



**U.S. Department
of Transportation**

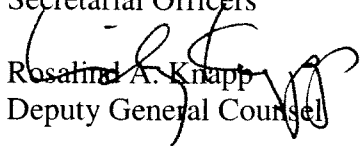
Office of the Secretary
of Transportation

GENERAL COUNSEL

November 2, 2009

1200 New Jersey Avenue, SE
Washington, DC 20590

MEMORANDUM TO: Heads of Operating Administrations
Secretarial Officers

FROM: 
Rosalind A. Knapp
Deputy General Counsel

SUBJECT: Freedom of Information Act (FOIA) and Creating a
“New Era of Open Government”

The President, the Attorney General, and the Department of Justice’s (DOJ) Office of Information Policy released guidance earlier this year designed to create a “New Era of Open Government.” As Chief FOIA Officer for the Department of Transportation (DOT), I thought this would be a good time to reiterate our ongoing FOIA obligations and discuss the new FOIA standards. I encourage you to distribute this memorandum widely within your offices. For the benefit of incoming officials and as a reminder to all of us, this memorandum begins with some basic principles.

What is FOIA?

FOIA is a disclosure statute (5 U.S.C. § 552) that 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. A requester must reasonably describe the records sought and submit the request in accordance with the agency’s published FOIA regulations. The Department has promulgated its FOIA rules at 49 CFR Part 7. FOIA requires that the Department respond to FOIA requests within 20 working days of receipt, with limited exceptions as outlined in the FOIA statute.

Department’s FOIA Structure

DOT has a Departmental FOIA Office located in the Office of the Secretary (OST), and FOIA Offices in each of its operating administrations and the Office of the Inspector General. In most of the Department’s FOIA programs, the FOIA function is centralized, with one office (typically staffed with FOIA specialists) handling all FOIA processing. However, two of the Department’s larger FOIA programs (the Federal Aviation Administration and the Federal Highway Administration) are decentralized--with FOIA specialists in a Headquarters FOIA Office providing guidance to many program and field offices (typically staffed with non-FOIA specialists) that respond directly to initial FOIA

requests. Each FOIA Office has one or more attorneys from its operating administration who provide legal support to its FOIA program. The Departmental FOIA Officer and Departmental FOIA attorneys, in the Office of Operations (C-60) within the General Counsel's Office, provide leadership, guidance, direction, and assistance to the FOIA Offices and FOIA attorneys throughout the Department. The Departmental FOIA Office also acts as the FOIA Office for OST, processing requests for OST records.

The Chief FOIA Officer provides high level oversight and support to the Department's FOIA programs, and must "recommend adjustments to agency practices, personnel, and funding as may be necessary" to improve FOIA administration. In his recent guidance, the Attorney General emphasized that Chief FOIA Officers must be active participants in their agencies' FOIA operations.

DOT also has FOIA Public Liaisons throughout the Department, who serve as officials to whom FOIA requesters can raise concerns about service they have received from the FOIA Offices. Although the FOIA Public Liaison function is a collateral duty, it is an important one. I anticipate that the role of the FOIA Public Liaisons will likely become more active and visible over the coming year. FOIA Public Liaisons report to the Chief FOIA Officer on their FOIA-related activities.

Agency Records

For purposes of FOIA, an agency record is one created *or* obtained by an agency that is in the agency's possession or control at the time a FOIA request is made. Agencies are not required to create a record in response to a FOIA request. The term "record" has been defined broadly to include any record (draft or final) in any format maintained by an agency. This includes e-mails, memoranda, correspondence files, information contained in computer or other electronic files, certain handwritten notes, calendars, audio and videotapes, maps, and photographs.

FOIA Processing

When a DOT FOIA Office receives a FOIA request, it first asks the appropriate program office(s) to search for responsive records. Any DOT employee receiving such a request must search for responsive records and, to the extent records are located, provide them to the FOIA Office (even if the DOT employee believes that certain records should not be released) to undergo a review. If an employee believes that any of the records, or portions thereof, may be subject to an exemption from release, the employee should indicate that to the FOIA Office when providing the records. The FOIA Offices throughout the Department have well-established FOIA review processes that include coordination with program office subject matter experts when making determinations regarding release; therefore, program office input is valued. Ultimately, however, each FOIA Office, working with FOIA counsel, must make the determination as to what records should be released, after reviewing the responsive records.

FOIA Offices should review documents and apply exemptions consistently. If a document is released to one requester, then that same document, redacted the same way, would need to be provided to all future requesters of that document. This is also true for any agency documents released by agency personnel outside the FOIA process.¹ Your FOIA Office and/or FOIA counsel can provide assistance in applying this “release to one, release to all” rule.

The FOIA Exemptions

Following are brief descriptions of the FOIA exemptions mentioned above.

Exemption 1	properly classified national defense and foreign relations information
Exemption 2	internal agency rules and practices (for example, where release could risk circumvention of agency rules)
Exemption 3	information that is prohibited from disclosure by another Federal statute
Exemption 4	trade secrets and other confidential business information
Exemption 5	inter-agency or intra-agency communications protected by legal privileges (e.g., deliberative process, attorney-client)
Exemption 6	information involving matters of personal privacy
Exemption 7	records or information compiled for law enforcement purposes, to the extent that the production of those records (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions, or (F) could reasonably be expected to endanger the life or physical safety of any individual
Exemption 8	information relating to the supervision of financial institutions
Exemption 9	geological information on wells

As stated above, it is the relevant FOIA office that must determine the applicability of an exemption, in coordination with FOIA counsel as appropriate.

¹ One important exception to this rule relates to information in a record subject to mandatory, not discretionary withholding, such as trade secrets or certain security-related information. Where an agency errs by releasing such information outside the agency, it should not repeat the mistake. However, to the extent the released information is subject only to discretionary withholding, the agency generally waives its right to assert the exemption in response to any future FOIA requests.

Creating a “New Era of Open Government”

On January 21, 2009, President Obama issued a memorandum to the heads of all departments and agencies on FOIA. The President directed that FOIA “should be administered with a clear presumption: In the face of doubt, openness prevails.” The President also instructed agencies that information should not be withheld merely because “public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.” Agencies are directed to respond to requests “promptly and in a spirit of cooperation.” The President also called on agencies to “adopt a presumption in favor of disclosure” and to apply that presumption “to all decisions involving FOIA.” The President’s memorandum directs agencies to take “affirmative steps to make information public,” and utilize “modern technology to inform citizens about what is known and done by their Government.” The Attorney General, in his March 19, 2009 memorandum on FOIA, established a new standard for defending agency decisions to withhold information. When a FOIA request is denied, agencies will now be defended by DOJ “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.”

When full disclosure of a record is not possible, agencies should always consider making a partial disclosure. The Attorney General reminded agencies that they “should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information.” In addition to reviewing records to see if portions are reasonably segregable as non-exempt, agencies should also review records to see if portions that are technically exempt can be released as a matter of discretion. The determination of whether an agency reasonably foresees harm from release of a particular record, or record portion, goes hand-in-hand with the determination of whether to make a discretionary release of information. The age of the record and sensitivity of its content, the nature of the decision at issue, the status of the decision, and the personnel involved are all factors that should be analyzed in determining whether a discretionary release is appropriate.

As the Attorney General states in his March 19 memorandum, “At the same time, the disclosure obligation under the FOIA is not absolute. The Act provides exemptions to protect, for example, national security, personal privacy, privileged records, and law enforcement interests.” Therefore, discretionary release of records covered by certain exemptions is not possible where the information must be withheld under some other legal authority. For example, records protected by the exemptions covering national security (Exemption 1), commercial and financial information (Exemption 4), personal privacy (Exemption 6), and information protected by statute (Exemption 3) are generally not subject to discretionary release.

FOIA Reporting

The FOIA statute requires a consolidated, comprehensive Department-wide annual statistical report that is posted on the Department’s FOIA home page (www.dot.gov/foia).

The Departmental FOIA Office prepares the report after receiving the required data from DOT's FOIA Offices, which have historically provided complete, timely, and reliable data for the report.

The Attorney General has directed that beginning early next year, in addition to the consolidated DOT-wide Annual FOIA Report, I must submit a separate Chief FOIA Officer report to DOJ addressing steps taken to improve transparency in our Department. In particular, the report must address: (1) steps taken to apply the presumption of openness; (2) steps taken to ensure that DOT has an effective system for responding to requests; (3) steps taken to increase proactive disclosures; (4) steps taken to increase the use of technology; and (5) steps taken to reduce backlogs and improve timeliness in responding to FOIA requests.

DOT's FOIA personnel already have discussed many of these issues at their regular monthly meetings led by the Departmental FOIA Officer. In addition, I have asked the Departmental FOIA Officer to conduct reviews of each DOT FOIA Office over the next several months to assess the effectiveness of each DOT FOIA program and identify potential recommended improvements. (This includes OST's FOIA program.) After the reviews have been completed, I will meet with senior officials in each operating administration to discuss the findings and any recommendations specific to that DOT component. I will also seek input on how the Departmental FOIA Office can improve its service to DOT's FOIA Offices. With this information in hand, and in keeping with the Attorney General's request, I will recommend adjustments to our FOIA work, as appropriate, and submit the required report to DOJ. You and your staff will have input on the report.

Closing

In his March memorandum, the Attorney General emphasized that each agency must be fully accountable for its FOIA operation and that all agency personnel have a role in the FOIA process. As you widely distribute this memorandum within your organization, please emphasize the need for all of the personnel in your agency to cooperate fully with our FOIA personnel in administering the FOIA program as directed by the President.

If you have questions regarding FOIA, please feel free to contact me. The Departmental FOIA Officer and Departmental FOIA attorneys, as well as your operating administrations' FOIA Offices, are also available to answer any questions you may have regarding FOIA.

cc: The Secretary
The Deputy Secretary
Chief of Staff
Deputy Chief of Staff