

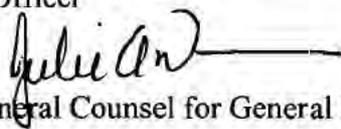


Homeland Security

February 5, 2008

MEMORANDUM FOR: DHS FOIA Officers and Counselors

FROM: Hugo Teufel III 
Chief FOIA Officer

Julie Dunne 
Associate General Counsel for General Law

SUBJECT: DHS Implementation of S. 2488, the Openness Promotes Effectiveness
in our National Government Act of 2007

This memorandum outlines DHS's implementation of the Openness Promotes Effectiveness in our National (OPEN) Government Act of 2007, which was signed by the President on December 31, 2007. This Act amended the Freedom of Information Act (FOIA) by, among many things, (1) establishing a definition of "a representative of the news media;" (2) directing that required attorney fees be paid from an agency's own appropriation rather than from the Judgment Fund; (3) prohibiting an agency from assessing certain fees if it fails to comply with FOIA deadlines; and (4) establishing an Office of Government Information Services to review agency compliance with FOIA. Several of these items are described below in more detail, but first this memorandum describes changes in FOIA processing and reporting requirements.

DHS already has implemented many of the FOIA processing and certain personnel requirements under the Act. For example, DHS has already implemented the requirements of Section 12 of the Act, which requires that the exemption being claimed be identified in the record. However, DHS must take the following additional actions to fully comply with the requirements of the statute:

1. DHS will establish an individualized tracking number system to trace each FOIA request. This individualized tracking number will be used to allow the requester to obtain current processing information via the Internet or telephone through the Requester Service Center, including the date on which DHS received the request and an estimated date on which DHS will issue its final response. DHS must implement the tracking number system and have processing information available for all FOIA requests by December 31, 2008.

2. DHS will respond within 20 days of receiving a FOIA request. This response period will begin when the appropriate component receives the request or 10 days after the FOIA request is received by any DHS FOIA office, whichever occurs first. DHS must reduce its response period to 20 days or less by December 31, 2008.
 - a. DHS can only toll the 20-day response period upon requesting additional information or clarifying a fee-related issue with the requester. The 20-day response period will then restart upon receiving a response from the requestor. An agency may only toll this 20 days response period once to obtain additional information from the requester.
 - b. If DHS is unable to fulfill the FOIA request within the 20-day response period, the penalties could be substantial. DHS will not be able to assess search or duplication fees, unless “unusual” or “exceptional” circumstances apply to the processing of the request. DHS may also be subject to enforcement litigation, including the payment of the opposing party’s attorney’s fees and costs.
 - i. “Unusual circumstances” occur when there is a need to
 1. search or collect records from field offices or similar establishments;
 2. search for and examine voluminous amounts of records; or
 3. consult with another agency or with more than two components within DHS.
 - ii. “Exceptional circumstances” are not defined in statute, but it cannot include “a delay that results from a predictable agency workload of requests ... unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.”¹
3. Each DHS component with FOIA initial denial and processing authority must individually track all FOIA requests. The DHS FOIA Officer will report these statistics to Congress and make them available to the public upon request.² The following requirements are of particular note:
 - a. The number of times the component relied upon each b(3) (statutory specific) exception;
 - b. Average and median request and appeal response times, including the range in number of days for each component to respond to FOIA requests;
 - c. Request counts by response times (i.e., how many were filled within 20 days, within 40 days, within 60 days, etc.);
 - d. The ten oldest pending requests and ten oldest appeals, including average and median appeals response time and noting the appeals that required the highest and lowest number of business days to complete;
 - e. All expedited treatment accounting, including average and median response times and the total number adjudicated within the required 10 days; and
 - f. All fee waiver accounting, including average and median response times.

¹ 5 U.S.C. 552(a)(6)(C)(ii)

² The tracking requirements will be codified at 5 U.S.C. 552(e)(1).

The Office of Government Information Services will be reviewing all agencies', including DHS's, policies and procedures, reviewing agencies' compliance with FOIA, mediating disputes, issuing advisory opinions, auditing agencies, and recommending policy changes to Congress and the President.

The Act also made several important clarifications and additions to the FOIA laws that are described below in more detail.

Definition of News Media Representatives

The Act provides a news media representative definition for the first time. This definition has fee implications, as media representatives are eligible for reduced processing and duplication fees. Section 3 provides that a news media representative includes any person or entity that gathers information, uses its editorial skills to turn the raw materials into a distinct work and distributes its distinct work to an audience. The definition provides as examples of news media representatives, television or radio stations broadcasting to the public at large and publishers of periodicals. Significantly, the definition includes freelance journalists in the definition, "if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity." The definition also notes that "alternative media," such as "the adoption of the electronic dissemination of newspapers through telecommunications services" shall be considered news media representatives. The key criterion seems to be how a "distinct work" is construed. The definition *excludes* those organizations that merely obtain information under FOIA and then distribute such information on a website or elsewhere without analysis or other original work.

Attorney Fees and Litigations Costs

Section 4 clarifies when attorney fees and litigation costs are paid and how such fees will be paid. Prior to this amendment, attorney fees and litigation costs could be assessed in cases where the complainant has substantially prevailed. Section 4 defines the term "substantially prevailed" as situations where the plaintiff obtained relief through a judicial order, enforceable written agreement or consent decree or where there has been "a voluntary or unilateral change in position by the agency, if complainant's claim is not insubstantial." Importantly, instead of paying such fees from the Judgment Fund, these fees must now be paid directly by the agency.

Definition of Record and Government Contractors

Section 9 of the Act amends the definition of a "record" under Section 552(f)(2). The definition is broadened to include "any information...that is maintained for an agency by an entity under Government contract, for the purposes of records management."

Status inquiries will continue to be fielded via the FOIA Requester Service Center. All other FOIA-related questions should be answered by Catherine Papoi, Deputy Chief FOIA Officer and legal concerns should be directed to Michael Russell, Deputy Associate General Counsel for General Law.



Homeland Security

February 25, 2008

MEMORANDUM FOR: DHS FOIA Officers and Counselors

FROM: Hugo Teufel III 
Chief FOIA Officer

SUBJECT: DHS Management of FOIA Requests Seeking Agency Records
on Ongoing Law Enforcement Investigations

This memorandum provides guidance on how Freedom of Information Act (FOIA) requests seeking agency records on ongoing law enforcement investigations should be handled Department-wide.

5 U.S.C. § 552(b)(7)(A) authorizes the withholding of law enforcement records or information, compiled for law enforcement purposes, that could reasonably be expected to interfere with ongoing enforcement proceedings or investigations. Determining the applicability of this Exemption 7 subsection requires a two-step analysis focusing on (1) whether a law enforcement proceeding or investigation is pending or prospective, and (2) whether release of information about it could reasonably be expected to cause some articulable harm.

Thus, as a general rule, an agency may invoke Exemption 7(A) so long as the law enforcement proceeding or investigation remains pending. When processing a FOIA request seeking agency law enforcement records pertaining to an ongoing law enforcement investigation, the component must review the records and perform the above two-step analysis. If a DHS component determines that release of the documents may cause some articulable harm, it should use the attached 7(A) denial template response. Components should not leave law enforcement requests open pending the closure of the subject investigation. Please review your current open cases and handle any such case according to this Departmental guidance.

Finally, FOIA Officers should be cognizant of the FOIA (c)(1) exclusion. This exclusion applies to situations in which the very fact of a criminal investigation's existence is as yet unknown to the investigation's subject, and disclosure of the existence of the investigation (which would be revealed by any acknowledgment of the existence of responsive records) could reasonably be expected to interfere with enforcement proceedings. In such circumstances, an agency may treat the records as not subject to the requirements of the FOIA and issue a "no records" response to the requester.

Please direct questions to Catherine Papoi, Director, Departmental Disclosure & FOIA at Catherine.Papoi@dhs.gov, or Michael Russell, Deputy Associate General Counsel for General Law at Michael.D.Russell@dhs.gov.



Homeland Security

March 4, 2008

MEMORANDUM FOR: All Department of Homeland Security FOIA Officers and Counselors

FROM: HUGO TEUFEL III 
Chief Freedom of Information Act Officer

JULIE DUNNE 
Associate General Counsel for General Law

SUBJECT: DHS Treatment of DHS Personnel Information Contained within Agency Records Processed Pursuant to the FOIA

This memorandum details how personnel information contained within agency records should be processed Department-wide under the Freedom of Information Act, 5 U.S.C. § 552.

The Omnibus Appropriation Act for FY 2008, Public Law 110-161, contains government-wide general provisions relevant to the agency Freedom of Information Act (FOIA) programs. The two general provisions, §§721 and 722, limit the dissemination of certain personnel information. The provisions state:

Section 721. None of the funds appropriated by this or any other Act may be used by the agency to provide a Federal employee's home address to any labor organization except when the employee has authorized such disclosure or when such disclosure has been ordered by a court of competent jurisdiction.

Section 722. None of the funds made available in this Act or any other Act may be used to provide any non-public information such as mailing or telephone lists to any person or any organization outside of the Federal Government without the approval of the Committees on Appropriations.

Additionally, it is Department policy to evaluate the release of personally identifying information on employees and individual DHS employees' names on a case-by-case basis. Each such evaluation must consider the factors set forth in *Reporters' Committee, Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 775 (1989), which held that "information that does not directly reveal the operation or activities of the federal government falls outside the ambit of the public interest that the FOIA was enacted to serve." In many cases information that identifies individual DHS

employees falls into this category of information, and FOIA officers should withhold it. Additional support for withholding information that personally identifies individual employees is found in the D.C. Circuit's opinion in *Electronic Privacy Information Center v. Department of Homeland Security et al.*, Civ. No. 04-0944 (D.D.C. 2004 RMU):

"The privacy interest of civilian federal employees includes the right to control information related to themselves and to avoid disclosures that could conceivably subject them to annoyance or harassment in either their official or private lives. Lesar v. Dep't of Justice, 636 F.2d 472, 487 (D.C. Cir. 1980); see also Nix v. United States, 572 F.2d 998, 1006 n.8 (4th Cir. 1978) (noting that, to implicate a federal employee's privacy interest under FOIA, harassment does not have to rise to the level that life or physical safety is in danger). The fact that federal employees have an identifiable privacy interest in avoiding disclosures of information that could lead to annoyance or harassment, however, does not authorize a blanket exemption for the names of all government employees in all records. Baez v. Dep't of Justice, 647 F.2d 1328, 1338 (D.C. Cir. 1980); Lesar, 636 F.2d at 487. To justify their Exemption 6 withholdings, the defendants must show that the threat to employees' privacy is real rather than speculative." (emphasis added)

Even though it is not possible or practicable to establish a basis for withholding the names of all DHS employees in all instances, it is Department policy to evaluate the release of personally identifying information on a case-by-case basis. In determining whether to withhold the information under Exemption 6, consideration shall focus on whether a release can reasonably be expected to cause a threat to the employee's privacy and whether the release of the employee's name(s) will shed light on how the Department performs its statutory duties. The analysis shall also factor in the grade level of the employee, as it is well established that senior officials have a diminished expectation of privacy, and the sensitivity level of an employee's position.

Additionally, DHS policy affords Exemption (b)(7)(C) protection in addition to Exemption (b)(6) protection for employee names in the context of law enforcement records. Lastly, employee direct phone numbers may be withheld under Exemption (b)(2)(low), while employees' email addresses may be withheld under both Exemption (b)(2)(low) and Exemption (b)(6).

Any questions may be directed to Catherine Papoi, Director, Departmental Disclosure & FOIA or Michael Russell, Deputy Associate General Counsel for General Law.



Homeland
Security

March 24, 2009

MEMORANDUM FOR: Distribution

FROM: Mary Ellen Callahan
Chief FOIA Officer *MEC*

SUBJECT: Attorney General's Guidelines on the Freedom of Information Act

On January 21, 2009, the President issued a memorandum on the Freedom of Information Act (FOIA) to the heads of all Federal agencies. In that memorandum, the President directed the Attorney General to issue new guidelines on FOIA. Per the President's instructions, Attorney General Eric Holder issued guidance governing the administration of FOIA on March 19, 2009. As Chief FOIA Officer for DHS, I wish to ensure timely dissemination of this information to all DHS FOIA officers and those who oversee FOIA operations at DHS components. Accordingly, I call on all FOIA offices DHS-wide to process FOIA requests with the presumption that, in the face of doubt, openness prevails. The Attorney General emphasized in his memorandum that we must all do our part to ensure transparency and administer FOIA effectively. At this time, I would like to remind all DHS employees of this shared responsibility.

Furthermore, per the Attorney General's memorandum, agencies should work proactively and promptly to make information public, including leveraging modern technology to disseminate information. In particular, I would like to remind components of the requirements outlined in subsection (a)(2) of the FOIA. Under subsection (a)(2), federal agencies must make four distinct categories of records affirmatively available for "public inspection and copying." Agencies must satisfy this "Reading Room" provision of the FOIA by providing the designated documents either solely in electronic Reading Rooms on agency websites, or in a combination of electronic and conventional "paper" Reading Rooms. The four categories of Reading Room records are:

1. "final opinions [and] . . . orders" made in the adjudication of cases;
2. specific agency policy statements;
3. "administrative staff manuals and instructions to staff that affect a member of the public"; and
4. records disclosed in response to a FOIA request that "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records."

FOIA-related questions should be answered by me, Vania Lockett, Associate Director of Disclosure and FOIA Operations, or William Holzerland, Associate Director of Disclosure and FOIA Program Development; legal concerns about this matter should be directed to David Palmer, Deputy Associate General Counsel (Legal Counsel).

Attachment: Attorney General Holder's Memorandum

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Inspector General
Assistant Secretary, Office of Legislative Affairs
Director, Operations Coordination
Director, National Cyber Security Center
Executive Secretary
Assistant Secretary, Public



Homeland Security

May 28, 2009

MEMORANDUM FOR: Distribution

FROM: Mary Ellen Callahan
Chief FOIA Officer 

SUBJECT: Overview of the Freedom of Information Act

On January 21, 2009, President Obama issued two important memoranda to the heads of Executive Departments and Agencies concerning government transparency. In one he committed his administration to an “unprecedented level of openness in government,” and in the other he stressed the importance of the Freedom of Information Act (FOIA), stating that it is “the most prominent expression of a profound national commitment to ensuring an open government.” My office is preparing more formal guidance on the President’s FOIA initiative. In the meantime, it is necessary that all current and incoming Departmental employees have an understanding of what is encompassed under FOIA, and how it impacts DHS records. Please distribute this within your Component/office as appropriate.

Presumption of Disclosure

FOIA gives any person a right, enforceable in court, to access federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by exemption or exclusion. The basic purpose of the FOIA is to ensure a fundamental principle of a democratic society -- that the public has a right to access and be informed about the activities of its government. Under President Obama’s memoranda and the Attorney General’s implementing guidelines, agencies are encouraged to process FOIA requests with a presumption of disclosure and further encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged. If full disclosure of a record is not possible, any portion of that record that is not subject to an exemption will be disclosed.

For purposes of FOIA, an agency record is either created or obtained by an agency, and the agency is either in possession or control of the record at the time a FOIA request is made. The term record has been defined broadly to include any information in any format maintained by an agency, and/or individuals in that agency, including electronic format. Typically, this may include emails, memoranda, correspondence files, or similar work products that are kept in hard copy or electronic files, information contained on discs or other storage media, handwritten notes, calendars, audio/videotapes, and photos. Documents obtained from another executive

branch agency may also be processed through a referral and consultation process. With respect to documents created or possessed by contractors, they may also constitute agency records if they are under control of DHS.

Exemptions

In certain circumstances, some information found in agency records may be withheld. The information must fall within an exemption specifically designated under FOIA. The relevant exemptions for DHS are listed as follows:

- Exemption (1) – Classified Information
- Exemption (2) – (“low” and “high”) Internal Administrative Matters
- Exemption (3) – Statutory Exemptions
- Exemption (4) – Commercial Information
- Exemption (5) – Common Law Privileges
- Exemption (6) – General Privacy
- Exemption (7) – Government Law Enforcement

It is important to note that exemptions do not apply merely because full or partial disclosure may cause embarrassment or demonstrate an error or failure. Therefore, all records responsive to a FOIA request should be produced to the Component or Department FOIA office to undergo an extensive review process. The Department has a well-established FOIA review process that closely coordinates with the subject matter experts within each program to make determinations regarding release. If you have further questions regarding FOIA, please feel free to contact either the Department’s FOIA Office within the Privacy Office at 703-235-0790 or your Component’s FOIA office.

Distribution

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Jane Holl Lute, Deputy Secretary
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Michael Aytes, Deputy Director, U.S. Citizenship and Immigration Services (Acting)
W. Craig Fugate, Administrator, FEMA
John Torres, Assistant Secretary for Immigration and Customs Enforcement (Acting)
Roger Mackin, Under Secretary for Intelligence and Analysis (Acting)
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