

October 16, 2006

**ATTORNEY GENERAL'S REPORT TO THE PRESIDENT
PURSUANT TO EXECUTIVE ORDER 13,392, ENTITLED
"IMPROVING AGENCY DISCLOSURE OF INFORMATION"**

Introduction

This report regarding the governmentwide administration of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (2000 & Supp. IV 2004), is submitted pursuant to Executive Order 13,392, 70 Fed. Reg. 75,373 (Dec. 14, 2005). Specifically, Executive Order 13,392 calls upon the Attorney General to submit to the President a report on agency FOIA implementation, based upon a review of individual agency implementation plans required by the Executive Order ("FOIA Improvement Plans"), together with the most recent annual FOIA reports filed by all agencies. The Executive Order calls on the Attorney General to consult with the Director of the Office of Management and Budget ("OMB") in preparing this report and directs the Attorney General to include "appropriate recommendations on administrative or other agency actions for continued agency dissemination and release of public information." Exec. Order No. 13,392, Sec. 4(a).

Accordingly, the Department of Justice has examined the agency FOIA Improvement Plans recently submitted under Executive Order 13,392, in conjunction with the agencies' annual FOIA reports for Fiscal Year 2005, for purposes of preparing this report. It has done so in coordination with OMB and with the full cooperation of all agencies involved.

Background

The Freedom of Information Act has been in operation now for nearly forty years.¹ As Executive Order 13,392 states: "[T]he Freedom of Information Act (FOIA) has provided an important means through which the public can obtain information regarding the activities of Federal agencies. Under the FOIA, the public can obtain records from any Federal agency, subject to the exemptions enacted by the Congress to protect information that must be held in confidence for the Government to function effectively or for other purposes." Exec. Order 13,392, Sec. 1(a).

Indeed, as a fundamental cornerstone of our modern democratic system of government, the FOIA has proven to be a remarkable success -- a vital tool used by our citizens to learn more about their government's operations and activities, thereby becoming a more fully informed citizenry. As such, it also has served as a model for the relatively recent surge and rapid proliferation of similar openness-in-government regimes around the world.²

¹ The FOIA was enacted in July 1966 but took effect one year later, on July 5, 1967.

² When the FOIA was enacted forty years ago, only two other nations had such a law. Since then, most particularly during the past twenty-five years, it has served as the leading model for

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As has been noted many times over the years, the volume of FOIA requests that agencies have received has increased dramatically as agency activities under it have continued to grow and develop. Today, a compilation of agencies' annual FOIA report data for Fiscal Year 2005 shows that Federal agencies receive and process more than 2.6 million FOIA requests annually, that they devote in the aggregate almost 5000 employee-years to handling them, and that they do so at a cost in excess of \$300 million per year. This is a volume of FOIA activity that far exceeds that of even relatively recent years; in fact, it represents an increase of more than 35% since Fiscal Year 2001 alone.³ While agencies have largely kept up with such increases, their backlogs in many cases have increased as well, drawing both administrative and legislative attention. Congress has amended the Act substantially over the years, most recently in 1996,⁴ and now what should prove to be the most significant administrative development in its history is the issuance and implementation of the subject of this report, Executive Order 13,392.

This first-of-its-kind FOIA executive order establishes a "citizen-centered" and "results-oriented" policy for improving the Act's administration throughout the Executive Branch and it most significantly draws new attention to the challenges presented by agency backlogs of pending FOIA requests, a matter of longstanding concern for both FOIA requesters and agencies

²(...continued)

the enactment and implementation of such transparency laws worldwide. Now, more than sixty-five nations of the world, across nearly all continents, have established freedom-of-information regimes similar to the FOIA at their national government levels. *See, e.g., FOIA Post*, "World Now Celebrates 'International Right-to-Know Day'" (posted 9/28/04); *FOIA Post*, "OIP Gives FOIA Implementation Advice to Other Nations" (posted 12/12/02). Recently, at an international conference of freedom-of-information commissioners held in England, the unprecedented issuance of Executive Order 13,392 was featured as a major part of the program agenda, so the Executive Order's implementation has become a subject of worldwide attention as well.

³ It should be noted that, apart from this large increase, during the most recent fiscal year one agency, the Social Security Administration ("SSA"), altered its practice of designating and recording certain first-party record requests so as to augment the governmentwide statistics on total FOIA requests with an additional 17.2 million such SSA requests recorded. *See* Government Accountability Office Report, "Freedom of Information Act: Preliminary Analysis of Process Trends Shows Importance of Improvement Plans" (July 26, 2006) (GAO-06-1022T) ("GAO Report on Exec. Order 13,392"), at 3 n.5; *see also id.* at 15-16 (describing Justice Department focus on point).

⁴ The FOIA has been amended by Congress multiple times during the past forty years, most notably in 1974, 1976, 1986, and 1996. A relatively minor amendment was made in 2002, as part of the Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, 116 Stat. 2383 (2002). *See Freedom of Information Act Guide & Privacy Act Overview* (May 2004), at 19 & nn.78-79. In the past, major amendments of the FOIA have most often been comprehensive ones that took into consideration both the difficulties and challenges experienced by agencies in administering the Act as well as the concerns of the FOIA-requester community.

alike. Fundamentally, Executive Order 13,392 emphasizes the FOIA's importance to "[t]he effective functioning of our constitutional democracy," and it pointedly reminds all Federal agencies that "FOIA requesters are seeking a service from the Federal Government and should be treated as such." Exec. Order No. 13,392, Sec. 1(a), (b).

Accordingly, the Executive Order states an overall policy of responding to FOIA requests "courteously and appropriately," and in ways that permit FOIA requesters to "learn about the FOIA process," most particularly "about the status of a person's FOIA request." *Id.* at Sec. 1(b). It calls upon all Federal agencies to discharge their FOIA responsibilities in an efficient and "results-oriented" manner and to "achieve tangible, measurable improvements in FOIA processing." *Id.* at Sec. 1(c). Its stated goal is to "improve service and performance" and "increase efficiency" in agency FOIA operations, "thereby strengthening compliance with the FOIA" and minimizing both "disputes and related litigation" arising under it. *Id.* at Sec. 1(c), (d). It takes considerable strides toward that goal through the establishment of such creative new mechanisms as Chief FOIA Officers, FOIA Requester Service Centers, FOIA Public Liaisons, and FOIA Improvement Plans at all Federal agencies. As such, Executive Order 13,392 stands as a strong step in improving the governmentwide administration of a law that is of widespread interest and concern.⁵

The implementation of this Executive Order has been a collaborative effort of thousands of FOIA personnel throughout the Executive Branch, made under the guidance of the Department of Justice and OMB, and it involves the related processes of program review, plan development, plan implementation, and the reporting of improvement at each individual agency -- all taking place under the direct oversight of each agency's newly designated Chief FOIA Officer. The combined efforts of all concerned already have yielded significant results.

Soon after the issuance of Executive Order 13,392, both the Department of Justice and OMB disseminated it throughout the Executive branch -- to the heads of all departments and agencies, as well as to all key FOIA personnel directly -- and provided preliminary guidance to agencies regarding it. OMB's guidance, issued on December 30, 2005, by OMB's Deputy Director, highlighted the Executive Order's requirements, drawing immediate attention to its most immediate requirement -- its mandate for the appointment of a Chief FOIA Officer at each agency by January 13, 2006 (i.e., within thirty days of the Executive Order's issuance). The Department of Justice's counterpart guidance memorandum comprehensively discussed Executive Order 13,392's provisions toward that end as well.

This initial appointment requirement was met widely across the Executive Branch by the Executive Order's January 13 deadline, with assistance from the Department of Justice and

⁵ See, e.g., *Quill*, Soc'y of Prof'l Journalists, Vol. 94, No. 7 (Sept. 2006), at 5 ("The president's directive moves the country forward, toward strengthening open government laws and reinforcing a national commitment to freedom of information. This executive order affirms that FOIA has provided citizens with important information about the functioning of government.") (quoting interview of Sen. John Cornyn).

OMB, and a list of all agency Chief FOIA Officers was promptly posted on the Department of Justice's special FOIA site on the World Wide Web.⁶ Then, in accordance with the Executive Order's requirements, these newly designated high-level agency officials began overseeing wide-ranging reviews of their agencies' FOIA operations, aiming toward the development and completion of FOIA Improvement Plans based upon those reviews by the Executive Order's deadline of June 14.

The Executive Order required each agency to "conduct a review of [its] FOIA operations" and to develop "an agency-specific plan to ensure that the agency's administration of the FOIA is in accordance with applicable law and the policies" that it established. Exec. Order No. 13,392, Sec. 3(a)-(b). Notably, it required that each agency's plan "include specific activities that the agency will implement to eliminate or reduce the agency's FOIA backlog," as well as "concrete milestones, with specific timetables and outcomes to be achieved." *Id.* at Sec. 3(b).

To facilitate these reviews, and the subsequent development of individual agency improvement plans, the Department of Justice and OMB conducted a conference for all Chief FOIA Officers, and accompanying key FOIA personnel, on March 8. This conference was keynoted by the Associate Attorney General and OMB's Deputy Director for Management, who by their presence and remarks heavily emphasized the importance of this governmentwide initiative. Their remarks were followed by detailed discussions of the Executive Order's implementation by the director and deputy director of the Justice Department's Office of Information and Privacy ("OIP"). A wide range of potential improvement areas was presented for all agencies' immediate consideration, in addition to those identified by the agencies themselves as particularly well suited to their own individual circumstances, as part of their review and planning processes.

Most significantly, the Department of Justice also provided very extensive written guidance to all agencies on their implementation of Executive Order 13,392, in the further exercise of Attorney General guidance authority under it. *See* Exec. Order No. 13,392, Sec. 4(b); *see also id.* at Sec. 3(b)(i). This formal guidance, which was issued on April 26 in coordination with OMB, was distributed to all agencies at the first of several follow-up sessions and also was made widely available on the Department's FOIA Web site.⁷ It contained discussions of more than two dozen potential improvement areas for possible inclusion in agency plans, set forth a standard template for the uniform development and presentation of all plans, included supplemental guidelines on the use of agency annual FOIA reports for reporting the results of Executive Order 13,392's implementation, and also addressed a breadth of questions and guidance points in further aid of the Executive Order's implementation.

As agencies advanced further in their reviews and planning, the Department of Justice held a follow-up session on April 27 for all agencies to share their experiences and best practices

⁶ *See* <http://www.usdoj.gov/04foia/chieffoiaofficers.html>.

⁷ *See* <http://www.usdoj.gov/oip/foiapost/2006foiapost6.htm>.

in these and other areas, as well as to pose any further questions that would benefit from discussion in a multi-agency setting. Two additional such sessions were held by the Department, the second on May 17 and the third on June 5, as the review and planning deadline approached.⁸ Beyond these sessions, agencies have posed a variety of Executive Order-related questions to the Department, through OIP's FOIA Counselor service and otherwise, since the time of the Executive Order's issuance.⁹

Subsequently, OIP also conducted a special training conference for the FOIA Public Liaisons at all Federal agencies, whose numbers total nearly two hundred,¹⁰ in order to review and emphasize their new responsibilities under Executive Order 13,392. At this conference, OIP discussed both the explicit roles of FOIA Public Liaisons under Executive Order 13,392's provisions (e.g., serving as supervisory officials in relation to agency FOIA Requester Service Centers) and the less obvious but no less important roles that they can perform in support of their agency's Chief FOIA Officer regarding improvement plan implementation and related activities.¹¹ Special emphasis was placed upon the importance of agency implementation efforts and their timely reporting by all agencies by February 1, 2007, in accordance with the Executive

⁸ During the same time, each agency's Chief FOIA Officer also became responsible under the Executive Order for establishing one or more FOIA Requester Service Centers and designating one or more FOIA Public Liaisons to aid FOIA requesters. See Exec. Order No. 13,392, Sec. 2(c).

⁹ The Department's Office of Information and Privacy established a special three-person Executive Order implementation team, in addition to its director and deputy director, that it has made available to work with all agencies on their implementation activities and to address all related questions for this purpose. Further discussions of OIP's governmentwide activities in this regard, which began immediately upon Executive Order 13,392's issuance, are contained in the Justice Department's annual FOIA report for Calendar Year 2005, which is found at: <http://www.usdoj.gov/04foia/05rep.htm>.

¹⁰ Under Executive Order 13,392, each of the agencies subject to the Act must maintain at least one FOIA Requester Service Center and one corresponding FOIA Public Liaison. Many agencies, particularly the larger ones that administer the FOIA most efficiently on a decentralized basis, have multiple FOIA Public Liaisons designated. The Department of Justice, for example, has thirty-four persons who are designated as FOIA Public Liaisons under Executive Order 13,392. See "DOJ Components' FOIA Service Centers/Liaisons," which is found at: <http://www.usdoj.gov/04foia/servicecenters.htm>.

¹¹ OIP also called upon FOIA Public Liaisons to take responsibility for ensuring that all personnel at their agencies who work with the FOIA (both directly and indirectly) have been educated about Executive Order 13,392's policies and customer-service principles. See *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (announcing FOIA Public Liaison program for July 11 and in footnote 26 stressing that OIP would be "urging any agency that has not already done so to conduct an in-house training session on the policies of the executive order for all of its FOIA personnel").

Order. OIP also included in this session a presentation by an official who has been designated as the Chief FOIA Public Liaison at the Department of Defense ("DOD") (where more than a dozen FOIA Public Liaisons cover DOD's decentralized operations), in order to provide an individual agency perspective on this area of Executive Order implementation activity.¹²

Further, the Department of Justice worked quite closely with many individual agencies as the June 14 FOIA Improvement Plan deadline arrived in order to encourage their timely and comprehensive completion of this requirement.¹³ In some instances, this involved specifically reminding agencies of the importance of timeliness in this regard. To facilitate this, and to aid the review of all agencies' improvement plans, OIP has compiled these plans and makes them available for convenient public access at a single location on its FOIA Web site. Thus, any interested person can examine all agency FOIA improvement plans under Executive Order 13,392, side by side, through a standard format recommended for ease of reference, just as they are able to do with the annual FOIA reports that agencies file.¹⁴

Improvement Plan Overview

As indicated above, Executive Order 13,392 has had an immediate and widespread positive effect on the operations of the Federal agencies that administer the FOIA. Most significantly, there has been good compliance with its twin requirements that agencies conduct comprehensive reviews of their FOIA operations and engage in the concomitant development of

¹² From almost the outset of the Executive Order's implementation, OIP has held out the Department of Defense as a model agency in this respect, based upon both the speed and quality of its early and sustained implementation efforts. At the conference for Chief FOIA Officers held on March 8, for example, DOD was singled out as exemplary in this way. On March 20, to further highlight the Executive Order's importance and promote its implementation in this fashion, OIP presented its Annual Outstanding FOIA Officer Award to a representative of DOD at a luncheon program held by the American Society of Access Professionals that was devoted solely to the Executive Order and its implementation.

¹³ See also OMB Director's Memorandum to Agencies of April 13, 2006, M-06-12, Follow-up Memorandum on "Implementation of the President's Executive Order 'Improving Agency Disclosure of Information.'"

¹⁴ It should be noted in this regard that the Department of Justice's guidance added a novel element that required agencies to group their improvement plan subject areas into three pertinent implementation time periods, for even further ease of review. See *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (Part II.F.). As is noted above, the Government Accountability Office has been examining agency FOIA Improvement Plans, among other aspects of FOIA administration, and the Department has been working cooperatively with GAO to facilitate its work in such ways.

FOIA Improvement Plans pursuant to its policy direction. All Federal agencies that are subject to the Act have prepared such plans and have posted them on their Web sites for public review.¹⁵

Overall, these plans demonstrate a strong agency commitment to the policies and principles of Executive Order 13,392, as well as the willingness to pursue a broad range of improvement activities in accordance with it. Most notably, for example, the following highly significant areas of FOIA administration improvement have been firmly embraced by the agencies as a result of the Executive Order's policy direction, the implementation guidance provided to them, and their comprehensive reviews of their FOIA operations:

Use of Technology/Automation. Pursuant to Executive Order 13,392, agencies have widely embraced the subject area of technology and automation as a vital means of improving their FOIA operations. In general, they have done so both to increase their effectiveness on behalf of FOIA requesters and also to meet the challenges that face many of them in the form of backlogs of FOIA requests. As agencies showed in their plans, this most often involves either the establishment or the upgrading of automated systems by which they can scan, redact, and process FOIA-requested records faster, with less use of paper, and with greater quality control. The Department of Defense, for example, heavily addressed this subject, stating that its "goal is to make all DOD [c]omponents aware of electronic options available to them and encourage their purchase and use if [their] FOIA workload warrants the expense."¹⁶ The Department of the Interior titled one of its goals "Employ Viable Technical Solutions," which includes using "technology to scan, redact, and streamline the FOIA process and improve quality control."¹⁷ Similarly, many other agencies demonstrated in their plans strong commitments to fully pursuing

¹⁵ The public review of agency FOIA Improvement Plans thus far has been largely positive and encouraging of agency efforts, as is most particularly reflected in the discussion of this subject at an oversight hearing held by the Subcommittee on Government Management, Finance, and Accountability of the House Government Reform Committee on July 26. GAO participated at this hearing together with the Justice Department and identified some areas for further improvement (as discussed below) but was generally supportive of the development of these plans, as were other hearing witnesses, including a representative of a broad-based media coalition. Additionally, the Justice Department has engaged in extensive public outreach activities regarding the Executive Order and its implementation, making more than a dozen public presentations on this subject this year, at such forums as those held by the American Society of Access Professionals and the Freedom Forum's First Amendment Center, as well as two major addresses on the subject overseas.

¹⁶ Department of Defense FOIA Improvement Plan at 15. Notably, DOD has been a leader among agencies not only in contracting for automated FOIA systems and equipment but also in "mak[ing] use of contractors for various aspects of [its] handling of FOIA requests." *FOIA Post*, "The Use of Contractors in FOIA Administration" (posted 9/30/04). Agencies have embraced this related subject area as well. *Accord FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (Potential Improvement Area #24).

¹⁷ Department of the Interior FOIA Improvement Plan at 33.

what the Department of Labor aptly characterized as "increased use of electronic tools in FOIA processing"¹⁸ as major parts of their Executive Order implementation activities. Accordingly, this is the basis for one of the recommendations made below.

Affirmative/Proactive Disclosure. The related areas of affirmative disclosure and proactive disclosure were strongly suggested for agency consideration in the Department of Justice's Executive Order implementation guidance. See FOIA Post, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (Potential Improvement Areas #1 and #2). The former involves the spontaneous disclosure of information to the public pursuant to subsection (a)(2) of the FOIA, 5 U.S.C. § 552(a)(2), while the latter refers to the public disclosure of records or information on a voluntary (i.e., not FOIA-compelled) basis. In both cases, the agency's disclosure efforts can readily meet the public demand for what is made available and can greatly reduce the need for the making of FOIA requests. In their FOIA Improvement Plans, agencies overwhelmingly recognized the value of further efforts in these subject areas. Indeed, all types of agencies, from the Federal Election Commission and the Federal Deposit Insurance Corporation to the Departments of Education and Housing and Urban Development, planned improvements designed to further enhance the value of such disclosures.

FOIA Web Sites. Likewise, agencies have now widely recognized the importance of both refining and maintaining (i.e., keeping up to date) the sites on the World Wide Web that they use for purposes of FOIA administration. Accord, e.g., FOIA Update, Vol. XIX, No. 3, at 3-4 ("OIP Guidance: Recommendations for FOIA Web Sites"). This is a particularly important part of fulfilling Executive Order 13,392's policies of increased efficiency and customer service. As one medium-sized agency, the Small Business Administration, stated in its FOIA Improvement Plan: "The [FOIA] website represents an increasingly important service that the Agency provides to the public."¹⁹ Fully recognizing this basic fact of modern agency administration, agencies such as the National Labor Relations Board and the United States Agency for International Development, for example, paid considerable attention to this subject area in their FOIA Improvement Plans.²⁰

FOIA Request Status Tracking. The Executive Order places distinct emphasis on the importance of all agencies having the ability to keep good track of their FOIA requests, not only for purposes of basic internal efficiency but also in order for them to be able to promptly and effectively respond to inquiries made by FOIA requesters about the status of their requests through the agencies' new FOIA Requester Service Centers and FOIA Public Liaisons, as well as otherwise. See, e.g., Exec. Order No. 13,392, Sec. 2(c)(vi). The Department of Veterans Affairs, for example, established a goal of "acquir[ing] an IT solution that provides the

¹⁸ Department of Labor FOIA Improvement Plan at 13.

¹⁹ Small Business Administration FOIA Improvement Plan at 13.

²⁰ See National Labor Relations Board FOIA Improvement Plan at 4-5; United States Agency for International Development FOIA Improvement Plan at 9.

capabilities to track FOIA requests by field location name and is accessible to each FOIA Service Center."²¹ Another department with a decentralized structure, the Department of Housing and Urban Development, likewise recognized the importance to such an agency of updating its automated tracking capability where necessary with "a replacement tracking system."²² Similarly, the General Services Administration ("GSA") expressly recognized that its "field office" structure makes it particularly vulnerable to request-tracking difficulties; it described its challenge as follows: "Currently, there is no centralized database to store and track FOIA requests [because each of GSA's regions] uses different forms of tracking systems. This results in the inability to accurately track the types or status of responses throughout the agency . . . [so] the agency's plan centers on improving this issue."²³ Even an entity as small as the Copyright Office of the Library of Congress (which is uniquely subject to the FOIA) determined that "certain changes to its current" procedures in this respect "could potentially further improve" its request-tracking capabilities.²⁴

Customer Service. In accordance with the Executive Order's directive that FOIA requesters be treated courteously and with strong customer-service values, this subject area too was overwhelmingly and appropriately embraced by dozens of agencies in their FOIA Improvement Plans. In so doing, several agencies notably developed novel ideas and approaches in this regard. The Federal Labor Relations Authority, for example, decided that it would design and employ a "customer feedback survey"²⁵ as part of its improvements in this area, and the Department of Labor planned similarly.²⁶ Toward this end, but of an internal rather than external nature, the General Services Administration formed a plan to "[d]evelop a best practices pamphlet to create standards for politeness and courtesy when dealing with requesters."²⁷ The Department of Transportation, for its part, established a goal of reviewing its standard forms and correspondence with its requesters in order to obtain any improvement ideas that can be

²¹ Department of Veterans Affairs FOIA Improvement Plan at 7 (observing further that "[e]ventually customers may be able to access the web to inquire about the status of their requests").

²² Department of Housing and Urban Development FOIA Improvement Plan at 22-23.

²³ General Services Administration FOIA Improvement Plan at 4.

²⁴ Library of Congress (Copyright Office) FOIA Improvement Plan at 4.

²⁵ Federal Labor Relations Authority FOIA Improvement Plan at 3.

²⁶ See Department of Labor FOIA Improvement Plan at 8-9.

²⁷ General Services Administration FOIA Improvement Plan at 12. This exemplary step taken by GSA follows the Department of Justice's advice on the "customer-service" training of agency personnel. See note 11 above.

incorporated into them.²⁸ Going forward, once these agencies experiment with and fully implement such "citizen-centered" ideas, other agencies should carefully consider adopting them.

Backlog Reduction/"Ten Oldest FOIA Requests." Perhaps the single most significant improvement area addressed by agencies in implementing Executive Order 13,392, in the eyes of both agencies and requesters in general, is the challenge of eliminating or reducing FOIA backlogs where and when they exist. The agencies that have such backlogs of pending FOIA requests by and large are the biggest ones, especially those agencies that regularly deal with complex records containing especially sensitive types of information. As is described in detail below, the Department of Justice has paid special attention to agency plans in this subject area through an extensive process of review; most agencies addressed it fully in accordance with the Executive Order's requirements in their initial plans, while others have committed to modifying their plans in order to achieve more robust results.

Beyond this, moreover, it should further be pointed out that several agencies have included within their backlog-related plans an emerging area of concern -- i.e., particular attention to the longest-pending FOIA requests that they have on hand. Serving as an example, the Department of Justice itself has established backlog-related goals that specifically include "clos[ing] the ten oldest FOIA requests pending" for records of its leadership offices on a regular basis.²⁹ In this same vein, the Department's Office of Information and Privacy, which adjudicates more than 3300 administrative appeals filed each year, has established this particular type of goal in addition to its aggressive goal of reducing its numbers of pending administrative appeals by 25%, 30%, and 35%, respectively, during Executive Order 13,392's first three implementation periods.³⁰ Thus, this aspect of backlog reduction has emerged to become a significant part of the Executive Order implementation picture.³¹

²⁸ See Department of Transportation FOIA Improvement Plan at 12.

²⁹ Department of Justice FOIA Improvement Plan at 11.

³⁰ See *id.* at 6 n.7.

³¹ Indeed, after the Justice Department provided this part of its plan to other agencies as a model at one of its inter-agency meetings, a number of them incorporated this "oldest requests" approach into their plans as well. See, e.g., Central Intelligence Agency FOIA Improvement Plan at 5-6; Department of the Treasury FOIA Improvement Plan at 7 (and attachment); Department of Education FOIA Improvement Plan at 10-11. Moreover, in addition to this planning process, the three agencies that were identified in March of this year as having one or more of the "ten oldest" FOIA requests governmentwide (according to a report issued by the National Security Archive) have already worked to address them. As a result, of these ten requests, nearly nine have been completed; the Central Intelligence Agency and Department of Energy have completed all of their requests, and the Department of Defense has completed all but one and a small part of another of its such requests.

Additionally, the agencies' development of their individual FOIA Improvement Plans has led to the identification of three specific "best practice" ideas that, to one degree or another, lend themselves to adoption by other agencies as well. These ideas, which serve as examples to be followed, are in the following subject areas:

In-house Training. The importance of using agency-specific "in-house" FOIA training (in addition to the broad range of training that is available to agencies on a governmentwide basis) was pointed out in Executive Order 13,392's implementing guidance,³² and several agencies went on to develop this improvement area even further. Specifically, the Department of Energy established a goal of providing basic FOIA training for its "senior managers," similar "program personnel," and "all new DOE employees."³³ Comparable plans for the training of non-FOIA personnel, upon whom FOIA officers often must rely for timely cooperation, were made by the Small Business Administration, the Federal Energy Regulatory Commission, the Federal Trade Commission, and the Department of Defense. Based upon this, other agencies should carefully consider pursuing the advantages of specialized FOIA training in such depth.

Simplified "Acknowledgment Letters." A second such idea holds great potential for improving the process by which agencies routinely send what are commonly referred to as "acknowledgment letters" to their FOIA requesters. These letters regularly serve the initial administrative purposes of confirming for a requester that his, her, or its request has been received; of advising of any request number that has been assigned to the request and should be used in future correspondence regarding it; and, in some instances, of invoking a ten-day extension of the FOIA's basic twenty-day deadline where doing so is warranted by unusual circumstances as authorized by the statute. See 5 U.S.C. § 552(a)(6)(B). Almost invariably, agencies send these letters out in the same basic form as their other FOIA correspondence. The General Services Administration, however, included within its FOIA Improvement Plan its goal to "[c]reate a response postcard to be sent to request[ers] . . . acknowledging receipt of the request."³⁴ This novel idea is contained in part of the Department of Justice's plan as well,³⁵ and it also is similar to a goal that is included in Amtrak's FOIA Improvement Plan.³⁶ Because of its

³² See *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (Potential Improvement Areas #21 and #22) (recommending attention to these subject areas notwithstanding any additional administrative burden involved).

³³ Department of Energy FOIA Improvement Plan at 2; see also *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (Potential Improvement Area #18) (identifying area as one in which "there can be much room for improvement").

³⁴ General Services Administration FOIA Improvement Plan at 13.

³⁵ See Department of Justice FOIA Improvement Plan at 147 (plan element of relatively small Justice Department component).

³⁶ See Amtrak FOIA Improvement Plan at 2, 6.

potential value as a time-saving mechanism for the administration of the FOIA by other agencies, this is the subject of one of the recommendations made below.

Intranet FOIA Sites. Also of particular note is the fact that two agencies, the Department of the Interior and the Department of Commerce, established goals involving the development of a "FOIA Intranet site" for use by their FOIA personnel.³⁷ Such a step, which can increase an agency's efficiency through improved communications among its FOIA personnel, has perhaps its greatest value in bridging the distance that otherwise can exist in large agencies between headquarters and field office employees. Other agencies should carefully consider possible application of this approach within their FOIA operations.

Though the utility of these "best practice" ideas will of course vary from one agency to the next, depending upon such factors as agency size and structure, they should be given full consideration wherever applicable in addition to what already has been identified for implementation in agencies' existing FOIA Improvement Plans.

As can be seen from the above, among all agencies' FOIA Improvement Plans many of them stand out in one particular respect or another. Three of them, by way of further example, illustrate the challenges agencies face in responding to FOIA requests and the goals agencies have set for themselves to address these challenges in their FOIA Improvement Plans. The Department of the Interior's plan, for one, reflects an extensive process of self-examination and review in the strong spirit of Executive Order 13,392, and it contains highly detailed descriptions of that agency's FOIA operations.³⁸ Most significantly, in the vital subject area of backlog elimination or reduction, the Department of the Interior's plan sets forth an aggressive goal of eliminating its FOIA backlog by the end of Fiscal Year 2008 and includes a full range of intermediate steps and time milestones arrayed toward that end.³⁹

Similarly, the FOIA Improvement Plan prepared by the United States Agency for International Development contains an excellent characterization of its FOIA operations, one that describes its somewhat unique situation as an international agency in that many of its records are not written in English; such a factor poses unusual challenges when it comes to FOIA processing.⁴⁰ This agency, too, conducted an exceptionally extensive review of its FOIA operations under Executive Order 13,392, and its review resulted in a wide variety of

³⁷ Department of the Interior FOIA Improvement Plan at 26; see also Department of Commerce FOIA Improvement Plan at 3, 7 (referring to same as FOIA "List Serv").

³⁸ See Department of the Interior FOIA Improvement Plan at 5-8, 10-13.

³⁹ See id. at 18-19.

⁴⁰ See United States Agency for International Development FOIA Improvement Plan at 3.

improvement areas being included in its plan.⁴¹ Its FOIA Improvement Plan includes a goal of eliminating its FOIA backlog by the end of 2007.⁴²

A third agency, the Small Business Administration, does not have a FOIA backlog to contend with, but its FOIA Improvement Plan sets a number of important goals -- in such areas as request tracking, use of the World Wide Web, and different types of FOIA training -- that were directly based upon the critical self-examination that it conducted.⁴³ Notably, the Small Business Administration broke down each of its goals into several "sub-goals," with the specification of very concrete steps and milestones by which all of its goals, both large and small, are being pursued.⁴⁴ In so doing, it took very much to heart what Executive Order 13,392 was designed to achieve.

At the same time, it also should be recognized that a number of initially submitted agency plans did not fully comply with Executive Order 13,392 in all technical respects, particularly regarding the important subject of timeliness of FOIA responses and backlog reduction. To be sure, the elimination or reduction of backlogs of pending FOIA requests is an enormous challenge for many Federal agencies, especially those that regularly deal with records pertaining to national security, law enforcement, homeland security, foreign relations, and/or complex commercial transactions. But the Department of Justice identified a number of agencies that could do more within their FOIA Improvement Plans to address such matters in accordance with the Executive Order.

Specifically, in the preparation of this report the Department of Justice conducted a review of agency FOIA Improvement Plans with a particular eye toward the way in which they addressed the area of backlog reduction wherever applicable. As a starting point for this review, it began with nine agencies that have been identified by GAO as having failed to sufficiently address this improvement area in all respects.⁴⁵ The Department extended its initial review well beyond these agencies, however, and encompassed nearly thirty agencies within it.

⁴¹ See id. at 4-6, 8-13.

⁴² See id. at 8, 9, 12.

⁴³ See Small Business Administration FOIA Improvement Plan at 5-7.

⁴⁴ See id. at 9-15.

⁴⁵ See GAO Report on Exec. Order 13,392, at 29. These nine agencies are the Department of Agriculture, the Department of Commerce, the Department of Defense, the Department of Labor, the General Services Administration, the National Aeronautics and Space Administration, the National Science Foundation, the Social Security Administration, and the Department of Veterans Affairs.

This review involved an analysis of the agency's FOIA Improvement Plan together with its most recent annual FOIA report, in accordance with the Executive Order's terms,⁴⁶ as well as full discussions of the agency's potential backlog-related circumstances. This was a very cooperative and highly successful process. Where it was determined that an agency needed to modify its FOIA Improvement Plan in this important improvement area -- which was the case with all nine agencies identified by GAO, as well as with almost a dozen others -- the Department discussed the similar modifications being made by other agencies and advised the agency on doing so.⁴⁷

As a result of this review process, several agencies already have completed the modification of their FOIA Improvement Plans, including the Department of Education, the Federal Energy Regulatory Commission, the National Aeronautics and Space Administration, the National Archives and Records Administration, and the Securities and Exchange Commission.⁴⁸ A number of additional agencies have to date completed the initial stages of this review process and have committed to modify their FOIA Improvement Plans. These agencies are the Department of Agriculture, the Department of Commerce, the Department of Defense, the Department of Homeland Security, the Department of Labor, the Department of Veterans Affairs, the Equal Employment Opportunity Commission, the Federal Deposit Insurance Corporation, the Federal Trade Commission, the General Services Administration, the Merit Systems Protection Board, the National Science Foundation, the National Transportation Safety Board, and the Social Security Administration.⁴⁹ All of these agencies are expected to complete the refinements of their FOIA Improvement Plans and post them on their FOIA Web sites soon, allowing each of them to incorporate this remedial enterprise into the first phase of its implementation activity.

⁴⁶ See Exec. Order No. 13,392, Sec. 4(a) (connecting FOIA Improvement Plans and annual FOIA reports for such review purposes).

⁴⁷ The possible need for such refinements of agency FOIA Improvement Plans, it may be noted, was anticipated in the implementation guidance that the Department of Justice provided to agencies earlier this year. See *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (advising agencies in footnote 18 to "consider making such refinements wherever appropriate"); see also *id.* at Q&A #1.

⁴⁸ In accordance with applicable guidance, these agencies have clearly specified on their FOIA Web sites that such modifications have been made, and they should likewise make this clear in new Section XII.A. of the annual FOIA reports that they file by next February. See note 47 above.

⁴⁹ These two categories between them include all nine of the agencies identified by GAO in this regard.

Recommendations

As described above, the Department of Justice, in coordination with OMB and based upon the study conducted by GAO, already has taken significant steps to improve individual agency implementation of Executive Order 13,392 in the furtherance of its policy direction. The many agencies that have followed the Department's recommendations for modifying and refining their FOIA Improvement Plans have demonstrated a strengthened commitment to the Executive Order's implementation and have acted with commendable responsiveness in this respect.

At this point, the primary focus of overall agency activity under the Executive Order is on the successful implementation of their FOIA Improvement Plans. The first implementation time period for measuring and reporting agency success in this regard extends for approximately three more months, i.e., up until the reporting deadline of February 1, 2007. As suggested above, this initial implementation period is vital to Executive Order 13,392's success, so the primary recommendation of the four recommendations made below pertains to that. Three additional recommendations are made regarding the processes of FOIA administration within agencies more generally.⁵⁰

1. Follow-up Meeting of Chief FOIA Officers. Above most other things, a salient feature of Executive Order 13,392 is the establishment of the new position of "Chief FOIA Officer" within each agency, a person who is primarily responsible and accountable for both FOIA administration and the Executive Order's implementation. As is noted above, the Department of Justice and OMB conducted a meeting for all Chief FOIA Officers on March 8, and now it would be most appropriate and useful to hold another one. At such a gathering of these agency officials, the basic points that have been made in this report can readily be communicated and the importance of agency implementation activities in the coming months can be emphasized directly.

2. Governmentwide Improvement of "Acknowledgment Letters." As is highlighted above, the FOIA Improvement Plans of two or three agencies contained an outstanding idea for the improvement of a particular administrative step that is taken by almost all agencies, regardless of size or circumstances, in their day-to-day administration of the Act -- the preparation and transmittal of "acknowledgment letters." The simple use of postcards rather than standard written letters for this basic, universal step in the FOIA process could save countless hours (and funding), freeing FOIA personnel for more substantive activities.

⁵⁰ As required by the Executive Order, all recommendations made relate to "continued agency dissemination and release of public information." Exec. Order No. 13,392, Sec. 4(a). Further, all agencies should be mindful of the importance of coordinating their record-disclosure activities under the FOIA with their information-dissemination activities undertaken pursuant to OMB Circular A-130 and the E-Government Act of 2002. See, e.g., OMB Deputy Director's Memorandum to agencies of December 30, 2005, M-06-04, Implementation of the President's Executive Order "Improving Agency Disclosure of Information"; OMB Memorandum of August 25, 2006, M-06-25, FY2006 E-Government Act Reporting Instructions.

Accordingly, the Department is recommending that, as a matter of widely applicable governmentwide practice, agencies promptly review this recommendation and take appropriate steps to follow this potentially time-saving practice where appropriate.⁵¹

3. "FOIA Form Reviews." Beyond such basic "acknowledgment letters," all agencies have developed their own individualized forms of communication with FOIA requesters for the various stages of their administrative processes. It would greatly further the policies and goals of Executive Order 13,392 if all agencies now were to conduct reviews of all such standard forms and correspondence formats used by them (as well as by their various sub-agencies and components where applicable) in order to ensure that they are fully reflective of the Executive Order's customer-service principles.⁵²

4. Governmentwide Technology Initiative. As summarized above, agencies have enthusiastically embraced the area of advanced technology and automation as a means of improving their FOIA operations, most particularly as a way of meeting the challenges faced by those with backlogs of complex FOIA requests. Accordingly, the Department recommends that, in the coming months, possible interagency approaches be explored for maximizing the opportunities that this area offers for providing agencies with cost-effective ways to process FOIA requests on a more efficient and timely basis. Agencies, working together with the Department of Justice and OMB, can explore these opportunities with the aim of further helping to reduce existing backlogs (and to avoid backlogs from arising or increasing in the future, such as in the event that an agency receives a significantly increased number of FOIA requests).

Conclusion

In sum, the agencies of the Executive Branch have implemented Executive Order 13,392 in a vigorous manner fully commensurate with the importance of this unprecedented Presidential initiative. Overall, they have followed the extensive implementation guidance that has been provided to them and where necessary have demonstrated a strong commitment to promptly making adjustments to their initial planning efforts as required.

At this point, all agencies are most actively engaged in the process of implementing the various parts of their FOIA Improvement Plans between now and the time by which they must

⁵¹ Of course, this does not apply to any agency that ordinarily does not need to employ acknowledgment letters, most particularly any agency that regularly deals with a relatively small volume of FOIA activity. Nor does it apply to any agency's response to a request for "expedited processing" of a FOIA request under subsection (a)(6)(E) of the Act, 5 U.S.C. § 552(a)(6)(E); such responses are required to be made within ten calendar days of the date on which the request is received. See 5 U.S.C. § 552(a)(6)(E)(ii)(I).

⁵² Such items can be reviewed for their correctness, completeness, and consistency, but also to make sure that they are up to date with respect to the new FOIA Requester Service Center and FOIA Public Liaison services that are now made available to FOIA requesters.

report on their initial successes. This first implementation period is of course essential to their continued success, as well as to continued public confidence in the Executive Order's strong and effective implementation. Accordingly, as is recommended first and foremost above, the Department of Justice looks forward to the holding of a second formal gathering of agency Chief FOIA Officers at which the importance of the agency efforts that are now ongoing (to be reported as of this coming February 1) can be emphasized. And beyond this initial implementation and reporting period, the Department also looks forward to submitting two further such reports to the President, by June 1, 2007, and June 1, 2008, pertaining to the Executive Order's next two implementation periods.⁵³

⁵³ See Exec. Order No. 13,392, Sec. 4(a) (calling for two further such reports "that provide the President with an update" on agency implementation of their FOIA Improvement Plans).