

# Sunshine in Government Initiative



March 30, 2006

The Honorable Alberto R. Gonzales  
Attorney General  
Robert F. Kennedy Building, Room 5137  
Tenth Street and Constitution Avenue, NW  
Washington, DC 20530

The Honorable Joshua B. Bolten  
Director, Office of Management and Budget  
1650 Pennsylvania Avenue, NW  
Washington, DC 20503

Dear Attorney General Gonzales and Director Bolten:

Under the Dec. 14, 2005 Executive Order: Improving Agency Disclosure of Information, each agency shall designate a Chief FOIA Officer who is charged with developing an agency specific plan on FOIA compliance, including concrete milestones for measurement of the agency's success in implementing the plan. The Department of Justice and Office of Management and Budget have the authority to issue guidance to the agencies re: implementation of the Order.

The undersigned groups are members of the Sunshine in Government Initiative, a media coalition committed to open government and access to government information. As major users of the Freedom of Information Act ("FOIA"), we submit the following recommendations on issues to be addressed in the agency-specific plans. These recommendations can be divided into two general categories:

- **External Reporting**: the production of particular data, in certain formats, to allow for adequate public oversight of FOIA compliance; and
- **Internal Review**: the adoption of certain "best practices" to improve FOIA compliance

## **External Reporting**

The statistics reported by agencies on FOIA processing are, at best, difficult to understand and, at worst, misleading in two ways. First, vital data regarding backlogs and processing times is currently provided in terms of a median number. Second, different agencies define "response" in different ways. The overall result is the failure to paint an accurate picture of how long the typical FOIA requester must wait to actually receive requested documents or an official denial of his or her request. This makes it difficult to create benchmarks for meaningful reform. We suggest standardizing data presented in agency-specific plans and annual reports in two ways:

- A. Rather than simply providing data on the time it takes to “respond” to a FOIA request, agencies should provide data on the following key points in the FOIA process:
1. The overall number of FOIA requests pending at the beginning of the fiscal year and the number of received requests that went unfulfilled in the particular fiscal year.
  2. The time that elapses from the date on which a FOIA request is first received by an agency (when it is “time stamped” as received) until the request is received by the actual person who will process the request and is logged for processing.
  3. The time that elapses from the date a FOIA request is received by the person processing the request until the agency responds.
  4. For granted requests, the time that elapses from the date a FOIA request is first received by an agency (when it is “time stamped” as received) until the documents are sent to the requester.
  5. The time required to adjudicate administrative appeals. Information should be provided regarding the (a) time required for a final decision to be rendered by the appellate reviewer, and (b) if the appeal is successful, the time that elapses from the filing of the appeal until the documents are sent to the requester.
  6. The number of requests for expedited review that are filed with the agency each year, the number of requests granted and the response time in cases of expedited review.
- B. The information provided in categories 2-6 above, should (1) reflect all components of an agency, as well as the agency as a whole and (2) be presented in terms of (a) *median* time, (b) *average* time and (3) *range* of time, from shortest to longest, for each category.

## **Internal Review**

While standardized reporting of data is important to public oversight of FOIA, real change comes from within. Each agency should seek to expand the “best practices” used to reduce backlogs. We believe the following suggestions merit attention:

1. The Chief FOIA Officer should be highly active within his or her agency and highly interactive with the public.

The Chief FOIA Officer carries great potential to effect change. The duties of the Chief FOIA Officer should be spelled out in the DOJ Guidance document sent to the agencies. We would recommend the following:

- There must be oversight of each Chief FOIA Officer to ensure that he or she is actively endeavoring to meet the goals of the Executive Order. At a minimum, the Chief FOIA Officer should have already met with the agency’s FOIA staff to discuss the Executive Order and any changes in agency practices and procedures that are planned. Specific focus should be placed on creating a more customer-friendly atmosphere.
- The Chief FOIA Officer should schedule public forums to receive comments on improving FOIA performance, as explicitly recommended in the EO, and incorporate those comments in the agency plan.

2. Technology is a key to alleviating the burden on understaffed FOIA offices.

Technology is vastly under-utilized in the fight against mounting FOIA backlogs. Agencies should consider taking advantage of the various software products available on the market to streamline both processing of requests and compliance with annual reporting requirements. They also must engage in proactive efforts to identify, index and post on the Internet information that may be of interest to the public. This should include, at a minimum:

- A comprehensive index to information available without a FOIA request should be posted on agency websites and in agency reading rooms.
- Agencies should affirmatively post or link to new documents whenever possible to allow the public to access information without a FOIA request.
- Section 2(c)(vi) of the Executive Order recommends the use of technology to create a “tracking system” that allows automated response to status inquiries; this should be mandatory, as it allows staff to focus on fulfilling requests.

3. Redundancy in the processing of FOIA requests can and should be reduced.

A major hindrance to efficient FOIA processing is time spent reviewing documents previously released to the public or that should be released without a FOIA request. Each agency should, at a minimum, have a written policy encouraging FOIA officers – and others – to make information available whenever possible without a FOIA request. This would include records frequently granted when requested or that do not contain any information that might fall into one of the exemption categories. Specifically:

- A clear definition should exist for “frequently requested documents.” OMB has stated that three requests trigger Section (a)(2)(D) of FOIA, which requires that the records then be placed on the Internet. Each agency should adhere to the three-request standard.
- Each agency should create a process by which prior decisions to release or withhold a document are recorded and accessible the next time the document is requested. This will ensure that the entire review process need not be repeated each time a request is filed.

4. The procedures related to expedited processing, multi-track processing, fee waivers and administrative appeals should be clear and easily accessible to the public.

The rules regarding these intricate and discrete applications of FOIA are often ignored by both requesters and FOIA staff alike. Agencies should:

- Make clear the methods used to expedite a request.
- Have clearly written and uniform guidelines for determining whether a FOIA request is complex or simple; these guidelines should be conspicuously posted on agency websites.
- Thoroughly review the fee waiver process with an eye toward uniformity among. Annual reports should include the number of fee waiver requests filed and the number granted.
- Increase-oversight of the administrative appeal process. Those who adjudicate administrative appeals must be independent of those who made the original decision; they must also be insulated from undue interference from their superiors. Chief FOIA Officers should personally review a certain number of administrative appeal decisions each year to ensure that the process works correctly.

We thank you for considering these comments and suggestions. For further information, please contact Kevin Goldberg, General Counsel, American Society of Newspaper Editors at 202-293-3860.

Sincerely,

**The Sunshine in Government Initiative**

American Society of Newspaper Editors  
The Associated Press  
Association of Alternative Newsweeklies  
Coalition of Journalists for Open  
Government  
National Newspaper Association

Newspaper Association of America  
Radio-Television News Directors  
Association  
The Reporters Committee for Freedom of  
the Press  
Society of Professional Journalists

cc: Mr. Robert D. McCallum, Jr., Associate Attorney General  
Mr. Clay S. Johnson III, Deputy Director for Management, Office of Management and  
Budget  
Mr. Daniel J. Metcalfe, Director, Office of Information and Policy, Department of Justice  
Mr. Glenn Schlarman, Chief, Information Policy and Technology Branch, Office of  
Management and Budget  
Agency Chief FOIA Officers