized hiring for two FOIA positions, an attorney and a non-attorney FOIA specialist in late 2010, but shortly after the positions were posted and applications received, hiring was frozen. No FOIA hiring took place until October 2011, when the new FOIA specialist came on board. See also the answer to Question II.4 above regarding recent staffing initiatives.
- c. The backlog also increased because the nature and complexity of FOIA requests increased. During FY2011, the agency received a number of voluminous and complex requests related to the Dodd-Frank Act. In addition, the FOIA unit prepared to respond to a massive Congressional inquiry regarding its FOIA program. Since October 2011, we have received at least 16 FOIA requests related to the widely-reported collapse of MF Global.
- d. Other causes contributing to the lack of a decrease in the backlog can be attributed to lack of familiarity with new technology. As mentioned above, the sole FOIA employee with any familiarity with FOIAXpress left the agency in December 2010. FOIA processing was taken over by a litigation paralegal and the Chief FOIA Officer. These individuals had limited experience with FOIA processing and none with FOIAXpress. In addition, as noted above, the FOIA

program has moved toward electronic searching and reviewing. Staff had to learn to search and redact in Concordance, in addition to learning FOIAXpress. We have begun to reap the benefits of efficiency and thoroughness benefits of electronic search and review, but there was a learning curve where things did not operate smoothly.

Administrative Appeal backlog

As stated above, there was one administrative appeal backlogged at the end of FY2010 and one at the end of FY2011. The lack of a decrease is attributed to the press of competing assignments connected to the Dodd-Frank rulemakings.

Additional Steps Taken to Reduce Backlogs and Improve Timeliness

1. Does the agency routinely set goals and monitor the process of the FOIA caseload? Yes, as described above, a weekly status report is generated from FOIAXpress and weekly meetings are held to determine the status of pending matters and to set deadlines for completion.
2. Has your agency increased its FOIA staffing? Yes, please see the responses to II.1 and II.4 above regarding recent increases to FOIA staff and increased IT support for the FOIA program.
3. Has the agency made IT improvements to increase timeliness? As described above, the FOIA program enjoys increased access to IT support and a better understanding of how to use IT functions and FOIAXpress.
4. Consultations with other agencies. Not applicable.

Use of FOIA's Law Enforcement "Exclusions"

The agency did not invoke an exclusion.

Spotlight on Success

Our pre-eminent success story is our handling of the multiple FOIA requests relating to MF Global. The agency used electronic search tools to create and review a single database that has been used for all MF Global requests. Documents responsive to each request can be readily identified and reviewed as necessary. Many documents responsive to later requests already have been reviewed with any applicable exemptions asserted. The search and review process was assisted by E-Discovery attorneys and E-Law tech specialists. The process for handling these related requests reflects the changing face of the CFTC's FOIA unit. A year ago, we lacked the staff and IT expertise to execute the project in this way. We are very pleased that the investments in staff and IT resources are beginning to pay off in such a visible way.