Blogs
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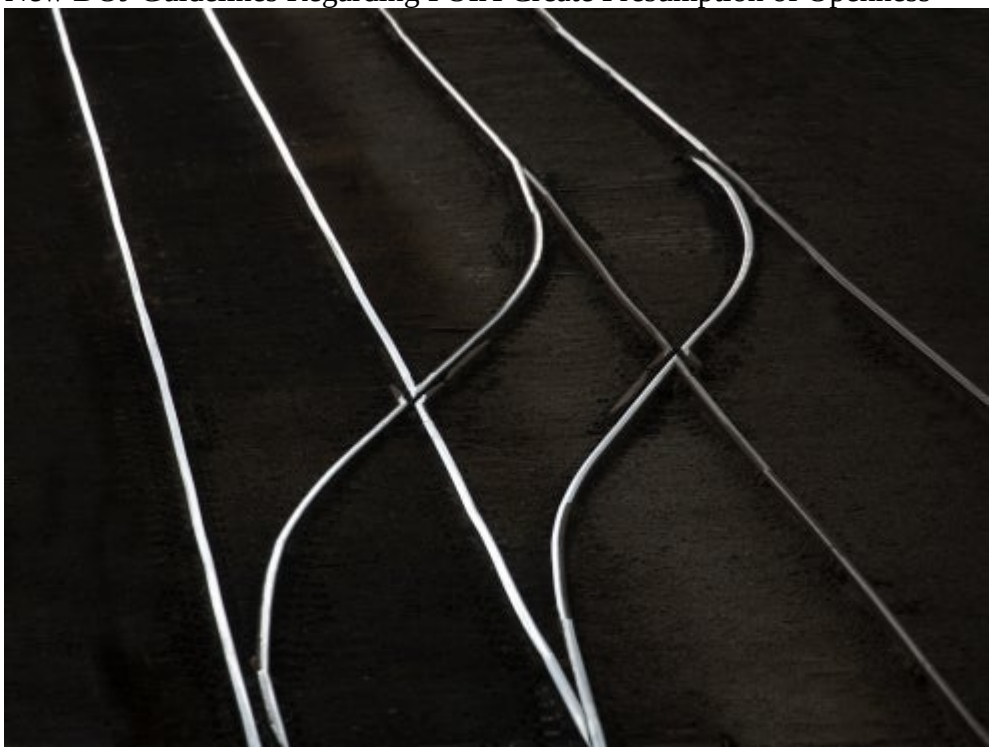
New DOJ Guidelines Regarding FOIA Create Presumption of Openness



Background on the Guidelines and FOIA On March 15, 2022, the United States Department of Justice ("DOJ") released new guidelines favoring the disclosure of federal agency records under the Freedom of Information Act ("FOIA").

Signed into law by President Lyndon B. Johnson in 1967, FOIA established a statutory right of public access to executive branch records. At a high-level, FOIA provides that any person has a legally enforceable right to obtain federal agency records subject to the Act to the extent that such records are not protected from public disclosure by one of FOIA's nine exemptions. The Supreme Court has explained that "the basic purpose of FOIA is to ensure an informed citizenry," which is "needed to check against corruption and hold the governors accountable to the governed." The DOJ's new guidelines direct federal departments and agencies to apply a presumption of openness in administering FOIA and explicitly state that the DOJ will not defend nondisclosure decisions that fail to do so. Under the new guidelines, the executive branch should not withhold requested information that might fall within one of FOIA's exemptions unless the relevant agency can identify a foreseeable harm or legal bar to disclosure. The guidelines also remind federal agencies that FOIA requires the proactive disclosure of records and emphasize that such agencies should make records more readily accessible without requiring individuals to file FOIA requests. As an example, the guidelines note that the DOJ's Executive Office for Immigration Review will no longer require individuals to file FOIA requests to obtain copies of their own records of immigration court proceedings. **Implications of the Guidelines on Voluntary Disclosures to the Executive Branch** The DOJ's presumption of openness should raise concerns for companies and individuals who have voluntarily provided or may voluntarily provide information to the DOJ, SEC, or other federal regulators in connection with investigations because it increases the likelihood that the regulators will publicly disclose such information. Exemption 4 of FOIA, which protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential," has generally barred the public disclosure of information voluntarily provided in the context of an investigation. Based on the new guidance, will courts narrow the scope of that exemption? Or will they determine that disclosing information voluntarily provided as part of investigations will cause foreseeable harm—perhaps by disincentivizing the provision of

such information—and therefore generally continue to apply the exemption? Additionally, will the DOJ now choose to disclose companies' annual compliance program reports produced pursuant to Non-Prosecution Agreements ("NPAs")? The DOJ has acknowledged that the public disclosure of those reports, which include proprietary and confidential information, would discourage cooperation and impede government investigations. This suggests that such reports should remain non-public. That said, NPAs requiring annual compliance program reports typically include language allowing the DOJ to disclose the reports at its sole discretion. Although the answers to the questions above remain unclear, what is clear is that the new guidelines should unsettle companies' and counsel's expectations regarding the confidentiality of information voluntarily provided to the executive branch. Accordingly, companies and counsel should (i) monitor judicial and DOJ decisions regarding disclosure under the new FOIA guidelines, (ii) assess the potential impact of the executive branch publicly disclosing any previously produced information, and (iii) carefully consider the costs and benefits of voluntarily producing information to federal regulators moving forward.

Authors

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