

Army FOIA, Privacy and Records Management Conference 2009

Presidential, Congressional and Policy Changes to the FOIA

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Topics



- ❑ President Obama's Day One Memos
- ❑ Attorney General Memo
- ❑ OPEN Government Act
- ❑ Congressional Interest
- ❑ Bottom Line
- ❑ FOIA Processing Changes
- ❑ Other FOIA Issues
- ❑ Discussion and Questions

Increased FOIA Emphasis



“In our democracy, the Freedom of Information Act (FOIA), is the most prominent expression of a profound national commitment to ensuring an open Government.”

President Obama, January 21, 2009

The President's Transparency and Open Government Memo



- ❑ Government should be transparent
- ❑ Government should be participatory
- ❑ Government should be collaborative
- ❑ Open Government Directive
 - that "instructs" agencies to take "specific actions"
 - Developed in a public forum, expected out this fall.

The President's FOIA Memo



- ❑ Signed and issued during first full day in office
- ❑ Establishes “a new era of open Government”
- ❑ Directs that agencies respond to requests promptly and in a spirit of cooperation
- ❑ Encourages agencies to make information available before it is requested, using modern technology
- ❑ Directs Attorney General to issue guidelines

Attorney General's FOIA Guidelines



- ❑ Provide guidance implementing the “openness” requirements in the President’s Memo
- ❑ Direct Agencies to improve their FOIA programs and hold agencies accountable for their program
- ❑ Provide that all agency employees are responsible for FOIA and direct agencies to address how agency personnel support the FOIA Office in responding to requests
- ❑ Require that agencies report each year on efforts to improve FOIA operation and facilitate disclosure

OPEN Government Act of 2007



- Request processing changes
 - Limits Time to respond and to refer requests
 - Limits Fee collection for delinquent responses
 - Track requests and provide status notification
- FOIA Liaison
- National Archives mediation and policy review
- Agency responsible for paying litigation costs and attorney fees
- Litigation costs and attorney fees are easier to recover

Congressional Scrutiny



- ❑ Senate Committee on the Judiciary hearing 30 Sep 2009
- ❑ Witness from National Security Archive discussed agency backlogs
- ❑ Identified Army request 15 to 10 years old
- ❑ Continue Improvement Programs to Reduce Backlogged Requests
- ❑ Possibility of further legislative assistance if goals are not met



Bottom Line

What Does This Mean for Us

- A New Era of Open Government
 - Be Open
 - Be Nice
 - Be Dedicated
 - Be Proactive

- Increased Emphasis on FOIA Programs

- New Processing Requirements

Bottom Line

Be Open



□ President's Memo

- "presumption in favor of disclosure"
- "clear presumption: In the face of doubt, openness prevails"

□ Attorney General Guidelines

- "foreseeable harm standard"
- "encourage ... discretionary disclosures"

□ Office of Information Policy Guidance

- "sea change in ... transparency"
- "must alter their mindset ... must think about the FOIA differently ... view all FOIA decisions through a prism of openness"

Bottom Line

Be Nice



- President's Memo
 - "spirit of cooperation"
 - "agencies are servants of the public"
- Attorney General Guidelines
 - Avoid "unnecessary bureaucratic hurdles"
 - "work proactively"
- Office of Information Policy Guidance
 - "work to insure that the process of requesting information is easy"
 - "simplify and improve ... interaction with FOIA requesters"
- Army
 - Requester is not an adversary, provide prompt correspondence, call to clarify, help formulate/tailor requests

Bottom Line

Be Dedicated



- President's Memo
 - "act promptly"
 - "disclosure should be timely"
- Attorney General Guidelines
 - "agencies should make it a priority to respond in a timely manner"
 - "agency must be fully accountable for its administration of the FOIA"
 - "we must all do our part to ensure open Government"
- Office of Information Policy Guidance
 - "require all agencies, ... to examine their entire approach to providing information to requesters in order ... to respond more promptly"
- Means
 - Work Harder- Work Faster?

Bottom Line

Be Proactive



□ President's Memo

- "take affirmative steps to make information public"
- "use modern technology to inform citizens"
- "a new era of open Government"

□ Attorney General Guidelines

- "readily and systematically post information online in advance of any public request"

□ Office of Information Policy Guidance

- "work proactively to post information online in advance of FOIA requests"
- "establish procedures whereby records of interest to the public are routinely identified and systematically posted"

Bottom Line

Increased Emphasis on FOIA



- ❑ Agency FOIA programs must be improved, and agencies will be held accountable
- ❑ Commanders need to direct all agency personnel to place a higher priority on timely assistance to FOIA personnel
- ❑ Recognize importance of FOIA professionals and their first line interactions with the public
- ❑ Increased Reporting - Monthly Reports on Delinquent Requests, yearly on efforts to facilitate disclosure

Bottom Line

Increased Emphasis on FOIA



- ❑ Business as usual will likely not satisfy the Obama Administration's intent
- ❑ We must improve our FOIA compliance
- ❑ More intensive efforts are necessary
- ❑ We will likely need to devote more resources to FOIA compliance
- ❑ Continue FOIA Improvement Initiatives

New Processing Requirements Presumption of Disclosure



- ❑ Applies to all reviews and decisions
- ❑ Ask, what can I release? (DOJ – “change in mindset”)
- ❑ Do not withhold merely because information falls within an Exemption – No categorical exclusions
- ❑ Need foreseeable harm or disclosure prohibited by law to withhold
- ❑ Discretionary release when appropriate
- ❑ Partial release when appropriate
- ❑ Disclosure is NOT absolute

New Processing Requirements Procedures



❑ Still Ask: Does it fit within an exemption?

❑ Exemptions 1, 3, 4, 6, and 7(C)

Are all requirements for the exemption met?

1. Does the information fit within a harm protected by one of the exemptions?
2. Can the harm be articulated, not abstract?
3. Review for partial release

If the requirements are met - withhold

❑ Exemptions 2, 5, 7, 8 and 9

Are all requirements for the exemption met?

1. Review for harm - does the information fit within a harm protected by one of the exemptions? If not release, if yes:
2. Can the harm be articulated, not abstract (see Foreseeable Harm test), if not release, if yes:
3. Consider Discretionary release (use your judgment)
4. Review for partial release
5. Remember the principles of openness - Public right to know, not meant to hide errors or embarrassment, when in doubt openness prevails . . .

New Processing Requirements Foreseeable Harm



- ❑ Must reasonably foresee that disclosure would harm an interest protected by one of the exemptions or that disclosure is prohibited by law.
- ❑ Must be able to articulate the harm, it cannot be speculative or abstract.
- ❑ Harm Review
 - Review type, content, age, character
 - Not type of document or where filed
 - Program harm
- ❑ Cannot withhold to protect officials from embarrassment or to keep errors or failures from being released.
- ❑ Disclosure obligation is not absolute, but "In the face of doubt openness prevails"



New Processing Requirements Foreseeable Harm Tests

- Mixed Signals, or Case-by-Case Review
 - Torture Memo Test – National Security Issues
 - Torture Picture Test
 - White house Visitor List
 - Recovery.gov
 - 5-day publishing of legislation
- Will the new rules, when combined with the ease of recovering costs and attorney fees encourage litigation?

Other FOIA Issues



- ❑ Coordination with Public Affairs
- ❑ DOJ, Office of Information Policy Guidance (OIP)
"Creating a 'New Era of Open Government'"
- ❑ Executive Order 13392, FOIA Improvement
- ❑ NARA - FOIA Ombudsman/Mediator
- ❑ DoD - New Manual, Transparency Plan
- ❑ New Army FOIA Management Team
- ❑ Reports
 - Monthly Backlog
 - Annual Report – Expanded and will include Agency efforts to improve FOIA and Facilitate disclosure
- ❑ Assistance:
 - Army FOIA Office
 - DoD FOIA Hotline, 703-696-3329
 - DOJ - Office of Information Policy, 202-514-FOIA



Discussion? and Questions?