

FOIA Basics

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FOIA Exemptions Policy

Under Obama Administration policy guidelines, agencies must:

- Apply a presumption of disclosure when reviewing records for release
- Review responsive records from the perspective of, "What can I release?"
- Not withhold information simply because it technically falls within an exemption



Foreseeable Harm Standard

Obama Administration Policy Guidelines (continued)

Foreseeable Harm Standard



The “foreseeable harm standard” must be applied when reviewing material subject to discretionary exemptions in accordance with guidance issued by the Attorney General and DOI. To justify withholdings under such exemptions, you must be able to identify a harm that will occur to an interest protected by an exemption, e.g., harm to personal privacy, law enforcement interests, the deliberative process, etc. (If information does not fall under any of the exemptions, there is no basis for withholding.)

Decisions regarding “foreseeable harm” must be made on a case-by-case basis. Bureaus/offices must document the administrative FOIA request file to reflect consideration of the interests that could be implicated by disclosure, including the reasons why discretionary release is appropriate or inappropriate (i.e., a foreseeable harm has been identified). If release is inappropriate, a statement of the specific harm(s) identified must be included in the file.

Discretionary Releases

Obama Administration Policy Guidelines (continued)



Discretionary Releases:

- When reviewing documents for discretionary release, focus on whether there is foreseeable harm in disclosing the information and consider the age of the information as well as its sensitivity.
- When full disclosure is not possible, strive to make a partial disclosure.
- Only information protected by an exemption or statute should be withheld.
- Consult with your Designated FOIA Attorney on all discretionary releases.

Release What Can be Released

Reasonable Segregation

Wherever possible, segregate and release any meaningful, non-exempt portions of records that contain both exempt and non-exempt information. Agencies must indicate the amount of information deleted and the exemption under which each deletion is made in the released versions of redacted records or in the response letter, unless it would harm an interest protected by the exemption.



Agencies must also indicate on the record the amount of information deleted, and the exemption under which each deletion is made, unless it would harm an interest protected by the exemption.

DEPARTMENT OF THE INTERIOR Office of the Chief Information Officer

Overview President Obama's and Attorney General Holder's FOIA Memoranda



**BIA Senior Managers
July 21, 2010**

President Obama's Memorandum

- Issued on January 21, 2009, his first day in office
- FOIA plays a vital role in our democracy by providing accountability through transparency
- FOIA should be administered with a clear presumption of disclosure
- "In the face of doubt, openness prevails."



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FOIA – An Information Disclosure Statute

❖ Information should not be withheld merely because:

- Officials might be embarrassed,
- Errors and failures might be revealed, or
- Because of speculative or abstract fears.

❖ Nondisclosure should never be based on effort to protect interests of Government officials at expense of those they serve



Attorney General Holder's Memorandum

- Issued March 19, 2009
- New era of open Government
- New presumption of openness
- Requires effective system for responding to requests
- Change in mind set: Ask "what can be released" rather than "what can be withheld"



Attorney General Holder's Memorandum (Continued)

- An agency should not withhold information simply because it may do so legally, i.e., because the records may be protected by a FOIA exemption
- Discretionary disclosures of information encouraged
- Partial disclosures should be made whenever possible if full disclosure is not feasible

Attorney General Holder's Memorandum (Continued)

- DOJ will only defend agency withholdings if:
 - (1) agency reasonably foresees that disclosure would harm an interest protected by any of the nine statutory exemptions, or
 - (2) disclosure is prohibited by law.
- Similar to Clinton/Reno FOIA policy— “foreseeable harm standard”

Discretionary Releases

- Such releases possible with FOIA exemptions 2, 5, and 9
- Most applicable to exemption 5 which protects inter and intra-agency memoranda or letters (pre-decisional, deliberative-process material)
- Records protected by exemptions covering national security, personal privacy, confidential commercial and financial information and information protected by statute, not generally subject to discretionary releases

FOIA is Everyone's Responsibility

- ❖ Each agency accountable for its administration of the FOIA
- ❖ All employees responsible for FOIA, not just FOIA Officers
- ❖ Key roles played by Chief FOIA Officer and FOIA professionals
- ❖ Eliminate unnecessary bureaucratic hurdles to access
- ❖ Make timely responses to requests a priority
- ❖ Reduce backlogs
- ❖ Work cooperatively with requesters
- ❖ Communicate often with requesters



Chief FOIA Officer Responsibilities

- Review and monitor agency's FOIA administration
- Report to DOJ annually on steps taken to improve FOIA operations and facilitate disclosure (new requirement)
- Recommend to Secretary changes and resources needed to improve FOIA implementation



New Era of Open & Transparent Government

“Agencies should use modern technology to inform citizens about what is known and done by their Government.”

Proactive Disclosures:

- Reduce the need for FOIA requests and may help reduce backlogs
- Apply to all agency programs and offices, not just FOIA

New Era of Open & Transparent Government

FOIA Reform (continued)

- **Proactively and systematically disclose information of interest to the public**
- **Post information online in advance of any FOIA request**
- **Make information about agency operations and decisions available online**
- **Design/redesign systems to facilitate retrieval of records/information the public wants or may want in future (integrate search & retrieval functions into Design & Development phases)**

New Era of Open & Transparent Government (continued)

- **Consider easy search/redact/release features - public inquiries are expanding**
- **Maintain and organize paper and electronic records in a way that makes them easy to find (practice good records management)**



DOJ Sites: Best Practices in Agency Chief FOIA Officer Reports

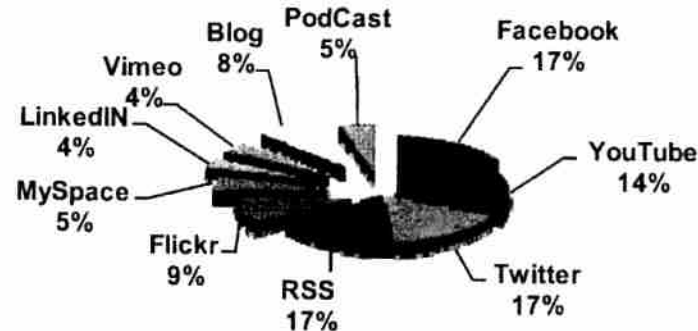


- Systematically post standard record types online, e.g., schedules, contracts, etc.
- Improve IT to aid retrieval from agency systems & online search capability/website navigation
- Use IT to process requests (e.g., redaction software)
- Increase FOIA or Web staff (make a FOIA full-time duty)
- Improve/increase communications with requesters
- Work with non-FOIA personnel so requests receive proper priority
- Review all pending FOIAs for those that can be resolved

DOJ Cites 'Best Practices' in Agency Chief FOIA Officer Reports

- Use social media to communicate with/engage the public

Types of Social Media Agencies Are Using



DOJ Cites 'Best Practices' in Agency Chief FOIA Officer Reports

- Use all means available to reduce backlogs:
 - Check with longstanding requesters (especially attorneys) to see if still interested
 - Process largest requests then provide releasable material on CD in response to smaller requests
 - Temporarily detail staff to work on backlog
 - Establish special teams - 10 oldest, litigation, big requests
 - Monitor processes to identify roadblocks & streamline
 - Complete 10 oldest requests/appeals each year
 - Form agreements with agencies to reduce consultations
 - Use contractors to assist processing



DOJ Cites Best Practices in Agency Chief FOIA Officer Reports

How Did Agencies Take Steps to Improve Timeliness?

What Steps Did Agencies Take to Reduce Backlogs or Improve Timeliness?



- Increased Staffing
- Increased Resources
- IT Improvements
- Training
- Monitored Personnel or Shifted Resources
- Involved Chief FOIA Officer

DOJ Cites 'Best Practices' in Agency Chief FOIA Officer Reports (continued)



- Meetings for web content managers, communications officers & FOIA personnel to facilitate postings
- Create online capability for requesters to obtain status information
- Link together component websites
- Post FOIA logs/lists of records released under the FOIA
- Increase awareness of FOIA and non-FOIA personnel of their roles in achieving transparency

SUMMARY



1. Promote accessibility, accountability, and openness
2. Demonstrate transparency

SUMMARY

3. Work cooperatively with requesters and respond promptly to requests

4. Reduce/eliminate backlogs and 10 oldest FOIA requests and appeals

- Discretionary disclosures
- Partial disclosures if full disclosure not possible

SUMMARY

The goal is to increase
transparency —

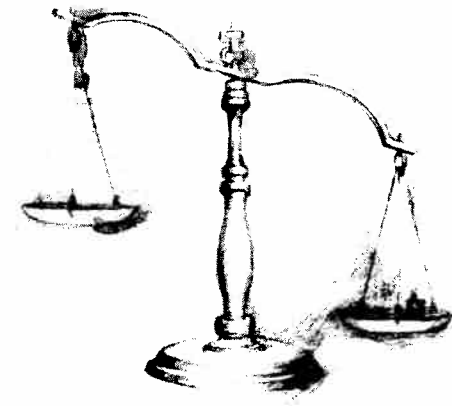
to the public and to the

TRANSPARENCY

FREEDOM OF INFORMATION ACT OVERVIEW



**Alexandra Mallus
Departmental FOIA Officer
DOI FOIA Training Conference
November 2, 2010**



Freedom of Information Act

FOIA, enacted in 1966 (5 U.S.C. 552)

Right to access agency records, enforceable in court

Records disclosed unless protected by one of nine exemptions

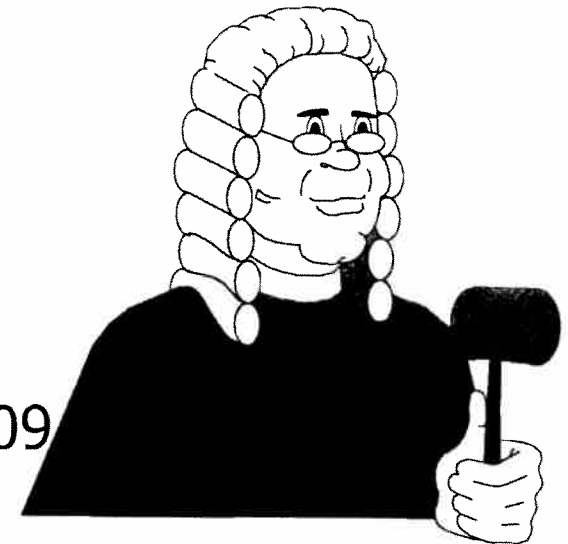
Ensure an informed citizenry

Prevent secret law

Amended substantially: 1974, 1986,
1996 (E-FOIA), and 2007

Executive Order 13392 (2005)

Obama/Holder FOIA Policy Guidance, 2009



FOIA:

An Information Disclosure Statute

Information should not be withheld merely because:

Officials might be embarrassed,

Errors and failures might be revealed, or

Because of speculative or abstract fears



Nondisclosure should never be based on effort to protect interests of Government officials at expense of those they serve.

Attorney General Holder's Memorandum

Issued March 19, 2009

New presumption of openness

Requires effective system for responding to requests

Change in mindset: Ask "what can be released" rather than "what can be withheld"



Attorney General Holder's Memorandum (Continued)

An agency should not withhold information simply because it may do so legally, i.e., because the records may be protected by a FOIA exemption

Discretionary disclosures of information encouraged

Partial disclosures should be made whenever possible if full disclosure is not feasible. DOJ will only defend agency withholdings if:

- Agency reasonably foresees that disclosure would harm an interest protected by 1 of 9 statutory exemptions, or

- Disclosure is prohibited by law

Similar to Clinton/Reno FOIA policy—"foreseeable harm standard"

References

The FOIA (5 U.S.C. 552)
Electronic FOIA Amendments of 1996 (P.L. No. 104-231)
Executive Order 13392
OPEN Government Act of 2007
President Obama's FOIA & Transparency Memos, January 2009
Attorney General Holder's FOIA Memo, March 2009
DOI FOIA Regulations (43 CFR Part 2, Subparts A thru E)
DOI FOIA Handbook (383 DM 15)
OMB Fee Guidelines (52 Fed. Reg. 10012)
References are available at <http://www.doi.gov/foia/policy.html>.

FOIA EXEMPTIONS

Alexandra Mallus
DOI FOIA Officer



DOI FOIA Training Conference
November 2, 2010

“My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government.”

President Barack Obama



NEW ERA IN OPEN GOVERNMENT

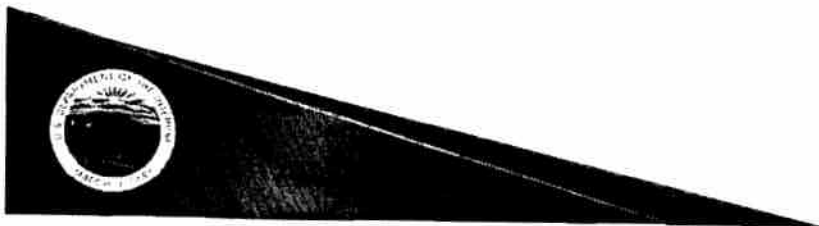
NEW ERA OPEN OF GOVERNMENT

**Congress included
nine exemptions
(and three exclusions)
in the FOIA in order
to protect certain
information from
disclosure.**



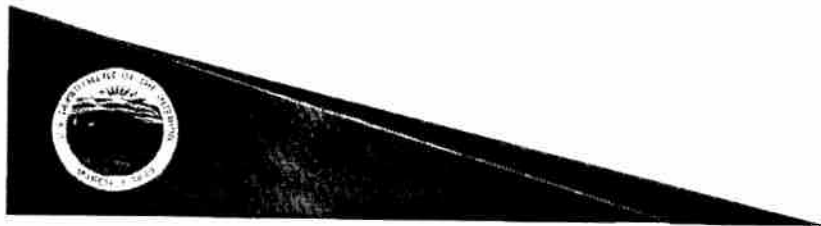
NEW ERA OPEN OF GOVERNMENT

When applying these exemptions, agencies must consider whether they reasonably foresee that disclosure would harm an interest protected by one of the exemptions.



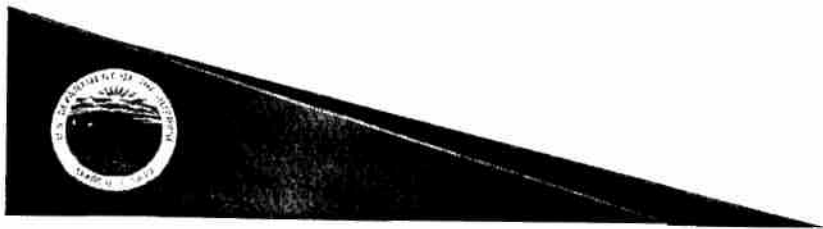
NEW ERA OPEN OF GOVERNMENT

**In the absence of such harm,
agencies are encouraged to make
a disclosure of the information in
keeping with the President's call
for greater transparency.**



NEW ERA OPEN OF GOVERNMENT

Generally, when only Government interests are at stake, the agency has broader discretion to release the information.



NEW ERA OPEN OF GOVERNMENT

The following Exemptions are ripe for discretionary disclosures:

- ❖ Exemption 5 (to be discussed later in greater depth)**
- ❖ Exemption 2 (“low 2” should generally no longer be used by your agency)**



EXEMPTION 5

Records covered by Exemption 5 are often good candidates for discretionary release under the “foreseeable harm” standard.



EXEMPTION 5

A few things to keep in mind with the deliberative process privilege:

- ❖ **The rationale for a final decision is not withholdable.**
- ❖ **Facts are not protected unless inextricably intertwined with deliberative material.**
- ❖ **Even deliberative records are not protected if the final decision incorporates them by reference.**
- ❖ **This privilege is ripe for discretionary disclosures under the Obama/Holder memos.**



EXEMPTION 5

Discretionary Disclosure : Attorney General Holder's memorandum mandates that we consider whether otherwise withholdable material can be released as a matter of discretion.

Exemption 5 is the primary Exemption for which this discretion can be broadly applied.



EXEMPTION 5

Discretionary disclosure factors:

- ❖ Age of the document
- ❖ Sensitivity of the document (note: “embarrassing to the agency” should not be a reason for failing to make a discretionary disclosure)
- ❖ Nature of the decision
- ❖ Status of the decision

In general, your mindset should be “what can I release” rather than “what can I withhold.”

