OFFICE OF SCIENCE AND TECHNOLOGY POLICY

FREEDOM OF INFORMATION ACT

REFERENCE GUIDE

January 2012

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Introduction

President Obama stated: "In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government." This Reference Guide will help the public understand how the FOIA process works—and how to obtain records from the office of Science and Technology Policy (OSTP)—so that the public can be better informed about the operations and activities of the federal Government.

FOIA applies to records of the Executive Branch of the federal government and does not provide access to records held by Congress, the federal courts, advisory offices of the President, state or local government agencies, or private businesses or individuals.

Mission of the Office of Science and Technology Policy

The Office of Science and Technology Policy's mission is set out in the National Science and Technology Policy, Organization, and Priorities Act of 1976 (Public Law 94-282, OSTP Organic Statute). It calls for OSTP to serve as a source of scientific and technological analysis and judgment for the President with respect to major policies, plans, and programs of the Federal Government.

The Act authorizes OSTP to:

- Advise the President and others within the Executive Office of the President on the impacts of science and technology on domestic and international affairs;
- Lead an interagency effort to develop and implement sound science and technology policies and budgets;
- Work with the private sector to ensure Federal investments in science and technology contribute to economic prosperity, environmental quality, and national security;
- Build strong partnerships among Federal, State, and local governments, other countries, and the scientific community;
- Evaluate the scale, quality, and effectiveness of the Federal effort in science and technology.

OSTP's Senate-confirmed Director also serves as Assistant to the President for Science and Technology. In this role, the Director co-chairs the President's Committee of Advisors on Science and Technology (PCAST) and supports the President's National Science and Technology Council (NSTC). A Senate-confirmed Associate Director leads each of OSTP's four divisions covering the areas of Environment, National Security and International Affairs, Science, and Technology.

Making a FOIA Request

The Executive Office of the President (EOP) entities subject to the FOIA are:

- Council on Environmental Quality
- Office of Management and Budget
- Office of National Drug Control Policy
- Office of Science and Technology Policy
- United States Trade Representative

The EOP entities exempt from the provisions of the FOIA are:

- Office of Administration
- White House Office
- Office of the Vice President
- Council of Economic Advisers
- National Security Council
- Office of Policy Development
- President's Foreign Intelligence Advisory Board

To make a FOIA Request of OSTP, please send your request to:
Office of Science and Technology Policy
Attn: FOIA Officer
1650 Pennsylvania Ave, NW
Washington, DC 20504

Phone: (202) 456-6125/Fax: (202) 395-1224 or e-mail your request to ostpfoia@ostp.eop.gov

The words FOIA REQUEST should be clearly marked on both the letter and the envelope or e-mail subject line. Because of security measures at the Eisenhower Executive Office Building (EEOB), and the New Executive Office Building (NEOB), requests made in person should be delivered to the NEOB, 725 17th Street, NW, Room G-1, Washington, DC 20503. Upon receipt of initial FOIA request, OSTP has 20 working days to respond. To facilitate this process, please describe the specific records requested in enough detail so that they can be located with a reasonable amount of effort. Requests for answers posed as questions are not covered under the FOIA. The request must be for records. Records must exist at the time the request is submitted. If the request requires an extension, OSTP will provide written notice explaining the reason for the delay and when a determination will be made. All proper FOIA requests will be responded to. If OSTP does not have records pertaining to the request, OSTP will send a letter so indicating within 20 working days of receiving the request.

Please state your willingness and ability to pay applicable fees or provide a justification to support a fee waiver.

Information Systems

OSTP uses several "information systems"[1] in order to maintain records. These enterprise information systems are maintained by the Office of Administration (OA), a separate component of the Executive Office of the President. These systems are:

- Discoverer: a contracting system,
- PRISM: a contracting system,
- EPIC: a security system,
- Citibank Web Interface: a Citibank payment system,
- Clearwell: an electronic discovery system, and
- OMEGA: an electronic discovery system made available to OSTP for specific cases by the Department of Justice.

Definitions of FOIA/PA Request

Freedom of Information Act/Privacy Act request. A FOIA request is generally a request for access to records concerning a third party, an organization, or a particular topic of interest. A Privacy Act request is a request for records concerning oneself; such requests are also treated as FOIA requests. (All requests for access to records, regardless of which law is cited by the requester, are included in this report.)

- Initial Request. A request to a Federal agency for access to records under the Freedom of Information Act.
- Appeal. A request to a Federal agency asking that it review at a higher administrative level a full denial or partial denial of access to records under the Freedom of Information Act, or any other FOIA determination such as a matter pertaining to fees.
- Processed Request or Appeal. Request or appeal for which an agency has taken a final action on the request or the appeal in all respects.
- Expedited Processing. An agency will process a FOIA request on an expedited basis when a request has shown an exceptional need or urgency for the records which warrants prioritization of his or her request over other requests that were made earlier.
- Simple Request. A FOIA request that an agency, using multi-track processing, places in its fastest (non-expedited) track based on the volume and/or simplicity of records requested.

[1] See 5 U.S.C. 552 (g)(1)

- Complex Request. A FOIA request that an agency, using multi-track processing, places in a slower track based on the volume and/or complexity of records requested.
- Grant. An agency decision to disclose all records in full in response to a FOIA request.
- Partial Grant. An agency decision to disclose a record in part in response to a FOIA request, deleting information determined to be exempt under one or more of the FOIA's exemptions; or a decision to disclose some records in their entireties, but to withhold others in whole or in part.
- Denial. An agency decision not to release any part of a record or records in response to a FOIA request because all the information in the requested records is determined by the agency to be exempt under one or more of the FOIA's exemptions, or for some procedural reason (because no record is located in response to a FOIA request).
- Time Limits. The time period in the Freedom of Information Act for an agency to respond to a FOIA request (ordinarily 20 working days from proper receipt of a "perfected" FOIA request).
- "Perfected" Request. A FOIA request for records which adequately describes the records sought, which has been received the FOIA office of the agency or agency component in possession of the records, and for which there is no remaining question about the payment of applicable fees.
- Exemption 3 Statute. A separate Federal statute prohibiting the disclosure of a certain type of information and authorizing its withholding under FOIA subsection (b)(3).
- Median Number. The middle, not average, number. For example, of 3, 7, and 14, the median number is 7.
- Average Number. The number obtained by dividing the sum of a group of numbers by the quantity of numbers in the group. For example, of 3, 7 and 14, the average number is 8.

The IMPAC Credit Card Holders Listing:
George Cravaritis
Office of Science and Technology Policy
Old Executive Office Building, Rm. 431
Washington, DC 20502
(202) 456-6004

Administration FOIA Policy

President Barack Obama, January 20, 2009

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Freedom of Information Act

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sunlight is said to be the best of disinfectants." In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.

I direct the Attorney General to issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the *Federal Register*. In doing so, the Attorney General should review FOIA reports produced by the agencies under Executive Order 13392

of December 14, 2005. I also direct the Director of the Office of Management and Budget to update guidance to the agencies to increase and improve information dissemination to the public, including through the use of new technologies, and to publish such guidance in the *Federal Register*.

This memorandum does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The Director of the Office of Management and Budget is hereby authorized and directed to publish this memorandum in the *Federal Register*.

Attorney General Eric Holder, March 19, 2009

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: THE ATTORNEY GENERAL

SUBJECT: The Freedom of Information Act (FOIA)

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, reflects our nation's fundamental commitment to open government. This memorandum is meant to underscore that commitment and to ensure that it is realized in practice.

A Presumption of Openness

As President Obama instructed in his January 21 FOIA Memorandum, "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails." This presumption has two important implications.

First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.

Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure. Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure.

At the same time, the disclosure obligation under the FOIA is not absolute. The Act provides exemptions to protect, for example, national security, personal privacy, privileged records, and law enforcement interests. But as the President stated in his memorandum, "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

Pursuant to the President's directive that I issue new FOIA guidelines, I hereby rescind the Attorney General's FOIA Memorandum of October 12, 2001, which stated that the Department of Justice would defend decisions to withhold records "unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."

Instead, the Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law. With regard to litigation pending on the date of the issuance of this memorandum, this guidance should be taken into account and applied if practicable when, in the judgment of the Department of Justice lawyers handling the matter and the relevant agency defendants, there is a substantial likelihood that application of the guidance would result in a material disclosure of additional information.

FOIA Is Everyone's Responsibility

Application 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. Each agency must be fully accountable for its administration of the FOIA.

I would like to emphasize that responsibility for effective FOIA administration belongs to all of us—it is not merely a task assigned to an agency's FOIA staff. We all must do our part to ensure open government. In recent reports to the Attorney General, agencies have noted that competing agency priorities and insufficient technological support have hindered their ability to implement fully the FOIA Improvement Plans that they prepared pursuant to Executive Order 13392 of December 14, 2005. To improve FOIA performance, agencies must address the key roles played by a broad spectrum of agency personnel who work with agency FOIA professionals in responding to requests.

Improving FOIA performance requires the active participation of agency Chief FOIA Officers. Each agency is required by law to designate a senior official at the Assistant Secretary' level or its equivalent who has direct responsibility for ensuring that the agency efficiently and appropriately complies with the FOIA. That official must recommend adjustments to agency practices, personnel, and funding as may be necessary.

Equally important, of course, are the FOIA professionals in the agency who directly interact with FOIA requesters and are responsible for the day-to-day implementation of the Act. I ask that you transmit this memorandum to all such personnel. Those professionals deserve the full support of the agency's Chief FOIA Officer to ensure that they have the tools they need to respond promptly and efficiently to FOIA requests. FOIA professionals should be mindful of their obligation to work "in a spirit of cooperation" with FOIA requesters, as President Obama has directed. Unnecessary bureaucratic hurdles have no place in the "new era of open Government" that the President has proclaimed.

Working Proactively and Promptly

Open government requires agencies to work proactively and respond to requests promptly. The President's memorandum instructs agencies to "use modem technology to inform citizens what is known and done by their Government." Accordingly, agencies should readily and systematically post information online in advance of any public request. Providing more information online reduces the need for individualized requests and may help reduce existing backlogs. When information not previously disclosed is requested, agencies should make it a priority to respond in a timely manner. Timely disclosure of information is an essential component of transparency. Long delays should not be viewed as an inevitable and insurmountable consequence of high demand.

In that regard, I would like to remind you of a new requirement that went into effect on December 31, 2008, pursuant to Section 7 of the OPEN Government Act of 2007, Pub. L. No. 110-175. For all requests filed on or after that date, agencies must assign an individualized tracking number to requests that will take longer than ten days to process, and provide that tracking number to the requester. In addition, agencies must establish a telephone line or Internet service that requesters can use to inquire about the status of their requests using the request's assigned tracking number, including the date on which the agency received the request and an estimated date on which the agency will complete action on the request. Further information on these requirements is available on the Department of Justice's website at www.usdoj.gov/oip/foiapost/2008foiapost30.htm.

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Agency Chief FOIA Officers should review all aspects of their agencies' FOIA administration, with particular focus on the concerns highlighted in this memorandum, and report to the Department of Justice each year on the steps that have been taken to improve FOIA operations and facilitate information disclosure at their agencies. The Department of Justice's Office of Information Policy (OIP) will offer specific guidance on the content and timing of such reports.

I encourage agencies to take advantage of Department of Justice FOIA resources. OIP will provide training and additional guidance on implementing these guidelines. In addition, agencies should feel free to consult with OIP when making difficult FOIA decisions. With regard to specific FOIA litigation, agencies should consult with the relevant Civil Division, Tax Division, or U.S. Attorney's Office lawyer assigned to the case.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees, agents, or any other person.

Guidance from the Office of Information Policy, Department of Justice, April 17, 2009

Creating a "New Era of Open Government"

On his first full day in office, January 21, 2009, President Obama issued a memorandum to the heads of all departments and agencies on the Freedom of Information Act (FOIA). The President directed that FOIA "should be administered with a clear presumption: In the face of doubt, openness prevails." Moreover, the President instructed agencies that information should not be withheld merely because "public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

Agencies were directed to respond to requests "promptly and in a spirit of cooperation." The President also called on agencies to "adopt a presumption in favor of disclosure" and to apply that presumption "to all decisions involving [the] FOIA." This presumption of disclosure includes taking "affirmative steps to make information public," and utilizing "modern technology to inform citizens about what is known and done by their Government."

The President directed the Attorney General to issue FOIA Guidelines for the heads of executive departments and agencies "reaffirming the commitment to accountability and transparency." On March 19, 2009, during Sunshine Week, Attorney General Eric Holder issued those Guidelines. The Attorney General highlighted that the FOIA "reflects our nation's fundamental commitment to open government" and that his Guidelines are "meant to underscore that commitment and to ensure that it is realized in practice."

The FOIA Guidelines stress that the FOIA is to be administered with the presumption of openness called for by the President. This presumption means that information should not be withheld "simply because [an agency] may do so legally." Moreover, the Attorney General has directed that whenever full disclosure of a record is not possible, agencies "must consider whether [they] can make partial disclosure." The Attorney General also "strongly encourage[s] agencies to make discretionary disclosures of information."

While recognizing that the "disclosure obligation under the FOIA is not absolute," and that the FOIA contains exemptions to protect, for example, national security, personal privacy, privileged records, and law enforcement interests, the Guidelines stress that the President has directed agencies not to withhold information merely to prevent embarrassment, or because "errors and failures might be revealed, or because of speculative or abstract fears."

Significantly, the Attorney General rescinded the October 12, 2001 Attorney General Memorandum on the FOIA and established a new standard for defending agency decisions to withhold information. When a FOIA request is denied, agencies will now be defended "only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."

Establishing an Effective System to Respond to Requests

In addition to establishing these principles applicable to the presumption of disclosure, the Attorney General also comprehensively addressed in his Guidelines a range of principles applicable to establishing an effective system for improving transparency. In doing so he emphasized that "[e]ach agency must be fully accountable for its administration of the FOIA."

The Guidelines emphasize that all agency employees are responsible for the FOIA, not just those who interact directly with FOIA requesters. In the past, agencies have identified common concerns that hinder their ability to provide information to the public, including competing agency priorities that pull FOIA personnel and resources away from FOIA duties, and the lack of sufficient technological support for FOIA activities. As a result, the Guidelines stress that in order "[t]o improve FOIA performance, agencies must address the key roles played by a broad spectrum of agency personnel who work with agency FOIA professionals in responding to requests."

The Attorney General highlighted the key roles played by both agency Chief FOIA Officers and FOIA professionals in each agency. Chief FOIA Officers "must recommend adjustments to agency practices, personnel, and funding as may be necessary." The Attorney General also specifically recognized the important role played by the FOIA professionals in each agency who directly work with FOIA requesters. He stressed that these professionals "deserve the full support of the agency's Chief FOIA Officer to ensure that they have the tools they need to respond promptly and efficiently to FOIA requests." Those FOIA professionals, in turn, were reminded that the President had directed agencies to work "in a spirit of cooperation" with FOIA requesters and to be mindful that "[u]nnecessary bureaucratic hurdles have no place in the 'new era of open Government' that the President has proclaimed."

The Guidelines emphasize the need for agencies to work proactively to post information online in advance of FOIA requests. When responding to requests, agencies are directed "to make it a priority to respond in a timely manner." Finally, Chief FOIA Officers are asked to review "all aspects of their agencies' FOIA administration, with particular focus on the concerns highlighted in" the Guidelines, and to report each year to the Department of Justice "on the steps that have been taken to improve FOIA operations and facilitate information disclosure at their agencies."

Net Impact

The combined impact of the President's FOIA Memorandum and the Attorney General's FOIA Guidelines is a sea change in the way transparency is viewed across the government. As a result of these directives there are now:

* New approaches to responding to requests and to working with requesters.

* New, more limited standards for defending agencies when they deny a FOIA request.

* New requirements to maximize the use of technology to disclose information.

* New requirements to post information online affirmatively, in advance of FOIA requests.

* New focus on the broad array of agency personnel whose actions impact the FOIA.

* New accountability requirements, particularly for agency Chief FOIA Officers who must report to the Department of Justice each year.

To implement these new Guidelines agencies must review all aspects of their approach to transparency and incorporate these principles into all decisions they make involving the FOIA to ensure that the presumption of disclosure is fully realized in practice.

Starting Point: Altering the Mind Set to Make the Presumption of Openness a Reality

The President has asked agencies to renew their commitment to the principles embodied in the FOIA in order to "usher in a new era of open Government." There are five key points agencies should keep in mind to realize this goal.

Agency personnel must alter their mind set in keeping with the President's vision. This is the first and in many ways the most important step. To achieve a "new era of open Government" agency personnel must think about the FOIA differently. They must focus on the principles set out in the President's Memorandum and the Attorney General's Guidelines. Most importantly, agency personnel should view all FOIA decisions through the prism of openness.

The key frame of reference for this new mind set is the purpose behind the FOIA. The statute is designed to open agency activity to the light of day. As the Supreme Court has declared: "FOIA is often explained as a means for citizens to know what 'their Government is up to.'" NARA v. Favish, 541 U.S. 157, 171 (2004) (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989). The Court elaborated that "[t]his phrase should not be dismissed as a convenient formalism." Id. at 171-72. Rather, "[i]t defines a structural necessity in a real democracy." Id. at 172. The President's FOIA Memoranda directly links transparency with accountability which, in turn, is a requirement of a democracy. The President recognized the FOIA as "the most prominent expression of a profound national commitment to ensuring open Government." Agency personnel, therefore, should keep the purpose of the FOIA -- ensuring an open Government -- foremost in their mind.

Second, agencies should be mindful not to review records with the sole purpose of determining what can be protected under what exemption. Instead, records should be reviewed in light of the presumption of openness with a view toward determining what can be disclosed, rather than what can be withheld. For every request, for every record reviewed, agencies should be asking "Can this be released?" rather that asking "How can this be withheld?"

Third, in keeping with the Attorney General's directive, agencies "should not withhold information simply because [they] may do so legally." Information should not automatically be

withheld just because an exemption technically or legally might apply. Indeed, if agency personnel find themselves struggling to fit something into an exemption, they should be aware of the President's directive that "[i]n the face of doubt, openness prevails."

Fourth, when full disclosure of a record is not possible, agencies should consider making a partial disclosure. The Attorney General reminded agencies that they "should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information." Under the Guidelines, that review takes on an added element. In addition to reviewing records to see if portions are reasonably segregable as non-exempt, agencies should also be reviewing records to see if portions that are technically exempt can be released as a matter of discretion. Whether a release involves boxes of material, or only a few pages, it is important for agencies to remember that the increased transparency resulting from even a partial disclosure of records is worthwhile.

Finally, agencies must keep in mind the President's directive that records cannot be withheld merely to protect public officials from embarrassment, or "because errors and failures might be revealed, or because of speculative or abstract fears." Rather, agencies should only withhold records, or portions of records, when they reasonably foresee that disclosure would harm an interest protected by one of the exemptions or when disclosure is prohibited by law.

Applying the "Foreseeable Harm" Standard

After taking all of these openness principles into account, there still will be records and portions of records for which protection will remain entirely appropriate. As the Attorney General recognized in his Guidelines, "the disclosure obligation under the FOIA is not absolute." Congress included exemptions from mandatory disclosure to protect against different harms, such as, for example, harm to national security, harm to personal privacy, and harm to law enforcement interests.

Under the Attorney General's Guidelines, before withholding a record, the agency must reasonably foresee that disclosure would harm an interest protected by one of the exemptions. Thus, FOIA professionals should examine individual records with an eye toward determining whether there is foreseeable harm from release of that particular record, or portion thereof. Each record should be reviewed by agencies for its content, and the actual impact of disclosure for that particular record, rather than simply looking at the type of document or the type of file the record is located in.

Thus, for example, a requested record might be a draft, or a memorandum containing a recommendation. Such records might be properly withheld under Exemption 5, but that should not be the end of the review. Rather, the content of that particular draft and that particular memorandum should be reviewed and a determination made as to whether the agency reasonably foresees that disclosing that particular document, given its age, content, and

character, would harm an interest protected by Exemption 5. In making these determinations, agencies should keep in mind that mere "speculative or abstract fears" are not a sufficient basis for withholding. Instead, the agency must reasonably foresee that disclosure would cause harm. Moreover, agencies must be mindful of the President's directive that in the face of doubt, openness prevails.

Discretionary Release

The determination of whether an agency reasonably foresees harm from release of a particular record, or record portion, goes hand-in-hand with the determination of whether to make a discretionary release of information. Under the Attorney General's Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged. Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5.

For records covered by certain other exemptions, however, discretionary disclosures are not possible because the information is required to be withheld by some other legal authority. Specifically, records protected by the exemptions covering national security, commercial and financial information, personal privacy, and information protected by statute, are generally not subject to discretionary releases. Thus, for material covered by Exemption 1, which protects properly classified information, if an agency determines that the information is properly classified, no discretionary disclosure is appropriate.

Similarly, if material is required to be withheld by a withholding statute encompassed under Exemption 3, the protection afforded by that statute should be applied and a discretionary release is not appropriate. Agencies should be certain, however, that the statute being invoked meets the requirements of Exemption 3 and, importantly, that the documents being withheld fall within the scope of the statute.

If material falls within Exemption 4, it is also generally protected by the Trade Secrets Act, a statute that prohibits release of commercial and financial information unless the release is otherwise authorized by law. Here, again, a discretionary disclosure of such material cannot be made if doing so is in violation of the Trade Secrets Act. Before withholding, agencies should be certain that the many requirements for invoking Exemption 4 are met in the first instance.

For information falling within Exemptions 6 and 7(C), if the information is also protected by the Privacy Act of 1974, it is not possible to make a discretionary release, as the Privacy Act contains a prohibition on disclosure of information not "required" to be released under the FOIA. Agencies should be mindful of the need to conduct a balancing under these exemptions in the first instance and also should consider whether it is possible, given the context of the

request, to protect the identities of the individuals mentioned in the documents while releasing the rest, in order to both protect privacy and to further the public's interest in openness.

When reviewing documents to determine whether Exemptions 1, 3, 4, 6, and 7(C) apply, agencies should carefully review all portions of the documents to determine whether they fall within the scope of the claimed exemption. In addition, agencies should strive to reasonably segregate any non-exempt information from such documents in order to make a partial disclosure if possible.

Factors to Consider in Making a Discretionary Release

Documents protected by the remaining Exemptions, Exemptions 2, 5, 7, 8, and 9, can all be subjects of discretionary release. Agency FOIA professionals must use their judgment in making such determinations for each document, but they should be guided by the "fundamental commitment to open government" that the Attorney General directed should be "realized in practice." Fundamentally, in reviewing a record the agency must first ensure that any portion being considered for withholding fits all requirements of the exemption being considered. If the exemption applies, the agency should then take the second step of determining whether to make a discretionary release of the record or portion of the record. For all records, the age of the document and the sensitivity of its content are universal factors that need to be evaluated in making a decision whether to make a discretionary release.

For records covered by Exemption 2, agencies should handle "Low 2" differently from "High 2". Information covered by "Low 2" is, by definition, trivial to begin with, thus there would be no reasonably foreseeable harm from release, and discretionary release should be the general rule. "High 2," by contrast, is premised on a finding of harm. Before applying High 2 to a record, agencies should ensure that they are not withholding based on "speculative or abstract fears," but instead are withholding because they reasonably foresee that disclosure would harm an interest protected by Exemption 2.

Similarly, for the subparts of Exemption 7 other than 7(C), agencies should ensure that before invoking the exemption they are not basing the withholding on "speculative or abstract fears," but instead are withholding because they reasonably foresee that disclosure would harm an interest protected by one of the subparts of Exemption 7. As with Exemption 2, there are certainly opportunities to make discretionary disclosures for records covered by Exemption 7. For example, agencies should consider whether records which reference a law enforcement technique or procedure are now outdated, or no longer sensitive, or not specific enough to cause harm. In such cases, a discretionary release can be made. Similarly, due to the breadth of protection afforded information provided by a confidential source, records covered by Exemption 7(D) also hold potential for discretionary disclosures. Some agencies already release much source-provided information when processing records of historical significance. Agencies

can review their practices in this area to look for additional cases where greater information can be released as a matter of discretion.

There is no doubt that records protected by Exemption 5 hold the greatest promise for increased discretionary release under the Attorney General's Guidelines. Such releases will be fully consistent with the purpose of the FOIA to make available to the public records which reflect the operations and activities of the government. Records covered by the deliberative process privilege in particular have significant release potential. In addition to the age of the record and the sensitivity of its content, the nature of the decision at issue, the status of the decision, and the personnel involved, are all factors that should be analyzed in determining whether a discretionary release is appropriate. Documents protected by other Exemption 5 privileges can also be subject to discretionary disclosures.

Thus, in response to requests for records, agencies should view each request with a presumption of openness. They should strive to maximize the amount of records released and aim to release portions of records when full release is not possible. Agencies should not withhold records merely because an exemption legally applies. For any document or portion of a document for which a discretionary release is possible, agencies should consider making such a release and should withhold only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption.

Achieving Transparency in New Ways

Responding to FOIA requests with a presumption of openness is only one element of the President's and Attorney General's vision for creating a "new era of open Government." In addition to responding to FOIA requests, agencies must look for other ways to increase transparency.

Specifically, the President directed agencies to "take affirmative steps to make information public." Moreover, the President stressed that agencies "should not wait for specific requests from the public." Instead, agencies "should use modern technology to inform citizens about what is known and done by their Government." This is a key area where agencies should strive for significant improvement.

Agencies should implement systems and establish procedures whereby records of interest to the public are routinely identified and systematically posted. This needs to be an on-going practice within each agency. To assist agencies in applying Federal agency dissemination policies for public information FOIA professionals should consult the dissemination principles outlined in Section 8 of OMB's Circular A-130. See http://www.whitehouse.gov/omb/assets/omb/circulars/a130/a130trans4.pdf

FOIA professionals themselves can work with officials in their agency to seek out records for purposes of posting. Additionally, agencies can set up procedures in key offices where other

officials routinely identify in advance, or as records are finalized, those that are good candidates for posting. The more information that is made available on agency websites, the greater the potential to reduce the number of individual requests made for records. More importantly, agencies must recognize that proactively disclosing information about the operations and activities of their agency is an integral part of achieving transparency.

Working Cooperatively with Requesters and Disclosing Records Promptly

The President also directed agencies to "act promptly" and make timely disclosures of information. Significantly, the Attorney General declared that "[l]ong delays should not be viewed as an inevitable and insurmountable consequence of high demand."

These directives require all agencies, but particularly those with a large volume of requests or a large backlog, to examine their entire approach to providing information to requesters in order to be able to respond more promptly. Certainly, increasing the amount of information made available proactively by the agency has the potential to reduce backlogs and delays. Chief FOIA Officers should be involved in reviewing their agency's FOIA operations to find areas where delays can be reduced. FOIA professionals in turn, must utilize their agency Chief FOIA Officer and keep him or her fully informed regarding the particular challenges they are facing so that the Chief FOIA Officer can make appropriate adjustments within the agency.

The President also directed agencies to act in a "spirit of cooperation" with requesters. As the Attorney General stressed: "Unnecessary bureaucratic hurdles have no place in the 'new era of open Government' that the President has proclaimed." Agencies should keep these principles in mind when interacting with requesters and work to ensure that the process of requesting information is easy. One way that interaction with requesters has improved is through the use of tracking numbers for requests that will take longer than ten days to process. The FOIA now requires that such tracking numbers be provided to requesters and that a telephone line or internet service be established so that a requester can check the status of his or her request. This is just one example of how agencies can simplify and improve their interaction with FOIA requesters.

Accountability

The Attorney General emphasized that each agency must be fully accountable for its FOIA operation. He also stressed that Chief FOIA Officers must be active participants in their agency's FOIA operations. Chief FOIA Officers are required by law to be senior level officials at the Assistant Secretary level or its equivalent. These officials are required to "recommend adjustments to agency practices, personnel, and funding as may be necessary" to improve FOIA administration.

As mentioned above, competing agency priorities and insufficient technology support were commonly cited by agencies as concerns that hindered their ability to improve their FOIA operations. These are key areas where the Chief FOIA Officer's assistance can be vital. When, for example, FOIA personnel are pulled away from FOIA to work on other matters, or when IT support personnel are not available to FOIA professionals, these actions negatively impact FOIA administration. This is where the agency Chief FOIA Officer plays a critical role in prioritizing demands and allocating resources so that FOIA operations are not negatively impacted. As the Attorney General emphasized, FOIA professionals "deserve the full support of the agency's Chief FOIA Officer to ensure that they have the tools they need to respond promptly and efficiently to FOIA requests."

Chief FOIA Officers will now be required to report to the Department of Justice each year on the steps they have taken to improve transparency in their agency. This will ensure that the principles established by the Attorney General's Guidelines continue to remain vital year after year.

Summary

The President and Attorney General have established sweeping new changes in the way transparency is to be viewed and administered across the Government. These principles require agencies to employ a comprehensive approach to transparency. This approach can be summarized in ten key elements that agencies must take into account in order to ensure that the fundamental commitment to open Government is realized.

1. The presumption of disclosure applies to all decisions involving the FOIA; agencies should keep that presumption foremost in their mind.

2. When responding to a request, agencies should approach their review of documents by asking, "What can I release?"

3. Records should not be withheld merely because they fall within an exemption.

4. Agencies should review each document with a focus on whether there is foreseeable harm from disclosure of that particular record.

5. Determinations of foreseeable harm are made on a case-by-case basis, but universal factors to consider are the age of the document and the sensitivity of its contents.

6. Agencies should make discretionary releases of records when possible.

7. When full disclosure of a record is not possible, agencies should strive to make a partial disclosure.

8. Separate and apart from the handling of individual FOIA requests, agencies should anticipate interest in records, should set up systems for identifying and retrieving them, and should post them on their website. Information about agency operations and decisions should be available to the public online. This is a key area where agencies can make real improvements in increasing transparency.

9. Agencies should work cooperatively with requesters and respond promptly.

10. FOIA professionals should work with their agency Chief FOIA Officers who, in turn, will be reporting to the Department of Justice each year so that each agency is fully accountable for its administration of the FOIA.

Achieving the "new era of open Government" that the President has proclaimed will require the commitment of all agency personnel. It will be an on-going process, as agencies continually strive to integrate the new openness principles into their FOIA operations and seek out ways to disclose more information proactively. By renewing their commitment to transparency, all agencies will be a part of this "new era of open Government."