
Attorney General Issues FOIA Guidance

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As reported in a previous WilmerHale e-alert, on President Obama's first full day in office, he ordered federal agencies to adopt a presumption of openness and disclosure under Freedom of Information Act (FOIA) requests and directed the Attorney General to issue implementing guidance. [\[Click Here for January 2009 e-alert\]](#). On March 19, 2009, following the President's directive, Attorney General Holder issued a Memorandum governing disclosure by executive branch agencies pursuant to FOIA requests (the Holder Memorandum).

The Holder Memorandum reaffirms the clear presumption of disclosure under FOIA that President Obama's directive had instituted: "In the face of doubt, openness prevails." It instructs each agency "not [to] withhold information simply because it may do so legally," and "strongly encourage[s] agencies to make discretionary disclosures of information." The Holder Memorandum formally rescinds former Attorney General John Ashcroft's FOIA Memorandum of October 12, 2001, which stated that the Department of Justice would defend agency 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." In contrast, per the Holder Memorandum, the Department of Justice will now defend a denial of a FOIA request only if one of two conditions is satisfied: "(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."

The practical effect of the guidance remains to be seen based on its implementation by individual agencies. For example, the Holder Memorandum does not identify any changes to disclosure policies on information obtained by the government from private parties, such as trade secrets or commercial or financial information. See 5 U.S.C. § 552(b).

Nonetheless, the Holder Memorandum suggests several ways in which its practical effect is likely to be evident. It takes immediate effect and authorizes agencies to revisit prior non-disclosure decisions that are the subject of pending litigation as of March 19, 2009: in those cases, the Holder Memorandum's guidance "should be 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." Also, highlighting FOIA's requirement that agencies must segregate and release nonexempt information, the Holder Memorandum specifically instructs agencies responding to FOIA

requests to consider whether partial disclosure is appropriate when full disclosure would not be appropriate under FOIA.

Overall, the Holder Memorandum appears to mark another step toward greater access to government information and enhanced "transparency" within the Executive Branch.

WilmerHale will continue to monitor developments in the administration's approach under FOIA.

To view the March 19, 2009 Memorandum by Attorney General Holder, click [here](#).

To view the January 21, 2009 Memorandum by President Obama, click [here](#).

To view the October 12, 2001 Memorandum by Attorney General Ashcroft, click [here](#).

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