

RESPONSE TO

REQUEST #4

Response to Request #4:

[Provide] 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

Records provided in response to a 2009 FOIA request

The National Security Archive

The George Washington University
Gelman Library, Suite 701
2130 H Street, N.W.
Washington, D.C. 20037



Phone: 202.994.7045
Fax: 202.994.7005
nsarchiv@gwu.edu
<http://www.nsarchive.org>

September 15, 2009

Nuclear Regulatory Commission
Mail Stop T6-D8
Washington, DC 20555-0001

FOIA/PA REQUEST

Case No.: 2009-0280
Date Rec'd: 9-15-09
Specialist: Raphael
Related Case: _____

Re: Request under the FOIA, in reply refer to Archive#20091028NRC002

Dear Sir or Madam:

Pursuant to the Freedom of Information Act (FOIA), I hereby request the following:

All records, including but not limited to guidance or directives, memoranda, training materials, or legal analyses, concerning the implementation of President Barack 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.

Please do not include copies of the Obama or Holder memos or any other guidance issued publicly by the Department of Justice.

As the FOIA requires, please release all reasonably segregable nonexempt portions of documents. To permit me to reach an intelligent and informed decision about whether and how to file an administrative appeal of any denied material, please describe any withheld records (or portions thereof) and explain the basis for your exemption claims.

As a representative of the news media, the National Security Archive qualifies for "representative of the news media" status under 5 U.S.C. Sec. 552(a)(4)(A)(ii)(II) and, therefore, may not be charged search and review fees. (See *National Security Archive v. U.S. Department of Defense*, 880 F.2d 1381 (D.C.Cir. 1989), cert denied, 110 S Ct. 1478 (1990)). This request is made as part of a scholarly and news research project that is intended for publication and is not for commercial use. For details on the Archive's research and extensive publication activities please see our website at www.nsarchive.org.

To expedite the release of the requested documents, please disclose them on an interim basis as they become available to you, without waiting until all the documents have been processed. Please notify me before incurring any photocopying costs over \$100. If you have any questions regarding the identity of the records, their location, the scope of the request or any other matters, please call me at (202) 994-7000 or email me at foiamail@gwu.edu. I look forward to receiving your response within the twenty-day statutory time period.

If you regard any of these documents as potentially exempt from the FOIA's disclosure requirements, I request that you nonetheless exercise your discretion to disclose them in keeping with President Obama's January 21, 2009, memorandum on the FOIA, which clearly expressed a presumption in favor of disclosure.

Sincerely,



Yvette M. Chin
FOIA Coordinator
National Security Archive

FAX COVER SHEET

Date: September 15, 2009

To: **U.S. Nuclear Regulatory Commission**

Organization: **Nuclear Regulatory Commission**

From: **The National Security Archive**

Number of pages (including cover sheet): 3

If there is a problem with this transmission, please call us at 202-994-7000 as soon as possible.

Message: NEW FOIA REQUEST: Archive #20091028NRC002

Thank you for all your assistance.

Regards,
Yvette M. Chin
FOIA Coordinator

2009-0280

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RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) / PRIVACY ACT (PA) REQUEST

RESPONSE TYPE FINAL PARTIAL

REQUESTER

Yvette M. Chin

DATE

OCT 20 2009

PART I. -- INFORMATION RELEASED

- No additional agency records subject to the request have been located.
- Requested records are available through another public distribution program. See Comments section.
- APPENDICES Agency records subject to the request that are identified in the listed appendices are already available for public inspection and copying at the NRC Public Document Room.
- APPENDICES **A,B** Agency records subject to the request that are identified in the listed appendices are being made available for public inspection and copying at the NRC Public Document Room.
- Enclosed is information on how you may obtain access to and the charges for copying records located at the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD 20852-2738.
- APPENDICES **A,B** Agency records subject to the request are enclosed.
- Records subject to the request that contain information originated by or of interest to another Federal agency have been referred to that agency (see comments section) for a disclosure determination and direct response to you.
- We are continuing to process your request.
- See Comments.

PART I.A -- FEES

AMOUNT *

\$

* See comments for details

- You will be billed by NRC for the amount listed.
- None. Minimum fee threshold not met.
- You will receive a refund for the amount listed.
- Fees waived.

PART I.B -- INFORMATION NOT LOCATED OR WITHHELD FROM DISCLOSURE

- No agency records subject to the request have been located.
- Certain information in the requested records is being withheld from disclosure pursuant to the exemptions described in and for the reasons stated in Part II.
- This determination may be appealed within 30 days by writing to the FOIA/PA Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Clearly state on the envelope and in the letter that it is a "FOIA/PA Appeal."

PART I.C COMMENTS (Use attached Comments continuation page if required)

The incoming FOIA/PA-2009-0280 request is located in ADAMS at ML092580512.

SIGNATURE - FREEDOM OF INFORMATION ACT AND PRIVACY ACT OFFICER

Donna L. Sealing
Donna L. Sealing

**APPENDIX A
RECORDS BEING RELEASED IN THEIR ENTIRETY**

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/(PAGE COUNT)</u>
1.	1/22/09	E-mail from Nichols to Holonich, FYI – President Obama’s Initial Public Directives (1 page)
2.	1/26/09	E-mail from Nichols to Ash, President Obama’s FOIA Memorandum (2 pages)
3.	3/20/09	E-mail from Nichols to Higgs, New Attorney General Memo on FOIA (1 page)
4.	3/20/09	E-Mail from Sealing to Brown et al., New Attorney General FOIA Memo (1 page)
5.	3/27/09	E-Mail from Janney to Nichols, Item of Interest (2 pages)
6.	4/1/09	E-Mail from Sealing to Raphael et al., YA on New FOIA Requirements (2 pages)
7.	4/2/09	E-Mail from Resner to Sealing, Need Executive Order Number (1 page)
8.	4/17/09	E-Mail from Holzle to Nichols, et al., New FOIA Guidance (9 pages)
9.	4/20/09	E-Mail from Holonich to Nichols, Guidance on President Obama’s FOIA Memoranda and Attorney General Holder’s FOIA Guidelines (3 pages)
10.	4/29/09	E-Mail from Sealing to Raphael et al., YA on FOIA (1 page)
11.	4/30/09	E-Mail from Sealing to Raphael, YA on FOIA policy/harm Statements (4 pages)
12.	4/30/09	E-Mail from Holzle to Sealing, YA on FOIA policy/harm Statements (4 pages)
13.	5/6/09	E-Mail from Nichols to Janney, FOIA YA (1 page)
14.	5/6/09	E-Mail from Raphael to Sealing, YA on FOIA policy/harm Statements (2 pages)

15. 5/19/09 E-Mail from Olive to Nichols, New FOIA Procedures – Yellow Announcement (2 pages)
16. 5/20/09 E-Mail from RidsOISResource to Moss et al., Yellow Announcement to All NRC Employees from R.W. Borchardt (3 pages)
17. 5/20/09 E-Mail from Sealing to Raphael, Ex. 2 (low) (1 page)
18. 5/21/09 E-Mail from Directives Resource to Sealing, Yellow Announcement No: 09-0054 (3 pages)
19. 5/21/09 E-Mail from Hoffman to Culleen, URL for Yellow Announcement (3 pages)
20. 5/21/09 E-Mail from Sealing to Culleen, New FOIA Procedures (1 page)
21. 5/22/09 E-Mail from FOIA Resource to Farrar et al., New FOIA Procedures (1 page)
22. 5/26/09 E-Mail from Menefee to WebWork Resource, Request for Change To Internal FOIA Web Page (1 page)
23. 6/1/09 E-Mail from Sealing to Brown et al., Harm Statements for Requests Caught in Pipeline (1 page)
24. 6/3/09 E-Mail from Sealing to Raphael, just confirming re: Ex. 5 (1 page)
25. 6/11/09 E-Mail from Culleen to WebWorkResource, FOIA internal Web site change (1 page)
26. 7/9/09 E-Mail from Sealing to Culleen, Change to FOIA Submittal Form on Public Web Site (4 pages)
27. 7/10/09 E-Mail from Raphael to Menefee, foia form memo (1 page)
28. 7/10/09 E-Mail from Menefee to RidsACRSacnw_MailCTR Resource Et al., from Menefee, FOIA Memo-Appendices template and How to Respond Guide (18 pages)
29. 7/14/09 E-Mail from Sealing to Menefee, training book re: Ex. 5 (1 page)
30. 8/5/09 E-Mail from FOIA Resource to RidsAcrcsAcnw_MailCTR Resource et al., Form Memo-Appendices.doc (9 pages)
31. 8/5/09 E-Mail from Nichols to Moss, FOIA Training Region IV (1 page)

32. 9/16/09 Freedom of Information Act web site (3 pages)
33. 10/16/09 Freedom of Information Act and Privacy Act Requests
Public web site (2 pages)
34. Undated FOIA Procedures (6 pages)
35. Undated How to Respond to an Initial FOIA Request (8 pages)
36. Undated Exemptions 1 thru 7 (16 pages)

APPENDIX B
RECORDS WITHHELD IN PART

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/(PAGE COUNT)</u>
1.	3/27/09	E-Mail from Sealing to Sealing, NRC's Announcement of AG FOIA Memo #1 (5 pages) Portions Outside Scope
2.	5/21/09	E-Mail from NRC Announcement to NRC Announcement 5 Nw Items from Thursday, May 21, 2009 (11 pages) Portions Outside Scope



RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) / PRIVACY ACT (PA) REQUEST

2009-0280

1

RESPONSE TYPE FINAL PARTIAL

REQUESTER

Yvette M. Chin

DATE

OCT 20 2009

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PART I.A -- FEES

- AMOUNT * You will be billed by NRC for the amount listed. None. Minimum fee threshold not met.
 \$ You will receive a refund for the amount listed. Fees waived.

* See comments for details

PART I.B -- INFORMATION NOT LOCATED OR WITHHELD FROM DISCLOSURE

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SIGNATURE - FREEDOM OF INFORMATION ACT AND PRIVACY ACT OFFICER

Donna L. Sealing

DL Sealing

DISTRIBUTION--FOIA/PA Subject, Action Officer, FOIA/PA Officer, Other (Specify)

PDR

OFFICE	ACTION OFFICER	FOIA/PA OFFICER
NAME	<i>MJR Michael</i>	<i>DL Sealing</i>
DATE	<i>10-20-09</i>	<i>10/20/09</i>



RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) / PRIVACY ACT (PA) REQUEST

2009-0280

2

RESPONSE TYPE FINAL PARTIAL

REQUESTER

Yvette M. Chin

DATE

OCT 20 2009

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- APPENDICES **C** Agency records subject to the request that are identified in the listed appendices are being made available for public inspection and copying at the NRC Public Document Room.
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- APPENDICES **C** Agency records subject to the request are enclosed.
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- We are continuing to process your request.
- See Comments.

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APPENDIX C
RECORDS BEING RELEASED IN THEIR ENTIRETY

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/(PAGE COUNT)</u>
1.	7/15/09	Draft, The Freedom of Information Act (FOIA) at the U.S. Nuclear Regulatory Commission, internal on-line FOIA training (61 pages)

Home

Course Ma

The Freedom of Information Act (FOIA) at the U.S. Nuclear Regulatory Commission

The Freedom of Information Act (FOIA) at the U.S. Nuclear Regulatory Commission

- 1. Module A - Introduction to the FOIA
- 2. Module B - The FOIA Exemptions
- 3. Module C - NRC Procedures Guidance
- 4. Module D - Review



The Commission directed the NRC staff to develop a training program for NRC staff members who routinely deal with FOIA matters. This on-line training was developed to meet that requirement and to provide individuals who have been assigned a Freedom of Information Act (FOIA) action who do not routinely deal with FOIA matters, a tutorial on the provisions of the FOIA, and implementation of the FOIA at the NRC. The NRC Office of Information Services FOIA (PA) staff also provides classroom FOIA training semi-annually at NRC Headquarters. For information about FOIA classroom training, contact the Office of Information Services FOIA (PA) staff via email at FOIA.Resource@nrc.gov.

Click  to continue.

these changes were made in June

2/1

1. Module A - Introduction to the FOIA



- 1.1 Objectives
- 1.2 Freedom of Information Act
- 1.3 Who Is Subject to the FOIA?
- 1.4 Who Can Make a FOIA Request?
- 1.5 Requirements for Making a Request
- 1.6 What Records Can be Requested
- 1.7 Searches for Records
- 1.8 Time Requirement for Agency's Response
- 1.9 Expedited Processing
- 1.10 Key Elements of a Response
- 1.11 Appeal Process and Appeal Denials
- 1.12 FOIA Requester Categories and Fees

1.13 Fee Waiver



1.1 Objectives



- ▶ Definition of the FOIA
- ▶ Purpose of the FOIA
- ▶ General Provisions of the FOIA

1.2 Freedom of Information Act

5 U.S.C. § 552. Enacted in 1966, the FOIA established the first comprehensive statutory right of access to government information.

- ▶ Principles of the FOIA
 - * government should be open and accountable
 - * shed light on the functions and operations of the government
- ▶ The burden is on the government to justify the withholding of information

- ▶ Memo dated January 21, 2009 from President Obama re: FOIA
- ▶ Obama memo (link to memo)
- ▶ Memo dated March 19, 2009 from the Attorney General re: FC
- ▶ Holder memo (link to memo)

Move to 3.17



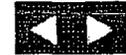
1.3 Who Is Subject to the FOIA?



- ▶ The FOIA applies to all federal agencies in the Executive Branch
- ▶ Does NOT apply to Congress, the Federal Courts, or the Executive Office of the President



1.4 Who Can Make a FOIA Request?



▶ Who Can Make a FOIA Request?

- ★ the FOIA provides that **"any person"** has a right, enforceable in court, to obtain access to federal agency records, except as protected from disclosure by the exemptions in the statute
- ★ the term **"any person"** encompasses individuals (including citizens of foreign countries), partnerships, corporations, associations, and foreign and domestic governments



1.5 Requirements for Making a Request



- ▶ The request must be made in accordance with the NRC's published regulations in 10 CFR Part 9 *OR*
 - ★ requester must cite the FOIA
 - ★ requester must reasonably describe the agency records sought in sufficient detail to allow a "reasonable" search and identification of records
 - ★ request does not require a signature (except for individuals who make requests for records about themselves)
 - ★ requester may ask for records in the form or format desired, i.e., electronic or paper. Agency must provide them if they are readily reproducible by the agency in that form or format

1.6 What Records Can be Requested



- ▶ Records in any format (paper or electronic) that are:
 - ★ either created or obtained by the NRC
 - ★ in the possession and control of the NRC associated with Government business

- ▶ Does not include:
 - ★ publicly available books, periodicals and other publications that are owned or copyrighted by non-Federal sources
 - ★ records solely in the possession and control of NRC contractors
 - ★ personal records that have not been circulated or integrated into agency files, including:
 - notes ^{Concerning} on government business that are either typed or written and not shared with others
 - records of a personal nature that are not associated with Government business

1.7 Searches for Records



- ▶ A "search" means to review manually or by automated means, agency records for the purpose of locating those records which are responsive to a request
- ▶ An agency must undertake a search that is reasonably calculated to uncover all relevant records
- ▶ An agency must search using methods which can be reasonably expected to produce the information requested
- ▶ Failure to find a specific record does not render the search inadequate. It is unreasonable to expect even the most exhaustive search to uncover every responsive record because records can be lost, destroyed, and misfiled
- ▶ Only agency records that are in existence on the date the NRC received the request are subject to the FOIA request
- ▶ Agencies are not obligated to create a record to respond to a FOIA request
- ▶ Agencies are not required to answer questions asked in a request



1.8 Time Requirement for Agency's Response



- ▶ Agencies must respond to a FOIA request within 20 days, excluding weekends and holidays, of receipt of a perfected request
 - ★ A request is considered perfected when it describes the records sought well enough to allow a reasonable search to be made, all questions about the applicable fees have been resolved with the requester, and any other matters, such as verification of identity, have been resolved. If a request does not require clarification, further agreement to pay fees, or resolution of any other issues, it will be considered to be a perfected request as of the date of receipt by the OIS FOIA/PA staff.

- ▶ An agency can extend the 20-day time limit if there is:
 - ★ an **unusual** circumstance
 - the need to search for and collect the requested records from regional offices or other establishments that are separate from the office processing the request
 - the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request
 - the need for consultation, which will be conducted with all practicable speed, with another Federal agency having a substantial interest in the determination of the request or among two or more components of the NRC having substantial subject-matter interest therein

 - ★ an **exceptional** circumstance
 - a requester may be notified in certain exceptional circumstances, when it appears that a request cannot be completed within the allowable time, and will be provided an opportunity to limit the scope of the request so that it may be processed in the time limit, or to agree to a reasonable alternative time frame for processing



1.9 Expedited Processing



- ▶ NRC may place a person's request at the front of a queue upon receipt of a written request that clearly demonstrates a compelling need for expedited processing due to:
 - ★ imminent threat to the life or physical safety of an individual
 - ★ media urgency to inform the public concerning actual or alleged Federal Government activity
- ▶ Within 10 calendar days, the requester must be informed of an expedited processing determination

1.10 Key Elements of a Response



▶ Agencies must provide:

- ★ fee information, if applicable
- ★ access to requested records where there is no legal basis to withhold
- ★ appropriate exemption ^(S) for withheld information
- ★ name of denial authority, if applicable
- ★ appeal procedures, if applicable





1.11 Appeal Process and Appeal Denials



- ▶ A requester may appeal an adverse determination
- ▶ A determination may be considered adverse when:
 - ★ a request is denied in whole or in part
 - ★ a search results in a "No record" determination (may raise questions regarding the adequacy of the search)
 - ★ a request for expedited processing is denied
 - ★ a fee waiver request is denied
 - ★ the agency fails to provide the requested records within 20 days, excluding weekends and holidays
- ▶ The appeal must be sent to the specified NRC appellate authority within 30 calendar days of the date of the NRC denial
- ▶ If an appeal is wholly or partially denied, the requester may seek judicial redress in a Federal district court
- ~~▶ The requester must be advised in the response to an appeal that they can seek judicial redress~~

AR

Handwritten notes:
The requester must be advised in the response to an appeal that they can seek judicial redress



1.12 FOIA Requester Categories and Fees



▶ The FOIA provides for three categories of requesters. The fees vary for each category:

★ commercial

- pay all fees: search, review, duplication

★ educational institution/non-commercial scientific institution/news media

- pay duplication fees with first 100 pages free

★ all others

- pay search fees with first 2 hours free
- pay duplication fees with first 100 pages free

2. Module B - The FOIA Exemptions



- 2.1 Objectives
- 2.2 What is an Exemption?
- 2.3 FOIA Exclusions
- 2.4 FOIA Exemption (b)(1) Classified National Security Information
- 2.5 FOIA Exemption (b)(1) at NRC
- 2.6 FOIA Exemption (b)(2) Internal Agency Rules and Practices
- 2.7 FOIA Exemption (b)(2) Low
- 2.8 FOIA Exemption (b)(2) High
- 2.9 FOIA Exemption (b)(3) Information Withheld by Statute
- 2.10 FOIA Exemption (b)(4) Commercial/Financial
- 2.11 FOIA Exemption (b)(5) Deliberative Process
- 2.12 FOIA Exemption (b)(5) (Cont.)
- 2.13 FOIA Exemption (b)(6) Personal/Privacy Information
- 2.14 FOIA Exemption (b)(6) (Cont.)
- 2.15 FOIA Exemption (b)(6) and Civilian Federal Employees
- 2.16 FOIA Exemption (b)(7) Law Enforcement/Investigatory
- 2.17 FOIA Exemption (b)(7) (Cont.)
- 2.18 FOIA Exemption (b)(7) (Cont.)
- X 2.19 Fee Waiver
- 2.20 Examples of Terminology Not Covered by (b)(7)(E)
- 2.21 Examples of Specific Techniques Covered by (b)(7)(E)
- 2.22 FOIA Exemption (b)(7) (Cont.)
- 2.23 Reasonable Segregation *MR*

move to 1.13

2.1 Objectives

- ▶ The FOIA Exemptions and Exclusions
- ▶ Application of the FOIA Exemptions



(Procedures)?

New FOIA Guideline
listing of exemptions that
require harm statement

next page

Where?



2.2 What is an Exemption?



- ▶ The FOIA provides nine exemptions from mandatory disclosure provisions
- ▶ The FOIA requires agencies to provide information unless it fits into an exemption. The NRC uses seven of these exemptions
- ▶ The seven FOIA exemptions used by the NRC are:
 - ★ Exemption 1 - Classified National Security Information
 - ★ Exemption 2 - Internal Agency Rules and Practices Information
 - ★ Exemption 3 - Information Required to be Withheld by Another Federal Statute
 - ★ Exemption 4 - Commercial/Proprietary Information
 - ★ Exemption 5 - Deliberative Process, Attorney-Client and Attorney Work Product Information
 - ★ Exemption 6 - Personal/Privacy Information
 - ★ Exemption 7 - Law Enforcement/Investigatory Information



2.3 FOIA Exclusions



► There are two special provisions for protecting certain especially sensitive law enforcement matters under certain specified circumstances that are rarely used by the NRC:

★ the (c)(1) Exclusion: Whenever a request is made which involves access to records described in subsection (b)(7)(A) and

▪ (A) the investigation or proceeding involves a possible violation of criminal law; and

▪ (B) there is reason to believe that

♦ (i) the subject of the investigation is not aware of its pendency, and

♦ (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section (the FOIA)

★ the (c)(2) Exclusion: Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of the FOIA unless the informant's status as an informant has been officially confirmed



2.4 FOIA Exemption (b)(1) Classified National Security Information



- ▶ 5 U.S.C. § 552(b)(1) of the FOIA integrates the national security protections provided by Executive Order (E.O.) 12958, as amended by E.O. 13292, with the FOIA disclosure mandate by protecting from disclosure all classified national security information concerning the national defense or foreign policy that has been properly classified in accordance with the substantive and procedural requirements of the current order
 - ★ the information needs to be reviewed to determine whether the record in its entirety or portions thereof can be declassified and released
 - ★ after review, if information remains classified, it must be withheld
- ▶ The amended Executive Order of March 25, 2003 (E.O. 13292), is the basis for determining what information qualifies as classified national security information
- ▶ Classification levels:
 - ★ Top Secret (TS)
 - ★ Secret (S)
 - ★ Confidential (C)



2.5 FOIA Exemption (b)(1) at NRC



- ▶ NRC receives few FOIA requests for classified records

- ▶ The classifying office will conduct a declassification review to segregate exempt classified information from nonexempt unclassified information, consulting with the Office of Nuclear Security and Incident Response (NSIR), if necessary

- ▶ NSIR will prepare a memorandum advising the classifying office of the results of its declassification review and indicating which portions of the record are currently classified. NSIR also will send a copy of this memorandum to the OIS FOIA/PA staff



2.6 FOIA Exemption (b)(2) Internal Agency Rules and Practices



- ▶ 5 U.S.C. § 552 (b)(2) of the FOIA exempts from mandatory disclosure records that are "related solely to the internal personnel rules and practices of an agency."

★ two subcategories: "low 2" and "high 2"



2.7 FOIA Exemption (b)(2) Low



5 U.S.C. § 552 (b)(2) Low

► Protects information which is trivial in nature and is considered not to have public interest

★ all information fitting within the bounds of Exemption (b)(2) Low may be released at the discretion of the agency

★ examples include:

- parking program
- employee performance standards
- leave practices

 2.8 FOIA Exemption (b)(2) High



5 U.S.C. § 552 (b)(2) High

- ▶ More substantial internal matters, the disclosure of which would risk circumvention of a statute or agency regulation
- ▶ Protects any information which might be used to circumvent a statute or agency rule or regulation

★ examples include:

- security classification guides
- operating rules, manuals for investigators
- vulnerability assessments
- internal information that could aid a terrorist including results of security-related inspections
- bridge pass codes for conference calls
- crediting plans for evaluation of employment applications
- agency credit card numbers



2.9 FOIA Exemption (b)(3) Information Withheld by Statute



▶ 5 U.S.C. § 552(b)(3) of the FOIA allows the withholding of information prohibited from disclosure by another Federal statute: the statute either "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

▶ Exemption 3 statutes include:

★ Section 145 of the Atomic Energy Act which precludes release of Restricted Data

★ Section 147 of the Atomic Energy Act which precludes release of Safeguards Information

▶ No discretion allowed for release of information under this exemption, the information must be withheld

* 41 U.S.C. SECTION 253(b), Subsection (m) (1), prohibits the disclosure

of contractor proposals in the possession and control of an executive agency to any person under section 552 of Title 5, U.S.C (the FOIA), except when incorporated into the contract between the agency and the submitter of the proposal

 **2.10 FOIA Exemption (b)(4) Commercial/Financial**

► 5 U.S.C. § 552(b)(4) of the FOIA protects trade secrets and commercial or financial information obtained from a person that is privileged or confidential.

- ★ in order to be exempt from disclosure under this exemption, information must originate outside the Federal government. Most information developed by government contractors on behalf of the government can not be withheld using this exemption
- ★ confidential business information (proprietary), the disclosure of which would likely cause the submitter competitive harm, can be withheld under this exemption and may encompass
 - voluntary or mandatory submission of costing information
 - unique technical approaches to problems
 - customer lists
 - information revealing vulnerabilities of nuclear facilities or materials to theft or sabotage
 - product manufacturing and design information
 - private sector information which could reasonably jeopardize the effectiveness of a Government security program
 - facility drawing details showing specific locations of equipment or materials within a building that could be of use to an adversary
 - non-public financial information
 - contract proposal information
 - confidential settlement agreement information
- ★ information can be withheld as proprietary if it is submitted in confidence by a foreign source or if it concerns a licensee's or applicant's physical protection program, program for protection of classified national security, or control and accounting program for special nuclear material in accordance with 10 CFR 2.390



2.11 FOIA Exemption (b)(5) Deliberative Process



- ▶ 5 U.S.C. § 552 (b)(5) protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."
- ▶ This encompasses memos, letters, drafts, and unclassified records normally not circulated beyond the Executive Branch
- ▶ Not all such information is withholdable. To be withheld, the information must generally be within one of three primary privileges
 - ★ attorney-client privilege
 - ★ attorney-work product privilege (documents prepared by attorneys in anticipation of litigation)
 - ★ pre-decisional/deliberative process privilege
- ▶ Covers communications between NRC employees or between NRC employees and other Federal agencies that have not been shared with the nuclear industry or public
- ▶ Even if the information is withholdable, the NRC frequently makes discretionary releases of records covered by Exemption 5, including drafts of records

**2.12 FOIA Exemption (b)(5) (Cont.)**

- ▶ The deliberative process privilege has several purposes:
 - ★ encourages open, frank discussion on matters of policy
 - ★ protects against public confusion that might result from disclosure of reasons and rationales that were not ultimately the grounds for an agency's action
 - ★ protects against premature disclosure of proposed policies
- ▶ The deliberative process privilege only encompasses advice, opinions, and recommendations prepared as part of a decision making process. Segregable factual material must be disclosed
- ▶ Examples of withholdable information:
 - ★ non-factual parts of reports (pre-decisional) containing evaluations, opinions, suggestions, and/or recommendations
 - ★ advice, suggestions, or evaluations of consultants and task forces
 - ★ trade secret, confidential research, or commercial information owned by the government
 - ★ facts inextricably intertwined with recommendations and opinions



2.13 FOIA Exemption (b)(6) Personal/Privacy Information



▶ 5 U.S.C. § 552 (b)(6) of the FOIA permits the government to withhold all information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." This requires a balancing of the public's right to disclosure against the individual's right to privacy

▶ This exemption covers:

- ★ medical files, personnel records, security clearance investigations, or any information not considered appropriate for release from a privacy perspective
- ★ applications, resumes, and other material submitted by candidates not selected for a position applied for at the NRC
- ★ information must be identifiable to a specific person not to a group or be statistical information

 2.14 FOIA Exemption (b)(6) (Cont.)



▶ Examples of Personal/Privacy Information that will be withheld

★ date of birth/place of birth

★ social security number

★ other personal information *SP*

- home addresses, home phone numbers, personal cell phone numbers, home email addresses, marital status, non-job-related interests, medical and financial information, religious affiliation or reference to religious activities, employee performance, and disciplinary information



2.15 FOIA Exemption (b)(6) and Civilian Federal Employees



▶ Federal employees have reduced privacy rights for certain information pertaining to their federal employment (see Yellow Announcement 2007-025)

▶ Releasable information of Federal Employees

★ name

★ title

★ grade

★ salary

★ duty station

★ work phone numbers

★ portions of successful employment applications that show their qualifications for their positions



2.16 FOIA Exemption (b)(7) Law Enforcement/Investigatory



- ▶ 5 U.S.C. § 552 (b)(7) of the FOIA protects from disclosure "records or information compiled for law enforcement purposes."
- ▶ 5 U.S.C. § 552 (b)(7)(A) protects from disclosure the release of such law enforcement records or information which could reasonably be expected to interfere with enforcement proceedings when
 - ★ a law enforcement proceeding is pending or prospective
 - ★ release of information about it could reasonably be expected to cause some articulable harm
- ▶ Exemption (b)(7)(A) is temporal in nature and ends once the investigation has been completed and all enforcement action, including judicial proceedings, have ended
- ▶ At NRC, Exemption (b)(7)(A) protects from disclosure the release of such law enforcement records or information which could reasonably be expected to interfere with a pending allegation, investigation, or enforcement action



2.17 FOIA Exemption (b)(7) (Cont.)

▶ 5 U.S.C. § 552 (b)(7)(B) protects from disclosure the release of such law enforcement records or information which would deprive a person of a right to a fair trial or an impartial adjudication

- ★ aimed at preventing prejudicial pretrial publicity that could impair a court proceeding

- ★ not often invoked

- ★ use of Exemption (b)(7)(A) serves the same purpose

▶ 5 U.S.C. § 552 (b)(7)(C) protects from disclosure the release of such law enforcement records or information which could reasonably be expected to constitute an unwarranted invasion of personal privacy

- ★ similar to Exemption (b)(6) but less stringent standards imposed

- ★ the passage of time will not ordinarily diminish the applicability of Exemption (b)(7)(C)

- ★ examples of uses of Exemption (b)(7)(C) at the NRC

- personal information in closed allegation, investigation, or enforcement files

- names and other identifying information on alleged, informants, and/or subjects of investigation



2.18 FOIA Exemption (b)(7) (Cont.)

- ▶ 5 U.S.C. § 552 (b)(7)(D) protects from disclosure the release of such law enforcement records or information which could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source.
 - ★ source must be given an express promise of confidentiality, or under circumstances from which such assurances could be reasonably inferred
 - ★ interpretations of the term "source" include individuals and institutions and can include crime victims, citizens providing allegations of misconduct, citizens responding to inquiries from law enforcement agencies, employees providing information about their employers, and foreign law enforcement agencies
- ▶ 5 U.S.C. § 552 (b)(7)(E) protects from disclosure the release of such law enforcement records or information which would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law
 - ★ the technique must not be well known to the public



2.19 Fee Waiver



► Fee Waiver

★ the FOIA provides that records shall be furnished without any charge or at a reduced charge "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."

★ FOIA requesters asking for a waiver or reduction of fees must:

- describe the purpose for which they intend to use the requested information
- explain the extent to which they will extract and analyze the substantive content of the agency record
- describe the nature of the specific activity or research in which the agency records will be used and the specific qualifications they possess to utilize information for the intended purpose in such a way that it will contribute to public understanding
- describe the likely impact on the public's understanding of the subject as compared to the level of public understanding of the subject before disclosure
- describe the size and nature of the public to whose understanding a contribution will be made
- describe the intended means of dissemination to the general public
- indicate if public access to information will be provided free of charge or provided for an access fee or publication fee
- describe any commercial or private interest that they or any other party has in the agency records requested

*Move to
1.13
Why
is this here?*



2.20 Examples of Terminology Not Covered by (b)(7)(E)



▶ The fact that the following investigative terminology may be used does not qualify them as an investigative **technique** within the meaning of Exemption (b)(7)(E) because the **terminology** is commonly known to the public.

- ★ wire tapping
- ★ mail cover
- ★ use of post office boxes
- ★ security flashes
- ★ tagging of fingerprints
- ★ pretext telephone calls
- ★ tracking devices
- ★ polygraph - lie detector testing
- ★ electronic monitoring or surveillance



2.21 Examples of Specific Techniques Covered by (b)(7)(E)



▶ The details of whether a particular technique was used in an investigation and, if so, how it was done are protectable. This allows withholding of

- ★ how a wiretap is performed
- ★ how a mail cover is conducted
- ★ specific tracking devices used and their capabilities
- ★ polygraph test procedures, formats, and questions used
- ★ the details about how electronic monitoring or surveillance are performed



2.22 FOIA Exemption (b)(7) (Cont.)



▶ 5 U.S.C. § 552 (b)(7)(E) protects from disclosure the release of such law enforcement records or information which could reasonably be expected to endanger the life or physical safety of any individual

- ★ requires the withholding of any information necessary to protect the safety of individuals
- ★ no discretionary release

2.23 Reasonable Segregation



- ▶ The FOIA requires that any reasonably segregable portion of an agency record (except for attorney work product) shall be provided to any person requesting such a record after deletion of the portions which are exempt
- ▶ Agencies cannot withhold entire pages or records if only portions contain exempt information. Agencies must segregate releasable information from exempt information and provide non-exempt information
- ▶ All records, including non-public records, must be reviewed when ^{subject to} ~~covered~~ by a FOIA request

Handwritten signature and initials
ak

3. Module C - NRC Procedures Guidance



[3.1 Objectives](#)

[3.2 General NRC Procedures](#)

[3.3 OIS FOIA/PA Officer and OIS FOIA/PA Staff Procedures When a Request is Received](#)

[3.4 OIS FOIA/PA Officer and OIS FOIA/PA Staff Procedures After Records are Received from the Office\(s\) and/or Region\(s\)](#)

[3.5 Specific NRC Procedures for Office\(s\) and/or Region\(s\)](#)

[3.6 Office and Region Timelines](#)

[3.7 Steps to Process a FOIA Request](#)

[3.8 Searches for Relevant Files](#)

[3.9 Searching for Records](#)

[3.10 Reviewing Relevant Records](#)

[3.11 Creating Appendices](#)

[3.12 Receipt and Processing of FOIA Appeals](#)

[3.13 Assigning FOIA Appeal Actions to Offices](#)

[3.14 Processing a FOIA Appeal](#)

[3.15 Processing a FOIA Appeal \(Cont.\)](#)

[3.16 Appeal Denials and Dispatch of Appeals](#)

[3.17 NRC FOIA References](#)



3.1 Objectives



- ▶ General NRC Procedures
- ▶ OIS FOIA Officer and Staff Responsibilities
- ▶ Offices and Regions Responsibilities
- ▶ NRC Instructions for Processing a FOIA Request
- ▶ NRC Instructions for Processing a FOIA Appeal



3.2 General NRC Procedures



▶ FOIA request is received at NRC

★ FOIA request is not considered received at NRC until it is received by the OIS FOIA/PA staff

▶ OIS FOIA/PA staff assigns the request to office(s) and/or region(s)

▶ The office(s) and/or region(s) provide an estimate of search and review time and pages

▶ Verified as valid ^{Request is} (perfected). If the request is not perfected because of a need to collect fees ^{This estimate seems on par with former}

★ OIS FOIA/PA staff computes the total amount due based on fee estimates from office(s) and/or region(s)

▪ contacts requester for agreement to pay fees

▪ may request advance payment

★ action by office(s) and/or region(s) is suspended until notified by OIS FOIA/PA staff that the request is perfected

▶ The office(s) and/or region(s) search for records when notified by the OIS FOIA/PA Specialist

▶ The office(s) and/or region(s) review responsive records line-by-line noting exemptions and make initial recommendations

▶ *The office(s) and/or regions must provide foreseeable harm statements for Exemptions 2 (high)*

▶ The OIS FOIA/PA Specialist reviews the office(s) and/or region(s) recommendations and coordinates with the office(s) and/or region(s) to resolve any differences of opinion

and 5 (Deliberative Process)

▶ The OIS FOIA/PA Specialist obtains Office of General Counsel (OGC) review, when required

▶ NRC FOIA/Privacy Officer ^{and Signs} approves the response

▶ The OIS FOIA/PA staff provides the response to the FOIA requester

and records, if applicable,



3.3 OIS FOIA/PA Officer and OIS FOIA/PA Staff Procedures When a Request is Received



▶ OIS FOIA/PA Officer

- ★ reviews request for completeness
- ★ approves or disapproves expedited processing, if requested
- ★ approves or disapproves fee waiver, if requested
- ★ reviews office(s) and/or region(s) to be assigned *action on requests*
- ★ assigns request to OIS FOIA/PA Specialist

▶ OIS FOIA/PA Staff

- ★ enters request in case tracking database
- ★ sends request to the FOIA Coordinator in the appropriate office(s) and/or region(s) for estimates
 - advises the FOIA Coordinator if expedited processing is requested
 - ~~confirms receipt if not acknowledged by office(s) and/or region(s) within 4 days~~
- ★ sends acknowledgement letter or e-mail to requester with case number and name and telephone number of the OIS FOIA/PA Specialist assigned to the case

** Contacts requester for clarification of scope and fee issues, if necessary.*

3.4 OIS FOIA/PA Officer and OIS FOIA/PA Staff Procedures After



Records are Received from the Office(s) and/or Region(s)

from office(s) and/or region(s)

- ▶ Review proposed responses for accuracy and completeness
- ▶ Resolve differences with office(s) and/or region(s)
- ▶ Make referrals to other Federal agencies, private sector entities, and NRC offices, if necessary
- ▶ Obtain OGC review, if necessary
- ▶ Redact the withheld information

★ redaction is the physical removal of withheld information from a record for the purpose of making a sanitized version of the record available

- ▶ Consolidate appendices received from office(s) and/or region(s)
- ▶ Prepare response to the requester



3.5 Specific NRC Procedures for Office(s) and/or Region(s)



▶ FOIA Coordinator receives the request from the OIS FOIA/PA staff

★ reviews request for understanding of scope (see Section 3.10), if needed

▪ contacts OIS FOIA/PA staff for clarification, if necessary

★ *Provides* ~~performs an initial~~ *duplication and* estimates of time to complete the search and review of records

▪ must provide an estimate to the OIS FOIA/PA staff within 4 work days of the offices' receipt of the request

★ when the request is perfected (see Section 3.2), the office and/or region locates, reviews, brackets records, and creates appendices (see Sections 3.9, 3.10, 3.11)

★ advises OIS FOIA/PA staff if other offices or employees may have responsive records

*prepares for available
Statement
for the
staff and
staff
person*



3.6 Office and Region Timelines



- ▶ Within 4 days (excluding weekends and holidays) provide fee estimate to OIS FOIA/PA staff
- ▶ Within 10 days (excluding weekends and holidays), of receiving a perfected request, provide the OIS FOIA/PA staff any responsive records
 - ★ responsive records should be reviewed and bracketed by the office before providing records to the OIS FOIA/PA staff



3.7 Steps to Process a FOIA Request



- ▶ Make sure you clearly understand what records the requester is seeking
 - ★ if you do not have a clear understanding of what records the requester is seeking, contact the FOIA/PA Specialist for clarification. Do not contact the requester directly. The FOIA/PA Specialist will contact the requester, if necessary
- ▶ Determine if you are likely to have records subject to the request
- ▶ Provide an estimate of search and review time and an estimate of pages if required (NRC Form 496, Report of Staff Resources for Processing FOIA/PA Requests)
- ▶ When processing is required
 - ★ search for records responsive to the request
 - ★ determine if the records are to be released or withheld from the requester
 - ★ bracket information that should be withheld and identify which exemption should be applied
 - ★ indicate whether the records do or do not contain sensitive security information
 - if a record contains sensitive security-related information proposed for release because it does not rise to the level of exempt information under the FOIA, the record will be released to the requester only and not made publicly available in ADAMS until a third FOIA request is received for the same record
 - ★ organize the records responsive to the request and submit them to your office FOIA coordinator
 - ★ submit your response package to your office FOIA coordinator

* Provide ~~as~~ foreseeable harm statements for exemptions 2 (high) and 5 (deliberative process). A statement is not required for Exemptions 1, 3, 4, ~~6, 7A and 7C unless it is not obvious why these exemptions are claimed~~ 6, 7A and 7C unless it is not obvious why these exemptions are claimed.



3.8 Searches for Relevant Files



▶ Search all relevant files (paper and electronic)

★ based on knowledge of subject matter

★ where you reasonably expect to locate records covered by the request



3.9 Searching for Records



▶ Paper Records

- ★ paper records under your personal control including working papers you have retained in your possession
- ★ paper records maintained in your office
- ★ paper records in the NRC File Center

▶ Electronic Records

- ★ e-mails including property sheets in the Received, Sent, Archives, and Trash files. Note that since trash files are still within your control, e-mails responsive to a FOIA request in the trash folder must be identified, retrieved, printed, and processed. You should also move the e-mail out of the trash folder to eliminate the possibility that an automatic deletion of e-mail will destroy the only copy
- ★ electronic records in ADAMS Main Library and Legacy Library including all versions
- ★ other electronic files, including but not limited to WordPerfect, Microsoft Word, spreadsheets, and presentation files, including those files stored on disks
- ★ databases including those files stored on disks

▶ Recording Computer Search Criteria

- ★ when a computer database such as ADAMS is searched to locate records responsive to a request, the search criteria used for conducting the search must be provided with the office response. The Department of Justice has advised agencies in order to justify that they have done an adequate search they must maintain computer search criteria. The search criteria must be provided even if no records are identified as a result of the computer search

▶ Searching Other Media

- ★ audio or video files or tapes



3.10 Reviewing Relevant Records



- ▶ Review records to determine if they should be released or withheld, after applying the FOIA exemption criteria
- ▶ Apply "reasonably segregable" rule (see Section 2.22) *May need to be changed to Section 2.23*
- ▶ Bracket exempt information
- ▶ *Prepare a foreseeable harm statement for Exemptions 2 (high) and 5 (Deliberative process)*
- ▶ Mark outside of scope information
 - ★ if any information on a page of a record that is responsive to the request falls outside of the scope of the request, the information must be marked that it is outside of the scope. The requester will then be provided a redacted copy of the record with the information withheld identified as being outside the scope of the request
 - ★ if entire pages from a record are outside of the scope of the FOIA request, indicate on those pages that they are outside of the scope of the request. Those pages will not be provided to the requester. The appendices for "Records Being Withheld in Part" will indicate the number of pages deemed outside of the scope



3.11 Creating Appendices



- ▶ Office/Region FOIA Coordinator provides to OIS FOIA/PA staff six categories of appendices, as necessary
 - ★ Records Already Publicly Available
 - ★ Records Being Released in Their Entirety
 - ★ Records Containing Sensitive Security Information to be Released to the Requester Only
 - ★ Records Being Withheld in Part
 - ★ Records Being Withheld in Their Entirety
 - ★ Records to be Referred to Other Office, Agency, or Company



3.12 Receipt and Processing of FOIA Appeals



- ▶ Any NRC employee who receives a FOIA appeal shall immediately send it to the OIS FOIA/PA Officer
- ▶ The FOIA requires that an agency respond to an appeal within 20 days (excluding weekends and holidays)
- ▶ A requester may appeal a denial of records in whole or in part and/or appeal
 - ★ the adequacy of a search, or "No Record" determination
 - ★ failure to provide records within 20 days (excluding weekends and holidays)
 - ★ denial of a fee waiver request
 - ★ denial of an expedited processing request



3.13 Assigning FOIA Appeal Actions to Offices



▶ The OIS FOIA/PA staff will provide:

- ★ a copy of the appeal correspondence
- ★ a copy of the original request correspondence
- ★ a copy of the initial request denial response with appropriate appendices
- ★ the records that were denied, unless maintained in another office



3.14 Processing a FOIA Appeal



To the Executive Director for Operations

- ▶ The original staff offices denying release of the records will review them again
- ▶ Consider any new information presented in the appeal correspondence
- ▶ Recommend to the OIS FOIA/PA staff whether or not the records, in whole or in part, should continue to be withheld from disclosure
- ▶ Office response must reflect the office director's or designee's personal approval of the decision to withhold each record or portion thereof
- ▶ *A freezeable form statement is required for Exemptions 2 (b)(7) and 5 (Deliberative Process)*
- ▶ ~~The office response must indicate whether the records do or do not contain sensitive security information (see Section 3.11)~~
- ▶ After resolving all identified problems; the OIS FOIA/PA staff will prepare a response
- ▶ The OIS FOIA/PA staff will obtain concurrences from
 - ★ the original offices denying the records
 - ★ OGC
 - ★ any other offices that are appropriate
- ▶ The OIS FOIA/PA staff will send the response to the ~~DED or appropriate~~ DEDO for approval and signature



3.15 Processing a FOIA Appeal (Cont.)



To the Secretary of the Commission

- ▶ SECY will coordinate a review of the denied records with OGC and
- ▶ Consider any new information in the appeal letter
- ▶ OGC will prepare a response for approval and signature of SECY

To the Inspector General

- ▶ A response will be prepared by the OIG Counsel, following consideration of any new information presented in the appeal correspondence, for approval and signature of the IG



3.16 Appeal Denials and Dispatch of Appeals



Appeal Denials

- ▶ If the appeal is denied, the response will specify the basis for the denial and will advise the requester of his or her right to seek a judicial review under 5 U.S.C. 552 (a)(4)(B) in the Federal District Court in their locale, or in the Federal District Court for the District of Columbia

Appeal Dispatch

- ▶ The OIS FOIA/PA staff will dispatch all appeal responses to the requester

References
3.17

President Obama Memorandum dated January 21, 2009 -
[http://www.whitehouse.gov/the_press_office/Freedom of Information Act](http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act)

Office of the Attorney General Memorandum dated March 19, 2009 -
<http://www.usdoj.gov/ag/foia-memo-march2009.pdf>

U.S. Department of Justice, Freedom of Information Act Guide, 2009
http://www.usdoj.gov/oip/foia_guide09.htm



3.17 NRC FOIA References



- ▶ [Management Directive 3.1](#)
- ▶ [10 CFR Part 9, Subpart A](#)
- ▶ [10 CFR 2.390](#)
- ▶ [U.S. Department of Justice, Freedom of Information Act Guide, March 2007](#)
- ▶ [OIS FOIA Privacy Team Guidance for Expedited Processing \(ML062690296\)](#)
- ▶ [Step-By-Step Guidance - How to Respond to a FOIA Request \(ML060590485\)](#)
- ▶ [NRC FOIA External Web Site](#)
- ▶ [NRC FOIA Intranet Web Site](#)



*not working
need Guide
published in 2007*

4.Module D - Review



The following is a short quiz.



4.1 Module D Review



Click on the box to begin. After you have finished, click on the "back" arrow, then the "forward" arrow to receive your certificate.





4.1.1 Review for Modules A, B & C

Select the appropriate answer for each question or enter the answer in the blank provided. When you have finished, click the button to submit your answers and find out your score.

- Q 1. The FOIA provides individuals a method to obtain information about the functions and operations of the government.
- True
- False
- Q 2. Agencies are required to provide records in the form and format requested if reasonably possible to do so.
- True
- False
- Q 3. Commercial requesters must pay all fees for processing a FOIA request.
- True
- False
- Q 4. Once a denial decision has been made regarding an appeal, a requester has no further recourse but to accept it.
- True
- False
- Q 5. Proprietary information would be withheld under FOIA Exemption 2.
- True
- False
- Q 6. A Social Security number would be withheld under FOIA Exemption 6.
- True
- False
- Q 7. Civilian Federal employees have no privacy rights.
- True
- False
- Q 8. The office receiving the FOIA request from the OIS FOIA/PA staff must conduct a search in all reasonable areas, including e-mail.
- True
- False
- Q 9. The office receiving the FOIA request from the OIS FOIA/PA staff must locate, review, and provide bracketed records to the OIS FOIA/PA staff within 10 days (excluding weekends and holidays)
- True
- False
- Q 10. When a computer database is searched, it is not necessary to record the search criteria for the OIS FOIA/PA staff.
- True
- False
11. A document that can not be located is considered outside the scope of the FOIA request.

- Q True
- Q False

12. Personal notes do not have to be provided under the FOIA if they have not been circulated or integrated into agency files.

- Q True
- Q False

13. All drafts are withholdable under the FOIA

- Q True
- Q False

14. When processing a FOIA request or appeal, NRC employees can contact the OIS FOIA/PA Officer or OIS FOIA/PA staff for advice or assistance.

- Q True
- Q False

15

Grade the Test

Your score will appear here

I would add another question concerning the foreseeable harm statement

Q 14.

*Question: What FOIA exemptions require a harm statement?
↑
foreseeable*

A 14.

*Answers: Ex 2 (high)
Ex 5 (Deliberative process)*



RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) / PRIVACY ACT (PA) REQUEST

2009-0280

3

RESPONSE TYPE FINAL PARTIAL

REQUESTER

Yvette M. Chin

DATE

OCT 23 2009

PART I. - INFORMATION RELEASED

- No additional agency records subject to the request have been located.
- Requested records are available through another public distribution program. See Comments section.
- APPENDICES Agency records subject to the request that are identified in the listed appendices are already available for public inspection and copying at the NRC Public Document Room.
- APPENDICES **D,E** Agency records subject to the request that are identified in the listed appendices are being made available for public inspection and copying at the NRC Public Document Room.
- Enclosed is information on how you may obtain access to and the charges for copying records located at the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD 20852-2738.
- APPENDICES **D,E** Agency records subject to the request are enclosed.
- Records subject to the request that contain information originated by or of interest to another Federal agency have been referred to that agency (see comments section) for a disclosure determination and direct response to you.
- We are continuing to process your request.
- See Comments.

PART I.A - FEES

- AMOUNT * You will be billed by NRC for the amount listed. None. Minimum fee threshold not met.
- \$ You will receive a refund for the amount listed. Fees waived.

* See comments for details

PART I.B - INFORMATION NOT LOCATED OR WITHHELD FROM DISCLOSURE

- No agency records subject to the request have been located.
- Certain information in the requested records is being withheld from disclosure pursuant to the exemptions described in and for the reasons stated in Part II.
- This determination may be appealed within 30 days by writing to the FOIA/PA Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Clearly state on the envelope and in the letter that it is a "FOIA/PA Appeal."

PART I.C COMMENTS (Use attached Comments continuation page if required)

The incoming FOIA/PA-2009-0280 request is located in ADAMS at ML092580512.

SIGNATURE - FREEDOM OF INFORMATION ACT AND PRIVACY ACT OFFICER

Donna L. Seal

RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) / PRIVACY ACT (PA) REQUEST

2009-0280

OCT 23 2009

PART II.A – APPLICABLE EXEMPTIONS

APPENDICES
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Records subject to the request that are described in the enclosed Appendices are being withheld in their entirety or in part under the Exemption No.(s) of the PA and/or the FOIA as indicated below (5 U.S.C. 552a and/or 5 U.S.C. 552(b)).

- Exemption 1: The withheld information is properly classified pursuant to Executive Order 12958.
- Exemption 2: The withheld information relates solely to the internal personnel rules and procedures of NRC.
 - Low 2 Internal matters of a relatively trivial nature.
 - High 2 Disclosure would risk circumvention of a legal requirement.
- Exemption 3: The withheld information is specifically exempted from public disclosure by statute indicated.
 - Sections 141-145 of the Atomic Energy Act, which prohibits the disclosure of Restricted Data or Formerly Restricted Data (42 U.S.C. 2161-2165).
 - Section 147 of the Atomic Energy Act, which prohibits the disclosure of Unclassified Safeguards Information (42 U.S.C. 2167).
 - 41 U.S.C., Section 253b, subsection (m)(1), prohibits the disclosure of contractor proposals in the possession and control of an executive agency to any person under section 552 of Title 5, U.S.C. (the FOIA), except when incorporated into the contract between the agency and the submitter of the proposal.
- Exemption 4: The withheld information is a trade secret or commercial or financial information that is being withheld for the reason(s) indicated.
 - The information is considered to be confidential business (proprietary) information.
 - The information is considered to be proprietary because it concerns a licensee's or applicant's physical protection or material control and accounting program for special nuclear material pursuant to 10 CFR 2.390(d)(1).
 - The information was submitted by a foreign source and received in confidence pursuant to 10 CFR 2.390(d)(2).
 - Disclosure will harm an identifiable private or governmental interest.
- Exemption 5: The withheld information consists of interagency or intraagency records that are not available through discovery during litigation. Applicable privileges:
 - Deliberative process: Disclosure of predecisional information would tend to inhibit the open and frank exchange of ideas essential to the deliberative process. Where records are withheld in their entirety, the facts are inextricably intertwined with the predecisional information. There also are no reasonably segregable factual portions because the release of the facts would permit an indirect inquiry into the predecisional process of the agency.
 - Attorney work-product privilege. (Documents prepared by an attorney in contemplation of litigation)
 - Attorney-client privilege. (Confidential communications between an attorney and his/her client)
- Exemption 6: The withheld information is exempted from public disclosure because its disclosure would result in a clearly unwarranted invasion of personal privacy.
- Exemption 7: The withheld information consists of records compiled for law enforcement purposes and is being withheld for the reason(s) indicated.
 - (A) Disclosure could reasonably be expected to interfere with an enforcement proceeding (e.g., it would reveal the scope, direction, and focus of enforcement efforts, and thus could possibly allow recipients to take action to shield potential wrongdoing or a violation of NRC requirements from investigators).
 - (C) Disclosure would constitute an unwarranted invasion of personal privacy.
 - (D) The information consists of names of individuals and other information the disclosure of which could reasonably be expected to reveal identities of confidential sources.
 - (E) Disclosure would reveal techniques and procedures for law enforcement investigations or prosecutions, or guidelines that could reasonably be expected to risk circumvention of the law.
 - (F) Disclosure could reasonably be expected to endanger the life or physical safety of an individual.
- OTHER (Specify)

PART II.B – DENYING OFFICIALS

Pursuant to 10 CFR 9.25(g), 9.25(h), and/or 9.65(b) of the U.S. Nuclear Regulatory Commission regulations, it has been determined that the information withheld is exempt from production or disclosure, and that its production or disclosure is contrary to the public interest. The person responsible for the denial are those officials identified below as denying officials and the FOIA/PA Officer for any denials that may be appealed to the Executive Director for Operations (EDO).

DENYING OFFICIAL	TITLE/OFFICE	RECORDS DENIED	APPELLATE OFFICIAL		
			EDO	SECY	IG
Joseph R. Gray	Associate General Counsel for Licensing and Regulation	Appendix D		✓	

Appeal must be made in writing within 30 days of receipt of this response. Appeals should be mailed to the FOIA/Privacy Act Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, for action by the appropriate appellate official(s). You should clearly state on the envelope and letter that it is a "FOIA/PA Appeal."

**APPENDIX D
RECORDS WITHHELD IN PART**

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/(PAGE COUNT)/EXEMPTIONS</u>
1.	3/24/09	E-Mail from Sealing to Brown et al., New FOIA Guidelines (1 page) Ex. 5
2.	3/26/09	E-Mail from Holzle to Rothschild, FOIA Memo 3-19-09 (1 page) Ex. 5
3.	4/6/09	E-Mail from Sealing to Rothschild YA – New FOIA Procedures.doc (4 pages) (2 pages released) Ex. 5
4.	4/13/09	E-Mail from Nichols to Sealing, FOIA New Procedures AG Guidance 2009 YA rev.doc (5 pages) (2 pages released) Ex. 5
5.	4/20/09	E-Mail from Sealing to Holzle, YA on New FOIA Procedures (4 pages) (1 page released) Ex. 5
6.	4/28/09	E-Mail from Holzle to Sealing, YA on FOIA policy/harm statements (4 pages) (1 page released) Ex. 5

APPENDIX E
RECORDS BEING RELEASED IN THEIR ENTIRETY

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/(PAGE COUNT)</u>
1.	4/20/09	E-Mail from Nichols to Sealing, Draft YA on New FOIA Procedures (3 pages)

Sealing, Donna

From: Donna Sealing *DS*
Sent: Monday, April 06, 2009 8:56 AM
To: Trip Rothschild
Cc: Russell Nichols
Subject: Draft YA on New FOIA Procedures
Attachments: YA-New FOIA Procedures.doc

Good Morning Trip,

Attached for your review is the YA on the new FOIA procedures.

Donna

From: Russell Nichols
Sent: Friday, March 27, 2009 7:49 AM
To: Trip Rothschild
Cc: Donna Sealing; Catherine Holzle; Joseph Gray; Stephen Burns
Subject: RE: FOIA Memo 03-19-09

Of course.

From: Trip Rothschild *TR*
Sent: Friday, March 27, 2009 7:44 AM
To: Russell Nichols
Cc: Donna Sealing; Catherine Holzle; Joseph Gray; Stephen Burns
Subject: RE: FOIA Memo 03-19-09

That sounds like a good game plan. OGC would like to review the yellow announcement in draft form.

From: Russell Nichols *DS*
Sent: Friday, March 27, 2009 7:06 AM
To: Trip Rothschild
Cc: Donna Sealing; Catherine Holzle
Subject: RE: FOIA Memo 03-19-09

Donna attended a meeting yesterday sponsored by DOJ where the AG memo was the topic. She plans to issue a Yellow Announcement (YA) that will provide guidance about the Attorney General's memo and require submission of a foreseeable harm statement for denials. There may be other things in the YA too, but we want to get it out soon even though DOJ has not issued the new reporting guidelines yet. She also plans to hold a class for the agency FOIA coordinators, and will update the FOIA training class and materials, and the instructional guidance that her section provides to FOIA coordinators. I don't think this merits rewriting MD 3.1. Do you have any other suggestions?

From: Trip Rothschild *TR*
Sent: Thursday, March 26, 2009 4:36 PM
To: Russell Nichols; Catherine Holzle
Subject: FW: FOIA Memo 03-19-09

Any thoughts?

From: Stephen Burns *SB*
Sent: Thursday, March 26, 2009 4:20 PM

DS

To: Joseph Gray; Trip Rothschild
Subject: Fw: FOIA Memo 03-19-09

Are we developing implementation guidance for staff? I haven't been able to read yet because the PDF is not easily readable on the Blackberry.
Steve

From: Kristy Remsburg
To: OGC Distribution
Sent: Thu Mar 26 13:56:50 2009
Subject: FOIA Memo 03-19-09
For your information.

Please see the attached memorandum from the Attorney General as this pertains to all of us.

Kristy

D-3



UNITED STATES NUCLEAR REGULATORY COMMISSION

Yellow Announcement: YA-09-####

Date: April ##, 2009

TO: All NRC Employees

SUBJECT: NEW FREEDOM OF INFORMATION ACT PROCEDURES

On March 19, 2009, Attorney General Eric Holder issued new guidelines to the heads of executive departments and agencies governing the Freedom of Information Act (FOIA). These guidelines reaffirm the government's "commitment of accountability and transparency" as directed by President Obama in his Memorandum on the FOIA issued January 21, 2009. The combined impact of these two memorandums is to usher in the new era of open Government.

The Attorney General's FOIA Guidelines strongly encourage agencies to make discretionary releases of records. The guidelines direct agencies not to withhold records simply because a FOIA exemption may technically apply. Agencies must apply the "foreseeable harm" standard. Whenever full disclosure of a record is not possible, consideration should be given to making a partial disclosure. The presumption of disclosure applies to all decisions involving the FOIA.

Another significant part of the Guidelines is the establishment of a new standard for defending agencies. The Department of Justice (DOJ) 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." The DOJ is also strongly emphasizing that a reasonable effort should be made to segregate exempt information from information that is required to be disclosed by the FOIA.

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

- A statement of foreseeable harm must be provided to the FOIA/Privacy Section when responding to an initial FOIA request when Exemptions 2 (high) and 5 of the FOIA are being claimed (and Exemptions 6 or 7C when it is not obvious why the exemption is being cited). Exemption 2 (low) will no longer be used. Harm statements for Exemptions 1, 3, and 4 are not necessary unless the reason for withholding the information is not obvious.
- When responding to FOIA appeals, the office response must not only indicate that the office director or designee has personally approved both the decision to withhold each record (or portion) thereof but also include the statement of foreseeable harm accompanying the initial recommendation to withhold the information.

To achieve the President's "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

OFFICE	FOIA/PA	RFPSB	OGC	DD/IRSD	D/IRSD
NAME	D. Sealing	R. Nichols	T. Rothschild	M. Janney	J. Holonich
DATE	04/ /09	04/ /09	04/ /09	04/ /09	04/ /09
OFFICE	DD/OIS	D/OIS	CIO	EDO	
NAME	J. Schaeffer	T. Boyce	D. Ash	R. W. Borchardt	
DATE	04/ /09	04/ /09	04/ /09	04/ /09	

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D-3

Sealing, Donna

From: Russell Nichols /OIS
Sent: Monday, April 13, 2009 7:22 AM
To: Donna Sealing
Subject: FW: Draft YA on New FOIA Procedures
Attachments: FOIA New Procedures AG guidance 2009 YA rev.doc

Donna,

Trip called me a few minutes ago. He thinks the YA needs a description of low 2. Also, he expressed concerns that the YA says low2 will no longer be used. He said he does not like to see things like "never" or "always" because there could be a situation where we decide to withhold. I told him we'd add an explanation of low 2, and that we'd talk with Mary Jean and Natalie to see what their recollection is of the Clinton/Reno years and whether low2 was ever invoked. Your insight into what DOJ has said about this would be helpful. For example, I am pretty sure they said they would not defend a low 2 withholding in court. Am I right about that? Let's talk when you get back.

Russ

From: Catherine Holzie
Sent: Friday, April 10, 2009 5:47 PM
To: Donna Sealing
Cc: Russell Nichols; Trip Rothschild
Subject: RE: Draft YA on New FOIA Procedures

Trip had some additional concerns on this draft YA, which I have incorporated into the attached revision of suggested edits. Essentially, it involves providing an explanation of the nature of the exemptions mentioned. I broke them into separate bulleted items to make it (hopefully) less confusing. Let me know what you think.

My suggested edits are attached. Please let me know if you have any questions. Thanks.

From: Donna Sealing
To: Trip Rothschild
Cc: Russell Nichols
Sent: Mon Apr 06 08:56:28 2009
Subject: Draft YA on New FOIA Procedures
Good Morning Trip,

Attached for your review is the YA on the new FOIA procedures.

Donna

From: Russell Nichols
Sent: Friday, March 27, 2009 7:49 AM
To: Trip Rothschild
Cc: Donna Sealing; Catherine Holzie; Joseph Gray; Stephen Burns
Subject: RE: FOIA Memo 03-19-09

Of course.

From: Trip Rothschild
Sent: Friday, March 27, 2009 7:44 AM

To: Russell Nichols
Cc: Donna Sealing; Catherine Holzle; Joseph Gray; Stephen Burns
Subject: RE: FOIA Memo 03-19-09

That sounds like a good game plan. OGC would like to review the yellow announcement in draft form.

From: Russell Nichols
Sent: Friday, March 27, 2009 7:06 AM
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Cc: Donna Sealing; Catherine Holzle
Subject: RE: FOIA Memo 03-19-09

Donna attended a meeting yesterday sponsored by DOJ where the AG memo was the topic. She plans to issue a Yellow Announcement (YA) that will provide guidance about the Attorney General's memo and require submission of a foreseeable harm statement for denials. There may be other things in the YA too, but we want to get it out soon even though DOJ has not issued the new reporting guidelines yet. She also plans to hold a class for the agency FOIA coordinators, and will update the FOIA training class and materials, and the instructional guidance that her section provides to FOIA coordinators. I don't think this merits rewriting MD 3.1. Do you have any other suggestions?

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Sent: Thursday, March 26, 2009 4:36 PM
To: Russell Nichols; Catherine Holzle
Subject: FW: FOIA Memo 03-19-09

Any thoughts?

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To: Joseph Gray; Trip Rothschild
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To: OGC Distribution
Sent: Thu Mar 26 13:56:50 2009
Subject: FOIA Memo 03-19-09
For your information.

Please see the attached memorandum from the Attorney General as this pertains to all of us.

Kristy



**UNITED STATES
NUCLEAR REGULATORY COMMISSION**

Yellow Announcement: YA-09-####

Date: April ##, 2009

TO: All NRC Employees

SUBJECT: NEW FREEDOM OF INFORMATION ACT PROCEDURES

On March 19, 2009, Attorney General Eric Holder issued new guidelines to the heads of executive departments and agencies governing the Freedom of Information Act (FOIA). These guidelines reaffirm the government's "commitment of accountability and transparency" as directed by President Obama in his Memorandum on the FOIA issued January 21, 2009. The combined impact of these two memorandums is to usher in the new era of open Government.

The Attorney General's FOIA Guidelines strongly encourage agencies to make discretionary releases of records. The guidelines direct agencies not to withhold records simply because a FOIA exemption may technically apply. Agencies must apply the "foreseeable harm" standard, as described below. Whenever full disclosure of a record is not possible, consideration should be given to making a partial disclosure. The presumption of disclosure applies to all decisions involving documents sought under the FOIA.

Another significant part of the Guidelines is the establishment of a new standard for defending agencies. The Department of Justice (DOJ) 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." The DOJ guidelines also strongly emphasize that the FOIA requires agencies to take reasonable steps to segregate exempt information from information that is required to be disclosed by the FOIA and to release the nonexempt information.

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

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- A statement of foreseeable harm must be provided to the FOIA/Privacy Section when responding to an initial FOIA request if FOIA Exemption 2 (high) is being claimed. Exemption 2 (high) is primarily used for internally-generated information the disclosure of presents a risk of circumvention of law or regulation. Exemption 2 (low) will no longer be used.
- A statement of foreseeable harm must be provided to the FOIA/Privacy Section when responding to an initial FOIA request if FOIA Exemption 5 is being claimed. Exemption 5 is generally used for protection of predecisional, deliberative process information, but also is used for attorney-client privileged information and attorney work-product.
- An explanation of the need for Exemptions 6 or 7(C) should also be provided when it is not obvious why the exemption is being cited. 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 the same type of information in the context of a law enforcement function. An explanation of the need for Exemption 7(A) should, likewise, be provided when it is not obvious why it is being cited. Exemption 7(A) protects information the disclosure of which could reasonably be expected to interfere with pending law enforcement proceedings.
- Exemptions 1, 3, and 4 generally are used when disclosure is not discretionary. Thus, an explanation of the need for these exemptions is not necessary, unless the reason for withholding the information is not obvious. Exemption 1 requires withholding of national security (classified) information. Exemption 3 authorizes withholding of information specifically exempted by federal statute. Exemption 4 authorizes withholding of trade secrets information or information commonly known as proprietary information.
- When responding to FOIA appeals, the office response must not only indicate that the Office Director or designee has personally approved both the decision to withhold each record (or portion) thereof and the statement of foreseeable harm accompanying the initial recommendation to withhold the information.

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Comment [cmh1]: Exemptions 1 and 3, in particular, mandate withholding. Exemption 4 also leaves little room for discretionary release, with Trade Secrets Act protection.

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Comment [cmh2]: This authority probably will need to be delegated considerably below this level, unless we really expect Office Directors to approve each statement.

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To achieve the President's "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

OFFICE	FOIA/PA	RFPSB	OGC	DD/IRSD	D/IRSD
NAME	D. Sealing	R. Nichols	T. Rothschild	M. Janney	J. Holonich
DATE	04/ /09	04/ /09	04/ /09	04/ /09	04/ /09
OFFICE	DD/OIS	D/OIS	CIO	EDO	
NAME	J. Schaeffer	T. Boyce	D. Ash	R. W. Borchardt	
DATE	04/ /09	04/ /09	04/ /09	04/ /09	

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D-4

Sealing, Donna

From: Donna Sealing
Sent: Monday, April 20, 2009 4:38 PM
To: Catherine Holze
Cc: Russell Nichols; Donna Sealing; Trip Rothschild
Subject: YA on New FOIA Procedures
Attachments: YA-New FOIA Procedures.doc

Cathy,

Attached is the revised draft YA for your review.

D-5



UNITED STATES
NUCLEAR REGULATORY COMMISSION

Yellow Announcement: YA-09-####

Date: April ##, 2009

TO: All NRC Employees

SUBJECT: NEW FREEDOM OF INFORMATION ACT PROCEDURES

On March 19, 2009, Attorney General Eric Holder issued new guidelines to the heads of executive departments and agencies governing the Freedom of Information Act (FOIA). These guidelines reaffirm the government's "commitment of accountability and transparency" as directed by President Obama in his Memorandum on the FOIA issued January 21, 2009. The combined impact of these two memorandums is to usher in the new era of open Government.

The Attorney General's FOIA Guidelines strongly encourage agencies to make discretionary releases of records. The presumption of disclosure applies to all decisions involving documents sought under the FOIA. The guidelines direct agencies not to withhold records simply because a FOIA exemption may technically apply.

Another significant part of the Guidelines is the establishment of a new standard for defending agencies in FOIA litigation. The Department of Justice (DOJ) 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." The DOJ guidelines also strongly emphasize that the FOIA requires agencies to take reasonable steps to segregate exempt information from information that is required to be disclosed by the FOIA and to release the nonexempt information. Whenever full disclosure of a record is not possible, a partial disclosure of nonexempt information should be made unless the disclosure would leave only essentially meaningless words or phrases.

Agencies must apply the "foreseeable harm" standard. Foreseeable harm is not merely "speculative or abstract fears." Agencies must reasonably foresee that disclosure would cause harm. For example, a requested record might be a draft containing recommendations. Such a record might be properly withheld under Exemption 5, but that should not be end of the review. Rather, the content of that particular draft should be reviewed and a determination made as to whether the agency reasonably foresees that disclosing that particular document, given its age, content, and character, would harm an interest protected by Exemption 5.

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

- A statement of foreseeable harm must be provided to the FOIA/Privacy Section when responding to an initial FOIA request if FOIA Exemption 2 (high) is being claimed. Exemption 2 (high) is primarily used for internally-generated information the disclosure of presents a risk of circumvention of law or regulation. Exemption 2 (low) is, by definition, trivial to begin with, thus there would be no reasonable foreseeable harm from release, and discretionary release should be the general rule.
- A statement of foreseeable harm must be provided to the FOIA/Privacy Section when responding to an initial FOIA request if FOIA Exemption 5 is being claimed. Exemption 5 is generally used for protection of predecisional, deliberative process information, but also is used for attorney-client privileged information and attorney work-product.
- An explanation of the need for Exemptions 6 or 7(C) should also be provided when it is not obvious why the exemption is being cited. 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 the same type of information in the context of a law enforcement function. An explanation of the need for Exemption 7(A) should, likewise, be provided when it is not obvious why it is being cited. Exemption 7(A) protects information the disclosure of which could reasonably be expected to interfere with pending law enforcement proceedings.
- Exemptions 1, 3, and 4 generally are used when disclosure is not discretionary. Thus, an explanation of the need for these exemptions is not necessary, unless the reason for withholding the information is not obvious. Exemption 1 requires withholding of national security (classified) information. Exemption 3 authorizes withholding of information specifically exempted by federal statute. Exemption 4 authorizes withholding of trade secrets or information commonly known as proprietary information.
- When responding to FOIA appeals, the office response must indicate that the Office Director or designee has personally approved the decision to withhold each record (or portion thereof) and the statement of foreseeable harm accompanying the initial recommendation to withhold the information.

To achieve the President's "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.

Comment [cmh1]: This authority probably will need to be delegated considerably below this level, unless we really expect Office Directors to approve each statement.

Comment [dis2R1]: That's why we included "or designee"

R. W. Borchardt
Executive Director for Operations

ADAMS Accession Number: ML09

*concurring by e-mail

OFFICE	FOIA/PA	RFPSB	OGC	DD/IRSD	D/IRSD
NAME	D. Sealing	R. Nichols	T. Rothschild	M. Janney	J. Holonich
DATE	04/ /09	04/ /09	04/ /09	04/ /09	04/ /09
OFFICE	DD/OIS	D/OIS	CIO	EDO	
NAME	J. Schaeffer	T. Boyce	D. Ash	R. W. Borchardt	
DATE	04/ /09	04/ /09	04/ /09	04/ /09	

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D-5

Holzle, Catherine

From: Catherine Holzle *1066*
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
Attachments: FOIA Procedures under 2009 AG policy YA (3).doc

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.

D-B



UNITED STATES NUCLEAR REGULATORY COMMISSION

Yellow Announcement: YA-09-####

Date: April ##, 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 departments and agencies governing the Freedom of Information Act (FOIA) agencies. These guidelines reaffirm the government's "commitment of to accountability and transparency" as directed by President Obama in his Memorandum on the FOIA issued on January 21, 2009. The combined impact of together, these two memorandums is to usher in the new era of open call for increased Governmental openness.

The Attorney General's FOIA Guidelines strongly encourage agencies to make discretionary releases of records. The President called on agencies to "adopt a presumption in favor of disclosure," presumption 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 may technically apply right allow withholding.

Another significant part of the gGuidelines 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 segregate 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 full disclosure of a record is not possible, agencies should make partial disclosures of nonexempt information should be made unless the disclosure redactions would leave only essentially meaningless words or phrases.

If disclosure is not prohibited by law, aAgencies must apply the DOJ's "foreseeable harm" standard when deciding whether to release records. To withhold information, Foreseeable harm is not merely "speculative or abstract fears." aAgencies must reasonably foresee that

D-6

disclosure would cause harm. "Speculative or abstract fears" are not enough to justify nondisclosure. For example, a FOIA request could ask the a requested record might be a agency to release a draft containing preliminary recommendations. Such a record might be eligible for withholding properly withheld 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 review. Rather, the age, content, and character of that particular draft should be reviewed and a determination made as to in determining whether the agency reasonably foresees that disclosure disclosing that particular document, given its age, content, and character, 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 new policy is being implemented by the Nuclear Regulatory Commission:

- 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 when responding to an initial FOIA request if FOIA Exemption 2 (high) is being claimed. 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) is primarily used for in response to requests for sensitive, internally-generated security information when the disclosure of which that information presents a risk of circumvention of law or regulation could allow recipients to circumvent laws or regulations.
- Exemption 2 (low) is, by definition, trivial to begin with, thus there would be no reasonable foreseeable harm would typically be expected to result from public release, and discretionary release should be the general rule.
- 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.
- A statement of foreseeable harm must be provided to the FOIA/Privacy Section when responding to an initial FOIA request if FOIA Exemption 5 is being claimed. Exemption 5 is generally used for protection of predecisional, deliberative process information, and is frequently applied to protect information in draft documents, but also is used for attorney-client privileged information and attorney work-product.
- An explanation of the need for Exemptions 6, 7(A), or 7(C) should also be provided when it is not obvious why the agency is citing those exemption exemption is being cited. 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 the companion authority for the same type of withholding privacy information in gathered for enforcement purposes, the context of a law enforcement function. An explanation of the need for Exemption 7(A) should, likewise, be provided when it is not obvious why it is being cited. Exemption 7(A) protects applies to enforcement information the when its disclosure of which could reasonably be expected to interfere with pending law-enforcement proceedings.

D6

- Exemptions 1, 3, and 4 generally are generally used invoked when disclosure is not discretionary. Thus, an explanation of the need for these exemptions is not necessary, unless the reason for withholding information the information is not obvious. Exemption 1 supports withholding of national security (classified) information specifically authorized to be kept secret in the interest of national defense. Exemption 3 authorizes authorizes withholding of information specifically required to be exempted protected by other federal statute laws. For the NRC, Exemption 3 is most often used to withhold Safeguards Information and Restricted Data. Exemption 4 authorizes shields of trade secrets or information commonly known and other proprietary business as proprietary 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 [cmh1][dis2] or the Director's designee has personally approved both the decision to withhold each record (or portion thereof) and the any statement of foreseeable harm accompanying the initial recommendation to withhold the information.

To achieve the President's 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

OFFICE	FOIA/PA	RFPSB	OGC	DD/IRSD	D/IRSD
NAME	D. Sealing	R. Nichols	T. Rothschild	M. Janney	J. Holonich
DATE	04/ /09	04/ /09	04/ /09	04/ /09	04/ /09
OFFICE	DD/OIS	D/OIS	CIO	EDO	
NAME	J. Schaeffer	T. Boyce	D. Ash	R. W. Borchardt	
DATE	04/ /09	04/ /09	04/ /09	04/ /09	

OFFICIAL RECORD COPY

Dlo

Sealing, Donna

From: Russell Nichols *ojs*
Sent: Monday, April 20, 2009 1:04 PM
To: Donna Sealing
Cc: Catherine Holzie
Subject: RE: Draft YA on New FOIA Procedures

Donna,

I apologize for continuing to have afterthoughts every time I read this, but now I have another one after I approved what you sent to Cathy. Therefore, I'm Cc'ing her so that she'll know we're thinking about the below change in case it crosses her mind too:

Because we use the term but we don't say exactly what it means, I think we should add a definition or elaboration for the term "foreseeable harm." To paraphrase the DOJ guidance, foreseeable harm is not merely speculative or abstract fears but the agency must reasonably foresee that disclosure would cause harm. DOJ actually gives an example using Exemption 5. If we have enough space (are YA's limited to a certain number of characters?), perhaps the DOJ example could be included in the YA. What do you think about taking the sentence about foreseeable harm out of the second paragraph on page one and adding a definition/elaboration of foreseeable harm as a new paragraph right before the last paragraph on page one? That way you'd have an explanation of FH followed by the paragraph that starts with "In order to comply..."

Russ

From: Donna Sealing
Sent: Monday, April 20, 2009 12:08 PM
To: Catherine Holzie
Cc: Russell Nichols; Trip Rothschild
Subject: RE: Draft YA on New FOIA Procedures

Cathy,

Here's the updated YA for your review.

Donna

From: Catherine Holzie *o/c*
Sent: Friday, April 10, 2009 5:47 PM
To: Donna Sealing
Cc: Russell Nichols; Trip Rothschild
Subject: RE: Draft YA on New FOIA Procedures

Trip had some additional concerns on this draft YA, which I have incorporated into the attached revision of suggested edits. Essentially, it involves providing an explanation of the nature of the exemptions mentioned. I broke them into separate bulleted items to make it (hopefully) less confusing. Let me know what you think.

My suggested edits are attached. Please let me know if you have any questions. Thanks.

From: Donna Sealing
To: Trip Rothschild
Cc: Russell Nichols

Sent: Mon Apr 06 08:56:28 2009
Subject: Draft YA on New FOIA Procedures
Good Morning Trip,

Attached for your review is the YA on the new FOIA procedures.

Donna

From: Russell Nichols
Sent: Friday, March 27, 2009 7:49 AM
To: Trip Rothschild
Cc: Donna Sealing; Catherine Holzle; Joseph Gray; Stephen Burns
Subject: RE: FOIA Memo 03-19-09

Of course.

From: Trip Rothschild
Sent: Friday, March 27, 2009 7:44 AM
To: Russell Nichols
Cc: Donna Sealing; Catherine Holzle; Joseph Gray; Stephen Burns
Subject: RE: FOIA Memo 03-19-09

That sounds like a good game plan. OGC would like to review the yellow announcement in draft form.

From: Russell Nichols
Sent: Friday, March 27, 2009 7:06 AM
To: Trip Rothschild
Cc: Donna Sealing; Catherine Holzle
Subject: RE: FOIA Memo 03-19-09

Donna attended a meeting yesterday sponsored by DOJ where the AG memo was the topic. She plans to issue a Yellow Announcement (YA) that will provide guidance about the Attorney General's memo and require submission of a foreseeable harm statement for denials. There may be other things in the YA too, but we want to get it out soon even though DOJ has not issued the new reporting guidelines yet. She also plans to hold a class for the agency FOIA coordinators, and will update the FOIA training class and materials, and the instructional guidance that her section provides to FOIA coordinators. I don't think this merits rewriting MD 3.1. Do you have any other suggestions?

From: Trip Rothschild
Sent: Thursday, March 26, 2009 4:36 PM
To: Russell Nichols; Catherine Holzle
Subject: FW: FOIA Memo 03-19-09

Any thoughts?

From: Stephen Burns
Sent: Thursday, March 26, 2009 4:20 PM
To: Joseph Gray; Trip Rothschild
Subject: Fw: FOIA Memo 03-19-09

Are we developing implementation guidance for staff? I haven't been able to read yet because the PDF is not easily readable on the Blackberry.
Steve

From: Kristy Remsburg
To: OGC Distribution
Sent: Thu Mar 26 13:56:50 2009
Subject: FOIA Memo 03-19-09
For your information.

Please see the attached memorandum from the Attorney General as this pertains to all of us.

Kristy

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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](#)

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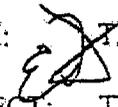


Office of the Attorney General

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

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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.

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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.

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*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*.

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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

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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.

Sealing, Donna

From: Russell Nichols, *OIS*
Sent: Thursday, January 22, 2009 11:13 AM
To: Joseph Holonich
Cc: Margie Janney; Donna Sealing; Gregory Trussell
Subject: FW: FYI - PRESIDENT OBAMA'S INITIAL PUBLIC DIRECTIVES
Attachments: opengov012109.pdf; 012109rb1.pdf; ethics012109.pdf; foia012109.pdf

Joe,

FYI. The President's FOIA memo (attached) directs the Department of Justice (DOJ) to develop FOIA guidelines for his administration. This is normal when administrations change between the parties. Until we get the DOJ guidelines, I don't plan to make any changes in the application of the FOIA exemptions. The same goes for the Open Government memo. We'll need to wait for Office of Management and Budget's guidance on that too. It appears that one is directed at information technology officers so I am not sure what direct impact it will have on IRSD. Will keep you advised.

See Mike Weber's comment regarding the President's rule making directive.

Russ

From: Trip Rothschild
Sent: Thursday, January 22, 2009 8:45 AM
To: Russell Nichols; Donna Sealing; Natalie Brown; Mary Jean Raphael
Subject: FW: FYI - PRESIDENT OBAMA'S INITIAL PUBLIC DIRECTIVES

FYI

From: Michael Weber
Sent: Thursday, January 22, 2009 7:07 AM
To: Albert Wong; Bill Brach; Catherine Haney; Dan Dorman; Dwight Walker; Lawrence Kokajko; Lisa Culp; Mark Flynn; Shawn Smith; Steven Ward
Cc: Gregory Morell; Susan Bagley; Martin Virgilio; Eric Leeds; Michael Johnson; Brian Sheron; Roy Zimmerman; Charles Miller; Trip Rothschild; Thomas Boyce (OIS); Vonna Ordaz
Subject: FYI - PRESIDENT OBAMA'S INITIAL PUBLIC DIRECTIVES

You may have heard about President Obama's initial public directives on rulemakings, ethics, pay, FOIA, and openness in government. They are attached (except the memorandum on pay which only applies to senior level White House personnel). We'll rely on OGC to determine their application to NRC. We've already been informed based on past precedent that the rulemaking directive does not apply; every incoming President since President Reagan issued a similar directive for review of rules at the beginning of their terms in office.

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Sealing, Donna

From: Russell Nichols *OIS*
Sent: Monday, January 26, 2009 9:42 AM
To: Darren Ash
Cc: Joseph Holonich; Thomas Boyce (OIS); James Schaeffer; Margie Janney; Karen Olive; Donna Sealing; Trip Rothschild; Catherine Holzle
Subject: FW: President Obama's FOIA Memorandum

Darren,

I didn't see you on the addressee list for this, which you should have been as the NRC Chief FOIA Officer unless you received it via a separate listserv.

I do not envision this change impacting NRC much, if at all, because we have operated in a spirit of openness and have judiciously applied the FOIA exemptions in the spirit in which they were intended. Will keep you advised when further guidance is received.

Russ

From: DOJ.OIP.FOIA [mailto:DOJ.OIP.FOIA@usdoj.gov]
Sent: Friday, January 23, 2009 4:29 PM
To: Arrington, Angela; Ball, Katherine; Bartlett, Michael J.; Bridge, Diane L.; Broderick, Marilyn; Brown, Vanessa S.; Cramer, Jodi; Dangin, Alfan; Adams Jr., Albert D.; An, Gil Hyun; Apol, David; Babcock, Lisa; Batie, Patricia; Bender, Stuart; Berger, Robin; Berumen, Malia; Boling, Edward A.; Bomgardner, Elizabeth; Boyd, Harriette; Brockner-Ryan, Beth; Buck, John; Carey, Priscilla; Carter, Mildred; Carter, Rodney L.; Castelli, Laurence; Castelli, Michael; Cerveny, John; Christopher, Nancy; Coe, A. Ren'ee; Cornell, Susan R.; Costello, Dan; Cragg, Scott; Crago, Erica; Crowley, Gerald; Cuffe, Elizabeth; Diaz-Ortiz, Martha; Dolan, Brenda; Dorsey, Betty B.; Duncan, Hilario R.; Eckert, Robert; Ehrlich, Carol; Femi, Judy; Fina, Joan; Fisch, Fred; FitzGerald, E. William; Frangipane, Noelle; Frye, Nneka; Garner, Stephanie D.; Gee, Patricia; Gottesman, Larry; Gottry, Heather C.; Grafeld, Margaret P.; Gressman, William E.; Gross, Jacqueline; Hackett, John F.; Hair, Shoko; Hanz, Brenda; Hardy, Dionne; Harris, Talya; Hawkins, Sharron; Higgins, Kitty; Hite, Jeanette S.; Hollaway, Rebecca; Hollingsworth, Judi; Hudson, Jennifer; Huff, Latita M.; Ingersoll, Janet; Inman, Katie; Jagadesan, Des; Jeffcoat, Mary A.; Jensen, Leslie; Johnson, Clay; Kammer, Will; Kil, Sophia; Kinsey, Brian Scott; Kirkpatrick, Christopher; Korb, Timothy; Krol, Jim; Kurt, Christopher; Laster, John; Lazaroff, Joy; Link, Kendra; Livornese, John; Low, Carol; Luczynksi, Kimberley; Luna, Stella; Marquis, Michael S.; Mason, Tony; Matthews, Carol A.; Mcconnell, Stephen; McCoy, Regina; McCready, Andrew W.; McLaughlin, Jeanne; Means, Judith; Mengel, David; Mills, Alberta; Newman, Annette; Russell Nichols; Noble, Jacqueline; Oleinick, Lew; Oliver, Ramona; Papoi, Catherine; Parsons, Bobbie; Paskar, Joanne; Paternmaster, mMara; Patten, Mae R.; Pearson, Christina; Peppe, Margaret G.; Perhach, William; Petersen, Daniel; Phillips, Pamela N.; Plick, Joe; Polk, Willie J.; Ratchford, Jeanne; Ray, Kathy; Rosas, Christina E.; Sadler, Fred; Schaub, Patricia; Smith, Angela; Tanaka, Allison; Aitken, Steven; Army Human Resources Command; Barber, Delores J.; Beemer, Anne; Brown, Miriam; Carr, Paul J.; Clark, Michell; Combs, Robert; Corbman, Laura; DeProspero, Peggy; Drabek, Cynthia; Easter, Stacy; Eiden, Leo; English, Sarah; Gilmore, Hugh; Hawkins, Sandra, L.; Hester, tom; Hogan, Jim; Hudson, Jennifer; Jackson, Kim; Johnson, Tammye; Johnson, Toyia; Jones, Thom; Kahn, R.; Leonard, Rachael; Lesko, Stephanie; Levitt, Marilyn; Lighton, Sharon; Mallus, Alex; Mancini, N.; Marr, Jennifer; Martz, Amanda; Mastromichalis, Keith; McConnell, Stephen; Miller, Margaret A.; Moye, Melba; Nelson, Delores; O'Connor, Cindy; Oliveri, Medaris; Olsen, Matthew; Ortiz, Raho; Paez, Alan; Pavlik-Keenan, Catrina; Pickworth, Melissa; Ramsay, Nancy; Reali, Francis; Salva, Dianne; Schecker, Larry; Donna Sealing; Sealing, Donna L.; Senzel, David; Sharpe, Thomas; Sheils, Peter; Shonks, Margie; Sincavage, Michael; Singer, Harold; Smith, Nancy Kegan; Smith-Toomey, Mary Beth; Sorbera, Joseph A.; St. Louis, Nicole; Steinberg, David; Stevenson, Todd A.; Suzuki, Shari; Taylor, Anastazia; Thomas, Charlene Wright; Tilley, Steven D.; Travers, Linda A.; Underwood, Dale; Vance, Frank D.; Vankevich, Peter M.; Veach, Kimberly; Vergelli, John; Verreau, Rebecca; Virga, Jane; Wallace, Sally; Washington, Angela; Watt, Sheree; Winefordner, Arlin; Wooden, Eric; Wright, Lauren E.; Wright, Virginia; Yates, Ruth; Yohe, Melanie
Subject: President Obama's FOIA Memorandum

FOIA Professionals:

On January 21, 2009, President Obama signed the "Presidential Memorandum for the Heads of Executive Departments and Agencies on the Freedom of Information Act," which establishes a new policy for Executive Branch departments and agencies concerning disclosure and transparency. The President directed all agencies to administer the FOIA with a clear presumption in favor of disclosure, to resolve doubts in favor of openness, and to not withhold information based on "speculative or abstract fears." In addition, the President called on agencies to ensure that requests are responded to with "a spirit of cooperation," that disclosures are timely, and that modern technology is used to make information available to the public even before a request is made.

To implement these objectives, the President directed the Attorney General to issue new guidelines governing the FOIA. Those guidelines will reaffirm the Executive Branch's "commitment to accountability and transparency." The Department of Justice looks forward to issuing the guidelines directed by the President and to working directly with other departments and agencies to ensure that the President's goal of making his administration the most open and transparent in history is realized.

The President's memorandum was effective immediately and supersedes former Attorney General Ashcroft's Memorandum on the FOIA dated October 12, 2001. As a result, agency personnel should immediately begin to apply the presumption of disclosure to all decisions involving the FOIA, as the President has called for.

Once the new FOIA guidelines are issued by the Attorney General, OIP will conduct comprehensive training on those guidelines and provide additional advice and guidance to departments and agencies to ensure that our government is accountable and transparent, in keeping with the President's commitment.

Melanie Ann Pustay
Director
Office of Information and Privacy
U.S. Department of Justice

Sealing, Donna

From: Russell Nichols *OIS*
Sent: Friday, March 20, 2009 2:34 PM
To: Gloria Higgs
Cc: Donna Sealing; Margie Janney; Mary Moss
Subject: New Attorney General Memo on FOIA

Darlene,

Here is a Daily Item for March 24 (based on a meeting that will be March 26):

On March 19, 2009, the Attorney General (AG) issued a memorandum, "The Freedom of Information Act (FOIA)," that provides his guidance to Federal agencies on FOIA processing. Issuance of the AG's memorandum was directed in President Obama's memorandum of January 21, 2009, "Freedom of Information Act" which established a new era of open, transparent government. The AG's memo can be found at: <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>. On March 26, 2009, the Office of Information Policy, Department of Justice, will host a government-wide training conference to discuss the President's and the AG's memoranda. Information and Records Services Division staff will attend.

Russ

Raphael, Mary Jean

From: Donna Sealing, *DIS*
Sent: Friday, March 20, 2009 7:27 AM
To: Natalie Brown; Warren Christian; Barbara Culleen; Deborah Dennis; Becky Menefee; Mary Jean Raphael
Subject: FW: New Attorney General FOIA Memo

Here's the link to the new AG's FOIA memo. We'll have another annual report to do.

<http://thefoiablog.typepad.com/files/foiamemo.pdf>

A14

Sealing, Donna

From: Margie Janney / *OIS*
Sent: Friday, March 27, 2009 9:07 AM
To: Russell Nichols
Cc: Donna Sealing
Subject: RE: Item of Interest

I'd like to report on this at Monday's OIS morning meeting.

From: Russell Nichols
Sent: Friday, March 27, 2009 9:04 AM
To: Margie Janney
Cc: Donna Sealing
Subject: RE: Item of Interest

Donna plans to issue a Yellow Announcement (YA) that will provide guidance about the Attorney General's memo and require submission of a foreseeable harm statement for denials. There may be other things in the YA too, but we want to get it out soon even though DOJ has not issued the new reporting guidelines yet. She also plans to hold a class for the agency FOIA coordinators, and will update the FOIA training class and materials, and the instructional guidance that her section provides to FOIA coordinators. I don't think this merits rewriting MD 3.1. Do you have any other suggestions?

From: Margie Janney
Sent: Friday, March 27, 2009 9:02 AM
To: Russell Nichols
Cc: Donna Sealing
Subject: RE: Item of Interest

How's this impact us?

From: Russell Nichols
Sent: Friday, March 27, 2009 7:27 AM
To: Mary Moss
Cc: Margie Janney; Donna Sealing
Subject: Item of Interest

Mary,

Here is Donna's IOI from her meeting with DOJ:

Department of Justice Training Conference on President Obama's and Attorney General Holder's Memoranda on the Freedom of Information Act

On March 26, 2009, staff from Information and Records Services Division attended a government-wide training conference sponsored by the Department of Justice (DOJ) at the Department of Commerce. The purpose of the meeting was to discuss President Obama's and Attorney General Holder's memoranda which establish a new era for open government. Agencies must apply a "foreseeable harm" standard when reviewing Freedom of Information Act requests. The Attorney General "strongly encourage(s) agencies to make discretionary disclosures of information." These discretionary releases would apply primarily to Exemptions 2, 5 and 7, and they will be most applicable to Exemption 5. Additionally, DOJ will be issuing guidance later this year regarding new reporting requirements on the steps agencies have taken to improve FOIA operations and

facilitate information disclosure. This report will be separate from the annual FOIA report agencies submit to DOJ.

Russ

Raphael, Mary Jean

From: Donna Sealing, OIS
Sent: Wednesday, April 01, 2009 12:13 PM
To: Mary Jean Raphael; Natalie Brown
Subject: YA on New FOIA Requirements
Attachments: YA-New FOIA Rqmts.doc

Mary Jean and Natalie,

Could you please take a look at the draft Yellow Announcement and give me your thoughts before I send the draft up to Trip.

Thanks,

Donna

A/6

On March 19, 2009, Attorney General Eric Holder issued new guidelines to the heads of executive departments and agencies governing the Freedom of Information Act (FOIA). These guidelines reaffirm the government's "commitment of accountability and transparency" as directed by President Obama in his Memorandum on the FOIA issued January 21, 2009. The combined impact of these two memorandums is to usher in the new era of open Government.

The Attorney General's FOIA Guidelines strongly encourage agencies to make discretionary releases of records. The guidelines direct agencies not to withhold records simply because a FOIA exemption may technically apply. Agencies must apply the "foreseeable harm" standard. Whenever full disclosure of a record is not possible, consideration should be given to making a partial disclosure. The presumption of disclosure applies to all decisions involving the FOIA.

Another significant part of the Guidelines is the establishment of a new standard for defending agencies. 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."

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

- A statement of foreseeable harm must be provided to the FOIA/Privacy Section when Exemptions 2 (high) and 5 of the FOIA are being claimed (and Exemptions 6 or 7C when it is not obvious why the exemption is being cited). Exemption 2 (low) will no longer be used. Harm statements for other exemptions are not necessary unless the reason for withholding the information is not obvious.
- When responding to FOIA appeals, the office response must indicate that the office director or designee has personally approved both the decision to withhold each record (or portion) thereof and the statement of foreseeable harm accompanying the recommendation to withhold.
- A reasonable effort should be made to segregate exempt information from information that is required to be disclosed by the FOIA.

To achieve the President's "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.

Sealing, Donna

From: Jo Ann Resner / OIS
Sent: Thursday, April 02, 2009 7:47 AM
To: Donna Sealing
Subject: RE: Need Executive Order Number

Thanks Donna. This is perfect.

From: Donna Sealing
Sent: Thursday, April 02, 2009 7:46 AM
To: Jo Ann Resner
Subject: RE: Need Executive Order Number

Jo Ann,

As requested - please let me know if you need any additional info.

Donna

On December 14, 2005, President George W. Bush issued Executive Order 13,392, "Improving Agency Disclosure of Information (EXIT)". In the order, the President directed agencies to ensure citizen-centered and results-oriented FOIA operations.

On January 21, 2009, President Obama issued a memorandum for the Heads of Executive Departments and Agencies, "Freedom of Information Act." This memo states that "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."

On March 19, 2009, Attorney General Holder issued a memorandum for Heads of Executive Departments and Agencies "The Freedom of Information Act (FOIA)." This memo states that "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."

From: Jo Ann Resner
Sent: Thursday, April 02, 2009 7:27 AM
To: Donna Sealing
Subject: Need Executive Order Number

Hi Donna,

What is the Executive Order number for our FOIA Improvement Plan? I want to include it in an impact statement for the budget.

Thanks,
Jo Ann

Raphael, Mary Jean

From: Catherine Holzie *106C*
Sent: Friday, April 17, 2009 5:08 PM
To: Russell Nichols; Donna Sealing; Kathryn Winsberg
Cc: Trip Rothschild; Nicola Sanchez; Charles Mullins; Robert Rader; James Adler; Sean Croston
Subject: New FOIA Guidance

The DOJ guidance we were waiting for just got posted today. Text follows and link is:
<http://www.usdoj.gov/oip/foiapost/2009foiapost8.htm>.

**President Obama's FOIA Memorandum
and
Attorney General Holder's FOIA Guidelines

Creating a "New Era of Open Government"**

On his first full day in office, January 21, 2009, President Obama issued a memorandum to the heads of all departments and agencies on the Freedom of Information Act (FOIA). The President directed that FOIA "should be administered with a clear presumption: In the face of doubt, openness prevails." Moreover, the President instructed agencies that information should not be withheld merely because "public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

Agencies were directed to respond to requests "promptly and in a spirit of cooperation." The President also called on agencies to "adopt a presumption in favor of disclosure" and to apply that presumption "to all decisions involving [the] FOIA." This presumption of disclosure includes taking "affirmative steps to make information public," and utilizing "modern technology to inform citizens about what is known and done by their Government."

The President directed the Attorney General to issue FOIA Guidelines for the heads of executive departments and agencies "reaffirming the commitment to accountability and transparency." On March 19, 2009, during Sunshine Week, Attorney General Eric Holder issued those Guidelines. The Attorney General highlighted that the FOIA "reflects our nation's fundamental commitment to open government" and that his Guidelines are "meant to underscore that commitment and to ensure that it is realized in practice."

The FOIA Guidelines stress that the FOIA is to be administered with the presumption of openness called for by the President. This presumption means that information should not be withheld "simply because [an agency] may do so legally." Moreover, the Attorney General has directed that whenever full disclosure of a record is not possible, agencies "must consider whether [they] can make partial disclosure." The Attorney General also "strongly encourage[s] agencies to make discretionary disclosures of information."

While recognizing that the "disclosure obligation under the FOIA is not absolute," and that the FOIA contains exemptions to protect, for example, national security, personal privacy, privileged records, and law enforcement interests, the Guidelines stress that the President has directed agencies not to withhold information merely to prevent embarrassment, or because "errors and failures might be revealed, or because of speculative or abstract fears."

Significantly, the Attorney General rescinded the October 12, 2001 Attorney General Memorandum on the FOIA and established a new standard for defending agency decisions to withhold information. When a FOIA request is denied, agencies will now be defended "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."

Establishing an Effective System to Respond to Requests

In addition to establishing these principles applicable to the presumption of disclosure, the Attorney General also comprehensively addressed in his Guidelines a range of principles applicable to establishing an effective system for improving transparency. In doing so he emphasized that "[e]ach agency must be fully accountable for its administration of the FOIA."

The Guidelines emphasize that all agency employees are responsible for the FOIA, not just those who interact directly with FOIA requesters. In the past, agencies have identified common concerns that hinder their ability to provide information to the public, including competing agency priorities that pull FOIA personnel and resources away from FOIA duties, and the lack of sufficient technological support for FOIA activities. As a result, the Guidelines stress that in order "[t]o 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."

The Attorney General highlighted the key roles played by both agency Chief FOIA Officers and FOIA professionals in each agency. Chief FOIA Officers "must recommend adjustments to agency practices, personnel, and funding as may be necessary." The Attorney General also specifically recognized the important role played by the FOIA professionals in each agency who directly work with FOIA requesters. He stressed that these 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." Those FOIA professionals, in turn, were reminded that the President had directed agencies to work "in a spirit of cooperation" with FOIA requesters and to be mindful that "[u]nnecessary bureaucratic hurdles have no place in the 'new era of open Government' that the President has proclaimed."

The Guidelines emphasize the need for agencies to work proactively to post information online in advance of FOIA requests. When responding to requests, agencies are directed "to make it a priority to respond in a timely manner." Finally, Chief FOIA Officers are asked to review "all aspects of their agencies' FOIA administration, with particular focus on the concerns highlighted in" the Guidelines, and to report each year to the Department of Justice "on the steps that have been taken to improve FOIA operations and facilitate information disclosure at their agencies."

Net Impact

The combined impact of the President's FOIA Memorandum and the Attorney General's FOIA Guidelines is a sea change in the way transparency is viewed across the government. As a result of these directives there are now:

- * New approaches to responding to requests and to working with requesters.
- * New, more limited standards for defending agencies when they deny a FOIA request.
- * New requirements to maximize the use of technology to disclose information.
- * New requirements to post information online affirmatively, in advance of FOIA requests.
- * New focus on the broad array of agency personnel whose actions impact the FOIA.
- * New accountability requirements, particularly for agency Chief FOIA Officers who must report to the Department of Justice each year.

To implement these new Guidelines agencies must review all aspects of their approach to transparency and incorporate these principles into all decisions they make involving the FOIA to ensure that the presumption of disclosure is fully realized in practice.

Starting Point: Altering the Mind Set to Make the Presumption of Openness a Reality

The President has asked agencies to renew their commitment to the principles embodied in the FOIA in order to "usher in a new era of open Government." There are five key points agencies should keep in mind to realize this goal.

Agency personnel must alter their mind set in keeping with the President's vision. This is the first and in many ways the most important step. To achieve a "new era of open Government" agency personnel must think about the FOIA differently. They must focus on the principles set out in the President's Memorandum and the Attorney General's Guidelines. Most importantly, agency personnel should view all FOIA decisions through the prism of openness.

The key frame of reference for this new mind set is the purpose behind the FOIA. The statute is designed to open agency activity to the light of day. As the Supreme Court has declared: "FOIA is often explained as a means for citizens to know what 'their Government is up to.'" NARA v. Favish, 541 U.S. 157, 171 (2004) (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989)). The Court elaborated that "[t]his phrase should not be dismissed as a convenient formalism." Id. at 171-72. Rather, "[i]t defines a structural necessity in a real democracy." Id. at 172. The President's FOIA Memoranda directly links transparency with accountability which, in turn, is a requirement of a democracy. The President recognized the FOIA as "the most prominent expression of a profound national commitment to ensuring open Government." Agency personnel, therefore, should keep the purpose of the FOIA -- ensuring an open Government -- foremost in their mind.

Second, agencies should be mindful not to review records with the sole purpose of determining what can be protected under what exemption. Instead, records should be

reviewed in light of the presumption of openness with a view toward determining what can be disclosed, rather than what can be withheld. For every request, for every record reviewed, agencies should be asking "Can this be released?" rather than asking "How can this be withheld?"

Third, in keeping with the Attorney General's directive, agencies "should not withhold information simply because [they] may do so legally." Information should not automatically be withheld just because an exemption technically or legally might apply. Indeed, if agency personnel find themselves struggling to fit something into an exemption, they should be aware of the President's directive that "[i]n the face of doubt, openness prevails."

Fourth, when full disclosure of a record is not possible, agencies should consider making a partial disclosure. The Attorney General reminded agencies that they "should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information." Under the Guidelines, that review takes on an added element. In addition to reviewing records to see if portions are reasonably segregable as non-exempt, agencies should also be reviewing records to see if portions that are technically exempt can be released as a matter of discretion. Whether a release involves boxes of material, or only a few pages, it is important for agencies to remember that the increased transparency resulting from even a partial disclosure of records is worthwhile.

Finally, agencies must keep in mind the President's directive that records cannot be withheld merely to protect public officials from embarrassment, or "because errors and failures might be revealed, or because of speculative or abstract fears." Rather, agencies should only withhold records, or portions of records, when they reasonably foresee that disclosure would harm an interest protected by one of the exemptions or when disclosure is prohibited by law.

Applying the "Foreseeable Harm" Standard

After taking all of these openness principles into account, there still will be records and portions of records for which protection will remain entirely appropriate. As the Attorney General recognized in his Guidelines, "the disclosure obligation under the FOIA is not absolute." Congress included exemptions from mandatory disclosure to protect against different harms, such as, for example, harm to national security, harm to personal privacy, and harm to law enforcement interests.

Under the Attorney General's Guidelines, before withholding a record, the agency must reasonably foresee that disclosure would harm an interest protected by one of the exemptions. Thus, FOIA professionals should examine individual records with an eye toward determining whether there is foreseeable harm from release of that particular record, or portion thereof. Each record should be reviewed by agencies for its content, and the actual impact of disclosure for that particular record, rather than simply looking at the type of document or the type of file the record is located in.

Thus, for example, a requested record might be a draft, or a memorandum containing a recommendation. Such records might be properly withheld under Exemption 5, but that should not be the end of the review. Rather, the content of that particular draft and that

particular memorandum should be reviewed and a determination made as to whether the agency reasonably foresees that disclosing that particular document, given its age, content, and character, would harm an interest protected by Exemption 5. In making these determinations, agencies should keep in mind that mere "speculative or abstract fears" are not a sufficient basis for withholding. Instead, the agency must reasonably foresee that disclosure would cause harm. Moreover, agencies must be mindful of the President's directive that in the face of doubt, openness prevails.

Discretionary Release

The determination of whether an agency reasonably foresees harm from release of a particular record, or record portion, goes hand-in-hand with the determination of whether to make a discretionary release of information. Under the Attorney General's Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged. Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5.

For records covered by certain other exemptions, however, discretionary disclosures are not possible because the information is required to be withheld by some other legal authority. Specifically, records protected by the exemptions covering national security, commercial and financial information, personal privacy, and information protected by statute, are generally not subject to discretionary releases. Thus, for material covered by Exemption 1, which protects properly classified information, if an agency determines that the information is properly classified, no discretionary disclosure is appropriate.

Similarly, if material is required to be withheld by a withholding statute encompassed under Exemption 3, the protection afforded by that statute should be applied and a discretionary release is not appropriate. Agencies should be certain, however, that the statute being invoked meets the requirements of Exemption 3 and, importantly, that the documents being withheld fall within the scope of the statute.

If material falls within Exemption 4, it is also generally protected by the Trade Secrets Act, a statute that prohibits release of commercial and financial information unless the release is otherwise authorized by law. Here, again, a discretionary disclosure of such material cannot be made if doing so is in violation of the Trade Secrets Act. Before withholding, agencies should be certain that the many requirements for invoking Exemption 4 are met in the first instance.

For information falling within Exemptions 6 and 7(C), if the information is also protected by the Privacy Act of 1974, it is not possible to make a discretionary release, as the Privacy Act contains a prohibition on disclosure of information not "required" to be released under the FOIA. Agencies should be mindful of the need to conduct a balancing under these exemptions in the first instance and also should consider whether it is possible, given the context of the request, to protect the identities of the individuals mentioned in the documents while releasing the rest, in order to both protect privacy and to further the public's interest in openness.

When reviewing documents to determine whether Exemptions 1, 3, 4, 6, and 7(C) apply, agencies should carefully review all portions of the documents to determine whether they fall within the scope of the claimed exemption. In addition, agencies should strive to reasonably segregate any non-exempt information from such documents in order to make a partial disclosure if possible.

Factors to Consider in Making a Discretionary Release

Documents protected by the remaining Exemptions, Exemptions 2, 5, 7, 8, and 9, can all be subjects of discretionary release. Agency FOIA professionals must use their judgment in making such determinations for each document, but they should be guided by the "fundamental commitment to open government" that the Attorney General directed should be "realized in practice." Fundamentally, in reviewing a record the agency must first ensure that any portion being considered for withholding fits all requirements of the exemption being considered. If the exemption applies, the agency should then take the second step of determining whether to make a discretionary release of the record or portion of the record. For all records, the age of the document and the sensitivity of its content are universal factors that need to be evaluated in making a decision whether to make a discretionary release.

For records covered by Exemption 2, agencies should handle "Low 2" differently from "High 2". Information covered by "Low 2" is, by definition, trivial to begin with, thus there would be no reasonably foreseeable harm from release, and discretionary release should be the general rule. "High 2," by contrast, is premised on a finding of harm. Before applying High 2 to a record, agencies should ensure that they are not withholding based on "speculative or abstract fears," but instead are withholding because they reasonably foresee that disclosure would harm an interest protected by Exemption 2.

Similarly, for the subparts of Exemption 7 other than 7(C), agencies should ensure that before invoking the exemption they are not basing the withholding on "speculative or abstract fears," but instead are withholding because they reasonably foresee that disclosure would harm an interest protected by one of the subparts of Exemption 7. As with Exemption 2, there are certainly opportunities to make discretionary disclosures for records covered by Exemption 7. For example, agencies should consider whether records which reference a law enforcement technique or procedure are now outdated, or no longer sensitive, or not specific enough to cause harm. In such cases, a discretionary release can be made. Similarly, due to the breadth of protection afforded information provided by a confidential source, records covered by Exemption 7(D) also hold potential for discretionary disclosures. Some agencies already release much source-provided information when processing records of historical significance. Agencies can review their practices in this area to look for additional cases where greater information can be released as a matter of discretion.

There is no doubt that records protected by Exemption 5 hold the greatest promise for increased discretionary release under the Attorney General's Guidelines. Such releases will be fully consistent with the purpose of the FOIA to make available to the public records which reflect the operations and activities of the government. Records covered by the deliberative process privilege in particular have significant release potential. In addition to the age of the record and the sensitivity of its content, the nature of the

decision at issue, the status of the decision, and the personnel involved, are all factors that should be analyzed in determining whether a discretionary release is appropriate. Documents protected by other Exemption 5 privileges can also be subject to discretionary disclosures.

Thus, in response to requests for records, agencies should view each request with a presumption of openness. They should strive to maximize the amount of records released and aim to release portions of records when full release is not possible. Agencies should not withhold records merely because an exemption legally applies. For any document or portion of a document for which a discretionary release is possible, agencies should consider making such a release and should withhold only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption.

Achieving Transparency in New Ways

Responding to FOIA requests with a presumption of openness is only one element of the President's and Attorney General's vision for creating a "new era of open Government." In addition to responding to FOIA requests, agencies must look for other ways to increase transparency.

Specifically, the President directed agencies to "take affirmative steps to make information public." Moreover, the President stressed that agencies "should not wait for specific requests from the public." Instead, agencies "should use modern technology to inform citizens about what is known and done by their Government." This is a key area where agencies should strive for significant improvement.

Agencies should implement systems and establish procedures whereby records of interest to the public are routinely identified and systematically posted. This needs to be an on-going practice within each agency. To assist agencies in applying Federal agency dissemination policies for public information FOIA professionals should consult the dissemination principles outlined in Section 8 of OMB's Circular A-130. See <http://www.whitehouse.gov/omb/assets/omb/circulars/a130/a130trans4.pdf>

FOIA professionals themselves can work with officials in their agency to seek out records for purposes of posting. Additionally, agencies can set up procedures in key offices where other officials routinely identify in advance, or as records are finalized, those that are good candidates for posting. The more information that is made available on agency websites, the greater the potential to reduce the number of individual requests made for records. More importantly, agencies must recognize that proactively disclosing information about the operations and activities of their agency is an integral part of achieving transparency.

Working Cooperatively with Requesters and Disclosing Records Promptly

The President also directed agencies to "act promptly" and make timely disclosures of information. Significantly, the Attorney General declared that "[l]ong delays should not be viewed as an inevitable and insurmountable consequence of high demand."

These directives require all agencies, but particularly those with a large volume of requests or a large backlog, to examine their entire approach to providing information to requesters in order to be able to respond more promptly. Certainly, increasing the amount of information made available proactively by the agency has the potential to reduce backlogs and delays. Chief FOIA Officers should be involved in reviewing their agency's FOIA operations to find areas where delays can be reduced. FOIA professionals in turn, must utilize their agency Chief FOIA Officer and keep him or her fully informed regarding the particular challenges they are facing so that the Chief FOIA Officer can make appropriate adjustments within the agency.

The President also directed agencies to act in a "spirit of cooperation" with requesters. As the Attorney General stressed: "Unnecessary bureaucratic hurdles have no place in the 'new era of open Government' that the President has proclaimed." Agencies should keep these principles in mind when interacting with requesters and work to ensure that the process of requesting information is easy. One way that interaction with requesters has improved is through the use of tracking numbers for requests that will take longer than ten days to process. The FOIA now requires that such tracking numbers be provided to requesters and that a telephone line or internet service be established so that a requester can check the status of his or her request. This is just one example of how agencies can simplify and improve their interaction with FOIA requesters.

Accountability

The Attorney General emphasized that each agency must be fully accountable for its FOIA operation. He also stressed that Chief FOIA Officers must be active participants in their agency's FOIA operations. Chief FOIA Officers are required by law to be senior level officials at the Assistant Secretary level or its equivalent. These officials are required to "recommend adjustments to agency practices, personnel, and funding as may be necessary" to improve FOIA administration.

As mentioned above, competing agency priorities and insufficient technology support were commonly cited by agencies as concerns that hindered their ability to improve their FOIA operations. These are key areas where the Chief FOIA Officer's assistance can be vital. When, for example, FOIA personnel are pulled away from FOIA to work on other matters, or when IT support personnel are not available to FOIA professionals, these actions negatively impact FOIA administration. This is where the agency Chief FOIA Officer plays a critical role in prioritizing demands and allocating resources so that FOIA operations are not negatively impacted. As the Attorney General emphasized, FOIA 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."

Chief FOIA Officers will now be required to report to the Department of Justice each year on the steps they have taken to improve transparency in their agency. This will ensure that the principles established by the Attorney General's Guidelines continue to remain vital year after year.

Summary

The President and Attorney General have established sweeping new changes in the way transparency is to be viewed and administered across the Government. These principles require agencies to employ a comprehensive approach to transparency. This approach can be summarized in ten key elements that agencies must take into account in order to ensure that the fundamental commitment to open Government is realized.

1. The presumption of disclosure applies to all decisions involving the FOIA; agencies should keep that presumption foremost in their mind.
2. When responding to a request, agencies should approach their review of documents by asking, "What can I release?"
3. Records should not be withheld merely because they fall within an exemption.
4. Agencies should review each document with a focus on whether there is foreseeable harm from disclosure of that particular record.
5. Determinations of foreseeable harm are made on a case-by-case basis, but universal factors to consider are the age of the document and the sensitivity of its contents.
6. Agencies should make discretionary releases of records when possible.
7. When full disclosure of a record is not possible, agencies should strive to make a partial disclosure.
8. Separate and apart from the handling of individual FOIA requests, agencies should anticipate interest in records, should set up systems for identifying and retrieving them, and should post them on their website. Information about agency operations and decisions should be available to the public online. This is a key area where agencies can make real improvements in increasing transparency.
9. Agencies should work cooperatively with requesters and respond promptly.
10. FOIA professionals should work with their agency Chief FOIA Officers who, in turn, will be reporting to the Department of Justice each year so that each agency is fully accountable for its administration of the FOIA.

Achieving the "new era of open Government" that the President has proclaimed will require the commitment of all agency personnel. It will be an on-going process, as agencies continually strive to integrate the new openness principles into their FOIA operations and seek out ways to disclose more information proactively. By renewing their commitment to transparency, all agencies will be a part of this "new era of open Government." (*posted 04/17/2009*)

Sealing, Donna

From: Joseph Holonich *OTS*
Sent: Monday, April 20, 2009 7:47 AM
To: Russell Nichols
Cc: Donna Sealing
Subject: RE: Guidance on President Obama's FOIA Memoranda and Attorney General Holder's FOIA Guidelines

Thanks Russ.

Joe

-----Original Message-----

From: Russell Nichols
Sent: Monday, April 20, 2009 7:47 AM
To: Joseph Holonich
Cc: Donna Sealing
Subject: RE: Guidance on President Obama's FOIA Memoranda and Attorney General Holder's FOIA Guidelines

Joe,

There will be some impact. That's why we are preparing the Yellow Announcement to notify the agency. When certain denials are made, a "foreseeable harm" statement will need to be included by the denying office. Also, we won't be able to use one of the exemptions except in rare circumstances.

We were waiting for DOJ to issue this guidance before we send out the YA, just in case they added something else in the guidance that they had not told us about.

Russ

-----Original Message-----

From: Joseph Holonich
Sent: Sunday, April 19, 2009 10:15 AM
To: Donna Sealing; Russell Nichols
Cc: Margie Janney
Subject: FW: Guidance on President Obama's FOIA Memoranda and Attorney General Holder's FOIA Guidelines

FYI. Let me know if there is any impact to us.

Joe

From: Darren Ash
Sent: Saturday, April 18, 2009 6:58 AM
To: Joseph Holonich; Margie Janney
Cc: Thomas Boyce (OIS); James Schaeffer
Subject: FW: Guidance on President Obama's FOIA Memoranda and Attorney General Holder's FOIA Guidelines

Joe and Margie,
In case you or your staff did not receive the message below. FYI.
Darren

A19

From: DOJ.OIP.FOIA [DOJ.OIP.FOIA@usdoj.gov]

Sent: Friday, April 17, 2009 4:50 PM

To: Aitken, Steven; Darren Ash; Ashworth, Russ; Ballard, E.; Barnes, Janet L.; Bartholow, Steven; Bartlett, Michael; Bennet, Marilyn; Bertina Adams; Bhagowalila, Sanjeev (Sonny); Black, David; Boling, Edward; Booker, Carol; Bryant, Wil; Buffon, Kathleen; Callear, James; Calvert, Lawrence; Carson, David; Chellaraj, Rajkumar; Cinerney, R.M.; Conley, Michael; Cuffe, Elizabeth; Danker, Deborah; De Deo, Carol; Duncan, Thomasenia; Ellison, Michele P.; Flahavan, Richard; Ford, Delorice; Fortuno, Victor; Gregory, Karen V.; Grosner, Brian; Hackett, John; Hall, Bill; Hendricks, Kenneth A; Hertz, Philip; Hill, Beverly; Hughes, Inez; Johnson, Jennifer L.; Johnson, Mary; Jordan, Mosina; Jurith, Edward; Kaye, Janice; Kearney, Barry; Keats, Craig; Killete, Delores; Knapp, Lindy; Kolb, Ingrid; Kronopolus, Cathy; Kropf, John (DHS); Laponsky, Mark; Mancini, Nadine; Mantini, John; Mason, Eileen; Mastroianni, Peggy; mspb@mspb.gov; McDonnell, Erin; McKenna, Michael; Monroig, Emma; Morgan, Rita M; Nelson, Keith; Nichols, Dorothy; Oliveri, Medaris; Otterman, Kate; Petrick, James; Powell, D. Matthew; Reynolds, Emily; Rhodes, Michael; Richards, Laura; Ruiz, Diego; Ryan, JoAnn; Schaub, Patricia; Scherer, Robert; Schiffer, Lois; Shannon, Matthew; Shapiro, Robert; Sorbera, Joe; St. Louis, N.; Stern, Gary; Stevenson, Todd; Suro-Brodie, Carmen; Tarasiuk, Aldolfo; Tittsworth, Jim; Tobey, Bill; Travers, Linda; Trinity, Frank; Verreau, Rebecca; Wallace, Sally; Warner, Christopher; Watson, Carole; Weiss, Nancy; Wellman, Tricia; Williams, Steven; Winefordner, Arlin; Wolff, Otto; Zak, Leocadia; Apol, D; Caldwell, J.; Callear, James; Cantor, Jonathan; Jacobs, Robert; Johnson, Tammye; Kaepplein, Kristin; Koppel, Rosa; Leonard, Rachael; Lewis, Vicky; Lighton, Sharon; Moye, Melba; Overton, Bruce; Phelps, John; Shaw, Cynthia; Spencer, William; Weems, Dorothy; White, Chris; Yoshimura, Edwin; Arrington, Angela; Ball, Katherine; Bridge, Diane L.; Broderick, Marilyn; Cramer, Jodi; Dangin, Alfon; Adams Jr., Albert D.; An, Gil Hyun ; Apol, David; Babcock, Lisa ; Batie, Patricia ; Bender, Stuart ; Berger, Robin; Berumen, Malia ; Boling, Edward A. ; Bomgardner, Elizabeth; Boyd, Harriette ; Brockner-Ryan, Beth ; Buck, John ; Carter, Mildred; Castelli, Laurence ; Castelli, Michael ; Cerveny, John ; Christopher, Nancy ; Coe, A. Ren'ee ; Cornell, Susan R. ; Costello, Dan ; Cragg, Scott ; Crowley, Gerald; Diaz-Ortiz, Martha; Dolan, Brenda; Duncan, Hilario R. ; Eckert, Robert ; Ehrlich, Carol; Femi, Judy ; Fina, Joan ; Fisch, Fred ; FitzGerald, E. William ; Frangipane, Noelle ; Frye, Nneka ; Garner, Stephanie D. ; Gee, Patricia ; Gottesman, Larry ; Gottry, Heather C. ; Grafeld, Margaret P. ; Gressman, William E. ; Gross, Jacqueline ; Hackett, John F. ; Hair, Shoko ; Hardy, Dionne ; Hawkins, Sharron ; Higgins, Kitty ; Hite, Jeanette S. ; Holland, A.; Hollingsworth, Judi ; Ingersoll, Janet ; Inman, Katie ; Jagadesan, Des ; Jeffcoat, Mary A.; Jensen, Leslie ; Johnson, Clay ; Kammer, Will ; Kirkpatrick, Christopher ; Korb, Timothy ; Krol, Jim ; Kurt, Christopher ; Laster, John ; Lazaroff, Joy ; Lerner, A.; Link, Kendra ; Livornese, John; Low, Carol ; Luczynski, Kimberley ; Luna, Stella ; Marquis, Michael S. ; Mason, Tony ; Matthews, Carol A. ; Mcconnell, Stephen ; McCoy, Regina ; McCready, Andrew W. ; McLaughlin, Jeanne ; Means, Judith ; Mengel, David ; Mills, Alberta ; Newman, Annette; Russell Nichols; Noble; Jacqueline; Oleinick, Lew ; Oliver, Ramona ; Papoi, Catherine; Parsons, Bobbie ; Paskar, Joanne ; Paternmaster, mMara; Patten, Mae R. ; Payne, Latita M. ; Peppe, Margaret G. ; Petersen, Daniel ; Phillips, Pamela N. ; Plick, Joe ; Ratchford, Jeanne ; Ray, Kathy ; Rosas, Christina E. ; Sadler, Fred ; Smith, Angela; Tanaka, Allison; Aitken, Steven; Allison Lerner; Army Human Resources Command; Barber, Delores J.; Beemer, Anne; Bestrain, Peggy; Blagg, Mahlon; Brown, Miriam; Bryant, Maureen; Carr, Paul J.; Chase, Michelle; Combs, Robert; Corbman, Laura; Debrae, Melvin; DeProspero, Peggy; Dickey, Jennifer; Drabek, Cynthia; Easter, Stacy; Eiden, Leo; English, Sarah; Gilmore, Hugh; Hawkins, Sandra, L.; Henshall, Dave; Hester, tom; Hogan, Jim; Hudson, Jennifer; Jackson, Barbara; Jackson, Kim; Johnson, Toyia; Jones, Thom; Kahn, R.; Katilius, Lizzette; Lesko, Stephanie; Levitt, Marilyn ; Longnecker, Tom; MacNeil, Deirdre; Mallus, Alex; Mancini, N.; Marr, Jennifer; Martz, Amanda; Mastromichalis, Keith; Miller, Margaret A.; Morris, Alexander; Morris, Ladonna; Moss, Sara; Motto, Brian; Nelson, Delores; O'Connor, Cindy; Oliveri, Medaris; Olsen, Matthew; Ortiz, Raho; Otterman, Kate; Pavlik-Keenan, Catrina; Pickworth, Melissa; Poore, Ray; Reali, Francis; Rollor, Audrey; Rouse, Dianne; Salva, Dianne ; Sasser, Tracey; Schecker, Larry

; Donna Sealing; Senzel, David; Sharpe, Thomas; Sheils, Peter ; Shonks, Margie
; Siegelbaum, Jill; Singer, Harold ; Smith, Nancy Kegan ; Steinberg, David
; Supik, Frank; Suzuki, Shari; Sydnor, Cynthia; Taylor, Anastazia ; Thomas, Charlene Wright
; Tilley, Steven D. ; Underwood, Dale ; Vance, Frank D. ;
Vankevich, Peter M. ; Veach, Kimberly; Virga, Jane; Washington, Angela; Watt, Sheree;
Weber, Frank; Westmoreland, Carol; Wiggins, Dawn; Williams, Alesia; Wooden, Eric; Wright, Lauren E.
; Yates, Ruth; Yohe, Melanie
Subject: Guidance on President Obama's FOIA Memoranda and Attorney General Holder's FOIA Guidelines

To: Chief FOIA Officers and Principal FOIA Contacts

This is a courtesy e-mail to let you know that the Office of Information Policy today posted guidance to agencies on President Obama's FOIA Memoranda and Attorney General Holder's FOIA Guidelines. You can view the article at <http://www.usdoj.gov/oip/foiapost/2009foiapost8.htm>.

Raphael, Mary Jean

From: Donna Sealing *DS*
Sent: Wednesday, April 29, 2009 2:37 PM
To: Mary Jean Raphael; Natalie Brown
Subject: RE: YA on FOIA

I just got it back from OGC today and will be working to finalize it. I will make sure that you and Natalie see it before it goes to Joe.

From: Mary Jean Raphael
Sent: Wednesday, April 29, 2009 1:16 PM
To: Donna Sealing
Subject: YA on FOIA

When you have the YA finalized (with OGC's comments), can I see a copy of it? I am making a lot of changes to our training book for the June session and I would like to the foreseeable harm statement in several section of the training book.

Thanks

A/10

Raphael, Mary Jean

From: Donna Sealing *OJS*
Sent: Thursday, April 30, 2009 10:56 AM
To: Mary Jean Raphael; Natalie Brown
Subject: FW: YA on FOIA policy/harm statements
Attachments: YA-New FOIA Procedures(3).doc

Latest version of YA for your review. Waiting to hear back from OGC on the last couple of changes.

From: Donna Sealing
Sent: Thursday, April 30, 2009 8:15 AM
To: Catherine Holze
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 Holze
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.



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.
- 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.

Deleted: for

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

OFFICE	FOIA/PA	RFPB	OGC	DD/IRSD	D/IRSD
NAME	D. Sealing	R. Nichols	T. Rothschild	M. Janney	J. Holonich
DATE	04/ /09	04/ /09	04/ /09	04/ /09	04/ /09
OFFICE	DD/OIS	D/OIS	CIO	EDO	
NAME	J. Schaeffer	T. Boyce	D. Ash	R. W. Borchardt	
DATE	04/ /09	04/ /09	04/ /09	04/ /09	

OFFICIAL RECORD COPY

Sealing, Donna

From: Catherine Holze , 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 Holze
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 Holze , 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:

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- 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.

Deleted: for

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

OFFICE	FOIA/PA	RFPSB	OGC	DD/IRSD	D/IRSD
NAME	D. Sealing	R. Nichols	T. Rothschild	M. Janney	J. Holonich
DATE	04/ /09	04/ /09	04/ /09	04/ /09	04/ /09
OFFICE	DD/OIS	D/OIS	CIO	EDO	
NAME	J. Schaeffer	T. Boyce	D. Ash	R. W. Borchardt	
DATE	04/ /09	04/ /09	04/ /09	04/ /09	

OFFICIAL RECORD COPY

Sealing, Donna

From: Russell Nichols *OIS*
Sent: Wednesday, May 06, 2009 8:08 AM
To: Margie Janney
Cc: Donna Sealing
Subject: RE: FOIA YA

Margie,

I disagree with breaking it up. First, people are going to read what interests them. If they are not interested, they're not going to read it just because the YA is short and the meat is in a document that is attached by a link. Second, it loses continuity and flow when it gets broken up. There are already two links in it to the Obama memo and the Attorney General's memo. Third, the general premise that it is too long is flawed. There are many YAs out there that are as long or longer than the FOIA YA, which is 947 words. For example, our own PII policy (YA 069, September 19, 2006) is 1184 words, and Jim Dyer's updated premium class airline travel policy (YA 034, March 31, 20009) which is 1989 words, the recent YA on 32nd Annual Awards Ceremony was six printed pages. Which takes me back to my first point - if people want to read it they will, if not they won't. Lastly, we coordinated this with OGC. They wanted the explanations of the exemptions in it, which is what lengthened it more than we would like. However, what's the point of us getting OGC concurrence, if we're going to change what they concur on? They are not rubber stamping our work, they provide serious input and revisions that are value added.

Russ

From: Margie Janney
Sent: Tuesday, May 05, 2009 6:06 PM
To: Russell Nichols; Donna Sealing
Cc: Mary Moss
Subject: FOIA YA

Russ/Donna,

This is really long and probably won't hold the interest of most staff. (Sorry to be blunt!)

My suggestion to you is keep these words, but write a short YA stating that Obama wants us to be more open and so we're changing the FOIA procedures and provide a link to what you've written. Basically the first two paragraphs. See the YA " Information Technology Security Policy - Laptop Security Policy"
<http://www.internal.nrc.gov/announcements/yellow/2009/2009-035.html> as an example.

Joe will be in the office tomorrow morning, so I put it on his desk with an Urgent sticker. I don't want to concur until I see the short version, but I like the words of the long version.

Thanks!
-Margie

Raphael, Mary Jean

From: Mary Jean Raphael/ *DF S*
Sent: Wednesday, May 06, 2009 8:51 AM
To: Donna Sealing
Subject: RE: YA on FOIA policy/harm statements

Thank you.

From: Donna Sealing
Sent: Wednesday, May 06, 2009 8:45 AM
To: Mary Jean Raphael
Subject: RE: YA on FOIA policy/harm statements

No harm statements needed for 7D and E. Harm statements will be required for **all** Exemption 5 withholdings. The YA is with Margie and there will probably have to be changes made it. Waiting to see.

From: Mary Jean Raphael
Sent: Wednesday, May 06, 2009 8:17 AM
To: Donna Sealing; Natalie Brown
Subject: RE: YA on FOIA policy/harm statements

I noticed that Exemptions 7D and 7E were not identified in the YA. Should I assume that we do not need harm statements whether it is obvious or not?
Also, are we requiring harm statements for all three parts of Ex. 5?

thanks

From: Donna Sealing
Sent: Thursday, April 30, 2009 10:56 AM
To: Mary Jean Raphael; Natalie Brown
Subject: FW: YA on FOIA policy/harm statements

Latest version of YA for your review. Waiting to hear back from OGC on the last couple of changes.

From: Donna Sealing
Sent: Thursday, April 30, 2009 8:15 AM
To: Catherine Holzie
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 Holzie
Sent: Tuesday, April 28, 2009 5:42 PM
To: Donna Sealing

R/14

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.

Sealing, Donna

From: Karen Olive *EDO*
Sent: Tuesday, May 19, 2009 3:30 PM
To: Russell Nichols; Donna Sealing
Cc: Georgette Price
Subject: RE: New FOIA Procedures - Yellow Announcement (ML091200457)

FYI, Darren signed the subject document today (5/19). Thanks!

Karen, x2276

From: Karen Olive *EDO*
Sent: Tuesday, May 19, 2009 9:23 AM
To: Russell Nichols
Cc: Georgette Price; Donna Sealing
Subject: RE: New FOIA Procedures - Yellow Announcement (ML091200457)

Thanks Russ. I'm taking it upstairs for signature in a few minutes and will let you know when its signed.

Karen, x2276

From: Russell Nichols *ORS*
Sent: Tuesday, May 19, 2009 7:27 AM
To: Karen Olive
Cc: Georgette Price; Donna Sealing
Subject: RE: New FOIA Procedures - Yellow Announcement (ML091200457)

Hi Karen,

See below.

Russ

From: Karen Olive *EDO*
Sent: Monday, May 18, 2009 3:48 PM
To: Donna Sealing; Russell Nichols
Cc: Georgette Price
Subject: New FOIA Procedures - Yellow Announcement (ML091200457)

Hi:

I rec'd the subject package today and just have a couple of questions: (pls forgive me if you already discussed this w/Darren - I think I missed the last couple of IRSD periodics)

1. Are we changing procedures or policy? The subject refers to procedures but the enclosure refers to implementing policy. Both. Based on the President's and Attorney *AKS*

General's new guidelines which are new federal policy, i.e. to be more open and transparent, we are implementing the foreseeable harm standard which is a procedure.

2. Is there anything about the implementation that is discretionary? The use of the term discretionary in this case refers to agencies making the decision whether to release information that is technically withholdable under an exemption. The new policy encourages agencies to make discretionary disclosures, which means to be more open even if there is an exemption under which the information could be withheld. Hence, the foreseeable harm standard, i.e., unless there is a foreseeable harm, agencies should discretionarily release the information. There are some exceptions to that, for example, agencies cannot make a discretionary release of classified information or information that is required to be withheld under another law.

However, implementation of the policy is not discretionary, i.e., we must comply with the foreseeable harm standard and the guidelines.

3. Will the changes impact any Management Directive(s), website, training? Yes, we'll have to include the foreseeable harm policy in the next update MD 3.1. We're updating our on-line FOIA training and our classroom presentation to include the new guidelines/procedures. We've already posted the President's and AG's memos on our external FOIA web site. We'll post the YA on our internal site once it is approved.

Thanks!

Karen, x2276

Sealing, Donna

From: RidsOIS Resource
Sent: Wednesday, May 20, 2009 4:22 PM
To: Mary Moss; Donna Sealing
Subject: FW: ACTION: 5/18/09 - Yellow Announcement to All NRC Employees fm R. W. Borchardt
Attachments: ADAMS Document.ADC

Hello,

I am just getting through all of my Emails from being out. Do either of you know if this was picked up? I see it hasn't been picked up yet.

Thanks,
Jeannie

From: Denise Wallace
Sent: Tuesday, May 19, 2009 4:59 PM
To: RidsOIS Resource; Jeannie Griffin
Subject: ACTION: 5/18/09 - Yellow Announcement to All NRC Employees fm R. W. Borchardt

ML091200457

Here is the signed and completed Official Record document in ADAMS. The Yellow Announcement was signed on 05/11/09 by Darren B. Ash. **OIS should have the Yellow Announcement posted to the internal NRC Web page as soon as possible (send email to Announcement Program@nrc.gov). The package can be picked up in the EDO mailroom.**

Thanks,
Denise Wallace

A116



**UNITED STATES
NUCLEAR REGULATORY COMMISSION**

Yellow Announcement: YA-09-0054

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"

ADAMS Accession Number: ML091200457

EDATS: OIS-2009-0126

OFFICE	FOIA/PA	RFPSB	OGC	DD/IRSD	D/IRSD
NAME	D. Sealing	R. Nichols	T. Rothschild	M. Janney	M. Janney for J. Holonich
DATE	05/01/09	05/01/09	05/01/09	05/08/09	05/08/09
OFFICE	DD/OIS	D/OIS	DEDCM	EDO	
NAME	J. Schaeffer	T. Boyce	D. Ash	R. W. Borchardt (DAsh for)	
DATE	05/14/09	05/14/09	05/19/09	05/19/09	

OFFICIAL RECORD COPY

Raphael, Mary Jean

From: Donna Sealing / *OTS*
Sent: Wednesday, May 20, 2009 12:41 PM
To: Mary Jean Raphael
Cc: Natalie Brown; Barbara Culleen
Subject: RE: Ex. 2 (low)

Mary Jean,

We should use the following language that is also in our YA:

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.

Donna

From: Mary Jean Raphael
Sent: Tuesday, May 19, 2009 3:13 PM
To: Donna Sealing
Subject: Ex. 2 (low)

I asked Natalie and Barb for comments on the "How to Respond to an Initial FOIA Request" document you looked over this morning. Natalie suggested I **remove** the low 2 description entirely which says that public release of this type of information would typically cause no harm, so the NRC should generally authorize discretionary release of low 2 records. Do you agree?

Thanks

AM7

Sealing, Donna

From: Directives Resource *ADM*
Sent: Thursday, May 21, 2009 3:53 PM
To: Donna Sealing
Cc: Beverly Martin; Announcement Program
Subject: RE: Yellow Announcement No 09-0054

Ok. Thanks for responding so quickly, Donna. We will add the reference to MD 3.1 at the bottom of Yellow Announcement No. 09-0054. The companion announcement will be categorized as "Policy."

-Theresa

From: Donna Sealing
Sent: Thursday, May 21, 2009 3:52 PM
To: Directives Resource
Cc: Beverly Martin; Announcement Program
Subject: RE: Yellow Announcement No 09-0054

YA 88-0040 does not apply.

Thank you.

From: Directives Resource
Sent: Thursday, May 21, 2009 3:45 PM
To: Donna Sealing
Cc: Beverly Martin; Announcement Program
Subject: RE: Yellow Announcement No 09-0054

Thanks. We'll send it shortly.

From: Donna Sealing
Sent: Thursday, May 21, 2009 3:44 PM
To: Directives Resource
Subject: RE: Yellow Announcement No 09-0054

301-415-5130.

From: Directives Resource
Sent: Thursday, May 21, 2009 3:43 PM
To: Donna Sealing
Subject: RE: Yellow Announcement No 09-0054

Hi, Donna.

What is your fax number? We can fax YA-88-0040 to you.

Theresa Barczy
(301) 492-3666

From: Donna Sealing
Sent: Thursday, May 21, 2009 3:32 PM
To: Directives Resource; Announcement Program; Barbara Culleen
Subject: RE: Yellow Announcement No 09-0054

A/118

See responses in green below.

From: Directives Resource
Sent: Thursday, May 21, 2009 3:20 PM
To: Donna Sealing
Cc: Barbara Culleen; Announcement Program; Directives Resource
Subject: Yellow Announcement No 09-0054

Dear Donna,

Could you contact me? I have some questions regarding Yellow Announcement No. 09-0054, "New Freedom of Information Act Procedures."

1. I'd like to confirm that Yellow Announcement No. 09-0054 is related to MD 3.1, "Freedom of Information Act." If so, we'd like to include a reference to MD 3.1 on the bottom of the Yellow Announcement. Yes, it's related to 3.1.
2. If Yellow Announcement No. 09-0054 is related to policy (e.g., MD 3.1), we'd like to categorize the companion announcement as "Policy," rather than "Employee Resources." Policy would be appropriate.
3. Lastly, does Yellow Announcement No. 09-0054 supersede any of the previously published Yellow Announcements listed below? If so, we'd like to add that information to Yellow Announcement No. 09-0054. (The text would say something like "This Yellow Announcement supersedes YA-XX-XXXX and YA-XX-XXXX." The only one that might be is YA-88-0040. Where can I find a copy to review? I looked at the listing for YAs and it only goes back to 1997.

3.001	Freedom of Information Act	YA-88-0040	Processing Freedom of Information Act Requests
		YA-97-0118	Release of Sensitive Information
		YA-96-0102	Release of Sensitive Information
		YA-99-0023	Release of Sensitive Information
		YA-07-0117	Civil Service Commission Regulation on the Disclosure Information From Official Personnel folders
		YA-08-0021	Policy Revision: Policy Prohibiting the Use of Peer-to-Peer Software, and its Impact on Processing Sensitive and Unclassified Non-Safeguards Information on NRC Information Technology Systems, Mobile Devices, and Home Com
		YA-08-0063	Information Security and Records Management Requirements When Using Information Sharing and Learning Technologies Such as Sharepoint and Tomoeye

Theresa Barczy
Policy Analyst
(301) 492-3666

Management Directives Program
<http://www.internal.nrc.gov/ADM/DAS/caq/mandirs>
DIRECTIVES.RESOURCE@nrc.gov

Sealing, Donna

From: Joan Hoffman *OIS*
Sent: Thursday, May 21, 2009 11:00 AM
To: Barbara Culleen
Cc: Donna Sealing
Subject: URL for Yellow Announcement

Barbara,

I'm sitting here with Donna and I pulled the document from ADAMS (ML091280033) and created a pdf to live in the FOIA intranet area.

In the 3rd paragraph, the new FOIA procedures link will go to:

<http://www.internal.nrc.gov/ois/divisions/irsd/foia/new-foia-procedures.pdf>

9/19

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.

Raphael, Mary Jean

From: Donna Sealing *DS*
Sent: Thursday, May 21, 2009 3:51 PM
To: Barbara Culleen
Cc: Mary Jean Raphael
Subject: New FOIA Procedures

Barbara,

Once the YA is sent out could you please send to from the FOIA box. Check the date and number to make sure it didn't change. Please add the link to the YA.

Thank you,

Donna

Regional Counsels, Senior Management FOIA Officials, FOIA Coordinators and Alternates,

Yellow Announcement No. 09-0054, dated May 19, 2009, subject: New Freedom of Information Act Procedures (FOIA) has been issued (add link to YA). Based on new FOIA guidelines from the President and the Attorney General, NRC has issued new FOIA procedures. Please review these new procedures, become aware of their impact on your mission, especially the guidance pertaining to foreseeable harm statements. This guidance will apply to all FOIA cases received on or after May 19 2009.

The following is additional guidance on drafting foreseeable harm statements.

While each document or portion of a document protected by exemptions 2 and 5 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.

If you have any questions, please let me know.

Donna Sealing
Chief, FOIA/Privacy Section

DS

Raphael, Mary Jean

From: FOIA Resource
Sent: Friday, May 22, 2009 9:02 AM
To: Karl Farrar; Jared Heck; Carolyn Evans; Karla Fuller; Billie Champ; Cecilia Carson; Earnestine Clay; FOIAPAADM Resource; FOIAPANSIR Resource; FOIAPAOI Resource; FOIAPAOIG Resource; FOIAPAOIP Resource; FOIAPAR2 Resource; FOIAPAR4 Resource; FOIAPASECY Resource; HR-FOIA Resource; John Pellet; NRO_FOIA.Resource; OEMAIL Resource; OGC_FOIA_COORDINATOR Resource; OPA Resource; R1FOIAPA RESOURCE; RidsAcrsAchw_MailCTR Resource; RidsAslbpMailCenter Resource; RidsEdoMailCenter Resource; RidsFsmeOd Resource; RidsNmssOd Resource; RidsNrrMailCenter Resource; RidsOcaaMailCenter Resource; RidsOcaMailCenter Resource; RidsOcfoMailCenter Resource; RidsResPmdaMail Resource; RidsSbcrMailCenter Resource; RIIIFOIAPA Resource; Sharon Marks; Stephanie Blaney; Art Howell; Barbara Gusack; BJ Holt; Bryan Champion; Cheryl Montgomery; Chuck Casto; Corenthis Kelley; Cynthia Carpenter; Elizabeth Hayden; James McDermott; Jennifer Golder; John Cordes; John Flack; Joseph McMillan; Kathryn Greene; Loren Plisco; Margaret Doane; Mark Flynn; Michael Johnson; Miriam Cohen; Patrick Howard; Phyllis Bower; Rebecca Schmidt; Richard Rough; Sandy Joosten; Susan Dickerson; Thomas Moore; Trip Rothschild
Cc: Mary Jean Raphael; Natalie Brown; Becky Menefee; Deborah Dennis; Warren Christian; Barbara Culleen; Russell Nichols
Subject: New FOIA Procedures

Regional Counsels, Senior Management FOIA Officials, FOIA Coordinators and Alternates.

Yellow Announcement No. 09-0054, dated May 19, 2009, subject: New Freedom of Information Act Procedures (FOIA) has been issued (<http://www.internal.nrc.gov/announcements/yellow/2009/2009-054.html>). Based on new FOIA guidelines from the President and the Attorney General, NRC has issued new FOIA procedures. Please review these new procedures, become aware of their impact on your mission, especially the guidance pertaining to foreseeable harm statements. This guidance will apply to all FOIA cases received on or after May 19, 2009.

The following is additional guidance on drafting foreseeable harm statements.

While each document or portion of a document protected by exemptions 2 and 5 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.

If you have any questions, please let me know.

Donna Sealing
Chief, FOIA/Privacy Section

MSA

Sealing, Donna

From: Becky Menefee *OTIS*
Sent: Tuesday, May 26, 2009 11:19 AM
To: WebWork Resource
Cc: Donna Sealing
Subject: RE: Request for Change to Internal FOIA Web Page

You folks are AWESOME! Thanks!

From: WebWork Resource
Sent: Tuesday, May 26, 2009 11:16 AM
To: Becky Menefee
Cc: Donna Sealing
Subject: RE: Request for Change to Internal FOIA Web Page

This is posted
Linda

From: Becky Menefee
Sent: Tuesday, May 26, 2009 10:45 AM
To: WebWork Resource
Cc: Donna Sealing
Subject: Request for Change to Internal FOIA Web Page

Please make the following change to the internal FOIA Web Page:

1) Under **Guidance**, above "Management Directive 3.1 Freedom of Information Act" please add "Yellow Announcement No. 054 dated May 19, 2009, New FOIA Procedures"

If you have any questions, please contact Donna Sealing (Donna.Sealing@nrc.gov) or me.

Becky Menefee, Program Analyst
FOIA/Privacy Section, Records and FOIA/Privacy Services Branch
Information & Records Services Division, Office of Information Services
Becky.Menefee@nrc.gov Ph: 301-415-6968 Rm: T-5F16 Ms: T-5F09

Ala

Raphael, Mary Jean

From: Donna Sealing *OIS*
Sent: Monday, June 01, 2009 11:55 AM
To: Natalie Brown; Warren Christian; Deborah Dennis; Barbara Cullen; Mary Jean Raphael
Subject: RE: HARM STATEMENTS FOR REQUESTS CAUGHT IN PIPELINE

Natalie and I had a conference call with OGC this morning and he said that we should be processing all cases under the new guidelines and requesting a harm statement regardless of the date.

From: Natalie Brown
Sent: Thursday, May 28, 2009 12:34 PM
To: Donna Sealing
Cc: Warren Christian; Deborah Dennis; Barbara Cullen; Mary Jean Raphael
Subject: HARM STATEMENTS FOR REQUESTS CAUGHT IN PIPELINE

Donna:

Are we supposed to obtain harm statements for the FOIA requests that were received before your May 19 yellow announcement? Your May 22, 2009 guidance to Sr. Mgmt. officials and the Coords states "...will apply to all FOIA cases received on or after May 19, 2009." We've received conflicting guidance on this issue. Bob Rader, OGC, said you told him this morning that all packages using 2 & 5 regardless of when received must have the statements now. Please clear this up for us.

A/22

Raphael, Mary Jean

From: Donna Sealing *OES*
Sent: Wednesday, June 03, 2009 10:50 AM
To: Mary Jean Raphael
Cc: Natalie Brown
Subject: RE: just confirming re: Ex. 5

No need to have it completed for tomorrow's training. I am addressing this at the beginning of the training.

From: Mary Jean Raphael
Sent: Wednesday, June 03, 2009 10:46 AM
To: Donna Sealing
Cc: Natalie Brown
Subject: RE: just confirming re: Ex. 5

Natalie and I were not aware of this. We will need to change several sections of the training book: How to Respond Document which is referenced in every new FOIA request, procedures section and Exemption 5, and form memo and possibly other documents. Will this be done before the training tomorrow?

From: Donna Sealing
Sent: Wednesday, June 03, 2009 10:25 AM
To: Mary Jean Raphael
Subject: RE: just confirming re: Ex. 5

That's correct.

From: Mary Jean Raphael
Sent: Wednesday, June 03, 2009 10:24 AM
To: Donna Sealing; Natalie Brown; Warren Christian; Barbara Culleen; Deborah Dennis; Becky Menefee
Cc: Russell Nichols
Subject: RE: just confirming re: Ex. 5

Should I assume we do not need a harm statement for attorney-work product?

From: Donna Sealing
Sent: Wednesday, June 03, 2009 10:19 AM
To: Mary Jean Raphael; Natalie Brown; Warren Christian; Barbara Culleen; Deborah Dennis; Becky Menefee
Cc: Russell Nichols
Subject: RE: just confirming re: Ex. 5

Per Trip, no need for a harm statement on this type info.

From: Mary Jean Raphael
Sent: Wednesday, June 03, 2009 9:51 AM
To: Donna Sealing
Subject: just confirming re: Ex. 5

that we need a harm statement for attorney-client privilege?

Tanks

Al24

Raphael, Mary Jean

From: Culleen, Barbara *OTS*
Sent: Thursday, June 11, 2009 8:44 AM
To: WebWork Resource
Cc: Pena, Alex
Subject: FOIA internal web site change

<http://www.internal.nrc.gov/ois/divisions/fird/foia/index.html>

Please replace "How to Respond to an Initial FOIA Request" with updated ML060590485 (updated on 5/26/09).

Barbara Culleen

FOIA/PA Specialist, FOIA/Privacy Section
Phone: 301-415-6873
E-mail: Barbara.Culleen@nrc.gov

OTS

Sealing, Donna

From: Sealing, Donna *OTIS*
Sent: Thursday, July 09, 2009 9:52 AM
To: Culleen, Barbara
Subject: Change to FOIA Submittal Form on Public Web Site

Barbara,

As we discussed, in an effort to try to cut down on the number of appeals I would like to add the following paragraph to our FOIA Request Submittal Form. Could we put it in a colored block to draw attention to it.

<http://webwork.nrc.gov:300/reading-rm/foia/foia-submittal-form.html>

FOIA Request Submittal Form

On January 21, 2009, President Obama issued a memorandum on the Freedom of Information Act (FOIA) reaffirming the government's "commitment to accountability and transparency." On March 19, 2009, the Attorney General issued new FOIA guidelines implementing the President's policy. The NRC is processing all FOIA requests in accordance with these new guidelines.

Privacy Act Statement

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FOIA Request Submittal Form

On January 21, 2009, President Obama issued a memorandum on the Freedom of Information Act (FOIA) reaffirming the government's "commitment to accountability and transparency." On March 19, 2009, the Attorney General issued new FOIA guidelines implementing the President's policy. The NRC is processing all FOIA requests in accordance with these new guidelines.

Privacy Act Statement

Failure to enter complete information may result in the inability to process your FOIA request.

First Name: (Required)

Last Name: (Required)

Company/Affiliation

Address 1: (Required)

Address 2:

City: (Required)

State: (Required)

Zip Code: (Required)

Country: United States
 Other - Specify:

E-mail:

Phone:

Description of Records:

Fee categorization - Select the category that best describes you or your organization: (Required)

- Affiliated with a private corporation and seeking information for use in the company's business.
- Affiliated with an educational or noncommercial scientific institution, and this request is made for a scholarly or scientific purpose and not for commercial use.
- An individual seeking information for personal use and not for a commercial use.
- A representative of the news media and this request is made as part of news gathering and not for a commercial use.

Enter media company name:

Select type of media:

Newspaper

Magazine

TV/Radio Station

Other - Enter description and purpose:

**Do Not fill out the following unless you are requesting expedited processing.
To request expedited processing check the appropriate box and provide an explanation:**

Failure to obtain requested records could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.

Request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

**Do Not fill out the following unless you are requesting a fee waiver.
The NRC will not consider your request for a fee waiver unless all eight criteria are addressed:**

1. Describe the purpose for which you intend to use the requested information.

2. Explain the extent to which you will extract & analyze the substantive content of the records.

3. Describe the nature of the specific activity or research in which the records will be used & the specific qualifications you possess to utilize information for the intended use in such a way that it will contribute to public understanding.

4. Describe the likely impact on the public's understanding of the subject as compared to the level of understanding of the subject existing prior to disclosure.

5. Describe the size & nature of the public to whose understanding a contribution will be made.

6. Describe the intended means of dissemination to the general public.

7. Indicate if public access to information will be provided free of charge or provided for an access fee or publication fee.

8. Describe any commercial or private interest you or any other party has in the agency records sought.

[Privacy Policy](#) | [Site Disclaimer](#)
Friday, July 10, 2009

Sealing, Donna

From: Raphael, Mary Jean *OTJ*
Sent: Friday, July 10, 2009 8:08 AM
To: Menefee, Becky; Sealing, Donna
Subject: foia form memo

Donna/Becky:

Can one of you send out the new form memo to all foia coordinators? It contains the block to check to provide harm statements. I would also let them know that the How to Respond to Initial FOIA Request document has been updated. I'm not sure that every office has focused on the fact that harm statements are required for certain exemptions. I just reminded one office and they said they had no idea and had not provided any guidance/information to the staff. This is an office that receives a good number of FOIA's.

Thanks

Mary J ean

A/27

Sealing, Donna

From: Menefee, Becky *OTJ*
Sent: Friday, July 10, 2009 10:01 AM
To: RidsAcrsAcnw_MailCTR Resource; FOIAPAADM Resource; RidsAslbpManagement Resource; Blaney, Stephanie; RidsEdoMailCenter Resource; RidsFsmeOd Resource; RidsNmssOd Resource; NRO_FOIA Resource; RidsNrrMailCenter Resource; FOIAPANSIR Resource; RidsOcaMailCenter Resource; RidsOcaaMailCenter Resource; RidsOcfoMailCenter Resource; OEMAIL Resource; OGC_FOIA_COORDINATOR Resource; HR-FOIA Resource; FOIAPAOI Resource; FOIAPAOIG Resource; FOIAPAOIP Resource; RidsResPmdaMail Resource; OPA Resource; RidsSbcrMailCenter Resource; FOIAPASECY Resource; R1FOIAPA RESOURCE; FOIAPAR2 Resource; RIIIFOIAPA Resource; FOIAPAR4 Resource; Pellet, John; Champ, Billie; Holzle, Catherine; Carson, Cecilia; Marks, Sharon
Cc: Sealing, Donna; Raphael, Mary Jean; Brown, Natalie; Culleen, Barbara; Dennis, Deborah; Christian, Warren
Subject: FOIA Memo-Appendices template and How to Respond guide
Attachments: FOIA Form Memo-Appendices.doc; How to Respond to an Initial FOIA Request.pdf

Some of you may not be aware that the FOIA Response Memo-Appendices template and How To Respond To An Initial FOIA Request guide (ML060590485) have been updated to reflect recent changes to the FOIA. For your convenience, copies are attached.

If you should have any questions regarding the use of these documents, please contact the FOIA/PA staff at 301-415-7169.

Becky Wood, Program Analyst
FOIA/Privacy Section, Records and FOIA/Privacy Services Branch
Information & Records Services Division, Office of Information Services
Becky.Menefee@nrc.gov Ph: 301-415-6968 Rm: T-5F16 Ms: T-5F09



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, DC 20555 - 0001

June 4, 2009

MEMORANDUM TO: FOIA/PA Caseworker, _____
FOIA/PA Section

FROM:

SUBJECT: FOIA/PA-_____

- No records subject to the request.
- Records already publicly available. (Appendix)
- Records being released in their entirety. (Appendix)
- Records being withheld in part. (Appendix)*
- Records being withheld in their entirety. (Appendix)*
- Records to be referred to other offices/agencies/companies. (Appendix)
- Ongoing investigation - 7A Certification attached.
- Attached is NRC Form 496, "Report of Staff Resources for Processing FOIA Requests."
- Place released records in PDR.
- Do not place released records in PDR.
- This is a partial response to this request.
- This is the final response to this request.
- This response contains sensitive security information. (Appendix)
- This response does not contain sensitive security information.
- * **Foreseeable harm statement attached for Exemptions 2 (high) and 5.**
Provide a statement for Exemptions 1, 3, 4, 6, 7A and 7C only if not obvious.

OTHER COMMENTS:

Attachment(s):
As stated

Re: FOIA/PA-xxxx-xxxx

**APPENDIX
RECORDS ALREADY PUBLICLY AVAILABLE**

<u>NO.</u>	<u>DATE</u>	<u>ACCESSION NUMBER</u>	<u>DESCRIPTION/ (PAGE COUNT)</u>
1.	10/14/94	9411040082	Enforcement Notification to Commissioners from Office of Enforcement, Subject: Proposed Imposition of Civil Penalty - \$8,000 (1 page)
2.	01/02/96	9600342901	Letter to J. Cullen from W. Axelson, Subject: Confirmatory Action Letter (2 pages)
3.	03/04/96	9608100026	NRC Inspection Report No. 030-02104/94001 (20 pages)

**APPENDIX
RECORDS BEING RELEASED IN THEIR ENTIRETY
(If copyrighted identify with *)**

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/ (PAGE COUNT)</u>
1.	Undated	A list of Corrective Actions provided by St. Joseph Mercy Hospital during the enforcement conference (1 page)
2.	12/18/90	Letter to H. Ray, St. Joseph Mercy Hospital from S. Richards, NMSS, Subject: Notice of Violation on IWI (5 pages)
3.	02/06/93	E-Mail from J Dyer, NRR to S Collins, RI, Subject: Schedule Conference Call (1 page)
4.	05/18/95	*Inside NRC (4 pages)

Re: FOIA/PA-xxxx-xxxx

**APPENDIX
RECORDS BEING RELEASED IN THEIR ENTIRETY
(If copyrighted identify with *)**

<u>NO.</u>	<u>DATE</u>	<u>ACCESSION NUMBER</u>	<u>DESCRIPTION/ (PAGE COUNT)</u>
1.	04/27/04	MLxxxxxxxx	Letter to Congressman Markey from Chairman N. J. Diaz, Subj: Response to Request for the Declassification of Documents relating to the TMI Accident (1 page)

Re: FOIA/PA-xxxx-xxxx

**APPENDIX
RECORDS BEING WITHHELD IN PART**

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/ (PAGE COUNT)/EXEMPTIONS</u>
1.	08/26/94	Memo to G. Beveridge, NMSS from J. Grobe, RIII, Subject: Voucher for Professional Services (3 pages) EX. 6
2.	09/09/94	Letter to an individual from C. Caputo, OI (1 page) EX. 7C
3.	10/25/95	Memo to J. Lieberman, OE from J. Martin, RI Subject: St. Joseph Mercy Hospital Proposed Notice of Violation and Proposed Imposition of Civil Penalty (3 pages) EX. 5
	Undated	Attachment 1: Escalation and mitigation factors (2 pages) EX. 5
	08/19/94	Attachment 2: NRC Inspection Report No. 030-02104/94001(DRSS) (19 pages) ANO 9408240029
4.	09/18/96	Letter to T. Pearson, St. Joseph Mercy Hospital from S. Smith, NMSS, Subject: Notice of Violation (9 pages) EX. 5

Re: FOIA/PA-xxxx-xxxx

**APPENDIX
RECORDS BEING WITHHELD IN THEIR ENTIRETY**

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/ (PAGE COUNT)/EXEMPTIONS</u>
1.	09/02/93	Office of Investigation's Case File and associated records (100 pages) EX. 7A
2.	10/13/94	OGC markup of draft Notice of Violation and Proposed Imposition of Civil Penalty (9 pages) EX. 5

Re: FOIA/PA-xxxx-xxxx

**APPENDIX
RECORDS TO BE REFERRED TO OTHER OFFICE/AGENCY/COMPANY**

<u>NO.</u>	<u>DATE</u>	<u>ENTITY</u>	<u>DESCRIPTION/ (PAGE COUNT)</u>
1.	09/02/96	OE	Memo to L. Chandler, OGC from J. Lieberman, OE, Subject: NOV with attached draft NOV (4 pages)
2.	10/22/96	Licensee	Letter to J. Smith, NMSS from M. Jones, DOE Subject: corrosion issues (25 pages)

(Note to Coordinators: When a record is to be referred to a licensee you need to provide the FOIA/PA Specialist responsible for the request with the appropriate licensee contact information (i.e., name, title, company, address, and telephone number if available).

Re: FOI/PA-xxxx-xxxx

**APPENDIX
RECORDS CONTAINING SENSITIVE SECURITY INFORMATION**

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/ (PAGE COUNT)</u>
1.	1/8/03	Registry of Radioactive Sealed Sources and Devices, Safety Evaluation of Device, Amended in its Entirety, CA0215D102G (7 pages)

How To Respond To An Initial FOIA Request

What is the Freedom of Information Act (FOIA)?

The FOIA was passed by Congress in 1966. It permits any person, whether a citizen or not, to request records in possession and control of a Federal agency, and the agency must provide access to those records unless they are exempted from disclosure by one of the nine exemption categories in the Act. You should follow the steps listed below as you process a FOIA request. Each step is explained following the list.

- _____ Step 1: Make sure you clearly understand what records the requester is seeking.
- _____ Step 2: Determine if you are likely to have records subject to the request.
- _____ Step 3: Provide an estimate of search and review time and an estimate of pages if required.
- _____ Step 4: What to do if expedited processing is required.
- _____ Step 5: Search for records responsive to the request.
- _____ Step 6: Determine if records are to be released or withheld from the requester.
- _____ Step 7: Bracket information that should be withheld.
- _____ Step 8: Organize the records responsive to the request and submit them to your office FOIA coordinator.
- _____ Step 9: Submit your response package to the FOIA/PA caseworker.

Step 1: Make sure you clearly understand what records the requester is seeking.

The FOIA/PA caseworker will make every effort to clarify the scope of the request before forwarding the request to the office FOIA coordinators. However, if you have questions about the request you should contact your office FOIA coordinator. If you believe you need additional clarification on the scope of the request, you should ask your office FOIA coordinator to request that the agency FOIA/PA caseworker responsible for overseeing processing of the request contact the requester for clarification or alternatively arrange a conference call with the requester at which time you may ask questions or offer suggestions to further define the scope of the request. Note that no contact should be made with the requester unless approved by the agency FOIA/PA caseworker so that all contacts with the requester meet the needs of all others who have a role in processing the request.

Step 2: Determine if you are likely to have records subject to the request.

Based on your knowledge of the subject matter of the request, you should determine if you will have records responsive to the request. You are only required to look for records where you believe it is reasonable to expect you will locate paper or electronic records covered by the subject matter of the request.

Only agency records that are in existence on the date NRC received the request are subject to a FOIA request. Agency records are records created or obtained by the agency and under the agency control at the time of request. This includes records created by the NRC staff, records submitted to the NRC by applicants, licensees, contractors, Federal and state agencies, international organizations and members of the public.

No records that are potentially responsive to the FOIA request may be destroyed after receipt of the FOIA request. However, there is no need to reconstruct a record that was destroyed prior to receipt of a request nor does NRC have to inform the requester that a record does not exist since it was destroyed prior to receipt of the request. As a matter of discretion, you may include records that can be released that were created after the date a request was received if you believe it would provide a clearer picture of agency actions regarding the subject of the request.

The agency is not obligated to create a record to respond to a request. Neither does the FOIA require an agency to answer questions that are asked in a request.

Some records may be determined to be **personal records** in that they may relate to the subject of the request but have not been circulated to anyone else in the agency, are not filed with any other agency records, and you were not required to create or retain them. These records still have to be identified and retained, but the agency does not have to invoke an exemption to withhold them. The agency does have to inform the requester that there are records that have been deemed to be personal records and the number of pages. Management Directive 3.1, Freedom of Information Act, contains a Personal Record Consideration Checklist that should be filled out by the owner of the personal records and submitted to the office FOIA coordinator. Contact your office FOIA coordinator for retention requirements.

Also, if you believe responsive records may be located in other offices, or with persons who may have been previously involved in the subject matter as staff in your organization or a member of a team or project, provide that information promptly to your office FOIA coordinator. The FOIA/PA caseworker will then contact the additional office(s) to begin searching for subject records.

Step 3: Provide an estimate of search and review time and pages if required.

Within **four (4)** working days of your office's receipt of the request, your office may be required to provide to the FOIA/PA caseworker an estimate of the amount of time expected to be required to search for, and review records, and an estimate of the number of pages (or inches) you expect will be released to the requester. This includes pages that may be released in part. Whether your office will need to provide an estimate will depend upon whether or not the requester has been granted a fee waiver. The instructions on the FOIA E-Mail Assignment

Form sent to your office FOIA coordinator will inform you if a fee waiver has been granted. If granted, fee estimates are not required. Proceed to Step 5. Otherwise if fees are required, your estimates must be given to your office FOIA coordinator within the time frame specified by your office.

Fee estimate for **search time** should include all time required to locate records responsive to the FOIA request. This includes time spent locating folders in file cabinets, looking for relevant records within file folders, and searching ADAMS and other databases, and consulting with others regarding the location of responsive records. **Review time** includes the actual time each person who will be involved in the review of the records will spend determining if the records can be released in their entirety or in part and the process of bracketing any information that will be proposed to be withheld. Duplication estimate is based on the number of pages likely to be released to the requester and **does not** include the staff-hours used to copy the records.

Step 4: What to do if expedited processing is required.

Your office FOIA coordinator will inform you if a request has been granted expedited processing. If a request has been granted expedited processing, you should process the expedited FOIA request before processing any previous FOIA requests. Contact your office FOIA coordinator for more specific directions if needed.

Step 5: Search for records responsive to the request.

- a. Begin your search when instructed by the office FOIA coordinator.

Your office FOIA coordinator will tell you when to begin your search. If you had to provide a search, review or page estimate, you can expect that there may be a delay before you are instructed to begin your search. A search can begin only when a request is "perfected", which means when all fee related or other issues are resolved. If no estimates are required, your office FOIA coordinator will advise you to immediately begin your search for records.

- b. Inform your office FOIA coordinator if you believe other offices or persons have responsive records.

If you believe responsive records may be located in other offices, or with persons who may have been previously involved in the subject matter as staff in your organization or a member of a team or project, provide that information promptly to your office FOIA coordinator. Notify your office FOIA coordinator when you are aware the Commissioners or the EDO, or a Deputy EDO has been involved in the subject matter and may have responsive records or the records may be the subject of an ongoing investigation. This information is valuable because it will ensure that the agency as a whole does an adequate search for responsive records. If you know others who are processing the same request or who should be, it may be useful to work closely with them, even if they are in other offices to both ensure an adequate search and to make the search more efficient.

c. Search all relevant files.

You must conduct, based on your knowledge of the subject matter, an adequate search of those paper and electronic files where you believe it is reasonable to expect to locate records covered by the subject matter of the request. You must include in your search the following:

- (1) paper records under your personal control including working papers you have retained in your possession
- (2) paper records maintained in your office
- (3) paper records in the NRC File Center
- (4) e-mails including property sheets in the Received, Sent, Archives, and Trash files. Note that since trash files are still within your control, e-mails responsive to a FOIA request in the trash folder must be identified, retrieved, printed out, and processed. You should also move the e-mail out of the trash folder to eliminate the possibility that an automatic deletion of e-mail will destroy the only copy.
- (5) electronic records in ADAMS Main Library and Legacy Library including all versions.
- (6) other electronic files, including but not limited to WordPerfect, Microsoft Word, spreadsheets, presentation files including those files stored on disks
- (7) databases including those files stored on disks
- (8) audio or video files or tapes.

d. Record computer search criteria

When a computer database such as ADAMS is searched to locate records responsive to a request, the search criteria used for conducting the search must be provided with the office response. The Department of Justice has advised agencies in order to justify that they have done an adequate search they must maintain computer search criteria. The search criteria must be provided even if no records are identified as a result of the computer search.

e. Download or print information from computer spreadsheets or databases.

If the requested information is in a database or spreadsheet and is retrievable by using an existing computer program or by minor program modifications or simple computer instructions, the subject information should be provided. If a program would have to be written, inform your office FOIA coordinator.

f. If a record is already publicly available you only have to identify the ADAMS accession number and a description of the record and page count. No copy is required to be made. Otherwise you will have to provide a copy of all responsive records.

Step 6: Determine if records are to be released or withheld from the requester.

After you have searched and located records, you should review the records to determine if any information in the records should be withheld under any of the FOIA exemptions. In particular you should be on alert for personal privacy information, allegation information, investigative related records, proprietary information, classified, or safeguards information. When you have questions you should refer to the applicable management directive or contact your office FOIA coordinator.

Sometimes while reviewing records you will find that they contain not only information that is subject to the request but also information that is outside the scope of the request. If an entire page of a record is outside of the scope of the request, you should mark the page at the top to indicate it is "Outside-of-Scope." This page will not be provided to the requester. If outside-of-scope information is on a page containing information that is subject to the request, the *outside-of-scope information must be marked "Outside-of-Scope."* The requester will be provided a redacted copy of the record that does not reveal the information that is outside-of-scope. It is not necessary to apply any FOIA exemptions to the outside-of-scope information.

Brief descriptions of the FOIA Exemptions are noted below. Descriptions are also found in NRC Management Directive 3.1, Freedom of Information Act, and 10 CFR 9.17. Your office FOIA coordinator can also provide additional information.

Exemption 1: Information properly classified pursuant to an Executive Order. This includes information classified as Confidential National Security Information (C/NSI); Secret National Security Information (S/NSI) or Top Secret National Security Information (TS/NSI).
PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS

Exemption 2: Information relating solely to internal personnel rules and procedures.

Low 2: This exemption 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 release of Exemption 2 (low) records.

High 2: More substantial internal matters the disclosure of which would risk circumvention of a legal requirement where the information is predominantly internal and disclosure significantly risks circumvention of statutes or agency regulations. Some examples are: critical infrastructure systems and assets, and vulnerability assessments. Other information properly withheld under this exemption includes general guidelines for conducting investigations, computer programs and source codes, bridge passcodes, agency credit card numbers, and crediting plans for future vacancies.

A FORESEEABLE HARM STATEMENT MUST BE PROVIDED FOR EXEMPTION 2 (HIGH)

Exemption 3: Information specifically exempted from public disclosure by statute. This includes (1) safeguards information (Section 147 of Atomic Energy Act (AEA)); (2) Restricted Data (RD) including Restricted Data classified at the

CONFIDENTIAL (C/RD), SECRET (S/RD), and TOP SECRET (TS/RD) levels (Sections 141-145 of the AEA), (3) voluntary submitted critical infrastructure information (6 U.S.C. 133(a)(1)(A). and (4) contractor proposals not incorporated into the contract (41 U.S.C., Section 253b(m)(1).

PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS

Exemption 4: Trade Secrets or commercial or financial information. This includes (1) confidential business (proprietary) information; (2) licensee's physical protection or material control and accounting program information for special nuclear material (see 10 CFR2.790(d)(1)); and (3) information submitted by a foreign source and received in confidence pursuant to 2.790(d)(2).

For confidential business (proprietary) information submitted by a company, provide a copy of the company's affidavit providing a statement of the reasons supporting the company's request that the information should be protected from public disclosure and the NRC's determination letter sent to the company. If your office determines that the information continues to be proprietary, the FOIA/PA staff, with OGC concurrence, will inform the requester in the NRC's response to the request. If you believe the record or portions are no longer proprietary, indicate those portions in your response. The FOIA/PA Officer will send a letter to the submitting company when an initial determination is made that information the company claims as proprietary should be disclosed. The letter gives the company the opportunity to object to disclosure and if the company has any objection it must provide the agency a statement specifying the grounds why the information continues to be proprietary. The FOIA staff in consultation with OGC and the originating office will review the statement and reach a final agency decision and inform the company and the requester of that decision.

PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS

Exemption 5: Interagency or intraagency records that are not available through discovery during litigation. This is normally referred to as predecisional information and includes information that would reveal (1) a deliberative process but only those portions which reveal advice, opinions, and recommendations, (2) attorney work-products and (3) records covered by the attorney-client privilege. This exemption's goal is to encourage the open, frank, and candid exchange of opinions needed for good decision making, protect against premature disclosure of public policies, and protect against public confusion by disclosure of reasons and rationale that are not in fact actual reasons for agency decisions. Note that final agency decisions and interpretations can not be withheld under this exemption.

A FORESEEABLE HARM STATEMENT MUST BE PROVIDED FOR EXEMPTION 5

Exemption 6: Information if released would result in a clearly unwarranted invasion of personal privacy. For example, this includes social security numbers, home addresses, home or personal telephone, cell and pager numbers, personal non-government e-mail addresses, date of birth, marital status, number of children, and non-job related interests, personal medical, financial, performance and disciplinary

information. For application packages, candidate evaluations, personnel forms SF 50 and SF 52, and appraisal-related records, guidance can be obtained from your office FOIA coordinator.

PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS

Exemption 7: Records compiled for law enforcement purposes. Sections A, C, and D are the most frequently used parts of this exemption.

7A: Disclosure could reasonably be expected to interfere with an enforcement proceeding. This exemption is used for records involved in an open allegation file, an ongoing investigation by the Office of Investigation (OI) or Office of the Inspector General (OIG), or in an ongoing enforcement action.

PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS

7B: Would deprive a person of a fair trial or an impartial adjudication.

PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS

7C: Disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy. (See examples under Exemption 6.) Note the threshold for invoking Exemption 7C is less than that for Exemption 6 because Exemption 6 requires that the invasion of personal privacy be clearly unwarranted.

PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS

7D: Information consists of names of individuals and other information the disclosure of which could reasonably be expected to reveal the identities of confidential sources. Confidential sources generally must have a written confidentiality agreement with the NRC. However that is not required by the OIG.

PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS

7E: Disclosure would reveal techniques and procedures for law enforcement investigations or prosecutions, or guidelines that could reasonably be expected to risk circumvention of the law.

PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS

7F: Disclosure could reasonably be expected to endanger the life or physical safety of an individual.

PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS

If you have questions regarding the application of exemptions you should consult with your own management or office FOIA coordinator.

Step 7. Bracket information that should be withheld.

If the entire record is to be withheld write at the top of the first page: "Withhold All" and note the applicable FOIA exemption(s). If only a part of a record is to be withheld, whether it be part of a page, paragraph, or sentence, the information should be enclosed in brackets preferably using a red pencil and the applicable FOIA exemption noted in the margin next to the brackets. The FOIA requires that information that can be released be segregated from that which is withheld, thus it is important that you carefully consider what information can be released and what must be withheld. In particular, facts in predecisional records must be segregated from any advice, opinions or recommendations or other deliberative process information that is to be withheld. Also, make sure that information you are proposing to be withheld has not already been released to the public. Finally, remember you are only to bracket information to be withheld. The FOIA /PA Specialist is responsible for actually deleting withheld information in records prior to their release to the requester.

Step 8: Organize the records responsive to the request and submit them to your office FOIA coordinator.

Organize the responsive records into the following categories and list on separate pages as follows. Remember that all responsive records must be provided to the office FOIA coordinator regardless of whether they will be released or withheld in whole or in part. (Note the suggested format for compiling a list of records is as follows: Record Date, Originator, Originator Organization, Brief Subject and Page Count)

- (1) **Records Already Publicly Available** - if in ADAMS (main and legacy libraries) include the ADAMS Accession Number or include a printout if the records were identified via an ADAMS search along with the criteria used to perform the search.
- (2) **Records Being Released in Their Entirety** - if the record is already in the ADAMS but not publicly available include the record's ADAMS Accession Number.
- (3) **Records Containing Security-Related Information** - these records will be released only to the requester and not made publicly available in ADAMS until a third FOIA request is received for the same record. When a third request is received, the record will be made publicly available in ADAMS.
- (4) **Records Being Released in Part** with the exemption(s) noted (*foreseeable harm statement must be provided for exemptions 2(high) and 5.*
- (5) **Records Being Withheld in Their Entirety** with the exemption(s) noted (*foreseeable harm statement must be provided for exemptions 2(high) and 5.*
- (6) **Records to be Referred to the Originating Office, Agency, or Company.**
 - (a) Identify any records submitted to the Commission or a Commissioner and provide a recommendation whether the record should be released or withheld because NRC policy requires Commission approval of the recommendation.

- (b) Identify if any responsive record(s) involve(s) a subject for which litigation is either ongoing or is probable. This will ensure coordination with the Office of General Counsel, the NRC Solicitor, and when necessary the Department of Justice.
- (c) Where an email contains the exchange between two or more offices, the submitting office is responsible for making a disclosure determination on the portions of the email originated by its staff and indicating the originating office(s) for the remaining portions.
- (d) If a record contains proprietary information, remember to provide a copy of any affidavit provided by the submitted and any NRC decision letter. If the decision is still pending on submitted request for proprietary treatment of the record please note that in the response. Also since a letter will be sent to the submitted by the FOIA/PA Officer, please provide an address if it is not apparent on the record.

Step 9: Submit your response package to the FOIA/PA caseworker.

Within **ten (10)** working days, your office is required to submit records to the FOIA/PA caseworker handling the processing of the request. You should provide your office FOIA coordinator your response package within the time frame specified by your office. If you can not respond within your office's time frame, you should obtain your management approval and inform your office FOIA coordinator as soon as possible and explain why a delay will occur and when you expect to provide the complete response.

Your transmittal memo to the FOIA/PA caseworker must indicate whether the response does or does not contain security-related information. Your memo must also provide foreseeable harm statements for exemptions 2(high) and 5. You only need to provide a foreseeable harm statement for exemptions 1, 3, 4, 6, 7A and 7C if the reason is not obvious. While each document or portion of a document protected by exemptions 2 and 5 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.

You should include in your response the actual search time and review time you spent on processing the request.

Do not put your office FOIA response in ADAMS. The FOIA/PA caseworker will place the FOIA request, NRC's response(s) to the requester (including the appendices and records) in ADAMS should the determination be made that the FOIA can be made publicly available.

Sealing, Donna

From: Sealing, Donna *oFS*
Sent: Tuesday, July 14, 2009 10:30 AM
To: Menefee, Becky
Cc: Raphael, Mary Jean
Subject: RE: training book re: Ex. 5

Becky,

Please change this page to read:

A FORESEEABLE HARM STATEMENT MUST BE PROVIDED FOR EXEMPTION 5, DELIBERATIVE PROCESS ONLY. ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY-WORK PRODUCT DO NOT REQUIRE A FORESEEABLE HARM STATEMENT.

There are a few more places in the book that require updating. Mary Jean will get with you.

Thank you,

Donna

From: Raphael, Mary Jean
Sent: Tuesday, July 14, 2009 10:02 AM
To: Sealing, Donna
Cc: Menefee, Becky
Subject: RE: training book re: Ex. 5

We should also change ML060590485, How to Respond to an Initial FOIA Request (page 6, exemption 5 in bold) to state this excludes attorney-client privilege.

From: Sealing, Donna
Sent: Tuesday, July 14, 2009 9:54 AM
To: Raphael, Mary Jean
Cc: Menefee, Becky
Subject: RE: training book re: Ex. 5

No this has not changed. The books were not updated because the Ex 5 decisions were made at the last minute before the class. The book needs to be updated to reflect that harm statements are not required for all Ex 5. The discussion was that the books would be updated for the next class.

From: Raphael, Mary Jean
Sent: Tuesday, July 14, 2009 9:51 AM
To: Sealing, Donna
Subject: training book re: Ex. 5

I was called by an office regarding if we needed a harm statement for Ex. 5, attorney-client. I indicated no. However, I was told that our training book under Ex. 5 states we need a harm statement for Exemption 5, not excluding attorney-client. Has this changed because members of our section have been telling folks that attorney-client needs a harm statement.

A/29

Sealing, Donna

From: FOIA Resource
Sent: Wednesday, August 05, 2009 9:15 AM
To: RidsAcrsAcnw_MailCTR Resource; FOIAPAADM Resource; RidsAslbpManagement Resource; Blaney, Stephanie; RidsEdoMailCenter Resource; RidsFsmeOd Resource; RidsNmssOd Resource; NRO_FOIA Resource; RidsNrrMailCenter Resource; FOIAPANSIR Resource; RidsOcaMailCenter Resource; RidsOcaaMailCenter Resource; OEMAIL Resource; RidsOcfoMailCenter Resource; OGC_FOIA_COORDINATOR Resource; HR-FOIA Resource; FOIAPAOI Resource; FOIAPAOIG Resource; FOIAPAOIP Resource; OPA Resource; RidsResPmdaMail Resource; RidsSbcrMailCenter Resource; FOIAPASECY Resource; R1FOIAPA RESOURCE; FOIAPAR2 Resource; RIIIFOIAPA Resource; FOIAPAR4 Resource
Cc: FOIA Resource; Munroe, Stacey; Holzle, Catherine; Carson, Cecilia; Marks, Sharon; Champ, Billie; Travick, Vanette; Raphael, Mary Jean; Brown, Natalie; Culleen, Barbara; Dennis, Deborah; Christian, Warren; Sealing, Donna
Subject: FOIA Response Memo & Appendices
Attachments: Form Memo-Appendices.doc
Importance: High

Attached is a revised electronic version of the FOIA Response Memorandum and Appendices which reflects changes due to the need of a Foreseeable Harm Statement. Please begin use of this form effective today. If you should have any questions, please feel free to contact any of the staff in the FOIA/Privacy Section.

Thank you,

FOIA/Privacy Section
Records and FOIA/Privacy Services Branch, IRSD/OIS
Mail Stop: T-5F09
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

FOIA.Resource@nrc.gov
Phone: 301-415-7169
Fax: 301-415-5130

A/20



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, DC 20555 - 0001

June 4, 2009

MEMORANDUM TO: FOIA/PA Caseworker, _____
FOIA/PA Section

FROM:

SUBJECT: FOIA/PA- _____

- No records subject to the request.
- Records already publicly available. (Appendix)
- Records being released in their entirety. (Appendix)
- Records being withheld in part. (Appendix)*
- Records being withheld in their entirety. (Appendix)*
- Records to be referred to other offices/agencies/companies. (Appendix)
- Ongoing investigation - 7A Certification attached.
- Attached is NRC Form 496, "Report of Staff Resources for Processing FOIA Requests."
- Place released records in PDR.
- Do not place released records in PDR.
- This is a partial response to this request.
- This is the final response to this request.
- This response contains sensitive security information. (Appendix)
- This response does not contain sensitive security information.
- * **Foreseeable harm statement attached for Exemptions 2 (high) and 5 (Deliberative Process). Provide a statement for Exemptions 1, 3, 4, 6, 7A and 7C only if not obvious.**

OTHER COMMENTS:

Attachment(s):
As stated

Re: FOIA/PA-xxxx-xxxx

**APPENDIX
RECORDS ALREADY PUBLICLY AVAILABLE**

<u>NO.</u>	<u>DATE</u>	<u>ACCESSION NUMBER</u>	<u>DESCRIPTION/ (PAGE COUNT)</u>
1.	10/14/94	9411040082	Enforcement Notification to Commissioners from Office of Enforcement, Subject: Proposed Imposition of Civil Penalty - \$8,000 (1 page)
2.	01/02/96	9600342901	Letter to J. Cullen from W. Axelson, Subject: Confirmatory Action Letter (2 pages)
3.	03/04/96	9608100026	NRC Inspection Report No. 030-02104/94001 (20 pages)

Re: FOIA/PA-xxxx-xxxx

**APPENDIX
RECORDS BEING RELEASED IN THEIR ENTIRETY
(If copyrighted identify with *)**

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/ (PAGE COUNT)</u>
1.	Undated	A list of Corrective Actions provided by St. Joseph Mercy Hospital during the enforcement conference (1 page)
2.	12/18/90	Letter to H. Ray, St. Joseph Mercy Hospital from S. Richards, NMSS, Subject: Notice of Violation on IWI (5 pages)
3.	02/06/93	E-Mail from J Dyer, NRR to S Collins, RI, Subject: Schedule Conference Call (1 page)
4.	05/18/95	*Inside NRC (4 pages)

Re: FOIA/PA-xxxx-xxxx

**APPENDIX
RECORDS BEING RELEASED IN THEIR ENTIRETY
(If copyrighted identify with *)**

<u>NO.</u>	<u>DATE</u>	<u>ACCESSION NUMBER</u>	<u>DESCRIPTION/ (PAGE COUNT)</u>
1.	04/27/04	MLxxxxxxxx	Letter to Congressman Markey from Chairman N. J. Diaz, Subj: Response to Request for the Declassification of Documents relating to the TMI Accident (1 page)

Re: FOIA/PA-xxxx-xxxx

**APPENDIX
RECORDS BEING WITHHELD IN PART**

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/ (PAGE COUNT)/EXEMPTIONS</u>
1.	08/26/94	Memo to G. Beveridge, NMSS from J. Grobe, RIII, Subject: Voucher for Professional Services (3 pages) EX. 6
2.	09/09/94	Letter to an individual from C. Caputo, OI (1 page) EX. 7C
3.	10/25/95	Memo to J. Lieberman, OE from J. Martin, RI Subject: St. Joseph Mercy Hospital Proposed Notice of Violation and Proposed Imposition of Civil Penalty (3 pages) EX. 5
	Undated	Attachment 1: Escalation and mitigation factors (2 pages) EX. 5
	08/19/94	Attachment 2: NRC Inspection Report No. 030-02104/94001(DRSS) (19 pages) ANO 9408240029
4.	09/18/96	Letter to T. Pearson, St. Joseph Mercy Hospital from S. Smith, NMSS, Subject: Notice of Violation (9 pages) EX. 5

Re: FOIA/PA-xxxx-xxxx

**APPENDIX
RECORDS BEING WITHHELD IN THEIR ENTIRETY**

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/ (PAGE COUNT)/EXEMPTIONS</u>
1.	09/02/93	Office of Investigation's Case File and associated records (100 pages) EX. 7A
2.	10/13/94	OGC markup of draft Notice of Violation and Proposed Imposition of Civil Penalty (9 pages) EX. 5

Re: FOIA/PA-xxxx-xxxx

**APPENDIX
RECORDS TO BE REFERRED TO OTHER OFFICE/AGENCY/COMPANY**

<u>NO.</u>	<u>DATE</u>	<u>ENTITY</u>	<u>DESCRIPTION/ (PAGE COUNT)</u>
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(Note to Coordinators: When a record is to be referred to a licensee you need to provide the FOIA/PA Specialist responsible for the request with the appropriate licensee contact information (i.e., name, title, company, address, and telephone number if available).

Re: FOIA/PA-xxxx-xxxx

APPENDIX
RECORDS CONTAINING SENSITIVE SECURITY INFORMATION

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/ (PAGE COUNT)</u>
1.	1/8/03	Registry of Radioactive Sealed Sources and Devices, Safety Evaluation of Device, Amended in its Entirety, CA0215D102G (7 pages)

Sealing, Donna

From: Nichols, Russell *OIS*
Sent: Wednesday, August 05, 2009 12:47 PM
To: Moss, Mary
Cc: Northern, Sandra; Sealing, Donna
Subject: IOI - FOIA Training Region IV

Hi Mary,

Here is an item of interest.

Freedom of Information Act (FOIA) Training

On August 4, 2009, Information and Records Services Division and Office of General Counsel staff provided a day-long FOIA training course to representatives of Region 4 via teleconference. Twenty-three (23) representatives of R4 participated. The course covered the history of the FOIA, NRC administrative FOIA procedures, the FOIA exemptions, and a discussion of the effects of the Obama administration's new openness and transparency policy on FOIA processing at NRC.

Russ

A/30



Sept 16, 2009

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Freedom of Information Act

The Freedom of Information Act (FOIA) of 1966 protects the rights of the public to information and makes provisions for individuals to obtain information on the operation of federal agencies. OIS manages NRCs FOIA Program and coordinates responses to requests under the Act.

On This Page:

- [Guidance](#)
- [Service Levels](#)
- [Training](#)

Contacts/Help Information

Donna L. Sealing
 Email:
 Donna.Sealing@nrc.gov
 Telephone: 301-415-7169

Guidance

- [How To Respond To An Initial FOIA Request](#)
- [Personal Information Withheld from Third Parties](#)
- [Freedom of Information Act and Privacy Act Requests](#)
- [Yellow Announcement No. 054 dated May 19, 2009, New FOIA Procedures](#)
- [Management Directive 3.1 - Freedom of Information Act](#)
- [Part 9 -- Public Records](#)
- [The Freedom of Information Act](#)
- [The Privacy Act of 1974](#)

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Service Levels

- Hours of operation: Monday through Friday 7:30 am - 4:15 pm
- Service Response times are in accordance with the Freedom of Information Act.

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Training

• FOIA training is available online at <http://grape.nrc.gov/Training/NewSite/courselogin.cfm?page=foia> or by participating in one of the semiannual FOIA/PA training sessions

• Contact the FOIA/Privacy Section at 301-415-7169 or FOIA.Resource@nrc.gov for further information.

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= Link to non-NRC Site = Link to NRC Public Site = Adobe PDF = MS Word = PowerPoint

Information Security Reminder

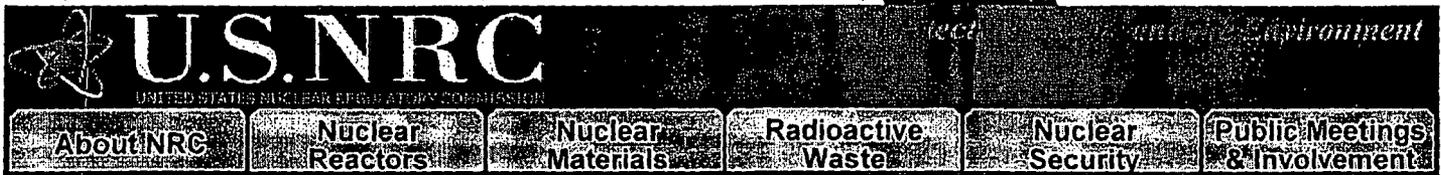
This page on NRC's Internal Web site may contain sensitive information. Check with the information owner before distributing outside the agency.

Last Modified: May 26, 2009 11:15 AM
Content maintained by OIS/IRSD Web Liaison

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Electronic Reading Room

Basic References
 Document Collections
 Agencywide Documents Access and Management System (ADAMS)
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Home > Electronic Reading Room> Freedom of Information Act and Privacy Act Requests

Freedom of Information Act and Privacy Act Requests

NRC administers policies, programs, and procedures to ensure NRC compliance with the Freedom of Information Act (FOIA) and the Privacy Act (PA), 5 U.S.C. 552 and 5 U.S.C. 552a. NRC's regulations on public records are found in 10 CFR Part 9 of the Code of Federal Regulations. NRC's Deputy Executive Director for Corporate Management is designated as the NRC Chief FOIA Officer.

The FOIA generally provides any person the right, enforceable in court, to obtain access to Federal agency records.

The objectives of the Privacy Act are to restrict disclosure of personally identifiable records maintained by Federal agencies, grant individuals rights of access to agency records maintained on themselves, grant individuals the right to seek amendment of agency records maintained on themselves, and to require agencies to comply with statutory norms for collection, maintenance, and dissemination of records.

For more information related to the FOIA and Privacy Act, see the following:

- Freedom of Information Act Guide
 - Access to Records Without a FOIA Request [5 U.S.C 552(a)(1) & (2)]
 - What to include in a FOIA request, how to submit the request, and how NRC will process the request
- Amendments to the FOIA "OPEN Government Act of 2007" - full text of the "Openness Promotes Effectiveness in our National Government Act of 2007, the bill signed into law on December 31, 2007
- Freedom of Information Act **EXIT** - President Obama Memorandum dated January 21, 2009
- Open Government and FOIA **EXIT** - Office of the Attorney General Memorandum dated March 19, 2009
- Executive Order 13,392, Improving Agency Disclosure of Information - provides a synopsis of the purpose and intent of the Executive Order, its requirements, and the NRC's compliance with its requirements
- NRC FOIA Backlog Reduction Goals for FY2008, FY2009, and FY2010 - establishes goals with respect to the numbers of FOIA requests and administrative appeals to be processed
- Privacy Act Requests Guide - what to include in a Privacy Act request, how to submit the request, and how NRC will process the request
- Processing Fees - detailed explanation of our FOIA and Privacy Act processing fees and fee waivers
- Index of Closed FOIA/PA Requests by Subject - subject list of requests closed since 1998
- Recent FOIA Requests - subject list and reference number of recently received requests
- Records Frequently Requested under the FOIA - full text of frequently requested records
- Privacy Act Systems of Records - a complete description of agency records that are retrieved by name, social security number, or any other type of personal identifier
- Annual FOIA Reports - statistics on NRC's FOIA program reported annually to the

To submit a FOIA/Privacy Act request:

Mail:

U.S. Nuclear Regulatory Commission
 FOIA/Privacy Officer
 Mailstop: T-5 F09
 Washington, DC 20555-0001

Fax: 301-415-5130

E-mail:

FOIA.resource@nrc.gov

Questions: 301-415-7169

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Department of Justice

- [Contact Us About FOIA/Privacy Act, Service Center, and Public Liaisons](#)

Related Information

- [NRC Citizen's Guide to NRC Information](#) - description of NRC's information and how to obtain it
- [Public Document Room](#)
- [Certification of Reading Room in Compliance with the FOIA](#)

For more information on the U.S. Federal government's FOIA programs, visit the Office of Information and Privacy, U.S. Department of Justice [EXIT](#), the Web site of the Federal government's executive office for guidance on FOIA implementation.

FOIA Procedures

All FOIA requests should immediately be sent to the FOIA/PA Section to mail stop: TWFN-05F09 or by fax to 301-415-5130

- ❖ FOIA/PA caseworker does not answer questions unless the question can be answered by providing access to a specific record
 - For example, if a request asked, "How many awards were made in the years 2003, 2004, and 2005 to persons in the SES and SLS series?"
 - if the Office of Human Resources can readily produce a document with the information, it would be provided to the requester
- ❖ Requests for records not yet created or information that would require the creation of a record will not be processed under the FOIA
- ❖ Requester may request records in any form or format if "reasonably possible"
 - As an example, a requester may prefer to have the response on a CD in an Excel format instead of a paper copy. NRC would produce the information in the requested format if reasonably possible

Roles of the FOIA/PA Caseworker

- ❖ Contacts requester for clarification, re-scoping, fee issues. Arranges conference calls between requester and staff when necessary. FOIA/PA caseworker must be included in all contacts with the requester
 - All conference calls with a requester for scope clarification must be handled by the FOIA/PA caseworker so that all appropriate staff are included. This insures that everyone involved clearly understands what the requester is asking for
- ❖ Conduct review of bracketed portions of records to be withheld in part and records proposed to be withheld in their entirety and make an independent judgment whether or not this proposed withholding is proper
 - The FOIA/PA caseworker reviews material designated for withholding
- ❖ Perform a general review of records proposed to be released by an office, primarily focusing on records with markings (i.e., classified, proprietary, safeguards, copyrighted), records originated by other Federal agencies, and records containing obvious personal privacy information
 - Keep in mind that personal e-mail addresses should be withheld and these can appear in the page header and in several places within e-mails when a running dialogue takes place between individuals
- ❖ Identify questions or issues regarding the appropriateness of the exemptions cited as the basis for withholding of the information and inconsistencies between offices, or by one office, in proposed withholdings

- It may be necessary for the FOIA/PA caseworker to discuss the proposed withholding or designated exemption with an office so that we fully understand the basis for the withholding
- ❖ **Make referrals between offices, to other agencies, and to companies either for direct response or consultation**
 - When records are designated for referral to a company/licensee, the office providing the records must provide the name of the company/licensee that the record is to be referred to as well as a contact name and phone number
- ❖ **After resolution of proposed release determinations, redact the information to be withheld**
 - Offices are only to [bracket] any material to be withheld --the FOIA/PA caseworker is responsible for physically redacting the bracketed information
- ❖ **Consolidate the appendices received from the offices and prepare them to accompany the response to the requester**
 - It is important that all offices prepare their appendices in the exact format provided to each coordinator
- ❖ **Prepare response(s) to the requester including the applicable FOIA exemptions and reasons for the denial, names of denying officials and informs requester of right to appeal, if applicable**
- ❖ **Obtain all necessary concurrences. Obtain signature from FOIA/PA Officer. Dispatch response, make distribution copies. Make available in ADAMS released records, when appropriate**

Roles of the Office FOIA/PA Coordinator

- ❖ **The office FOIA coordinator serves as the office/region point of contact and serves as liaison between the office/region and the FOIA/PA caseworker**
- ❖ **Responsible for assigning action to appropriate staff within the office/region in accordance with internal office procedures**
- ❖ **Assists staff in understanding the scope of the request and provides assigned staff instructions on how to respond to the FOIA request**
- ❖ **Responsible for providing a consolidated office/region response for fee estimates within the allotted 4-day time frame when applicable**
- ❖ **Notifies the FOIA/PA caseworker if staff indicates additional offices/regions are likely to have responsive records**
- ❖ **Informs staff within the office/region when to begin processing the request**
- ❖ **Notifies the FOIA/PA caseworker of any problems which would impact the completion date**
- ❖ **The office FOIA coordinator, prior to submitting the records to the caseworker, should review the records to insure that information to be withheld is bracketed consistently throughout the records and that duplicate records are removed (e.g., two divisions/branches provide the same record)**

- ❖ Organizes all responsive record into the categories identified in the “How to Respond to an Initial FOIA Request” (ML060590485) [Exhibit 14] document. Prepares the consolidated appendices and submits to the FOIA/PA caseworker with a completed transmittal memo [Exhibit 16] and NRC Form 496 [Exhibit 15]

Roles of the Senior FOIA Management Official

Each NRC office has an individual designated as the Senior FOIA Management Official. This is the person who can provide the office FOIA coordinator with the necessary guidance when problems or questions arise within the office [Exhibit 10]

- ❖ Serves as office focal point to resolve problems that cannot be resolved between FOIA/PA caseworker and office FOIA coordinator
- ❖ Represents the Office Director in resolving initial disclosure determination issues or delays by the staff in responding to FOIA actions
- ❖ Assists the office FOIA coordinator in clarifying the scope of requests and identifying appropriate office staff to conduct the search for and review of responsive records
- ❖ Possesses substantial knowledge of the work and current technical and policy considerations within the office

FOIA/PA Case Assignment

❖ 3 Types of E-mail Assignment

- Basic E-mail
 - normal processing - office FOIA coordinator to provide fee estimates to FOIA/PA caseworker within 4 days of case assignment to the office (individual office procedures may allow fewer than 4 days) [Exhibit 12.1]
- Fee waiver granted
 - FOIA/PA Officer makes determination - office does not need to provide any processing estimates and should begin processing immediately [Exhibit 12.2]
- Expedited processing granted
 - FOIA/PA Officer makes determination - If granted, the FOIA request moves to the top of the list of other pending FOIA requests in your office [Exhibit 12.3]

❖ Offices/Regions:

- Provide fee estimates within 4 working days
- Search/Review/Duplication (inches or pages)
 - search is time spent looking for responsive records, manually and/or using existing computer programs
 - review is time spent examining the responsive records to determine whether they are exempt from disclosure in whole or in part
 - duplication is the number of releasable pages or inches*

- * Duplication costs can take the form of pages, microform, audiovisual materials, disk, CD, magnetic tape, or machine-readable documentation
- Provide records to FOIA in 10 working days from perfection
 - a request is considered to be "perfected" when there are no remaining questions about the scope of the request, the payment of applicable fees, the need for verification of identity, or other matters that preclude processing of the request
- ❖ **NRC Form 496A Referral Related to FOIA/PA Request [Exhibit 13]**
 - Referral of related records for which your office has responsibility or an interest in the records which requires a release determination or recommendation
 - Used to assign an action to an office through the appeal process

Responding to an Initial FOIA Request

How to Respond to an Initial FOIA Request

❖ **Record**

- What is an agency record? 10CFR Part 9: a record in the possession and control of the NRC that is associated with Government business. Documents which have handwritten notations on them qualify as a separate document (e.g., you have a clean copy of a SECY paper and you have another copy of the paper with someone's editorial comments on it - treat as two separate documents)
- Agency record does not include publicly available books, periodicals, or items that are copyrighted; does not cover records solely in the possession and control of contractors;
- Nor does it include personal records in the possession of NRC personnel that have not been circulated, were not required to be created or retained by the NRC and can be retained or discarded at the author's sole discretion

❖ **Personal Records**

- Have not been commingled with agency records
- Have not been circulated or shared with others in the course of transacting NRC business
- Were prepared for the individual's own use
- Were not required to be created or retained by NRC
- Can be retained or discarded at the author's sole discretion
- Were not used as a substantive part in writing an agency record
- Complete Consideration Checklist (MD 3.1, pages 72-73)
 - provide number of pages
- Personal records must be maintained for six years by the employee, office FOIA coordinator, or FOIA/PA caseworker

❖ **Search**

- All records that are in existence on the date a request is received and that are within the scope of the request must be addressed (records include electronic, databases, e-mail with properties page, word processing files, disks, audio, video. Also must check ADAMS - PARS & Legacy Libraries (public and non-public). Also check file center (NRR, FSME and NMSS and regions often send records to file center)

❖ **Review**

- Searching office will conduct a detailed review and make an initial recommendation as to what information can be released and what should be withheld
- Outside scope - if on same page as information within scope, outside scope position must be identified. If entire page is outside scope, mark accordingly

❖ **Office Response**

- Indicate in your memo
 - whether the response is a partial or final
 - whether the records can be placed in PDR
 - a foreseeable harm statement for Exemptions 2 (high) and 5 (Deliberative Process), and 1, 3, 4, 6, 7A and 7C if not obvious.
 - whether or not the response contains any sensitive security information
 - indicate the actual time spent processing the request on NRC Form 496 which is available on Informs

❖ **Creating Appendices**

- Response Memo and Appendix Samples [Exhibit 16]
 - Records Being Released in Their Entirety
 - Records containing sensitive security information (Being released to requester only)
 - Records Being Withheld in Part
 - Records Being Withheld in Their Entirety
 - Records to be Referred to Other Office/Agency/Company

❖ **Record computer search criteria (ADAMS, MLTS, etc.)**

- Described in "How to Respond.." instructions - Item 5.d
- Make sure records listed as publicly available are indeed public
 - for ADAMS records check availability, release date, sensitivity, and replication (has to have all 4)

❖ **When describing records on the appendices - do not use anything in your description that is being withheld within the record you are describing**

❖ **Non-Public Records in ADAMS to be made publicly available**

- Provide ML # and indicate record can now be made publicly available. FOIA/PA caseworker will work with ADAMS to have record made publicly available

❖ **Copyrighted Records**

- Place on appendix - Release in Entirety. Place * before description of the record. [e.g., web sites, map quest, newspaper, magazines, books, documents marked with copyright ©]. A note in the transmittal memo stating that there are copyrighted documents within the package is helpful

❖ **Records for Referral**

- FOIA/PA caseworker makes all referrals to other offices/companies/agencies
- If record is to the Commission, originating office makes recommendation on releasability. FOIA/PA caseworker will refer to Commission, who will make final decision on release
- If office locates record originated by another office but the locating office has an interest in the record, provide a recommendation to FOIA/PA caseworker

❖ **Response to FOIA/PA Request [Exhibit 17]**

- A copy of NRC Form 464 Part I & Part II with appendices will be provided to each office involved with a specific response

❖ **Removal of Records from PDR Released under FOIA**

- Telephone FOIA/PA caseworker immediately
- Senior FOIA Management Official shall follow-up with written confirmation of the release
- FOIA/PA caseworker will coordinate removal of the records

❖ **Senior Management Meeting Documents (Agency Action Review Meeting (AARM) Information**

- Identify these records as "senior management meeting documents"
- Provide a disclosure determination

FOIA/PA caseworker will refer to the EDO's office who will make the final determination on release

Appeals

❖ Appeals can be made for:

- Denial
 - records, fee waiver, expedited processing
- Adequacy of Search
 - record was not located
- Lack of Response
 - NRC failed to respond within 20 days

❖ Appellate Authority:

- Commission appeal
 - SECY responds
- IG appeal
 - IG responds
- EDO appeal
 - FOIA/PA caseworker coordinates and prepares response for appropriate DEDO
 - staff reviews records appealed, considering any new information presented in appeal letter
 - response to FOIA/PA caseworker from office FOIA coordinator must reflect that the office director or his designee has personally approved the decision to withhold each record or portion thereof
 - a foreseeable harm statement is required for Exemptions 2 (high) and 5 (Deliberative Process), and 1, 3, 4, 6, 7A and 7C if not obvious.

How To Respond To An Initial FOIA Request

What is the Freedom of Information Act (FOIA)?

The FOIA was passed by Congress in 1966. It permits any person, whether a citizen or not, to request records in possession and control of a Federal agency, and the agency must provide access to those records unless they are exempted from disclosure by one of the nine exemption categories in the Act. You should follow the steps listed below as you process a FOIA request. Each step is explained following the list.

- _____ Step 1: Make sure you clearly understand what records the requester is seeking.
- _____ Step 2: Determine if you are likely to have records subject to the request.
- _____ Step 3: Provide an estimate of search and review time and an estimate of pages if required.
- _____ Step 4: What to do if expedited processing is required.
- _____ Step 5: Search for records responsive to the request.
- _____ Step 6: Determine if records are to be released or withheld from the requester.
- _____ Step 7: Bracket information that should be withheld.
- _____ Step 8: Organize the records responsive to the request and submit them to you office FOIA coordinator.
- _____ Step 9: Submit your response package to the FOIA/PA caseworker.

Step 1: Make sure you clearly understand what records the requester is seeking.

The FOIA/PA caseworker will make every effort to clarify the scope of the request before forwarding the request to the office FOIA coordinators. However, if you have questions about the request you should contact your office FOIA coordinator. If you believe you need additional clarification on the scope of the request, you should ask your office FOIA coordinator to request that the agency FOIA/PA caseworker responsible for overseeing processing of the request contact the requester for clarification or alternatively arrange a conference call with the requester at which time you may ask questions or offer suggestions to further define the scope of the request. Note that no contact should be made with the requester unless approved by the agency FOIA/PA caseworker so that all contacts with the requester meet the needs of all others who have a role in processing the request.

Step 2: Determine if you are likely to have records subject to the request.

Based on your knowledge of the subject matter of the request, you should determine if you will have records responsive to the request. You are only required to look for records where you believe it is reasonable to expect you will locate paper or electronic records covered by the subject matter of the request.

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Only agency records that are in existence on the date NRC received the request are subject to a FOIA request. Agency records are records created or obtained by the agency and under the agency control at the time of request. This includes records created by the NRC staff, records submitted to the NRC by applicants, licensees, contractors, Federal and state agencies, international organizations and members of the public.

No records that are potentially responsive to the FOIA request may be destroyed after receipt of the FOIA request. However, there is no need to reconstruct a record that was destroyed prior to receipt of a request nor does NRC have to inform the requester that a record does not exist since it was destroyed prior to receipt of the request. As a matter of discretion, you may include records that can be released that were created after the date a request was received if you believe it would provide a clearer picture of agency actions regarding the subject of the request.

The agency is not obligated to create a record to respond to a request. Neither does the FOIA require an agency to answer questions that are asked in a request.

Some records may be determined to be **personal records** in that they may relate to the subject of the request but have not been circulated to anyone else in the agency, are not filed with any other agency records, and you were not required to create or retain them. These records still have to be identified and retained, but the agency does not have to invoke an exemption to withhold them. The agency does have to inform the requester that there are records that have been deemed to be personal records and the number of pages. Management Directive 3.1, Freedom of Information Act, contains a Personal Record Consideration Checklist that should be filled out by the owner of the personal records and submitted to the office FOIA coordinator. Contact your office FOIA coordinator for retention requirements.

Also, if you believe responsive records may be located in other offices, or with persons who may have been previously involved in the subject matter as staff in your organization or a member of a team or project, provide that information promptly to your office FOIA coordinator. The FOIA/PA caseworker will then contact the additional office(s) to begin searching for subject records.

Step 3: Provide an estimate of search and review time and pages if required

Within **four (4)** working days of your office's receipt of the request, your office may be required to provide to the FOIA/PA caseworker an estimate of the amount of time expected to be required to search for, and review records, and an estimate of the number of pages (or inches) you expect will be released to the requester. This includes pages that may be released in part. Whether your office will need to provide an estimate will depend upon whether or not the requester has been granted a fee waiver. The instructions on the FOIA E-Mail Assignment Form sent to your office FOIA coordinator will inform you if a fee waiver has been granted. If granted, fee estimates are not required. Proceed to Step 5. Otherwise if fees are required, your estimates must be given to your office FOIA coordinator within the time frame specified by your office.

Fee estimate for **search time** should include all time required to locate records responsive to the FOIA request. This includes time spent locating folders in file cabinets, looking for relevant records within file folders, and searching ADAMS and other databases, and consulting with others regarding the location of responsive records. **Review time** includes the actual time each person who will be involved in the review of the records will spend determining

if the records can be released in their entirety or in part and the process of bracketing any information that will be proposed to be withheld. Duplication estimate is based of the number of pages likely to be released to the requester and **does not** include the staff-hours used to copy the records.

Step 4: What to do if expedited processing is required.

Your office FOIA coordinator will inform you if a request has been granted expedited processing. If a request has been granted expedited processing, you should process the expedited FOIA request before processing any previous FOIA requests. Contact your office FOIA coordinator for more specific directions if needed.

Step 5: Search for records responsive to the request

- a. Begin your search when instructed by the office FOIA coordinator.

Your office FOIA coordinator will tell you when to begin your search. If you had to provide a search, review or page estimate, you can expect that there may be a delay before you are instructed to begin your search. A search can begin only when a request is "perfected," which means when all fee related or other issues are resolved. If no estimates are required, your office FOIA coordinator will advise you to immediately begin your search for records.

- b. Inform your office FOIA coordinator if you believe other offices or persons have responsive records.

If you believe responsive records may be located in other offices, or with persons who may have been previously involved in the subject matter as staff in your organization or a member of a team or project, provide that information promptly to your office FOIA coordinator. Notify your office FOIA coordinator when you are aware the Commissioners or the EDO, or a Deputy EDO has been involved in the subject matter and may have responsive records or the records may be the subject of an ongoing investigation. This information is valuable because it will ensure that the agency as a whole does an adequate search for responsive records. If you know others who are processing the same request or who should be, it may be useful to work closely with them, even if they are in other offices to both ensure an adequate search and to make the search more efficient.

- c. Search all relevant files.

You must conduct, based on your knowledge of the subject matter, an adequate search of those paper and electronic files where you believe it is reasonable to expect to locate records covered by the subject matter of the request. You must include in your search the following:

- (1) paper records under your personal control including working papers you have retained in your possession
- (2) paper records maintained in your office
- (3) paper records in the NRC File Center

- (4) e-mails including property sheets in the Received, Sent, Archives, and Trash files. Note that since trash files are still within your control, e-mails responsive to a FOIA request in the trash folder must be identified, retrieved, printed out, and processed. You should also move the e-mail out of the trash folder to eliminate the possibility that an automatic deletion of e-mail will destroy the only copy.
- (5) electronic records in ADAMS Main Library and Legacy Library including all versions.
- (6) other electronic files, including but not limited to WordPerfect, Microsoft Word, spreadsheets, presentation files including those files stored on disks
- (7) databases including those files stored on disks
- (8) audio or video files or tapes.

d. Record computer search criteria

When a computer database such as ADAMS is searched to locate records responsive to a request, the search criteria used for conducting the search must be provided with the office response. The Department of Justice has advised agencies in order to justify that they have done an adequate search they must maintain computer search criteria. The search criteria must be provided even if no records are identified as a result of the computer search.

e. Download or print information from computer spreadsheets or databases.

If the requested information is in a database or spreadsheet and is retrievable by using an existing computer program or by minor program modifications or simple computer instructions, the subject information should be provided. If a program would have to be written, inform your office FOIA coordinator.

f. If a record is already publicly available you only have to identify the ADAMS accession number and a description of the record and page count. No copy is required to be made. Otherwise you will have to provide a copy of all responsive records.

Step 6: Determine if records are to be released or withheld from the requester.

After you have searched and located records, you should review the records to determine if any information in the records should be withheld under any of the FOIA exemptions. In particular you should be on alert for personal privacy information, allegation information, investigative related records, proprietary information, classified, or safeguards information. When you have questions you should refer to the applicable management directive or contact your office FOIA coordinator.

Sometimes while reviewing records you will find that they contain not only information that is subject to the request but also information that is outside the scope of the request. If an entire page of a record is outside of the scope of the request, you should mark the page at the top to indicate it is "Outside-of-Scope." This page will not be provided to the requester. If outside-of-scope information is on a page containing information that is subject to the request, the outside-of-scope information must be marked "Outside-of-Scope." The requester will be provided a redacted copy of the record that does not reveal the information that is outside-of-scope. It is not necessary to apply any FOIA exemptions to the outside-of-scope information.

Brief descriptions of the FOIA Exemptions are noted below. Descriptions are also found in NRC Management Directive 3.1, Freedom of Information Act, and 10 CFR 9.17. Your office FOIA coordinator can also provide additional information.

Exemption 1: Information properly classified pursuant to an Executive Order. This includes information classified as Confidential National Security Information (C/NSI); Secret National Security Information (S/NSI) or Top Secret National Security Information (TS/NSI). **PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS**

Exemption 2: Information relating solely to internal personnel rules and procedures.

Low 2: This exemption 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 release of Exemption 2(low) records.

High 2: More substantial internal matters the disclosure of which would risk circumvention of a legal requirement where the information is predominantly internal and disclosure significantly risks circumvention of statutes or agency regulations. Some examples are: critical infrastructure systems and assets, and vulnerability assessments. Other information properly withheld under this exemption includes general guidelines for conducting investigations, computer programs and source codes, bridge passcodes, agency credit card numbers, and crediting plans for future vacancies. **A FORESEEABLE HARM STATEMENT MUST BE PROVIDED FOR EXEMPTION 2(HIGH)**

Exemption 3: Information specifically exempted from public disclosure by statute. This includes (1) safeguards information (Section 147 of Atomic Energy Act (AEA)); (2) Restricted Data (RD) including Restricted Data classified at the CONFIDENTIAL (C/RD), SECRET (S/RD), and TOP SECRET (TS/RD) levels (Sections 141-145 of the AEA), (3) voluntary submitted critical infrastructure information (6 U.S.C. 133(a)(1)(A). and (4) contractor proposals not incorporated into the contract (41 U.S.C., Section 253b(m)(1)). **PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS**

Exemption 4: Trade Secrets or commercial or financial information. This includes (1) confidential business (proprietary) information; (2) licensee's physical protection or material control and accounting program information for special nuclear material (see 10 CFR 2.390(d)(1)); and (3) information submitted by a foreign source and received in confidence pursuant to 2.390(d)(2).

For confidential business (proprietary) information submitted by a company, provide a copy of the company's affidavit providing a statement of the reasons supporting the company's request that the information should be protected from public disclosure and the NRC's determination letter sent to the company. If your office determines that the information continues to be proprietary, the FOIA/PA staff, with OGC concurrence, will inform the requester in the NRC's response to the request. If you believe the record or portions are no longer proprietary, indicate those portions in your response. The FOIA/PA Officer will send a letter to the submitting company when an initial determination is made that information the

company claims as proprietary should be disclosed. The letter gives the company the opportunity to object to disclosure and if the company has any objection it must provide the agency a statement specifying the grounds why the information continues to be proprietary. The FOIA staff in consultation with OGC and the originating office will review the statement and reach a final agency decision and inform the company and the requester of that decision. **PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS**

Exemption 5: Interagency or intraagency records that are not available through discovery during litigation. This is normally referred to as predecisional information and includes information that would reveal (1) a deliberative process but only those portions which reveal advice, opinions, and recommendations, (2) attorney work-products and (3) records covered by the attorney-client privilege. This exemption's goal is to encourage the open, frank, and candid exchange of opinions needed for good decision making, protect against premature disclosure of public policies, and protect against public confusion by disclosure of reasons and rationale that are not in fact actual reasons for agency decisions. Note that final agency decisions and interpretations can not be withheld under this exemption. **A FORESEEABLE HARM STATEMENT MUST BE PROVIDED FOR EXEMPTION 5, DELIBERATIVE PROCESS ONLY. ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY-WORK PRODUCT DO NOT REQUIRE A FORESEEABLE HARM STATEMENT**

Exemption 6: Information if released would result in a clearly unwarranted invasion of personal privacy. For example, this includes social security numbers, home addresses, home or personal telephone, cell and pager numbers, personal non-government e-mail addresses, date of birth, marital status, number of children, and non-job related interests, personal medical, financial, performance and disciplinary information. For application packages, candidate evaluations, personnel forms SF 50 and SF 52, and appraisal-related records, guidance can be obtained from your office FOIA coordinator. **PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS**

Exemption 7: Records compiled for law enforcement purposes. Sections A, C, and D are the most frequently used parts of this exemption.

7A: Disclosure could reasonably be expected to interfere with an enforcement proceeding. This exemption is used for records involved in an open allegation file, an ongoing investigation by the Office of Investigation (OI) or Office of the Inspector General (OIG), or in an ongoing enforcement action. **PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS**

7B: Would deprive a person of a fair trial or an impartial adjudication. **PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS**

- 7C: Disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy. (See examples under Exemption 6.) Note the threshold for invoking Exemption 7C is less than that for Exemption 6 because Exemption 6 requires that the invasion of personal privacy be clearly unwarranted. **PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS**
- 7D: Information consists of names of individuals and other information the disclosure of which could reasonably be expected to reveal the identities of confidential sources. Confidential sources generally must have a written confidentiality agreement with the NRC. However that is not required by the OIG. **PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS**
- 7E: Disclosure would reveal techniques and procedures for law enforcement investigations or prosecutions, or guidelines that could reasonably be expected to risk circumvention of the law. **PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS**
- 7F: Disclosure could reasonably be expected to endanger the life or physical safety of an individual. **PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS**

If you have questions regarding the application of exemptions you should consult with your own management or office FOIA coordinator

Step 7: Bracket information that should be withheld.

If the entire record is to be withheld write at the top of the first page: "Withhold All" and note the applicable FOIA exemption(s). If only a part of a record is to be withheld, whether it be part of a page, paragraph, or sentence, the information should be enclosed in brackets preferably using a red pencil and the applicable FOIA exemption noted in the margin next to the brackets. The FOIA requires that information that can be released be segregated from that which is withheld, thus it is important that you carefully consider what information can be released and what must be withheld. In particular, facts in predecisional records must be segregated from any advice, opinions or recommendations or other deliberative process information that is to be withheld. Also, make sure that information you are proposing to be withheld has not already been released to the public. Finally, remember you are only to bracket information to be withheld. The FOIA /PA Specialist is responsible for actually deleting withheld information in records prior to their release to the requester.

Step 8: Organize the records responsive to the request and submit them to your office FOIA coordinator.

Organize the responsive records into the following categories and list on separate pages as follows. Remember that all responsive records must be provided to the office FOIA coordinator regardless of whether they will be released or withheld in whole or in part. (Note the suggested format for compiling a list of records is as follows: Record Date, Originator, Originator Organization, Brief Subject and Page Count.)

- (1) **Records Already Publicly Available** - if in ADAMS (main and legacy libraries) include the ADAMS Accession Number or include a printout if the records were identified via an ADAMS search along with the criteria used to perform the search.
- (2) **Records Being Released in Their Entirety** - if the record is already in the ADAMS but not publicly available include the record's ADAMS Accession Number.
- (3) **Records Containing Security-Related Information** - these records will be released only to the requester and not made publicly available in ADAMS until a third FOIA request is received for the same record. When a third request is received, the record will be made publicly available in ADAMS.
- (4) **Records Being Released in Part** with the exemption(s) noted (*a foreseeable harm statement must be provided for exemptions 2(high) and 5(Deliberative Process)*).
- (5) **Records Being Withheld in Their Entirety** with the exemption(s) noted (*a foreseeable harm statement must be provided for exemptions 2(high) and 5(Deliberative Process)*).
- (6) **Records to be Referred to the Originating Office, Agency, or Company.**
 - (a) Identify any records submitted to the Commission or a Commissioner and provide a recommendation whether the record should be released or withheld because NRC policy requires Commission approval of the recommendation.
 - (b) Identify if any responsive record(s) involve(s) a subject for which litigation is either ongoing or is probable. This will ensure coordination with the Office of General Counsel, the NRC Solicitor, and when necessary the Department of Justice.
 - (c) Where an email contains the exchange between two or more offices, the submitting office is responsible for making a disclosure determination on the portions of the email originated by its staff and indicating the originating office(s) for the remaining portions.
 - (d) If a record contains proprietary information, remember to provide a copy of any affidavit provided by the submitted and any NRC decision letter. If the decision is still pending on submitted request for proprietary treatment of the record please note that in the response. Also since a letter will be sent to the submitted by the FOIA/PA Officer, please provide an address if it is not apparent on the record.

Step 9: Submit your response package to the FOIA/PA caseworker.

Within **ten (10)** working days, your office is required to submit records to the FOIA/PA caseworker handling the processing of the request. You should provide your office FOIA coordinator your response package within the time frame specified by your office. If you can not respond within your office's time frame, you should obtain your management approval and inform your office FOIA coordinator as soon as possible and explain why a delay will occur and when you expect to provide the complete response.

Your transmittal memo to the FOIA/PA caseworker must indicate whether the response does or does not contain security-related information. Your memo must also provide foreseeable harm statements for exemptions 2(high) and 5(*Deliberative Process*). You only need to provide a foreseeable harm statement for exemptions 1, 3, 4, 6, 7A and 7C if the reason

is not obvious. While each document or portion of a document protected by exemptions 2(high) and 5(*Deliberative Process*) 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.

You should include in your response the actual search time and review time you spent on processing the request.

Do not put your office FOIA response in ADAMS. The FOIA/PA caseworker will place the FOIA request, NRC's response(s) to the requester (including the appendices and records) in ADAMS should the determination be made that the FOIA can be made publicly available.

Exemption 1

Classified Information

Confidential – Secret - Top Secret

- ❖ **Exempts from public disclosure records that are specifically authorized under criteria established by Executive Order 12958 to be kept secret in the interest of national defense or foreign policy, and that are properly classified pursuant to such Executive Order**
 - This includes information classified as Confidential National Security Information (C/NSI), Secret National Security Information (S/NSI), or Top Secret National Security Information (TS/NSI)
 - Classification is indicated in parenthesis after each paragraph
 - Classified records must have a cover sheet attached indicating the highest-level of classified information contained in the record. (SF 703, Top Secret; SF 704, Secret; SF 705, Confidential)
 - Classified NRC records relate to foreign and/or domestic policy
 - The NRC sometimes consults with other federal agencies before making a release determination for classified records

NOTE: See Management Directive 12.2, NRC Classified Information Security Program for further information

Must be accompanied by a foreseeable harm statement **only** if it is not obvious why the agency is citing this exemption

Exemption 2
Internal Personnel Rules and Practices
of an Agency

Exemption 2 (High)

- ❖ The information is predominately internal and disclosure significantly risks circumvention of statues or agency regulations. Homeland Security Information can be withheld using this exemption including critical infrastructure systems and assets and vulnerability assessments. Other information properly withheld include:
 - General guidelines for conducting investigations
 - Computer programs and source codes
 - Bridge passcodes
 - Agency credit card numbers
 - Crediting plans

A foreseeable harm statement must accompany any denials using this exemption

Exemption 2 (Low)

- ❖ 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.

Exemption 3
Disclosure Prohibited by
Other Federal Statutes

Exemption 3

The withheld information is specifically exempted from public disclosure by the statute indicated:

- ❖ **Section 141-145 of the Atomic Energy Act, which prohibits the disclosure of Restricted Data or Formerly Restricted Data**
 - Information whose compromise would assist in the design, manufacture, or utilization of nuclear weapons
- ❖ **Section 147 of the Atomic Energy Act, which prohibits the disclosure of Unclassified Safeguards Information**
 - Concerns the physical protection of operating power reactors, spent fuel shipments, or the physical protection of Special Nuclear Materials
 - A Safeguards Information cover sheet (NRC Form 461) must be attached to the record
- ❖ **41 U.S.C., Section 253b, Subsection (m)(I), prohibits the disclosure of contractor proposals in the possession and control of an executive agency to any person under Section 552 of Title 5, U.S.C. (the FOIA), except when incorporated into the contract between the agency and the submitter of the proposal**

Must be accompanied by a foreseeable harm statement only if it is not obvious why the agency is citing this exemption

Exemption 4
Trade Secrets, Commercial or
Financial Information

Exemption 4

Trade Secret, Commercial, or Financial Information

- ❖ **Disclosure will harm an identifiable private or governmental interest**
- ❖ **The exempt information is originated by non-government sources**
- ❖ **Information is confidential business (proprietary)**
 - Records marked "proprietary information" or "10 CFR 2.390" are submitted to the NRC from outside government sources (companies, licensees, etc.), and are accompanied by an affidavit which details what information should be withheld from public disclosure, and what harm would come from release of the information. When these records become subject to a FOIA request, the program office must review the records to determine whether the records (or portions of the records) are still proprietary, and provide a disclosure determination to the FOIA/PA Caseworker.
 - If the program office determines that the information is no longer proprietary, the FOIA/PA caseworker will send a letter informing the submitter that because it is subject to a FOIA request, the records (or portions of the records) will be released unless the submitter objects to the release. If the submitter objects, the objection must be received by the NRC within 10 days of the date of the letter. The records will then be returned to the program office for re-review, and a final disclosure determination.
- ❖ **Information concerns a licensee or applicant's physical protection, material control and accounting program for special nuclear material pursuant to 10 CFR 2.390(d)(1)**
- ❖ **Information was submitted by a foreign source which was received in confidence pursuant to 10 CFR 2.390(d)(2)**

Must be accompanied by a foreseeable harm statement only if it is not obvious why the agency is citing this exemption

Exemption 5
Predecisional Information

Exemption 5

Predecisional Information

- ❖ **This exemption covers information referred to as predecisional information. It is frequently used to cover records that (1) would reveal a deliberative process, portions of which are advice, opinions, or recommendations, (2) attorney work-products, and (3) records covered by the attorney-client privilege**
- ❖ **Normally records received from outside NRC cannot qualify for Exemption 5**
 - Exception: External experts working as if an employee
- ❖ **Attorney Work Product**
 - Records prepared by an OGC attorney in anticipation of litigation
- ❖ **Attorney-Client**
 - Confidential communications between an OGC attorney and client providing legal advice
 - Must be applied by client
 - usually OGC requests it be used
 - record referred by FOIA/PA caseworker to client
 - facts divulged by client to OGC attorney
 - opinions given by OGC attorney
- ❖ **Inter-agency or intra-agency memoranda or letters which would not be available by law to a party in litigation with the agency**
- ❖ **On March 19, 2009, Attorney General Holder issued new guidelines reaffirming President Obama's commitment to accountability and transparency. Agencies must adopt a presumption in favor of disclosure and make discretionary releases in response to requests for records**
- ❖ **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**
- ❖ **A Foreseeable Harm Statement must be provided for Exemption 5, Deliberative Process. Attorney-Client Privilege and Attorney-Work Product do not require a Foreseeable Harm Statement**

Exemption 6
Personal Information

Exemption 6

Personal Information

- ❖ **Protects from disclosure of personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy**
- ❖ **When personal information is found, the agency must balance the person's privacy interest against the public's interest in knowing these facts--how do these facts show how the agency functions**
 - If the balance is in favor of the individual, then the agency will redact the information
 - If the balance is in favor of the public, the agency will release the information
- ❖ **Personal information is normally not disclosed to third parties**
 - There may be circumstances when this information may be disclosed
 - with the consent of the person to whom the information pertains, or
 - a determination is made that disclosure is in the public interest
 - this requires a balancing of the public interest in disclosure against the individual's right to privacy
- ❖ **The following are examples of personal information that may be located in job applications, resumes, personnel records, materials licenses, etc., that are exempt from disclosure pursuant to Exemption 6:**
 - Social Security number
 - Home street address, city, state and zip code
 - Home phone number, personal cell phone, and pager numbers
 - Names of children, spouse, number of children
 - Marital status
 - Email address (non-government)
 - Date of birth and age
 - Citizenship
 - Personnel dosimetry records
 - Type of military discharge, serial/service number, disciplinary actions, performance evaluations*
 - Veteran preference information
 - Lowest pay applicant will accept
 - Non-Federal salaries
 - Non-job related interests

- Reason for leaving a job
- Supervisor's name, address, and telephone number exception: release if last supervisor was a Federal employee
- Personal medical and financial information
- Personal performance and disciplinary matters
- Date graduated from high school, high school name and location of high school
- Dates attended colleges and date of degrees
- Scholarships/fellowships
- References' name, address and telephone number
- References to language skills that are not job required
- Responses to questions whether a person has been fired from a job
- Responses to questions regarding criminal activity, court martials, forfeited of collateral, imprisonment due to firearms or explosives violations, pending charges of violations of law or delinquency on any Federal debt
- Response to whether you ever applied for retirement pay
- Response to whether you have relatives working for the Federal Government
- Religious affiliation or reference to religious activities
- ❖ **Form SF 50 and SF 52 - Request for Personnel Action**
 - FEGLI Plan
 - Annuitant Indicator
 - Service Computation Date
 - Veterans Preference (both places)
- ❖ **Form 178, Candidate Evaluation - Certification & Selection Record (CERT)**
 - On Part A, withhold all names except for the selectee and the requester. Release all ratings for each rating factor and overall rating
 - On Part B, withhold all names except for the selectee and the requester
- ❖ **Form 412, Non-SES Performance Appraisal Summary Rating**
 - Withhold all notations in the chart giving the element's rating and numerical equivalent, the summary rating and the numerical total
- ❖ **Form 412A, Non-SES Performance Appraisal System Performance Plan**
 - Withhold ratings and appraisal narratives

Must be accompanied by a foreseeable harm statement only if it is not obvious why the agency is citing this exemption

*There may be additional protectable aspects of military services but this will be determined on a case-by-case basis.

Exemption 7 and Allegation Files

Protects "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information" could be expected to cause one of the harms outlined in one of the subparts, 5 U.S.C. Section 552(b)(7)

❖ Law Enforcement Purpose Standard

- May include civil, criminal, administrative and regulatory proceedings
- May apply to records compiled to enforce state law, unless the agency lacks the authority to pursue a particular law enforcement matter

❖ Exemption 7A

- Could reasonably be expected to interfere with enforcement proceedings
 - two step analysis
 - is the law enforcement proceeding pending/prospective
 - could the release reasonably be expected to cause some articulable harm
- Not designed to endlessly protect law enforcement information. May only apply to enforcement proceedings that are:
 - pending (still investigating)
 - prospective (actually have a concrete plan to investigate in the future)
- May apply to closed investigations, if records substantially relate to another proceeding
- Information provided by the requester:
 - generally may not withhold this material, unless it can articulate how it would interfere with enforcement
- Changed circumstances:
 - if 7A is no longer valid while the FOIA request is pending, office will need to review the records for release
- 7A Certification - Do not need to provide the records [Exhibit 19]
 - complete the 7A cert (Form 656 on Informs)
 - file must still be reviewed to determine if there are any records that can be released

- office denying the material must mark in their file what material was subject to the request at the time the denial was made

❖ Exemption 7B

- Would deprive a person of a right to a fair trial or an impartial adjudication
 - rarely invoked
 - in the situation in which it would most logically be employed (ongoing law enforcement proceeding) an agency's application of 7A to protect law enforcement interests would serve to protect the interests of the defendants to the prosecution as well

❖ Exemption 7C

- Could reasonably be expected to constitute an unwarranted invasion of personal privacy
 - to protect personal privacy information in a closed investigation/allegation/enforcement file
 - fingerprinting [Exhibit 20]
 - the passage of time does not ordinarily diminish the 7C protection
 - fact that was previously public knowledge or disclosed, may be so far from the public arena today that it is practically obscure and 7C may apply
 - privacy interest may increase with the passage of time
 - 7C is not precluded by the fact that the requester could piece together the identity of a third party from the other sources, or from improperly redacted documents
- Balancing the Public Interest
 - interest is whether the records shed light on the agency's performance of its statutory duties
- Minimal Privacy Interest?
 - even a minimal privacy interest is superior to no public interest
- Glomarization
 - a defense that an agency can use to protect the privacy of persons mentioned in records compiled for law enforcement purposes and for particularly sensitive non-law enforcement records. This "neither confirm nor deny" response is used when even the mere acknowledgment of the existence or non-existence of records would cause "a clearly unwarranted invasion of personal privacy." (Exhibit 5)
 - example: request from a third party for allegations/investigations/complaints on a named individual

Exemption 7D

- "...could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution that furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source."

❖ Exemption 7E

- Would disclose techniques and procedures for law enforcement investigations or prosecutions or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law
 - covers techniques and procedures for investigations or prosecutions, but only if they are not well known to the public. (Courts have held that common law enforcement techniques, such as wiretapping or the placement of radio tracking devices on suspect vehicles, are well known to the public
 - in some cases, commonly known procedures have been protected when "the circumstances of their usefulness may not be widely known" or their use in concert with other elements of an investigation and in their totality directed toward a specific investigative goal constitute a 'technique' which merits protection
 - agency must make a determination whether the disclosure could reasonably be expected to risk circumvention of the law
 - similar to Exemption 2 (high) and designed to protect only the material that would harm investigations or prosecutions

❖ Exemption 7F

- Could reasonably be expected to endanger the life or physical safety of any individual
 - can withhold names and identifying information of Federal employees and third persons who may be unknown to the requester in connection with law enforcement matters
 - can withhold identities of individuals who testified at requester's criminal trial
 - can withhold law enforcement officer subsequently retired
 - not limited to criminal law enforcement information
 - can be used to protect information that would aid a terrorist
 - must be some enforcement related regulatory requirement that caused the information to come into the NRC's possession
 - **A foreseeable harm statement is not needed for Exemption 7 unless it is not obvious why the information is being withheld.**

Allegation Files

❖ Agency Allegation Advisor (AAA)

- OE

❖ Office Allegation Coordinators (OAC)

- FSME, NRR, NRO, NMSS, NSIR, RI, RII, RIII, and RIV
- FOIA requests involving allegation records must be transmitted with either the red or blue cover sheet in accordance with MD 8.8
 - green cover sheet – Investigation Information
 - red cover sheet - Confidential Allegation Material
 - blue cover sheet - Sensitive Allegation Material
- The appropriate cover sheet will remain with the FOIA package throughout the processing of the records
- If the incoming FOIA request clearly identifies an alleged, the request will be Fed-Ex'd or hand-carried to the office/region and not scanned into ADAMS
- Allegation records will not be made publicly available in ADAMS without the approval of the regional or program OAC or the AAA or his/her assistant
- The AAA or designee will review and concur in all responses to FOIA requests involving allegation records
 - in providing his/her concurrence, the AAA or designee is certifying that the information to be disclosed from each record would not cause harm to an open allegation or disclose the identify of an alleged whose identity still warrants protection
- If alleged is widely publicly known - will not protect his/her identity
- Definition of Widely Known Alleged:
 - alleged notified media
 - alleged held press conference about the allegation
 - alleged identified himself/herself as the alleged at a public meeting
- Alleged must be notified if NRC is going to release their identity in FOIA requests involving TECHNICAL issues. (OAC's will notify the alleged)
- Records in an Allegation/Investigation file originated by the licensee:
 - licensee records marked "Confidential," "Proprietary," or "Withhold from Public Disclosure under 2.390" must be reviewed for release
 - if the determination is made to release the record in its entirety or in part, the FOIA/PA caseworker will send a letter to the licensee
 - the FOIA/PA caseworker will not tell the licensee who the requester is unless it is a 3rd party and we are going to be placing the FOIA request, response and records in ADAMS as public



RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) / PRIVACY ACT (PA) REQUEST

2009-0280

4

RESPONSE TYPE FINAL PARTIAL

REQUESTER

Yvette M. Chin

DATE

OCT 29 2008

PART I. -- INFORMATION RELEASED

- No additional agency records subject to the request have been located.
- Requested records are available through another public distribution program. See Comments section.
- APPENDICES Agency records subject to the request that are identified in the listed appendices are already available for public inspection and copying at the NRC Public Document Room.
- APPENDICES **F** Agency records subject to the request that are identified in the listed appendices are being made available for public inspection and copying at the NRC Public Document Room.
- Enclosed is information on how you may obtain access to and the charges for copying records located at the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD 20852-2738.
- APPENDICES **F** Agency records subject to the request are enclosed.
- Records subject to the request that contain information originated by or of interest to another Federal agency have been referred to that agency (see comments section) for a disclosure determination and direct response to you.
- We are continuing to process your request.
- See Comments.

PART I.A -- FEES

AMOUNT *

\$ 24.00

* See comments for details

- You will be billed by NRC for the amount listed. None. Minimum fee threshold not met.
- You will receive a refund for the amount listed. Fees waived.

PART I.B -- INFORMATION NOT LOCATED OR WITHHELD FROM DISCLOSURE

- No agency records subject to the request have been located.
- Certain information in the requested records is being withheld from disclosure pursuant to the exemptions described in and for the reasons stated in Part II.
- This determination may be appealed within 30 days by writing to the FOIA/PA Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Clearly state on the envelope and in the letter that it is a "FOIA/PA Appeal."

PART I.C COMMENTS (Use attached Comments continuation page if required)

The fees for processing your request are:

220 pages of duplication @ \$0.20 per page (minus 100 free pages) = \$24.00
Total = \$24.00

The incoming FOIA/PA-2009-0280 request is located in ADAMS at ML092580512.

SIGNATURE - FREEDOM OF INFORMATION ACT AND PRIVACY ACT OFFICER

Donna L. Sealing *Mary Ann Rappell (for)*

APPENDIX F
RECORDS RELEASED IN THEIR ENTIRETY

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/(PAGE COUNT)</u>
1.	1/29/09	Memorandum to the Commission from Cyr, Presidential Memoranda on Government Transparency and the Freedom Of Information Act (7 pages)

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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

CONTACT: James E. Adler, OGC
301-415-1656

¹ This will be a newly created position.

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F-1

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.

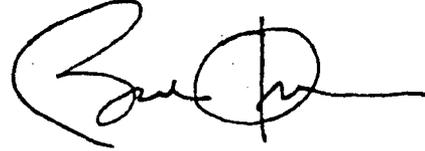
Government should be participatory. Public engagement enhances the Government's effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer 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

[FR Doc. E9-1777
Filed 1-23-09; 11:15 am]
Billing code 3195-W9-P

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.

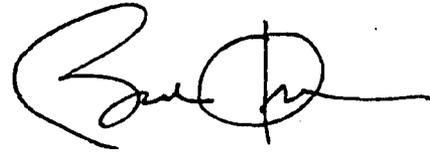
All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

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*.



THE WHITE HOUSE,
Washington, January 21, 2009

[FR Doc. E9-1773
Filed 1-23-09; 11:15 am]
Billing code 3110-01-P