

**ANNUAL REPORT
OF THE
U.S. OFFICE OF SPECIAL COUNSEL (OSC)
ON
FREEDOM OF INFORMATION ACT (FOIA) ACTIVITIES
FOR FISCAL YEAR 1998**

I. BASIC INFORMATION REGARDING THIS REPORT

- A. OSC contact person for questions about this report: Frederick N. Ottie, Attorney, U.S. Office of Special Counsel, 1730 M Street, N.W., Suite 300, Washington, D.C. 20036-4505, telephone (202) 653-8971.
- B. Electronic address for report on World Wide Web: <http://www.osc.gov>.
- C. Requesting a paper copy of this report: download from OSC website (see I.B. above) or request it from OSC contact person (see I.A. above).

II. HOW TO MAKE A FOIA REQUEST

- A. Names, addresses, and telephone numbers of all individual agency components and offices that receive FOIA requests: Frederick N. Ottie, Attorney, U.S. Office of Special Counsel, 1730 M Street, N.W., Suite 300, Washington, D.C. 20036-4505, or by fax to (202) 653-5161.
- B. Brief description of agency's response-time ranges: median processing time is 167 days.
- C. Brief description of why some requests are not granted:

OSC is an investigative and prosecutorial agency. Most requests concern records maintained in OSC's case files, involving allegations of prohibited personnel practices against federal agencies and employees (including retaliation for whistleblowing); whistleblower allegations of fraud, waste, or abuse; and allegations of prohibited political activity (*i.e.*, Hatch Act violations) against federal, state, or local government employees. These records, consisting of investigatory material compiled for law enforcement purposes by or under the supervision of attorneys, are maintained in a system of records subject to the Privacy Act. OSC has exempted its system of records from the Privacy Act's access provisions in accordance with section 552a(k) of that law. For that reason, most requests for these records are exempt from disclosure to first-parties (complainants or subjects) under the Privacy Act, but small portions may be disclosable to them under the FOIA. Requests for these records by third parties (individuals other than complainants or subjects) are typically denied because the records were compiled for a law enforcement purpose, and because

disclosure could reasonably be expected to result in an unwarranted invasion of the personal privacy of the individuals identified in the records under 5 U.S.C. § 552(b)(7)(C). Additionally, all parties are denied access under 5 U.S.C. § 552(b)(5), as appropriate, for records that are either subject to the attorney work product privilege or subject to the deliberative process privilege because they contain evidence of OSC's predecisional, deliberative process.

III. DEFINITION OF TERMS AND ACRONYMS USED IN THIS REPORT

A. Agency-specific acronyms and other terms:

1. OSC - U.S. Office of Special Counsel
2. FOIA - Freedom of Information Act (5 U.S.C. § 552)
3. PA - Privacy Act (5 U.S.C. § 552a)
4. FY - Fiscal Year (October 1 through September 30)

B. Basic Terms:

1. FOIA/PA Request - Freedom of Information Act/Privacy Act request. A FOIA request is generally a request for disclosure of records concerning a third party, an organization, or a particular topic of interest. A Privacy Act request is a request for records covered by that Act concerning oneself; such requests are also treated as FOIA requests. (All requests for records, regardless of which law is cited by the requester, are included in this report.)
2. Initial Request - A request to OSC for records under the Freedom of Information Act.
3. Appeal - A request to OSC asking that for review at a higher administrative level of a full denial or partial denial of a FOIA request, or any other FOIA determination, such as a decision pertaining to fees.
4. Processed Request or Appeal - A request or appeal for which OSC has taken a final action on the request or appeal in all respects.
5. Multi-track Processing - A system in which simple requests requiring relatively minimal review are placed in one processing track and more voluminous and complex requests are placed in one or more other tracks. Requests in each track are processed on a first-in/first-out basis. OSC does not have multi-track processing. A requester who has an urgent need for records may request expedited processing (see III.B.6 below).

6. Expedited Processing - OSC will process a FOIA request on an expedited basis when a requester has shown an exceptional need or urgency for the records which warrants giving his or her request priority over other records that were made earlier.
7. Simple Request - A FOIA request that a federal agency using multi-track processing places in its fastest (non-expedited) track based on the volume and/or simplicity of records requested. As noted, OSC does not have multi-track processing.
8. Complex Request - A FOIA request that a federal agency using multi-track processing places in a slower track based on the volume and/or complexity of records requested. As noted, OSC does not have multi-track processing.
9. Grant - An OSC decision to disclose all records in full in response to a FOIA request.
10. Partial Grant - An OSC decision to disclose a record in part in response to a FOIA request, deleting information determined to be exempt under one or more of the FOIA's exemptions; or a decision to disclose some records in their entirety, but to withhold others in whole or in part.
11. Denial - An OSC decision not to release any part of a record or records in response to a FOIA request because all the information in the requested records by OSC to be exempt under one or more of the FOIA's exemptions, or for some procedural reason (such as because no record is located in response to a FOIA request).
12. Time Limits - The time period in the FOIA for an agency to respond to a FOIA request (ordinarily 20 working days from proper receipt of a "perfected" FOIA request).
13. Perfected Request - A FOIA request for records which adequately describes the records sought, which has been received by OSC's FOIA office, and for which there is no remaining question about the payment of applicable fees.
14. Exemption 3 Statute - A separate federal statute prohibiting the disclosure of a certain type of information and authorizing its withholding under FOIA subsection (b)(3).
15. Median Number - The middle, not average number. For example, of 3, 7, and 14, the median number is 7.
16. Average Number - The number obtained by dividing the sum of a group of numbers by the quantity of numbers in the group. For example, of 3, 7, and 14, the average number is 8.

17. Working Days - Days excepting Saturdays, Sundays, and legal public holidays.

IV. EXEMPTION 3 STATUTES RELIED ON BY OSC DURING FISCAL YEAR 1998: None

V. INITIAL FOIA/PA ACCESS REQUESTS

A. Numbers of Initial Requests

1. Numbers of requests pending as of the end of the preceding fiscal year: 62
2. Numbers of requests received during current fiscal year: 124
3. Number of requests processed during current fiscal year: 107
4. Number of requests pending as of the end of current fiscal year: 79

B. Disposition of Initial Requests

1. Number of total grants: 45
2. Number of partial grants: 22
3. Number of denials: 28
 - a. Number of times each FOIA exemption used (counting each exemption once per request):
 - (1) Exemption 1: 0
 - (2) Exemption 2: 32
 - (3) Exemption 3: 0
 - (4) Exemption 4: 0
 - (5) Exemption 5: 44
 - (6) Exemption 6: 3
 - (7) Exemption 7(A): 3
 - (8) Exemption 7(B): 0
 - (9) Exemption 7(C): 43

(10) Exemption 7(D): 0

(11) Exemption 7(E): 0

(12) Exemption 7(F): 0

(13) Exemption 8: 0

(14) Exemption 9: 0

4. Other reasons for nondisclosure in whole or in part (total): 12

a. No records: 7

b. Referrals: 1

c. Request withdrawn: 4

d. Fee-related reason: 0

e. Records not reasonably described: 0

f. Not a proper FOIA request for some other reason: 0

g. Not an agency record: 0

h. Duplicate request: 0

i. Other (specify): 0

VI. APPEALS OF INITIAL DENIALS OF FOIA/PA REQUESTS

A. Number of appeals

1. Number of appeals pending at the end of preceding fiscal year: 9

2. Number of appeals received during current fiscal year: 6

3. Number of appeals processed during current fiscal year: 4

4. Number of appeals pending at end of current fiscal year: 11

B. Disposition of Appeals

1. Number completely upheld: 2

2. Number partially reversed: 2
3. Number completely reversed: 0
 - a. Number of times each FOIA exemption used (counting each exemption once per appeal):
 - (1) Exemption 1: 0
 - (2) Exemption 2: 0
 - (3) Exemption 3: 0
 - (4) Exemption 4: 0
 - (5) Exemption 5: 2
 - (6) Exemption 6: 0
 - (7) Exemption 7(A): 0
 - (8) Exemption 7(B): 0
 - (9) Exemption 7(C): 3
 - (10) Exemption 7(D): 0
 - (11) Exemption 7(E): 0
 - (12) Exemption 7(F): 0
 - (13) Exemption 8: 0
 - (14) Exemption 9: 0
4. Other reasons for nondisclosure in whole or in part (total):
 - a. No records: 0
 - b. Referrals: 0
 - c. Request withdrawn: 0
 - d. Fee-related reason: 0

- e. Records not reasonably described: 0
- f. Not a proper FOIA request for some other reason: 0
- g. Not an agency record: 0
- h. Duplicate request: 0
- i. Other (specify): 0

VII. COMPLIANCE WITH TIME LIMITS/STATUS OF PENDING REQUESTS

A. Median processing time for requests processed during FY 98

- 1. Total for all requests (note: OSC does not have multi-track processing):
 - a. Number of requests processed: 107
 - b. Median number of days to process: 159
- 2. Requests accorded expedited processing: 0
 - a. Number of requests processed: 0
 - b. Median number of days to process: 0

B. Status of pending requests as of the end of FY 98

- 1. Number of requests pending as of the end of FY 98: 79
- 2. Median number of days such requests were pending as of end of FY 98: 167

VIII. Comparison with Previous Year(s) (Optional)

The U.S. Department of Justice Guidelines on annual FOIA reporting instruct agencies that this section is optional. It is noted that the 1997 reporting period covered only nine months, in accordance with the Electronic Freedom of Information Act Amendments of 1996, while this report covers a full fiscal year and includes expanded reporting requirements. For that reason, meaningful comparison data is not available. It is anticipated that comparison data will be included in OSC's report for FY 1999.

IX. COSTS/FOIA STAFFING

A. Staffing levels

1. Number of full-time FOIA personnel: 0
 2. Number of personnel with part-time or occasional FOIA duties (in total work-years): 1.38
 3. Total number of personnel (in work-years): 1.38
- B. Total costs (including staff and all resources)
1. FOIA processing (including requests and appeals): \$92,986.52
 2. Litigation-related activities: 0
 3. Total costs: \$92,986.52

X. FEES

- A. Total amount of fees collected by OSC for processing requests: 0
- B. Percentage of total costs: 0

XI. REGULATIONS (INCLUDING FEE SCHEDULE)

OSC's FOIA regulation, including a fee schedule, is codified at 5 C.F.R. Part 1820. (A copy is attached.) However, OSC is currently revising its FOIA regulation to incorporate changes required by the Electronic FOIA Amendments of 1996 and to make other updating amendments.

**TITLE V-CODE OF FEDERAL REGULATIONS
PART 1820-PUBLIC INFORMATION**

Attachment

Authority: 5 U.S.C. 552(a)(3), 552(a)(4), 1212(g), 1219.

Source: 54 FR 47342, Nov. 14, 1989, unless otherwise noted.

§ 1820.1 Public list.

(a) Pursuant to 5 U.S.C. 1219, the Special Counsel maintains and makes available to the public a list of:

(1) Noncriminal matters referred to heads of agencies under 5 U.S.C. 1213 (c) and (g)(1), and reports received as a result of such referrals;

(2) Matters referred by the Special Counsel to heads of agencies under 5 U.S.C. 1215(c)(2); and

(3) Matters referred to heads of agencies under 5 U.S.C. 1214(e), together with certifications from the heads of agencies under such subsection.

(b) The list is available to the public between 8:30 a.m. and 5 p.m. weekdays (except legal holidays) in the Office of Special Counsel, 1730 M Street NW., Suite 300, Washington, DC 20036-4505.

[55 FR 47342, Nov. 14, 1989, as amended at 55 FR 47839, Nov. 16, 1990; 59 FR 64843, Dec. 16, 1994]]

§ 1820.2 Procedures for obtaining records under the Freedom of Information Act.

Requests for records shall be made in writing. Requests should be addressed to the Office of Special Counsel, 1730 M Street NW., Suite 300, Washington, DC 20036-4505. Requests must be clearly and prominently marked "Freedom of Information Act Request" on both the envelope and the letter.

[54 FR 47342, Nov. 14, 1989, as amended at 59 FR 64843, Dec. 16, 1994]

§ 1820.3 Categories of requesters under the Freedom of Information Act.

There are four categories of requesters:

(a) Commercial use requesters. These requesters seek information for themselves or on behalf of someone else for a use or purpose

that furthers commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. A requester will not be presumed to be a “commercial use requester” merely by submitting a request on corporate letterhead without further explanation of the use to which he plans to put the requested information. Similarly, a request submitted on the letterhead of a nonprofit organization without further explanation will not be presumed to be for a noncommercial purpose. The Office of Special Counsel will seek clarification from the requester where there is a reasonable doubt as to the intended use of the information.

(b) Educational and noncommercial scientific institution requesters.

(1) An “educational institution” requester is associated with a preschool, a public or private elementary or secondary school, an institution of undergraduate or graduate higher education, or an institution of vocational or professional education, that operates a program or programs of scholarly research, and seeks the information for a scholarly or scientific research goal of the institution, rather than for an individual goal.

(2) A “noncommercial scientific institution” requester is associated with an institution that is not operated on a “commercial” basis (as that term is defined by paragraph (a) of this section), and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(c) News media requesters. These requesters actively gather news for entities that are organized and operated to publish or broadcast news to the public. Freelance journalists may be news media requesters if they can demonstrate a solid basis for expecting publication through a news organization (such as by producing a publication contract or citing their past publication records), even though not actually employed by it. “News” means information about current events or information that would be of current interest to the public. News media “entities” include, but are not limited to, television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of “news”) who make their products available for purchase or subscription by the general public.

(d) All other requesters.

§ 1820.4 Free or partially free search time and partially free copying.

(a) Free search time and partially free copying. Educational and noncommercial scientific institution requesters and news media requesters who are requesting records for noncommercial

use are entitled to free copying for the first 100 pages and free search time.

(b) Partially free search time and partially free copying.

Requesters who are not commercial use requesters, educational or noncommercial scientific institution requesters, or news media requesters are “all other requesters”, and are entitled to two hours of free search time and free copying for the first 100 pages. Requests from record subjects for records about themselves filed in a system of records will continue to be treated under the fee provisions of the Privacy Act, which permits the assessment of fees only for copying.

§ 1820.5 Waiver or reduction of fees.

(a) The Associate Special Counsel for Investigation, the Deputy Associate Special Counsel for Prosecution, the Associate Special Counsel for Prosecution, the Deputy Special Counsel, and the Special Counsel may authorize waiver or reduction of fees that could otherwise be assessed if disclosure of the information requested:

(1) Is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government, and

(2) Is not primarily in the commercial interest of the requester.

(b) Satisfaction of paragraph (a)(1) of this section will be determined by all of the following:

(1) Whether the subject of the requested records concerns “the operations or activities of the Government.” The requested records concern identifiable operations or activities of the Government, and the connection between the records and the operations or activities is direct and clear, not remote or attenuated;

(2) Whether disclosure is “likely to contribute” to an understanding of Government operations or activities. An analysis of the substantive content of the releasable portions of the requested records reveals meaningfully informative information on the operations or activities of the Government that is not already in the public domain in duplicative or substantially identical form;

(3) Whether disclosure will contribute to “public understanding.” Considering the identity of the requester and his qualifications to make use of the information, disclosure will contribute to the understanding of the public at large, and not to the individual understanding of the requester or a narrow segment of interested persons; and

(4) Whether the disclosure is likely to contribute “significantly” to public understanding of Government operations or activities. By an objective standard, the disclosure is likely to enhance

the general public's understanding of the subject matter in question more than minimally.

(c) Satisfaction of paragraph (a)(2) of this section will be determined by both of the following:

(1) Whether the requester has a commercial interest to be furthered by the disclosure. The requester does not seek to further a commercial, trade, or profit interest, as those terms are commonly understood; and

(2) Whether the magnitude of the identified commercial interest of the requester is sufficiently large, compared to the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester." If the requester has a commercial interest, that interest is not greater than the public interest to be served by disclosure of the requested records.

§ 1820.6 Fees to be charged.

(a) Requests for records are subject to the following fees:

(1) Commercial use requesters. For search, review, and copying: Photocopies per page, \$0.25. Manual record search, \$2.50 per quarter hour if conducted by a clerical employee; \$5.00 per quarter hour if conducted by a professional or managerial employee. Search fees may be assessed even if the records in question are not located or if the records located are determined to be exempt from disclosure.

(2) Educational and noncommercial scientific institution requesters, news media requesters. For copying only: Photocopies per page, \$0.25, excluding the first 100 pages.

(3) All other requesters. For search and copying only: Photocopies per page (excluding the first 100 pages), \$0.25. Manual record search (excluding the first two hours), \$2.50 per quarter hour if conducted by a clerical employee; \$5.00 per quarter hour if conducted by a professional or managerial employee.

(b) Method of search. (1) Any "search", which includes all time spent looking for material that is responsive to a request, will be done in the most efficient and least expensive manner in order to minimize costs for both the agency and the requester.

(2) For researches made by computer, costs will be assessed when the hourly cost of operating the central processing unit and the operator's hourly salary plus 16 percent equals the equivalent dollar amount of two hours of salary of the person performing the search.

(c) Review charges. Only commercial use requesters will be charged for time spent reviewing records to determine whether they are exempt from mandatory disclosure. These charges will

be assessed only for initial review (i.e., the review undertaken when first analyzing the applicability of a specific exemption to a particular record or portion of record), and not for review at the administrative appeal level of an exemption already applied. However, charges will be assessed for a second review of records or portions of records withheld in full under an exemption which is subsequently determined not to apply in order to determine the applicability of other exemptions not previously considered. Review charges shall not include costs incurred in resolving issues of law or policy that may be raised in the course of processing a request.

(d) Copying. A “page” of copying refers to a paper copy of standard size, normally 8 ½”x11” or 11”x14”. However, copies may also take the form of microform, audio-visual materials, or machine readable documentation (e.g., magnetic tape or disk), among others.

(e) Nonassessment of fees. No fees will be assessed to any requester, including commercial use requesters, if the cost of routine collection and processing of the fee would be equal to or greater than the fee itself. To make this determination, the OSC will consider the administrative costs of receiving and recording a requester's remittance and processing the fee for deposit.

(f) Other charges. Complying with requests for special services, such as certification of records as true copies and sending records by special methods (e.g., express mail) is entirely at the discretion of the Office. Since neither the Freedom of Information Act nor its fee structure covers these kinds of services, the OSC will assess fees to recover the full costs of providing these services should the Office elect to provide them.

(g) Aggregating requests. If the Office of Special Counsel reasonably believes that a requester or a group of requesters acting in concert is filing a series of requests for the purpose of evading the assessment of fees, the OSC may aggregate the requests and assess fees accordingly. One element to be considered in determining reasonable belief is the time period within which the requests are filed. Multiple requests of this type filed within a 30-day period may be presumed to have been made to avoid fees. In no case will the Office aggregate requests on unrelated subjects from one requester.

(h) Advance notice of fees. If it is likely that fees will exceed \$25, the requester will first be notified of the estimated amount, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. The notice will offer the requester the opportunity to confer with personnel of the

Office of the Special Counsel with the object of reformulating the request to meet his or her needs at a lower cost.

§ 1820.7 Payments and collections.

(a) Payments. Payment of fees shall be made by check or money order payable to the United States Treasury.

(b) Advance payments. A requester is not required to make an advance payment unless:

(1) The OSC estimates or determines that the requester may be required to pay fees in excess of \$250, in which case the requester will be notified of the estimated cost. The requester must then furnish satisfactory assurance of full payment if the requester has a history of prompt payment of Freedom of Information Act fees. If the requester has no history of payment, then the requester may be required to furnish an advance payment up to the full estimated cost; or

(2) The requester has previously failed to pay a fee assessed in a timely fashion (i.e. within 30 days of the date of billing), in which case the requester may be required to-

(i) Pay the full amount owed plus any applicable interest as provided in paragraph (d) of this section, or prove payment of the alleged amount in arrears, and

(ii) Make an advance payment of the full amount of the estimated cost before a new or pending request will be processed.

(c) Effect of nonpayment. When the OSC acts under either paragraph (b)(2)(i) or (b)(2)(ii) of this section, the administrative time limits prescribed in 5 U.S.C. 552(a)(6) of the Freedom of Information Act will begin only after the fee payments described above have been received.

(d) Interest charges. Interest may be charged to any requester who fails to pay fees assessed within 30 days of the date of billing. Interest will be assessed on the 31st day following the day on which the bill for fees was sent, and will be calculated at the rate prescribed in 31 U.S.C. 3717. Receipt of fees, even if not processed, will stay the accrual of interest.

(e) Collections. If the OSC deems it appropriate in order to encourage repayment of fees assessed in accordance with these regulations, the OSC will use the procedures authorized by the Debt Collection Act of 1982 (Public Law No. 97-365), including disclosure to consumer reporting agencies and use of collection agencies.

§ 1820.8 Appeals.

Any denial, in whole or in part, of a request for records

of the Office of Special Counsel shall advise the requester of his right to appeal the denial to the Special Counsel or the Special Counsel's designee. The requester shall submit his appeal in writing within 30 days of the denial. The appeal shall be addressed to the Special Counsel at 1730 M Street NW., Suite 300, Washington, DC 20036-4505. When a request is denied on appeal, the requester shall be advised of his right to seek judicial review.

[54 FR 47342, Nov. 14, 1989, as amended at 59 FR 64843, Dec. 16, 1994]