



U.S. Department of the Interior

Office of the Solicitor
Division of Administration
FOIA Appeals Branch
1849 C Street, N.W., MS 6556
Washington, D.C. 20240

May 29, 2009

ORIGINALLY SENT VIA E-MAIL

Re: Preparing Foreseeable Harm Statements for FOIA Appeals

On March 19, 2009, Attorney General Eric Holder issued a memorandum outlining the Department of Justice's (DOJ) guidelines on the FOIA (copy attached). In his memorandum, Attorney General Holder states, among other things, that DOJ will defend a denial of a FOIA request 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.

Since the FOIA Appeals Office provides the final level of administrative review before a requester may file a lawsuit challenging the denial of a FOIA request, this Office will require Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold documents (or portions of documents) based on FOIA exemptions (2), (5), and (9). For FOIA appeals that challenge a bureau's/office's decision to withhold documents (or portions of documents) based on any of the remaining FOIA exemptions, the FOIA Appeals Office will request Foreseeable Harm Statements only when it can not reasonably ascertain the harm that would come from the disclosure of the documents.

Starting immediately, the FOIA Appeal Route Slips that this Office sends to you transmitting new FOIA appeals will include a section advising you whether a Foreseeable Harm Statement is required for a particular appeal. Also, for the FOIA appeals that are currently pending related to your bureau, where appropriate, the FOIA Appeals Office will send new FOIA Appeal Route Slips requesting that you provide Foreseeable Harm Statements for those appeals as well.

I have outlined below the information that you must include in Foreseeable Harm Statements that you and other FOIA professionals in your bureau/office prepare, as well as some matters that you should consider when preparing these documents.

GUIDELINES FOR FORESEEABLE HARM STATEMENTS

When preparing the Foreseeable Harm Statements, please address each withheld document or partially withheld document separately. If the bureau/office has withheld a group of documents (in full or in part) where the subject matter of each of those documents focuses on the same topic, you may address each of the below items (except item 6) in terms of categories of documents. For example, if a bureau/office withheld 10 iterations of a draft document *or* seven e-mail messages from members of a panel to the selection official all discussing who to hire, it is

appropriate to discuss their withholding in terms of categories. Be sure to identify the number of documents that you have grouped into a particular category.

1. For each withheld document or, if appropriate, category of documents, explain the rationale the bureau/office used to justify the invocation of the exemption; and
2. For each withheld document or, if appropriate, category of documents, explain how disclosure could reasonably be foreseen to cause harm to the interest that the exemption or privilege was designed to protect.
3. Confirmation that: **(a)** the bureau/office performed a line-by-line, page-by-page review of each of the withheld documents in an effort to identify exempt and non-exempt information; and **(b)** it has segregated and released all of the information in the documents that it determined was not exempt from disclosure by any of the FOIA exemptions it invoked.

For appeals that challenge a bureau's/office's decision to invoke the **deliberative process privilege of exemption (5)**, in addition to providing the above information, please also provide the following:

4. Explanation of the deliberative process to which each withheld document (or category of documents) relates;
5. Explanation of the role that each withheld document (or category of documents) played in the course of that deliberative process;
6. For each withheld or partially withheld document, explain the harm to the deliberative process if the document is released. Please do not use the standard exemption (5) language, e.g., "to protect against public confusion, to protect against premature disclosure of proposed policies before they are finally adopted, etc.," because you need to demonstrate more than that the document is protected from release by exemption (5). For example, address one or more of the following:
 - (a) Explain how the public would be confused by the release of a particular document.
 - (b) Is the information in the document premature and subject to change upon review by others in the office?
 - (c) Was the information reviewed and rejected by decisionmakers?
 - (d) Is the information in the document a part of an ongoing process awaiting approval by decisionmakers?
 - (e) What is the status of the deliberative process involved?
 - (f) How controversial is the issue over which the document was prepared?

Please also provide any other information that you believe will assist the Department in assessing the foreseeable harm that is likely to come from disclosure of the withheld documents or information.

7. Was the factual information in **each** document segregated and released? If not, explain why. To withhold factual information in any of the documents, for **each piece of factual information in each document** you **must** be able to answer yes to **one** of the following questions:

(a) Did the author(s) of the document(s) select specific facts out of a larger group of facts (where the authors are using their judgment to separate significant facts from insignificant facts) to make a recommendation to or for the benefit of the decisionmaker? If yes, explain.

(b) Is the factual information so inextricably connected to the deliberative material that its disclosure would expose or cause harm to the agency's deliberations. In other words, would the release of any factual information be tantamount to revealing the agency's deliberations? If yes, explain.

(c) Is it impossible to reasonably segregate meaningful portions of the factual information from the deliberative information? In other words, is the factual information so minimal that segregation would render the document nonsensical? If yes, explain.

If, after conducting a **line-by-line, page-by-page** review of each document, you determine that there is factual information that does not fall into one of the three categories listed under paragraph 7 (a)-(c), above, that information must be released. Please identify that factual information in order to assist the Department with its administrative review of the bureau's/office's action.

Also, please consult with your appropriate FOIA Attorney when preparing the harm statement and have that individual review and surname the Foreseeable Harm Statement prior to forwarding it to the FOIA Appeals Office.

As always, thank you for your continued cooperation. If you have any questions regarding this matter, please call me at (202) 208-5339.



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Department of the Interior