



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

March 15, 2022

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: THE ATTORNEY GENERAL

SUBJECT: FREEDOM OF INFORMATION ACT GUIDELINES

For more than fifty years, the Freedom of Information Act (FOIA), 5 U.S.C. § 552, has been a vital tool for ensuring transparency, accessibility, and accountability in government. As the Supreme Court has explained, the Act's "basic purpose . . . is to ensure an informed citizenry," which is "vital to the functioning of a democratic society [and] needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The guidelines set forth below update and strengthen the federal government's commitment to the fair and effective administration of FOIA.

A. The Presumption of Openness

1. As amended in 2016, the Freedom of Information Act provides that a federal agency or department (hereinafter "agency") may withhold responsive records only if: (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the nine exemptions that FOIA enumerates; or (2) disclosure is prohibited by law. 5 U.S.C. § 552(a)(8)(A)(i).

2. Information that might technically fall within an exemption should not be withheld from a FOIA requester unless the agency can identify a foreseeable harm or legal bar to disclosure. In case of doubt, openness should prevail. Moreover, agencies are strongly encouraged to make discretionary disclosures of information where appropriate.

3. When an agency determines that it cannot make full disclosure of a requested record, FOIA requires that it "consider whether partial disclosure of information is possible" and "take reasonable steps necessary to segregate and release nonexempt information." *Id.* § 552(a)(8)(A)(ii).

4. To help ensure proper application of the foreseeable harm standard, agencies should confirm in response letters to FOIA requesters that they have considered the foreseeable harm standard when reviewing records and applying FOIA exemptions.

5. In determining whether to defend an agency's nondisclosure decision, the Justice Department will apply the presumption of openness described above. The Justice Department will not defend nondisclosure decisions that are inconsistent with FOIA or with these guidelines.

6. Although the fair and effective administration of FOIA requires that openness prevail in the face of doubt, Congress established nine exemptions to protect, for example, national security, personal privacy, privileged records, and law enforcement interests. *Id.* § 552(b). As the Act makes clear, however, the "burden is on the agency to sustain" a decision to withhold records under those exemptions. *Id.* § 552(a)(4)(B). Nor may agencies withhold information based merely on speculative or abstract fears or fears of embarrassment.

7. The Justice Department's Office of Information Policy stands ready to provide guidance to agencies making FOIA determinations in close cases and to provide support and training as agencies work to implement this guidance. With respect to specific FOIA litigation, agencies should consult with the relevant Justice Department attorney assigned to the case.

B. Proactive Disclosures

1. The proactive disclosure of information is also fundamental to the faithful application of FOIA. Proactive disclosures enable information about federal government operations to be more readily available to all.

2. FOIA requires agencies to proactively disclose certain categories of records, including previously released records that have been requested three or more times or that "have become or are likely to become the subject of subsequent requests." *Id.* § 552(a)(2)(D)(ii).

3. In making proactive disclosures, agencies should post records online as soon as feasible. Agencies should also continue to maximize their efforts to post more records online quickly and systematically in advance of any public request.

4. The Justice Department has strengthened its efforts to encourage proactive agency disclosures, including by – as the Government Accountability Office (GAO) recommended – providing more specific criteria regarding how relevant metrics should be reported in agency Annual FOIA Reports.¹

C. Removing Barriers to Access and Reducing FOIA Request Backlogs

1. Agencies should continue their efforts to remove barriers to requesting and accessing government records and to reduce FOIA processing backlogs. For example, the Justice Department's Executive Office for Immigration Review has long required individuals to file FOIA requests to obtain official copies of their own records of immigration court proceedings. We are now changing that policy, and I encourage all agencies to examine whether they have

¹ See U.S. DEP'T OF JUST., DEPARTMENT OF JUSTICE HANDBOOK FOR AGENCY ANNUAL FREEDOM OF INFORMATION ACT REPORTS (2021), <https://www.justice.gov/oip/page/file/1438431/download>.

similar or other categories of records that they could make more readily accessible without requiring individuals to file FOIA requests.

2. It is equally important to ensure that the public can readily find information that the government makes available. Records should be posted online quickly and systematically. In addition, agency FOIA websites should be easily navigable, and records should be presented in the most useful, searchable, and open formats possible. As we continue to improve our FOIA programs, improving the organization and presentation of disclosed materials should be a core part of our efforts to efficiently provide government records to the public.

3. FOIA.gov continues to serve as the government's central website for FOIA administration. The Justice Department is committed to continuing to build on the functionality of the site to better serve requesters and agencies. Together with the Office of Management and Budget, the Justice Department issued joint guidance in 2019 to ensure full interoperability of FOIA.gov.² Agencies should ensure that they are complying with FOIA.gov's interoperability requirements and are regularly updating their information on FOIA.gov.

4. Timely disclosure of records is also essential to the core purpose of FOIA. Agencies must have effective systems in place for responding to requests in a timely manner. The Justice Department encourages Chief FOIA Officers to undertake a comprehensive review of their FOIA programs to ensure that searches, reviews, and productions of records are conducted as efficiently as possible.

5. Agency FOIA professionals should continue to work with FOIA requesters in a spirit of cooperation. Each agency should actively work with requesters to remove barriers to access and to help requesters understand the FOIA process and the nature and scope of the records the agency maintains. Agencies should also ensure that they promptly communicate with requesters about their FOIA requests. As the Justice Department has emphasized in guidance for more than a decade, agencies should communicate electronically with FOIA requesters to the greatest extent possible, including by accepting FOIA requests and subsequent administrative correspondence electronically.

D. Ensuring Fair and Effective FOIA Administration

Ensuring fair and effective FOIA administration requires support from agency leadership, proper training, and a full understanding of FOIA obligations by the entire agency workforce.

1. I urge agency Chief FOIA Officers to undertake comprehensive reviews of all aspects of their agencies' FOIA administration, with a particular focus on the concerns highlighted in this memorandum. In accordance with FOIA and the Justice Department's FOIA Guidelines, agencies should report to the Justice Department each year on the steps they have taken to improve FOIA operations and facilitate information disclosure at their agencies. 5 U.S.C. § 552(j)(2)(D). The Justice Department's Office of Information Policy will offer specific guidance on the timing and content of such reports to ensure that they inform current and

² See *Guidance for Achieving Interoperability with the National Freedom of Information Act (FOIA) Portal on FOIA.gov* (February 12, 2019).

emerging FOIA challenges and risks, including, as the GAO recommended, the number of requests for which unusual circumstances apply and the effect of litigation on overall FOIA request processing and backlog.

2. In conducting assessments, Chief FOIA Officers should carefully review backlogs of requests and evaluate the allocation of agency resources to FOIA operations.

3. The FOIA Improvement Act of 2016 established a Chief FOIA Officers Council to develop recommendations for increasing compliance and efficiency in responding to FOIA requests, and to identify, develop, and coordinate initiatives for increasing transparency and compliance with FOIA's requirements. The Council has served as a helpful platform for understanding common challenges, advancing new FOIA initiatives, and identifying and sharing best practices. I encourage new agency Chief FOIA Officers to participate on the Council for the benefit of their own agencies and to improve government-wide FOIA administration.

4. The federal government could not process the hundreds of thousands of FOIA requests that are received every year without its dedicated FOIA professionals. FOIA professionals deserve the full support of their Chief FOIA Officers and all their agency colleagues.

5. Successful FOIA administration also requires proper training and a commitment to FOIA compliance by agency personnel. Simply put, FOIA is everyone's responsibility. I encourage each agency head to provide regular and proper training to your workforce that explains the importance of FOIA and every individual's role in administering it. The Justice Department's Office of Information Policy has issued several guidance documents and articles on the topics discussed in this memorandum, including resources to assist you with ensuring proper training and compliance with FOIA. See <https://www.justice.gov/oip>. I urge agencies to consult these resources.

6. The Justice Department understands the challenges agencies face in responding to the high number of requests they receive each year. The Department stands ready to work constructively with your agencies, with Congress, and with the FOIA requester community to improve processing capacities, reduce backlogs, and make government more transparent, responsive, and accountable. I encourage your agencies to take advantage of the government-wide resources the Justice Department has made available as you work to comply with your FOIA obligations.³

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Transparency in government operations is a priority of this Administration and this Department. We stand ready to work with each of you to make real the Freedom of Information Act's promise of a government that is open and accountable to the American people.

³ This memorandum, which supersedes previous Attorney General memoranda on this subject, 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.

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