

**ADVANCING FREEDOM OF INFORMATION
IN THE NEW ERA OF RESPONSIBILITY
Hearing Testimony – Thomas J. Perrelli
September 30, 2009 – 10:00**

As the Associate Attorney General of the Department of Justice and the Department's Chief FOIA Officer, I am pleased to speak with the Committee this morning about the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, and the efforts of the Department of Justice to implement the President's January 21, 2009 FOIA Memorandum and the Attorney General's March 19, 2009 FOIA Guidelines. As the lead federal agency responsible for implementation of the FOIA across the government, we at the Department of Justice are especially committed to encouraging compliance with the Act by all agencies and to fulfilling President Obama's goal of making this Administration the most open and transparent in history.

President Obama took action toward this goal on his first full day in office, when he issued a memorandum to the heads of all departments and agencies on the Freedom of Information Act. The memo sent a powerful message, announcing "a new era of open Government." Much of this mission, of course, occurs outside the direct context of FOIA, as the President made clear that "agencies should take affirmative steps to make information public." At the same time, the President made clear that we need to take a new approach to FOIA. When administering the statute, "all decisions" should be made "with a clear presumption": "In the face of doubt, openness prevails." 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."

Finally, the President directed the Attorney General to issue new FOIA guidelines to the heads of all executive departments and agencies, giving further direction to how we can implement this commitment to accountability and transparency.

The Department of Justice has long carried a special responsibility in ensuring that FOIA's demands are met, and the Department immediately began working to carry out the President's directive. Two days after the President issued his Memorandum, our Office of Information Policy (OIP) sent out initial guidance to agencies. This guidance emphasized the significance of the President's Memorandum and advised them to begin applying the presumption of disclosure immediately to all decisions involving the FOIA. We also began training attorneys and access professionals on the President's Memorandum, reiterating the President's message and giving practical advice on how to implement the new policies.

The real cornerstone of our efforts, however, has been the Guidelines that the Attorney General issued on March 19, 2009 in response to the President's Memorandum. The Guidelines, issued during Sunshine Week, contain three primary messages, which I would like to discuss separately. First, the Guidelines implement a new approach to disclosures of information. Second, they emphasize new management practices that will better enable federal agencies to make government accessible and open. And third, the Guidelines direct the implementation of new metrics by which FOIA performance can be measured. I will address these three areas separately.

First, the Guidelines implement the President's presumption of openness with respect to disclosures. The Attorney General's FOIA Guidelines strongly encourage

agencies to make discretionary releases of records. The Guidelines also direct agencies not to withhold records simply because a discretionary FOIA exemption may apply, and the Guidelines stress that the President directed agencies not to withhold information merely to prevent embarrassment to public officials, or because “errors and failures might be revealed, or because of speculative or abstract fears.” Rather, the Attorney General made clear that 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.” Finally, the Guidelines direct agencies to consider whether a partial disclosure can be made, even if a full disclosure may not be possible.

The Attorney General’s guidelines are not just words, and we are working to implement them every day. Our litigators, for example, are taking the Attorney General’s guidelines seriously. In the course of litigation, our attorneys are regularly working with agencies to identify documents that the agency has withheld under a legitimate assertion of an exemption but that could be disclosed under the new Guidelines, and we are conducting systematic outreach throughout the Department and into the U.S. Attorney’s Offices to make sure the change is taking effect. Agencies, for their part, are responding, working with us to release additional documents where they can, re-processing records to apply new standards where practicable, and making partial releases where they cannot make full releases.

The Department and its federal colleagues are also working to make affirmative disclosures outside the FOIA context, just as the President directed. The disclosure of our Office of Legal Counsel opinions through discretionary release and publication has

received significant attention, but the Department and other agencies are making affirmative disclosures in many other areas. For example, our Executive Office for Immigration Review has published its Immigration Judge Benchbook online, so the public and immigration community have the same access to this resource that our immigration judges have. Another agency has begun including, in its contracts, a provision that expressly provides for the contract and supporting material to be posted publicly. Yet another agency released information about environmental hazards that it had long withheld under Exemption 2. There are numerous other examples, which I will be happy to discuss further.

The President's Memorandum calls not just for a change in policy, but a change in culture. The Department has thus worked hard to educate its agency partners on what the change requires. The day after the Attorney General's Guidelines issued, OIP highlighted the Guidelines' key features for agencies in an article posted on *FOIA Post*, the Department's online publication featuring FOIA guidance and news. A week later, OIP held a government-wide training conference for over 500 agency personnel – and, in the spirit of the Guidelines, posted the presentation online for the widest possible dissemination. And on April 17, 2009, OIP issued extensive written guidance that gives concrete, practical ways that agencies can implement the new requirements. This guidance, also provided through *FOIA Post*, discussed, among other things, the Guidelines' more limited standards for defending agencies when they deny a FOIA request and the new emphasis on proactive disclosures. OIP described ways to apply the foreseeable harm standard and discussed the factors to consider in making discretionary releases.

Second, the Attorney General emphasized that utilizing the “proper disclosure standard is only one part of ensuring transparency,” and that achieving open Government also requires critical attention to “an effective system for responding to FOIA requests.” That is, while open government does further good management; open government also *requires* good management. This imperative has several components, as the Attorney General’s Guidelines indicated. At one level, it requires us to recognize that FOIA is not just the responsibility of the government’s many committed FOIA professionals; it is also the responsibility of agency personnel in all spheres, from the technological personnel who are implementing complicated searches to the policymakers and other employees who have an obligation to search their own offices diligently. At another level, it means that FOIA personnel need to work, as President Obama and Attorney General Holder put it, “in a spirit of cooperation” with FOIA requesters. And at perhaps the most nuts-and-bolts level, it means that agencies have to implement the basic management practices required by Section 7 of the OPEN Government Act, by assigning tracking numbers to requests and establishing telephone lines or internet services that requesters can use to check the status of their requests.

We are taking these management principles as seriously as we are taking the new approach to disclosures. Our April 17 guidance to agencies gives, again, among other things, additional information about the roles that other agency personnel play in implementing FOIA and the need to work cooperatively with requesters. More important than its words, however, is that the Department is practicing what it preaches and has been reaching out to the public and the requester community. The Director of OIP was the keynote speaker at a conference held in May sponsored by the American Society of

Access Professionals, an association of public and private sector officials and individuals interested in issues relating to transparency. Last month, OIP hosted a productive Requester Roundtable, at which it invited any interested members of the FOIA requester community to meet with OIP and to share their ideas for improving FOIA administration; OIP will hold a training session this Fall for agency personnel to discuss the ideas and concerns that the requesters raised. We intend to continue these training and requester outreach activities in the months and years ahead.

Third, and finally, the Guidelines direct the Office of Information Policy to implement new metrics that we can use to measure FOIA performance, and require agency Chief FOIA Officers to report each year on how the agency is improving its performance. These reports will serve as the means by which each agency will be “fully accountable” for its FOIA administration. The public deserves to see how we are doing in our responses to requests for information.

I am particularly pleased to be discussing this issue today, because our Office of Information Policy is today issuing the guidelines that agencies are to use in preparing the Chief FOIA Officer Reports that the Attorney General has called for. These guidelines will be made available publicly on the Department’s website.

The Reports will collect information that is directly tied to the important transparency principles that the President and Attorney General have emphasized. In particular, each agency Chief FOIA Officer will be required to describe the steps being taken at their agency (1) to apply the presumption of disclosure; (2) to ensure that there is an effective and efficient system in place for responding to requests; (3) to increase proactive disclosures; (4) to increase utilization of technology; and (5) to reduce backlogs

and increase timeliness in responding to requests. These reports will follow submission of agency Annual FOIA Reports, which are required to be submitted to the Department of Justice by February 1st of each year.

The Department's Reporting Requirements add several additional obligations to agency Annual FOIA Reports, and go beyond what is required by the OPEN Government Act. They are particularly designed to target information about backlogs of FOIA requests, as agencies are to report on their number of backlogged requests and backlogged administrative appeals, that were pending at the agency at the end of the fiscal year and that are beyond the statutory time period for a response. Starting with the Annual FOIA Report for Fiscal Year 2009, agencies will also be required to give a comparison of the backlogged numbers from year to year. These Annual FOIA Reports will be the starting point for agency Chief FOIA Officers when they prepare their Chief FOIA Officer Reports. For any agency facing a backlog of requests, the Department is requiring the Chief FOIA Officer Report to include a description of the steps being taken by the agency to reduce the backlog.

Agencies are required to include in their Annual FOIA Reports a listing of all the Exemption 3 statutes that they relied on during the preceding fiscal year to withhold information. To increase transparency on that issue, OIP has compiled a comprehensive list of all the Exemption 3 statutes cited by agencies in their Annual FOIA Reports for this past year and has posted that information on OIP's webpage, and is in the process of creating a chart of all statutes that have been recognized by the courts as proper Exemption 3 statutes.

We believe that the Department's efforts in this area are taking us a long way to fulfilling the President's goal of making this the most transparent Administration in history – but it is really an Administration-wide project. The Attorney General's Chief FOIA Officer Reports and litigation authority are important tools, but they are not the only ways we can make our government more transparent. That is why we have conducted agency-specific training sessions at the Departments of Commerce, Navy, Energy, Treasury, Labor, Transportation, as well as the SEC, EPA, and GSA, and just prepared a video presentation on our transparency initiatives that we can make easily available to the other federal agencies. It is also why we continue to take pride in the Department of Justice Guide to the Freedom of Information Act. The 2009 edition of this comprehensive reference volume has just come out, and it continues to be the definitive source for FOIA professionals inside and outside of government. We are ready to work with others throughout the government to fulfill the President's openness initiatives.

I should add that we are particularly pleased to be testifying with Miriam Nisbet, and welcoming the Office of Government Information Services (“OGIS”) to the federal FOIA family. Director Nesbit has roots in our own Office of Information Policy, and her office and the Department are cooperating already. Our partnership with OGIS will bring benefits both within government and to the citizens who seek information about how their government works. As the Department works directly with agencies in FOIA litigation, OGIS will be mediating and resolving agency-requester disputes to avoid that litigation. As the Department fulfills its obligation to encourage agency compliance with FOIA's requirements, we look forward to OGIS's reviews of where agency compliance currently stands. Indeed, the Department looks forward to working with OGIS on those

compliance reviews, so that the President may provide recommendations to Congress in the future.

In closing, the Department of Justice appreciates the Committee's commitment to open government, and looks forward to working with the Committee on matters pertaining to the government-wide administration of the Freedom of Information Act. I would be pleased to address any question that you or any other Member of the Committee might have on this important subject.