

May 30, 2008

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

Introduction

On December 14, 2005, the President issued Executive Order 13,392 on "Improving Agency Disclosure of Information." In the Order, the President stated that "[t]he effective functioning of our constitutional democracy depends upon the participation in public life of a citizenry that is well informed," and that "the Freedom of Information Act (FOIA) has provided an important means through which the public can obtain information regarding the activities of Federal agencies." Accordingly, the President established the policy that agency FOIA operations shall be "citizen-centered" and be "both results-oriented and produce results." As the President stated, "[a] citizen-centered and results-oriented approach will improve service and performance, thereby strengthening compliance with the FOIA, and will help avoid disputes and related litigation."

In the Executive Order, the President directed the head of each Executive Branch agency to designate a senior official (at the Assistant Secretary level or equivalent) to serve as that agency's Chief FOIA Officer. So as to ensure a citizen-centered approach to responding to FOIA requests, the Order also directed each agency to establish one or more FOIA Requester Service Centers and to designate one or more FOIA Public Liaisons. The Service Centers would "serve as the first place that a FOIA requester can contact to seek information concerning the status of the person's FOIA request and appropriate information about the agency's FOIA response." The Liaisons would "serve as supervisory officials to whom a FOIA requester can raise concerns about the service the FOIA requester has received from the Center." In addition, the Liaisons would "seek to ensure a service-oriented response to FOIA requests and FOIA-related inquiries," and would "assist, as appropriate, in reducing delays, increasing transparency and understanding of the status of requests, and resolving disputes."

In addition, the Executive Order directed each agency to conduct a review of its FOIA operations and, based on this review, to develop and issue a FOIA Improvement Plan, approved by the head of the agency, "to ensure that the agency's administration of the FOIA is in accordance with applicable law and the policies set forth" in the Order. These agency-specific plans, which would "address the agency's implementation of the FOIA during Fiscal Years 2006 and 2007," were to include "specific activities that the agency will implement to eliminate or reduce the agency's FOIA backlog, including (as applicable) changes that will make the processing of FOIA requests more streamlined and effective, as well as increased reliance on the dissemination of records that can be made available to the public through a Website or other means that do not require the public to make a request for the records under the FOIA."

Moreover, each agency's plan also needed to include "concrete milestones, with specific timetables and outcomes to be achieved," by which the agency "shall measure and evaluate the agency's success in the implementation of the plan."

A core element of Executive Order 13,392, in support of its "citizen-centered" and "results-oriented" policies, is the Order's emphasis on transparency and accountability. Under the Order, each agency was required by June 14, 2006, to submit to the Attorney General and the Director of the Office of Management and Budget (OMB), and to post on its Website, a report that summarized the results of the agency's review of its FOIA operations and enclosed a copy of the agency's FOIA Improvement Plan. In addition, the Justice Department's Website publishes all agency Improvement Plans, as well as a list of the Chief FOIA Officers for all the agencies.

Moreover, the Executive Order directed each agency to report periodically on the agency's progress in implementing its Improvement Plan. These agency progress reports were to be included as part of the agencies' Annual FOIA Reports for Fiscal Years 2006 and 2007, which under the FOIA were to be submitted to the Department of Justice by February 1, 2007 and 2008, respectively. As with the agency FOIA Improvement Plans, each agency's Annual FOIA Report is posted on both the agency's Website and on the Justice Department's Website.

Thus, the public is able to track the progress that agencies have made in meeting the goals that they established for improving their FOIA operations. In fact, the Executive Order directed each agency to identify in its FOIA report, and in a separate report to the President's Management Council (PMC), any agency deficiencies in meeting the milestones that the agency had established in its FOIA Improvement Plan. The Order also required the agency to explain "the reasons for the agency's failure to meet the milestone" and to outline "the steps that the agency has already taken, and will be taking, to address the deficiency."

Finally, the Executive Order directed the Attorney General to submit periodic reports to the President regarding the implementation of the Executive Order. The Attorney General submitted the first of these reports to the President on October 16, 2006. That report, which is posted on the Justice Department's Website, summarized the initial phase of the Executive Branch's implementation of the Order, with a focus on the reviews and FOIA Improvement Plans that the agencies had developed and issued.

The second report of the Attorney General was submitted on June 1, 2007. In accordance with the Executive Order, that report was based on agency Annual FOIA Reports for Fiscal Year 2006, and it provided "an update on the agencies' implementation of the FOIA and of their plans" for improving their FOIA operations. The 2007 report described the initial progress that agencies had made in the first months of implementing their FOIA Improvement Plans, as reported in their Fiscal Year 2006 Annual FOIA Reports.

This 2008 report is the last of the reports required by the Executive Order. In accordance with the Executive Order, it is based on agency Annual FOIA Reports for Fiscal Year 2007. Section I provides an Overall Assessment. Section II sets forth a more detailed discussion of

agency activities. Section III provides a discussion of the areas where agencies have encountered difficulties in meeting their milestones or goals, and Section IV provides recommendations.

In addition, as was done last year, to aid in the review of agencies' progress in implementing the Executive Order, the Department of Justice, in coordination with OMB, has focused on the progress that has been made by twenty-five key agencies, including all fifteen Cabinet departments.¹ For each of those key agencies, charts have been prepared and a color has been assigned to the progress the agency has reported in its Annual FOIA Report. For agencies that reported success in timely achieving the milestones that they established for themselves during the reporting period, the color dark green was assigned. For agencies that achieved their milestone or goal during this reporting period, but did so later than planned, the color light green was assigned. If the entire goal was reached during this reporting period, a check mark also was assigned.² For those agencies that reported progress, but not success, in timely meeting a milestone, the color yellow was assigned. For agencies that did not report progress, the color red was assigned.

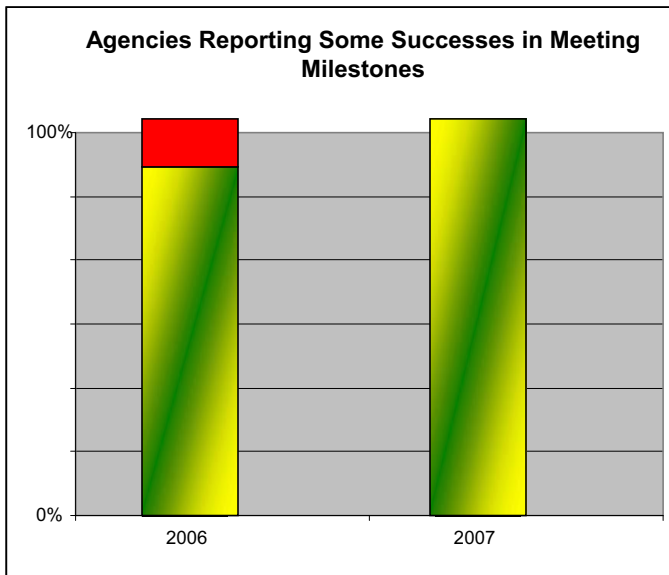
I. Overall Assessment of Agency Activities

Agencies Made Sustained and Measurable Progress. Overall, Federal agencies made sustained and measurable progress in implementing the Executive Order during the final reporting period, which reflected a year of implementation activity. Through a wide variety of initiatives, agencies addressed multiple aspects of FOIA administration within their agency and made remarkable improvements. Frequently, even when an agency missed completion of a particular milestone, that deficiency was offset by the successes the agency had achieved in meeting other milestones. The Executive Order brought renewed attention to the importance of proper administration of the FOIA within all agencies and that, in and of itself, has provided, and will continue to provide, great benefits to agencies and the public alike.

All Agencies Achieved Some Success In Implementing Their FOIA Improvement Plans. All eighty-nine agencies operating under FOIA Improvement Plans reported achieving success in meeting some or all of their milestones and goals. This represents a significant accomplishment.

¹ The key agencies are: Department of Agriculture, Department of Commerce, Department of Defense, Department of Education, Department of Energy, Department of Health and Human Services, Department of Homeland Security, Department of Housing and Urban Development, Department of the Interior, Department of Justice, Department of Labor, Department of State, Department of Transportation, Department of the Treasury, Department of Veterans Affairs, U.S. Agency for International Development, Central Intelligence Agency, Environmental Protection Agency, General Services Administration, National Aeronautics and Space Administration, National Science Foundation, Nuclear Regulatory Commission, Office of Personnel Management, Small Business Administration, Social Security Administration.

² Because some agencies set goals that extended beyond the time period of the Executive Order, there are instances where an agency was assigned the color green because it had timely achieved its milestones during this reporting period, but no check was assigned because the overall goal itself was not yet met.



Moreover, in a number of cases, agencies did not simply meet but instead exceeded their various milestones and goals, either by reaching them ahead of schedule or by exceeding the benchmark for success. For example, the Department of Energy, as did other agencies, exceeded its backlog reduction goal. As reported in its Annual FOIA Report: "[I]n the area of Backlog Reduction, the Department successfully completed its initiative to reduce the number of pending FOIA cases that were more than one year old by 50%. The Department exceeded this goal by 10% and reduced that backlog to 89 cases."

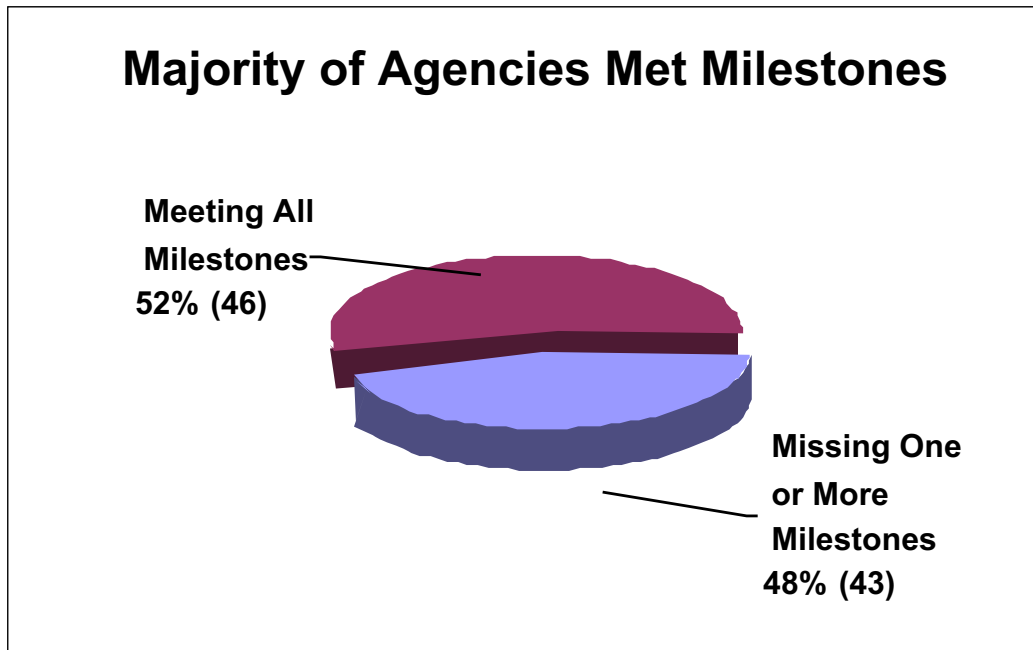
Similarly, the Office of Government Ethics exceeded its goal of achieving a 90% timeliness rate for responding to requests. As reported in its Annual FOIA Report the Office of Government Ethics maintained a 100% timely response rate throughout 2007 and into 2008.

Likewise, the Department of Defense met its training goal ahead of schedule. As reported in its Annual FOIA Report, a milestone that was scheduled for July 2008 which concerned creation of online training modules on its FOIA Website was met early, in 2007.

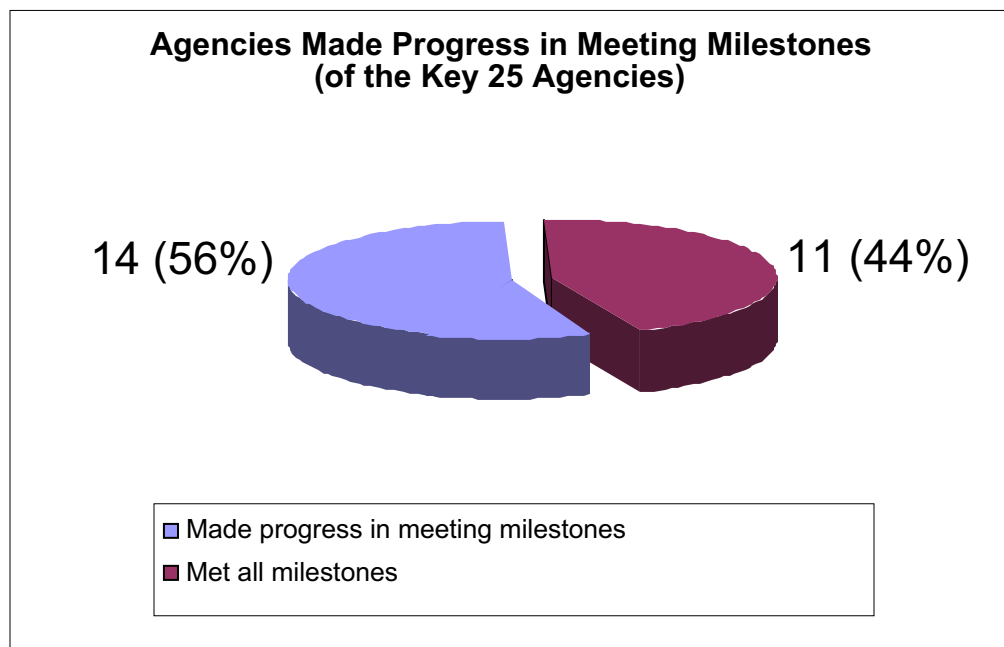
"[A] milestone that was scheduled for July 2008, 'Online training modules established on FOIA Website,' was met in 2007."

Department of Defense, 2007
Annual FOIA Report

More than Half of the Agencies Successfully Met All of Their Milestones and Goals Under The Executive Order and Reported No Deficiencies for this Reporting Period. A total of forty-six agencies reported achieving successes in timely meeting all their milestones and goals under the Executive Order and had no deficiencies for this reporting period.



Of the twenty-five key agencies, eleven reported success in timely achieving all their milestones for this reporting period. All twenty-five key agencies reported meaningful progress in FOIA administration.



Although forty-three of the eighty-nine total agencies reporting on milestones and goals under the Executive Order³ reported having failed to meet at least one of their milestones by the plan's timetable, many still made significant progress toward meeting the missed milestone or goal. In fact, six agencies remedied all deficiencies by the end of this reporting period and twelve others remedied at least some of the deficiencies. In those cases, the agency subsequently met the milestone or goal, but at a time later than originally planned.

For example, the Federal Maritime Commission reported that its goal of improving affirmative disclosure by posting frequently asked questions on the Commission's Website was completed, although the completion date was later than originally planned. A similar situation occurred with HHS which had milestones related to Website improvement which were completed, albeit later than originally planned.

"New FAQs were to be approved by February 2007 and posted to the Commission's website by April 2007. . . . A new staff person responsible for the tasks associated with implementing the Commission's FOIA Plan has been hired and trained [and] [f]inal FAQs were posted to Commission's website on January 17, 2008."

FMC, 2007
Annual FOIA Report

Agencies Reported Positive Achievements in FOIA Administration. As was reflected in last year's report, the Executive Order has had, and continues to have, a positive influence on the administration of the FOIA in a variety of ways.

For example, customer service and assistance to FOIA requesters has improved remarkably. Moreover, many agencies have realized meaningful backlog reductions. This, in particular, is quite significant given that the Executive Order specifically recognized the challenges facing agencies with backlogs by noting that agency plans to reduce or eliminate backlogs should be "consistent with available resources and tak[e] into consideration the volume and complexity of the FOIA requests pending with the agency." As was reported last year, agencies have also made significant progress in other areas, such as increasing their proactive disclosures of records and improving their FOIA Websites. Moreover, agencies have made great strides in seeking out technological solutions to improving FOIA administration overall. In all these areas, positive outcomes have been achieved.

³ For Fiscal Year 2007, there were ninety-two agencies subject to the FOIA. Eighty-nine of those agencies are included in the scope of this report. The three agencies not included are the Privacy and Civil Liberties Oversight Board which came into existence after the issuance of Executive Order 13,392, the United States International Boundary and Water Commission, which did not submit an improvement plan or annual report until February 2008, and the Tennessee Valley Authority, which set no improvement goals.

It is also worth emphasizing that each agency created its FOIA Improvement Plan to address its own particular FOIA situation, as was reflected in the range of areas agencies selected for improvement, as well as the manner in which they undertook to achieve their goals. Although there were deficiencies in meeting some milestones and goals, agencies were encouraged by both the Department of Justice and OMB to be aggressive in setting their goals. The fact that some agencies, for some improvement areas, were not able to achieve all that they had aimed for is in part a reflection of the fact that some agencies set high goals for themselves. As is discussed below, agencies also encountered difficulties, such as a shortage of staff and the need for greater IT assistance, which had an impact on their ability to meet their goals.

Continued Attention to FOIA Administration is Essential. Finally, the Executive Order was written to cover the first two years of an overall effort to improve the government's FOIA practices. At the conclusion of the 2007 report, a series of recommendations was made to provide further assistance to agencies in improving their FOIA administration. As a result of those recommendations, agencies had to submit Updated Status Reports to the President's Management Council concerning any deficiencies encountered in meeting FOIA Improvement Plan milestones as identified in their Fiscal Year 2007 Annual FOIA Report. Additionally, any agency that had a backlog of FOIA requests or appeals as of the end of Fiscal Year 2007 was required to establish, and post on its Website, backlog reduction goals for Fiscal Years 2008, 2009, and 2010.

In addition, the Department of Justice hosted a third conference of Chief FOIA Officers to emphasize the important role these agency officials fill in the administration of the FOIA. The Department also facilitated a follow-up meeting of the Inter-Agency Working Group on Technology to share information on technological improvements that can aid in FOIA processing and administration. Lastly, the Department of Justice conducted two specialized FOIA training sessions. The first emphasized the role and duties of FOIA Public Liaisons and emphasized their role in resolving disputes. The second training program focused on the content of agency FOIA Reading Rooms and Websites and addressed both the legal requirements for posting certain agency documents, as well as the advantages that greater accessibility of documents brings to the area of FOIA administration.

Continued attention must be paid to the administration of the FOIA. Such attention and focus by agency officials is essential to improving the FOIA process both for agency personnel and requesters alike.

The Executive Order's Designation of Key Personnel to Lead FOIA Activities and its Requirements Regarding Tracking of Requests Are Now Required by Statute. When Congress recently amended the FOIA by passing the OPEN Government Act of 2007, it incorporated into the FOIA a number of key provisions of the Executive Order. In many ways, this will be a lasting legacy of the Executive Order.

In particular, the FOIA now requires that agencies designate Chief FOIA Officers who shall have agency-wide responsibility for compliance with the FOIA, will monitor

implementation of the FOIA throughout the agency, and will report to the Attorney General as directed. Similarly, agencies are now required by statute to designate FOIA Public Liaisons who, among other duties, are to assist in reducing delays and resolving disputes. Moreover, starting in 2009 agencies will be required by the FOIA to assign individualized tracking numbers for all requests that will take longer than ten days to process and to establish a telephone line or Internet service to provide requesters with information about the status of their requests and an estimated time for completion of processing.

Going forward, those agencies which set any goals or milestones for future fiscal years, or which extended goals into future fiscal years, will continue to work on achieving those goals. In light of the statutory changes to the FOIA, the critical functions performed by agency Chief FOIA Officers and FOIA Public Liaisons will continue. To further encourage agencies to continue on the positive path they have taken, Section IV of this report proposes a series of additional recommendations.

II. Agency Progress in Meeting Plan Milestones and Goals

Across the government, agencies have reported meaningful improvements in FOIA administration, spanning a wide range of activity areas. This final reporting period covers the last full year of activity under the Executive Order.⁴ As mentioned above, the Department of Justice has created a chart for each of the twenty-five key agencies. Each chart lists the agency's goals that relate to milestones falling within the reporting period for the Fiscal Year 2007 Annual FOIA Report. For each improvement area where success was achieved, the improvement area is marked in green – dark green indicates the milestones were all met on time, light green indicates that at least one milestone was later than originally planned. As the attached charts demonstrate, although some agencies experienced some difficulties in meeting all of their planned milestones, overall agencies made quite significant progress towards meeting their FOIA Improvement Plan goals.

In last year's report, the Department of Justice highlighted six general categories of improvement areas that were chosen by agencies in their implementation of the Executive Order. These six areas are addressed again in this year's report and continue to stand out as areas in which agencies have made real progress in improving the operation of the FOIA across the government:

⁴ Annual FOIA Reports, which are required to be filed with the Department of Justice on February 1 of each year, contain a variety of statistical information for the preceding fiscal year. Section XII of the 2007 Annual FOIA Report, which addressed Executive Order implementation activities, extended beyond the end of the fiscal year, and included agency progress through January 2008.

1. Backlog Reduction: Despite an Overall Increase in the Number of Requests Received, Agencies Overall Processed More Requests and Decreased the Number of Pending Requests.

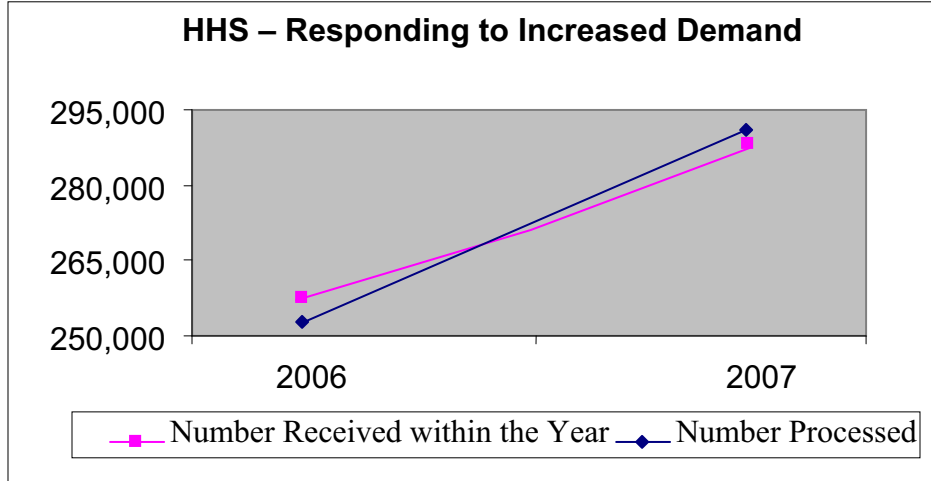
Backlog Reduction is the Single Most Significant Improvement Area Addressed by Agencies. As reported last year, perhaps the single most significant improvement area addressed by agencies in implementing Executive Order 13,392 is the challenge of eliminating or reducing FOIA backlogs where and when they 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.

Increases in Numbers of Incoming Requests Compound Challenge of Backlog Reduction. The first step toward analyzing the issue of agency backlogs is to look at the number of requests received by agencies. For Fiscal Year 2007, forty-nine agencies, more than half, reported an increase in the number of incoming requests. Clearly, for those agencies facing the added burden of increased incoming requests, the challenge of backlog reduction is magnified. The increase in the number of incoming requests was quite significant for some agencies. Compared with Fiscal Year 2006, in Fiscal Year 2007:

- ▶ The Department of Health and Human Services (HHS) received 31,569 more requests.
- ▶ The Department of Defense (DOD) received 3,608 more requests.
- ▶ The National Archives and Records Administration (NARA) received 2,490 more requests.

Despite Overall Increases in Incoming Requests, Agencies Overall Processed More Requests in Fiscal Year 2007. Although there was an overall increase in the number of incoming requests, forty-seven agencies, again more than half, reported processing a greater number of requests during the last fiscal year as compared with the year before. For many agencies the increased number of processed requests was quite significant. For example, compared with Fiscal Year 2006, in Fiscal Year 2007:

- ▶ HHS processed 33,742 more requests.
- ▶ The Department of Homeland Security (DHS) processed 23,354 more requests.
- ▶ The Department of Labor processed 4,513 more requests.



This increase in the number of requests processed by agencies during the fiscal year is important. This higher rate of processing is a strong indicator that the increased attention brought to FOIA by the Executive Order, and the resulting improvements in FOIA administration, led to greater numbers of requests being processed during the course of the fiscal year, which is a concrete achievement.

Despite Overall Increases in Incoming Requests, Agencies Overall Reported a Decrease in the Number of Pending Requests. Although the overall number of incoming requests increased in Fiscal Year 2007, fifty-seven agencies, more than 60%, maintained or decreased the number of requests reported as still pending at the end of Fiscal Year 2007. Of these, thirty-five agencies reported a decrease in the number of pending requests. For some of those agencies, the decrease in the number of pending requests was significant. For example, compared with Fiscal Year 2006, in Fiscal Year 2007:

- ▶ DHS reduced the number of pending requests by 26,881.
- ▶ The Securities and Exchange Commission (SEC) reduced the number of pending requests by 3,494.
- ▶ The Department of Justice reduced the number of pending requests by 1,629.

Agencies Face Challenges in Reducing Backlogs. Although progress has been made in the area of backlog reduction, the challenge of reducing backlogs remains great. As mentioned above, many agencies reported an increase in the number of incoming requests. Not surprisingly, that directly affected many agencies' ability to reduce their backlog. Indeed, of the thirty-four agencies that reported an increase in the number of pending requests, twenty had received more incoming requests and so a corresponding increase in the number pending at the end of the fiscal year is not unexpected.

Moreover, even for those agencies that processed significantly more requests in Fiscal Year 2007, the number of requests that remain pending was often still significant. For example,

HHS, which processed more than thirty thousand more requests in Fiscal Year 2007 as compared with the previous fiscal year, and reduced its number of pending requests by nearly six hundred, still had over twenty-eight thousand requests pending at the end of the fiscal year.

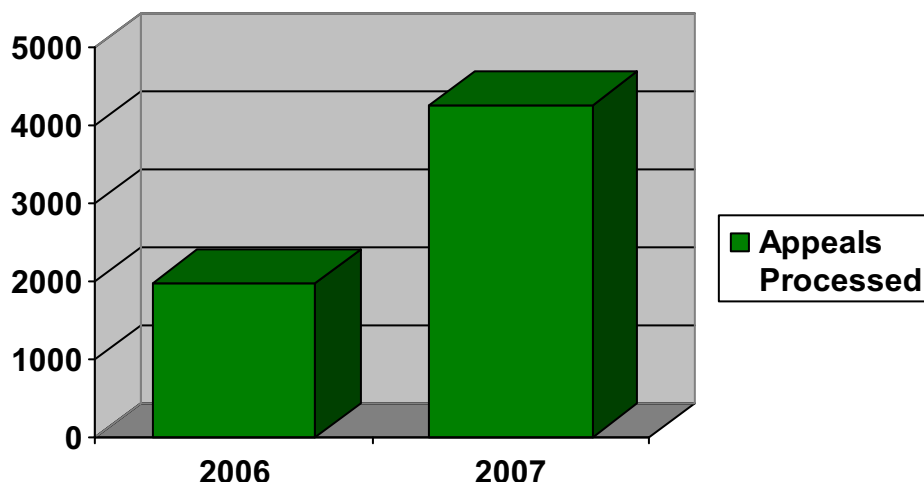
Certainly, there remains much work to be done in the area of backlog reduction. Still, the accomplishments of some agencies in this area are noteworthy and serve as illustrations of the positive outcomes that grew out of the Executive Order.

Agencies Focused on Backlog Reduction. In accordance with the Executive Order, virtually all agencies addressed the issue of backlog reduction in crafting their FOIA Improvement Plans. For Fiscal Year 2007, many agencies reported significant accomplishments in meeting their milestones and goals connected with backlog reduction.

For example, the Department of Commerce reported that its applicable Bureaus exceeded the backlog reduction goal of 30%, achieving 50% to 100% reduction in their backlog. Similarly, the Department of Energy exceeded by 10% its goal to reduce by 50% the number of requests pending more than one year. Likewise, the Departments of Education, Labor, Transportation, Agriculture, and Interior, as well as the VA, HHS, DHS, CIA, EPA, NSF, and SSA all reported improvements in the area of backlog reduction.

Within the Department of Justice, the Office of Information and Privacy continued to reduce its backlogs of both pending initial requests and pending appeals. For initial requests, the Office of Information and Privacy exceeded its 20% reduction goal and reduced the backlog of initial requests by more than 30%, including closing its ten oldest requests. The Office of Information and Privacy also greatly exceeded its parallel backlog reduction goal for administrative appeals, far surpassing its 30% reduction goal and achieving a 41% reduction in the number of pending administrative appeals, including the ten oldest. In so doing, OIP significantly increased the number of administrative appeals processed during the course of the fiscal year, up from 1,970 to 4,255.

DOJ – Processing More Appeals to Exceed Goal



Similarly, another Department of Justice component, the United States Marshals Service reduced its backlog of pending requests by 68%, and reduced its median processing times for both simple and complex requests by 50% and 49% respectively.

Many Agencies Have Taken Foundational Steps for Future Backlog Reduction Activities. As reported last year, several agencies identified a series of steps to be taken to reduce their backlogs, including foundational steps that were necessary to bring about reductions in the backlog, and those agencies were successful in accomplishing those steps. For example, DOD had three objectives in its overall backlog reduction goal: to determine the level of staffing necessary to reduce backlogs, to fund additional FOIA personnel, and to concentrate on a series of initiatives to reduce its FOIA backlog by 10% annually beginning in Fiscal Year 2008. DOD met its milestones in these areas and so is well on its way to achieving backlog reduction. Other agencies likewise completed their initial steps toward backlog reduction, including NSF, which identified the cause of delays in responding to requests and took steps in hiring personnel to address that problem. Similarly, NASA undertook additional hiring steps in order to better address its backlog.

Agencies Focused on Their Oldest Requests. One aspect of FOIA backlogs that frequently receives a great deal of attention is the age of the oldest requests pending at an agency. Although the age of the oldest request may be aberrational, the existence of any request that has been pending for years, sometimes decades, is so at odds with the concept of a timely response under the FOIA that it undermines the public's confidence in the agencies' administration of the Act. Many agencies included in their FOIA Improvement Plans a goal to close their ten oldest pending requests each fiscal year. To further encourage agencies to address their oldest requests, in 2007, the Department of Justice required agencies to list the dates of their ten oldest requests in their Annual FOIA Report. That requirement has now been codified by the OPEN Government Act. This increased transparency regarding the oldest pending requests at each agency will undoubtedly serve as an incentive to all agencies to work to close those ten oldest requests each year.

Agencies Still Face Challenges in Eliminating Backlogs. Although these examples of successes in the area of backlog reduction are encouraging, as mentioned above, there remain real challenges for agencies struggling to reduce or eliminate backlogs. Indeed, these challenges should not be underestimated. The numbers of requests agencies receive are not under their control. The complexities of the requests, the number of offices that must be searched, the number of consultations that must be made, and the levels of review that must be undertaken prior to responding to the request are all beyond the control of the agency. Yet all of these factors determine how long it can take an agency to respond to a request.

2. Proactive Disclosures: Agencies Anticipating the Needs of Requesters and Increasing the Amount of Government Documents Posted On-line.

Agencies Continued to Show Improvement in Proactive Disclosures. In an effort to reduce the need to file requests, and consistent with the Executive Order's focus on the issue, the area of improving proactive disclosures of information, i.e., making information available to the public on the agency's own initiative, continued to see significant improvement.

For example, the Department of Education increased the number of documents available in its Electronic Reading Room and made a series of other improvements in the area of proactive disclosure, including establishing a guideline for identifying documents to be posted to the Web prior to receipt of a FOIA request. Similarly, a component of the Department of Justice, the Office of Community Oriented Policing Services (COPS) reported accomplishing a series of steps designed to improve the availability of information on its Website. As reported by COPS: "Through the implementation of this area of improvement the COPS [FOIA] Office was able to continue to significantly increase the types and total amount of documents available through the FOIA electronic reading room."

Likewise, the Departments of Agriculture, and Labor, and the CIA, all reported success in the area of proactive disclosure.

3. FOIA Websites: Agencies Using the Internet to Inform the Public.

Agencies Recognize the Importance of Updating their Websites. Agencies have now widely recognized the importance of both refining and maintaining their sites on the Web that they use for purposes of FOIA administration.

For example, the Department of Defense reported that it had conducted an audit of all its components' Websites to ensure that all components followed a standardized approach to increase reader accessibility. The Department of Labor likewise redesigned the format of its Web page to enhance its readability and navigation capacities. The CIA reports that its Website is now more user-friendly and that it posts new documents to the Web each month. Within the Department of Justice, the Civil Rights Division reported making significant enhancements to its Electronic Reading Room, as did the Office of Federal Detention Trustee.

Similarly, the Departments of Education, and Agriculture, and the EPA, and the SBA all reported successes in the area of Website improvement.

4. Use of Technology/Automation: Agencies Enhancing FOIA Response Times Using Existing Information Technology.

Agencies Have Embraced IT to Improve FOIA Operations. As has been highlighted in both previous reports, agencies have widely embraced the subject area of technology and automation as a vital means of improving their FOIA operations. This has consistently been viewed as the improvement area that holds the most promise for agencies in improving both the speed and the quality of their responses to FOIA requests.

For example, the Department of Transportation has established a system to allow FOIA requesters to make electronic payment of their FOIA fees and reported making progress in adding additional components to that system. In the Department of Justice, the Office of Information and Privacy made extensive progress toward its goal of securing a comprehensive electronic processing and tracking software package by completing a feasibility study and a market assessment. In a related IT initiative, it also completed all the requirements necessary to install hardware and software for scanning documents and saving them directly into the computer network.

Similarly, other agencies, such as the Department of the Treasury, as well as the CIA and NRC reported progress and successes in the area of technology.

5. FOIA Request Status Tracking: Enhancing Agencies' Accountability to be Responsive to Requesters.

Agencies Have Met Milestones in Tracking the Status of Requests. One of the key features of the Executive Order is its emphasis on the importance of all agencies having the ability to effectively track the status of FOIA requests, both for increasing efficiency within the agency and in order to be better able to promptly respond to inquiries made by FOIA requesters about the status of their requests. As reported last year, many of the key agencies met milestones in this area.

For example, GSA reported that “[i]mplementing the new tracking system throughout GSA has been [the] most successful accomplishment” of its Plan. It explained that “[t]his system allows us to monitor all FOIA requests nationwide and provides us with outstanding internal control over the data being reported.” GSA explained that an “increase in staff in [its] Central Office, also an improvement area, allows GSA to perform daily spot checks on all the data entered into the tracking system to ensure accuracy and reliability.”

Within the Department of Justice, the Justice Management Division (JMD) reported that although it had completed its automated FOIA tracking system in 2006, it had continued to work on improving it in 2007. JMD reported that the “system has several features, including: a

complete tracking function that includes all the requirements to produce an annual report; an ability to track by both calendar and work days; a search function that quickly answers questions regarding FOIA requests that are both active and closed; a reporting system that can access individual FOIA reports or annual FOIA reports for all FOIA requests in the system and for multiple fiscal years; and an ability to identify where any specific FOIA request is in the FOIA process.”

Other agencies reporting improvements in the area of request tracking are the Departments of Labor, Treasury, and Agriculture, as well as the CIA, and SBA.

6. Customer Service: Improving Service to the Public.

Agencies Have Reported Strong Progress in Improving Customer Service. In accordance with the Executive Order's directive that FOIA requesters be treated courteously and recognized as customers of a service being provided by the government, agencies reported strong progress in this improvement area.

For example, NASA reported making “tremendous strides” in the area of customer service, addressing those areas that were seen as potential problems and maintaining a focus on them. NASA reported that this has included conducting “Customer Service Awareness” training during its Annual FOIA Conference, ensuring that its process remains decentralized, and focusing on “improving [its] customer relations at each center location.” The Department of Interior established a toll-free telephone number to facilitate the public’s communication with the agency regarding their FOIA requests. In the Department of Justice, the Executive Office for United States Trustees (EOUST) reported: "In the area of customer service, the new FOIA staff has created and implemented a system for tracking and summarizing all communications between each requester and EOUST so that a chronology of this information is readily available at any work station for all FOIA requests."

Similarly, the Department of State, as well as the VA, CIA and EPA all reported successes in the area of customer service.

III. Challenges Faced by Agencies in Meeting Certain Plan Milestones and Goals

The Executive Order required that agency annual FOIA reports for Fiscal Years 2006 and 2007 specifically identify and explain the reasons for any failure to meet a milestone or goal in the agency's FOIA Improvement Plan. These "deficiencies" were also required to be reported to the PMC. For this second and final reporting period, forty-six agencies met all of their milestones and goals established in their FOIA Improvement Plans and had no deficiencies. Eleven of the twenty-five key agencies completed all of their milestones and goals due this reporting period, even if their completion was after the target date for one or more of their milestones or goals.

A. Agency Deficiencies

Forty-three agencies reported deficiencies of some kind. Six of these agencies remedied all of those deficiencies during this reporting period. Twelve agencies remedied at least some of their deficiencies. As mentioned above, it is important to remember that agencies which had deficiencies still had other areas where they reported success. All agencies made some progress under the Executive Order. Thus, deficiencies must be viewed in that context.

Still, as part of the requirements imposed by the Executive Order, for any failure to meet a plan milestone or goal, the agency was required to explain why it had not met the milestone or goal, and it was also required to outline the steps it has taken or will be taking to address the deficiency. For some agencies, the deficiency was corrected during the reporting period and so has now been cured. For the twenty-five agencies whose progress is depicted on the attached charts, the deficiencies from this reporting period that have been cured are represented by the color light green. Other agencies have made some progress in addressing their deficiencies and they are indicated on the chart by the color yellow. For any agency that had a deficiency that was not at least partially corrected, the color assigned is red. For the twenty-five key agencies, none reported a deficiency for which no remedial action had been taken as of the end of the reporting period.

The explanations for the deficiencies generally fall into several categories. As with last year's reporting, five of the same categories continue to apply this year. They are: resource limitations, competing priorities, IT difficulties, milestone reassessment, and complexity problems. A sixth category, delays caused by impending passage of the OPEN Government Act, which amended the FOIA, was cited by several agencies this past year as the cause of a deficiency. Each of these six categories is discussed below.

Staffing and Other Unanticipated Limitations

As with last year's reporting, this was the most commonly cited reason for failure to meet a milestone or goal. These limitations arose in three related areas, staffing issues, funding problems, and facility-related factors. There was a slight increase from last year in the number of agencies that reported funding difficulties as a reason for missing a milestone or goal, rising from two to six agencies. For example, DHS was unable to hire additional FOIA personnel for some of its components, reach backlog reduction milestones on time, and have certain FOIA personnel attend training, due to resource constraints. Also, due to budgetary constraints, NARA was unable to meet its milestone to streamline its process of referring documents to agencies for declassification.

Again this year, two agencies encountered facility-related limitations that affected their ability to carry out milestones and goals. The Department of Transportation was unable to meet several milestones due to complications surrounding the Department's (including the entire FOIA office's) move to a new building. The FBI also encountered difficulties in a couple of

improvement areas that resulted from the move of its facilities from Washington, DC to Winchester, Virginia.

As reported last year, and again this year, difficulties encountered with staffing was a very common reason given for a deficiency. Indeed, thirteen agencies identified this as a reason for a deficiency. For example, a component of the Department of Justice was unable to meet a backlog reduction milestone and make improvements to its Website because of the loss of personnel during this reporting period. Also, the Executive Office of the President's Council on Environmental Quality was unable to meet its milestone of publishing new regulations and developing a new handbook, due to the loss of employees; as a result, the office was understaffed for the majority of this reporting period.

Competing Priorities

Again this year, the second most frequently cited cause for a deficiency was the existence of competing priorities. Fourteen agencies reported this as the cause of at least one deficiency. Competing priorities came from both other FOIA responsibilities and non-FOIA tasks performed by FOIA personnel. For example, the Department of Education reported that it was unable to meet a milestone toward its backlog reduction because devoting more resources would create an "undue negative impact on operational priorities" of the office. Similarly, work load considerations for employees were a concern at the National Transportation Safety Board, and "litigation, administrative, and operational demands" have delayed HHS's implementation of milestones connected with its improvement goal concerning increased public awareness of FOIA. Competing priorities was consistently identified by some agencies as a cause for a deficiency during the past two reporting periods. For instance, the American Battle Monuments Commission reported that as occurred last year, it was unable to load its database of Medal of Honor recipients on its Website due to other work priorities.

IT Difficulties

As also reported last year, several improvements in FOIA processing were delayed due to IT-related problems or because planned technological improvements were more complicated than anticipated. As seen in last year's annual reports, IT-related problems interfered with some agencies' abilities to meet improvement goals related to automated processing, Website development, and tracking capabilities. For example, the Inter-American Foundation hoped to post a revised Website by December 2007. While the revisions were submitted by December 2007, due to complications within the agency's IT department, they were not posted on the Website until February 2008.

Milestone Reassessment

As with last year's reporting, some agencies failed to meet certain milestones because the agency re-evaluated the benefit to be derived from what was originally planned. For example, the Department of Defense determined that its components were already "utilizing existing

information technology security standards," so the establishment of such standards for FOIA software would be redundant. At the Overseas Private Investment Corporation, the agency determined its goal of meeting a thirty-day average response time for voluminous requests was unrealistic in light of the nature of the requested records and the risk of violations of the Trade Secrets Act. At the U.S. Copyright Office, the agency has initiated an improvement effort that is more comprehensive than originally outlined in its FOIA Improvement Plan, so more time is needed for that effort.

Complexity Issues

Again this year, agencies identified both task complexity and coordination complexity as reasons they failed to meet certain milestones. For example, at the Department of Justice, the creation of the new National Security Division (which now includes the former Office of Intelligence Policy Review (OIPR)) resulted in a significant increase in the volume of incoming requests over and above what was received in OIPR in the prior year. As a result, the National Security Division had a backlog of fifteen requests at annual reporting time. Similarly, an unanticipated increase in the number of FOIA requests received at the Committee for Purchase from People Who Are Blind or Severely Disabled added to the complexity of that agency's backlog elimination efforts. As a result, that agency still had four backlogged requests when it filed its annual report. The complexity of coordinating Department of the Interior/Office of Management and Budget review of a proposed on-line FOIA request form has delayed a milestone at Interior.

Impending FOIA Amendments

This year, in light of the impending FOIA Amendments that were ultimately passed at the end of 2007, some agencies delayed milestones related to revising or publishing FOIA regulations or revising internal procedures. These agencies did so in order to make their work in these areas more comprehensive than originally planned by factoring in requirements from the FOIA amendments. Agencies that reported deficiencies connected with awaiting passage of the FOIA amendments include USDA, HHS, American Battle Monuments Commission, Executive Office of the President – U.S. Trade Representative, FCC, SEC, NLRB, and the Copyright Office.

B. Agency Reporting of Deficiencies to the President's Management Council

In Section 3(c) of the Executive Order, the President directed each agency in its annual FOIA report, and in a separate report sent to the PMC, to identify any agency deficiencies in meeting the milestones that the agency had established in its FOIA Improvement Plan. The Order also required the agency to explain "the reasons for the agency's failure to meet the milestone" and to outline "the steps that the agency has already taken, and will be taking, to address the deficiency."

In the recent annual reports, forty-three agencies reported deficiencies in meeting at least one of their milestones for this final reporting period. The agencies also explained the reasons for the deficiencies and outlined their corrective actions.

Remedial Steps Taken. Six of the forty-three agencies already took remedial action and were able to complete all of their deficient milestones within the reporting period. Twelve other agencies were able to complete some of their deficient milestones within the reporting period. Twenty-five agencies identified some measure of remedial action to cure their deficiencies at a later date.

Deficiencies Reported. As provided last year, agencies were required to report these deficiencies to the PMC. And, similar to last year's report, one of the recommendations in Section IV of this report is for each agency with remaining deficiencies to submit to the PMC, by August 1, 2008, an updated status report describing the progress that the agency has made in correcting its deficiencies, including any further corrective action that the agency has taken or will be taking.

IV. Recommendations

The Department of Justice, in coordination with OMB, has worked extensively with agencies to improve individual agency implementation of Executive Order 13,392 in furtherance of the principles behind the Order's policy direction. During the course of the Executive Order's implementation period, a series of recommendations have been made. The Department, in its October 2006 report, recommended holding a follow-up meeting of Chief FOIA Officers; streamlining FOIA correspondence; and increasing the use of advanced technology and automation to improve agency FOIA operations. In its June 2007 report the Department recommended additional reporting requirements for agencies with deficiencies; the setting of backlog reduction goals for Fiscal Years 2008, 2009, and 2010; a follow-up meeting of Chief FOIA Officers; the continuation of the Inter-Agency Working Group on Technology; and specialized training sessions focused on the role of FOIA Public Liaisons and on FOIA Website improvement. All these recommendations were offered to aid in the successful implementation of the Executive Order and were carried out with great success.

At this point, agencies are continuing to successfully implement the remaining stages of their FOIA Improvement Plans and ensure that any deficiencies identified in the earlier reporting periods are addressed and remedied. Moreover, many of the key elements of the Executive Order have been codified by the OPEN Government Act, and that serves as the touchstone for the recommendations being made now. These recommendations look forward beyond the end of the Executive Order's implementation period to ensure its policies continue to improve FOIA practice in the years to come.

1. Updated Status Report by Agencies That Reported Deficiencies. By August 1, 2008, each agency that reported in its Fiscal Year 2007 Annual FOIA Report a deficiency in

meeting one or more milestones in its FOIA Improvement Plan, that was not fully cured by the time of submission of the Annual FOIA Report, shall submit to the PMC an updated status report. This report shall describe the progress the agency has made in correcting the deficiency(ies), including any further corrective action that the agency has taken or will be taking. Additional guidance on this reporting requirement will be forthcoming by the Department of Justice's Office of Information and Privacy.

2. Continued Attention on Backlog Reduction. Agencies have shown substantial improvement in the area of backlog reduction. The emphasis on this critical area of FOIA administration by the Executive Order has had a significant impact. Nevertheless, reduction of FOIA backlogs is not something that is easily or quickly addressed. Much work remains to be done. One point that emerges from the last two years of implementation of the Executive Order is the necessity to continue to focus attention on backlog reduction. Accordingly, the Department of Justice has added a new requirement to agency Annual FOIA Reports that for the first time directs agencies to report the number of backlogged requests and backlogged administrative appeals (i.e., those pending beyond the statutory time limit). In addition, agencies will now be required to report how those figures compare to the numbers of backlogged requests and backlogged appeals from the previous year. To further assist in keeping this important topic at the forefront of FOIA administration, the Department of Justice recommends that any agency which has a backlog of requests and which has not made progress in backlog reduction over the last two years should develop a plan to reduce its backlog. In creating the plan, the agency should consider whether appropriate staffing and agency support is being given to FOIA activities. The plan should be provided to the agency's Chief FOIA Officer by September 8, 2008, for his or her approval. The Chief FOIA Officer of each such agency should, in turn, notify the Department of Justice and OMB once he or she has approved the plan. Such notification should be made no later than October 6, 2008.

3. Reading Room Review. Maintaining and improving FOIA Reading Rooms is an issue that requires continued attention. Again, while the Executive Order has prompted improvements to agency FOIA Reading Rooms, some agencies still need to devote more attention to ensuring that, at a minimum, their Reading Rooms contain all the material that is required by the FOIA to be included there. In last year's report, the Department recommended a specialized training session on the topic of Reading Rooms. Such a training session was conducted and it was well received. Since that time, the Department has added the topic of Reading Rooms to many of its training programs in order to ensure that government personnel are fully informed of the requirements for posting documents. The Department is also reaching out to those agencies that it has identified as having Reading Rooms in need of improvement. To build on this initiative of the Department, and in furtherance of the Executive Order's goals, the Department recommends that agency Chief FOIA Officers certify to both the Department and OMB, by no later than October 31, 2008, that an internal review of their agency FOIA Reading Rooms has been conducted, that any deficiencies in the content of the Reading Room have been addressed, and that the agency's Reading Rooms comply with the FOIA. Additional guidance on this reporting requirement will be forthcoming by the Department of Justice's Office of Information and Privacy.

V. Conclusion

In sum, the agencies of the Executive Branch have worked hard to implement Executive Order 13,392 in a vigorous manner. Overall, they have made steady and meaningful progress in meeting the milestones and goals they set. All agencies have made progress under their FOIA Improvement Plans and many have truly excelled. Agencies have reported meaningful improvement in the areas of backlog reduction, affirmative and proactive disclosure, and requester services. Additionally, agencies have improved their Websites and have embraced the subject area of technology and automation to improve FOIA administration.

All agencies face challenges in achieving improvements in FOIA administration. The Executive Order was designed to work over a two-year period, but many agencies face challenges that could not be remedied in that short amount of time. The Department of Justice, through its Office of Information and Privacy, will continue to advise and train agency personnel on all aspects of FOIA compliance. In the end, though, each agency must individually continue to devote sufficient attention, resources, and energy to this area. The recommendations contained in this report are designed to hold agencies more accountable and to make their actions more transparent.

The administration of the Freedom of Information Act throughout the government has been significantly improved as a result of the Executive Order. Going forward, agencies will need to continue their efforts to further improve the administration of the Act which is such a vital aspect of our democratic government. As the Executive Order states: “The effective functioning of our constitutional democracy depends upon the participation in public life of a citizenry that is well informed.” FOIA is “an important means through which the public can obtain information regarding the activities of Federal agencies.” The Department of Justice looks forward to providing continued leadership and guidance in these efforts.

Attachment A

Background

The October 16, 2006 Attorney General report describes in detail the history of the FOIA and the development of Executive Order 13,392. See Attorney General's Report to the President on Executive Order 13,392, available at http://www.usdoj.gov/oip/04_7.html. It also describes the many steps taken by the Department of Justice and OMB to assist agencies in implementing this important Presidential initiative. See id. Notably, since the issuance of the Executive Order, agencies have established FOIA Requester Service Centers and designated FOIA Public Liaisons. They have also conducted comprehensive reviews of their FOIA operations and developed FOIA Improvement Plans which set out specific goals in a wide range of improvement areas with concrete milestones and benchmarks to be achieved. Those plans took effect June 14, 2006.

The Department of Justice and OMB have now held three conferences for agency Chief FOIA Officers and have also conducted two special training conferences for FOIA Public Liaisons. The Department of Justice has worked with agencies, both in formal training sessions and on a one-on-one basis, providing guidance on proper Executive Order implementation. Importantly, the Department also provided extensive written guidance to all agencies concerning a wide range of issues connected with the Executive Order's implementation, including instructions for the content of the new Section XII of their Annual FOIA Reports.

As the lead Executive Order implementation agency, the Department of Justice for the past two years has completed its own 2006 and 2007 Annual FOIA Report two weeks in advance of the February 1 deadline and posted it on the Department's FOIA Website to serve as a model for all other agencies. Agencies then submitted their Annual FOIA Reports to the Office of Information and Privacy at the Department of Justice, which worked with each agency to ensure that their reports met the technical requirements of the FOIA and the Executive Order. Once this process was completed, the reports were then posted on the Department's FOIA Website for public review. To date, all agencies have submitted their Annual FOIA Reports to the Department for review.

Attachment B: Progress Charts of Key Agencies

[Note: The charts are currently being coded so that they are in compliance with accessibility standards and will be posted as soon as possible.]