

President Obama Calls for FOIA Improvements and Digital Media and Data Privacy Law Blog

on 01.27.2009
Posted in FOIA

On his first full day in office, President Barack Obama issued two memoranda to the heads of executive departments and agencies plainly declaring that government departments and agencies must be open for public scrutiny.

In the Freedom of Information Act (“FOIA”) memorandum, President Obama directs executive departments and agencies to administer FOIA with a presumption in favor of openness.

In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

The FOIA memorandum further directs agencies to adopt policies in favor of open disclosure and to apply those policies to *all* decisions involving FOIA. Agencies should not merely react to FOIA requests but, rather, should proactively make information available to the public, including through use of modern technologies. Furthermore, “disclosure should be timely.”

The FOIA memorandum also directs the U.S. Attorney General to issue new guidelines governing FOIA to heads of executive departments and agencies and directs the Director of the Office of Management and Budget (“OMB”) “to update guidance to agencies to increase and improve dissemination to the public, including through the use of new technologies. . . .” Both the Attorney General’s and OMB’s guidelines are to be published in the *Federal Register*.

The full text of the FOIA memorandum is linked [here](#).

In addition to the FOIA memorandum, President Obama also issued a memorandum entitled, “Transparency and Open Government.” The transparency memorandum broadly declares the following:

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My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, strengthen our democracy and promote efficiency and effectiveness in Government.

The transparency memorandum goes on to set out three principles concerning the manner in which government "should" operate, and it states the actions executive departments and agencies should take to further those principles.

1. "Government should be transparent." The administration will "take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use." The memorandum states that executive departments and agencies should use new technologies to make information available to the public online and should also ask for public feedback to target the information that is "of the greatest use to the public."
2. "Government should be participatory." Because "public engagement enhances the Government's effectiveness and improves the quality of its decisions," executive departments and agencies should offer (and ask for public feedback on how to offer) the public more opportunities to participate in policy decisions.
3. "Government should be collaborative." The memorandum states that collaboration engages the public in government. To that end, executive departments and agencies should "use innovative tools, methods, and systems to cooperate among themselves, across all levels of Government, and with nonprofit organizations, businesses, and individuals in the private sector. Executive departments and agencies should also ask for public feedback on how to better collaborate and how to identify new opportunities for collaboration.

The transparency memorandum directs the Chief Technology Officer, along with the Director of the OMB, within 120 days to coordinate the development of an "Open Government Directive" that "instructs executive departments and agencies to take specific actions implementing the principles" laid out in the transparency memorandum.

The full text of the transparency memorandum is linked [here](#).

It is important to recognize that the principles and guidelines set forth in the FOIA and transparency memoranda are not, in themselves, laws that create new rights of access. Indeed, the memoranda are careful to point this out. However, the memoranda set the tone for the executive branch at the outset of the new Obama Administration. If followed, the memoranda suggest a pointed contrast to prior administrations. For example, some have accused the Bush administration of secrecy and of frustrating FOIA by denying or dragging out requests. Time will tell if FOIA access and openness will improve in the Obama Administration, but the memoranda appear to be a promising first step. A number of prominent newspapers have penned editorials

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applauding the memoranda, including the New York Times, Los Angeles Times, Seattle Times, and Baltimore Sun.

The memoranda direct specific actions to be taken by certain executive branch officials (e.g., the Director of OMB, the Attorney General, and the Chief Technology Officer), so we should see new agency guidelines concerning FOIA and an Open Government Directive in the future.