



# Homeland Security

May 28, 2009

MEMORANDUM FOR: Distribution

FROM: Mary Ellen Callahan  
Chief FOIA Officer

A handwritten signature in blue ink, appearing to read "Me, EHC", written over the printed name and title of the sender.

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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