

**FOIA Risk Assessment**

Issue	Description	Federal Government Position during Bush Administration	Federal Government Position during Obama Administration
<b>Low</b>			
CREW vs. EPA	FOIA suit for documents related to the firing of an alleged whistle blower.		Agency has made additional releases of previously withheld material after agreeing to re-review documents withheld under Exemption 5
CREW vs. Council on Environmental Quality	FOIA suit for documents related to the Bush administration's global warming policies.		Agency has made additional releases of previously withheld material after agreeing to re-review documents withheld under Exemption 5
<b>Guarded</b>			
CREW v. Office of Administration (OA)	FOIA lawsuit seeking documentation OA prepared when it discovered the missing email problem and its proposals – never implemented – to restore missing email and put an effective electronic record keeping system in place.	During litigation, OA suddenly declared it was not an agency subject to the FOIA. The district court agreed, dismissing the case, and the D.C. Cir. affirmed that dismissal on the ground OA is not an agency and, therefore, is not subject to the FOIA	37 organizations wrote to White House counsel on May 14, 2009, asking that White House, as a matter of policy and consistent with transparency pledge, make records of OA publicly available; White House has yet to respond. Every president except George W. Bush has treated OA as an agency since its inception, adopting comprehensive FOIA regulations and processing hundreds of requests.

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<p><u>EFF v. Office of the Director of Nat'l Intelligence, et al.</u>, Civ. Nos. 08-1023, 08-2997 (N.D. Cal.):</p>	<p>In several FOIA requests submitted in December 2007 and April 2008, EFF asked the Office of the Director of National Intelligence and DOJ for records concerning information about the efforts of telecommunications carriers to lobby for immunity against legal liability for their role in the government's warrantless electronic surveillance of millions of Americans.</p>	<p>Based on a preliminary injunction ordering expedited processing, the agencies completed processing and withheld substantial amounts of material under several exemptions, including sweeping, unprecedented invocations of the presidential communications privilege.</p>	<p>EFF asked the government to stay the litigation pending issuance of the AG's guidelines and when they refused filed a motion for a stay, which the Court granted on March 23. In April, the government made a "discretionary release" of only a handful of documents, some of which were publicly available elsewhere, and has continued to rely on overly broad presidential communications privilege claims.</p>
<p>Secret Service Litigation</p>	<p>Series of cases CREW has sought records of White House visits prepared by the Secret Service as part of its statutory protective function</p>	<p>The Bush administration claimed the records were presidential, not agency, and therefore not subject to the FOIA. Alternatively, the administration argued all of the records were exempt in their entirety under Exemption 5, claiming release could disclose material protected by the presidential communications privilege (a so-called Glomar assertion). The district court agreed with CREW that White House visitor records are agency records subject to the FOIA and the government's appeal is pending before the D.C. Circuit.</p>	<p>Initially, in response to a show cause order why the appeals should not be dismissed for lack of appellate jurisdiction, the Obama administration followed the Bush administration's course, arguing the records are presidential and alternatively exempt in their entirety. The White House has since decided to voluntarily release visitor records each month from the previous 90-120 days online. According to the White House, the release will exclude a group of appointments that "cannot be disclosed because of national security imperatives or their necessarily confidential nature." The benefits of this new policy will not be clear until the extent of these exclusions is known.</p>

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<b><i>Elevated</i></b>			
CREW, et al. v. Executive Office of the President	<i>Lawsuit under the Federal Records Act challenging the failure of the Bush White House to take action to restore millions of missing emails from White House servers and to put in place effective and appropriate electronic record keeping system</i>		On January 21, 2009, the EOP filed a motion to dismiss, arguing the case is now moot because the White House has restored a limited number of missing emails; White House has refused to produce complete administrative record; White House agreed to settlement negotiations only if plaintiffs agreed to withdraw requests for the administrative record and discovery; Parties are now in settlement negotiations but pace of document production has been very slow and EOP has relied over broadly on a “sensitive” marking to keep from public view an array of documents.
<u>EFF v. Dep’t of Justice</u> , Civ. No. 06-1708 (D.D.C.):	<i>This lawsuit, filed in October 2006, stems from EFF’s FOIA request for records related to two electronic surveillance systems used by the FBI.</i>		On March 31, 2009, pursuant to a court order, the government provided EFF with a Vaughn submission based on a sample of 762 records selected the previous year. The accompanying declaration from FBI official David Hardy outlined the number of pages withheld in total (7,864 – 1,739 in full (including duplicates) and 6,066 in part), and the number of pages released in full (59). Mr. Hardy made no mention of the AG Memo and the FBI and, upon inquiry from EFF, repeatedly refused to tell EFF whether the AG Memo had an impact on its processing of the responsive records. As a result, the only way for EFF to ascertain whether the AG Memo had an impact on the FBI’s processing of the responsive documents would be to perform a line-by-line comparison of each record in the Vaughn sample against records disclosed previously in the litigation.

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<p><u>EFF v. Dep't of Justice</u>, Civ. No. 07-656 (D.D.C.):</p>	<p>In March 2007, in the wake of a damning report from the DOJ inspector general, EFF filed a FOIA request seeking information about the FBI's misuse of national security letter authority.</p>	<p>On June 16, 2007, Judge Bates ordered the FBI to process 2,500 pages of responsive documents per month. The FBI completed processing in October 2008, and provided EFF a complete set of all released records on a rolling basis in December.</p>	<p>After President Obama released his January 21 FOIA memo and while the parties were negotiating the next steps in the litigation, EFF suggested the case be stayed pending issuance of the AG's guidelines. The FBI refused to agree to a delay and while the court denied EFF's subsequently filed stay motion as moot on March 24, Judge Bates ordered the FBI to evaluate whether the new FOIA guidelines affected the scope of its disclosures and withholdings.</p> <p>During a conference between the parties the FBI represented it did not intend to apply the AG Memo to all the documents at issue, but might consider applying it to a sample. In a subsequently filed status report, DOJ represented that consistent with the AG Memo the litigation should move forward as initially proposed.</p>
<b>High</b>			
<p>CREW v. Dep't of Justice</p>	<p>FOIA lawsuit seeking the interview Vice President Cheney gave to the FBI as part of its investigation into the leak of Valerie Plame Wilson's covert identity</p>	<p>The Bush administration refused to release any responsive documents, claiming they fell within Exemptions 5 (deliberative process and presidential communications privileges); 6 and 7(c) (personal privacy); and 1 and 3 (sources and methods).</p>	<p>In July, the Department of Justice (DOJ) filed papers, including a declaration from Lanny Breuer, Assistant Attorney General for the Criminal Division. Embracing the same arguments made by the Bush administration for withholding the interview, DOJ argues if it is disclosed, future high-level White House officials will be unwilling to cooperate with criminal law enforcement investigations.</p>

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<p><u>ACLU v. Dep't of Defense</u> (S.D.N.Y.)</p>	<p>a lawsuit brought under the FOIA that seeks photos of detainee abuse</p>	<p>The Bush administration claimed the photos were exempt in their entirety, relying on exemption 7(F).</p>	<p>Both the district court and the Second Circuit Court of Appeals rejected the government's argument that release of the photos was protected from disclosure under the FOIA because it would cause harm to a large, undefined group of individuals (including U.S. troops abroad and the American public generally). After this ruling, the Department of Defense announced it would release all remaining undisclosed detainee photos. On May 13, however, President Obama announced his opposition to the release. The government, in court filings, is now resisting release of the photos and has represented it will seek further review from the Supreme Court.</p>
<p>Wilson v. Libby, et al</p>	<p>Lawsuit by Valerie Plame Wilson and Joseph Wilson against Scooter Libby, Dick Cheney, Karl Rove, and Richard Armitage seeking damages for constitutional torts the defendants committed when they deliberately disclosed Valerie Plame Wilson's covert CIA identity in retaliation for Joseph Wilson revealing inaccuracies in President Bush's State of the Union address.</p>	<p>Although the United States was not a named party, it has taken the lead in briefing the constitutional torts issues. Both the district court and the D.C. Circuit dismissed the lawsuit, finding the constitutional claims are precluded by the existence of the Privacy Act, despite the fact the Act does not apply to the White House.</p>	<p>In a brief filed with the Supreme Court opposing the plaintiffs' request for certiorari, DOJ lawyers agreed with the Bush administration that the Wilsons have no legitimate grounds to sue; DOJ's brief goes even further than its briefs under the Bush administration, challenging Mr. Wilson's failure to provide any evidence he was harmed by Cheney, Rove or Libby, despite the fact that plaintiffs have not yet been afforded any discovery.</p>

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<p><u>EFF v. Dep't of Justice</u>, Civ. No. 06-1773)(D.D.C.):</p>	<p>In August 2006, EFF sought records from the FBI concerning the Investigative Data Warehouse (IDW), a massive repository of personal information that plays a central role in the Bureau's data-mining activities. Specifically, EFF sought information concerning the privacy policies and practices surrounding the IDW, in light of the fact that the agency never published a Privacy Act notice describing the system.</p>	<p>Following a series of interim releases – and the withholding of a substantial amount of information – the FBI moved for summary judgment on January 23, 2009, two days after President Obama announced a fundamental change in executive branch FOIA policy.</p>	<p>On February 11, Judge Walton ordered the Bureau to advise the court within 60 days as to whether its position has changed in light of the new executive branch FOIA policy. The AG Memo was issued on March 19, and on April 13 the FBI gave “notice that it does not currently seek to amend Defendant’s Motion for Summary Judgment or the materials filed in support of that motion.” As a result, not one additional word was released following the issuance of the AG Memo.</p>
<p><u>ACLU v. Dep't of Defense</u> (S.D.N.Y.)</p>	<p>a lawsuit brought under the FOIA that seeks photos of detainee abuse</p>	<p>The Bush administration claimed the photos were exempt in their entirety, relying on exemption 7(F).</p>	<p>Both the district court and the Second Circuit Court of Appeals rejected the government’s argument that release of the photos was protected from disclosure under the FOIA because it would cause harm to a large, undefined group of individuals (including U.S. troops abroad and the American public generally). After this ruling, the Department of Defense announced it would release all remaining undisclosed detainee photos. On May 13, however, President Obama announced his opposition to the release. The government, in court filings, is now resisting release of the photos and has represented it will seek further review from the Supreme Court.</p>

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<p>CREW v. Dep't of Justice</p>	<p>FOIA lawsuit seeking documents related to DOJ's decision to reduce from \$130 billion to \$10 billion the requested penalty in its lawsuit against the tobacco industry; CREW has indicated repeatedly its willingness to dismiss the lawsuit if DOJ would agree to release a core group of documents, pointing out such release is consistent with the AG Memo (DOJ is claiming exemption 5), particularly in light of the D.C. Circuit's recent decision dismissing the tobacco companies' appeal.</p>	<p>DOJ resisted processing the request for years until the court ordered the agency to process immediately at no cost to CREW.</p>	<p>DOJ attorneys have suggested higher-level DOJ officials oppose settlement because of the precedent it would set for the potential future production of their own internal emails and memos.</p>
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