

UNITED STATES
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D.C. 20555-0001



January 29, 2009

MEMORANDUM TO: Chairman Klein
Commissioner Jaczko
Commissioner Lyons
Commissioner Svinicki

FROM: Karen D. Cyr *Karen D. Cyr*
General Counsel

SUBJECT: PRESIDENTIAL MEMORANDA ON GOVERNMENT
TRANSPARENCY AND THE FREEDOM OF INFORMATION ACT

On January 21, 2009, the President issued two related memoranda, addressed to the heads of executive departments and agencies, which set forth general principles regarding governmental transparency and the Freedom of Information Act (FOIA), respectively. The basic theme of these memoranda is that the government as a servant of the public, should keep the public informed about its activities and should involve the public as much as possible in its decision making. Each memorandum further directs the preparation of additional implementation details that would be applicable government-wide. Until such details are developed, however, the practical impact upon the Nuclear Regulatory Commission (NRC) cannot be assessed. The two memoranda are summarized below, and copies of the memoranda are attached.

Transparency and Open Government

The President's memorandum entitled "Transparency and Open Government" announces a set of principles aimed at "creating an unprecedented level of openness in Government." These principles are broken down into three (overlapping) categories: (1) public access to information; (2) public participation; and (3) collaboration. The memorandum also directs "the Chief Technology Officer,¹ in coordination with the Office of Management and Budget (OMB) and the Administrator of General Services, to coordinate the development by appropriate executive departments and agencies, within 120 days, of recommendations for an Open Government Directive (OGD), to be issued by the Director of OMB," that will provide agencies with specific

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¹ This will be a newly created position.

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implementation instructions. The memorandum specifically advises that independent agencies "should comply" with this forthcoming directive.²

In general, the principles contained in the memorandum appear consistent with the NRC's current practices. For instance, the memorandum calls for the disclosing of agency information "rapidly in forms that the public can readily find and use" and indicates that "new technologies" should be used to place "information about [agency] operations and decisions online and readily available to the public." The availability of NRC documents through the NRC public website, which includes access both to the searchable public Agencywide Document Access and Management System (ADAMS) database and to other information and document collections present on the website itself, seems to go a long way, if not the entire way, towards fulfilling this stated goal. It is conceivable, though, that the NRC may need to make some adjustments to its online information access scheme if the OGD includes detailed prescriptive requirements or requires government-wide standardization.

As to public participation, the memorandum notes in very general terms that public involvement fosters better government decision-making and calls upon agencies to increase the opportunities for public participation and to "solicit public input" on how to facilitate and improve public participation. The NRC currently offers members of the public a variety of ways to participate in its decision-making, and so it is not clear that the OGD, once developed, would necessarily require substantial new steps by the NRC. Nonetheless, the memorandum does call for "increasing" and "improving" public participation, and for seeking public input on how to do so; it is possible that compliance with the OGD may potentially entail additional action by all agencies, no matter their current level of public participation.

Finally, the memorandum recommends that agencies make efforts to improve their collaboration, both with other federal agencies and with persons and entities outside the federal government. The memorandum also issues a general call for agencies to "solicit public feedback to assess and improve their level of collaboration and to identify new opportunities for cooperation."

While the details for implementing the memorandum's stated principles have yet to be worked out, it seems likely that compliance with those implementing details will not require significant changes in the way the NRC operates.

² Administrations have traditionally been sensitive to the relationships between themselves and the independent regulatory agencies. Accordingly, a number of past executive orders and presidential memoranda have expressly exempted independent agencies from complying with their terms, while others have recommended that independent agencies should comply with either some or all of their terms. The Transparency and Open Government memorandum falls into the latter category, recommending that independent agencies should comply with the pending Open Government Directive.

Some presidential issuances, however, as in the case of the FOIA memorandum discussed below, do not specifically address applicability to independent agencies. Such applicability may, nonetheless, be presumed in this case. This is because the U.S. Department of Justice, which will be developing guidance to implement the FOIA memorandum's policy principles, has the authority to set government-wide FOIA policy that even independent agencies are expected to follow.

Freedom of Information Act

The President's memorandum on the Freedom of Information Act (FOIA) announces that the FOIA should be interpreted in a manner that favors disclosure. The memorandum states that "agencies should adopt a presumption in favor of disclosure" that "should be applied to all decisions involving FOIA." In addition, the memorandum emphasizes that information disclosure obligations exist even when the public has not requested information. Finally, the memorandum directs the Attorney General to issue new FOIA guidelines to implement the principles enunciated in the memorandum and further directs the Director of OMB to update guidance to agencies related to information dissemination.

While the memorandum most forcefully targets document withholdings that conflict with the spirit of the FOIA, its ultimate reach will likely be broader than that. In addition to criticizing the withholding of information for reasons such as avoidance of embarrassment or concealment of errors, the memorandum takes issue with the withholding of information "because of speculative or abstract fears." Particularly when viewed in light of the Transparency and Open Government memorandum discussed above, this statement might indicate that the administration will support the release of some information that agencies historically may have withheld under various FOIA exemptions. And more broadly, the tenor of the memorandum would seem to signal that the Department of Justice will be less willing to defend FOIA withholding decisions that are challenged in court, particularly where the potential harm from disclosure is not self-evident or clearly consistent with law or policy.

The memorandum also indicates that the presumption of disclosure under FOIA should apply even in the absence of FOIA requests. According to the memorandum, "agencies should use modern technology to inform citizens about what is known and done by their government," whether prompted by FOIA requests or not. The NRC's consistent commitment to making a wide range of agency information and documentation publicly available via its public website and through public ADAMS likely goes a long way towards satisfying this Presidential mandate. What more, if anything, will be required will depend upon the new guidelines to be issued by the Attorney General and the Director of OMB. No deadlines for the issuance of this guidance were established.

Enclosures:
As stated

cc: EDO
OIP
OPA
OCA
SECY
CFO
OIG
OIS

Presidential Documents

Memorandum of January 21, 2009

Transparency and Open Government

Memorandum for the Heads of Executive Departments and Agencies

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.

Government should be transparent. Transparency promotes accountability and provides information for citizens about what their Government is doing. Information maintained by the Federal Government is a national asset. My Administration will take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use. Executive departments and agencies should harness new technologies to put information about their operations and decisions online and readily available to the public. Executive departments and agencies should also solicit public feedback to identify information of greatest use to the public.

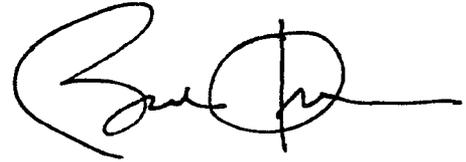
Government should be participatory. Public engagement enhances the Government's effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities to participate in policy-making and to provide their Government with the benefits of their collective expertise and information. Executive departments and agencies should also solicit public input on how we can increase and improve opportunities for public participation in Government.

Government should be collaborative. Collaboration actively engages Americans in the work of their Government. Executive departments and agencies should use innovative tools, methods, and systems to cooperate among themselves, across all levels of Government, and with nonprofit organizations, businesses, and individuals in the private sector. Executive departments and agencies should solicit public feedback to assess and improve their level of collaboration and to identify new opportunities for cooperation.

I direct the Chief Technology Officer, in coordination with the Director of the Office of Management and Budget (OMB) and the Administrator of General Services, to coordinate the development by appropriate executive departments and agencies, within 120 days, of recommendations for an Open Government Directive, to be issued by the Director of OMB, that instructs executive departments and agencies to take specific actions implementing the principles set forth in this memorandum. The independent agencies should comply with the Open Government Directive.

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

This memorandum shall be published in the *Federal Register*.



THE WHITE HOUSE,
Washington, January 21, 2009

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Presidential Documents

Title 3—

The President

Memorandum of January 21, 2009

Freedom of Information Act

Memorandum for the Heads of Executive Departments and Agencies

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.

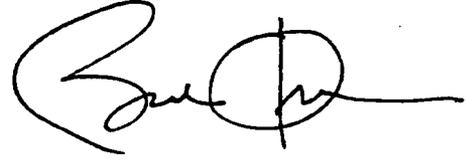
All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

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*.

A handwritten signature in black ink, appearing to read "Paul D. Ryan", written in a cursive style.

THE WHITE HOUSE,
Washington, January 21, 2009

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