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- Former AG Ashcroft Memo is rescinded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
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.
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).
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