



Executive Order 13,392 Implementation Guidance

Introduction

On December 14, 2005, the President issued Executive Order 13,392, entitled "Improving Agency Disclosure of Information," which contains several statements of FOIA policy and specific new planning and reporting requirements that affect all federal agencies in their administration of the Act. Among other things, Executive Order 13,392 calls upon all agencies to improve their FOIA operations with both efficiency and customer service in mind. Pursuant to this first-of-its-kind FOIA executive order, the head of each federal agency now has designated a Chief FOIA Officer to oversee all ongoing agency implementation activities under it, as well as the agency's administration of the FOIA overall.

Among the responsibilities of each Chief FOIA Officer is to "conduct a review of the agency's FOIA operations to determine whether agency practices are consistent with the policies" that are set forth in this new executive order. Exec. Order No. 13,392, Sec. 3(a) (Dec. 14, 2005); *see also id.* at Sec. 3(a)(i)-(v) (specifying certain matters to be reviewed). Under the executive order's timetable, these agency reviews are to provide the basis for the development of "agency-specific plan[s]" for improvement of the administration of the Act, *id.* at Sec. 3(b)(i) -- plans that must include "concrete milestones, with specific timetables and outcomes to be achieved," by which agency improvements can be measured, *id.* at Sec. 3(b)(iv) -- and these plans are to be submitted in reports to the Department of Justice and the Office of Management and Budget (and then published on agency Web sites, including through posting on each agency's FOIA Web site) by *June 14, 2006*. Further, agencies are required to specifically report on the implementation of their plans and the meeting of their goals as part of the annual FOIA reports that they prepare for Fiscal Year 2006 and Fiscal Year 2007, which by statute are due to be completed on February 1, 2007, and February 1, 2008, respectively. *See id.* at Sec. 3(c)(ii).

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To assist federal agencies in this important Presidential initiative, this guidance addresses a wide range of points and considerations that all agencies should keep in mind as they implement Executive Order 13,392. See Exec. Order No. 13,392, Sec. 4(b) (providing for implementation guidance to be issued by Attorney General); see also *id.* at Sec. 3(b)(i). Part I of this guidance is a compilation of particular areas of FOIA administration that agencies may find appropriate for consideration (in the context of their individual circumstances) as part of their reviews under the executive order and in the development of their improvement plans.⁽¹⁾ Part II consists of a template for all agencies to use in preparing their plans and accompanying reports. This template's use will promote uniformity, clarity, and proper consistency in these plans, thereby allowing ready comparison from one agency's plan to the next by all interested persons.⁽²⁾ Part III is a supplemental guideline for all agencies to follow in preparing their FY 2006 and FY 2007 annual reports, where they will report their progress in implementing their plans and improving their FOIA activities in compliance with Executive Order 13,392. Lastly, Part IV of this guidance covers a broad range of questions and guidance points, in convenient Q&A form, that pertain to the executive order's implementation.

Part I -- Potential Improvement Areas

The following are potential improvement areas that agencies may consider in the development of their improvement plans. It is not intended to be an all-inclusive list, as each agency should also consider its own individual circumstances in identifying particular areas in which it can improve its administration of the FOIA in accordance with Executive Order 13,392.⁽³⁾ The areas marked with an asterisk specifically derive from the executive order itself.

*1. *Affirmative disclosure under subsection (a)(2)*. The FOIA as amended in 1996 requires that agencies post on their Web sites frequently requested records, policy statements, staff manuals and instructions to staff, and final agency opinions. See, e.g., *FOIA Update*, Vol. XIX, No. 1, at 3-4 ("OIP Guidance: Electronic FOIA Amendment Implementation Guidance Outline"). This obligation is unique in that it is a continuing one, which requires constant attention to make sure that an agency does not fall out of statutory compliance. See, e.g., *FOIA Post*, "GAO E-FOIA Implementation Report Issued" (posted 3/23/01). Agencies should double-check that all is being done that should be done in this regard. See Exec. Order No. 13,392, Sec. 3(a)(iv) (calling for attention to this statutory requirement in particular).

*2. *Proactive disclosure of information*. When an agency has public information that does not fall into any subsection (a)(2) category but

nevertheless could be made readily available to the public, including through posting on the Web, such availability can reduce the need for the making of FOIA requests. See Exec. Order No. 13,392, Sec. 3(b)(ii) (calling for "increased reliance on the dissemination of records that can be made available to the public" without the necessity of a FOIA request). And in some instances, FOIA requests that are made to an agency can most efficiently be handled through effective use of information that an agency already has made publicly available without the requester being aware of it. See, e.g., FOIA Update, Vol. XVI, No. 1, at 1-2. Agencies should take a fresh look at this area in accordance with applicable governmentwide guidance on the subject.⁽⁴⁾ See also Exec. Order No. 13,392, Sec. 3(a)(iv).

3. Overall FOIA Web site improvement. Under the 1996 FOIA Amendments, agencies have specific obligations that they have to meet through their FOIA Web sites and also have the opportunity to use those sites for broader FOIA administration purposes as well, which requires user-friendly formats and navigation. See, e.g., FOIA Post, "Follow-Up Report on E-FOIA Implementation Issued" (posted 9/27/02); FOIA Update, Vol. XIX, No. 3, at 3-4 ("OIP Guidance: Recommendations for FOIA Web Sites"). Especially in that items on Web sites can quickly become out of date, this is a particularly worthwhile area for agency attention. See also OMB Memorandum No. 05-04, "Policies for Federal Agency Public Websites" (Dec. 17, 2004) (addressing federal policies and requirements for effectively managing federal agency public Web sites).

***4. Improvement of agency's FOIA Reference Guide.** All agencies are required to maintain a FOIA Reference Guide (or FOIA requester handbook) as an aid to potential FOIA requesters in accordance with the requirements of subsection (g) of the Act as added in the 1996 FOIA Amendments. Agencies should double-check to ensure that these guides remain comprehensive and up to date. Furthermore, Executive Order 13,392 specifically requires that each agency's implementation plan "include activities to increase public awareness of FOIA processing," Exec. Order No. 13,392, Sec. 3(b)(iii), which directly ties to this improvement area in that an effective means for increasing public awareness is through use of an agency's FOIA Reference Guide. See *id.* at Sec. 2(b)(v); see also *id.* at Sec. 1(b).⁽⁵⁾

***5. Automated tracking capabilities.** Executive Order 13,392 places strong emphasis on the ability of an agency to provide information to FOIA requesters about the status of their requests. See, e.g., *id.* at Sec. 1(b). Accordingly, agencies should examine their existing capabilities in this regard to identify any need to install new -- or to upgrade existing -- request-tracking systems.⁽⁶⁾

6. *Electronic FOIA -- automated processing. New technologies are now being used by many agencies to scan, redact, and process FOIA-requested records faster, with less use of paper and greater quality control. Here, too, agencies should examine the efficiencies that can be achieved by installing (or, where applicable, upgrading) such systems. *See id.* at Sec. 2(b)(i) (reiterating strong emphasis on FOIA "efficiency"); *see also id.* at Sec. 3(a)(iii)(A) (speaking of "use of information technology in responding to FOIA requests").

7. *Electronic FOIA -- receiving/responding to requests electronically.* Beyond the use of advanced technology for FOIA request tracking and FOIA request processing is the potential for use of the Internet as a means of receiving (and in some cases even responding to) FOIA requests. The Office of Information and Privacy has encouraged agencies to explore their capability to use their FOIA Web sites in this way, *see FOIA Update, Vol. XIX, No. 1*, at 6, and some agencies now do so. Indeed, it is only a matter of time before this becomes "commonplace," *id.*, so this is an ideal time for agencies to focus on this potential improvement area. ⁽⁷⁾

8. *Multi-track processing. Through the 1996 FOIA Amendments, Congress encouraged agencies that have backlogs of pending FOIA requests to establish multi-track processing systems for the processing of their requests, *see* 5 U.S.C. § 552(a)(6)(D), and the executive order calls upon agencies to examine this as well, *see* Exec. Order No. 13,392, Sec. 3(a)(iii)(C). In doing so, agencies should consider a full range of questions where applicable in this improvement area: (a) whether a multi-track system should be established; (b) whether the existing number of tracks is sufficient; and (c) whether the existing contours between tracks (i.e., the lines used to delineate one track from the next) are most appropriate in light of the agency's current operations and its aspirations for backlog-related improvement. ⁽⁸⁾

9. *Troubleshooting of any existing problems (even minor ones) with existing request tracking. Even agencies that have no need to install or upgrade automated FOIA request-tracking systems still can encounter particular problems with the tracking of requests due to human error or other difficulties. In light of the central role of request tracking in the executive order's implementation, with its strong emphasis on providing FOIA requesters with timely information about the status of their requests, *see, e.g., id.* at Sec. 2(c)(i)-(ii), agencies could find it useful to focus on any problems that arise in their request-tracking operations and to ensure that they are addressed with generic solutions where applicable.

10. *Case-by-case problem identification.* Likewise, problems or mistakes can arise in all aspects of an agency's FOIA operations, not just regarding

request tracking as discussed above, and it is important to ensure that any lessons learned in particular cases are considered for across-the-board adjustments where necessary. In short, it can be useful for an agency to establish a practice of automatically considering generic solutions that can broadly be applied to their FOIA operations whenever individual problems of any type are identified and solved.

***11. Expedited processing.** Both Congress and the executive order speak to the matter of expediting the processing of certain FOIA requests upon request. See 5 U.S.C. § 552(a)(6)(E); Exec. Order No. 13,392, Sec. 3(a)(iii)(B). Uniquely under the FOIA, decisions on whether to expedite the handling of a FOIA request must be made within *ten calendar days*. See *FOIA Update, Vol. XVII, No. 4*, at 10 (citing 5 U.S.C. § 552(a)(6)(E)(ii)(I)). Accordingly, agencies should review their practices to ensure that they are fully in compliance with the law and sound policy in this area as well.

***12. Backlog reduction/elimination.** Agency backlogs of pending requests have long been a concern under the FOIA, and Executive Order 13,392 reflects that. Not all agencies have FOIA request backlogs, but for those that do the executive order calls upon them to "identify ways to eliminate or reduce" them. Exec. Order No. 13,392, Sec. 3(a)(v); see also *id.* at Sec. 3(b)(ii). This should be a major underpinning of the implementation plans of all such agencies. See also Part IV, Q&A # 13, below.

***13. Politeness/courtesy.** This improvement area is no less integral to the overall "customer-service" policy of the executive order, see Exec. Order No. 13,392, Sec. 1(b), and by contrast with other areas it is one that does not involve any significant consumption of agency resources. Simply put, as often is said, "politeness costs nothing." So there is no reason why any agency should not pay considerable attention to this area.⁽⁹⁾ See also Part IV, Q&A # 8, below.

***14. Forms of communication with requesters.** A major theme of Executive Order 13,392 is that agencies should do a better overall job of communicating with FOIA requesters about their requests. See, e.g., Exec. Order No. 13,392, Sec. 1(b). This means paying attention to such things as the clarity of all agency/requester communications. Unless an agency is entirely confident that its standard forms of communication leave no room for improvement in this regard, it should consider making such improvements where appropriate. See also *id.* at Sec. 2(c)(iii).

15. Acknowledgment letters. It is particularly important for agencies to do the best that they can to make FOIA requesters aware of the status of their pending requests, both responsively (through their FOIA Requester Service Centers) and proactively as well. Acknowledgment letters are a vital tool that

can be used by agencies toward that end, if they promptly make clear to requesters what they can expect regarding their requests, so this is a significant area for agencies to review with an eye toward improvement.

16. *System of handling referrals.* Agencies routinely engage in the process of making referrals to other agencies of FOIA-requested records that originated with those other agencies. See *FOIA Post*, "FOIA Counselor Q&A" (posted 1/24/06) (noting the distinction between "referring" records and "forwarding" a FOIA request); *FOIA Update*, Vol. XII, No. 3, at 3-4 ("OIP Guidance: Referral and Consultation Procedures"). This is an area in which there sometimes is room for improvement in agency practices, with respect to the processes both of making record referrals and responding to them, so it warrants careful consideration.

17. *System of handling consultations.* In other circumstances, where agencies locate responsive records that did not themselves originate with another agency but which contain information that did (or in which another agency has a strong interest), they engage in consultations with those other agencies before responding to the request. See *id.* at 4. Such consultations have been known to consume large amounts of time and to contribute to agency backlogs of pending requests, making this an area deserving of considerable remedial attention. Among other things, agencies encountering such difficulties should consider establishing new protocols and practices designed to achieve timely attention to this by all agencies involved. (10)

18. *Process by which necessary cooperation is obtained from agency "program personnel."* All agency FOIA personnel know that they have to depend upon the cooperation of agency "program personnel" -- i.e., those who both maintain requested records and often also maintain the particular subject-matter expertise necessary to determine a record's sensitivity -- in order both to locate responsive records and to process them as efficiently as possible. Such agency personnel, who by definition have primary missions that are not FOIA-related, in many cases could be encouraged to place greater priority on providing necessary FOIA assistance. This is an area in which there can be much room for improvement, through such steps as agency directives, protocols for escalating demands, intra-agency meetings, etc. See, e.g., footnote 10 above.

19. *Improvement ideas from field office personnel (where applicable).* Not all agencies have field offices or installations, but most that do have them handle their FOIA operations on at least a partly decentralized basis. Where this is the case, an agency should be sure not to overlook the contributions that can be made by knowledgeable field office FOIA personnel, both as to ideas for agencywide improvements that might not occur to headquarters personnel as well as regarding particular improvements that can be made at

field offices (either individually or as a group) themselves. *See also* Part IV, Q&A # 5, below.

20. *Additional training needed (formal and/or on-the-job).* Because of the historically heavy turnover in FOIA personnel at federal agencies, FOIA training has long been a major element of governmentwide FOIA administration. The issuance of Executive Order 13,392 is a good occasion for agencies to consider whether they are taking full advantage of the governmentwide FOIA training that is available, *see, e.g., FOIA Post, "FOIA Training Opportunities, Fiscal Year 2006"* (posted 7/21/05; supplemented 9/20/05 and 1/26/06), conducting their own training sessions with sufficient regularity, *see, e.g., FOIA Post, "FOIA Conferences Held by Growing Numbers of Agencies"* (posted 2/22/05), and also focusing on whether they are using on-the-job training with sufficient effectiveness.

21. *In-house training on "safeguarding label"/FOIA exemption distinctions.* Across the federal government, agencies now use a variety of labels to designate certain types of unclassified records as those requiring special safeguarding or document controls for one reason or another. As has been observed, these "safeguarding labels" -- such as "For Official Use Only" ("FOUO") or "Sensitive But Unclassified" ("SBU"), to name just two -- generally "describe broad types of potentially sensitive information that might not even fall within any of the FOIA exemptions." *Freedom of Information Act Guide & Privacy Act Overview* (May 2004), at 191 & n.218; *see also id.* at 225-26 & n.157. Increasingly, though, the use of such administrative labels might be seen as indistinct from FOIA-processing decisions at some agencies, so their attention to this area could be beneficial.

22. *Increased staffing (where applicable).* This potential improvement area requires little elaboration beyond the observation that agencies always should consider the propriety of reallocation of staffing resources where warranted by current circumstances. In this case, the existence of the executive order itself, with its new FOIA policies and FOIA-related obligations, provides a basis for such consideration. *See* Exec. Order No. 13,392, Sec. 2(b)(iii) (speaking of recommended "adjustments to agency practices, policies, personnel, and funding as may be necessary"); *see also id.* at Sec. 3 (a)(i) (speaking of "expenditure of resources").

23. *Changes to personnel practices (job series, grades, etc.) needed.* In addition to examining staffing levels, agencies should look at the grade levels of their employees who are devoted to FOIA administration. In some cases, upgrades in this regard might be readily within an agency's power to implement. *See also* Part IV, Q&A # 9, below. In other cases, such steps might require consultation with or approval by the Office of Personnel Management. In either case, such improvements should be carefully considered. *See also*

Part IV, Q&A # 4, below.

24. Contracting out/hiring of contract employees. An increasing number of agencies have made good use of either contracting out certain limited FOIA-related activities or hiring contract employees for FOIA work, or both. *See FOIA Post, "The Use of Contractors in FOIA Administration"* (posted 9/30/04); *see also FOIA Post, "FOIA Counselor Q&A"* (posted 1/24/06) (discussing the interplay of the FOIA and OMB Circular A-76 regarding "contracting out" and "competitive sourcing" information). Agencies should consider contracting out as one option for improvement in this area that "has become a large part of the FOIA landscape and is likely to remain so for some time to come." *Id.*

25. Purchase of new equipment needed. Beyond the possible installation or upgrade of automated request-tracking or request-processing equipment, agencies should not overlook the possible need for more basic office equipment in support of their FOIA operations. Sometimes, even a relatively small capital investment (in a more modern photocopy machine, for example) can yield significant improvements in FOIA productivity and efficiency.

26. Centralization/decentralization. Generally speaking, federal agencies handle their FOIA responsibilities on either a centralized basis (more common with small- or medium-sized agencies) or a decentralized basis (more common with larger agencies). At some agencies, it is a close call as to which approach is best. This is a good time for each agency to review its overall FOIA-administration structure in order to ensure that it is the most effective one possible.

***27. Recycling of improvement information gleaned from FOIA Requester Service Centers.** Lastly, all agencies should be sure to take full advantage of the information that they now will be gaining -- in what can be regarded as "customer feedback" form -- through the new FOIA Requester Service Centers (and FOIA Public Liaisons as well) that they establish. Agencies should consider setting up a formal process for such requester-provided information to be tapped for the making of generic improvements in order to be well positioned to achieve the type of improvements that the executive order calls for.

Part II -- Plan/Report Template

Below is the standard format for all agencies to use in the preparation and reporting of their improvements plans under Executive Order 13,392:

A. Characterize overall nature of agency's FOIA operations (degree of detail optional), with optional reference to areas preliminarily considered for

agency review. (Agencies may also describe any particular FOIA challenges that they face.)

B. List all areas selected for review

C. Include narrative statement summarizing results of review (11)

D. List all areas chosen as improvement areas for agency plan

E. For each improvement area provide: (12)

1. Name (e.g., backlog reduction/elimination) (13)
2. Brief statement of goal(s)/objective(s) (i.e., improvement(s) sought to be made) (14)
3. List of all distinct steps planned to be taken
4. Time milestones (in relation to specific timetables and outcomes)
5. Means of measurement of success (e.g., quantitative assessment of backlog reduction expressed in numbers of pending requests, percentages, or working days) (15)

F. For the entire plan, group the improvement areas into the following time periods:

1. Areas anticipated to be completed by December 31, 2006
2. Areas anticipated to be completed by December 31, 2007
3. Areas anticipated to be completed after December 31, 2007 (16)

Part III -- Supplemental Annual FOIA Report Guideline

Under the 1996 FOIA Amendments, all federal agencies prepare annual reports of their FOIA activities at the end of each fiscal year, and are required to submit them to the Attorney General by no later than February 1, in accordance with guidelines issued by the Department of Justice. See 5 U.S.C. § 552(e)(1); see also *FOIA Update*, Vol. XVIII, No. 3, at 3-7 ("OIP Guidance:

Guidelines for Agency Preparation and Submission of Annual FOIA Reports") (establishing uniform template for such reports). Under the statute, the Attorney General is authorized to establish additional annual report guidelines as is "determine[d] may be useful," 5 U.S.C. § 552(e)(4), and this has been done several times over the past decade. (17)

Accordingly, all agencies should add a new "Section XII" to their annual FOIA reports, in order to meet the requirements of Executive Order 13,392, through use of the following uniform outline:

XII. Report on FOIA Executive Order Implementation

A. Description of supplementation/modification of agency improvement plan (if applicable) (18)

B. Report on agency implementation of its plan, including its performance in meeting milestones, with respect to each improvement area

C. Identification and discussion of any deficiency in meeting plan milestones (if applicable) (19)

D. Additional narrative statement regarding other executive order-related activities (optional) (20)

E. Concise descriptions of FOIA exemptions (21)

F. Additional statistics:

1. Time range of requests pending, by date of request (or, where applicable, by date of referral from another agency)

2. Time range of consultations pending with other agencies, by date of initial interagency communication

G. Attachment: Agency improvement plan (in current form) (22)

Under subsection (e)(1) of the FOIA, agencies are given four months from the end of each fiscal year (i.e., from October 1 to February 1) to compile and submit their annual FOIA reports. In order for these statutory reports to best serve their intended purpose under Executive Order 13,392, agencies should strive to have them cover as much executive order implementation activity as possible while still ensuring that they are completed by the statute's firm February 1 reporting deadline. (23) It is expected that agencies should be able

to report at least seven months of executive order activity and results (i.e., from no later than June 14, 2006, through late January of 2007) in their first such report. (24)

Part IV -- Q&As

Question # 1 Is it possible for an agency to supplement or modify its plan after it is submitted?

Yes. If an agency identifies a need to supplement or otherwise modify its plan in any respect after its submission it should promptly do so. Agencies should not be discouraged, for example, from adding supplemental improvement goals and objectives (or further aspects of them) that they seek to achieve based upon new circumstances or newly discovered information. In any such case, however, the agency should be sure to (a) specify on its Web site exactly what the modification is; (b) notify the Justice Department and OMB of the modification; and (c) include the modification in new Section XII.A. of its annual FOIA report. *See also* footnote 18 above.

Question # 2 Will there be consequences if an agency does not meet the goals and milestones contained in its improvement plan?

Yes, there is such a mechanism in the executive order, *see* Exec. Order No. 13,392, Sec. 3(c)(iii), one that involves the identification of performance deficiencies through annual FOIA reports and also the reporting of those deficiencies to the President's Management Council, *see id.* at Sec. 3(c)(iii)(D). Each agency will be responsible for specifically addressing any goal or milestone that is not met. Nevertheless, agencies should strive to set reasonably aggressive goals, mindful that they will be held accountable for the aggressiveness of their goals and will have every opportunity to explain the reasons for, and full circumstances surrounding, any deficiency that results. *See id.* at 3(c)(iii)(B).

Question # 3 What are the time boundaries for improvement plans and the completion of goals and milestones?

While the executive order places primary emphasis on an agency's administration of the FOIA during the next year and a half, *see id.* at Sec. 3(b)(i), there are no absolute limitations on agency plans per se, so some plan goals and underlying milestones could extend beyond the FY 2007 reporting period where necessary and appropriate. To be sure, some improvements simply have longer implementation horizons than others by their very nature. But agencies should ensure that they have a good balance of short- and longer-term goals and milestones in their plans. And it is strongly recommended that milestones regularly be set at no more than three months

apart. *See also* footnote 16 above.

Question # 4 Is it okay to have goals that are dependent upon officials at other agencies making decisions?

Yes. Agencies should not rule out inclusion of a possible improvement area just because it might depend upon the action of personnel at another agency. In the event of an agency's inability to meet a milestone due to the action or inaction of others outside the agency, that can be reported as such.

Question # 5 Is it okay to have goals that pertain to just one part of an agency's activities?

Yes. As a matter of fact, an agency would be short-sighted if it did not consider including such goals in its plan. *See* footnote 3 above.

Question # 6 Can large decentralized departments divide their plans by sub-agency or agency component?

Yes. At the Department of Justice, for example, more than thirty individual agency components are generating individual portions of the Department's implementation plan. The improvement plans of such agencies can be set out on a component-by-component basis, just as their annual FOIA reports are, so long as a high standard of clarity is met in that fashion. *See also* footnote 13 above.

Question # 7 Should agencies consider the FOIA appeals process in their reviews and plans?

Yes. Although the executive order does not mention the process of adjudicating administrative appeals, agencies should in this respect as well follow the general rule of not ruling anything out when conducting their reviews and formulating their plans.

Question # 8 Should seemingly small or slight improvements -- such as politeness and courtesy, for instance -- be included in an agency's plan?

Yes. First, the executive order speaks directly to agencies ensuring that they treat their FOIA requesters "courteously," Exec. Order No. 13,392, Sec. 1(b), and that is a significant part of its overall policies. *See also* footnote 9 above and accompanying text. Second, in the formulation of their improvement plans, agencies certainly should not exclude any meaningful improvement simply due to its limited scope or relative size.

Question # 9 Should agencies consider the use of FOIA-related

performance standards for their employees?

Yes, that is among the personnel-related measures that agencies might consider incorporating into their plans. See *FOIA Update*, Vol. XVI, No. 3, at 1 (describing the institution of such measures).

Question # 10 Does every agency need to submit a plan by June 14?

Yes. Executive Order 13,392 has universal applicability in that it does not distinguish among agencies that are subject to the FOIA. Accordingly, even very small agencies or those that receive very small numbers of FOIA requests are subject to it and must comply with its requirements. At the same time, of course, such agencies can be expected to exercise reasonable flexibility and practicability in applying the executive order to their own particular circumstances.

Question # 11 What things should an agency consider in developing a plan to eliminate or reduce its backlog?

Agencies should consider a number of measures of timeliness, including number of pending requests, median processing times, average processing times (in addition, if that is feasible), number of requests processed in a year, duration of oldest pending requests, etc. See *also* footnote 15 above and accompanying text. When exercising that judgment and flexibility, though, an agency should remember that it will be judged accordingly by all who are interested in this aspect of its plan. See *id.*; see *also* footnote 12 above.

Question # 12 Regarding backlogs, how does an agency account for FOIA requests that have not been perfected?

Unperfected FOIA requests -- i.e., those for which a FOIA requester has not met all statutory requirements, such as payment of applicable fees, see *FOIA Update*, Vol. XVIII, No. 3, at 4 -- should not be counted as part of an agency's backlog of pending requests. The Act's time limits do not start to apply until a request is perfected. See *FOIA Update*, Vol. XIX, No. 3, at 2; see *also* Exec. Order No. 13,392, Sec. 3(a)(i) (defining the term "backlog" to mean "requests for records [that] have not been responded to within the statutory time limit").

Question # 13 What if an agency is considering an improvement that will have long-term benefits but might yield short-term increases in backlog during the transition -- is that okay?

Yes. An agency is not limited in backlog reduction to time horizons in FY 2006 and FY 2007 only. If an agency believes that reform could enable it to

process requests in a more efficient manner, thereby reducing its backlog, then the agency should consider implementing these measures even though it would result in a short-term increase in backlog. In other words, the agency must be confident in its achievement of a long-term benefit. At the same time, the agency should consider what it might do to counterbalance any anticipated such short-term effect through other backlog-reduction means. See *id.* at Sec. 3(b)(ii) (speaking of multiple "activities that the agency will implement to eliminate or reduce [its] FOIA backlog").

Question # 14 When should agencies name their FOIA Public Liaisons?

Agencies should name their FOIA Public Liaisons as soon as possible. All agencies have been asked either to designate their FOIA Public Liaison(s) by mid-April or set a timetable for that designation to take place. In this regard, it should be remembered that the executive order specifically contemplates a process of consultation between agencies' Chief FOIA Officers and their FOIA Public Liaisons in the development of agency improvement plans, see Exec. Order No. 13,392, Sec. 3(b)(i), so as a practical matter this should be accomplished well in advance of the June 14 deadline for the submission of those plans. See *also id.* at Sec. 2(c)(v) (requiring the posting of all FOIA Requester Service Center and FOIA Public Liaison contact information on agency FOIA Web sites).

Question # 15 Can an agency's Chief FOIA Officer also be its FOIA Public Liaison?

No, not unless the agency is so small as to make that absolutely necessary. The executive order clearly contemplates that the two positions are to be held by two different persons. See, e.g., Exec. Order No. 13,392, Sec. 2(c)(vi). Only where an agency's extremely small size absolutely precludes that as a practical matter should this approach not be followed.

Question # 16 Can an agency have multiple FOIA Requester Service Centers but only one FOIA Public Liaison?

Yes. An agency may structure its executive order implementation in this way so long as its single FOIA Public Liaison holds sufficient authority to oversee the work of multiple FOIA Requester Service Centers. One large agency, for instance, has acted to do so through use of a directive from the agency's head that explicitly authorizes a single FOIA Public Liaison to exercise supervisory authority where necessary over all of the agency's FOIA Requester Service Center personnel.

Question # 17 Can agencies list their FOIA Requester Service Centers by address only?

No. FOIA Requester Service Centers should be listed by telephone number. The executive order, which speaks of "service-oriented" assistance to FOIA requesters, *id.* at Sec. 2(c)(ii), does not limit this service to written inquiries only, so it should be made available to requesters through convenient telephone communication.

Question # 18 Should agencies list mailing addresses for their FOIA Requester Service Centers?

As a general rule, no. If FOIA Requester Service Centers were to field questions by mail, rather than by telephone, that ordinarily would be inconsistent with the executive order's most efficient implementation. Nor should names regularly be included, as the personnel available to answer telephone inquiries at a FOIA Requester Service Center necessarily will vary at least somewhat from day to day. Of course, any agency's Chief FOIA Officer may, in the exercise of his or her judgment based upon individual agency circumstances, opt to add such information.

Question # 19 Do agencies have to report on the activities of their FOIA Requester Service Centers or their FOIA Public Liaisons?

No. The executive order contains no requirement to that effect, but agencies certainly can include such information as a matter of administrative discretion in new Section XII.D. of their annual FOIA reports.

Question # 20 Can a FOIA Requester Service Center answer questions regarding more than a request's status?

Yes, it can do so where appropriate as a matter of discretion, always remembering the executive order's "service-oriented" policies. See Exec. Order No. 13,392, Sec. 1(b)-(d); see also *id.* at Sec. 2(c)(ii).

Conclusion

In sum, all federal agencies should pay careful attention to the requirements of Executive Order 13,392, as further explicated in this guidance, as they continue to conduct their FOIA reviews and prepare their improvement plans for submission by no later than June 14.⁽²⁵⁾ Both the Justice Department and OMB encourage agencies to pose any additional questions that might arise during this critical implementation time period, as well as beyond, as full and proper compliance with this executive order by all federal agencies is essential. Toward this end, agency FOIA personnel should not hesitate to contact the Justice Department's Office of Information and Privacy, at (202) 514-FOIA, to raise any related question or to discuss any aspect of Executive Order 13,392's implementation at any time.⁽²⁶⁾

¹This compilation includes such items as were discussed at the Chief FOIA Officers Conference conducted by the Justice Department and OMB on March 8, 2006. Follow-up sessions are scheduled for April 27, May 17, and June 5, at which agencies can further exchange such ideas and best practices among themselves as they continue their reviews and near their plan-development deadlines.

²This is very much in accord with the approach taken for agencies' annual FOIA reports under the 1996 FOIA Amendments, where by statute all agencies' reports are made available by the Department of Justice "at a single electronic access point" for such comparison purposes. 5 U.S.C. § 552(e)(3) (2000 & Supp. III 2003). Just as it does with annual FOIA reports, the Justice Department plans to make all agency improvement plans available for convenient public access at a single location on its FOIA Web site.

³As a sound general rule, agencies should consider all possible improvements that can be made to their FOIA operations -- improvements both large and small, both short-term and long-term, and both agencywide and more localized in nature. In other words, there is no reason for any agency to rule out any FOIA-related improvement that it thinks it might meaningfully be able to make.

⁴See OMB Circular No. A-130, "Management of Federal Information Resources" (Nov. 28, 2000) (addressing agency dissemination of government information to the public); see *also* OMB Memorandum No. 06-02, "Improving Public Access to and Dissemination of Government Information and Using the Federal Enterprise Architecture Data Reference Model" (Dec. 16, 2005) (addressing electronic dissemination in particular).

⁵As was mentioned at the March 8 gathering of Chief FOIA Officers and accompanying agency FOIA personnel, the Department of Justice is updating its own FOIA Reference Guide in accordance with the executive order to serve as a model for other agencies.

⁶This improvement area is a good example of a circumstance in which an agency should consider not merely whether to establish a system or not, but also any need to undertake an

upgrade of a system that might already exist. The executive order's basic policy goal of "increase[d] efficiency," Exec. Order No. 13,392, Sec. 1(c), can be pursued in more than one way.

⁷The Department of Justice, by way of example, is taking further steps in this area with respect to the more than 1000 requests annually that are received for records of its leadership offices by the Office of Information and Privacy.

⁸This area, too, serves to illustrate the depth of agency analysis that is possible in considering improvements that can be made: Even an agency that already employs multi-track processing and upon review verifies that it is employing the optimal number of tracks still should go beyond that to carefully consider whether the contours of those tracks should be recalibrated. If so, even in a relatively minor respect, that is still an improvement worth making.

⁹For example, in-house training on the requester-oriented policies of the executive order for all agency FOIA personnel can go a long way toward meeting goals in this improvement area. See *also* footnote 26 below.

¹⁰See, e.g., *FOIA Update*, Vol. XV, No. 3, at 6 (advising that where multiple agencies are involved, consultations "should be accomplished most efficiently through a simultaneous (not sequential) consultation process"). Notably, this is an area in which an agency could establish an improvement goal based upon a series of escalating actions if cooperation is not obtained over the course of set time intervals.

¹¹This template element stems from section 3(c)(i) of Executive Order 13,392, which requires that an agency "summarize[] the results of the review [that it undertook] under section 3(a) of this order" in "a report" accompanying its plan. That requirement can most effectively be met with a narrative statement that elaborates upon the items listed in Parts II.B. and II.D. by describing what the agency found and concluded as a result of its review. See Exec. Order No. 13,392, Sec. 2(b)(iv). Essentially, an agency's report and its plan efficiently combine together through use of this template form.

¹²In line with the President's Management Agenda, as

spearheaded by OMB, agencies should "focus on results, . . . [on] a clear definition of success for every program and activity, . . . on the desired outcomes [the agency] hope[s] to achieve and on understanding what we are really trying to accomplish." For additional information, see http://www.whitehouse.gov/results/agenda/2005_results_report.pdf and www.results.gov. See also Exec. Order No. 13,392, Sec. 3(b)(iv) (specifying OMB's role in the process by which an agency "shall measure and evaluate [its] success in the implementation of [its] plan").

¹³In any case in which an improvement area is not agencywide in its scope, this should be indicated here, together with a clear specification of the particular scope of agency activity that is to be covered. For ease of reference, all information contained in agency improvement plans will be considered to be agencywide in its scope unless clearly indicated otherwise. See also Part IV, Q&A # 5, below (addressing the inclusion within agency plans of improvement goals that apply to just one agency component, program, or field installation).

¹⁴In discussing each such improvement area of their plans, agencies should be sure to include descriptions of where they presently stand in that regard and where they hope to be once their implementation efforts have been completed. See also Part IV, Q&A # 2, below (advising agencies to "set reasonably aggressive goals").

¹⁵In determining such appropriate measurements, agencies should be able to carefully determine which ones best fit their individual circumstances, which can vary greatly from one agency to another. See, e.g., Exec. Order No. 13,392, Sec. 3(a)(i) (calling for use of "numerical and statistical benchmarks where appropriate"). At the same time, all agencies should be mindful that their plans may be evaluated by others in this regard as well. See, e.g., *id.* at Sec. 4(a) (establishing procedure by which all aspects of final agency plans may be reviewed by Attorney General between June 14 and October 14, 2006).

¹⁶For purposes of this temporal breakdown of all plan areas -- i.e., simply to afford a picture of each agency's plans over time -- the term "completed" should be understood to mean "completed in its entirety." It is recognized that significant parts or stages of an improvement area's objectives might reach

completion at earlier times, and this certainly can be reported in an agency's annual FOIA report as discussed in Part III, so agencies should not be unduly influenced by this temporal breakdown in the establishment of their plan milestones. And there is no barrier to an agency including in its plan goals that necessarily extend beyond the year 2007. See Part IV, Q&A # 3, below. Generally speaking, agencies should strive for a sound balance of improvement goals across the time periods specified here, with strong priority placed on the first two, see Exec. Order No. 13,392, Sec. 3(b)(i), but without exclusion of the third, and they should aim for milestones that are reached no less frequently than quarterly.

¹⁷ See *FOIA Post*, "FOIA Counselor Q&A: Annual FOIA Reports" (posted 12/19/03); *FOIA Post*, "Annual Report Guidance for DHS-Related Agencies" (posted 8/8/03); *FOIA Post*, "Supplemental Guidance on Annual FOIA Reports" (posted 8/13/01); *FOIA Update*, Vol. XIX, No. 3, at 2; see also Exec. Order No. 13,392, Sec. 3(c)(ii) (speaking of supplemental annual report guidelines to be issued by Attorney General for purposes of executive order implementation); *id.* at Sec. 2(b)(iv) (same).

¹⁸ Agencies might with the passage of time identify a need to supplement or otherwise modify their plans subsequent to their initial preparation in June 2006, and they should consider making such refinements wherever appropriate. One basis for doing so could be the report that is to be issued by the Department of Justice in October 2006. As noted above, Executive Order 13,392 authorizes the Attorney General to consider all agency plans and to provide the President with "appropriate recommendations on administrative or other agency actions" for purposes of future governmentwide FOIA administration. Exec. Order No. 13,392, Sec. 4(a); see also Part IV, Q&A # 1, below (discussing the process by which agency plans may be refined). Beyond the year 2006, the executive order provides for two further Attorney General reports to the President, on June 1, 2007 and June 1, 2008, based upon the subsequent agency activity and plan implementation that is reflected in all agencies' subsequent annual FOIA reports in those years. See Exec. Order No. 13,392, Sec. 4(a).

¹⁹ The executive order specifically requires that any such deficiency be identified and explained, together with an outline

of remedial action, in this new section of an agency's annual FOIA report. See Exec. Order No. 13,392, Sec. 3(c)(iii)(A)-(C); see also Part IV, Q&A # 2, below.

²⁰This new guideline subsection is akin to existing Section VIII.E. of the Justice Department's annual report guidelines in that it provides an optional, open-ended opportunity for an agency to state any related information that it believes to be relevant to the subject matter.

²¹See Exec. Order No. 13,392, Sec. 2(b)(v) (explicitly requiring that such descriptions be included both in annual FOIA reports and in FOIA Reference Guides).

²²Agencies currently are required under existing Section XI to attach a copy of their regulations to their annual reports; agency improvement plans will be a second attachment, at least for the reports filed in 2007 and 2008.

²³It bears reiteration that all agencies should make certain that they meet this statutory deadline of February 1, 2007, without fail. See 5 U.S.C. § 552(e)(1) (establishing firm February 1 deadline for completion of annual FOIA reports); see also Exec. Order No. 13,392, Sec. 3(c)(ii) (building upon the existing statutory reporting timetable, as a firm deadline, for executive order reporting purposes).

²⁴Agencies should of course specify the exact time periods for which they are reporting, in both their FY 2006 and their FY 2007 annual reports.

²⁵See Exec. Order No. 13,392, Sec. 3(c)(i) (requiring submission "to the Attorney General and the OMB Director" by this date). These submissions can be made to the Attorney General by electronic transmission to OIP at the following e-mail address: Pamela.A.Maida@usdoj.gov. They can be made to the Director of OMB at FOIAreporting@omb.eop.gov.

²⁶As was mentioned at the governmentwide meeting held on March 8, OIP has established an executive order implementation team of Pamela Maida, Kenneth Hendricks, and Thomas Hitter for this purpose. See also footnote 1 above. Any questions for OMB can be posed to Daniel Costello, in the

Information Policy and Technology Branch of OMB's Office of Information and Regulatory Affairs, at (202) 395-7857. Additionally, the Justice Department is planning to hold a special training program for all FOIA Public Liaisons, which has been scheduled for July 11. At this program, it will be urging any agency that has not already done so to conduct an in-house training session on the policies of the executive order for all of its FOIA personnel. (*posted 4/27/06*)

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