

**2012 Chief FOIA Officer Report
of the
Federal Communications Commission
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March 2011 – March 2012**

The Federal Communications Commission (FCC) is an independent regulatory agency. It was established by the Communications Act of 1934 and is charged with regulating interstate and international communications by radio, television, wire, satellite and cable. It is directed by five Commissioners nominated by the President and confirmed by the United States Senate. The President designates one of the Commissioners as Chairman, who acts as the chief executive officer of the agency. The FCC is organized by function into seven operating Bureaus and ten Staff Offices. Implementation of the Freedom of Information Act (FOIA) is the responsibility of all FCC components, as FOIA requests are processed by the Bureau or Office that is the custodian of the records sought. The Commission's General Counsel has been designated as the FCC's Chief FOIA Officer.

The FCC has conducted a review of its administration of the FOIA and analyzed the data from its FOIA Annual Report from Fiscal Year 2011 (October 1, 2010 to September 30, 2011). Three highlights of this review and analysis are:

- The Commission continues to increase disclosures through responses to FOIA requests and proactive disclosures.
- There are fewer backlogged initial FOIA requests and appeals at the end of this reporting period than there were at the end of the previous reporting period.
- Access to agency records is continuing to be improved through, among other measures, the upgrade of the FCC's website to improve navigation, search capabilities, accessibility of information, and personalization.

Section I: Steps Taken to Apply the Presumption of Openness

The guiding principle underlying the President's FOIA Memorandum and the Attorney General's FOIA Guidelines is the presumption of openness. Describe the steps your agency has taken to ensure that the presumption of openness is being applied to all decisions involving the FOIA. To do so, you should answer the questions listed below [in bold] and then include any additional information you would like to describe how your agency is working to apply the presumption of openness.

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

No. However, the President's FOIA Memorandum, the Attorney General's FOIA Guidelines, and the Department of Justice Office of Information Policy (DOJ/OIP) guidance have been distributed to all Bureau and Office heads and all staff involved in processing FOIA requests throughout the FCC. In addition, staff was notified of the Memorandum on the Freedom of Information

Act issued in 2010 by former White House Chief of Staff Rahm Emanuel and former White House Counsel Robert Bauer.

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

The FCC's Office of General Counsel (OGC) legal staff and the FCC's FOIA Liaison attended programs conducted by the Department of Justice Office of Information Policy and the American University Washington College of Law.

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

3. Did your agency make any discretionary releases of otherwise exempt information?

Yes.

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

FOIA Exemption 5, 5 U.S.C. § 552(b)(5) (deliberative process privilege) would have covered information released as a matter of discretion.

5. Describe your agency's process to review records to determine whether discretionary releases are possible.

When records have been determined to be exempt from disclosure under one or more FOIA exemptions, FCC FOIA processing staff then reviews these records in accordance with the guidance issued by DOJ/OIP concerning discretionary release. Because many of the decisions to withhold all or part of a record are based on FOIA Exemptions 4, 6, and 7(C), 5 U.S.C. § 552(b)(4), (6), and (7)(C), and the Trade Secrets Act, 18 U.S.C. § 1905, the Commission has little discretion to release the records. When records are withheld in full or in part based on Exemption 5, 5 U.S.C. § 552(b)(5), usually involving the deliberative process privilege, staff reviews them to determine whether there will be any foreseeable harm from the release of the record. Factors considered include the age of the record and the sensitivity of its content, the nature of the decision at issue, the status of the agency decision, and the personnel involved. For records withheld under the subsections of FOIA Exemption 7 other than subsection (7)(C) (personal information), staff reviews the records to ensure that the harm to law enforcement activities is not speculative or abstract.

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

Not applicable.

In Section V.B.(1) of your agency's Annual FOIA Report, entitled "Disposition of FOIA Requests – All Processed Requests" the first two columns list the "Number of Full Grants" and the "Number of Partial Grants/Partial Denials." Compare your agency's 2011 Annual FOIA Report with last year's [2010] Annual FOIA Report, and answer the following questions:

- 7. Did your agency have an increase in the number of responses where records were released in full?**

No. In FY 2011 the FCC processed 169 requests where records were released in full; in FY 2010 the FCC processed 188 requests where records were released in full.

- 8. Did your agency have an increase in the number of responses where records were released in part?**

Yes. In FY 2011 the FCC processed 147 requests where records were released in part; in FY 2010 the FCC processed 123 requests where records were released in part.

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

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

Describe here the steps your agency has taken to ensure that its system for responding to requests is effective and efficient. To do so, answer the questions below and then include any additional information that you would like to describe how your agency ensures that your FOIA system is efficient and effective.

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

Yes. The FCC's IT team works closely with the agency's FOIA professionals to ensure efficient, streamlined processing of FOIA requests. The IT team is kept apprised of the technology needs of the FOIA Office. The IT team also attends training conducted by DOJ/OIP to become aware of new innovations in FOIA processing technology that could improve the FCC's FOIA processes. As described in answer IV.6, however, budget constraints have prevented the agency from obtaining new software to sort or de-duplicate records.

2. Is there regular interaction between agency FOIA professionals and the Chief FOIA Officer?

As both Chief FOIA Officer and the FCC's General Counsel, I am part of the senior management team for the Commission. My staff is daily in contact with the FOIA staff of the Office of Managing Director (OMD) and FOIA processing staff throughout the agency to keep track of FOIA processing and to assist with compliance with FOIA's substantive standards. I provide guidance on resolving novel or otherwise complex issues relating to the FOIA and FOIA requests. I contact individual Bureaus and Offices when additional resources are needed to ensure timely processing of FOIA requests. Finally, I conduct monthly meetings with my staff to assess the status of FOIA appeals and any other issues of importance to the agency's FOIA program.

3. Do your FOIA professionals work with your agency's Open Government Team?

OGC and OMD FOIA staff meet regularly with the FCC's Open Government team (including OMD's New Media group) to discuss methods for increasing proactive disclosures to reduce the need for filing a FOIA request for agency records. The staff also discusses ways in which the redesigned FCC website (launched in 2011) can be used to increase information available to the public.

4. Describe the steps your agency has taken to assess whether adequate staffing is being devoted to FOIA administration.

OMD reviews FOIA staffing on an agency-wide basis in an effort to ensure sufficient resources to process all FOIA requests within the FOIA's statutory timeframes when otherwise possible. The efficiency of the agency's FOIA staff is also demonstrated by the reduction of backlogs in both initial requests and FOIA appeals. In addition, OMD is reviewing the responsibilities of the FOIA Liaison as part of its efforts to fill the position upon the retirement of the FCC's longtime FOIA Liaison.

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

The FOIA Office in OMD assigns for response initial FOIA requests within one day of receipt to the FCC's Bureaus and Offices that are the custodian of the records sought. The FOIA Liaison, who leads the FOIA Office, also issues weekly reports listing the new FOIA requests filed with the agency, the Bureau or Office assigned to the request, and the due date for responding to the request. The FOIA Office issues alerts to the Bureaus or Offices processing the initial requests to ensure due dates are met, or statutorily permissible or agreed-upon extensions are obtained. Also, additional licenses were obtained for redaction software, which was distributed more widely to FOIA staff throughout the Commission to help fulfill the agency's segregation and redaction duties under the FOIA.

Section III: Steps Taken to Increase Proactive Disclosures

Both the President and Attorney General focused on the need for agencies to work proactively to post information online without waiting for individual requests to be received. Describe here the steps your agency has taken both to increase the amount of material that is available on your agency website, and the usability of such information, including providing examples of proactive disclosures that have been made during this past reporting period (i.e., from March 2011 to March 2012). In doing so, answer the questions listed below and describe any additional steps taken by your agency to make and improve proactive disclosures of information.

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

Yes. In the Spring of 2011, the FCC launched a redesigned website, www.fcc.gov, containing vast amounts of information for the public, and in late 2011 the FCC unveiled My.FCC.gov, enabling the public to create customized access to the information on our website.

2. Provide examples of the records, datasets, videos, etc., that have been posted this past year.

The Commission has posted large data sets tied to telecommunications reports, such as those found at <http://www.fcc.gov/measuring-broadband-america> and <http://www.fcc.gov/reports/international-broadband-data-report-second>. It also has posted 75 videos of public information campaigns, transparency initiatives, and tutorials, which can be found at <http://www.youtube.com/fccdotgovvideo#g/u>. In addition, the Commission has posted background material and citizen summaries for 85 public workshops, panels, and open meetings. See <http://www.fcc.gov/events>, <http://www.fcc.gov/calendar>, and <http://www.fcc.gov/open-meetings>.

3. Describe the system your agency uses to routinely identify records that are appropriate for posting.

This past year, the FOIA staff of OMD revised the form distributed to the Bureaus and Offices with initial FOIA requests to require staff to indicate whether the records released are either frequently requested records that must be posted under 5 U.S.C. § 552(a)(2)(D), or otherwise should be posted to the Internet.

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

Numerous steps have been taken to make FCC information more useful to the public:

- An FCC-wide search tool has been integrated into every page on the FCC's newly redesigned website in a persistent floating top bar. The website search tool is continually tested and improved.
- In late 2011 the FCC launched My.FCC.Gov, which allows users to create a personalized version of the FCC website.
- The FCC now offers a web form for each rulemaking proceeding that allows users to comment without having to navigate to the Commission's electronic comment filing system.
- The FCC upgraded the Internet-based tools available to the public for tracking rulemaking proceedings by offering features such as RSS feeds and full-text search so the public can stay informed about new dockets and filings in ongoing proceedings.
- The redesigned website offers a feedback forum where the public is encouraged to give feedback on how the website and the materials on it can be better offered to the public. The FCC regularly updates its responses to this feedback to create a strong feedback loop with site visitors.

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

See answers 1-4 above.

Section IV: Steps Taken to Greater Utilize Technology

A key component of the President's FOIA Memorandum was the direction to "use modern technology to inform citizens about what is known and done by their Government." In addition to using the internet to make proactive disclosures, agencies should also be exploring ways to utilize technology in responding to requests. In 2010 and 2011, agencies reported widespread use of technology in handling FOIA requests. For 2012, the questions have been further refined and now also address different, more innovative aspects of technology use.

Electronic receipt of FOIA requests:

1. Can FOIA requests be made electronically to your agency?

Yes, either by email to FOIA@FCC.gov, or by electronic on-line form at <http://transition.fcc.gov/foia/#reqform>.

2. If your agency processes requests on a decentralized basis, do all components of your agency receive requests electronically?

Yes. The FCC is a small agency that receives fewer than 600 initial FOIA requests each year. The FOIA requests are assigned by OMD's FOIA Office and distributed electronically to the Bureau or Office that is the custodian of records responsive to each request.

Online tracking of FOIA requests:

- 3. Can a FOIA requester track the status of his/her request electronically?**

No.

- 4. If not, is your agency taking steps to establish this capability?**

The FCC is enhancing its now internal automated system for tracking and processing FOIA requests to provide FOIA requesters with the ability to track the status of their requests through a search capability based on a tracking number provided to them.

Use of technology to facilitate processing of requests:

- 5. Beyond using technology to redact documents, is your agency taking steps to utilize more advanced technology to facilitate overall FOIA efficiency, such as improving record search capabilities, utilizing document sharing platforms for consultations and referrals, or employing software that can sort and de-duplicate documents?**

Yes.

- 6. If so, describe the technological improvements being made.**

The FCC's IT team is assessing ways it can better utilize technology the agency already owns or licenses to improve record search capabilities. Budgetary constraints likely will limit the acquisition of new software for sorting or de-duplicating records, however. A shared drive has long been used to enable FCC staff to retrieve and review records gathered for FOIA responses. Extending the "shared drive" concept to use by other Federal agencies is not warranted because the FCC receives very few consultation or referral requests and because the shared drive exists within the FCC's security firewall.

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

The President and the Attorney General have emphasized the importance of improving timeliness in responding to requests. This section addresses both time limits and backlog reduction. Backlog reduction is measured both in terms of numbers of backlogged requests or appeals and by looking at whether agencies closed their ten oldest requests and appeals. For the figures required in this Section, please use those contained in the specified sections of your agency's 2011 Annual FOIA Report.

- 1. Section VII.A of your agency's Annual FOIA Report, entitled "FOIA Requests – Response Time for All Processed Requests," includes figures that show your agency's average response times for processed requests. For agencies utilizing a multi-track system to**

process requests, there is a category for “simple” requests, which are those requests that are placed in the agency’s fastest (non-expedited) track, based on the low volume and/or simplicity of the records requested. If your agency does not utilize a separate track for processing simple requests, answer the question below using the figure provided in your report for your non-expedited requests.

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

No.

- b. If so, for your agency overall, for Fiscal Year 2011, was the average number of days to process simple requests twenty working days or fewer?**

Not applicable.

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

The average number of days to process perfected requests in FY 2011 was 23.32 days, which is within the time permitted by statute considering authorized extensions of time.

- 2. Sections XII.D.(2) and XII.E.(2) of your agency’s Annual FOIA Report, entitled “Comparison of Numbers of Requests/Appeals from Previous and Current Annual Report – Backlogged Requests/Appeals,” show the numbers of any backlog of pending requests or pending appeals from Fiscal Year 2011 as compared to Fiscal Year 2010. You should refer to those numbers when completing this section of your Chief FOIA Officer Report. In addition, Section VII.E, entitled “Pending Requests – Ten Oldest Pending Requests,” and Section VI.C. (5), entitled “Ten Oldest Pending Administrative Appeals,” from both Fiscal Year 2010 and Fiscal Year 2011 should be used for this section.**

- a. If your agency had a backlog of requests at the close of Fiscal Year 2011, did that backlog decrease as compared with Fiscal Year 2010?**

Yes, it decreased from 23 as reported in the FY 2010 Annual Report to 19 as reported in the FY 2011 Annual Report.

- b. If your agency had a backlog of administrative appeals in Fiscal Year 2011, did that backlog decrease as compared to Fiscal Year 2010?**

Yes, it decreased from 11 as reported in the FY 2010 Annual Report to 9 as reported in the FY 2011 Annual Report. Furthermore, 6 of the 9 appeals pending at the end of FY 2011 (*i.e.*, as of September 30, 2011) were disposed of in October 2011.

c. In Fiscal Year 2011, did your agency close the ten oldest requests that were pending as of the end of Fiscal Year 2010?

No, but 6 of the 10 oldest pending initial FOIA requests from FY 2010 or before were closed during FY 2011.

d. In Fiscal Year 2011, did your agency close the ten oldest administrative appeals that were pending as of the end of Fiscal Year 2010?

No, but the FCC closed 9 of the 10 oldest administrative appeals that were pending as of the end of FY 2010, and it closed the tenth on October 21, 2011.

3. If you answered “no” to any of the above questions, describe why that has occurred. In doing so, answer the following questions then include any additional explanation:

Initial Request Backlog:

a. Was the lack of a reduction in the request backlog a result of an increase in the number of incoming requests?

The FCC did reduce its initial request backlog in FY 11. The FCC did not close all of the 10 oldest requests that were pending as of the end of Fiscal Year 10, but this was not due to an increase in the number of incoming requests.

b. Was the lack of a reduction in the request backlog caused by a loss of staff?

The FCC did reduce its initial request backlog in FY 11. The FCC did not close all of the 10 oldest requests that were pending as of the end of Fiscal Year 10, but this was not due to a loss of staff.

c. Was the lack of a reduction in the request backlog caused by an increase in the complexity of the requests received?

The FCC did reduce its initial request backlog in FY 11. The FCC did not close all of the 10 oldest requests that were pending as of the end of Fiscal Year 10, in part because of the increased complexity of those remaining requests.

d. What other causes, if any, contributed to the lack of a decrease in the request backlog?

Two of the oldest initial requests that remained at the end of FY 2011 were related to the Supreme Court case, *AT&T v. FCC*, decided by the Court in February 2011. These two matters also involved other continuing lower court litigation. The other two unresolved backlogged initial requests involved large volumes of records and ongoing negotiations with the requesters.

Administrative Appeal Backlog:

- a. Was the lack of a reduction in the backlog of administrative appeals a result of an increase in the number of incoming appeals?**

The FCC did reduce its administrative appeals backlog in FY 11. The FCC did not close all of the 10 oldest requests that were pending as of the end of Fiscal Year 10, but this was not due to an increase in the number of incoming requests.

- b. Was the lack of a reduction in the appeal backlog caused by a loss of staff?**

The FCC did reduce its administrative appeals backlog in FY 11. The FCC did not close all of the 10 oldest requests that were pending as of the end of Fiscal Year 10, but this was not due to a loss of staff.

- c. Was the lack of a reduction in the appeal backlog caused by an increase in the complexity of the appeals received?**

The FCC did reduce its administrative appeals backlog in FY 11. The FCC did not close all of the 10 oldest requests that were pending as of the end of Fiscal Year 10, in part because of the increased complexity of the remaining request.

- d. What other causes, if any, contributed to the lack of a decrease in the appeal backlog?**

The appeal that remained at the end of FY 2011 involved the same FOIA issue considered in the Supreme Court case, *AT&T v. FCC*, decided by the Court in February 2011. The Commission released the appeal decision referenced above on October 21, 2011.

All agencies should strive to both reduce any existing backlogs or requests and appeals and to improve their timeliness in responding to requests and appeals. Describe the steps your agency is taking to make improvements in those areas. In doing so, answer the following questions

and then also include any other steps being taken to reduce backlogs and to improve timeliness.

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

Yes. OMD monitors processing of initial FOIA requests by the individual Bureaus and Offices, and keeps track to ensure timely responses. As Chief FOIA Officer I am kept apprised of the status of processing initial FOIA requests. I also contact individual Bureaus and Offices when additional resources are needed to ensure timely processing of FOIA requests. OGC is responsible for preparing decisions for the Commission addressing administrative appeals. As General Counsel and Chief FOIA Officer I meet regularly with my staff to prioritize assignments and set goals for processing administrative appeals.

2. Has your agency increased its FOIA staffing?

Total FOIA staffing for the agency decreased from 18.48 FTEs in FY 2010 to 17.80 FTEs in FY 2011. However, OGC has assigned additional staff to assist with providing FOIA advice to the other Bureaus and Offices, and drafting administrative appeal decisions.

3. Has your agency made IT improvements to increase timeliness?

The FCC has not implemented any IT improvements in the past fiscal year to increase timeliness.

4. If your agency receives consultations from other agencies, has your agency taken steps to improve the efficiency of the handling of such consultations, such as utilizing IT to share the documents, or establishing guidelines or agreements with other agencies on the handling of particular information to speed up or eliminate the need for consultations?

The FCC normally receives fewer than ten requests for consultations or referrals from other Federal agencies during a fiscal year. Such requests are routed through OGC for prompt processing and response either to the referring agency or to the original FOIA requester.

Use of FOIA's Law Enforcement "Exclusions"

In order to increase transparency regarding the use of the FOIA's statutory law enforcement exclusions, which authorize agencies under certain exceptional circumstances to "treat the records as not subject to the requirements of [the FOIA]," 5 U.S.C. § 552(c)(1), (2), (3), please answer the following questions:

1. **Did your agency invoke a statutory exclusion during Fiscal Year 2011?**

No.

2. **If so, what is the total number of times exclusions were invoked?**

Not applicable.

Spotlight on Success

Out of all the activities undertaken by your agency since March 2011 to increase transparency and improve FOIA administration, describe here one success story that you would like to highlight as emblematic of your agency's efforts.

Most representative of the FCC's efforts to increase transparency since March 2011 was the roll-out of a new FCC website to promote broad public engagement through plain language, transparency, and tools to make it easier for all stakeholders – including consumers, researchers and businesses – to find what they need. The new FCC.gov was the first federal agency website that made government data available in formats that can help entrepreneurs build innovative applications, including making all of our APIs available for developers. Our new website includes an easy-to-use proceedings page where people can submit comments into the public record with just one click.

The new and improved website was launched in May 2011, but the FCC did not rest there. In late 2011 we launched My.FCC.gov, offering personalization options to make it possible to easily create, save and manage a customized page.