

Sealing, Donna

From: Catherine Holzle , 06C
Sent: Thursday, April 30, 2009 12:02 PM
To: Donna Sealing
Cc: Russell Nichols; Trip Rothschild; Sean Croston; Nicola Sanchez
Subject: RE: YA on FOIA policy/harm statements

Looks good. Let's go with it. Thanks for your efforts!

From: Donna Sealing
Sent: Thursday, April 30, 2009 8:15 AM
To: Catherine Holzle
Cc: Russell Nichols; Trip Rothschild; Sean Croston; Nicola Sanchez
Subject: RE: YA on FOIA policy/harm statements

Cathy,

Russ and I have reviewed the YA and have incorporated all your changes. Attached is the revised copy and couple of our changes. Just let me know if this is ok to finalize.

Thanks,

Donna

From: Catherine Holzle , 06C
Sent: Tuesday, April 28, 2009 5:42 PM
To: Donna Sealing
Cc: Russell Nichols; Trip Rothschild; Sean Croston; Nicola Sanchez
Subject: FW: YA on FOIA policy/harm statements

Our latest suggestions to consider for revising the draft YA on the FOIA policy are reflected on the attachment. Please let me know if you have any questions. Thanks.

8/12



UNITED STATES NUCLEAR REGULATORY COMMISSION

Yellow Announcement: YA-09-####

Date: May ##, 2009

TO: All NRC Employees

SUBJECT: NEW FREEDOM OF INFORMATION ACT PROCEDURES

On March 19, 2009, Attorney General Eric Holder issued new Freedom of Information Act (FOIA) guidelines to the heads of executive agencies. These guidelines reaffirm the government's "commitment to accountability and transparency" as directed by President Obama in his Memorandum on the FOIA issued on January 21, 2009. Together, these two memoranda call for increased Governmental openness.

The President called on agencies to "adopt a presumption in favor of disclosure," which applies to all decisions involving documents sought under the FOIA. The Attorney General's FOIA guidelines strongly encourage agencies to make discretionary releases in response to requests for records. The guidelines direct agencies not to withhold records simply because a FOIA exemption might allow withholding.

Another significant part of the guidelines is the establishment of a new governmental standard for defending agencies in FOIA litigation. The Department of Justice (DOJ) will defend an agency's 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." The DOJ guidelines also strongly emphasize that the FOIA requires agencies to take reasonable steps to separate exempt information from information that is required to be disclosed by the FOIA and to release the nonexempt information. Whenever records cannot be fully disclosed, agencies should make partial disclosures of nonexempt information unless the redactions would leave only essentially meaningless words or phrases.

If disclosure is not prohibited by law, agencies must apply DOJ's "foreseeable harm" standard when deciding whether to release records. To withhold information, agencies must reasonably foresee that disclosure would cause harm. "Speculative or abstract fears" are not enough to justify nondisclosure. For example, a FOIA request could ask the agency to release a draft containing preliminary recommendations. Such a record might be eligible for withholding under FOIA Exemption 5 because it contained analysis and recommendations that constituted part of

a deliberative process, but that should not be end of the agency's inquiry. Rather, the age, content, and character of that particular draft should be reviewed in determining whether the agency reasonably foresees that disclosure would harm an interest protected by Exemption 5.

In order to comply with the "foreseeable harm" standard and encourage the discretionary release of certain types of information, the Nuclear Regulatory Commission is implementing the following policy:

- If FOIA Exemption 5 or Exemption 2 (high) is claimed in the initial response to a FOIA request, a statement of foreseeable harm must be provided to the FOIA/Privacy Section. Exemption 5 may be invoked to withhold certain predecisional, deliberative process information. It is frequently applied to withhold information in draft documents, and to withhold attorney-client privileged information and attorney work-product. The NRC commonly uses Exemption 2 (high) in response to requests for sensitive, internally-generated security information when the disclosure of that information could allow recipients to circumvent laws or regulations.
- On the other hand, Exemption 2 (low) has historically applied to internal information of a trivial nature, such as NRC parking lists or room numbers for NRC office buildings. Public release of such information would typically cause no harm, so the agency should generally authorize discretionary releases of Exemption 2 (low) records.
- An explanation of the need to withhold information under Exemptions 6, 7(A), or 7(C) should be provided when it is not obvious why the agency is citing those exemptions. Exemption 6 protects personal privacy information when its disclosure would cause an unwarranted invasion of privacy that is not outweighed by the public interest in disclosure. Exemption 7(C) is the companion authority for withholding privacy information gathered for law enforcement purposes. Exemption 7(A) applies to law enforcement information when its disclosure could reasonably be expected to interfere with pending law enforcement proceedings. Deleted: for
- Exemptions 1, 3, and 4 are generally invoked when disclosure is not discretionary. Thus, an explanation of the need for these exemptions is not necessary, unless the reason for withholding information is not obvious. Exemption 1 supports withholding national security (classified) information specifically authorized to be kept secret in the interest of national defense. Exemption 3 authorizes withholding information specifically required to be protected by other federal laws. For the NRC, Exemption 3 is most often used to withhold Safeguards Information and Restricted Data. Exemption 4 shields trade secrets and other proprietary business information generated outside the agency and is also used to protect licensees' security-related information.
- When responding to FOIA appeals, the office response must indicate that the Office Director or the Director's designee has personally approved both the decision to withhold each record (or portion thereof) and any statement of foreseeable harm accompanying the initial recommendation to withhold information.

Achieving the President's goal of a "new era of open Government" will require the commitment of all agency personnel. As the Attorney General stated in his FOIA Guidelines, "FOIA is everyone's responsibility and not merely a task assigned to an agency's FOIA staff." The Attorney General stresses that we must all do our part to ensure open government.

If you have any questions about this guidance, please contact Donna L. Sealing, FOIA/Privacy Officer, at 301-415-5804 or by e-mail at Donna.Sealing@nrc.gov.

R. W. Borchardt
Executive Director for Operations

ADAMS Accession Number: ML09

*concurring by e-mail

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