Sealing, Donna

From: NRC Announcement [nrc.announcement@nrc.gov]
Sent: Thursday, May 21, 2009 9:00 PM
To: NRC Announcement
Subject: Daily: 5 New Items from Thursday, May 21, 2009

NRC Daily Announcements

Thursday May 21, 2009 -- Headquarters Edition

Outside of Scope

◇ **Policy: New Freedom of Information Act Procedures**

Outside of Scope

Outside of Scope

Information in this record was deleted in accordance with the Freedom of Information Act. Exemptions Outside Scope
FOIA/PA 2009-288

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Outside of Scope

Policy: New Freedom of Information Act Procedures

Yellow Announcement No. 054, New Freedom of Information Act Procedures, is now available on the internal Web site under Yellow Announcements.

Outside of Scope

NRC Yellow Announcement

UNITED STATES NUCLEAR REGULATORY COMMISSION

Announcement No. 054

Date: May 19, 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.

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. In order to comply with the President and Attorney General, I am issuing new FOIA procedures for the Nuclear Regulatory Commission.

If you have any questions about this guidance, please contact Donna L. Sealing, FOIA/Privacy Officer, at 301-415-5804.

/RA/

Darren B. Ash for
R. W. Borchardt
Executive Director for Operations

Management Directive Reference: MD 3.1, "Freedom of Information Act"

NRC Yellow Announcements Index

Office of the Attorney General

Washington, D.C. 20530

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 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.

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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.

THE BRIEFING ROOM

Wednesday, January 21st, 2009 at 12:00 am

Freedom of Information Act

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*.

BARACK OBAMA

U.S. NUCLEAR REGULATORY COMMISSION
NEW FREEDOM OF INFORMATION ACT PROCEDURES

If disclosure is not prohibited by law, agencies must apply the Department of Justice's (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 Freedom of Information Act (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 the end of the agency's review. 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 (NRC) 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.

- 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.

- Another significant part of the guidelines is the establishment of a new governmental standard for defending agencies in FOIA litigation. The 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, NRC should make partial disclosures of nonexempt information unless the redactions would leave only essentially meaningless words or phrases.