

OPIC Chief FOIA Officer Program review: OPIC's FOIA program (June 13, 2006)

I. FOIA Program Overview

In accordance with Executive Order 13392 dated December 14, 2005, I have reviewed OPIC's Freedom of Information Act ("FOIA") process in the first quarter of calendar year 2006 ("CY06"), to identify procedural modifications to improve OPIC's FOIA process.

Based on this review, I have determined that, for the most part, OPIC's FOIA program is efficient and generally compliant with FOIA response deadlines. Specifically, in fiscal year 2005 ("FY05"), OPIC responded to 76% of FOIA requests within the twenty-business day timeframe, and OPIC's average response timeframe was 13.5 days.

This response time was due primarily to three factors: 1) OPIC staff's cognizance of the importance of responding to FOIA requests in a timely manner and corresponding assistance in ensuring such compliance, 2) the relative simplicity of most FOIA requests that OPIC receives, and 3) OPIC's low FOIA volume. With respect to the third factor, it is worth noting that OPIC's FOIA volume peaked at 91 in FY04 and has since decreased, to 76 in FY05 and to 11 in the current fiscal year (extrapolating the data, this would translate into a FOIA volume of less than 50 for the full FY06).

However, within this context of overall outstanding performance, OPIC experienced significant delays in responding to 10 (or 13% of FY05 total volume) requests in FY05. With respect to these 10 requests, OPIC's response time ranged from 42 to 192 days, with a median response time of 56.5 days and an average response time of 82.5 days.

A review of these requests revealed several common denominators that contributed to the delay. First, most of these requests were all-encompassing in scope (i.e., requested "any and all documents"), and the requesters either declined the opportunity to narrow the scope of the requests to enable more timely OPIC responses or the requests remained broad even when more narrowly-tailored.¹

Second, OPIC's searches pursuant to most of these requests uncovered a voluminous amount of responsive records, and most of this material reflected information that private enterprises submitted to OPIC. Consequently, in addition to its internal review, OPIC had to transmit voluminous records to business submitters, and to afford these submitters the opportunity to review the records and identify confidential commercial or financial information.

¹ For example, a request for all records pertaining to an oil well concession in Iraq entailed a review of over 3000 pages.

Finally, most of these requests concerned records for specific OPIC-supported projects. Due to its statutory mandate, OPIC supports projects in developing countries and regions, and many of the projects are in remote locations.² In addition, the business submitters' contact personnel often travel overseas, and consequently these parties were often unable to respond within the allotted timeframe.³

In addition, there were unique circumstances underlying half of these requests that suggest that the extended response timeframe for these requests was anomalous. First, one individual submitted four of the broad and voluminous requests within a two-week time span, which taxed OPIC's limited FOIA resources.⁴ Second, one of the requests entailed a search of a correspondence database during an employee transition: the new employee could not conduct an electronic search until after receiving training. Third, one request sought information concerning an investment fund that had undergone a management change: OPIC contacted both the former and current fund managers to solicit each firm's views on disclosure, and each one demurred. OPIC subsequently tried – unsuccessfully – to contact the portfolio company whose information was at issue.

Since OPIC's FOIA process overall is efficient except for requests for voluminous project-specific records, I have conducted this review with the specific objective of improving OPIC's timeliness in responding to such requests. Implementing the process modifications recommended below should reduce OPIC's cycle time for such requests without negatively impacting OPIC's responses to routine requests.

II. Findings

I have reviewed each component of OPIC's FOIA process as it was implemented with respect to the 10 requests involving significant delays to identify procedural bottlenecks and to propose modifications to eliminate or reduce delays. Specifically, I have reviewed the time each of the following phases required: 1) intake (receipt of request and distribution of requests to the appropriate offices), 2) search, 3) internal review, 4) external review, and 5) response to requesters.

Upon conducting this review, in light of all the tasks required, it became readily apparent that the 20-day response timeframe is not feasible for requests that are broad, voluminous and seek project-specific documents ("Complex requests"). Nevertheless, OPIC can improve several

² For example, 4 of the requests involving significant delays concerned projects located in Guatemala, Bolivia, El Salvador, and Iraq.

³ Since the FOIA requires a response within 20 business days, OPIC typically requests that business submitters review the responsive records and respond to OPIC within 10 business days.

⁴ OPIC's FOIA resources consist of a FOIA Director, his assistant, and the occasional use of a paralegal. In addition, each department's administrative assistant serves as a FOIA coordinator, who is tasked with circulating FOIA requests to department staff, compiling responsive records for the vice president's review, and subsequently delivering the materials to the FOIA Director. For each of these personnel, FOIA is an ancillary function. In addition, once the vice president clears the documents, the FOIA Director is the only staff dedicated to the initial FOIA review (to determine whether documents or portions thereof are exempt from disclosure).

components of its FOIA process to reduce overall cycle time for such requests. I will address each component separately below.

1) Intake

Based on this review, I have found that OPIC's intake processes operate efficiently. Even with respect to the Complex requests, OPIC's FOIA Office logged incoming requests on the date of receipt and distributed them to the appropriate offices within 2 days.⁵ Consequently, these processes do not require significant changes. Nevertheless, to expedite OPIC's overall process, I recommend transmitting copies of incoming requests and transmittal pages electronically rather than in hard copy format. Doing so will enable departmental FOIA coordinators to more quickly distribute requests to their staff and enable the FOIA Director to subsequently notify business submitters about pending requests.

2) Search

This element consists of three functions: 1) the department staff's search for responsive records, 2) the coordinator's compilation of the records and delivery to the vice president, and 3) the vice president's review of the records (a sensitivity review for the vice president to identify particular program sensitivities reflected in the documents that may not be apparent to the FOIA Director, e.g., specific insurance contract language that reveals the type of insurance coverage), clearance and delivery to FOIA Director.

Considering the labor-intensive nature of these tasks, OPIC's average search time for these Complex requests -- 16.5 business days -- is not surprising.⁶ Nevertheless, the amount of search time these requests required practically precluded OPIC from complying with the 20 business-day response timeframe even before the materials were ready for review.⁷

To reduce search time, I recommend (in addition to transmitting the incoming requests electronically) implementing a search deadline and "tickler system," giving the responsive offices (i.e., OPIC departments that are likely to have responsive records) a specific deadline to compile, review and produce the records, and following up with these offices halfway through the allotted search time. Specifically, the FOIA Director should instruct the department FOIA coordinators to complete the search cycle (including obtaining the vice president's review and clearance) within 10 business days, and the FOIA Director should contact the coordinator after 5 business days to ensure that the process is on track and/or identify difficulties or ambiguities in the search parameters.

In addition, I recommend establishing a default timeframe for the search, at the end of which the documents at issue are deemed ready for the FOIA Director's review even if the vice president

⁵ In addition, since the requesters have increasingly transmitted their requests by facsimile or electronic mail, OPIC's FOIA Office often receives and logs in requests on the same date noted in the requests.

⁶ I note that the amount of search time ranged from 1 to 49 days.

⁷ It bears noting that, although FOIA requires an agency to respond within 20 business days, under certain circumstances (e.g., a request for voluminous records), the statute permits an agency to satisfy the response timeframe by notifying the requester about the special circumstances, providing the requester with an estimated response timeframe, and affording the requester the opportunity to either narrow the scope of the request or accept the agency's estimated response timeframe.

has not cleared them yet. For instance, in the absence of a search difficulty or ambiguity, if the vice president does not clear the documents at the end of 15 business days, the documents are deemed presumptively cleared for the FOIA Director's review.

3) Internal review

This element reflected another area of weakness for the Complex requests, with an average internal review period of 20 days.⁸ Aside from the issues described above (the nature of these requests), the primary contributor to this lengthy internal review period was the lack of an adequate back-up to the FOIA Director. Simply stated, the FOIA Director was (and remains) the sole employee conducting the initial FOIA review. Several of the requests arrived concurrently or within a short time span, and the records responsive to these requests were likewise delivered to the FOIA Director at or near the same time. Consequently, records responsive to one request could not be reviewed until the FOIA Director completed the review of responsive records for a previously received request.

To reduce internal review time, I recommend providing intensive FOIA training to OPIC's other senior administrative counsel, to enable him to review responsive records for a request concurrent to the FOIA Director's review for a different request.

4) External review

Not all FOIA requests require an external review; only requests involving information that OPIC received from a non-Government entity requires such review. In accordance with Executive Order 12600 and OPIC's FOIA regulations, OPIC is required to: 1) notify a business submitter⁹ when information that it provided to OPIC (and that is responsive to a FOIA request) reflects potentially confidential commercial or financial information, and 2) afford such party an opportunity to review the responsive records and comment on disclosure. In such situations, OPIC provides the business submitter 10 business days to review the documents and provide OPIC with its comments (e.g., objections or consent to disclosure).

Even if a business submitter were to respond within the 10-day timeframe, OPIC would likely be unable to satisfy the 20-day response timeframe for broad and voluminous requests, in light of the tasks required before and after OPIC notifies the business submitter.¹⁰ This problem is exacerbated when business submitters are unable to respond within the allotted timeframe.

Having said that, with respect to these requests, the business submitters' requested extensions were not an issue: the average request was 3.5 days. Similarly, OPIC's negotiation or

⁸ Within this class of requests, the range varied significantly, from a low of 0 (reflecting internal review completed the same day the responsive department delivered the records) to a high of 81. Excluding the high and low values, the average search time decreases 3 days.

⁹ This term refers to the party that provided the information to OPIC; in OPIC's parlance, this refers to the project sponsor or insured.

¹⁰ To comply with the 20-day timeframe, OPIC would have to complete its search and internal review within 5 business days, and (assuming OPIC receives the business submitter's comments within the 10-day timeframe) subsequently review the business submitter's comments and respond to the requester within 5 business days. For records exemplified by the Complex requests, such a timeline is untenable.

clarification with the business submitters were not a factor in delaying OPIC's responses. Only one business submitter's response required clarification or negotiation, and this delayed OPIC's response by an additional 8 days.

Since this element did not contribute significantly to OPIC's delayed response, this element does not require dramatic changes. However, I recommend that OPIC: 1) convert the responsive records to electronic form and provide them to the business submitter by email,¹¹ and 2) explore whether OPIC can perform this task earlier in the process (e.g., simultaneous to its internal review).

5) Responses to requesters

This element consists of 3 timelines: (a) the time it takes the FOIA Director to draft a response once the internal and/or external review is complete, (b) the time it takes the draft response to circulate through the Department of Legal Affairs ("DLA") management, and (c) the time it takes the FOIA Director to finalize a response once the draft response is cleared.

On average, it took the FOIA Director 8 days from the completion of the review phase to draft a response letter for Complex requests;¹² this timeframe was much too long. To reduce this timeframe, I recommend directing the FOIA Director to prepare responses within 2 business days of completion of review. If circumstances arise that would prevent the FOIA Director from doing so, he should convey this fact to DLA management, which would then instruct his back-up to draft a response.

Similarly, the DLA management clearance time line was unreasonably long. The DLA management clearance for these Complex requests averaged 31 days, with clearance timeframes ranging from 11 to 74 days.¹³ To be fair, DLA management (in particular OPIC's Vice President and General Counsel) is responsible for advising senior management on a diverse range of time-sensitive mission-critical issues that often took (and continue to take) priority over FOIA requests.

Nevertheless, the FOIA response timeframe is mandated by statute and cannot be ignored; consequently, OPIC must accelerate the clearance process. To do so, I recommend either delegating the clearance function to the Deputy General Counsel or establishing a default clearance deadline (similar to the departmental vice president review deadline) of 15 days: if DLA management does not clear the draft response within this timeframe, the draft is presumptively cleared and ready for the FOIA Director to transmit to the requester.

The third function – time between DLA clearance and transmittal to requester – was not a factor in OPIC's delayed responses to these requests. On average, this timeframe was less than 2 days; in three instances, the FOIA Director transmitted final responses on the same day of DLA clearance. Accordingly, I see no need to modify this function.

¹¹ Doing so will have the dual benefit of accelerating delivery of the documents to the business submitter and reducing OPIC's mailing costs.

¹² This average may be misleading, since the timeline ranged from 1 day to 30; excluding these 2 extremes, the average timeline decreases by 2 days.

¹³ Removing these 2 extremes reduces the average clearance to 27.5 days.

III. Conclusions and Recommendations

Overall, OPIC's FOIA program operates efficiently. The program's only deficiency arises with respect to broad requests for voluminous project-specific information: such requests inherently engender significant search and review time that render responding within the statutory timeframe untenable. However, OPIC can adopt certain measures to reduce the response time, such as:

- Converting the request and responsive records into electronic form
- Creating a tickler system to follow-up with responsive departments on search status
- Establishing default timeframes for department review and DLA clearance
- Providing FOIA training to the other SCAA to enable concurrent FOIA reviews
- Examining feasibility of notifying business submitters earlier in the process

Although the responsibility for implementing most of these recommendations lies within DLA, improving the search timeframe requires the cooperation and buy-in of the other departments. Accordingly, to ensure that these departments accord this issue the necessary import, it would be helpful for the President & Chief Executive Officer to articulate support for this effort.

IV. Timeline and Benchmarks

By implementing the aforementioned measures, OPIC should expect to significantly reduce the response timeline for Complex requests. Specifically, the timeline for such requests should approach the following: intake – 1 day, search – 10 days, internal review – 5 days, external review -- 10 days, response to requester – 10 days. OPIC's staff's compliance with these timelines would reduce OPIC's responses to Complex requests from 82.5 days to a more reasonable 36 days.

With respect to OPIC's FOIA program benchmarks, I recommend the following:

- Increasing OPIC's timely responses from 76% to 80%
- Responding to at least 50% of Complex requests within 36 business days
- Clearing draft responses within 15 days on at least 50% of Complex requests