

# Legal Insights: Obama Administration Broadens Freedom of Information Act Disclosures

By Ross Crown

The Obama Administration recently released new guidelines for disclosure of information under the Freedom of Information Act (FOIA). Government contractors frequently submit requests for release of information under FOIA and also are frequently the subject of such requests. How the new administration's handling of FOIA will impact these requests should be of interest to those doing business with the federal government.

## New FOIA Guidelines

On January 21, 2009, President Barack Obama issued a Memorandum on the Freedom of Information Act. In this brief statement, the President said that FOIA "should be administered with a clear presumption: In the face of doubt, openness prevails." He added that the "presumption of disclosure should be applied to all decisions involving FOIA." The President then directed the Attorney General to issue new guidelines governing FOIA "reaffirming the commitment to accountability and transparency."



In accordance with the President's memorandum, on March 19, 2009, Attorney General Eric Holder issued his own memorandum on FOIA. Citing a "presumption of openness", Mr. Holder stated that an agency should not withhold information simply because it may do so legally. He strongly encouraged agencies to make discretionary disclosures of information. Moreover, when an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure.

The Attorney General's memorandum includes new FOIA guidelines. Mr. Holder rescinded the previous guidelines issued by the Bush Administration on October 12, 2001 which committed the Department of Justice to defending decisions to withhold records "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." Instead, the Attorney General directed the Department of Justice to 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."

## FOIA Exemptions

Congress enacted the Freedom of Information Act, 5 U.S.C. §552, to set a policy of broad disclosure of Government documents to ensure an informed citizenry, which is, in turn, considered vital to the functioning of a democratic society. At the same time, however, Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information. Balancing these private and public interests, Congress enacted nine exemptions to FOIA. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n.*, 975 F.2d 871 (D.C. Cir. 1992).

The exemption most often invoked in response to requests involving government contracts is Exemption 4. Exemption 4 provides that the disclosure requirement does not apply to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." § 552 (b) (4). Although the Government is not precluded from disclosing information within Exemption 4 (an exemption just means that an agency is not compelled to disclose), the Trade Secrets Act, 18 U.S.C. §1905, is at least coextensive with Exemption 4. The Trade Secrets Act does prohibit the Government from producing information within its scope. *McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin.*, 180 F.3d 303 (D.C. Cir. 1999).

Exemption 4 has been construed on many occasions by federal courts. In elaborating on the scope of Exemption 4, it has been held that confidential information submitted voluntarily to the Government is "confidential" for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained. *Critical Mass Energy Project*. Information submitted involuntarily is protected under Exemption 4 if its disclosure would be likely either to (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *McDonnell Douglas Corp.*

A common target of FOIA requests in the government contracts arena is line item pricing information. Regardless of whether line item pricing is deemed to have been submitted voluntarily or involuntarily, courts have found that this information should be considered confidential commercial or financial information. *McDonnell Douglas Corp.*

## Impact of New Guidelines

Government contractors need to be aware of the impact of the new administration guidelines on FOIA requests. The Attorney General wants agencies to adopt a more expansive view of their obligation to produce information under FOIA. For contractors requesting information from the Government, this is good news. FOIA requests are now likely to receive more favorable responses from the Government. On the other hand, contractors who are the subject of FOIA requests may be concerned to find agencies are willing to produce information that arguably falls within Exemption 4 as construed by the courts. Under these circumstances, such contractors need to be prepared to seek judicial relief. As matters presently stand, contractors looking to keep proprietary information confidential may receive a more sympathetic reception from the courts than from the agencies. •

Ross is a partner in the Albuquerque office of Lewis and Roca LLP. This article is intended for general information only and should not be construed as legal advice or opinion. Any questions concerning your legal rights or obligations in any particular circumstance should be directed to your lawyer.