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
- 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?