

Commodity Futures Trading Commission
CHIEF FOIA Officer Report
March 2011

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 resolve doubts in favor of openness, and to not withhold information based on "speculative or abstract fears."

In addition, the President called on agencies 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. To carry out these responsibilities, the President directed the Attorney General to issue new guidelines governing the FOIA.

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 "fundamental commitment to open government." 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 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, use of technology, and 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 at their agencies."

I. Steps Taken to Apply the Presumption of Openness

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

During FY 2010, the Commodity Futures Trading Commission ("CFTC") FOIA unit took the following steps to fully implement the presumption of openness:

- routinely reviewed program office staff determinations regarding exemptions.
- routinely advised program offices that exemptions 5 and 7 must be applied selectively and not automatically, including documents involved in an agency enforcement action.
- provided written guidance to a program office on the importance of conducting a search reasonably calculated to uncover responsive documents.

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

- The FOIA response form required to be completed by program staff contains the following certification:

CERTIFICATION

Under the Attorney General's March 19, 2009 guidelines for a "New Era of Open Government," an agency should not withhold information simply because it may do so legally. Agencies are strongly encouraged to make discretionary disclosures of information. Also, please be aware that agencies will now **only** be defended if the agency "reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions or disclosure is prohibited by law."

By signing, you are certifying that you, on behalf of your division, have taken reasonable steps to segregate and release non-exempt information and/or make a discretionary release of responsive material.

Print Name

Signature

Date

****Person certifying should be the individual making the final decision to release/withhold responsive material.*

- The President's Memorandum and the Attorney General's Guidelines are posted on the FOIA page on CFTC.gov/

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

The above-describe certification and ongoing reminders are our principal means of reflecting the presumption of openness

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

Principal examples include:

- Analyzed and advised making a discretionary release of a draft consultant's report to the agency addressing the agency's market surveillance capabilities to a media requester. After minor redactions, the document was released in early 2011. (10-114)
- Advised making a discretionary release to a media requester of two CDs of internal drafts and deliberative documents covered by exemption 5. The documents remain under review by a policy office to assure that, consistent with the Holder Guidelines, the CFTC "reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions." An initial production to this requester was made during the prior reporting period. (10-00013 and 10-0044).

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

Mostly exemption 5.

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

- The program office with responsive documents makes the initial determination, often in consultation with the FOIA office. If no prior consultation occurs, the FOIA unit raises the issue with the program office. Depending on the nature of the documents, further review by a policy office may take place.

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

The most CFTC transparency during FY2010 initiatives stemmed from the Chairman's office and 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 the following transparency policy regarding meetings with outside organizations, which is prominently posted on the Commission's website:

- The CFTC is committed to transparency in the rulemaking process. Information on all meetings that Chairman Gensler and Commission staff have with outside organizations regarding the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act will be made public. The topics of the meetings, attendees, summaries of the meetings and any materials presented to the CFTC can be found here.
- In addition, the Commission determined in FY2010 to deliberate and vote on proposed Dodd-Frank Act rulemakings at public meetings rather than by seriatim vote. The first such meeting was held on October 1, 2010 and 12 such meetings have been held to date.
- To facilitate public input on the proposed rules, the Commission, among other things, created an interactive online comment form.

In addition, between January and May 2010, the Commission held four public hearings on significant industry issues, including, for example a meeting to consider the trading of futures contracts based on movie box office receipts.

The CFTC also continues to make available widely watched market data, especially Commitments of Traders (COT) reports, as described more fully in last year's Chief FOIA Officer report. COT reports account for about half of all hits to the CFTC's website.

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

The CFTC's annual report for FY10 listed 153 FOIA requests processed, with 61 full grants and 34 partial grants and 10 full denials. The remaining requests were withdrawn or there were no responsive records. This compares favorably with FY09, a year in which 200 requests were processed. Dispositions that year included 62 full releases, 30 partial releases and 22 full denials, with the rest being withdrawn or lacking responsive records. While the numbers of full and partial grants are about the same, the number of such grants as a percentage of requests processed is higher.

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

1. Do FOIA professionals within your agency have sufficient IT support?

At the time of last year's report, the CFTC had just awarded a contract for a commercial off the shelf FOIA processing system. The system was installed over the summer. It provides greatly enhanced case tracking ability and transparency, although the CFTC to date is using only part of its capabilities. The FOIA program otherwise enjoys increasing IT support within the agency's capabilities and is using IT in new ways. Documents responsive to one FOIA request were loaded into the Practice Manager database for faster review. Within the past year, the CFTC Office of General Counsel hired an E-discovery specialist attorney who is assisting the program to better utilize IT search capabilities.

2. Describe how your agency's FOIA professionals interact with your Open Government Team.

The Chief FOIA Officer prepared the initial draft of the initial Open Government Report and continues to work with the Open Government Team. FOIA unit personnel and Open Government personnel participate in intra-agency initiatives. Because of the CFTC's small size – about 600 employees – there is a great deal of informal information sharing.

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

The CFTC determined that FOIA is understaffed. The understaffing became more acute when a senior FOIA attorney was detailed to the Chairman's office this year to work on Dodd-Frank rulemakings. During FY10 the CFTC authorized hiring an additional full-time FOIA specialist and an attorney with FOIA experience and these positions were posted early in FY201. Hiring efforts have been halted until budget issues have been resolved.

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

Apart from the commercial off the shelf FOIA processing system and plans to expand the staff when funds allow, the FOIA unit proactively and with increasing frequency seeks IT assistance in using existing eLaw functionalities, such as Concordance, Practice Manager, etc.

III. Steps Taken To Increase Proactive Disclosures

1. Has your agency added new material to your agency website since last year?

Yes. Please see the examples listed above under I.1.g. relating to transparency initiatives taken pursuant to the Dodd-Frank rulemakings.

2. What types of records have been posted?

The summaries of more than 100 meetings with outside stakeholders are the most significant new disclosure. The CFTC also solicited pre-rulemaking submissions. In addition, the CFTC provided increased market information by disaggregating commercial and noncommercial positions and by including position data of linked foreign contracts in its widely watched COT reports.

3. Give examples of the types of records your agency now posts that used to be available only by making a FOIA request for them.

Please see responses to III.b. above and III.d. below.

4. What system do you have in place 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.

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

The CFTC has established a presence on Facebook, Youtube, Flickr and Twitter. All of these sites supplement cftc.gov by giving users additional means of accessing information. Facebook also sponsors discussion groups open to the public on commodity-related issues.

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

In FY 2010, the CFTC upgraded its public facing Web site to:

- Implement a new visual design to improve the presentation and readability of information throughout the Web site;
- Enhance the homepage to feature easy access to important information and events at the CFTC;
- Improve site navigation and implement dynamic dropdown menus for primary and secondary navigation;
- Provide greater transparency with the implementation of Web pages dedicated to transparency;
- Implement flash enabled headlines and an historical timeline of the CFTC; and
- Implement a Web 2.0 presence featuring YouTube, Flickr, and Facebook.

The CFTC has fully complied with the Federal Open Government Directive by increasing access to public meetings; increasing market reporting transparency; continuing transparency, participation, and collaboration efforts; and participating in the data.gov initiative.

As mentioned above, the CFTC has increased the frequency and variety of public meetings. In addition to above-described meetings, the CFTC held during FY2010:

- Roundtables on Dodd-Frank rulemaking; joint meetings with the Securities and Exchange Commission on harmonization of market regulation and the market events of May 6;
- Commission meetings on the current application of position limits and exemptions from position limits in energy markets, precious metals and base metals markets, and on speculative trading in the energy markets;
- Advisory Committee Meetings on wheat convergence; technological, high frequency, and direct access trading; and global markets;
- A joint meeting with the Federal Energy Regulatory Commission to consider issues related to clearing and inter-ISO/RTO netting in the energy markets.
- The CFTC provided increased participation in and access to these meetings by webcasting and providing audio of the meeting available via listen-only conference calls.

IV. Steps Taken To Greater Utilize Technology

1. Electronic receipt of FOIA requests:

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

For FOIA purposes, the CFTC operates as a single component. Approximately 90 percent of requests are received electronically.

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

NA—one component.

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

Through the foiasubmissions mailbox on the agency website, cftc.gov, and by fax. Most requests are emailed.

2. Electronic tracking of FOIA requests:

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

NA. The CFTC operates as one component for FOIA purposes. All incoming requests are tracked through a commercial off the shelf FOIA processing system, although not all production is through this FOIA processing system.

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

NA—one component.

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

The Commission has been using a commercial off the shelf FOIA processing system on line less than one year.

3. Electronic processing of FOIA requests:

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

While only the FOIA unit has the capacity to process documents through the use of a commercial off the shelf FOIA processing system, other program offices have other means of electronic production. In particular, the Division of Enforcement can produce documents through various eLaw programs. All offices can produce documents through email. Documents available only in hard copy are converted to electronic versions with assistance from IT staff.

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

NA. See above.

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

See response to 3.a. above.

4. Electronic preparation of your Annual FOIA Report:

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

A commercial off the shelf FOIA processing system was used for the first time this year to produce the annual report.

- b. If you are not satisfied with your existing system to prepare your Annual FOIA Report, describe the steps you have taken to increase your use of technology for next year.**

We experienced some software difficulties, which we anticipate will be resolved by next year.

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

1. If your agency has a backlog, report here whether that backlog is decreasing. That reduction should be measured in two ways. First, report whether the number of backlogged requests and backlogged administrative appeals that remain pending at the end of the fiscal year decreased or increased, and by how many, when compared with last fiscal year. Second, report whether your agency closed in Fiscal Year 2010 the ten oldest of those pending requests and appeals from Fiscal Year 2009, and if not, report how many of them your agency did close.

At the end for FY 2010 there were 16 backlogged requests, compared to 6 backlogged requests at the end of FY09. The CFTC did not have an administrative appeals backlog. All FY2009 backlogged cases were closed during FY2010.

2. If there has not been a reduction in the backlog as measured by either of these metrics, describe why that has occurred. In doing so, answer the following questions and then include any other additional explanation:

- a. Is the backlog increase a result of an increase in the number of incoming requests or appeals?**

No, the number of FOIA requests decreased by 20 percent (199 to 158)

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

Yes, the FOIA unit was understaffed and incurred the loss of a senior FOIA attorney who has been detailed to the Office of the Chairman to work on Dodd-Frank

rulemakings. Late in FY2010, the CFTC authorized hiring for two FOIA positions, an attorney and a non-attorney FOIA specialist. Shortly after the positions were posted and applications received, hiring was frozen.

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

Yes, several backlogged requests seek either voluminous documents covered by exemptions 7 and 5; or documents covered by exemption 5 that require extensive policy review.

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

The enhanced commitment to transparency has been a factor. The two oldest FOIA requests (related combined requests by the same requester) seek discretionary release of draft documents access to which probably would have been routinely denied in the past. Under the Holder Guidelines, releases under these requests have been made and further releases may be made after further review.

3. Describe the steps your agency is taking to reduce any backlogs and to improve timeliness in responding to requests and administrative appeals. In doing so answer the following questions and then also include any other steps being taken to improve timeliness.

a. Does your agency routinely set goals and monitor the progress of your FOIA caseload?

Yes, the status of the caseload is routinely monitored on a commercial off the shelf FOIA processing system. Simple requests may be opened and closed within a day. The goal is to operate at a level of efficiency that will eliminate any end of year backlogs.

b. Has your agency increased its FOIA staffing? No. As explained above, FOIA staffing has been decreased and has been slated for future increases.

c. Has your agency made IT improvements to increase timeliness? Yes. The commercial off the shelf FOIA processing system and increased use of eLaw programs including Concordance and Practice Manager are expected to increase timeliness once they are fully operational.

d. Has your agency Chief FOIA Officer been involved in overseeing your agency's capacity to process requests? Yes, the Chief FOIA Officer is involved on a daily basis and assists to suggest ways to

target responsive documents efficiently. The Chief FOIA Officer also addresses legal issues arising in connection with FOIA.

Spotlight on Success

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

We highlight the above-mentioned FOIA Case 10-00114, the release to a media requester of a report prepared by an outside contractor analyzing the agency's market surveillance operations and making recommendations. The CFTC announced the contract when it was issued, but did not formally adopt or published the ensuing report. In addition to the requested report, the CFTC identified and released 2 related reports that fell within the scope of the request. The CFTC identified 259 responsive pages of documents, most of which were subject to exemption 5. After review, the CFTC released 223 pages.