FREEDOM OF INFORMATION ACT – FORESEEABLE HARM CHECKLIST

I. Overview

Under the 2016 Freedom of Information Act (FOIA) Improvement Act, Agencies "shall withhold information" under the FOIA "only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law." Agencies must also "take reasonable steps necessary to segregate and release nonexempt information." An agency should not withhold documents merely because it can demonstrate, as a technical matter, that the documents fall within the scope of a "discretionary" FOIA Exemption. To be certain, not all FOIA Exemptions are discretionary. Some Exemptions either constrain an agency's ability to make a discretionary disclosure of information (i.e., the privilege belongs to a third-party), or affirmatively prohibit it as a matter of law.[1] Documents protected by other Exemptions can, however, be the subject of discretionary release. FOIA Exemption (b)(5) in particular holds the greatest potential for discretionary disclosure. FOIA Exemption (b)(5), includes:

- The Deliberative Process Privilege, which applies to inter- or intra-agency documents containing recommendations or opinions on legal or policy matters (deliberative) made prior to adoption of a policy (pre-decisional) (some categories of documents that may qualify are: draft documents, meeting notes, and other types of documents that document the agency's decision-making process);
- The Attorney-Client Privilege, which applies to confidential communications between an attorney and the client on matters for which the client has sought legal advice; and
- The Attorney Work Product Privilege/Doctrine, which applies to materials prepared by an attorney, or at an attorney's direction, in anticipation of foreseeable litigation.[2]

Should an agency choose to withhold information under a discretionary Exemption, the agency may withhold only if the agency reasonably foresees that disclosure of the requested information would harm an interest protected by the asserted Exemption. The Act refers to this as the "foreseeable harm" standard and agencies must complete a foreseeable harm determination for the documents they seek to withhold under the discretionary FOIA Exemptions. In sum, offices responding to a FOIA request are required to apply the foreseeable harm standard when they determine that information can be withheld under a discretionary FOIA Exemption, particularly Exemption (b)(5).

The checklist in Section II, below, is intended to assist you in making foreseeable harm determinations, and provides a process for properly completing this analysis. Careful application of this process to every new FOIA request is crucial. With passage of Section 4 of the OPEN Government Act of 2007, an agency that reverses its position and releases documents at District Court must now pay any judicially-awarded attorney fees and costs from its own appropriations. Thus, failure to take the required foreseeable harm analysis seriously could ultimately result in thousands of dollars in attorneys fees liability against your office's budget. **Foreseeable harm determinations only need to be made for documents originating from NOAA. Documents originating from other parts of the Department (e.g., Census, NIST, Office of the Secretary, Office of the General Counsel, etc.) or other Federal agencies must be referred to that DOC Bureau or Federal agency for processing under the FOIA.**

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[1] See, for example, FOIA Exemptions (b)(1) (national security information), (b)(3) (nondisclosure provisions contained in other federal statutes), (b)(4) (confidential commercial/financial information), (b)(6) (personal privacy information), and (b)(7)(C) (personal privacy information contained in law enforcement records).

[2] For information that is subject to either the attorney-client privilege or attorney work-product privilege, offices should consult their regional or headquarters NOAA Office of General Counsel.

II. Checklist -- Making the Foreseeable Harm Determination

Step 1: Have any responsive documents been withheld under any FOIA Exemption?

__Yes: Proceed to Step 2.
__No: Stop. This is a full release and a foreseeable harm determination is not required.

Step 2: Have any responsive documents been withheld under (check all that apply):

__ FOIA Exemptions (b)(7)(A), (b)(7)(B), (b)(7)(D), (b)(7)(E) or (b)(7)(F)?

If you are withholding documents under one of these exemptions, please contact your FOIA Liaison for assistance in developing a foreseeable harm analysis.

__ **FOIA Exemption (b)(5)?** Proceed to Step 3.

Step 3: Is the information being withheld because (check one or more):

__ a. It contains opinions or recommendations on a policy or legal matter (not purely factual); AND

- concerns a Federal agency decision that had not been made at the time the document was produced, or
- memorializes a predecisional discussion (even if the document was created after the decision was made)?

__ b. It concerns communications with a Federal agency attorney on or related to legal advice sought or received, or a matter in or likely to be the subject of litigation?

If yes, for a, proceed to Step 4. If yes for b, contact NOAA GC.

Step 4: Foreseeable Harm: Determine if the release of the record(s) may result in foreseeable harm, after considering the following:

__ a. Does the record concern a sensitive or controversial matter (e.g., a matter that has received attention in the press, been the subject of an audit or a congressional request, or is associated with matters currently or recently in litigation)? Consider whether other agencies were involved in the matter.

__ b. Does the record concern a sensitive decision-making process?

__ c. Would disclosure affect the employees that contributed to the records (such as encouraging press inquiries to an individual)?

__ d. Would future decisions be jeopardized if the records were released?

__ e. Would disclosure likely inhibit or chill the exchange of views between agency personnel, thereby diminishing the deliberative quality of agency's decision?

__ f. Would withholding the record protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action?

__ g. Would withholding the record protect against public confusion that would result from pre-mature release of a decision or policy that has not been made?

__ Yes: If any of lines a-g are checked, proceed to Step 5.
__ No: If lines a-g are not checked, proceed to Step 6.

Step 5: Use the rationale(s) for withholding the information indicated in Step 4, above, to articulate a specific factual explanation about the documents at issue.

- The explanation must connect the cited rationale(s) in Step 3 to specific information in the document(s) at issue or to information that relates to a matter discussed in the documents at issue, and explain why release of the information would cause "foreseeable harm" to the agency (or contact NOAA GC if it concerns attorney-client or attorney work product privilege).
- In preparing a "foreseeable harm" analysis, you should take into account the age of the document (under FOIA, documents more than 25 years old are no longer eligible for deliberative process privilege) and the sensitivity of its contents.
- See examples on page 3.
- Proceed to Step 6.

Step 6: Are you confident about your decision? Is your manager also confident about your decision?

__Yes

Step 7: Consult with your NOAA GC attorney before proceeding.

__ **a.** If any of lines a-g were checked in Step 4, proceed to Step 8.

__ **b.** If lines a-g were not checked in Step 4, and General Counsel did not identify any concerns with your determination that no foreseeable harm would result from releasing the records, your analysis is complete.

Step 8: Determine whether the foreseeable harm analysis may be applied to groups or smaller sub-sets of withheld documents on the same topic or whether the analysis should be applied to each individually withheld document.

Because FOIA Exemptions must be applied document-by-document, line-by-line, offices must apply the foreseeable harm standard on the same basis. Accordingly, for each responsive document that requires a foreseeable harm analysis, an office must consider whether disclosure would harm an interest protected by the applicable exemption. In some cases, the harm presented by release of information in a document will apply to a series of responsive documents. In other cases, the harm will apply only to portions of a document. In still other cases, the content of responsive documents will vary to such a degree as to require a different articulation of foreseeable harm for each individual document. If you're unsure, please consult your FOIA Liaison or the appropriate NOAA GC FOIA Expert.

_____ _____

Subject Matter Expert Signature Date

Examples for Step 5:

Use the rationale(s) for withholding the information indicated in Step 3, above, to articulate a specific factual explanation about the documents at issue. Using information contained in the withheld document itself, explain why release of the information would cause "foreseeable harm" to the agency or contact NOAA GC if it concerns attorney-client or attorney work product privilege.

Example 1: This document(s) (email, briefing paper, report, etc.) concerns a pending consideration of regulating a new activity in a National Marine Sanctuary. In these documents, a number of agency employees debate the relative merits of taking this particular action, including discussing whether the activity is harmful to the environment or whether the restrictions of the activity would be effective. Any restrictions of the activity is controversial, and is often discussed in the press. Releasing this information could lead to public confusion where the regulated community may misunderstand and misinterpret these exchanges of preliminary ideas and alternatives as the agency's position on whether the regulations are necessary or effective in deterring impacts of the activity on the environment. Further, release of this document would likely inhibit or chill the exchange of opinions between agency personnel on whether the regulation is necessary or effective, thereby diminishing the deliberative quality of the agency's decision-making process. Opinions among the public are strong and the agency staff live in a small community - release of discussions of individually named agency staff could trigger repeated press queries or personal harassment of the staff in the community. These communications occurred in the very early stages of the decision-making process and can be described as brainstorming and thought-provoking dialogue on a range of alternatives. The release of this information, in particular, could impair the decision-(regulatory) making process as staff would become reluctant to freely and openly interact with one another and offer such preliminary observations and analyses.

Example 2: The document is an investigative report into a personnel matter that contains employees' opinions and recommendations. Given that this is an investigative report into potential wrongdoing, there are foreseeable harms in releasing portions of the report. First, release of certain information would have a chilling effect on the free-flow of information. The release of certain portions of investigative report could very well impact future internal investigations as employees would not be as forthcoming and open when speaking to investigators were there a possibility that their names and comments could be made available to the public. The discretionary release of the investigator's findings and recommendations could also cause harm to the agency as only one recommendation from the report has been implemented to date and there would be a likelihood of confusion as to which actions were in fact taken by agency management. Further, since only some of the corrective actions were taken, the release of the recommendations could very well impair agency management's ability to implement additional recommended actions due to the sensitivity involved in the proposed actions.