



April 5, 2024

MEMORANDUM FOR: Departmental FOIA Personnel

FROM: William H. Holzerland
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SUBJECT: Freedom of Information Act Foreseeable Harm Standard

Introduction:

The Freedom of Information Act (FOIA or “the Act”), as amended, serves as a “vital tool for ensuring transparency, accessibility, and accountability in government.”¹ The Attorney General’s 2022 FOIA Guidelines require FOIA be administered with a presumption of openness, and state that “[i]n case of doubt, openness should prevail.”²

The law provides a right for any person to request federal agency records and generally requires agencies to respond to requests within twenty (20) business days.³ It requires agencies to release segregable, non-exempt portions of responsive records unless one of nine statutory exemptions applies, or the records are excluded from the Act’s coverage.

As FOIA is a disclosure statute, agencies generally have discretion as to whether a FOIA exemption should be asserted, except when records are classified or protected by another law outside FOIA. An agency may withhold responsive records only if: (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the nine exemptions that FOIA enumerates; or (2) disclosure is prohibited by law.⁴

The Assistant Secretary for Public Affairs (ASPA) serves concurrently as the U.S. Department of Health & Human Services’ (HHS) Agency Chief FOIA Officer. As designated by the Secretary and noted in regulation, the ASPA assumes agency-wide responsibility for ensuring efficient and appropriate compliance with FOIA.⁵

References to “the Department” should be read as referring to this Department or any Operating Division or Staff Division thereof; the Office of Inspector General may choose to apply this policy or to issue policy not inconsistent with the Act and this memorandum independently, pursuant to its authority under the Inspector General Act of 1978.⁶

¹ Office of the Attorney General, U.S. Department of Justice, *Freedom of Information Act Guidelines* (March 15, 2022), <https://www.justice.gov/ag/page/file/1483516/download>.

² *Id.*

³ 5 U.S.C. § 552 (a)(6)(A)(i).

⁴ *Id.* § 552(a)(8)(A)(i).

⁵ 45 C.F.R. § 5.3.

⁶ 5 U.S.C. ch. 4 § 401 *et seq.*



Background:

This memorandum addresses one aspect of the FOIA Improvement Act of 2016 – the “foreseeable harm” standard it codified into law. The purpose is to ensure Departmental FOIA professionals and programmatic subject matter experts applying the Act adequately adhere to this standard when processing initial FOIA requests as well as administrative appeals.

Though this standard remains an emerging area of law, applying the foreseeable harm standard is a key element in administering FOIA with a presumption of openness. A new, multi-step analysis is required on a case-by-case basis to justify withholdings: (1) a determination that a record (or portion thereof) falls within any exemption(s) and (2) that disclosure would result in a reasonably foreseen harm to an interest underlying the applicable exemption(s).

The foreseeable harm standard is not satisfied by conclusory or generalized statements of harm, but rather requires a rigorous and particularized showing of harm for each record or category of records the Department intends to withhold in responding to a request.

The Department may consider discretionary releases of records in scenarios where an exemption technically applies, as appropriate and permissible, and Departmental FOIA personnel are encouraged to do so after careful consideration of all relevant factors.

Applying the Foreseeable Harm Standard:

The foreseeable harm standard applies to all exemptions except for Exemption 3, which requires withholding of certain matters, “specifically exempted from disclosure by statute.”⁷ However, the level of analysis and degree of detail needed in a foreseeable harm statement varies across the exemptions, as discussed below.

Concise Harm Analysis Required (Exemptions 1, 4, 6, and 7):

Certain exemptions contain elements for withholding records that should, in the ordinary course, establish that disclosure would result in reasonably foreseeable harm. For these exemptions, the harm analysis is built into the statutory text.

To the extent FOIA Exemptions 1 (concerning properly classified information), 4 (concerning trade secrets or privileged commercial or financial information), 6 (concerning information the disclosure of which would “constitute a clearly unwarranted invasion of personal privacy”), or 7 (concerning information compiled for law enforcement purposes where certain predicates of likely harm are satisfied) may apply, after analyzing the records and releasing all reasonably segregable, non-exempt portions thereof, a concise statement of harm would likely suffice and should be documented in each case by Departmental FOIA personnel as necessary.⁸

⁷ *Id.* §§ 552(a)(8)(A)(i)(II), (b)(3).

⁸ *Id.* §§ 552(b)(1), (4), (6)-(7).



Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9):

For records that may be covered by Exemptions 2, 5, 8, and 9, after analyzing the records and determining the exemption(s) technically apply, both a detailed foreseeable harm analysis and particularized, concrete statement of harm is necessary, as a harm analysis is not built into those exemptions.

The foreseeable harm standard is not satisfied by stating speculative or abstract harms, those that are unreasonable for the circumstances surrounding the record(s) in question, nor prospective harms that are not directly tethered to the record(s) at issue. As the harm analysis is not built into Exemptions 2, 5, 8, and 9, harm statements that rephrase or restate the respective exemptions' statutory language do not satisfy the standard.

To the extent Exemption 2 may apply (records that are related solely to the internal personnel rules and practices of an agency), articulating foreseeable harm for such records will be possible in limited circumstances when the agency can articulate a particularized harm that would result from the release of the records in question.⁹

If Exemption 5 may apply (inter-agency or intra-agency records that would normally be privileged in the civil discovery context), concluding foreseeable harm would result from release of such records requires rigorous analysis.

This exemption incorporates privileges including but not limited to the attorney-client privilege (which protects confidential communications between an attorney and client relating to a legal matter for which the client has sought professional advice), the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation), and the deliberative process privilege (which generally protects records that are pre-decisional, deliberative, less than twenty-five years old,¹⁰ and about a legal or policy matter).¹¹ However, the deliberative process privilege generally does not protect purely factual information.¹²

When analyzing records to determine whether Exemption 5 applies, the Department must address two steps in its analysis to determine whether application of the exemption is valid as a technical matter:

- 1) Whether the threshold is met (the records constitute "inter-agency or intra-agency memorandums or letters"); AND if so,
- 2) Whether a civil discovery privilege applies.

⁹ *Id.* § 552 (b)(2).

¹⁰ *Id.* § 552 (b)(5).

¹¹ 2 See *Mapother v. DOJ*, 3 F.3d 1533, 1537 (D.C. Cir. 1993) ("The deliberative process privilege protects materials that are both predecisional and deliberative." (citing *Petroleum Info. Corp. v. U.S. Dep't of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992))).

¹² See *EPA v. Mink*, 410 U.S. 73, 91 (1973) (refusing to extend deliberative process privilege protection to "factual material otherwise available on discovery merely [on the basis that] it was placed in a memorandum with matters of law, policy, or opinion").



If the result of the Exemption 5 analysis is that one or both factors is absent, Exemption 5 does not apply and the record(s) must be disclosed, unless other exemption(s) apply.

However, if the result of the Exemption 5 analysis is that both elements are satisfied, the Department must still consider a third factor prior to determining whether the record must be disclosed, or if foreseeable harm would result from release, withholding it.

This effectively constitutes an additional analytical step necessary when considering whether invoking Exemption 5 for the record at issue may be advisable under the circumstances surrounding the record(s) in question.

In scenarios where Exemption 5 technically applies, the analytical steps are as follows:

- 1) Whether the threshold is met (the records constitute “inter-agency or intra-agency memorandums or letters”); AND if so,
- 2) Whether a privilege applies; AND if so,
- 3) Whether release of the record(s) in question would cause a concrete, articulable harm that the exemption was designed to protect against.

If no foreseeable harm would result from release, even if Exemption 5 technically applies, the record(s) must be disclosed, unless other exemption(s) apply.

Only when the Exemption 5 threshold is met, AND a privilege applies, AND release would cause concrete, foreseeable harm can this exemption be applied, and the record(s) withheld on that basis.

Exemptions 8 and 9 (which protect information pertaining to the regulation or supervision of financial institutions and geological or geophysical information about wells, respectively) would be invoked by this Department on an extremely infrequent basis, if ever. If you are unsure whether Exemption 8 or 9 applies to a record or portion thereof, seek additional information from a subject-matter expert prior to applying it.

Factors to Consider in Foreseeable Harm Analysis:

In considering whether foreseeable harm would arise from the release of record(s) that meet the respective exemptions’ statutory requirements, or when prospective harm from disclosure might be unclear on the face of the records, FOIA personnel are encouraged to consult with subject-matter experts familiar with the context and potential sensitivities of particular records prior to the FOIA officer making a final determination.

Relevant factors may include but are not limited to the following: the nature of the decision involved; nature of the decision-making process; status of the decision; relative rank or seniority of the personnel involved; potential for process impairment; significance of any potential process



impairment; age of the information in the record; and sensitivity of individual record portions. These factors should be balanced against each other, noting that no single factor is determinative.

In the event the Department determines statutory requirements are met and that foreseeable harm would result from release of the record in question, it must document with particularity the factors that led to this determination prior to withholding the record under the applied exemption(s).

Conclusion:

The foreseeable harm standard is an independent and meaningful burden on agencies, necessitating heightened analysis. To comply with the Act and meet this standard, the Department must identify specific harms to the relevant protected interests that it can reasonably foresee would result from disclosure, connecting the harms in a direct and meaningful way to the information being withheld.

In a scenario where the Department foresees harm in release, it can describe the contents of the withheld record(s) and describe how release of the record(s) would negatively impact interests the exemptions were designed to protect against. If there is foreseeable harm in release, the Department may withhold the record (or portion thereof) after releasing all reasonably segregable, non-exempt information, when possible.

Departmental FOIA determinations issued after review of the records, application of the law, and HHS implementing regulations must clearly communicate to the requester in correspondence its basis for any denials, denoting in the response letter to the requester: (1) that the Department considered foreseeable harm in reaching its determination, and (2) provide a brief, tailored explanation of the analysis conducted and its results, in a manner designed to enhance understanding of the handling of the request.

If you have any questions about the applicability of this memorandum or need assistance, please contact your Operating Division FOIA Officer via the contact information found at <https://www.hhs.gov/foia/contacts/index.html> and/or contact the ASPA FOIA Division via FOIARequest@hhs.gov.

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