

THE FREEDOM OF INFORMATION ACT

By Karen A. Henry

Anchorage
Bellevue
Los Angeles

New York
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Seattle
Shanghai
Washington, D.C.



“Sunlight is said to be
the best of
disinfectants.”

Justice Louis Brandeis.

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Basic Concept

- All records of the **agencies of the federal government** must be accessible to the public, **unless specifically exempt.**

Agencies of the Federal Gov't:

- Includes the entire executive branch and almost all independent regulatory agencies.
- Does not include Congress, the federal courts, and other agencies that have no policy or rule-making function, and the sole function of which it to “advise and assist the President” (like the Council on Economic Advisors and National Security Council).

Exemptions

- National defense or foreign policy information properly classified pursuant to Executive Order (§ 552(b)(1));
- Matters “related solely to the interpersonnel rules and practices of an agency” (§ 552(b)(2));
- Matters specifically exempted from disclosure by a statute other than the FOIA, but only if such statute absolutely requires that matters be withheld, or establishes particular criteria for withholding or refers to particular types of information to be withheld (§ 552(b)(3));

Exemptions contd.

- Trade secrets and commercial or financial information obtained from a person and privileged or confidential (§ 552(b)(4));
- Inter-agency or intra-agency memorandum or letters which would be privileged in civil litigation (§552(b)(5));

Exemptions contd.

- Personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy (§ 552(b)(6));
- Records or information compiled for law enforcement purposes, but only to the extent that one or more of six specified forms of harm would or could reasonably be expected to result from disclosure (§ 552(b)(7));

Exemptions contd.

- Matters in or related to certain reports prepared by, on behalf of, or for the use of agencies which regulate or supervise financial institutions (§ 552(b)(8));
- Oil well data (§ 552(b)(9)).

POP QUIZ

Which records of the federal gov't
must be publicly accessible?

Answer:

- **All** records of federal government agencies must be publicly accessible...

Unless?

- The record(s) fall within one of the nine exemptions found in (b)(1) - (b)(9).

A Further Note About Exemptions

- Generally speaking, the exemptions set forth in (b)(1) – (b)(9) *permit* an agency to withhold access to agency records; they exemptions do not *require* an agency to withhold its records.

Agency Discretion

- How the government exercises its discretion is controlled by Executive Order.

President Jimmy Carter?

President Carter's FOIA Administration Policy

- Permit access, unless the law clearly provided a relevant exemption.

President Ronald Reagan?

President Reagan's FOIA Administration Policy

- Withhold access if the records *could possibly* be exempted under the FOIA.

President Bill Clinton?

President Clinton's FOIA Administration Policy

- Restrict access only to prevent “foreseeable harm.”

George W?

President G.W. Bush's FOIA Administration Policy

- Withhold access if there is any “sound legal basis” for so doing.



Office of the Attorney General
Washington, D. C. 20530

October 12, 2001

MEMORANDUM FOR HEADS OF ALL FEDERAL DEPARTMENTS AND AGENCIES

FROM: John Ashcroft
Attorney General

A handwritten signature in black ink, appearing to read "John Ashcroft", written over the typed name.

SUBJECT: The Freedom of Information Act

As you know, the Department of Justice and this Administration are committed to full compliance with the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000). It is only through a well-informed citizenry that the leaders of our nation remain accountable to the governed and the American people can be assured that neither fraud nor government waste is concealed.

The Department of Justice and this Administration are equally committed to protecting other fundamental values that are held by our society. Among them are safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy.

Our citizens have a strong interest as well in a government that is fully functional and efficient. Congress and the courts have long recognized that certain legal privileges ensure candid and complete agency deliberations without fear that they will be made public. Other privileges ensure that lawyers' deliberations and communications are kept private. No leader can operate effectively without confidential advice and counsel. Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), incorporates these privileges and the sound policies underlying them.

I encourage your agency to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA. Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.

In making these decisions, you should consult with the Department of Justice's Office of Information and Privacy when significant FOIA issues arise, as well as with our Civil Division on FOIA litigation matters. When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.

This memorandum supersedes the Department of Justice's FOIA Memorandum of October 4, 1993, and it likewise creates no substantive or procedural right enforceable at law.

President Barack Obama?

President Obama's Administration Policy

- “The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails.”
- “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.”



Federal Register

Monday,
January 26, 2009

Part IX

The President

Memorandum of January 21, 2009—
Freedom of Information Act
Memorandum of January 21, 2009—
Transparency and Open Government

Presidential Documents

Title 3—

Memorandum of January 21, 2009

The President

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.

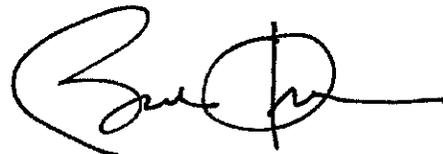
All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

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*.

A handwritten signature in black ink, appearing to read "Paul D. Ryan", with a stylized flourish extending to the right.

THE WHITE HOUSE,
Washington, January 21, 2009

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



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

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.

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.

Administrative Process

Who may make a FOIA request?

- “[A]ny person” may make a FOIA request (§ 552(a)(3)).

How about “illegal aliens?”

Yes!

- See *Doherty v. Dep't of Justice*, 596 F. Supp. 423 (S.D.N.Y. 1984) (access to records of government agencies does not depend on citizenship or residency).

How about non-resident alien?

Yes!

- See DeLaurentiis v. Haig, 528 F. Supp. 601 (E.D. Pa. 1981), aff'd, 686 F.2d 192 (3rd Cir. 1982) (access to agency records does not depend on citizenship or residency).

How about a prison inmate?

Yes!

- See Cox v. Dep't of Justice, 576 F.2d 1302, 1305 n.5 (8th Cir. 1978) (status as a prisoner not relevant).

How about a fugitive from
justice?

No.

- See Doyle v. Dep't of Justice, 494 F. Supp. 842 (D.D.C. 1980), aff'd 668 F.2d 1365 (D.C. Cir. 1982), cert denied, 455 U.S. 1002 (1982).
- Tried and convicted of various securities violations and sentenced to three years in state prison, with all but three months being suspended;
- Failed to surrender to serve jail time;
- Fled to the Republic of Panama;
- Issued a FOIA request through his lawyer.

More Doyle...

- “From time immemorial, courts of equity have applied the maxim that those who demand equity must come into court with clean hands. The hands of this plaintiff are sullied with his contempt for the tribunals whose assistance he is seeking to invoke. Unless and until he presents himself for service of the sentence lawfully imposed upon him, this Court will exercise the discretion vested in it by refusing to assist him with his demands.”

Choosing the Correct Agency

- If it's not obvious which agency has the record sought, check the United States Government Manual (<http://www.gpoaccess.gov/gmanual/index.html>), which describes agency functions, or the Federal Yellow Book (<http://www.leadershipdirectories.com>).

Choosing the Correct Agency contd.

- Once you have identified the correct agency, check that agencies current policies regarding FOIA requests. These policies usually identify the specific employee at the agency responsible for processing FOIA requests.

Your Initial Request Letter

Contents: Your initial FOIA request letter should:

- Include reasonable request for specific agency records;
- Make arrangements for agency fees;
- Make clear that you expect a response within the statutory time limits;
- Remind the agency that the FOIA requires the release of all reasonably segregable portions which are not themselves exempt (§552(b)); and
- State that you are aware of your administrative appeal rights.

Reasonable Description of Records Sought

- A “reasonable description” is one that “enable[s] a professional employee of the agency who [is] familiar with the subject area of the request to locate the record with a reasonable amount of effort.” H.R. Rep. No. 93-876 (1974) at 6.

Does this request contain a “reasonable description?”

- All correspondence, documents, memoranda, tape recordings, notes, and any other material pertaining to the atrocities committed against plaintiffs, including, but not limited to, the files of various government offices.

No.

- See Mason v. Callaway, 554 F.2d 129 (4th Cir. 1977) (broad, sweeping requests lacking specificity are not permissible).

What about this one?

- A request to the IRS for: 1) all files indexed and maintained under my name or social security number; and 2) all documents containing my name.

No.

- See Keese v. U.S., 632 F. Supp. 85, 91 (S.D. Tex. 1985) (“[r]equests for all documents containing a requester's name are not reasonably specific as required by the FOIA “).

What have we learned?

- The more precise and limited your request, the greater the chance your request will be processed.
- Think who, what, when, where, how.

Let's fix the requests in Mason and Keese...

Mason Case

- All correspondence, documents, memoranda, tape recordings, notes, and any other material pertaining to the atrocities committed against plaintiffs, including, but not limited to, the files of various government offices.

Extra information...

- Assume that Mason believed that his termination from the Panama Canal Company (a federal agency) on June 10, 1976 was unlawful, and that he is seeking to compel disclosure of documents relating to his discharge.

How's this?

- I hereby request access to and copies of **all** documents in your possession relating to Panama Canal Company's termination of Mason's employment on June 10, 1976.
- (We are assuming no privacy issues)

What about Keese?

- 1) All files indexed and maintained under my name or social security number; and 2) All documents containing my name.
- What additional information would you need to make this request more precise?

Assume the following:

- Ms. Keese prepares income tax returns. The IRS, Criminal Investigative Division, is currently investigating her for willful preparation of false and fraudulent federal income tax returns. She contends that in the course of this investigation, the IRS has: 1) trespassed upon her property while conducting an illegal search and seizure; 2) placed she and her husband under surveillance and harassed them; and 3) harassed her clients, threatened to withhold or have withheld clients' refund checks, scheduled simultaneously audits of plaintiff's clients so as to prevent plaintiff from being present, and defamed plaintiff to her clients by telling them about her irrelevant past criminal record, that her pricing methods were illegal, that she is not qualified to represent clients before the IRS, and that she is unreliable. She claims that these acts are the result of a government conspiracy to destroy her business.

Recap - FOIA Request Should:

- Include reasonable request for specific agency records;
- Make arrangements for agency fees;
- Make clear that you expect a response within the statutory time limits;
- Remind the agency that the FOIA requires the release of all reasonably segregable portions which are not themselves exempt (§552(b)); and
- State that you are aware of your administrative appeal rights.

Agency Fees

- Agencies are permitted to recoup their searching and copying fees, however, “fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information.” S. Rep. No. 93-1200 at 8.

In your letter..

- I agree to pay reasonable duplication fees for the processing of this request in an amount not to exceed \$____. Please notify me prior to your incurring expenses in excess of that amount.

Fee Schedule

- The FOIA statute allows agencies to charge fees to certain types of requesters for responding to FOIA requests. The FOIA divides requesters into four categories for purposes of assessing fees:

Category 1

- Commercial use requesters. When agencies receive a request for documents for commercial use, they typically assess charges that recover the full direct cost of searching for, reviewing for release, and duplicating the records sought.

Category 2

- Educational and non-commercial scientific institution requests. Agencies typically provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages.

Category 3

- Representatives of the news media. Agencies typically provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages.

A note on media requesters...

- Notice that the 100 page discount is for reproduction only; media still must pay for the agencies' search time.
- However, search fees typically are charged only to the *first requester*. So if the materials previously have been released, you should note that in your letter to avoid incurring search charges unnecessarily.

Category 4

- All other requesters. Agencies typically charge requesters who do not fit into any of the other categories fees that recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without charge.

Fee Waivers

- Fee waivers or fee reductions may be requested. Agencies have discretion to grant full or partial waivers at their discretion.
- The agency more likely to waive fees if it determines that release of the records would benefit the general public.

How can I minimize my fee exposure?

In my letter:

- I can identify myself as a journalist (why?)
- I can explain that release of the requested information is in the public interest (why?)
- I can request that the agency waive any applicable fees (why?)

Recap – FOIA Request Letters Should:

- Include reasonable request for specific agency records;
- Make arrangements for agency fees;
- Make clear that you expect a response within the statutory time limits;
- Remind the agency that the FOIA requires the release of all reasonably segregable portions which are not themselves exempt (§552(b)); and
- State that you are aware of your administrative appeal rights.

Statutory Time Limit: Initial Request

- An agency is required to make a determination on an initial FOIA request within 20 business days of its receipt (§ 552(a)(6)(A(i))).

Statutory Time Limit: Agency Appeal

- An agency must make a determination on an appeal within 20 business days of its receipt (§ 552(a)(6)(A)(ii)).

Extension of Statutory Time Limit:

- An agency can take an additional ten working days to make its determination under “unusual circumstances.” (§ 552(a)(6)(B)).

Recap – FOIA Request Letter Should:

- Include reasonable request for specific agency records;
- Make arrangements for agency fees;
- Make clear that you expect a response within the statutory time limits;
- Remind the agency that the FOIA requires the release of all reasonably segregable portions which are not themselves exempt (§552(b)); and
- State that you are aware of your administrative appeal rights.

Segregability

- “Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which [fall into one of the nine exemptions]. The amount of the information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption... If technically feasible, the amount of information deleted shall be indicated at the place in the record where the deletion is made.” § 552(b).

More on Segregability...

- The segregability requirement applies to all documents and all exemptions in the FOIA. See Center for Auto Safety v. EPA, 731 F.2d 16, 21 (D.C. Cir. 1984).

In your letter...

- You can ask the agency to release “all segregable portions of otherwise exempt material.”

Recap – FOIA Request Letter Should:

- Include reasonable request for specific agency records;
- Make arrangements for agency fees;
- Make clear that you expect a response within the statutory time limits;
- Remind the agency that the FOIA requires the release of all reasonably segregable portions which are not themselves exempt (§552(b)); and
- State that you are aware of your administrative appeal rights.

Administrative Appeal Rights

What can be appealed?

- The denial of a request, in full or in part;
- The adequacy of the agency's search;
- The failure to issue a timely response;
- The assessment of excessive fees;
- The denial of a fee waiver request; and
- The denial of a request for expedited processing.

Content: What should be in my appeal letter?

- Identify the letter as an appeal from a specific action (e.g., denial of request);
- Identify yourself (name, address, phone number);
- Identify the specific FOIA request made;
- State that a reply is expected within 20 business days from the agency's receipt of the appeal letter;
- Demand a complete list of the documents covered by the request, a specific indication of what material is being withheld, and which exemptions are claimed;
- Offer to discuss your request and appeal with the appropriate agency representative.

What have we learned:

- The structure of the FOIA;
- The FOIA exemptions;
- Which agencies the FOIA applies to;
- Agency discretion;
- Who may make a FOIA request;
- How to formulate my FOIA request;
- Information that should be contained in my initial FOIA request letter;
- Information that should be contained in an appeal letter if my request is denied.

- Questions?

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