

# President Obama's Guidance Memo (1-21-09)

- "A democracy requires accountability, and accountability requires transparency"
- There is a clear presumption of disclosure
- respond to requests "promptly and in a spirit of cooperation"
- FOIA "reflects our nation's fundamental commitment to open government"

## President Obama's Guidance, Con't.

- Information should not be kept confidential merely because:
  - Officials might be embarrassed
  - Errors and failures might be revealed, or
  - Because of speculative or abstract fears.
- Directs the Atty General/DOJ and OMB to issue guidance within 120 days

# Attorney General Holder's FOIA Guidance Memo

- Issued March 19, 2009
- Underscores commitment to open gov't
- Applicable to all federal employees
- Former AG Ashcroft Memo is rescinded
- FOIA officers should work in a "spirit of cooperation" with the requesters
- "Unnecessary bureaucratic hurdles" have no place in an era of open government

# Atty. Gen. Memo, Cont'd

- Strongly encourages agencies to make discretionary disclosure of information
- Certain categories of information continue to be exempt from release
  - Information meeting the threshold requirements for exemptions 1, 3, 4, 6 (& some portions of ex. 7) are not impacted by a discretionary release

# Atty. Gen. Memo, Cont'd

- An agency should not withhold info simply because it has the legal ability to do so.
- Discretionary release impacts that information which meets the threshold for exemptions 2, 5 and some portions of ex. 7.

# Atty. Gen. Memo, Cont'd

- Whenever full release of an agency record is inappropriate, "reasonable segregation" should be observed, and a partial release made
  - FDA will continue to use the "minor deletions" policy
  - Partial releases must comply with both
  - the 1996 EFOIA Amendments (identifying the location and extent of redactions) &
  - with sect. 12, of the OPEN Government Act (citing the FOIA exemption which permits withholding, at the site of each redaction).

## Atty. Gen. Memo, Cont'd FOIA-based Litigation

- Justice will defend litigation resulting from a denial of a FOIA request only if the agency foresees that disclosure would harm an interest protected by one of the exemptions, or
- if disclosure is prohibited by law.

# Equally important are the FOIA professionals...

- Requires agencies to work proactively
- Respond to requests in a timely manner
- Systematically post information online in advance of receiving requests (proactive release), to:
  - reduce the need for requests &
  - assist in backlog reduction.



# **Atty. Gen. Memo –** ***“application of a concept”***

- View FOIA differently than in the past
- Work cooperatively & in a timely manner
- Ask “what can be released”
- Apply the presumption of openness
- Apply the “foreseeable harm” test (not speculative) for discretionary release
- Consider partial release (minor deletions)
- Anticipate interest & pro-actively release, using technology (internet)
- The FOIA is every employee’s responsibility