



President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines

On his first full day in office, January 21, 2009, the President issued a memorandum to all executive departments and agencies emphasizing that the FOIA reflects a "profound national commitment to ensuring an open Government."¹ President Obama called for federal executive departments and agencies to administer the FOIA with "a clear presumption: [i]n the face of doubt, openness prevails."² The President directed departments and agencies not to withhold information "merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."³ He instructed agencies to respond to requests "promptly and in a spirit of cooperation."⁴ The President further directed agencies to adopt a presumption in favor of disclosure with regard to all FOIA decisions.⁵ That presumption requires agencies to proactively release records, without waiting for specific requests, and use technology to inform citizens "about what is known and done by their [g]overnment."⁶ The President directed the Attorney General to issue FOIA Guidelines for the Executive Branch that "reaffirm[] the commitment to accountability and transparency."⁷

¹ [Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act](#), 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter President Obama's FOIA Memorandum].

² [Id.](#)

³ [Id.](#)

⁴ [Id.](#)

⁵ [Id.](#)

⁶ [Id.](#)

⁷ [Id.](#)

On March 19, 2009, Attorney General Eric H. Holder, Jr. issued new FOIA guidelines for the Executive Branch.⁸ Reiterating the President's commitment to open government, Attorney General Holder encouraged agencies to make discretionary releases when appropriate, and to make partial disclosures of records when full disclosures are not possible.⁹ In issuing these guidelines, Attorney General Holder rescinded the October 12, 2001 Attorney General Memorandum on the FOIA,¹⁰ and established a "foreseeable harm" standard for defending agency decisions to withhold information.¹¹ Under this standard, the Department of Justice will defend an agency's 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."¹² In keeping with the President's commitment to openness and with the Attorney General's FOIA Guidelines, agencies must now include the "foreseeable harm" standard as part of their FOIA analysis at both the initial request and the administrative appeal stages.¹³

The Attorney General also emphasized that "the responsibility for effective FOIA administration belongs to all of us – it is not merely a task assigned to an agency's FOIA staff."¹⁴ He noted that "[i]mproving FOIA performance requires the active participation of agency Chief FOIA Officers."¹⁵ The Attorney General also recognized the FOIA professionals who carry out the day-to-day work of implementing the FOIA and declared that they "deserve the full support of the agency's Chief FOIA Officer to ensure

⁸ [Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act](#), 74 Fed. Reg. 51879 (Oct. 8, 2009) [hereinafter Attorney General Holder's FOIA Guidelines]; see *FOIA Post*, "[OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines – Creating a New Era of Open Government](#)" (posted 4/17/09).

⁹ [Attorney General Holder's FOIA Guidelines](#), 74 Fed. Reg. at 51879-01.

¹⁰ [Id.](#)

¹¹ [Id.](#) at 51879-02.

¹² [Id.](#)

¹³ See [Id.](#) at 51879-01 (stating that "[a]n 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"); *FOIA Post*, "[OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines – Creating a New Era of Open Government](#)" (posted 4/17/09) (providing guidance to agencies on implementing new transparency standards).

¹⁴ [Attorney General Holder's FOIA Guidelines](#), 74 Fed. Reg. at 51879-02.

¹⁵ [Id.](#)

that they have the tools they need to respond promptly and efficiently to FOIA requests."¹⁶

The Attorney General reminded FOIA professionals "of their obligation to work 'in a spirit of cooperation' with FOIA requesters," noting that "[u]nnecessary bureaucratic hurdles have no place in the 'new era of open [g]overnment' that the President has proclaimed."¹⁷ Finally, the Attorney General instructed agencies "to work proactively and to respond to requests promptly."¹⁸ He called on agencies to "readily and systematically post information online in advance of any public request," and reiterated that "[t]imely disclosure of information is an essential component of transparency."¹⁹

To ensure more effective FOIA administration, the Attorney General directed agency Chief FOIA Officers to "review all aspects of their agencies FOIA administration, with particular focus on the concerns highlighted" by his guidelines, and to "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."²⁰ The Attorney General directed the Office of Information Policy (OIP) to establish guidelines for those reports.²¹ Agencies' Chief FOIA Officer Reports are made available online by each agency and OIP in turn posts them in a central location on OIP's website.²² OIP prepares summaries of the reports and conducts assessments of agency implementation of the FOIA which are also made publically available on OIP's website.²³ Finally, on the Department of Justice website FOIA.gov, detailed data regarding agency's implementation of the FOIA is displayed graphically and educational material about the FOIA is provided.²⁴

¹⁶ [Id.](#)

¹⁷ [Id.](#)

¹⁸ [Id.](#) at 51879-03.

¹⁹ [Id.](#)

²⁰ [Id.](#)

²¹ [Id.](#)

²² See OIP, Reports, <http://www.justice.gov/oip/reports.html>.

²³ See [id.](#)

²⁴ See FOIA.gov, <http://www.foia.gov>.