President Obama’s FOIA Memorandum and ATTORNEY GENERAL HOLDER’S FOIA GUIDELINES
“A democracy requires accountability, and accountability requires transparency.”
Clear Presumption of Disclosure
“In the face of doubt, openness prevails.”
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.
“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.”
ATTORNEY GENERAL HOLDER’S FREEDOM OF INFORMATION ACT MEMORANDUM
The Attorney General’s FOIA Guidelines were written to underscore our nation’s “fundamental commitment to open government.”
The Attorney General “strongly encourage[s] agencies to make discretionary disclosures of information.”
Agencies will now be defended “only if

(1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or

(2) disclosure is prohibited by law.”
The Attorney General also comprehensively addresses a range of principles applicable to establishing an effective system for improving transparency.
In doing so, he emphasizes that: “Each agency must be fully accountable for its administration of the FOIA.”
All agency employees are responsible for the FOIA, not just those who interact directly with FOIA requesters.
The Attorney General highlights the key roles played by both the agency Chief FOIA Officers and the FOIA professionals in each agency.
“Unnecessary bureaucratic hurdles have no place in the ‘new era of open Government’ that the President has proclaimed.”
Agencies need to work “proactively” to post information online in advance of FOIA requests.
When responding to requests, agencies are directed to “make it a priority to respond in a timely manner.”
Chief FOIA Officers are asked to review “all aspects of their agencies’ FOIA administration” and to report each year to the Department of Justice on the steps taken “to improve FOIA operations and facilitate information disclosure at their agencies.”
Combined impact of these two memos is to usher in the new era of open Government.
IMPACT OF MEMORANDA

New standards for responding to requests and working with requesters.
IMPACT OF MEMORANDA

New, more limited defensibility standard when agencies withhold records.
New requirement to maximize use of technology to disclose information.
New requirement to post information online affirmatively, in advance of FOIA requests.
New focus on broad array of agency personnel who are responsible for the FOIA.
New accountability standards, particularly for agency Chief FOIA Officers, who must report to the Department of Justice each year.
Starting Point: Altering the Mind Set

The key frame of reference is the new presumption of openness.
To achieve a “new era of open Government,” agencies must think about the FOIA differently.
Starting Point: Altering the Mind Set

Ask “what can be released.”
Records should not be withheld just because an exemption technically or legally might apply.
The disclosure obligation of the FOIA is not absolute.

Congress included exemptions from mandatory disclosure to protect against certain harms, such as harm to national security, harm to personal privacy, and harm to law enforcement interests.
FOIA professionals should examine documents with an eye toward harm.
When an agency determines that it cannot make a full release, it should consider whether it is possible to make a partial release.
Discretionary releases.

Such releases are possible with a number of FOIA exemptions, including Exemptions 2, 5, and 7, but they will be most applicable under Exemption 5.
For certain exemptions, discretionary disclosures are not possible because the information is protected by some other legal authority.
For all records, the sensitivity of the document’s content and its age are universal factors that guide a decision to make a discretionary release.
There is no doubt that records protected by Exemption 5 hold the greatest promise for increased discretionary releases under the Attorney General’s Guidelines.
Such releases will be fully consistent with the purpose of the FOIA to open up agency activity to the light of day.

These are the principles embodied in the FOIA. The President has asked all agencies to renew their commitment to them.
Achieving transparency in new ways.
Providing information to the public proactively.
Anticipate interest in records.
Establish systems to identify records of interest to the public.
Post those records on the agency website.
Utilize technology.
Agencies should exponentially increase the amount of information on their websites.
Working cooperatively with requesters.
“Unnecessary bureaucratic hurdles have no place in the ‘new era of open Government’ that the President has proclaimed.”
Timely Disclosures.
“Long delays should not be viewed as an inevitable and insurmountable consequence of high demand.”
Accountability.
Each agency must be fully accountable for its FOIA administration.
Chief FOIA Officers will be reporting each year to the Department of Justice on the steps “taken to improve FOIA operations and facilitate information disclosure at their agencies.”
Presumption of disclosure applies to all decisions involving the FOIA.

If responding to a request, approach review of documents by asking: What can I release?
SUMMARY

Records should not be withheld merely because they technically fall within an exemption.

Review each document with a focus on whether there is foreseeable harm from disclosure of that particular record.
Determinations of foreseeable harm are made on a case-by-case basis, but universal factors to consider are the age of the document and the sensitivity of its contents.
Make discretionary releases.

When full disclosure is not possible, strive to make partial disclosure.
SUMMARY

When full disclosure is not possible, consider what can be made available to the public on that topic. Ask whether there is information that can be put on the website to satisfy public interest in the topic.
SUMMARY

Separate and apart from the handling of individual FOIA requests, agencies should anticipate interest in records, should set up systems for identifying and retrieving such records, and should post them on the website. Information about agency operations and decisions should be available to the public online.
SUMMARY

Agencies should work cooperatively with requesters and respond promptly to requests.
To achieve the “new era of open Government” that the President has proclaimed will require the commitment of all agency personnel.