

USALSA Report

United States Army Legal Services Agency

Litigation Division Note

Responding to Freedom of Information Act (FOIA) Requests for Contractor Post-Performance Evaluations

Introduction

Under the Competition in Contracting Act of 1984 (CICA),¹ a contractor must be “responsible” to compete for a government contract.² One of the factors agencies consider when determining a contractor’s responsibility is its performance record.³ Accordingly, the Federal Acquisition Regulation (FAR)⁴ requires agencies to record and maintain contractor performance information to use as source selection information for future procurements.⁵

The agency tailors the content and format of these reports “to the size, content, and complexity of the contractual requirements.”⁶ The reports “generally provide for input . . . from the technical office, contracting office, and . . . end users of the product or service.”⁷ In addition to objective data, they contain

potentially subjective matter, such as the evaluator’s ratings and written comments.⁸

Contracting officers may receive requests for these evaluations from a contractor’s competitors and other members of the public under the FOIA.⁹ In response, agencies routinely assert the Procurement Integrity Act (PIA)¹⁰ as an authority for withholding source selection information under FOIA exemption (b)(3) (Exemption 3).¹¹ This basis, however, might not be defensible in litigation. This note recommends two privileges under FOIA’s exemption (b)(5) (Exemption 5) that agencies should examine when responding to requests for contractor post-performance evaluations: confidential commercial information generated by the government and deliberative process material.¹²

The FAR Requires Contract Performance Evaluations

The obligation to prepare a performance evaluation depends on the type and dollar amount of the contract. For all “contracts [over] \$1,000,000 (regardless of the date of contract

1. Competition in Contracting Act of 1984, Pub. L. No. 98-369, Div. B, Title VII, 98 Stat. 1175 (1984) (codified as amended in scattered sections of 31 U.S.C. and 41 U.S.C.) [hereinafter CICA].

2. See 41 U.S.C. § 403(6)-(7) (2000); 48 C.F.R. § 9.103(b) (2001) (“No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility.”).

3. See 41 U.S.C. § 403(7)(c); 48 C.F.R. § 9.104-1(c) (“To be determined responsible, a prospective contractor must . . . have a satisfactory performance record.”); *id.* § 9.104-3(b).

4. 48 C.F.R. §§ 42.1500-.1503.

5. *Id.* § 42.1503(b).

6. *Id.* § 42.1502(a).

7. *Id.* § 42.1503(a).

8. See General Servs. Admin., Standard Form 1420: Performance Evaluation – Construction Contracts (Oct. 1983), available at <http://www.deskbook.osd.mil/app-files/RLIB0072.pdf>.

9. 5 U.S.C. § 552 (2000).

10. 41 U.S.C. § 423 (2000).

11. 5 U.S.C. § 552(b)(3). Exemption 3 permits withholding of records when:

specifically exempted from disclosure by statute (other than 5 U.S.C. § 552a), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Id.

12. *Id.* § 552(b)(5). Exemption 5 permits withholding of “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” *Id.*

award) and each contract in excess of \$100,000 beginning not later than 1 January 1998,” agencies must prepare contractor performance evaluations on completion of the contracted work.¹³ The FAR also requires performance evaluations at the completion of every government construction project of “\$500,000 or more; or [m]ore than \$10,000 if the contract was terminated for default,”¹⁴ and for architect-engineer contracts that exceed \$25,000.¹⁵

All post-performance evaluations may be used as source selection information for any federal agency procurement within three years of the completion of contract performance.¹⁶ The principal purpose for making and collecting the performance evaluations is to ensure that all prospective contractors are responsible before they are awarded a government contract.¹⁷ Upon request, all federal government departments and agencies may share these evaluations to support future award decisions.¹⁸

The FAR Requires Agencies to Withhold Reports as “Source Selection Information”

During the three-year period of potential use as source selection information, the FAR prohibits release of the reports to any party “other than Government personnel and the contractor whose performance is being evaluated.”¹⁹ The rationale is expressly set forth: “Disclosure . . . could cause harm both to

the commercial interest of the Government and to the competitive position of the contractor being evaluated as well as impede the efficiency of Government operations.”²⁰ The FAR provisions, however, are subject to the statutory disclosure obligations imposed by the FOIA.²¹ Except for specific exemptions, the FOIA generally provides public access to federal agency records.²²

Consequently, contracting officials may not withhold post-performance evaluations from a FOIA requester based solely upon the dictates of the FAR. To withhold a report or portion thereof, contracting personnel must properly assert an applicable FOIA exemption.

FOIA Exemption 3 and the Procurement Integrity Act

The PIA is a statutory prohibition upon disclosing procurement information, including source selection information, “before the award of a [public] contract to which the information relates.”²³ A 1996 amendment, however, contains a savings clause that arguably subordinates the PIA to the FOIA.²⁴ There are no published cases which determine that the PIA is a valid FOIA Exemption 3 withholding statute.²⁵ Because the PIA is not a firmly established withholding statute,²⁶ components of the Department of Defense that seek to withhold post-performance evaluations should consider other applicable FOIA exemptions for justification.

13. 48 C.F.R. § 42.1502(a) (2001). Contracts performed by Federal Prison Industries, Inc. or by people who are blind or severely disabled are exempt from performance evaluation. *See id.* § 42.1502(b).

14. *Id.* § 36.201(a).

15. *Id.* § 36.604(a). Agencies may also conduct post-performance evaluations of architect-engineer contracts under \$25,000. *Id.*

16. *Id.* § 42.1503(d)-(e).

17. *See id.* §§ 9.104-3(b), 42.1501.

18. *Id.* § 42.1503(c).

19. *Id.* § 42.1503(b).

20. *Id.*

21. *Id.* § 9.105-3(a) (“Except as provided in [the] Freedom of Information Act, information . . . accumulated for purposes of determining the responsibility of a prospective contractor shall not be released or disclosed outside the Government.”). *Id.*

22. *See* 5 U.S.C. § 552(a)-(b) (2000).

23. 41 U.S.C. § 423(a) (2000).

24. *See id.* § 423(h)(7). The PIA is subject to “any requirements . . . established under any other law or regulation.” *Id.* (emphasis added).

25. The Department of Defense (DOD) Directorate for Freedom of Information and Security Review (DFOISR) publishes a list of statutes commonly used within the DOD determined valid Exemption 3 statutes through litigation. Memorandum, H. J. McIntyre, Director, DFOISR, (Mar. 3, 2001) (on file with DFOISR). *But see* Legal and Safety Employee Research, Inc. v. United States Dep’t of the Army, No. 00-1748 (E.D. Cal. May 7, 2001).

26. A statute should be considered “firmly established” as an Exemption 3 withholding statute when litigation has established that the statute either “(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.” 5 U.S.C. § 552(b)(3). *See, e.g.,* Reporters Comm. for Freedom of the Press v. United States Dep’t of Justice, 816 F.2d 730, 734 (D.C. Cir. 1987), *modified on other grounds*, 831 F.2d 1124 (D.C. Cir. 1987), *rev’d on other grounds*, 489 U.S. 749 (1989).

Even if the PIA qualified as an Exemption 3 statute, it probably would not encompass post-performance evaluations. The PIA's specific categories of "source selection information" do not include performance evaluations.²⁷ The catchall definition of source selection information covers material marked on a case-by-case basis as source selection information, but it also fails to embrace these evaluations.²⁸ The FAR does not direct any case-by-case determinations or provide any criteria for making them. Indeed, such directions would be contrary to the FAR mandate for collecting and sharing performance evaluations.²⁹

It will likely require a legislative amendment to the PIA for post-performance evaluation reports to fall conclusively under Exemption 3. The PIA will be firmly established as an Exemption 3 withholding statute only when it is clear that the savings clause in the 1996 amendment does not subordinate the statute to the FOIA. Congress should also amend the definition section of the PIA to include post-performance evaluation reports as source selection information. Until then, Exemption 3 and the PIA do not provide a sound legal basis for withholding post-performance evaluations.

FOIA Exemption 5 as a Basis for Withholding Post-Performance Evaluations

Exemption 5 might succeed where Exemption 3 apparently fails in justifying the withholding of post-performance evaluations.³⁰ Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."³¹ The language of Exemption 5 covers all documents not routinely discoverable in litigation with the agency.³² Contracting officers should consider the Exemption 5 privileges afforded to

confidential commercial information and to deliberative inter-agency or intra-agency internal memorandums, as discussed in the following sections.

Confidential Commercial Information - The Merrill Privilege

In *Federal Open Market Committee of the Federal Reserve System v. Merrill*, the Supreme Court ruled that Exemption 5 incorporated a qualified privilege for confidential commercial information when the "information is generated by the Government itself in the process leading up to awarding a contract."³³ It explicitly recognized an Exemption 5 privilege in the context of a government procurement program.³⁴

The Court applied a two-pronged test to determine if Exemption 5 applied to the information the government sought to withhold under the FOIA. The first prong was whether the documents were confidential commercial information. The second prong was whether the documents would be privileged in civil discovery.³⁵

The Court first determined that the documents were commercial information, describing them as "substantially similar to confidential commercial information generated in the process of awarding a contract."³⁶ Then it found that the documents would be protected in civil discovery, observing that "the sensitivity of the secrets involved and the harm that would be inflicted upon the government by premature disclosure should serve as relevant criteria in determining the applicability of the Exemption 5 privilege."³⁷

In *Morrison-Knudsen Co. v. Department of Army*, the District Court for the District of Columbia³⁸ applied this analysis to documents the government used to formulate its own bid in the

27. See 41 U.S.C. § 423 (f)(2)(A)-(I). In the context of a pending procurement, post-performance evaluations could arguably fall under one of the specific definitions if incorporated into the evaluation of proposals. See *id.*

28. See *id.* § 423 (f)(2)(J). Subparagraph (J) is the catchall provision: "other information marked as 'source selection information' based on a case-by-case determination by the head of the agency, his designees, or the contracting officer that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates." *Id.*

29. 48 C.F.R. § 42.1503(b)-(c) (2001).

30. In addition to the two FOIA Exemption 5 privileges discussed in this note, other FOIA exemptions may apply to a particular record. These include, but are not limited to, exemptions for classified information, contractor trade secrets and commercial information, and Privacy Act material. See 5 U.S.C. § 552(b)(1), (3), (4).

31. *Id.* § 552(b)(5).

32. *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975).

33. 443 U.S. 340, 360 (1979).

34. *Id.*

35. *Id.* at 361.

36. *Id.*

37. *Id.* at 363.

A-76 procurement process.³⁹ The court found that because the government relied on the documents in formulating its bid, the documents were commercial information created by the government for purposes relating to the federal procurement process. After examining evidence of the government's intent to withhold the information from other potential contractors and the public, the court deemed the information to be confidential as well.⁴⁰ The court considered whether the documents contained sensitive commercial information, not otherwise available, which would significantly harm the A-76 program if released before the submission of bids.⁴¹ It found that the documents would enable an informed bidder to approximate a winning bid price more accurately than would be otherwise possible using generally available data and the information released with the bid solicitation.⁴²

Contractor Post-Performance Evaluation Reports Are Confidential Commercial Information

*Merrill*⁴³ and its progeny establish the test for determining the confidentiality of commercial information. Although there is a dearth of case law addressing the applicability of these privileges to post-performance evaluations used as source selection information, the evaluations appear to easily satisfy all requirements of the two-prong *Merrill* test.

Under the first prong, information must satisfy three elements. The post-performance evaluations must be "confidential," "commercial information," and "generated by the

government."⁴⁴ Federal Acquisition Regulation subpart 42.15 provides the necessary information to answer each element of this prong. Subpart 42.15 states that "[t]he completed evaluation shall not be released to other than Government personnel and the contractor whose performance is being evaluated."⁴⁵ Therefore, the evaluations are confidential. This FAR provision also designates post-performance evaluations as source selection information for use in government procurements, so the evaluations are commercial information as well.⁴⁶ Finally, subpart 42.15 confirms that the government generates the evaluations.⁴⁷

The second prong of the *Merrill* test is whether the documents would be privileged in civil discovery.⁴⁸ Under Federal Rule of Civil Procedure 26(c)(7), "a trade secret or other confidential research, development, or commercial information" can be protected from discovery in litigation.⁴⁹ In the procurement context, "[t]he theory behind a privilege for confidential commercial information generated in the process of awarding a [government] contract . . . is . . . that the Government will be placed at a competitive disadvantage or that consummation of the contract may be endangered."⁵⁰

Again, the FAR provides the applicable information. Subpart 42.15 expressly provides that disclosure of the evaluations "could cause harm both to the commercial interest of the Government and to the competitive position of the contractor being evaluated as well as impede the efficiency of Government operations."⁵¹ This is consistent with the analysis required by *Merrill*,⁵² and suggests that the FAR Council may have been

38. A FOIA suit may be brought in the district where the complainant resides, the district where the agency records are located, and the District of Columbia. 5 U.S.C. § 552(a)(4)(B) (2000).

39. 595 F. Supp. 352, 354 (D.D.C. 1984), *aff'd*, 762 F.2d 138 (D.C. Cir. 1985). These documents related to manpower distribution by staffing and workload, staffing of functions and salary costs, required maintenance cost estimates, employee and cost data, and a table of maintenance requirements performed in-house, contracted out, and left undone. *Id.* at 353 n.3. *See generally* FEDERAL OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (Aug. 4, 1983, Revised 1999).

40. *Morrison-Knudsen*, 595 F. Supp. at 353-55.

41. *Id.* at 356.

42. *Id.* at 355.

43. *Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340 (1979).

44. *See Merrill*, 443 U.S. at 360.

45. 48 C.F.R. § 42.1503(b) (2001).

46. *Id.*

47. *Id.* § 42.1502(a) (stating that agencies generate the evaluations).

48. *See Merrill*, 443 U.S. at 361.

49. FED. R. CIV. P. 26(c)(7).

50. *Merrill*, 443 U.S. at 360.

51. 48 C.F.R. § 42.1503(b).

mindful of FOIA Exemption 5 and the *Merrill* test when drafting subpart 42.15.

In the broadest sense, the harm to the government is the danger that disclosure will significantly reduce competition. Public availability of the contractor post-performance evaluations obfuscates the document's original significance (and the government's purpose for generating the evaluations) and greatly increases the risk of detrimental usage. The most obvious of these risks is the potential competitor's use of the evaluation against the contractor in the contract award process.

To appreciate the potential harm to the government, one must recognize the contractor's point of view. Contractors who do not want their post-performance evaluations freely disseminated might discontinue bidding on government contracts. Reduced competition hurts the government procurement process because it tends to raise contract prices and reduce quality and innovation. Recognizing this, Congress passed the CICA in 1984 to ensure competition in government contracting to the maximum extent practicable.⁵³

The Evaluations May Also Qualify Under the "Deliberative Process" Privilege

Contracting officials seeking to withhold information may also consider Exemption 5's deliberative process privilege. This exemption protects the government's internal consultative process by preserving the confidentiality of opinions, recommendations, and deliberations underlying government decisions and policies.⁵⁴ The broad scope of the privilege encourages agency employees to express their opinions frankly, without the inhibiting fear of publicity. It also protects against

public confusion resulting from the disclosure of communications that help shape an agency action, but actually are not the basis for the final action.⁵⁵

As the Supreme Court stated, the ultimate purpose of the Exemption 5 deliberative process privilege is to "prevent injury to the quality of agency decisions."⁵⁶ While the privilege undoubtedly protects the policy formation process, its overarching purpose is to protect the integrity of the decision-making process by ensuring that agency officials do not operate "in a fishbowl."⁵⁷ The privilege exists in part to prevent disclosure from discouraging candid discussion within the agency.⁵⁸

To properly invoke the Exemption 5 deliberative process privilege, the agency must show that the protected communication is pre-decisional—"a]ntecedent to the adoption of an agency policy,"⁵⁹ and deliberative—recommendations or opinions on "legal or policy matters."⁶⁰ The privilege is not limited to agency policies, but also covers agency decisions that are not necessarily policy matters. The Supreme Court has stated that the privilege exempts "materials reflecting deliberative or policy-making processes"⁶¹ In addition, the privilege covers "materials reflecting the advisory and consultative process by which decisions *and* policies are formulated."⁶²

Every court of appeals that has considered the issue has expressly rejected the argument that the privilege is limited to policy decisions. In *Providence Journal Co. v. Department of the Army*, the Court of Appeals for the First Circuit reversed a district court opinion that held that an Inspector General report did not fall within the deliberative process privilege.⁶³ The district court had stated that it was not a deliberative policy-making document "because it concerned the discipline of specified individuals rather than general disciplinary issues."⁶⁴ The appel-

52. See *Merrill*, 443 U.S. at 361-63.

53. See CICA, *supra* note 1. See also Armed Services Procurement Act of 1947, 10 U.S.C. §§ 2304-2305 (2000); Federal Property and Administrative Services Act of 1949, 41 U.S.C. §§ 253-253(a) (2000); Office of Federal Procurement Policy Act, 41 U.S.C. §§ 401-424 (2000).

54. See *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 772 (D.C. Cir. 1978) (en banc).

55. See *Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice*, 742 F.2d 1484, 1497 (D.C. Cir. 1984); *Russell v. United States Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982).

56. *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975).

57. *EPA v. Mink*, 410 U.S. 73, 87 (1972) (quoting S. REP. No. 89-813, at 9 (1965)).

58. *Access Reports v. United States Dep't of Justice*, 926 F.2d 1192, 1195 (D.C. Cir. 1991).

59. *Jordan*, 591 F.2d at 774.

60. *Id.*

61. *Mink*, 410 U.S. at 89 (emphasis added). See also *id.* at 87 (referring to "legal or policy matters").

62. *The Army Times Publ'g Co. v. United States Dep't of the Air Force*, No. 91-5395, slip op. at 5 (D.C. Cir. 1993) (emphasis added). See also *Access Reports*, 926 F.2d at 1194; *Wolfe v. United States Dep't of Health & Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc).

63. 981 F.2d 552 (1st Cir. 1992).

late court rejected this approach, stating that this “deliberative task is no less an agency function than the formulation or promulgation of agency disciplinary policy.”⁶⁵ The court found no authority for the distinction between reports discussing general policy matters and those involving investigations of specific individuals.⁶⁶ It held that “the appropriate judicial inquiry is whether the agency document was prepared to facilitate and inform a final decision or deliberative function entrusted to the agency.”⁶⁷

Similarly, in *National Wildlife Federation v. United States Forest Service*,⁶⁸ the Court of Appeals for the Ninth Circuit expressly rejected the plaintiff’s argument that “opinions and recommendations regarding facts or consequences of facts,” as opposed to policy recommendations, do not fall within the deliberative process privilege.⁶⁹ The court found no requirement for a document to contain recommendations on law or policy to be “deliberative” for purposes of Exemption 5.⁷⁰

Congress specifically intended for Exemption 5 to protect internal agency deliberations, thereby ensuring the “full and frank exchange of opinions” within an agency.⁷¹ Congress noted that an agency cannot always operate effectively if required to disclose documents or information which it received or generated before it “completes *the process of awarding a contract* or issuing an order, decision, or regulation”⁷² Taken together, the “full and frank exchange of opinions” language and the express intent to protect against pre-award disclosure of information reflects that Congress considered the deliberative process privilege to apply to the awarding of government contracts.

When the Supreme Court confirmed that a specific qualified privilege exists for commercial information in the context of

government contracting, the theory focused upon the competitive disadvantage to the government.⁷³ Although *Merrill* distinguished the confidential commercial information privilege, the Court did not render this privilege mutually exclusive from the deliberative process privilege. Therefore, confidential commercial information of the government that is also deliberative and pre-decisional should also be evaluated under the deliberative process privilege of Exemption 5.

Contractor Performance Evaluations Are Pre-Decisional and Deliberative

Contractor performance evaluations might be viewed as post-decisional because they are prepared upon the conclusion of a government contract. They are, however, more appropriately characterized as pre-decisional documents because the evaluation’s primary purpose is to support future government procurements. The post-performance evaluations are prepared in accordance with the FAR and implement the CICA mandate to determine contractor responsibility through the evaluation of past performance records.⁷⁴

Contractor performance evaluations may vary in form and content, depending upon the nature of the contract and the agency requirements.⁷⁵ Nonetheless, they are all deliberative documents. Performance evaluations contain value judgments regarding contractor’s performance. The evaluations normally include an evaluator’s opinions, conclusions, and recommendations concerning the contractor’s performance.⁷⁶ They are a necessary part of the process for making decisions regarding contractor responsibility for future procurements.⁷⁷

64. *Id.* at 559-60.

65. *Id.*

66. *Id.*

67. *Id.*

68. 861 F.2d 1114 (9th Cir. 1988).

69. *Id.* at 1118-20.

70. *Id.* at 1118.

71. *Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 359 (1979) (quoting H.R. REP. NO. 89-1497, at 10 (1966)).

72. *Id.* (emphasis added).

73. *See id.* at 360.

74. *See* 41 U.S.C. § 403(6)-(7) (2000); 48 C.F.R. § 9.103(b) (2001).

75. *See* 48 C.F.R. § 42.1502(a).

76. *See supra* notes 7-8 and accompanying text.

77. *See* 41 U.S.C. § 403(6)-(7); 48 C.F.R. § 9.103(b).

Additional FOIA Considerations - Segregate Releasable Portions and Apply the “Foreseeable Harm” Standard

After identifying any applicable exemptions, the FOIA requires agency officials to release “any reasonably segregable portion of a record.”⁷⁸ An entire record may be withheld only if the agency determines that the non-exempt material is so “inextricably intertwined” with the exempt material that the released portion would only be “essentially meaningless words and phrases.”⁷⁹ In the context of deliberative material, the distinction between fact and deliberation is not always clear; the process of deciding what facts belong in a report can be an exercise of judgment that renders the facts themselves exempt.⁸⁰ Consequently, contracting officers should seek help from their legal advisors.

The Department of Justice no longer encourages the discretionary release of exempt material based on a foreseeable harm analysis.⁸¹ Although the new FOIA guidance does not affirmatively discourage discretionary releases, it emphasizes the Administration’s commitment to protecting agency deliberations and sensitive business information.⁸²

The FAR drafters decided that agencies cannot keep post-performance evaluations as source selection information for longer than three years after contract performance.⁸³ Presumably, this is because release of the evaluations carries less risk

to the procurement process as the information grows older. Because the evaluations must lose their “source selection information” status after three years, it will be more difficult to justify withholding them afterwards as confidential commercial information or pre-decisional material. On the other hand, an earlier discretionary release remains a possibility in the right circumstances.

Conclusion

The PIA will remain a questionable basis for withholding contractor performance evaluations under FOIA Exemption 3 unless it becomes firmly established as a qualifying statute and defines the evaluations as source selection information. When responding to a FOIA request for contractor post-performance evaluations, an agency contemplating withholding the information should consider the Exemption 5 privileges extended to the government’s confidential commercial information and deliberative material. Freedom of Information Act officials and their legal advisors should remain mindful of the duty to segregate releasable materials, as well as the recent Department of Justice guidance on discretionary release. Knowledgeable legal advisors can offer valuable assistance to contracting officers and FOIA officers who must navigate this system of exemptions and obligations. Major Scott Reid.

78. 5 U.S.C. § 552(b) (2000). “Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” *Id.*

79. *See, e.g.,* Neufeld v. IRS, 646 F.2d 661, 663 (D.C. Cir. 1981).

80. *Montrose Chem. Co. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974). *See generally* U.S. DEP’T OF JUSTICE, OFFICE OF INFO. AND PRIVACY, JUSTICE DEPARTMENT GUIDE TO THE FREEDOM OF INFORMATION ACT 247-52 (2000).

81. Memorandum from the Att’y Gen., to Heads of all Federal Departments and Agencies, subject: The Freedom of Information Act (15 Oct. 2001) [hereinafter FOIA memo, 15 Oct. 2001] (regarding the FOIA), available at <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>. The memorandum advises agencies to make a discretionary release of exempt material “only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.” *Id.* The new policy supercedes the previous October 1993 policy statement that encouraged discretionary release. Memorandum from the Att’y Gen., to Heads of Departments and Agencies, subject: The Freedom of Information Act (4 Oct. 1993) (regarding the FOIA), available at <http://www.fas.org/sgp/clinton/reno.html>.

82. *See* FOIA memo, 15 Oct. 2001, *supra* note 81.

83. *See* 48 C.F.R. § 42.1503(e).