

Evaluation of the Commission's Implementation of E-FOIA

March 20, 2001



AUDIT REPORT

OIG-AR-01-01

March 20, 2001

TO: THE COMMISSION

We hereby submit Audit Report No. OIG-AR-01-01, *Evaluation of the Commission's Implementation of E-FOIA*, for the Commission's implementation of our recommendations.

The Freedom of Information Act (FOIA) was enacted in 1966 to provide the public with greater access to information from the Federal Government. The Electronic Freedom of Information Act Amendments of 1996 (E-FOIA) amended FOIA to provide greater access to Federal Government information through electronic means.

The objective of this audit was to evaluate the Commission's implementation of E-FOIA and to identify any areas for improvement of the Commission's processes consistent with the intent of E-FOIA. To accomplish this objective, we analyzed Commission procedures for processing FOIA requests and developing annual reports and compared them to requirements of the FOIA to determine the adequacy of those procedures. We also determined Commission compliance with FOIA provisions to "currently publish" in the Federal Register basic information on its activities. We also reviewed the contents of the electronic reading room and compared that to information requested in FOIA requests and a listing of USITC Directives and publications. In addition, we identified and reviewed prior audit coverage of the implementation of the FOIA.

We found that the Commission was in general compliance with FOIA as amended by E-FOIA.

We made several recommendations to improve the Commission's E-FOIA program. These recommendations dealt with publication of more details on information available electronically from the Commission, improved processing of FOIA requests, better accounting and reporting of FOIA requests, and establishment of a capability for online filing and acceptance of FOIA requests.

We held an exit conference on January 30, 2001, with representatives from the Offices of the Secretary, Administration, and General Counsel. Comments received at the exit conference have been incorporated in our report, as appropriate. On February 27 and March 2, 2001, respectively, the General Counsel and the Deputy Secretary provided plans to implement the recommendations contained in this report. Those plans were approved by the Chairman and are attached to this report as Appendix B.



Dev Jagadesan
Acting Inspector General

Audit Report No. OIG-AR-01-01

EVALUATION

OF THE

COMMISSION'S E-FOIA

March 20, 2001

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I. BACKGROUND

The U.S. International Trade Commission (Commission) is an independent, quasi-judicial federal agency that provides trade expertise to both the legislative and executive branches of the government. The Commission determines the impact of imports on U.S. industries, and directs action against certain unfair trade practices, such as dumping of foreign products in U.S. markets, excess subsidies of foreign products, and infringement by foreign entities on U.S. intellectual property rights. Commission analysts and economists investigate and publish reports on U.S. industries and the global trends that affect them.

The Freedom of Information Act (the FOIA) 5 U.S.C. 552, was enacted in 1966 (Public Law 89-554) to require agencies of the Federal Government to make agency information available to the public, subject to specified exemptions, for any purpose. The FOIA required federal agencies to make certain information on agency rules, opinions, orders, records, and proceedings, available to the public for public inspection and copying. Subsections (SS) (a) (1) through (a) (3) of the FOIA contain three information disclosure provisions. SS (a) (1) requires disclosure in the Federal Register of basic information regarding the transaction of agency business. SS (a) (2) requires that certain types of records be available for public inspection and copying, commonly referred to as the “reading room” requirement. SS (a) (3) provides that all records not available under SS (a)(1) or (a)(2) or exempt from mandatory disclosure, or excluded from disclosure, are subject to disclosure upon an agency’s receipt of a proper FOIA request from any person. SS (a)(1) and (a)(2) are commonly referred to as the “affirmative disclosure” provisions of the FOIA.

The FOIA was amended by Public Law 104-231, popularly known as the “Electronic Freedom of Information Act Amendments of 1996” (E-FOIA). The amendment required agencies to: (1) Make all SS (a)(2) (reading room) records created on or after November 1, 1996 available electronically by November 1, 1997; (2) Establish a new reading room category of records; (3) Submit reports annually covering the preceding fiscal year; (4) Prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency; (5) Promulgate regulations for expedited processing of requests; and (6) Ensure that regulations provide for notice of determination to provide expedited processing within 10 days. In addition, E-FOIA defined a record to include an electronic format.

The Department of Justice has established the Office of Information and Privacy to advise federal offices on the interpretation and implementation of FOIA. The Office provides counseling services, publishes a quarterly newsletter on FOIA matters, publishes an index of FOIA cases, issues policy memoranda on major FOIA cases, and issues policy memorandums on major FOIA issues.

The General Accounting Office (GAO) in “Freedom of Information Act- Noncompliance With Affirmative Disclosure Provisions” GAO/GGD-86-68, April 1986, reported that 14 of 25 agencies reviewed had not fully complied with FOIA (a)(1) requirements and 15 of

25 had not complied with FOIA (a)(2) provisions. The audit was conducted at the request of the Chairman, House Subcommittee on Government Information, Justice, and Agriculture, Committee on Government Operations. The Commission was not one of the 25 agencies reviewed by GAO.

II. OBJECTIVE

The objective of the audit was to evaluate the Commission's implementation of E-FOIA in compliance with existing and amended laws, regulations, and directives governing the availability to the public of Commission records, and to identify areas for improving Commission processes.

III. METHODOLOGY AND SCOPE

We engaged Leon Snead & Company, P.C. to assist in conducting this audit.

We conducted the audit from October 17, 2000 through January 11, 2001 at the Commission's facility in Washington D.C. We interviewed Commission officials who were responsible for managing and processing FOIA requests and for reporting results of the Commission's FOIA program to the Department of Justice in the annual report. We also discussed FOIA policy issues with officials from the Office of Information and Privacy, Department of Justice.

We analyzed Commission procedures for processing FOIA requests and developing annual reports and compared them to requirements of the FOIA to determine the adequacy of those procedures. We reviewed FOIA request case files received during FY1998 through FY2000 to determine the date the request was received, date of response to requester, status of release of information, exemptions claimed, fees charged, the subject of the request, the general condition of the files and whether or not established procedures were followed.

We determined Commission compliance with FOIA provisions to "currently publish" in the Federal Register basic information on its activities. We also reviewed the contents of the electronic reading room and compared that to information requested in FOIA requests and a listing of USITC Directives and publications. In addition, we identified and reviewed prior audit coverage of the implementation of the FOIA.

We conducted the audit in accordance with *Government Auditing Standards*, 1994 version, as revised, promulgated by the Comptroller General of the United States.

IV. FINDINGS

A. IMPLEMENTATION OF FOIA SUBSECTION (a)(1)

Subsection (a)(1) requires that each agency shall separately state and currently publish in the Federal Register descriptions of its organization, the procedures to be used to obtain information, procedures established to accomplish agency functions, and regulations adopted as authorized by law. The Office of Information and Privacy of the Department of Justice has issued guidance on publication requirements because of uncertainty with the term “currently publish” used in the FOIA.

The guidance contained in “The Automatic Disclosure Provisions of FOIA: Subsections (a)(1) &(a)(2)” states that agencies should publish Subsection (a)(1) information in the Federal Register at least quarterly. Officials from the Office of Information and Privacy told us that agencies with no field offices or major separate departments and processing a limited number of FOIA requests could publish on a semi-annual or annual basis unless the required information changed significantly.

Our review of material published by the Commission in the Federal Register showed that several articles were published addressing FOIA. However, the articles were published on an irregular basis and did not always include the information required by FOIA Subsection (a)(1). Publication of the notices in the Federal Register annually will bring USITC into compliance with FOIA and support the concept of government openness and accountability underlying the FOIA. In addition, the inclusion of procedures for accessing materials available electronically may result in fewer formal written FOIA requests.

Recommendation 1 *We recommend that the Office of the Secretary publish information required by FOIA Subsection (a)(1) in the Federal Register annually. Information on the availability of the web site and its contents should be included.*

B. IMPLEMENTATION OF FOIA SUBSECTION (a)(2)

Subsection (a)(2) requires agencies to make certain materials available for public inspection and copying unless the materials are promptly published and copies offered for sale. The materials to be made available include final opinions and orders made in the adjudication of cases, statements of policy and interpretation adopted by the agency but not published in the Federal Register, and administrative staff manuals and instructions to staff that pertain to the public. This is popularly called the reading room requirement.

The E-FOIA amendment created a fourth category of record by establishing a requirement that those records that were requested and released under Subsection (a)(3) (discussed in the section below), be made available in reading rooms if the records are likely to become subject to subsequent requests. The E-FOIA also requires agencies to make reading room records created after November 1, 1996 available by electronic means.

The Commission's Reading Room Records

Information that E-FOIA requires to be electronically published is contained on the Commission's web site, which serves as an electronic reading room. A review of FOIA requests for fiscal year (FY) 1998 through FY2000 indicates requests for the same information decreased after the information was placed on the web site. For example, during FY1998, 17 requests for names of personnel with IMPAC cards were received. During FY2000, one request was received. As required by E-FOIA, the reference material or guide for requesting records or information is on the web site.

Our review of FOIA requests did not indicate that there was information that should have been included in the reading room that was not included. We did find that formal requests were being made for information that was available on the web site. This suggests that making the public aware of the web site and the information on it would result in fewer FOIA requests. Implementation of the recommendation regarding publication in the Federal Register will help make the public aware of the web site and the information on it.

Similarly, our review of Commission published documents and directives did not reveal any that appeared to be reading room materials that were not included in the reading room. Many of the documents published by the Commission contain confidential business information that cannot be released to the public.

C. IMPLEMENTATION OF OTHER FOIA PROVISIONS

FOIA Subsection (a)(3) requires that, except for information that is made available under subsection (a)(1) and (a)(2), each agency upon receiving a request for records which reasonably describes the record and is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person. Subsection (a)(4) requires each agency to develop regulations specifying the fees applicable to the processing of FOIA requests. Section (b) of the FOIA provides for 9 categories of information that are exempt from disclosure.

The E-FOIA amendment established 20 working days as time in which to respond to a FOIA request and provisions allowing the requester to be notified of unusual circumstances requiring additional time for processing not to exceed 10 working days. In addition, the E-FOIA amendment revised the annual report to cover the preceding fiscal year and specified the information that would be included in the report.

During FY1998 through FY2000, the Commission processed 210 FOIA requests. We reviewed the FOIA request files to determine (1) if the response was made within 20 working days, (2) if the information requested was released, (3) the subject of the request, and (4) if fees charged for search and duplication were consistent with FOIA provisions. Overall, we found the case files to be complete and well maintained. The results of our review of the case files are provided below.

1. Timeliness of Responses

Our analysis of the 210 FOIA case files showed that responses to 4, or approximately 2%, of requests were sent 3-5 days after the 20 working day period, specified by the FOIA, had expired. The files for these cases do not contain information that would explain the delays. However, it was obvious from our review of other files that significant effort is made to understand what is being requested through the use of written correspondence, e-mail, and telephone conversations.

Recommendation 2 *We recommend that the Office of the Secretary notify the requester of circumstances requiring additional time beyond 20 working days and document the reasons in the file.*

2. Release of information

For the 210 FOIA requests received during the review period, information was provided for 122 of them to the extent the information was available, no information was provided for 61 because the subject was outside the scope of Commission activities. The Commission claimed exemptions for 17, and 10 were withdrawn.

Our review of the 210 FOIA case files showed that for 122 of the requests the information requested was provided to the extent that it was available in the Commission. In those cases, the response to the requester included the information available and an explanation of the information not provided. It was clear that some of the information requested was not germane to the Commission. The case files showed that 37 of the requests were for confidential business information (CBI).

For 61 requests no information was provided because the subject matter was outside the scope of Commission activities. For example, in this category were requests on status of visa applications, missing persons, information on trade issues for which no documentation was available, and requests for information on officials that were candidates for public office. Making known the availability of the web site and the information on it may result in fewer of these types of requests. See recommendation 1 above.

On 17 requests, exemptions were claimed to deny release of the information. Part of the information was released for 9 of these cases. Our review of the exemptions used to deny release of the information showed that they were appropriate and complied with provisions of the FOIA. Four requests were denied because the information was for CBI.

Ten requests were withdrawn after written or verbal communications with the requester. Several of these concerned internal investigations.

3. Subject of requests

We assigned each of the 210 FOIA requests received during the period reviewed to one of seven request categories. The subject categories are subjective because of the diverse nature of the requests and lack of sufficient information in all cases needed to determine the intended use of the information. Listed below are the subject categories, a brief description of the subject, and number of requests within the category:

- Commission Documents - 97 or 46 %.
Documents, reports, and studies on international trade issues. During FY1999, 61 requests in this category were received. Over half (37) was for CBI concerning a major investigation of trade in cement.
- Commercial Interest - 40 or 19%.
Related to potential sales to the Commission.
- Media - 26 or 12%.
Requests for information on candidates for political office.
- Other Corporations and Individuals - 19 or 9%.
Information on corporations or individuals not included in other categories.
- FOIA Program - 14 or approximately 7%.
Information on the Commission's FOIA program, FOIA request logs, and related material.
- Personnel - 12 or about 5 %.
Information on the Commission's employees and internal investigations.
- Unknown - 2 or less than 1%.
Subject of the request was not clear.

4. FOIA Request Processing Fees

The FOIA prescribes that fees charged for processing requests conform to the Uniform Freedom of Information Act Fee Schedule and Guidelines developed by the Office of Management and Budget (OMB). USITC rules, as stated in 19 CFR 201.20, fully implement the requirements of FOIA and the OMB guidelines.

The E-FOIA amendment requires that total fees collected be reported in the annual report to the Department of Justice. Our review showed a discrepancy between the amount of fees reported to the Department of Justice, the amount received in the Commission's Office of Finance, and the amount billed to requesters in the case files. For FY1999, the Commission reported to the Department of Justice FOIA fee collections of \$1,521.50, the Office of Finance listed receipts from FOIA fees of \$3,102.32, and the case files showed billings or fee assessments of \$2,504.10. Similarly in FY1998, \$817 in collections was

reported to the Department of Justice, \$1,144 was reported as received by the Office of Finance, and the case files showed billings of \$1,354.30.

The existing procedures require that fees be entered into a FOIA master file as they are assessed or received. The entries in the master file are the basis for developing the annual report to the Department of Justice. Our analysis of Office of Finance fee receipts showed collection of fees that were not reflected in the FOIA master file. The personnel responsible for maintaining the case files stated that the check or related documentation may have been sent directly to the Office of Finance before a copy was made for inclusion in the case files or the master file updated. We were unable to fully reconcile the fees received to the FOIA case files or the master file because of incomplete payee information, single payments for more than one FOIA request, and payments received in a different fiscal year than the fiscal year the request was submitted.

In addition, we were unable to determine with any assurance that fees assessed to requesters are being collected. Our review of the case files for some cases showed that requesters were given estimates of fees that the requester agreed to pay, but no indication in the case files that the fees were received as discussed above. The OMB guidelines provide for and Commission rules state that processing of FOIA requests may be denied if fees were not paid on a prior request.

Procedures are needed to accurately report fees in the annual report. These procedures should include provisions to ensure that FOIA requesters assessed fees, do in fact pay them.

Recommendation 3 *We recommend that the Office of the Secretary and Office of Finance establish procedures for accounting for FOIA fees. Those procedures should include providing the Office of Finance with a copy of the correspondence to the requester assessing the fees to be paid. The procedures should also include a process to periodically follow up on non-payment of fees. In addition, the Office of the Secretary should obtain from the Office of Finance the amount of fees actually collected during the fiscal year for inclusion in its annual report to the Department of Justice.*

D. OTHER RELATED MATTERS

1. Electronic FOIA Requests

The FOIA does not require agencies to have a capability to receive FOIA requests via e-mail through the Internet. The Office of Information and Privacy, Department of Justice, has encouraged agencies to explore their capability to receive FOIA requests electronically through the Internet and their web sites. The Department of Energy has established a web site that incorporates an on-line form for submitting FOIA requests, as

have other agencies. The Commission should establish a capability to receive FOIA requests through their web site.

Recommendation 4 *We recommend that the Office of the Secretary develop a capability for receiving FOIA requests using e-mail and using an online form incorporated into the Commission's web site. Utilization of e-mail and the web site to receive FOIA requests may require that 19 CFR 201 be revised.*

2. Revision of 19 CFR 201.17 through 201.21

The general and permanent rules as published in 19 CFR 201 emphasize the FOIA request procedures provided by FOIA SS (a)(3). The rules should be revised to highlight the affirmative access provisions developed by the Commission in accordance with provisions of FOIA (a)(1) & (a)(2) in the initial paragraphs of the rules. The existing rules do not provide guidance on the information that is available in the electronic reading room. Revising the rules may result in fewer formal FOIA requests for information that is available on the web site or receipt of requests that are not germane to the functions that the Commission performs.

Recommendation 5 *We recommend that the General Counsel propose to amend rules of practice and procedure at 19 CFR 201.17 through 201.21 to emphasize the affirmative access provisions of FOIA SS (a)(1) & (a)(2). The amendment of procedures should include how the public can access the electronic reading room and a description of the information that is available on it.*

V. SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

As summarized in the Appendix, the Commission was in general compliance with E-FOIA requirements during the period reviewed. The only exception noted was a failure to request a time limit extension for responses to a few FOIA requests.

To improve the Commission's E-FOIA program, we make the following recommendations:

1. We recommend that the Office of the Secretary publish information required by FOIA SS (a)(1) in the Federal register annually. Information on the availability of the web site and its contents should be included.
2. We recommend that the Office of the Secretary notify the requester of circumstances requiring additional time beyond 20 working days and document the reasons in the file.

3. We recommend that the Office of the Secretary and Office of Finance establish procedures for accounting for FOIA fees. Those procedures should include providing the Office of Finance with a copy of the correspondence to the requester assessing the fees to be paid. The procedures should also include a process to periodically follow up on non-payment of fees. In addition, the Office of the Secretary should obtain from the Office of Finance the amount of fees actually collected during the Fiscal year for inclusion in its annual report to the Department of Justice.
4. We recommend that the Office of the Secretary develop a capability for receiving FOIA requests using e-mail and an online form incorporated into the Commission's web site. Utilization of e-mail and the web site to receive FOIA requests may require that 19 CFR 201 be revised.
5. We recommend that the General Counsel propose to amend rules of practice and procedure at 19 CFR 201.17 through 201.21 to emphasize the affirmative access provisions of FOIA SS (a)(1) & (a)(2). The amendment of procedures should include how the public can access the electronic reading room and a description of the information that is available on it.

APPENDIX A

E-FOIA Requirements and Commission Compliance

EFOIA Amendment to 5 U.S.C. § 552 Section/Subsection	Required Action	Commission Compliance
§ 552 (a)(2)(D)	Make available copies of all records which have been requested and released and which the agency determines are likely to become the subject of subsequent requests.	<u>In Compliance:</u> Information can be found in the electronic reading room on the Commission's website.
§ 552 (a)(2)(E)	<ol style="list-style-type: none"> 1) Create a general index of the records referred to in (D) and make available by computer, by Dec. 31, 1999. 2) Make all records referred to in this subsection and created on or after November 1, 1996, available by electronic means within one year. 	<ol style="list-style-type: none"> 1) <u>In Compliance:</u> The Index is on the web site and it includes records from (D). 2) <u>In Compliance:</u> The electronic reading room contains the required records.
§ 552 (a)(3)(B)	Provide the record in any form or format the person requests if the form or format is readily reproducible in such a form. Each agency shall use reasonable means to keep records available in such forms.	<u>In Compliance:</u> The ITC received a single request for information in a Word Perfect format, and provided that information on disk.
§ 552(a)(3)(C)	Agency shall make reasonable efforts to search for records in electronic form.	<u>In Compliance:</u> The Commission has provided materials in electronic form.

§ 552 (a)(6)(A)(i)	Determine within 20 days of receiving a request what action on the request will be taken.	<u>Overall Compliance:</u> 4 out of 210 responses were 3-5 days late.
§ 552(a)(6)(B)(i) & (ii)	May extend (A)(i) time limit with notice to the party.	<u>Not in Compliance:</u> Did not ask for additional time in the 4 cases above.
§ 552(a)(6)(E)(i)	Promulgate regulations for providing expedited processing of requests for records in cases of compelling need and other cases as determined by the agency.	<u>In Compliance:</u> No requests have asked for expedited processing. The ITC has created rules and procedures as codified in 19 CFR 201.17(b), to deal with any future requests.
§ 552(a)(6)(E)(ii)	Determination and notice of expedited processing must be made within 10 days. A procedure must be developed for expedited processing.	<u>In Compliance:</u> Procedures found in 19 CFR 201.17(b)
§ 552(e)(1)	Submit a report to the Attorney General on or before February 1 st of each year.	<u>In Compliance:</u> The reports are being submitted.
§ 552(e)(2)	Make each report required by (e)(1) available to the public, including by electronic means.	<u>In Compliance:</u> The annual reports are available on the website in the electronic reading room.
§ 552 (g)	Prepare and make available a guide for requesting materials including an index, a description of major information and a record locator, and a handbook.	<u>In Compliance:</u> The guide has been developed and is on the web site.

PRIVILEGED

RESPONSE REQUESTED
BY NOON, MARCH 2, 2001MEMORANDUM

GC-Y-059

February 27, 2001

TO: THE CHAIRMAN¹

FROM: The General Counsel² *LIB*

SUBJECT: Draft Audit Report OIG-AR-01-01: Evaluation of the Commission's
Implementation of E-FOIA

This is to request your approval of the following response, prepared in accordance with USITC Directive 1701.2 (Aug. 30, 1996), to the subject draft audit report. Of the five recommendations in the draft report, the fifth is addressed to this office. That recommendation reads as follows:

We recommend that the General Counsel propose to amend rules of practice and procedure at 19 C.F.R. 201.17 through 201.21 to emphasize the affirmative access provisions of FOIA SS (a)(1) & (a)(2). The amendment of procedures should include how the public can access the electronic reading room and a description of the information that is available on it.

We agree with the recommendation. When the Electronic Freedom of Information Act Amendments of 1996 (E-FOIA) were enacted, the Commission provided to the public on its World Wide Web site information called for by E-FOIA. Amending the Rules of Practice and Procedure to reference the web site and provide information on its contents would be in keeping with that previous effort to educate the public about the agency.

Of course, this office has no authority to amend the Commission's rules; such amendments must be approved by the Commission. Some time ago, we began preparing a draft notice of proposed rulemaking for the Commission's consideration, to make technical corrections to the rules and bring them into conformity with current agency practice. In

¹ Copies to the Commission and the Secretary.

² This memorandum was prepared by Paul Bardos (rm. 707B, tel. 205-3102).

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response to the draft audit report, we have inserted language into the draft notice of rulemaking that addresses the fifth recommendation. We plan to circulate the draft notice of rulemaking to other staff offices for comment by April 2, 2001.

Although the draft audit report's other recommendations are not addressed to this office, please note that we do not object to them.

Stephen Koplan

APPROVED: ✓ DISAPPROVED: _____

DATE: 2-28-01



UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, DC 20436

March 2, 2001

SE-Y-004

MEMORANDUM

TO: The Chairman

FROM: Marilyn R. Abbott, Deputy Secretary to the Commission 

SUBJECT: Response to Draft Audit Report: Evaluation of the Commission's
Implementation of E-FOIA

This is to request approval of the response prepared in accordance with USITC Directive 1701.2 (August 30, 1996) to the subject draft report.

The recommendations read as follows:

Recommendation 1: The Office of the Secretary, in consultation with the Office of the General Counsel, will prepare and publish in the Federal Register information covered by Section (a)(1) of the FOIA. This notice will include information on the availability of the web site and its contents. The notice will be developed to co-incide with issuance of the Annual FOIA Report, due to the Department of Justice on February 1, of each year.

Recommendation 2: The Office of the Secretary will, in addition to notifying the requester of circumstances requiring additional time beyond the 20 working days, document the reasons in the administrative file.

Recommendation 3: The Office of the Secretary and the Office of Finance have established new procedures for accounting for FOIA fees. These procedures include providing the Office of Finance with a copy of any correspondence assessing fees as well as the Office of Finance providing an annual summary of FOIA deposits to the Office of Secretary. The Office of the Secretary will follow-up with requesters regarding payments of fees. Attempts to collect fees will be noted in the administrative file.

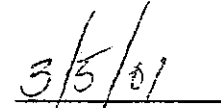
Recommendation 4: The Office of the Secretary, in consultation with the Office of Information Services, is exploring acceptance of FOIA requests via a Web page form. Once an electronic capability has been achieved, the Agency can explore amending the rules to accept electronic FOIA requests.

Chairman's Decision

Approve:

Disapprove:


Chairman, Stephen Koplan


Date

- cc: The Commissioners
Office of Finance
Office of General Counsel
Office of Information Services
Office of Inspector General