United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

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OCIO DIRECTIVE 2010-011

To: Bureau Chief Information Officers
General Counsel, Office of Inspector General
Acting Deputy Assistant Secretary – Management, Indian Affairs

From: Bernard J. Mazer
Chief Information Officer
Chief FOIA Officer

Subject: Implementing Administration Guidelines for the Freedom of Information Act (FOIA)

Purpose: This Directive supplements the policies and procedures prescribed in DOI's FOIA regulations (43 CFR Part 2, Subparts A through E) and the Departmental *FOIA Handbook* (383 DM 15) for reviewing documents in response to FOIA requests. Specifically, it implements the Administration's policy guidance pertaining to the review of documents under the FOIA.

Background: On January 21 and on March 19, 2009, President Obama and Attorney General Holder (respectively) issued important FOIA policy memoranda.[1] These memoranda establish a new commitment to transparency and accountability throughout Government and a "foreseeable harm" standard of review similar, but not identical, to the one established under the Clinton Administration.

These memoranda make it clear that FOIA should be administered with a presumption of disclosure and that an agency may not withhold information simply because an exemption applies. Further, if full disclosure of a document is not possible, the agency should consider making a partial disclosure. "Discretionary disclosures" are strongly encouraged where possible. However, agencies must continue to withhold information specifically prohibited from disclosure by statute or Executive order and may continue to withhold information whose release would foreseeably cause harm to an interest protected by a FOIA exemption. The Department of Justice (DOJ) will now "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."[2]

Scope: The procedures discussed in this Directive must be applied by all DOI bureaus and offices when responding to FOIA requests. This Directive only addresses the review of documents in response to FOIA requests. It does not address implementation of the

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[1] For copies of these memoranda, go to the DOI FOIA website's "FOIA Policy and Guidance" page at http://www.doi.gov//foia/policy.html and look under "Administration Guidance."

[2] Attorney General's March 19, 2009 Memorandum to Heads of Executive Departments and Agencies titled, *The Freedom of Information Act (FOIA).*

Administration's policy for proactively disclosing information to the public outside the context of a FOIA request.

Time Frame: These procedures are effective immediately and apply to all pending FOIA requests.

Policy: Bureaus and offices are expected to comply fully with the Attorney General's FOIA policy[3] as follows:

1. Presumption of Disclosure. DOI will apply a presumption of disclosure in responding to requests made under the FOIA. Accordingly, DOI will disclose requested information unless its release is prohibited by statute or Executive order, or is likely to cause harm to an interest protected by a FOIA exemption, such as harm to the national security or an individual's personal privacy.

2. Timely Disclosure of Information. Consistent with its existing regulations, DOI must continue to make every effort to notify all requesters whether or not it will comply with their perfected FOIA requests within twenty workdays (or thirty workdays if an extension is taken). In the event DOI is not able to comply with these time limits, it will notify the requester in writing of the status of the request and provide an estimate of when the requester may expect a final response.

3. Standard of Review. The Administration's policy calls on agencies to renew their commitment to the principles embodied in the FOIA. In general, these principles encourage agencies to review FOIA documents for disclosure from a perspective of openness, keeping in mind the FOIA's role in opening Governmental activity to the public. Consistent with this policy:

- Do not withhold documents (in part or in full) simply because an exemption applies;
- Do not withhold documents (in part or in full) unless there is a reasonably foreseeable harm to an interest protected by a FOIA exemption, or disclosure is prohibited by law;
- Review each responsive document's content with consideration for the likely impact of its full or partial disclosure given the document's age (i.e., in general, as a document ages it becomes less sensitive), sensitivity (e.g., is the information actually personal or confidential, or already publicly available) and purpose (e.g., a draft document may qualify for protection under Exemption 5, but there may be no foreseeable harm in releasing it);
- Remember that FOIA requires that agencies consider making partial disclosures of a document when full disclosure is not possible--the Act requires agencies to take reasonable steps to segregate and release non-exempt information; and

[3] Administration memoranda, DOI FOIA regulations and related policies may be viewed at http://www.doi.gov/foia/policy.html. See also DOJ's *FOIA Post* dated April 17, 2009 at http://www.usdoj.gov/oip/foiapost/2009foiapost8.htm, and DOJ's *Guide to the Freedom of Information Act* at http://www.usdoj.gov/oip/foia_guide09.htm.

- Remember that FOIA does not authorize the withholding of documents to protect public officials from embarrassment, hide errors or failures, or because of speculative or abstract fears.

4. Discretionary Disclosures. Decisions regarding discretionary releases (see *Definition of Terms* attached) of information should be made on a case-by-case basis. In accordance with current DOI policy (see the *FOIA Handbook,* 383 DM 15, at 3.8, 3.14F, 3.19C and 5.14), discretionary releases of otherwise exempt information may be appropriate in certain instances.

Under the Attorney General's guidelines, agencies are encouraged to make discretionary disclosures or releases even if an exemption applies to a record. Discretionary releases are possible for records or information covered by Exemptions 2, 5, 8, and 9, but will be most applicable to Exemption 5. For certain other exemptions, discretionary disclosures are not possible since the information is required to be withheld by some other legal authority. Specifically, records protected by the exemptions covering national security (Exemption 1), commercial and financial information (Exemption 4), personal privacy (Exemptions 6 and 7(C) where the records are subject to the Privacy Act), and information protected by statute (Exemption 3), are generally not subject to discretionary releases.

When determining whether Exemptions 1, 3, 4, 6, and 7 apply to a record, determine first whether the record falls within the scope of the claimed exemption. Be sure to reasonably segregate any non-exempt information before making a partial disclosure if possible.

Discretionary release of records that are both protected by the Privacy Act and covered by Exemptions 6 and/or 7(C) and is not possible because the Privacy Act prohibits the release of information not "required" to be released under the FOIA. However, remember that to properly review such information the bureau/office must conduct a balancing of the individual's privacy versus the public interest in release, and should consider whether, given the context of the request, it is possible to protect the identities of individuals named in the documents while releasing the rest.

Records protected by Exemptions 2, 5, 8 and 9 can be subject to discretionary release. FOIA reviewers must first ensure that any information being considered for withholding fits all requirements of the exemption. If the exemption applies, then determine whether discretionary release is appropriate. For all records, the age of the record and the sensitivity of its content are universal factors that need to be evaluated in deciding if discretionary release is possible.

Information covered by "low 2" is trivial by definition. Therefore, there would be no reasonably foreseeable harm from its release and discretionary release should be the general rule. "High 2," by contrast, is premised on a finding of harm. Therefore, if the information fulfills all criteria of the exemption, it is not possible to make a discretionary release. Before applying "high 2" to a record, make sure that the decision to withhold is not based on "speculative or abstract fears," but instead is based on a reasonably foreseen harm to an interest protected by the exemption.

The consideration of information covered by subparts of Exemption 7, other than 7(C), is similar to that for "high 2." If the information being considered for release fulfills all criteria of the exemption, then generally discretionary release is not possible. First verify that the decision to

withhold is not based on "speculative or abstract fears" and instead is based on reasonably foreseen harm to an interest protected by one of the subparts of Exemption 7. For example, 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 (7(E)). In such cases, release is possible because the information no longer fulfills the criteria of the exemption. Similarly, due to the breadth of protection afforded information provided by a confidential source, records covered by Exemption 7(D), also should be given careful examination to ensure that the exemption still applies. Some agencies release much source-provided information when processing records of historical significance.

The greatest potential for discretionary disclosure lies with Exemption 5 information that is subject to the deliberative process privilege, which covers predecisional documents written as part of the decision-making process within an agency. Some of the factors to be considered when reviewing deliberative materials include:[4]

- **The nature of the decision or the advice involved –** Some decisions are highly sensitive and perhaps even controversial; most are far less so.
- **The nature of the decision-making process –** Some agency decision-making processes require total candor and confidentiality; many others are not nearly so dependent.
- **The status of the decision –** If the decision is not yet made, then there is a far greater likelihood of harm from disclosure; conversely, with decisions already made there is far less likelihood.
- **The status of the personnel involved –** Are the employees who created the items of information, or other employees who are similarly situated, likely to be affected by the disclosure?
- **The potential for process impairment –** How much room is there for actual diminishment of deliberative quality if the personnel involved do feel inhibited by potential disclosure?
- **The significance of any process impairment –** In some cases, any anticipated "chilling effect" on the agency's decision-making process might be so minimal as to be practically negligible.
- **The age of the information –** While there is no universally applicable age-based litmus test, the sensitivity of all information fades with the passage of time.
- **The sensitivity of individual record portions –** Apart from any other factor or consideration, FOIA practitioners ultimately must focus on the individual sensitivity of each item of information.

NOTE: Not all information is subject to discretionary disclosure under the FOIA. For records covered by certain exemptions, discretionary disclosures are not possible because the information is required to be withheld by some other legal authority.[5]

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[4] Examples were taken from a Department of Justice guidance document – *FOIA Update,* Vol. XV, No. 2 (1994).
[5] See DOJ's *FOIA Post* dated April 17, 2009 at http://www.usdoj.gov/oip/foiapost/2009foiapost8.htm, and the *Discretionary Disclosure and Waiver* section in DOJ's *Guide to the Freedom of Information Act* at http://www.justice.gov/oip/foia_guide09/disclosure-waiver.pdf.

All discretionary releases must be reviewed and approved in writing by the appropriate FOIA attorney. The bureau/office must prepare a cover memorandum or written statement to the attorney setting forth the basis or bases for the discretionary release before the release is made. This documentation should reflect the fact that the bureau/office has considered the protected interests that could be implicated by disclosure, including the reasons why a discretionary release is appropriate, and should be retained in the FOIA case file. The bureau/office should advise the requester in its response that it has exercised its discretion in releasing exempted information.

In sum, reviewers must determine first whether the information they are considering withholding meets the definition of the exemption. In some instances, where a finding of harm is necessary to qualify for coverage under the exemption, this determination may affect whether discretionary release is even possible. In such cases, reviewers must ensure that the harm is actually foreseeable and not based on speculative or abstract fears. For all records, the age of the record and the sensitivity of its content are factors that should be considered in deciding if discretionary release is possible. All discretionary releases must be approved in writing by the appropriate FOIA attorney.

5. Determinations to Withhold Information (see attached *Discretionary/Nondiscretionary Exemptions*). Determinations to withhold documents under Exemptions "low 2," 5, 8 and 9 ("discretionary exemptions") must be supported by a "foreseeable harm statement" that describes the protected interest as well as the specific harm to that interest the bureau/office foresees will result from release. The foreseeable harm statement should address each withheld document or partially withheld document separately, except where there are a group of documents being withheld in part or in full and the subject matter of the documents focuses on the same topic. For such document groups, the foreseeable harm statement may address their withholding in terms of categories. The foreseeable harm statement must be reviewed and approved in writing by the appropriate FOIA attorney and will be used to judge whether the initial reason or reasons for nondisclosure continue to justify the withholding(s) upon appeal or in litigation. A foreseeable harm statement is only required when a withholding is made pursuant to Exemption "low 2," 5 or 9. (See attached *Guidelines for Preparing Foreseeable Harm Statements.*)

6. Appeals. Bureaus/offices will provide foreseeable harm statements to the DOI Appeals Office for all new FOIA appeals challenging a withholding under Exemption "low 2," 5 or 9. For all other exemptions, the Appeals Office may ask a bureau/office to provide a foreseeable harm statement if it is unclear whether an identifiable harm will result from disclosure of the information withheld. For outstanding appeals, bureaus/offices should be prepared to submit foreseeable harm statements to the Appeals Office, upon request, if not provided previously.

7. Bureau/Office FOIA Officers Responsibilities. Bureau/Office FOIA Officers and Coordinators are responsible for providing guidance to appropriate bureau/office personnel, consistent with this Directive, as well as for ensuring that such decisions, including input from responsible officials on the release/denial of the requested documents, are properly documented in the appropriate FOIA case files.

Contacts: Questions concerning this directive may be directed to Alexandra Mallus, the Departmental FOIA Officer, by telephone at (202) 208-5342 or by email at

alexandra_mallus@ios.doi.gov, or Rosemary Melendy, Senior FOIA Program Officer, by telephone at (202) 208-5412 or by email at rosemary_melendy@ios.doi.gov.

Please ensure that this directive and its attachments are disseminated promptly to all employees within your bureau/office involved with processing FOIA requests to ensure Departmentwide compliance. We appreciate your assistance and cooperation in this regard.

Attachments:

Definition of Terms
Discretionary/Nondiscretionary Exemptions
Guidelines for Preparing Foreseeable Harm Statements

cc: Bureau/Office FOIA Officers
FOIA Attorneys
DOI FOIA Appeals Officer
Edward Keable, SOL-GL
Timothy Murphy, SOL-GL

DEFINITION OF TERMS

Discretionary Disclosure/Release Versus Proactive Disclosure/Release

A discretionary disclosure or release is different from a proactive disclosure. A discretionary disclosure occurs when a bureau/office decides, on a discretionary basis, to release information that is protected by a FOIA exemption (usually one of the "discretionary exemptions") in response to a FOIA request. To the extent that an exemption (i.e., a "nondiscretionary exemption") covers information that is otherwise protected by law or Executive order, discretionary release of such information may not be possible.

A proactive disclosure is when a bureau/office decides to make its records or information publicly available outside the context of a FOIA request. Although agencies have been required to affirmatively disclose information under subsection (a)(2) of the FOIA, the Obama Administration has placed greater emphasis on making proactive disclosures, in particular on the Web. Proactive disclosures can be made at any time by any office. Typically, such records are not posted in a FOIA electronic reading room and instead are posted on a program office's website where the public is most likely to look for them.

Discretionary Versus Nondiscretionary Exemptions

In accordance with Department of Justice (DOJ) guidance, discretionary 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."[1] When conducting its review of a document, the agency must first verify that any information being considered for withholding under an exemption meets all of the requirements of that exemption. If the exemption applies, the agency should then determine whether to make a discretionary release of the document or portion thereof. The age of the document and the sensitivity of its content are universal factors that need to be evaluated when deciding whether or not to make a discretionary release.

Per DOJ, "[f]or records covered by certain other exemptions … 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."[2]

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[1] See DOJ's *FOIA Post* dated April 17, 2009 at http://www.usdoj.gov/oip/foiapost/2009foiapost8.htm, and the *Discretionary Disclosure and Waiver* section in DOJ's *Guide to the Freedom of Information Act* at http://www.justice.gov/oip/foia_guide09/disclosure-waiver.pdf.

[2] Ibid.

Foreseeable Harm

The harm that is reasonably expected to occur to an interest protected by one of the nine statutory exemptions if the requested information were disclosed in response to a FOIA request is referred to as the "foreseeable harm." In the context of the *Open Government Initiative*, foreseeable harm applies to decisions to withhold information pursuant to one of the "discretionary exemptions" (see above). Some examples include: release of the information would have a chilling effect on communication between agency employees and the decision-making process; release of the information would interfere with the inherent confidential nature of the attorney-client relationship; etc.

Foreseeable Harm Statement

A foreseeable harm statement is a written statement which documents the facts and reasoning justifying the decision to withhold information under a FOIA exemption. It is usually prepared by the FOIA/program office that makes the response to the FOIA request. It describes the protected interest as well as the specific harm that is expected to result from release. Foreseeable harm statements are only required when a bureau/office decides to withhold information under a discretionary exemption. They are not necessary when withholding information pursuant to a nondiscretionary exemption. Bureaus/offices should prepare foreseeable harm statements prior to issuing the response to the requester in order to preserve the original arguments and thinking of the reviewer(s) in the event of an appeal or litigation. Foreseeable harm statements should also be reviewed and approved in writing by the appropriate FOIA attorney.

GUIDELINES FOR PREPARING FORESEEABLE HARM STATEMENTS

When preparing the Foreseeable Harm Statements, the bureau/office should address each withheld document or partially withheld document separately with limited exceptions. Specifically, if the bureau/office has withheld a group of documents (in full or in part) where the subject matter of each of the documents focuses on the same topic, it may address each of the numbered items below (except where the term "category of documents" is not included in the item) in terms of categories or groups of documents. For example, if the bureau/office withheld 10 versions of a draft document, ***or*** seven e-mail messages from panel members to a selecting official all recommending whom to hire, it is appropriate to discuss their withholding in terms of categories. Be sure to state the number of documents in the group or category.

1. For each withheld document (or category of documents), explain the rationale the bureau/office used to justify the use of the exemption; and

2. For each withheld document (or category of documents), explain how disclosure could reasonably be foreseen to cause harm to the interest that the exemption or privilege was designed to protect.

3. Confirm that:

   (a) The bureau/office performed a line-by-line, page-by-page review of each of the withheld documents in an effort to identify exempt and non-exempt information; and

   (b) The bureau/office has segregated and released all of the information in the documents that it determined was not exempted from disclosure by any of the FOIA exemptions it employed.

When invoking the **deliberative process privilege of Exemption (5)**, in addition to providing the above information, also:

4. Explain the deliberative process to which each withheld document (or category of documents) relates;

5. Explain the role that each withheld document (or category of documents) played in the course of that deliberative process;

6. For each withheld or partially withheld document, explain the harm to the deliberative process if the document is released. Avoid using standard Exemption 5 language, such as "to protect against public confusion," or "to protect against premature disclosure of proposed policies before they are finally adopted," etc." More justification is necessary than the fact that a document is covered by Exemption 5. For example:

   (a) How or why would the public be confused by the release of a particular document?

   (b) Is the withheld information premature and subject to change upon review by others in the office?

   (c) Was the information reviewed and rejected by decisionmakers?

   (d) Is the withheld information part of an ongoing process awaiting approval by decisionmakers?

   (e) What is the status of the deliberative process involved?

   (f) How controversial is the issue over which the document was prepared?

Be sure to also provide any other information that the bureau/office believes will assist the Department in the event of an appeal or litigation in assessing the foreseeable harm that is likely to result from release of the documents or information being withheld.

7. Was the factual information in **each** document segregated and released? If not, explain why. To withhold factual information in any of the documents, for **each piece of factual information in each document** the bureau/office **must** be able to answer yes to **one** of the following questions:

(a) Did the author(s) of the document(s) select specific facts out of a larger group of facts (where the authors are using their judgment to separate significant facts from insignificant facts) to make a recommendation to or for the benefit of the decisionmaker? If yes, explain.

(b) Is the factual information so closely connected to the deliberative material that its disclosure would expose or cause harm to the agency's deliberations. In other words, would the release of any factual information be the same as revealing the agency's deliberations? If yes, explain.

(c) Is it impossible to reasonably segregate meaningful portions of the factual information from the deliberative information? In other words, is the factual information so minimal that segregation would make the document nonsensical? If yes, explain.

If, after conducting a **line-by-line, page-by-page** review of each document, the bureau/office determines that there is factual information that does not fall into one of the three categories above, that information must be released. In this situation, the bureau/office should identify that factual information to assist the Department in reviewing the bureau's/office's decision upon appeal or litigation.

Finally, be sure to consult with the appropriate FOIA Attorney when preparing the harm statement and have that individual review and surname the Foreseeable Harm Statement. This is especially important in the case of an appeal or lawsuit.

Discretionary/Nondiscretionary Exemptions		
CONCURRENCE: Concurrence normally refers to obtaining the approval of the appropriate FOIA attorney, but it may include consultation with interested program offices, bureaus or agencies, if appropriate. **GUIDANCE: This chart is intended to serve as a reference guide only. It is not a substitute for performing the required legal analysis on a document-by-document basis. Be sure that you have carefully and correctly applied the criteria of the pertinent exemption(s) to the information being reviewed before referring to this guidance.**		
Exemption	**Description**	**Discretionary Disclosure**
1	Classified national defense and foreign relations information.	No.
2	Related solely to the internal personnel rules and practices of an agency: (Low 2) – internal matters of a relatively trivial nature; (High 2) – internal matters of a more substantive nature the disclosure of which would significantly risk the circumvention of a statute or agency regulation or impede the effectiveness of certain agency activities.	Yes. No.
3	Information specifically exempted from disclosure by statute, if that statute-- (A) (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after Dec. 31, 2007, specifically cites to 5 USC §552(b)(3).	No. Yes, if no foreseeable harm exists and with the appropriate concurrence. Depends on the wording of the statute (refer to (A)(i) and (ii) above).
4	Trade secrets and commercial or financial information obtained from a person and privileged or confidential.	No.
5	Inter-agency or intra-agency memos or letters which would not be available by law to a party other than an agency in litigation with the agency, e.g.: ▪ Deliberative Process ▪ Attorney-Client ▪ Attorney Work-Product ▪ Government Commercial Information	Yes, if no foreseeable harm exists and with the appropriate concurrence. Yes, if no foreseeable harm exists and with the appropriate concurrence. Yes, if no foreseeable harm exists and with the appropriate concurrence. No.
6	Information involving matters of personal privacy.	No.
7	Records or information compiled for law enforcement purposes, to the extent that the production of those records: ▪ could reasonably be expected to interfere with enforcement proceedings (7A) ▪ would deprive a person of a right to a fair trial or an impartial adjudication (7B) ▪ could reasonably be expected to constitute an unwarranted invasion of personal privacy (7C) ▪ could reasonably be expected to disclose the identity of a confidential source (7D) ▪ would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions (7E) ▪ could reasonably be expected to endanger the life or physical safety of any individual (7F).	No, if the information under consideration for withholding truly fulfills the criteria of the Exemption 7 subpart invoked (and the determination of harm is <u>not</u> based on any "speculative or abstract fears").
8	Information relating to the supervision of financial institutions.	Yes, if no foreseeable harm exists and with the appropriate concurrence.
9	Geological information on wells.	Yes, if no foreseeable harm exists and with the appropriate concurrence.