

EDO Principal Correspondence Control

FROM: DUE: 04/15/10

EDO CONTROL: G20100177

DOC DT: 03/25/10

FINAL REPLY:

Representative Patrick McHenry
Representative Darrell Issa

TO:

Chairman Jaczko

FOR SIGNATURE OF :

** PRI **

CRC NO: 10-0136

Chairman Jaczko

DESC:

ROUTING:

Implementation of White House and Department of
Justice Directives on Openness and Transparency
[FOIA's] (EDATS: SECY-2010-0178)

Borchardt
Virgilio
Mallett
Ash
Mamish
Burns/Rothschild
Schmidt, OCA
Boyce, OIS

DATE: 03/30/10

ASSIGNED TO:

CONTACT:

EDO

Rihm

SPECIAL INSTRUCTIONS OR REMARKS:

Please prepare a response in accordance with OEDO
Notice 2009-0441-02 (ML093290179). OIS to provide
input to Roger Rihm, OEDO, if required. Roger Rihm
will coordinate response with OGC and OCA.

Template: SECY-017

E-RIPS: SECY-01

EDATS

Electronic Document and Action Tracking System

EDATS Number: SECY-2010-0178

Source: SECY

General Information

Assigned To: OEDO

OEDO Due Date: 4/15/2010 11:00 PM

Other Assignees:

SECY Due Date: 4/19/2010 11:00 PM

Subject: Implementation of White House and Department of Justice Directives on Openness and Transparency (FOIA's)

Description:

CC Routing: OIS

ADAMS Accession Numbers - Incoming: NONE

Response/Package: NONE

Other Information

Cross Reference Number: G20100177, LTR-10-0136

Staff Initiated: NO

Related Task:

Recurring Item: NO

File Routing: EDATS

Agency Lesson Learned: NO

OEDO Monthly Report Item: NO

Process Information

Action Type: Letter

Priority: Medium

Sensitivity: None

Signature Level: Chairman Jaczko

Urgency: NO

Approval Level: No Approval Required

OEDO Concurrence: YES

OCM Concurrence: NO

OCA Concurrence: NO

Special Instructions: Please prepare response in accordance with OEDO Notice 2009-0441-02 (ML093290179). OIS to provide input to Roger Rihm, OEDO, if required. Roger Rihm will coordinate response with OGC and OCA.

Document Information

Originator Name: Representative Patrick McHenry and Representative Darrell Issa

Date of Incoming: 3/25/2010

Originating Organization: Congress

Document Received by SECY Date: 3/30/2010

Addressee: Chairman Jaczko

Date Response Requested by Originator: 4/26/2010

Incoming Task Received: Letter

OFFICE OF THE SECRETARY
CORRESPONDENCE CONTROL TICKET

Date Printed: Mar 30, 2010 10:40

PAPER NUMBER: LTR-10-0136
ACTION OFFICE: ED/GC

LOGGING DATE: 03/30/2010

AUTHOR: REP Patrick McHenry
AFFILIATION: CONG
ADDRESSEE: Gregory Jaczko
SUBJECT: Transparency in the Federal government.....disclosure in response to the Freedom of Information Act (FOIA)

ACTION: Signature of Chairman
DISTRIBUTION: OGC, RF, OCA to Ack

LETTER DATE: 03/25/2010
ACKNOWLEDGED: No
SPECIAL HANDLING: Chairman Correspondence
...Response requested NLT...
April 26, 2010

NOTES:

FILE LOCATION: ADAMS

DATE DUE: 04/19/2010
DATE SIGNED:

EDO --G20100177

ONE HUNDRED ELEVENTH CONGRESS
Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6143

Majority (202) 225-5051
Minority (202) 225-5074

March 25, 2010

The Honorable Gregory B. Jaczko
Chairman
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Dear Chairman Jaczko:

On his first full day in office, President Obama proclaimed his Administration's commitment to openness and transparency by signing a memorandum that urged the federal agencies to adopt a presumption in favor of disclosure in response to Freedom of Information Act (FOIA) requests. The Freedom of Information Act grants the public access to federal agency records unless the requested information is protected by any of nine exemptions or three exclusions. Two recent audits demonstrate that the agencies have failed to implement the President's first-day FOIA guidance to such an extent that we are concerned the records and information of the federal government are no more, and possibly less, available to the public than they were during previous administrations.

President Obama promised taxpayers "a new era of openness in our country" and a presidency built on "transparency and the rule of law."¹ To that end, on January 21, 2009, President Obama issued new guidance on FOIA, via a memorandum to the heads of executive departments and agencies. The President stated that "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."² Additionally, agencies were instructed that "[n]ondisclosure should never be based on an

¹ CNN.com, *Vowing transparency, Obama OKs ethics guidelines*, <http://www.cnn.com/2009/POLITICS/01/21/obama.business/index.html> (last visited March 22, 2010).

² Memorandum for Heads of Executive Departments and Agencies, President, Freedom of Information Act, January 21, 2009, available at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/

effort to protect the personal interests of Government officials at the expense of those they are supposed to serve.”¹

As directed by President Obama, on March 19, 2009, Attorney General Holder issued a memorandum to the heads of executive departments and agencies to “underscore” the President’s FOIA commitment and “ensure” that it was realized in practice.² The memorandum stressed two points: 1) an agency should not withhold information simply because it may do so legally; and 2) whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure.³ Additionally, presumably to discourage FOIA denials, the Attorney General limited the Department of Justice’s defense of FOIA denials to those that 1) the department reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or 2) disclosure is prohibited by law.⁴

Despite these memoranda stressing the importance of openness and transparency, an audit by the National Security Archive, an open-government project at George Washington University, found that only four agencies have increased the release of information and decreased denials under FOIA, the majority of agencies have not responded to either the Obama or Holder memos with concrete changes in their FOIA practices, and ancient requests still persist in the FOIA system.⁵ Additionally, despite receiving 48,686 fewer FOIA requests in the past fiscal year than in 2008, the number of rejections rose by 154,189.⁶ In direct opposition to Obama’s memorandum, the use of FOIA exception 5, which more than any other exemption protects the personal interests of Government officials, has risen, from 47,395 in fiscal year 2008 to 70,779 in the past fiscal year.⁷

During a March 18, 2010 Subcommittee on Information Policy, Census, and National Archives hearing on current trends in the administration of FOIA, several witnesses expressed frustration with the current climate surrounding FOIA. One witness, a director of a FOIA litigation group, testified that he has observed no improvement since President Obama signed the January 21, 2010 FOIA memorandum: “We [are] unable to discern any real difference between the manner in which the disputed information was handled first under the Bush policy, and later under the Obama policy.”⁸

¹ *Id.*

² Memorandum for Heads of Executive Departments and Agencies, Attorney General, Freedom of Information Act, March 19, 2009.

³ *Id.*

⁴ *Id.*

⁵ Sunshine and Shadows: The Clear Obama Message for Freedom of Information Meets Mixed Results, The National Security Archive, George Washington University, March 15, 2010, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB308/2010FOIAAudit.pdf>

⁶ Gastongazette.com, *Promises of openness are yet unfulfilled*, <http://www.gastongazette.com/articles/openness-45091-promises-span.html> (last visited March 22, 2010).

⁷ Sharon Theimer, *Promises, Promises: Is Gov’t More Open with Obama?* ASSOC. PRESS, Mar. 16, 2010.

⁸ Written Testimony of Electronic Frontier Foundation Senior Counsel David Sobel, prepared for the H. Oversight and Gov’t Reform Subcommittee on Information Policy, Census, and National Archives hearing on “Administration of the Freedom of Information Act: Current Trends,” Mar. 18, 2010.

Another witness, representing perhaps the most active FOIA requestor and litigator operating today, stated plainly "The Obama administration is less transparent than the Bush administration."⁹

So that we may better understand the failure of the federal agencies to implement the directives of the White House and Justice Department, and to facilitate openness and transparency in the future, we request the following documents:

1. Your agency's complete FOIA log, including the identity of each party that requested records and/or information, the date the request was received, the date the request was fulfilled, whether the request was rejected, and if so, what exemption or exclusion was cited.
2. A complete explanation for each full or partial FOIA rejection since January 21, 2009.
3. All records and communications referring or relating to a full or partial FOIA rejection since January 21, 2009.
4. All records and communications referring or relating to the implementation of President Obama's January 21, 2009, memorandum on the Freedom of Information Act and/or Attorney General Eric Holder's memorandum of March 19, 2009, on the Freedom of Information Act.

We respectfully request that you provide the requested information **no later than Monday, April 26, 2010**. Please note that, for purposes of responding to this request, the terms "records," "communications," and "referring or relating" should be interpreted consistently with the attached Definitions of Terms.

The Committee on Oversight and Government Reform is the main investigative committee in the U.S. House of Representatives. Pursuant to House Rule X, it has authority to investigate the subjects within the Committee's legislative jurisdiction as well as "any matter" within the jurisdiction of the other standing House Committees. This broad jurisdiction includes the oversight of Executive Branch operations and administrative functions.

⁹ Written Testimony of Judicial Watch President Tom Fitton, prepared for the H. Oversight and Gov't Reform Subcommittee on Information Policy, Census, and National Archives hearing on "Administration of the Freedom of Information Act: Current Trends," Mar. 18, 2010.

March 25, 2010

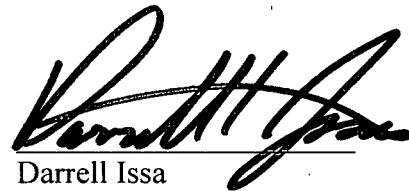
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If you have any questions or comments please contact Marvin Kaplan or Jonathan Skladany of the Committee staff at (202) 225-5074.

Sincerely,



Patrick McHenry
Ranking Member
Subcommittee on Information Policy,
Census, and National Archives



Darrell Issa
Ranking Member
Committee on Oversight and
Government Reform

Attachment

Definitions of Terms

1. The term "record" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A record bearing any notation not a part of the original text is to be considered a separate record. A draft or non-identical copy is a separate record within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, telexes, discussions, releases, personal delivery, or otherwise.
3. The terms "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is in any manner whatsoever pertinent to that subject.