

For: FSA Offices

Attorney General's FOIA Guidelines

Approved by: Deputy Administrator, Management



1 Overview

A Background

On March 19, 2009, the Attorney General issued comprehensive new guidelines to the heads of executive departments and agencies governing FOIA. These guidelines reaffirm the government's "commitment to accountability and transparency" as directed by the President in the FOIA memorandum issued January 21, 2009, available at http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act/.

The Attorney General's FOIA Guidelines, provided in Exhibit 1 and available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>, are discussed in depth at DOJ's web site at <http://www.usdoj.gov/oip/foiapost/2009foiapost8.htm>. The guidelines address the following:

- presumption of openness that the President stated in the FOIA memorandum
- necessity for agencies to create and maintain an effective system for responding to requests
- necessity for agencies to make information available proactively to achieve the "new era of open Government" that the President envisions.

B Purpose

This notice provides guidance for:

- understanding the Attorney General's guidelines
- implementing the Attorney General's guidelines.

<p>Disposal Date</p> <p>May 1, 2010</p>	<p>Distribution</p> <p>All FSA Offices; State Offices relay to County Offices</p>
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1 Overview (Continued)

C Exhibits

The following exhibits are provided:

- Attorney General's FOIA Guidelines (Exhibit 1)
- FOIA exemptions (Exhibit 2)
- examples of foreseeable harm statements (Exhibit 3).

2 Understanding the Attorney General's FOIA Guidelines

A Discretionary Releases of Records

The Attorney General's FOIA Guidelines:

- strongly encourage agencies to make discretionary releases of records
- direct agencies **not** to withhold records simply because a FOIA exemption may technically apply.

Note: Whenever a full disclosure of a record is **not** possible, agencies are directed to consider whether a partial disclosure can be made.

B New Standards for Defending Agencies

The Attorney General's FOIA Guidelines establish a new standard for defending agencies. A denial of a FOIA request or appeal will now be defended by DOJ only if either of the following applies:

- disclosure of responsive records is prohibited by law
- the agency reasonably foresees that disclosure of responsive records would harm an interest protected by 1 of the 9 statutory exemptions.

C Posting Information Online in Advance of Public Requests

The Attorney General's FOIA Guidelines stress that agencies should readily and systematically post information online and otherwise make it available to the public in advance of any request from the public filed under FOIA. Providing more information online:

- reduces the need for individualized requests
- may help reduce existing backlogs.

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3 Implementing the Attorney General's FOIA Guidelines

A Processing FOIA Requests

FSA offices processing FOIA requests must:

- apply the presumption of openness to processing FOIA requests, asking “what can be released?” rather than “what can be protected?” when reviewing responsive records
- make discretionary releases of records responsive to FOIA requests whenever discretionary releases are both legally **possible** and contextually **appropriate** (Exhibit 2)

Notes: Information protected by exemptions covering governmental interests can be the subject of discretionary releases (FOIA exemptions 2, 5, and 7) when it is determined, on a case-by-case basis, that doing so is appropriate.

Information protected by other legal authorities covering national security, personal privacy, commercial and financial information, and information protected by statute are **not** generally subject to discretionary releases (FOIA exemptions 1, 3, 4, 6, 8, and 9). Discretionary releases of these records must **not** be made.

For information protected by FOIA exemptions 2, 5, and 7, the sensitivity of the information and the age of the information are factors that must be weighed in the decision to make a discretionary release. In general, the less sensitive the information and the older the information, the more likely it is that making a discretionary release might be appropriate.

- make partial disclosures of responsive records, if at all possible, when portions of responsive records are covered by 1 or more FOIA exemptions, and making a discretionary release is neither legally possible nor contextually appropriate, rather than withholding the records in full
- withhold records, in response to FOIA requests, in full or in part, only when either of the following applies:
 - disclosure is prohibited by law

Example: Section 1619 of the Food, Conservation, and Energy Act of 2008 prohibits disclosure of certain information found in FSA records.

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3 Implementing the Attorney General's FOIA Guidelines (Continued)

A Processing FOIA Requests (Continued)

- FSA reasonably foresees that disclosure would harm an interest protected by 1 of the 9 statutory exemptions

Note: The harm foreseen must:

- be reasonably able to be anticipated and must **not** be based on abstract or speculative fears
- **not** be based on fears that FSA officials or employees might be embarrassed, or that errors and failures might be revealed
- be based on the interest the exemption is designed to protect, such as:
 - exemption 6 protects the personal privacy of the individual to whom the information pertains
 - exemption 5 (deliberative process privilege) protects the agency's decisionmaking process.
- handle records protected by exemption 2 (low 2), covering matters internal to the government of a relatively trivial nature, differently from records protected by exemption 2 (high 2), covering matters of a more substantial nature, of which the disclosure would risk circumvention of a legal requirement

Notes: Disclosure of records protected by exemption 2 (low 2) would rarely, if ever, result in foreseeable harm. Examples of low 2 information include the following:

- file or tracking numbers
- document routing information
- internal telephone and facsimile numbers.

Disclosure of records protected by exemption 2 (high 2) could frequently be expected to cause harm to interests the exemption is designed to protect, such as:

- disclosure of computer access codes
- instructions or programs that might be used to gain wrongful access to electronic systems that store FSA information
- disclosure of government credit card numbers that might be used to commit fraud by charging the personal expenses of private individuals to them.

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3 Implementing the Attorney General's FOIA Guidelines (Continued)

A Processing FOIA Requests (Continued)

- document the decision to withhold records under exemption 5 (deliberative process privilege) by compiling a **harm statement**, for the administrative file, when FSA determines that disclosure of a record protected by exemption 5 (deliberative process privilege) would result in reasonably foreseeable harm

Note: See Exhibit 3 for examples of foreseeable harm statements for exemption 5 (deliberative process privilege). An exemption 5 (deliberative process privilege) harm statement must:

- identify the harm foreseen to FSA's decisionmaking process, with reference to how disclosure of each record or portion of a record withheld under this exemption and privilege can reasonably be foreseen to threaten 1 or more of the following interests that the deliberative process privilege was designed to protect:
 - FSA's interest in preserving open, frank discussions on matters of policy between subordinates and superiors
 - FSA's interest in preventing premature disclosure of proposed policies before they are finally adopted
 - FSA's interest in preventing the public confusion that might result from disclosure of reasons and rationales that were **not** ultimately the grounds for FSA's decisions
- be in writing, dated and signed by the authorized FSA official, in the case of State and County Office FOIA responses, to sign FOIA response letters, and in the case of National FOIA Offices, be dated and signed by either of the following:
 - the FSA official authorized to sign FOIA response letters for the office
 - a program official authorized to speak for the program whose records are being withheld under this exemption
- be provided to ALS in the event of an administrative appeal or litigation involving the withholding of specific FSA records under exemption 5 (deliberative process privilege).

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3 Implementing the Attorney General's FOIA Guidelines (Continued)

A Processing FOIA Requests (Continued)

- consult and obtain the **written concurrence** of the FSA FOIA Officer before making discretionary releases of records protected by exemptions 2 (high 2), 7A, 7B, 7C, 7D, 7E, and 7F, and the following 3 privileges under exemption 5:
 - attorney client privilege
 - attorney work product privilege
 - government commercial information privilege.

B All FSA Offices

All FSA offices must:

- anticipate public interest in FSA records, and work proactively to post those records on FSA's public web site whenever appropriate
- support the efforts of offices and employees tasked with the responsibility of responding to FOIA requests and appeals, when FOIA requests or appeals for records maintained by their programs and/or offices are received by:
 - responding to requests for searches of their program files in a timely manner
 - recommending discretionary releases of program records whenever legally possible and contextually appropriate
 - providing signed and dated harm statements consistent with the requirements of this notice whenever recommending that program records be withheld under exemption 5 (deliberative process privilege)
- remember, at all times, that "in the face of doubt, openness prevails" under FOIA.

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4 Action

A State Office Action

State Offices shall:

- comply with the guidance in this notice
- communicate the guidance in this notice to their respective County Offices, providing training in its implementation, if appropriate
- ensure that County Offices comply with the guidance in this notice.

B County Office Action

County Offices shall comply with the guidance in this notice.

C National FOIA Office Action

National FOIA Offices shall comply with the guidance in this notice.

D Contacts

For questions about this notice, contact Sue Ellen Sloca, FSA FOIA Officer, at either of the following:

- e-mail at sueellen.sloca@wdc.usda.gov
- telephone at 202-720-1598.

Attorney General's FOIA Guidelines



Office of the Attorney General

Washington, D.C. 20530

March 19, 2009

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM:  THE ATTORNEY GENERALSUBJECT: 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

Attorney General's FOIA Guidelines (Continued)

Memorandum for Heads of Executive Departments and Agencies
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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.

Attorney General's FOIA Guidelines (Continued)

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Working Proactively and Promptly

Open government requires agencies to work proactively and respond to requests promptly. The President's memorandum instructs agencies to "use modern 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.

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.

FOIA Exemptions (5 U.S.C. 552(b)(1)-(9))

Exemption	Description	Discretionary Release
1	Classified national defense and foreign relations information.	No
2	Internal agency rules and practices. (Low 2) (High 2)	Yes Only with concurrence
3	Information that is prohibited from disclosure by another Federal law.	No
4	Trade secrets and other confidential business information.	No
5	Inter-agency or intra-agency communications that are protected by legal privileges. (deliberative process privilege) (attorney client privilege) (attorney work product privilege) (government commercial information privilege)	Yes Only with concurrence Only with concurrence Only with concurrence
6	Information involving matters of personal privacy.	No
7	Records or information compiled for law enforcement purposes, to the extent that the production of those records: <ul style="list-style-type: none"> • could reasonably be expected to interfere with enforcement proceedings (7A) • would deprive a person of a right to a fair trial or an impartial adjudication (7B) • could reasonably be expected to constitute an unwarranted invasion of personal privacy (7C) • could reasonably be expected to disclose the identity of a confidential source (7D) • would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions (7E) • could reasonably be expected to endanger the life or physical safety of any individual (7F). 	Only with concurrence Only with concurrence Only with concurrence Only with concurrence Only with concurrence
8	Information relating to the supervision of financial institutions.	No
9	Geological information on wells.	No

Examples of Foreseeable Harm Statements

A Document 1

An e-mail message from a program specialist to his or her supervisor, containing his or her personal observations with respect to a course of action proposed by his or her supervisor and discussed at the last staff meeting, with personal recommendations as to what modifications might be made to the proposed course of action to render it more efficient to implement, nationwide.

Statement of Foreseeable Harm: “The document contains recommendations for action proposed by a subordinate employee to his supervisor. The recommendations proposed were not accepted, and the proposed course of action was ultimately implemented by FSA as originally proposed by the supervisor. Release of this document could reasonably be foreseen to have a “chilling effect” on the willingness of employees in subordinate positions within FSA to offer suggestions to improve the efficiency and efficacy of agency programs, and to make individual recommendations with respect to proposed agency decisions. Signed _____, dated _____.”

B Document 2

Portions of the minutes of a COC meeting in Executive Session, deliberating over a request for _____ by a producer, which was tabled until the next COC meeting, after a vigorous exchange of opinions that lead COC to conclude that it needed more information on various aspects of the issue before a final decision could be made and a formal response to the producer issued.

Statement of Foreseeable Harm: “The document contains discussions of possible courses of action, with rationales proposed for each, with respect to an issue on which the County Office Committee has not yet issued a final decision. Release of this document could reasonably be foreseen to stifle the free flow of discussion and inhibit candor within the County Office Committee, when deliberating in Executive Session. It could also be reasonably foreseen to confuse the public when a final decision is made, by revealing rationales for alternative courses of action not adopted by FSA. Release of these competing rationales could be reasonably foreseen to jeopardize the public’s understanding of FSA’s final decision when it is actually issued. Signed _____, dated _____.”

C Guidance on Drafting Foreseeable Harm Statements

While each document or portion of a document protected by exemption 5 (deliberative process privilege) must be addressed in a foreseeable harm statement, a single statement may cover multiple documents or multiple portions of documents, provided that the harm foreseen, and the reasons why the harm is foreseen, are the same for each. While foreseeable harm statements do not need to be lengthy, they should be reasonably specific, preferably more specific than the examples provided in this notice. These statements were necessarily generic because the descriptions of the records being considered for release as examples in this notice are also generic.