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Description of document: Department of State records relating to the implementation of the President's January 2009 Memoranda on FOIA, 2009-2012

Requested date: 29-May-2009

Released date: 16-April-2012

Posted date: 02-July-2012

Source of document: Freedom of Information Act
Office of Information Programs and Services
A/GIS/IPS/RL
US Department of State
Washington, D. C. 20522-8100
Fax: 202-261-8579
[Online FOIA Request Form](#)

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United States Department of State

Washington, D.C. 20520

Case No. F-2009-04398

Segment: ER, IPS and L

APR 16 2012

In response to your online request submitted on May 29, 2009 under the Freedom of Information Act (Title 5 USC Section 552), we initiated searches of the following Department of State record systems: the Central Foreign Policy Records; the Office of Information Programs and Services; and the Office of the Legal Advisor.

All three searches have meanwhile been completed, resulting in the retrieval of four documents that appear to be responsive to your request. After reviewing these documents, we have determined that two may be released in full, and two may be released with excisions. Subsection (b)(5) of the Freedom of Information Act exempts from disclosure inter-agency or intra-agency communications forming part of the deliberative process, attorney client privilege, or attorney work product.

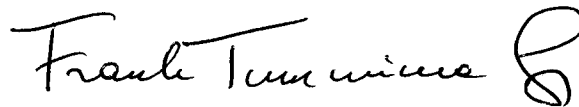
All released material is enclosed. All non-exempt material that is reasonably segregable from the exempt material has been released.

With respect to material withheld by the Department of State, you have the right to appeal our determination within 60 days. A copy of the appeals procedures is enclosed.

The Freedom of Information Act provides for the recovery of the direct costs of searching for and duplicating records requested for non-commercial use. However, no fee is charged if the cost of collecting and processing the fee exceeds the amount of the fee. Since billable costs in this case do not exceed that amount, your request has been processed without charge to you.

We have now completed the processing of your case. If you have any questions, you may write to the Office of Information Programs and Services, SA-2, Department of State, Washington, DC 20522-8100, or telephone us at (202) 261-8484. Please be sure to refer to the case number shown above in all correspondence about this case.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sheryl L. Walter".

Sheryl L. Walter, Director
Office of Information Programs and Services

Enclosures:
As stated.

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**SUMMARY OF ISSUES DISCUSSED AT THE JUNE 2009
MEETINGS OF REVIEWERS AND SENIOR REVIEWERS**

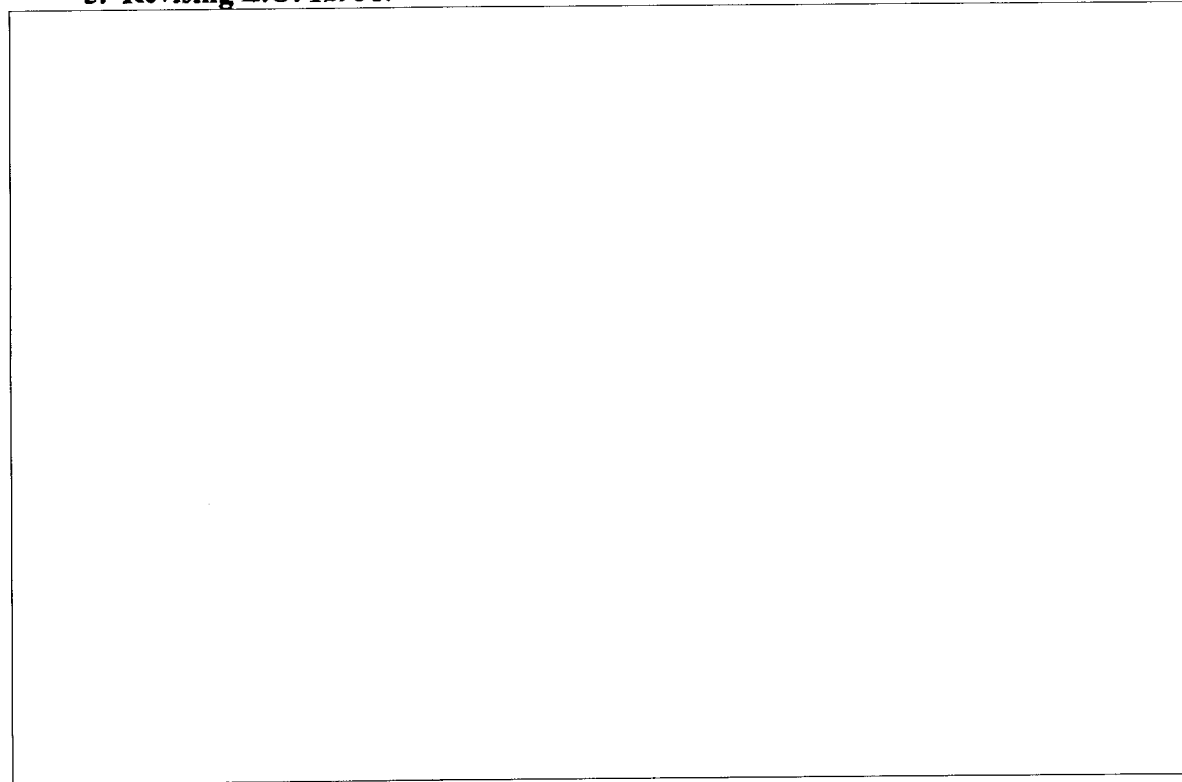
This message summarizes discussions of issues at the June 10 Senior Reviewer Workshop and the June 11 Reviewer Refresher Training Session. It may include additional material on topics covered briefly and/or information covered in one session but not the other. We therefore suggest you review this summary, even if you attended one of the sessions. Drafted by Fred Smith and Nick Murphy. Comments are welcome.

INDEX OF ISSUES DISCUSSED



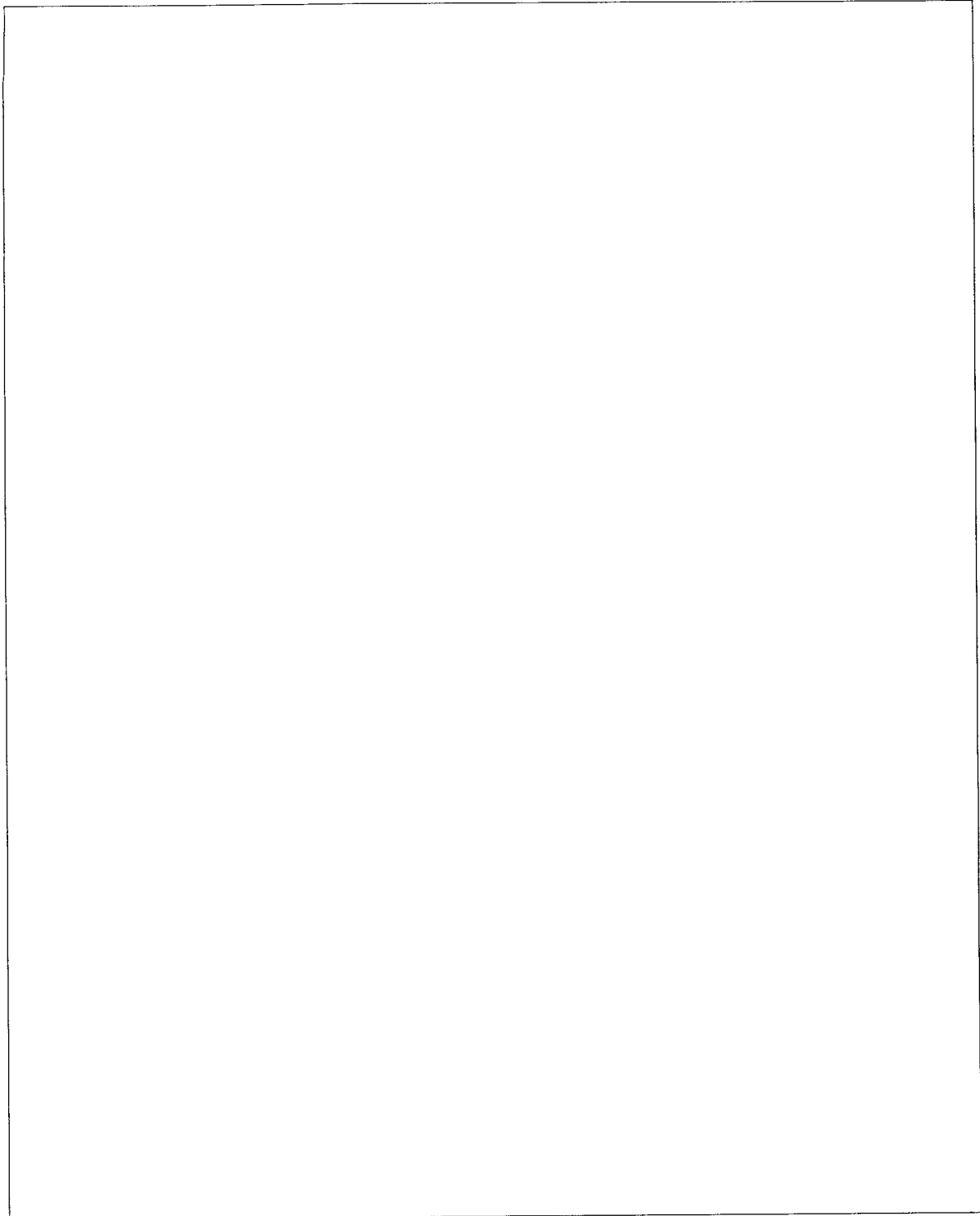
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- 4. Openness Initiatives:**
 - a. President's Jan. 21 Memorandum on Transparency and Open Government.**
 - b. President's Jan. 21 Executive Order on Presidential Records.**
 - c. Freedom of Information.**
 - 1) President's Jan. 21 Memorandum on the FOIA.**
 - 2) Attorney General's March 19 Memorandum on the FOIA.**
 - 3) DOJ's Office of Information Policy Guidance and Discretionary Disclosure.**
- 5. Revising E.O. 12958.**



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REVIEW AUTHORITY: Frank Tumminia, Senior Reviewer



4. Openness Initiatives:

a. President's Jan. 21 Memorandum on Transparency and Open Government. The first in the flurry of issuances by the new administration of pronouncements on open

government was the President's Jan. 21 Memorandum setting forth the principles that government should be 1) transparent, 2) participatory, and 3) collaborative. In the Memorandum, the President directed the Chief Technology Officer, in coordination with the OMB Director, to produce, within 120 days, recommendations of specific actions for agencies to implement these principles.

b. President's Jan. 21 Executive Order on Presidential Records. On the same day, the President issued an executive order establishing policies and procedures governing the assertion of executive privilege by incumbent and former Presidents and revoking E.O. 13233, the Bush executive order on the Presidential Records Act (PRA). The Bush order, issued in 2001, had been seen by many as an effort to thwart the purpose of the PRA to make presidential records generally available to the public twelve years after the end of an administration, when disclosure would be subject only to FOIA exemptions (except exemption five). As a general matter, the Bush order authorized the incumbent President to withhold records of a former President, even when the former President authorized access. It also required the incumbent President to concur in a former President's assertion of privilege, "absent compelling circumstances." Under the Obama order, the incumbent President does not become involved unless the Attorney General or the White House counsel concludes that, upon receiving notice from the Archivist of intent to disclose Presidential records, a substantial question of executive privilege exists. In such a case, the matter goes to the President for decision.

c. Freedom of Information.

1) President's Jan. 21 Memorandum on the FOIA. The memorandum emphasizes that agencies should "adopt a presumption in favor of disclosure" and directs the Attorney General to issue FOIA Guidelines "to underscore that commitment and to ensure that it is realized in practice."

2) Attorney General's March 19 Memorandum on the FOIA. The March 19 memorandum rescinds Attorney General Ashcroft's 2001 memorandum that stated that the DOJ would defend agency withholdings "unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records." In contrast, the Holder memo states that the DOJ "will defend a denial of a FOIA request 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." In short, the Obama administration has returned to the "foreseeable harm" standard of the Clinton administration.

3) DOJ's Office of Information Policy Guidance and Discretionary Disclosure. Soon after the issuance of Attorney General Holder's memorandum, the DOJ's Office of Information Policy held a briefing seminar for FOIA attorneys on the significance of the AG's memorandum, the substance of which was captured in an April 17 extended FOIA Post piece on applying the "foreseeable harm" standard. The OIP guidance states that discretionary releases are possible for "records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5."

OIP notes that with respect to **exemption 1**, if the agency determines that the information is properly classified, no discretionary disclosure is appropriate. Similarly, if material is required to be withheld by a withholding statute encompassed under **exemption 3**, no discretionary release is possible. The courts have generally held that

material falling within **exemption 4** is covered by the Trade Secrets Act, a statute criminalizing the release of confidential commercial and financial information. Accordingly, no discretionary release of exemption 4 material is possible. Disclosure of information falling within **exemptions 6 and 7(c)** is not possible if the information is also protected by the Privacy Act (PA) as the PA prohibits disclosure of information not "required" to be released under the FOIA. (Note that the PA applies only to U.S. citizens and lawful permanent residents.) The OIP guidance reminds that a balancing of interests (i.e., public interest in disclosure against the degree of invasion of privacy) is required under the FOIA privacy provisions and suggests consideration be given to disclosing the information while protecting the identity of the individual involved.

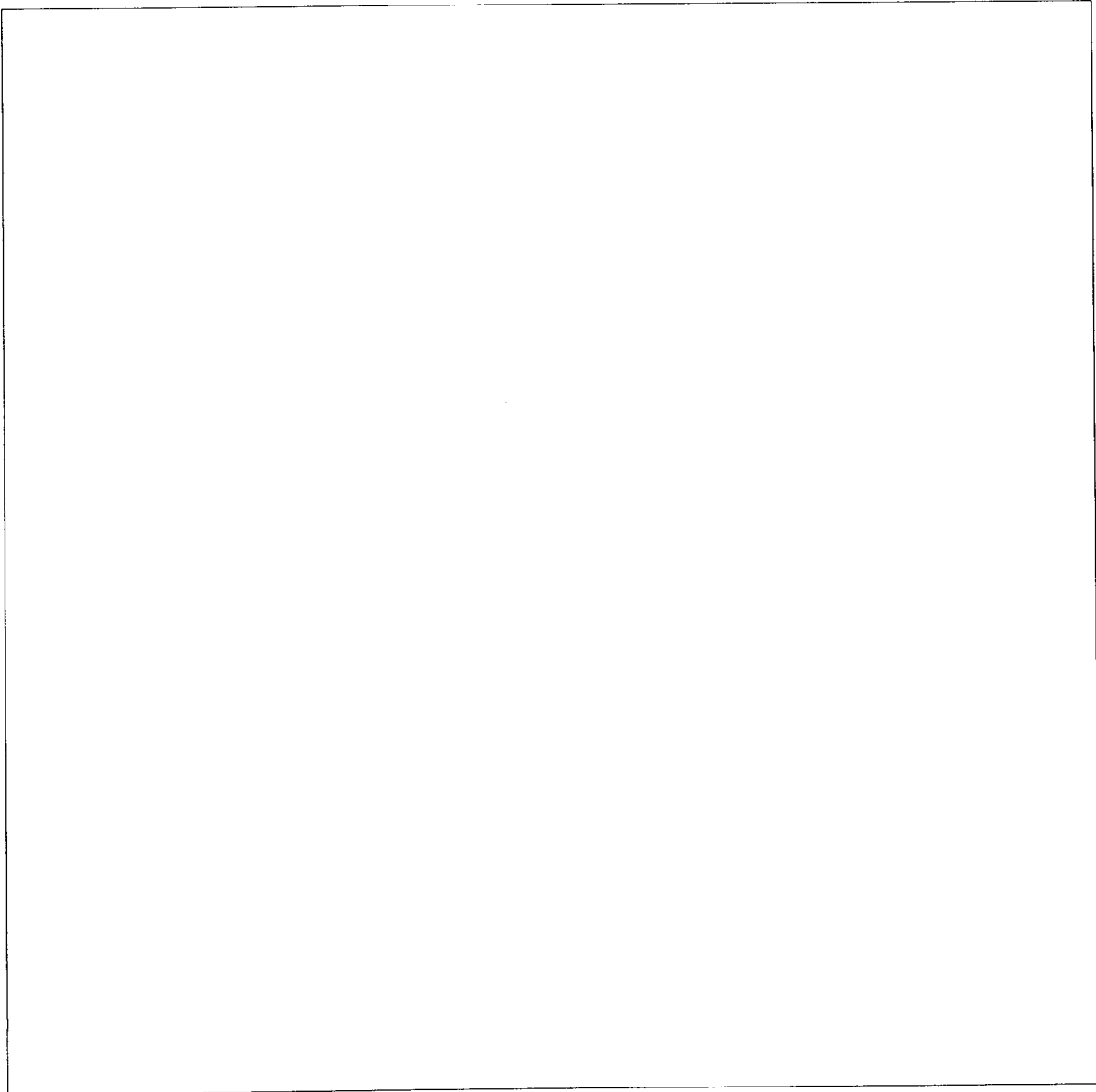
With respect to **exemption 2**, information coming within low 2 is, by definition, trivial, so its disclosure would not cause foreseeable harm. Similarly, high 2 is, by definition, applicable to information the disclosure of which would cause harm. Accordingly, it would not be a candidate for discretionary disclosure. **Exemption 7** (other than 7C) offers some possibilities for discretionary disclosure. The OIP guidance suggests that information relating to law enforcement techniques or procedures now well-known or outdated might be appropriate for discretionary disclosure. So too with confidential sources in older documents.

As before, the greatest potential for discretionary release is seen in the OIP guidance to reside in **exemption 5**. According to the OIP, "Records covered by the deliberative process privilege in particular have significant release potential. In addition to the age of the record and the sensitivity of its content, the nature of the decision at issue, the status of the decision, and the personnel involved, are all factors that should be analyzed in determining whether discretionary release is appropriate." During the seminar, OIP emphasized that to be withheld as deliberative, the information must relate to an identifiable decision. If information does not relate directly to that decision, it should generally be released. Presumably this would mean, for instance, that e-mails exchanged about arranging a meeting to discuss the core decision should not be withheld. Interestingly, the OIP guidance also states that "Documents protected by other Exemption 5 privileges can also be subject to discretionary disclosures."

In the discussion, the possibility of discretionary release of exemption 5 material, especially attorney-client and attorney work-product material, so zealously protected by the Legal Adviser's Office, was suggested. As was noted in the discussion, the attorney-client privilege is intended, primarily, to protect the client so that the client will make full disclosure to the attorney to enable the attorney to fully protect the client's interest. Thus, it is normally considered that the client may waive the privilege so that such normally privileged information may be disclosed. Of course, the situation of information and legal advice exchanged between Department attorneys and bureau clients is somewhat different from that in non-government situations, but this may provide a way to achieve greater disclosure of such exemption 5 information.

5. Revising E.O. 12958. Among the President's openness initiatives was a memorandum of May 27, 2009 ordering that, within ninety days, the NSC Director present a proposal for a revision of E.O. 12958. The same memo directed that a task force chaired by the AG and Secretary of Homeland Security provide recommendations on Controlled Unclassified Information (CUI) – or what is now SBU. (see next item).

Given the very short deadline, the Information Policy Committee (IPC) dealing with issues of information access has been meeting weekly to devise a new draft. The underlying assumption of the effort is that too much information is classified originally and remains classified for too long. The draft that is emerging should permit agencies to continue to protect what they must but will emphasize the need to identify damage to the national security before classifying, require greater training for original and derivative classifiers, and tighten the standards for exempting information from automatic declassification at 25 years. It will also mandate periodic review of classification guides and policies to ensure that material is not being unnecessarily classified. A major new section will create a National Declassification Center (NDC). Its ultimate shape and mission have not been decided, but initially it will address the millions of documents that agencies have referred for other agency review in the 25 year declassification process.



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**SUMMARY OF ISSUES DISCUSSED AT THE FEBRUARY 2009
MEETINGS OF REVIEWERS AND SENIOR REVIEWERS**

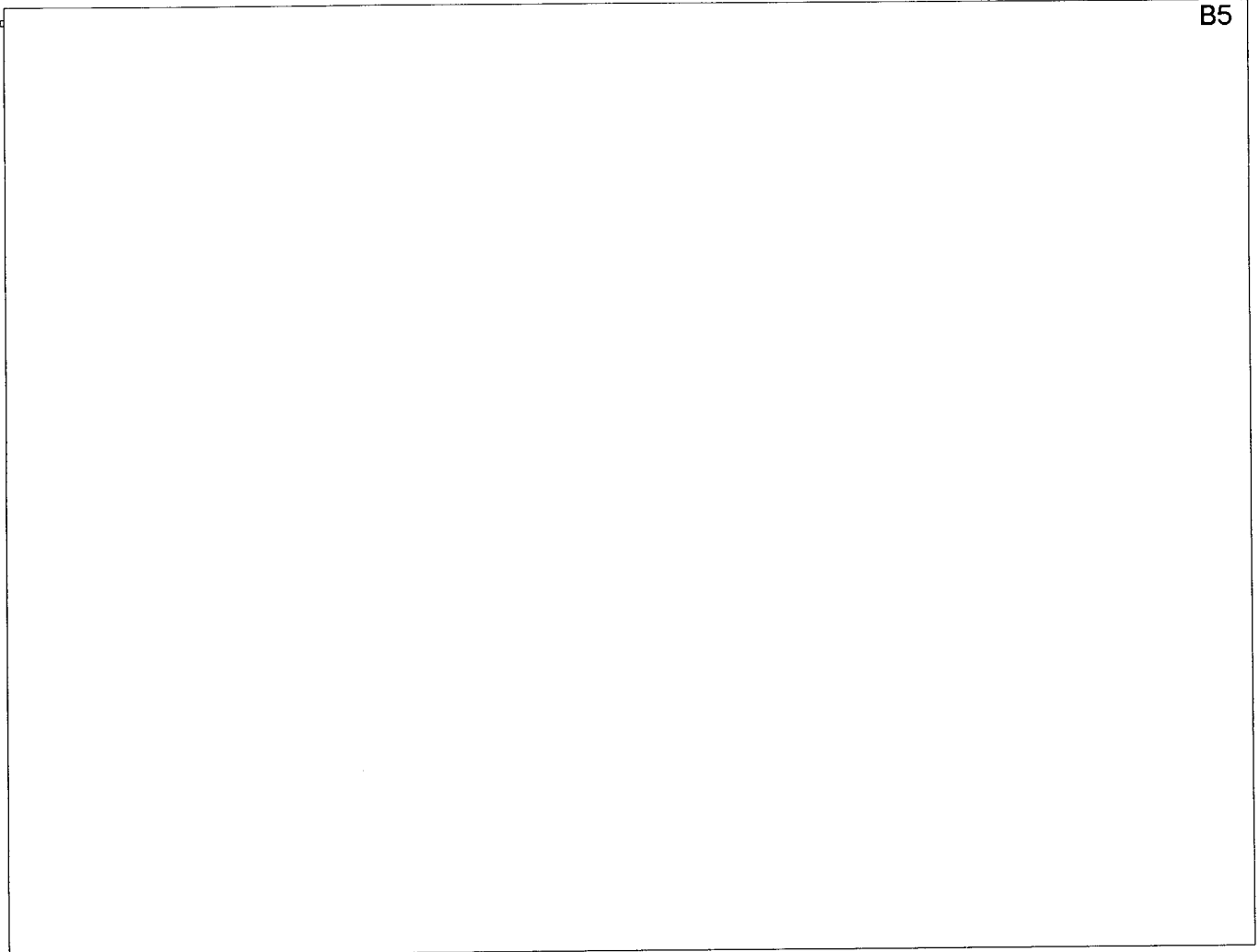
This message summarizes discussions of issues at the February 25 Senior Reviewer Workshop and the February 26 Reviewer Refresher Training Session. It may include additional material on topics covered briefly and/or information covered in one session but not the other. We therefore suggest you review this summary even if you attended one of the sessions. Drafted by Fred Smith and Nick Murphy. Comments are welcome.

INDEX OF ISSUES DISCUSSED



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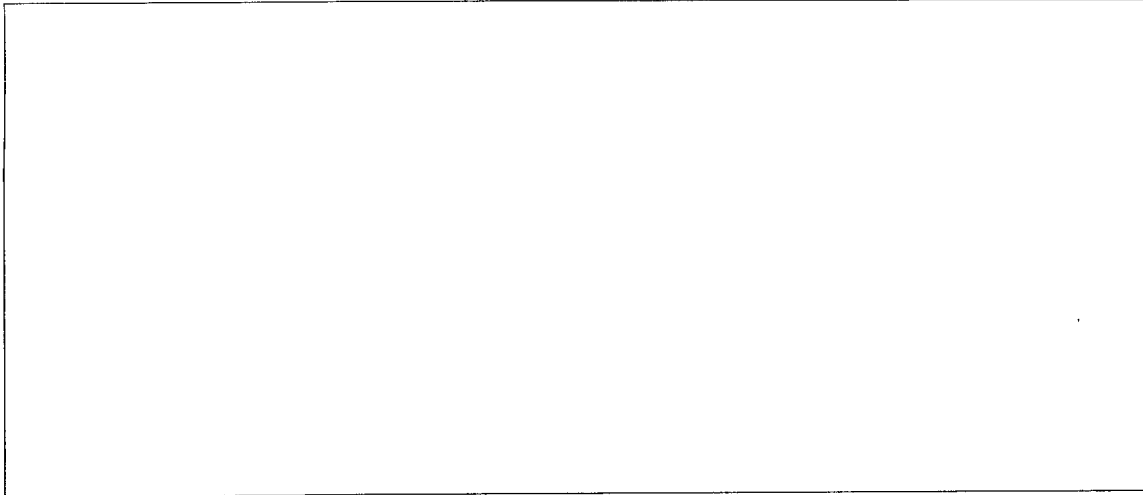
3. New administration's FOIA policy.



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REVIEW AUTHORITY: Frank Tumminia, Senior Reviewer

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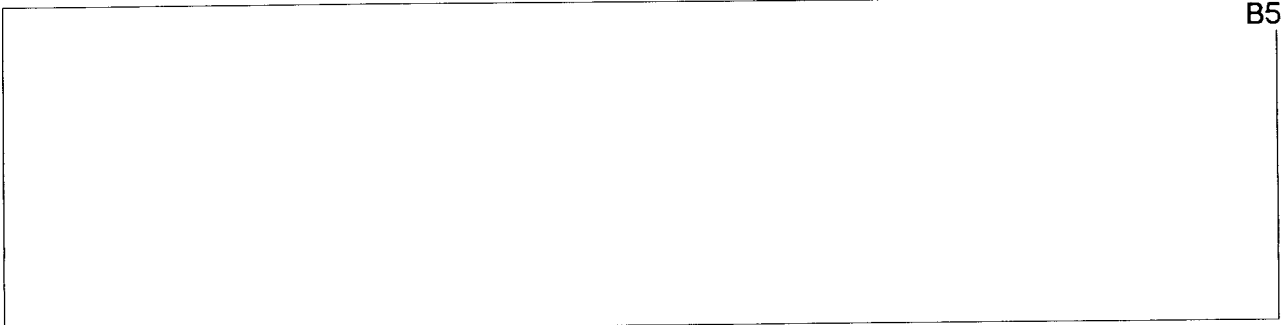


3. New administration's FOIA policy. It was notable that one of the first official acts of President Obama was the issuance, on January 21, of a memorandum for the heads of executive departments and agencies directing them to adopt a presumption in favor of disclosure in order to renew their commitment to the principles embodied in the FOIA. He also directed the Attorney General to issue new guidelines governing the FOIA, which Mr. Holder did on March 19 in somewhat more length than his immediate predecessors. The new guidelines, as expected, specifically revoked the Ashcroft memorandum and returned to something very like the Reno memorandum guidelines:

[T]he Department of Justice will defend a denial of a FOIA request 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 memo also reiterates President's instruction of a presumption of disclosure; encourages agencies to make discretionary disclosures, and to make partial disclosures when full disclosure is not possible. For IPS reviewers there is not much that is really new. We never abandoned in practice the Reno standard of foreseeable harm. The Holder memorandum might, however, make our job easier in working with offices and bureaus (see next item.) The DOJ's Office of Information and Policy (note the new name: formerly Office of Information and Privacy) will over time be issuing additional guidance to agencies.

4. The Secretary Issues Statement on FOIA. On the occasion of FOIA Day, March 16, Secretary Clinton issued a statement (initially drafted in IPS) putting the Department solidly behind the president's openness initiatives, particularly as regards FOIA. While the statement was necessarily general, it might be a useful lever in getting better responses to search taskings and for reviewers to use in their discussions with bureaus over what may be released.



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