

2012 Chief FOIA Officer Report

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Section I: Steps Taken to Apply the Presumption of Openness

The guiding principle underlying the President's FOIA Memorandum and the Attorney General's FOIA Guidelines is the presumption of openness.

Describe the steps your agency has taken to ensure that the presumption of openness is being applied to all decisions involving the FOIA. To do so, you should answer the questions listed below and then include any additional information you would like to describe how your agency is working to apply the presumption of openness.

1. Did your agency hold an agency FOIA conference, or otherwise conduct training during this reporting period?

Answer: No.

2. Did your FOIA professionals attend any FOIA training, such as that provided by the Department of Justice?

Answer: Yes. An NIGC FOIA Office professional attended one FOIA training during Fiscal Year (FY) 2011.

In his 2009 FOIA Guidelines, the Attorney General strongly encouraged agencies to make discretionary releases of information even when the information might be technically exempt from disclosure under FOIA. OIP encourages agencies to make such discretionary releases whenever there is no foreseeable harm from release.

3. Did your agency make any discretionary releases of otherwise exempt information?

Answer: No. The National Indian Gaming Commission (NIGC) has not made any discretionary releases at this time. In FY 2012, the NIGC received one FOIA request for information in which some of the responsive information would normally be withheld under FOIA exemptions. We anticipate a discretionary release of this information, as it will pose no harm to the agency if released.

The NIGC is charged by Congress with administering and implementing the Indian Gaming Regulatory Act (IGRA). Documents generated in the course of the NIGC's mission of regulating gaming on Indian lands routinely contain confidential and proprietary information, which is exempt under FOIA exemption (b)(4). IGRA mandates that all information coming within the purview of FOIA exemptions (b)(4) and (b)(7) must be kept confidential, with the only exception being that when such information indicates a violation of Federal, State, or Tribal law, it is provided to the appropriate law enforcement officials. 25 U.S.C. § 2716. Thus, when processing this type of

information, every effort has been made to release nonexempt material after consulting with the submitter of material.

Likewise, when requests for gaming-related contracts, such as development, lease, or consulting agreements, which by their nature contain trade secrets and commercial or financial information, are received, a review is made of similar documents, previously processed and released, to look for standard language commonly used to ensure that this information is not withheld in the current release.

Documents are routinely released in part whenever they can not be released in full. The FOIA Office received 76 requests during FY 2011. Exemption (b)(4) was applied in 14% of the releases in FY 2011 as compared to 27% of the releases in FY 2010.

Another area closely scrutinized is our application of exemption (b)(5). Requests for documents, working papers, and e-mails concerning agency decisions or legal advice or opinions usually originate within the Office of General Counsel (OGC). The vast majority of documents created by OGC are, for the most part, inter-agency or intra-agency memorandums or letters which would not be available by law to a party, other than an agency in litigation with the agency – meaning that the majority of the documents would be privileged in the civil litigation discovery context. Every effort is made to reduce redactions of information under exemption (b)(5). Exemption (b)(5) was applied in 6% of the releases in FY 2011 as compared to 8% of releases in FY 2010.

4. What exemptions would have covered the information that was released as a matter of discretion?

Answer: FOIA exemption (b)(5). It should be noted that although the information referenced above in Answer 3 has been flagged for a discretionary release, the entire FOIA request is still being reviewed by the FOIA Office.

5. Describe your agency's process to review records to determine whether discretionary releases are possible.

Answer: Although the NIGC receives a low volume of FOIA requests, the NIGC regularly reviews documents to ascertain whether any discretionary releases may be made. Because IGRA mandates that information qualifying as exempt under (b)(4) and (b)(7) must be kept confidential, those exemptions are not reviewed for discretionary releases; however, all other exemptions are reviewed for potential discretionary releases. Concerning requests for high profile material, in addition to the FOIA Office's review, the program office responsible for the records will review the proposed release and application of exemptions to determine whether the discretionary release of additional material is possible. In addition, regular meetings are attended by various agency personnel to discuss transparency and to identify records that are appropriate for posting on the agency's website.

6. Describe any other initiatives undertaken by your agency to ensure that the presumption of openness is being applied.

Answer: President Obama's FOIA Memorandum of January 21, 2009, and Attorney General Holder's FOIA Memorandum of March 19, 2009, are available in electronic format for access by all agency personnel on our internal shared drive. Further, as described above, the NIGC is regularly reviewing documents to ascertain whether any discretionary releases may be made. Moreover, the NIGC also posts new documents to its website not otherwise available except through FOIA requests. There were approximately 125 such postings in FY 2011 on the NIGC website, primarily because the agency is currently engaged in a comprehensive regulatory review and is consulting with Tribes during this process. To this end, the following documents are posted to the NIGC's website: all discussion drafts of regulatory changes; all proposed rules; all comments in response to discussion drafts and proposed rules; all final rules; and transcripts of every consultation. And, as noted previously, the agency has posted agency decisions on its website.

In Section V.B.(1) of your agency's Annual FOIA Report, entitled "Disposition of FOIA Requests – All Processed Requests" the first two columns list the "Number of Full Grants" and the "Number of Partial Grants/Partial Denials." Compare your agency's 2011 Annual FOIA Report with last year's Annual FOIA Report, and answer the following questions:

7. Did your agency have an increase in the number of responses where records were released in full?

Answer: Yes. There is a 2% increase in the number of requested documents released in full in FY 2011. Of the 65 requests processed during FY 2011, 19 of the requests, or 28%, were granted in full. Of the 72 requests processed during FY 2010, 19 of the requests, or 26%, were granted in full.

8. Did your agency have an increase in the number of responses where records were released in part?

Answer: No. There is an 11% decrease in the number of requested documents released in part for FY 2011. Of the 65 requests processed during FY 2011, 12 of the requests, or 18%, were released in part. Of the 72 requests processed during FY 2010, 23 of the requests, or 31%, were released in part.

Section II: Steps Taken to Ensure that Your Agency Has an Effective System in Place for Responding to Requests

As the Attorney General emphasized in his FOIA Guidelines, "[a]pplication of the proper disclosure standard is only one part of ensuring transparency. Open government requires not just a presumption of disclosure, but also an effective system for responding to FOIA requests."

This section should include a discussion of how your agency has addressed the key roles played by the broad spectrum of agency personnel who work with FOIA professionals in responding to requests, including, in particular, steps taken to ensure that FOIA professionals have sufficient IT support.

Describe here the steps your agency has taken to ensure that its system for responding to requests is effective and efficient. To do so, answer the questions below and then include any additional information that you would like to describe how your agency ensures that your FOIA system is efficient and effective.

1. Do FOIA professionals within your agency have sufficient IT support?

Answer: Yes. The NIGC's Information Technology (IT) Office supports our mission of openness to ensure that documents are posted on our website, as requested, and to create or update web pages as needed. IT also provides assistance for searching for responsive documents within our e-mail system and other tasks as needed. Thus, the IT department provides sufficient support to the FOIA Office.

2. Is there regular interaction between agency FOIA professionals and the Chief FOIA Officer?

Answer: Yes. The Assistant Records Manager reports to the Chief FOIA Officer, who is also the agency's General Counsel.

3. Do your FOIA professionals work with your agency's Open Government Team?

Answer: Yes. The FOIA Office, IT personnel, and Open Government personnel take part in regular meetings to discuss ways to improve openness and transparency within the NIGC.

4. Describe the steps your agency has taken to assess whether adequate staffing is being devoted to FOIA administration.

Answer: In 2011, the NIGC underwent a reorganization. Since the reorganization, regular meetings have been held to discuss the FOIA backlog, compliance, reevaluation and implementation of revised procedures, as well as assistance from legal staff.

5. Describe any other steps your agency has undertaken to ensure that your FOIA system operates efficiently and effectively.

Answer: When the agency receives a new request, a tracking number is assigned to it and the pertinent information is entered into an electronic spreadsheet. The request letter is then scanned and saved in an electronic format. An e-mail search request is sent to all offices where records could reasonably be located. Attention is focused on working with agency personnel to complete search requests within a timely manner. Once search requests are returned with responsive documents, an initial review of the responsive documents is performed to determine how long processing will take. If processing will exceed the 20 working-day time period from the date the letter was received, an

acknowledgement letter is sent to the requester explaining what needs to be done to complete processing of the request, along with an estimate of the additional time needed. The requester may modify his request at this time to shorten the processing time.

The NIGC has implemented a multi-tracking system for processing FOIA requests pursuant to 5 U.S.C. § 552(a)(6)(D) and 25 C.F.R. § 517.6(b). Requests within each track are processed on a “first-in, first-out” basis. Track 1 is for those requests that seek and receive expedited processing. Track 2 is for those requests that do not require lengthy consultations with other entities or do not involve voluminous records. Track 3 is for those requests that involve voluminous records or records requiring lengthy or numerous intra-agency consultations, such as records with confidential commercial information. *See* 25 C.F.R. § 517.5. Material that is exempted from release under FOIA is redacted and then copied for release to the requester. Releases of redacted documents are scanned and saved in an electronic format for easy retrieval for any future requests and possible posting on the NIGC web page.

Due to the mission of our agency, the majority of documents requested contain confidential financial and proprietary information. Submitter notices are required under both FOIA and the NIGC regulations for information deemed commercial and for financial information that is confidential or privileged. Prior to sending out submitter notices, documents are reviewed for information that qualifies for withholding, information is highlighted, and copies are sent to the submitters explaining why the information is categorized as withheld. If the submitters believe more information needs to be withheld, or the documents need to be withheld in full, they are required to provide written justification within 10 days. Submitter response letters are reviewed to see if any additional information has been requested to be withheld and whether that information qualifies for withholding under any FOIA exemption. However, the FOIA Office continues to work on accelerating the time period needed to complete the submitter notice requirement.

To that end, the FOIA Office works telephonically with submitters to discuss questionable suggested withholdings to reduce the additional time needed for review. A final determination letter is sent to the submitters letting them know the final agency action and allowing them an opportunity to seek judicial relief prior to the NIGC release of any documents. Once the submitter notices are completed, a final release to the requester is made.

As a general matter, the FOIA Office routinely reviews the FOIA tracking log to ensure that cases within each track are progressing in accordance with handling FOIA requests in a timely manner.

While the NIGC acknowledges that there is always room for improvement and will implement changes as identified, the current system and staffing the FOIA Office has in place for handling and responding to requests is adequate for the low volume of requests received.

Section III: Steps Taken to Increase Proactive Disclosures

Both the President and Attorney General focused on the need for agencies to work proactively to post information online without waiting for individual requests to be received.

Describe here the steps your agency has taken both to increase the amount of material that is available on your agency website, and the usability of such information, including providing examples of proactive disclosures that have been made during this past reporting period (i.e., from March 2011 to March 2012). In doing so, answer the questions listed below and describe any additional steps taken by your agency to make and improve proactive disclosures of information.

1. Has your agency added new material to your website since last year?

Answer: Yes. There were approximately 125 new documents added to the website in FY 2011.

2. Provide examples of the records, datasets, videos, etc., that have been posted this past year.

Answer: The NIGC has posted all discussion drafts of potential changes to its regulations; proposed rules; comments in response to discussion drafts and proposed rules; final rules; and transcripts of every consultation. In addition, documents not available except through FOIA requests were posted to the website, including redacted versions of approved management contracts and legal opinions regarding contracts submitted for the Office of General Counsel's review.

3. Describe the system your agency uses to routinely identify records that are appropriate for posting.

Answer: The NIGC has responded to the need and demand of posting agency documents onto our website. The NIGC continues to update this material on the agency's website as it is issued. As a consequence, new material is added to the NIGC's website on a frequent basis. We currently have the following material available for viewing and downloading at www.nigc.gov:

- * Compacts that gaming tribes have in place with their states;
- * Bulletins issued by the NIGC;
- * Enforcement actions issued by the NIGC for violations relating to IGRA and its implementing regulations;
- * Commission final agency decisions;
- * Advisory legal opinions issued by the NIGC's Office of General Counsel addressing whether certain games fall within the IGRA definitions of Class II or Class III games;
- * Discussion drafts of potential changes to the NIGC regulations;
- * Proposed rules;

- * Comments in response to discussion drafts and proposed rules;
- * Final rules;
- * Transcripts of every consultation;
- * Current tribal gaming ordinances that were approved by the NIGC Chair;
- * Indian lands advisory legal opinions issued by the NIGC's Office of General Counsel and the Department of the Interior's Solicitor's Office on whether a tribe may game on certain lands;
- * A list of all gaming tribes and their gaming facility locations;
- * Redacted versions of the management contracts approved by the NIGC Chair; and
- * Redacted versions of the legal opinion letters issued by the NIGC's Office of General Counsel in response to requests by tribes and other parties for review of contracts and agreements and legal opinions as to whether such contracts or agreements constitute a management contract or violate the rule requiring tribes to have the sole proprietary interest in its gaming activity.

The NIGC also posts numerous documents and information related to the agency itself, such as organizational charts, Commission structure, laws and regulations, Commission testimony and press releases. In addition, the NIGC posts all letters and comments received from tribes and others in response to tribal consultations regarding regulatory priorities; discussion documents for potential regulatory changes; notices of proposed rules; final rules; all written comments received regarding these actions; and all transcriptions of oral comments made regarding these actions. These materials would not otherwise be available except through FOIA requests. Also, the NIGC's records retention and disposition schedule is available on our website.

Further, the NIGC routinely identifies records that are appropriate for posting by reviewing processed FOIA requests for frequently requested records. In turn, these records are posted to the agency website.

4. Beyond posting new material, is your agency taking steps to make the information more useful to the public, especially to the community of individuals who regularly access your agency's website, such as soliciting feedback on the content and presentation of the posted material, improving search capabilities, providing explanatory material, etc.?

Answer: Yes. The NIGC took steps to enhance the search capability of all PDF documents and to improve the website's indexing and search functions.

5. Describe any other steps taken to increase proactive disclosures at your agency.

Answer: Please see the response to Answer 3 of this Section.

Section IV: Steps Taken to Greater Utilize Technology

A key component of the President's FOIA Memorandum was the direction to "use modern technology to inform citizens about what is known and done by their Government." In addition to using the internet to make proactive disclosures, agencies should also be exploring ways to utilize technology in responding to requests. In 2010 and 2011, agencies reported widespread use of technology in handling FOIA requests. For 2012, the questions have been further refined and now also address different, more innovative aspects of technology use.

Electronic receipt of FOIA requests:

1. Can FOIA requests be made electronically to your agency?

Answer: Yes. The FOIA Office does receive requests electronically, through its info@nigc.gov e-mail address, which is located on the NIGC website or by e-mailing agency personnel or the FOIA Office directly. When FOIA requests are directed to agency personnel, those requests are forwarded to the FOIA Office for processing.

2. If your agency processes requests on a decentralized basis, do all components of your agency receive requests electronically?

Answer: Yes.

Online tracking of FOIA requests:

3. Can a FOIA requester track the status of his/her request electronically?

Answer: No. At this time, the NIGC does not have this feature as part of its FOIA process. As explained above, we are a small agency with a low volume of FOIA requests per fiscal year.

4. If not, is your agency taking steps to establish this capability?

Answer: Yes. We are in the developmental stages of an electronic tracking system to our website and are diligently working to finish implementation of the electronic tracking system.

Use of technology to facilitate processing of requests:

5. Beyond using technology to redact documents, is your agency taking steps to utilize more advanced technology to facilitate overall FOIA efficiency, such as improving record search capabilities, utilizing document-sharing platforms for consultations and referrals, or employing software that can sort and de-duplicate documents?

Answer: No. The current procedures in place are adequate for the low volume of requests received by the FOIA Office. For example, only 65 requests were processed in FY 2011.

6. If so, describe the technological improvements being made.

Answer: Not applicable. Please see Answer 5.

Section V: Steps Taken to Improve Timeliness in Responding to Requests and Reduce Backlogs

The President and the Attorney General have emphasized the importance of improving timeliness in responding to requests. This section addresses both time limits and backlog reduction. Backlog reduction is measured both in terms of numbers of backlogged requests or appeals and by looking at whether agencies closed their ten oldest requests and appeals. *For the figures required in this Section, please use those contained in the specified sections of your agency's 2011 Annual FOIA Report.*

1. Section VII.A of your agency's Annual FOIA Report, entitled "FOIA Requests – Response Time for All Processed Requests," includes figures that show your agency's average response times for processed requests. For agencies utilizing a multi-track system to process requests, there is a category for "simple" requests, which are those requests that are placed in the agency's fastest (non-expedited) track, based on the low volume and/or simplicity of the records requested. If your agency does not utilize a separate track for processing simple requests, answer the question below using the figure provided in your report for your non-expedited requests.

a. Does your agency utilize a separate track for simple requests?

Answer: Yes. The NIGC has implemented the use of a separate track for "simple" requests that do not require lengthy consultations within the NIGC and with other entities or for requests that do not involve voluminous records.

b. If so, for your agency overall, for FY 2011, was the average number of days to process simple requests 20 working days or fewer?

Answer: No. The average number of days to process simple requests in FY 2011 was 30 working days.

c. If your agency does not track simple requests separately, was the average number of days to process non-expedited requests 20 working days or fewer?

Answer: This is not applicable. Please see Answer (1)b.

2. Sections XII.D.(2) and XII.E.(2) of your agency's Annual FOIA Report, entitled "Comparison of Numbers of Requests/Appeals from Previous and Current Annual Report

– Backlogged Requests/Appeals,” show the numbers of any backlog of pending requests or pending appeals from Fiscal Year 2011 as compared to Fiscal Year 2010. You should refer to those numbers when completing this section of your Chief FOIA Officer Report. In addition, Section VII.E, entitled “Pending Requests – Ten Oldest Pending Requests,” and Section VI.C.(5), entitled “Ten Oldest Pending Administrative Appeals,” from both Fiscal Year 2010 and Fiscal Year 2011 should be used for this section.

a. If your agency had a backlog of requests at the close of Fiscal Year 2011, did that backlog decrease as compared with Fiscal Year 2010?

Answer: No. The number of backlogged requests increased slightly, by 10, at the close of FY 2011, as compared to four requests backlogged in FY 2010.

b. If your agency had a backlog of administrative appeals in Fiscal Year 2011, did that backlog decrease as compared to Fiscal Year 2010?

Answer: The NIGC did not have any backlogged administrative appeals in FY 2011.

c. In FY 2011, did your agency close the ten oldest requests that were pending as of the end of Fiscal Year 2010?

Answer: Yes. The NIGC had a backlog of four requests from FY 2010 that were processed in FY 2011.

d. In Fiscal Year 2011, did your agency close the ten oldest administrative appeals that were pending as of the end of Fiscal Year 2010?

Answer: The NIGC did not have any administrative appeals pending at the end of Fiscal Year 2010.

If you answered “no” to any of the above questions, describe why that has occurred. In doing so, answer the following questions and then include any additional explanation.

Request Backlog:

a. Was the lack of a reduction in the request backlog a result of an increase in the number of incoming requests?

Answer: No. During FY 2011, 76 FOIA requests were received. In FY 2010, 70 requests were received. Therefore, the number of requests increased marginally.

b. Was the lack of a reduction in the requests backlog caused by a loss of staff?

Answer: No.

c. Was the lack of a reduction in the request backlog caused by an increase in the complexity of the requests received?

Answer: Yes. The increase in the backlog of pending requests is the result of the complexity of many of the requests received, along with the often time-consuming process of submitting documents to the submitters for their review and input for purposes of determining the exempt commercial and financial information under FOIA exemption (b)(4).

d. What other causes, if any, contributed to the lack of a decrease in the request backlog?

Answer: None.

Administrative Appeal Backlog:

a. Was the lack of a reduction in the backlog of administrative appeals a result of an increase in the number of incoming appeals?

Answer: This question is not applicable. The NIGC did not have any backlogged administrative appeals in FY 2011.

b. Was the lack of a reduction in the appeal backlog caused by a loss of staff?

Answer: This question is not applicable. Please see Answer a.

c. Was the lack of a reduction in the appeal backlog caused by an increase in the complexity of the appeals received?

Answer: This question is not applicable. Please see Answer a.

d. What other causes, if any, contributed to the lack of a decrease in the appeal backlog?

Answer: This question is not applicable. Please see Answer a.

e. All agencies should strive to both reduce any existing backlogs or requests and appeals and to improve their timeliness in responding to requests and appeals. Describe the steps your agency is taking to make improvements in those areas. In doing so, answer the following questions and then also include any other steps being taken to reduce backlogs and to improve timeliness.

1. Does your agency routinely set goals and monitor the progress of your FOIA caseload?

Answer: Yes. We routinely review the FOIA tracking log to ensure cases within each track are progressing in accordance with FOIA and the NIGC FOIA regulations. Periodic updates of the current backlog are provided for review and discussion to facilitate the processing of the backlogged requests.

2. Has your agency increased its FOIA staffing?

Answer: No.

3. Has your agency made IT improvements to increase timeliness?

Answer: Yes. With assistance from IT, the NIGC has taken steps to enhance the search capability of all PDF documents and to improve the website's indexing and search functions. IT also routinely assists the FOIA Office by providing access to potentially responsive electronic documents through e-mail or by posting documents to a central location on the network. In addition, IT posts documents to the website in accordance with the Attorney General's transparency and open government requirements.

4. If your agency receives consultations from other agencies, has your agency taken steps to improve the efficiency of the handling of such consultations, such as utilizing IT to share the documents, or establishing guidelines or agreements with other agencies on the handling of particular information to speed up or eliminate the need for consultations?

Answer: When the NIGC receives consultations from other agencies, we generally communicate by phone and/or e-mail. At this time, the NIGC does not have any additional established guidelines or agreements in place with other agencies.

Use of FOIA's Law Enforcement "Exclusions"

In order to increase transparency regarding the use of FOIA's statutory law enforcement exclusions, which authorize agencies under certain exceptional circumstances to "treat the records as not subject to the requirements of [the FOIA]," 5 U.S.C. § 552(c)(1), (2), (3), please answer the following questions:

1. Did your agency invoke a statutory exclusion during FY 2011?

Answer: The NIGC did not invoke any statutory exclusions during FY 2011.

2. If so, what is the total number of times exclusions were invoked?

Answer: Not applicable.

Spotlight on Success

Out of all the activities undertaken by your agency since March 2011 to increase transparency and improve FOIA administration, describe here one success story that you would like to highlight as emblematic of your agency's efforts.

In keeping with President Obama's FOIA Memorandum of January 21, 2009, and Attorney General Holder's FOIA Memorandum of March 19, 2009, once a management contract has received approval, the NIGC FOIA Office immediately starts the submitter notice process because it is generally lengthy. This enables the NIGC to get the document processed, redacted, and posted to the agency website in a timely fashion. This proactive action has minimized the number of requests we receive regarding this subject. The NIGC recently received a call from a requester who frequents the agency website and wanted a copy of a management contract that was recently approved. Since we were proactive with our approach to getting the document processed prior to his call, we were able to inform the requester that the contract he was requesting would be on the agency's website in a few weeks. He then decided to wait until the contract was put on the NIGC's website instead of submitting a formal FOIA request.