

**Executive Office of the President  
Office of the U.S. Trade Representative**



**CHIEF FREEDOM OF INFORMATION ACT OFFICER  
ANNUAL REPORT  
March 11, 2013**

## **Introduction**

The Office of the United States Trade Representative (USTR) is responsible for developing and coordinating United States international trade policy and negotiating initiatives, commodity and direct investment policy, and conducting trade and investment negotiations with other countries. The head of USTR is the U.S. Trade Representative, a Cabinet member who serves as the President's principal trade advisor, negotiator and spokesperson on trade issues. USTR has its headquarters in Washington, DC and has overseas offices in Beijing, China, Brussels, Belgium, and Geneva, Switzerland. The Geneva Office represents the United States at the World Trade Organization (WTO).

USTR consults with other government agencies on trade policy matters through the Trade Policy Review Group (TPRG) and the Trade Policy Staff Committee (TPSC). These groups, administered and chaired by USTR and composed of more than 20 Federal agencies and offices, make up the sub-cabinet level mechanism for developing and coordinating U.S. Government positions on international trade and trade-related investment issues.

The USTR FOIA Office consists of a Chief FOIA Officer, a FOIA Program Manager, and one FOIA Program Analyst who also acts as the FOIA Public Liaison. FOIA requests submitted to USTR vary in size and complexity from very narrow requests for a single or a few documents to very voluminous and complex requests that require broad searches and review of thousands of documents. Many of USTR's documents contain sensitive national security information and are classified pursuant to executive orders. The review of responsive records often requires coordination with other Federal agencies, foreign governments, and commercial entities, whose information may be contained in USTR records, before USTR can make a release determination. Accordingly, USTR processes FOIA requests incrementally, often by making interim responses to requesters with portions of responsive records rather than waiting until all records are processed.

Due to the agency's global presence, unique international mission, and the level of coordination with third parties, USTR faces great challenges in achieving full compliance with the time limits of the FOIA. USTR does, however, remain fully committed to achieving the fullest possible compliance with a strong focus on maintaining open dialogues with requesters and leveraging technology to improve internal processes.

## I. Steps Taken to Apply the Presumption of Openness

### 1. (a) Did your agency hold an agency FOIA conference, or otherwise conduct training during this reporting period?

USTR delivered mostly informal FOIA training during this reporting period while developing a formal training course to be rolled out in the Spring. USTR provided informal, one-on-one training to most of the employees involved in responding to a FOIA request this reporting period. In most cases, the FOIA Program Manager (PM) and/or the FOIA analyst met with employees to discuss strategies for responding to specific requests and leveraged these meetings as opportunities to provide refresher training to employees. The FOIA PM covered a variety of topics during these discussions including:

- Explanations of USTR's basic obligations under the FOIA and our enhanced responsibilities for making discretionary releases under the 2009 White House and DOJ FOIA Memoranda;
- Reviews of how to conduct thorough and efficient electronic records searches, and who to seek assistance from within USTR's Information Technology (IT) Office;
- Clarifications on the FOIA exemptions generally applicable to USTR information and when they do and do not apply including an emphasis on the (b)(5) "foreseeable harm" standard agencies are required to apply.

These informal training sessions have been very effective tools for educating and reminding USTR staff about the importance of their FOIA obligations. The informal setting has allowed for robust discussion and explanation that would not likely be achieved in a larger training session. Further, employees have shown greater interest in learning the technical aspects of the FOIA, because they are applying them to specific cases involving their own documents.

The FOIA PM has also developed a formal, one-hour FOIA training program that provides an overview of key FOIA topics for employees. The class format is interactive and is tailored for small groups of 20 or fewer students. The small class size provides a greater opportunity for meaningful participation and discussion.

### (b) Did your FOIA professionals attend any FOIA training, such as that provided by the Department of Justice?

Yes, the FOIA PM attended a number of training programs this reporting period, including DOJ OIP sponsored FOIA training and private sector training related to electronic discovery software with FOIA applications. Having focused on a broader array of information disclosure issues prior to joining USTR in August 2012, the FOIA PM attended DOJ's *Freedom of Information Act for Attorneys and Access Professionals* two-day course in December of 2012. In addition, the FOIA PM

attended the October *Annual FOIA Report Refresher Training* and the October *FOIA Requester Roundtable*.

In addition to DOJ sponsored training, the FOIA PM attended a half-day seminar sponsored by Symantec on its electronic discovery software platform Clearwell. USTR currently uses the Clearwell platform to collect, cull-through, review, and redact some of its electronically stored information (ESI) in response to FOIA requests. This particular seminar focused on new Clearwell applications, including its Transparent Predictive Coding functions.

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

Yes. USTR continued to conduct “Holder reviews” of all FOIA responses to ensure the agency is properly applying the presumption of openness standard when processes documents for release. USTR FOIA staff performed these reviews for all 59 FOIAs processed during this reporting period.

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

FOIA exemptions (b)(2) and (b)(5) would have covered the information that USTR discretionarily released during this reporting period.

**4. Provide a narrative description, or some examples, of the types of information that your agency released as a matter of discretion.**

One example of the (b)(2) information USTR discretionarily released includes the internal federal codes which correspond to particular categories of employee bonuses in response to a FOIA request for USTR employee bonus information.

An example of the (b)(5) information USTR discretionarily released is deliberative email related to USTR’s media strategy in response to a FOIA request for communications related to a WTO dispute between the United States and the European Union involving the Boeing Company and the French company Airbus. Similarly, USTR discretionarily released deliberative email related to internal discussions of a tobacco exclusion in the negotiations for a Trans Pacific Partnership (TPP) trade agreement after conducting the requisite harm analysis.

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

Other initiatives USTR has undertaken to ensure that the agency is applying a presumption of openness include: inviting requestors to USTR for briefings on the material covered by their FOIA search and contacting other offices within the Executive Office of the President (EOP) that may have received the same request to determine whether USTR is releasing as much information as possible.

In addition, USTR frequently coordinated with third parties whose commercial and/or financial information became subject to the FOIA to ensure that these entities understood the limitations of exemption (b)(4) and to explore whether there was any information subject to the exemption which they would not object to releasing. This collaboration ensured that exemption (b)(4) was not improperly applied and that the maximum amount of information would be released. USTR is also continuing its practice of posting FOIA releases, as well as other key documents to the USTR website.

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

### **1. Do FOIA professional within your agency have sufficient IT support?**

FOIA professionals at USTR have excellent information technology (IT) support. As a component within the EOP, USTR's FOIA Office has access to both an internal IT Office and the EOP's Office of Administration's (OA) IT Office. The FOIA staff frequently meets with members of both of these IT teams to discuss ideas and planned enhancements to improve and streamline USTR's FOIA process. In the past year, both of these IT departments supported FOIA staff training on Clearwell, USTR's commercial E-discovery software tool. In addition, the FOIA Office and USTR IT Office are considering ways to encourage USTR staff use of the recently created Wiki page on "How to respond to a FOIA." USTR's internal IT Office also assists with adding new documents to the FOIA electronic reading room and is always available to assist the FOIA Office with newly encountered electronic search and processing questions and challenges.

### **2. Do your FOIA professionals work with your agency's Open Government Team?**

FOIA professionals meet with USTR's Open Government Team.

The Open Government Steering Committee consists of Senior Executive Service employees from key offices within the Agency. This group is charged with setting open government policy and direction while meeting legal and intergovernmental deliberation requirements. The group also works to secure resources in support of USTR's plan and associated projects. Core membership includes the Office of Administration; Office of the General Counsel; Office of Public and Media Affairs; Office of Trade Policy and Economics; Office of Intergovernmental Affairs and Public Engagement; Office of Small Business, Market Access and Industrial Competitiveness; Office of Congressional Affairs; Office of Southeast Asia and the Pacific; and the Office of Intellectual Property and Innovation.

The Open Government Steering Committee reports to the Chief of Staff and Deputy USTR's. The Committee is supported by two teams:

- Open Government Media Team: Staff from the Office of Public and Media Affairs and the Office of Intergovernmental Affairs and Public Liaison. This team is responsible for direct interaction with the public and key stakeholders.
- Open Government Data Team: Staff from the Office of Administration and the Office of Trade Policy and Economics. This team is responsible for posting data, monitoring plan progress, and coordinating revisions to the plan.

**3. Has your agency assessed whether adequate staffing is being devoted to FOIA administration?**

USTR recently designated a Chief FOIA Officer (CFO) to fill the position after the former CFO retired from USTR. The CFO will contribute senior level support to USTR's FOIA mission. In terms of day to day requirements, the FOIA PM has determined that the FOIA Office requires additional part time support and is currently taking steps to hire a law student intern in the next several weeks.

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

USTR hired a new FOIA PM/FOIA Attorney in August 2012 to replace the departing FOIA Attorney. The new FOIA PM brings nearly six years of federal Information Law/FOIA expertise to USTR. She has begun work on eliminating USTR's areas of weakness identified in last year's CFO Report such as: delays in responding to FOIAs due to staff on official travel; challenges with computer searches of past employees' files, and failure to narrow FOIA requests through early requester outreach.

The FOIA PM is primarily focused on increasing communication to employees responsible for responding to FOIA requests to ensure that responding timely and accurately to requests remains a priority, given the work loads and travel schedules of a majority of USTR staff.

### **III. Steps Taken to Increase Proactive Disclosures**

**1. Provide examples of material that your agency has posted this past year.**

Some examples of the information USTR posted to the USTR website this year include: Press releases, fact sheets, USTR reports, and USTR blog entries. USTR also created a separate section on the website on the Trans Pacific Partnership (TPP), one of the most high profile USTR trade initiatives and a frequent topic of FOIA requests.

**2. Beyond posting new material, is your agency taking steps to make the posted information more useful to the public, especially to the community of individuals who regularly access your agency's website?**

Yes.

**3. If so, provide examples of such improvements.**

The Office of Public and Media Affairs manages [USTR.gov](http://ustr.gov), an interactive website that allows USTR to create and maintain an open dialogue with the public on trade policy. Key features on [USTR.gov](http://ustr.gov) are a blog, a “Weekly Trade Spotlight,” and an interactive map that shows where Ambassador Kirk has traveled. USTR uses the website’s blog to inform the public of upcoming events at USTR, and current trade topics on USTR’s agenda. Members of the public can sign up for the USTR “Trade Talk Email Newsletter.” This email newsletter contains news and information regarding United States trade policy and is delivered electronically to subscribers who have requested to receive correspondence from USTR.

USTR also uses the following social media tools: Twitter, YouTube, Vimeo, Flickr, Tumblr, and Facebook to make information more accessible and useful to the public. USTR tracks the metrics that indicate the level of public interest (e.g., number visits, posts, “fans”) in the information on the website. In 2012, there were 148 blog posts; 1,631,742 visits to the website; and 3,916,235 page views at the website. Both website visits and page views increased by hundreds of thousands from 2011.

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

In 2012, USTR made enhancements to the design and functionality of [USTR.gov](http://ustr.gov). And as a complement to increased domestic outreach, the website also contains features that illustrate the impact of trade on communities around the country. By communicating proactively with the public and responding in a timely and thorough manner to inquiries, USTR is committed to upholding the high standards for transparency set by President Obama. Other new material has been added to the website as a result of the Open Government Directive and a proactive stance on FOIA disclosure.

As part of the Open Government Directive, USTR continues to post its FOIA logs, which were previously only available through making a FOIA request. USTR has increased the number of prior year FOIA responses that are posted to the website. USTR routinely reviews documents for posting as part of internal meetings of the FOIA staff and meetings of the Open Government Committee.

**IV. Steps Taken to Greater Utilize Technology**

*Electronic receipt of FOIA requests:*

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

Yes, USTR has the capability to receive FOIA requests electronically and frequently receives them via email.

- 2. If your agency is decentralized, can FOIA requests be made electronically to *all* components of your agency?**

Not applicable. USTR has one central FOIA Office.

*Online tracking of FOIA requests:*

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

At this time, FOIA requesters cannot track the status of their requests electronically. Requestors can, however, send an email directly to the USTR FOIA Analyst or the FOIA Program Manager, using the contact information provided on the USTR FOIA web page, to receive case status. USTR is very responsive to such inquiries and is generally able to provide requestors with immediate case updates. This is possible because USTR's backlog is usually less than 20 cases thus the FOIA Office staff is aware of the status of most cases without needing to conduct research or consult files.

- 4. If so, describe the information that is provided to the requester through the tracking system.**

Not yet applicable

- 5. In particular, does your agency tracking system provide the requester with an estimated date of completion for his or her request?**

Not yet applicable

- 6. If your agency does not provide online tracking of requests, is your agency taking steps to establish this capability?**

Yes, the FOIA Office and the IT Office are considering steps to establish this capability.

*Use of technology to facilitate processing of FOIA requests*

- 7. 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, USTR has leveraged technology to both improve electronic record search capabilities and to sort and de-duplicate documents.

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

USTR uses Clearwell to collect, sort, reviews, redact and produce records to respond to FOIA requests. The FOIA Office typically uses Clearwell in cases that require archives of former employees to be searched. Clearwell is also useful where FOIA requestors identify specific terms or employees in their requests. The FOIA Office is also moving towards a “paperless” document collection process by using a share drive to collect and organize documents. Using a share drive also saves time with internal consultations with employees regarding such issues as discretionary releases. USTR is likewise working toward mostly electronic communications with requesters and generally transmits FOIA responses via email unless a requester specifies that they require a response

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

### **1. (a) Does your agency utilize a separate track for simple requests?**

Yes

### **(b) If so, for your agency overall, for Fiscal Year 2012, was the average number of days to process simple requests twenty working days or fewer?**

No, for Fiscal Year 2012, the average number of days to process simple requests was slightly higher at 22 days.

### **(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?**

Not applicable.

### **2. (a) If your agency had a backlog of requests at the close of Fiscal Year 2012, did that backlog decrease as compared with Fiscal Year 2011?**

No, USTR’s FOIA backlog increased from thirteen requests at the end of FY 2011 to twenty requests and the end of FY 2012.

### **(b) If your agency had a backlog of administrative appeals in Fiscal Year 2012, did that backlog decrease as compared to Fiscal Year 2011?**

USTR did not have a backlog of administrative appeals in either FY 2011 or FY 2012.

### **(c) In Fiscal Year 2012, did your agency close the ten oldest requests that were pending as of the end of Fiscal Year 2011?**

No, USTR closed six of its ten oldest requests; four remain open.

**(d) In Fiscal Year 2012, did your agency close the ten oldest administrative appeals that were pending as of the end of Fiscal Year 2011?**

USTR did not have a backlog of administrative appeals in FY 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:**

**Request Backlog:**

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

Yes, in part the backlog is a result of USTR receiving seven more requests in FY 2012 (sixty-six) as compared to FY 2011 (fifty-nine).

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

Yes, in part the backlog is a result of the loss of three staff members during FY 2012. First, USTR’s longtime FOIA PM/FOIA Attorney left at the beginning of April 2012. During this same time, the longtime Chief FOIA Officer (CFO) retired. USTR quickly hired a new FOIA PM/Attorney but this replacement only stayed for about a month, then he also departed. USTR was without a FOIA PM for approximately two months until the current FOIA PM started in late August 2012. USTR also just appointed a new CFO. This turnover in FOIA staff is likely the main cause of the lack of a reduction in the request backlog.

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

Yes, in part the backlog is a result of USTR receiving several broad and complex FOIA requests seeking voluminous records during FY 2012. For example, USTR received a number of requests seeking all documents related to its involvement in the TPP, which is the primary trade negotiation USTR is currently undertaking. Further, USTR received several requests in FY 2012 that required extensive consultation with both private third parties and other federal agencies to review potentially exempt information. This back and forth often adds weeks or months to response times.

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

The major causes are outlined above.

- 4. OIP has issued guidance encouraging agencies to make interim releases whenever they are working on requests that involve a voluminous amount of material or requires searches in multiple locations. By providing rolling releases to requesters agencies facilitate access to the requested information. If your agency had a backlog in Fiscal Year 2012, please provide an estimate of the number of cases in the backlog where a substantive, interim response was provided during the fiscal year, even though the request was not finally closed.**

USTR estimates that it provided a substantive interim response in a fifth of the FOIA cases in the backlog.

### **Use of FOIA’s Law Enforcement “Exclusions”**

USTR did not invoke a statutory exclusion during Fiscal Year 2012 per 5 U.S.C. § 552(c)(1), (2), (3).

### **Spotlight on Success**

USTR’s success story for FY 2012 is its use of technology to collect specific data that FOIA requesters sought in a number of instances rather than taking much longer to gather hundreds of pages of responsive records that together would have contained similar information. Examples included requests for employee bonus information, USTR travel locations and expenses, and trade negotiation expenses for the TPP. In each of these cases, USTR took extra steps to verify the data to ensure the requester was receiving accurate and complete information. Though USTR is not required to create documents under the FOIA, USTR exercised its discretion to do so in cases where it was the most efficient and effective solution for both the agency and the requester.