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Subj: Update on New White House and DOJ FOIA Policy

We have received additional guidance on the new White House and Justice Department policy of openness in the Federal government, and discretionary release under the FOIA. I attended a "meeting" at Justice with FOIA legal contacts from other agencies where a number of DOJ attorneys tried to explain the new policy. The meeting was summed up by one participant who said that he had been listening for 1.5 hours and was more confused than before the meeting.

A number of good points were made however, concerning the procedural aspects of processing requests.

1. The new policy only applies to Exemptions (low) 2, 5, 6 and 7(C) (when the information is not covered by the Privacy Act), and 7(A) and 7(D) (non-identifying information provided by a source).
2. The new policy does not create any new legal rights for FOIA requesters.
3. It is VERY IMPORTANT when making a discretionary release to indicate in your transmittal letter that the documents are subject to an exemption, but that you are making a discretionary release. You should not indicate, however, that the documents are being released because there is no governmental harm. This will facilitate our defense of other cases when we decide to withhold similar information.
4. If there is an ongoing decisionmaking process DOJ will support withholding, because of the foreseeable harm to the decisionmaking process. Thus, a document by document review does not need to be conducted for documents withheld during the decisionmaking process. Once a final decision is made, however, consideration should be given to release. As a general rule DOJ has determined that drafts which do not differ materially from a final document, where the final document is released, "should ordinarily be released under agency discretion...." Additionally, the older the decision or documents the more consideration should be given to release. DOJ recognizes that there are also times when these drafts can be withheld, but to do so, a foreseeable harm must be clearly articulated.

5. The Department of Justice will no longer accept bald statements that release of information will have a chilling effect on the decisionmaking process. We must back up the use of chilling effect with an analysis of the foreseeable harm release would cause. Do not put this analysis in your response to the requester or affidavits/declarations. The analysis should be put in the recommended denial memorandum to the IDA, or a file memorandum.

6. The Justice Department and the U.S. Attorney's offices are sending letters to all agency contacts with outstanding FOIA litigation. Agencies will be required to do a document by document "rereview" of all information withheld to determine whether it should be released under the new policy. If there is no foreseeable harm to the government the documents should be released, after consultation with the Justice Department attorney or assistant U.S. attorney in charge of the litigation. The release letter should include language that the release is discretionary.

7. DOJ is asking that all agency counsels exercise discretion in discussing the new policy with opposing counsel or the court. If asked you should emphasize that these reviews are voluntarily undertaken to promote the policy of openness and may not always result in the release of additional documents. Also emphasize that this does not create a private right of action for plaintiffs.

8. When drafting affidavits/declarations in response to FOIA litigation, do not include the foreseeable harm analysis you went through under the new policy or the rereview required by DOJ. We do not want the courts picking up on this analysis and creating new law (they will be tempted enough to do this anyway).

If you have any questions, please call me at (202)272-0027.

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