

ASHCROFT MEMO: DOJ FOIA GUIDE SEMINAR, JUNE 26, 2002, POINTS NOTES
PRESENTATION OF DAN METCALFE, CO-DIRECTOR, OFFICE OF INFORMATION & PRIVACY

Three aspects about the AG's Memo: What it follows, What it isn't & What it is.

What it follows

Administrations have a tradition of issuing this type of memo.

Examples: Wm. French Smith (substantial legal basis), Janet Reno (foreseeable harm).
They set the tone and establish general policy of FOIA implementation government-wide.

What it isn't

It doesn't change the law, it can't. Congress can do that.

It doesn't gut FOIA (contrary to stories in the media).

It doesn't direct the withholding of particular information.

What it is

It commits to full compliance with FOIA.

It encourages agencies to consider the values/interests of exemptions.

It summarizes those values/interests – personal, commercial and institutional.

It establishes a "sound legal basis" standard for applying exemptions.

It permits discretionary releases after careful consideration and this is significant.

Additional Points

Two facets for withholding under "sound legal basis":

- 1) Legally sound – as per the law or the FOIA Guide.
- 2) Factually sound – fully considers context, impact on what else is out there.

As a practical matter:

- 1) There is not that much difference in DOJ's willingness to defend agencies.
- 2) DOJ is not encouraging discretionary disclosures as much as in the past.

INTRODUCTION

A more recent significant Freedom of Information Act development was the issuance in October 2001 of a statement of FOIA policy by Attorney General John Ashcroft.⁶⁷ The Ashcroft FOIA Memorandum emphasizes the Bush Administration's commitment to full compliance with the FOIA as an important means of maintaining an open and accountable system of government.⁶⁸ At the same time, it recognizes the importance of protecting the sensitive institutional, commercial, and personal interests that can be implicated in government records -- such as the need to safeguard national security, to enhance law enforcement effectiveness, to respect business confidentiality, to protect internal agency deliberations, and

(...continued)

activities involving development of World Wide Web sites); *id.* at 3-7 (Department of Justice guidelines on implementation of new annual reporting requirements); FOIA Update, Vol. XVIII, No. 2, at 1 (describing Justice Department's amendment-implementation activities, including development of FOIA Reference Guide); FOIA Update, Vol. XVIII, No. 1, at 3-7 (addressing amendment-implementation questions); FOIA Update, Vol. XVII, No. 4, at 1-11 (describing amendments); *see also* FOIA Post, "Supplemental Guidance on Annual FOIA Reports" (posted 8/13/01); FOIA Post, "GAO E-FOIA Implementation Report Issued" (posted 3/23/01); FOIA Post, "Agencies Continue E-FOIA Implementation" (posted 3/14/01); FOIA Update, Vol. XIX, No. 4, at 4-5 (emphasizing importance of "new partnership" between agency FOIA officers and agency Information Resources Management (IRM) personnel in Electronic FOIA amendment implementation); FOIA Update, Vol. XIX, No. 3, at 2 (addressing additional amendment-implementation questions); FOIA Update, Vol. XIX, No. 2, at 2 ("Web Site Watch" discussion of agency FOIA Web sites); FOIA Update, Vol. XIX, No. 1, at 2 (same); FOIA Update, Vol. XIX, No. 1, at 6 (addressing additional amendment-implementation questions); FOIA Update, Vol. XVIII, No. 2, at 2 (same); *cf.* FOIA Post, "Summary of Annual FOIA Reports for Fiscal Year 2000" (posted 1/31/02); FOIA Post, "Summary of Annual FOIA Reports for Fiscal Year 1999" (posted 10/15/01). *See generally* Department of Justice FOIA Regulations, 28 C.F.R. pt. 16 (2001); FOIA Post, "GAO to Update its E-FOIA Implementation Study" (posted 3/8/02) (describing continued GAO review of agency amendment-implementation activities); FOIA Update, Vol. XIX, No. 3, at 1 (describing 1998 congressional hearing on agency amendment-implementation activities).

⁶⁷ Attorney General Ashcroft's FOIA Memorandum, *reprinted in* FOIA Post (posted 10/15/01) (superseding predecessor Attorney General FOIA policy memorandum that had been in effect since 1993).

⁶⁸ *See* FOIA Post, "New Attorney General FOIA Memorandum Issued" (posted 10/15/01) (describing Attorney General Ashcroft's FOIA Memorandum); *see also* Presidential Memorandum for Heads of Departments and Agencies Regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993), *reprinted in* FOIA Update, Vol. XIV, No. 3, at 3 (emphasizing importance of FOIA).

INTRODUCTION

to preserve personal privacy.⁶⁹

The Ashcroft FOIA Memorandum establishes a "sound legal basis" standard governing the Department of Justice's decisions on whether to defend agency actions under the FOIA when they are challenged in court.⁷⁰ Under this new standard, agencies should reach the judgment that their use of a FOIA exemption is on sound footing, both factually and legally, whenever they withhold requested information.⁷¹ The Ashcroft FOIA Memorandum also recognizes the continued agency practice of considering whether to make "discretionary disclosures" of information that is exempt under the Act, upon "full and deliberate consideration" of all interests involved.⁷² While it places particular emphasis on the right to privacy among the other interests that are protected by the Act's exemptions,⁷³ it reminds agencies "to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA."⁷⁴

In sum, the FOIA is a vital and continuously developing government disclosure mechanism which, with refinements over time to accommodate both technological advancements and society's maturing interests in an open and fully responsible government, can truly enhance our democratic way of life.

⁶⁹ See Attorney General Ashcroft's FOIA Memorandum, reprinted in FOIA Post (posted 10/15/01) (recognizing the protection of such interests as among the "fundamental values that are held by our society").

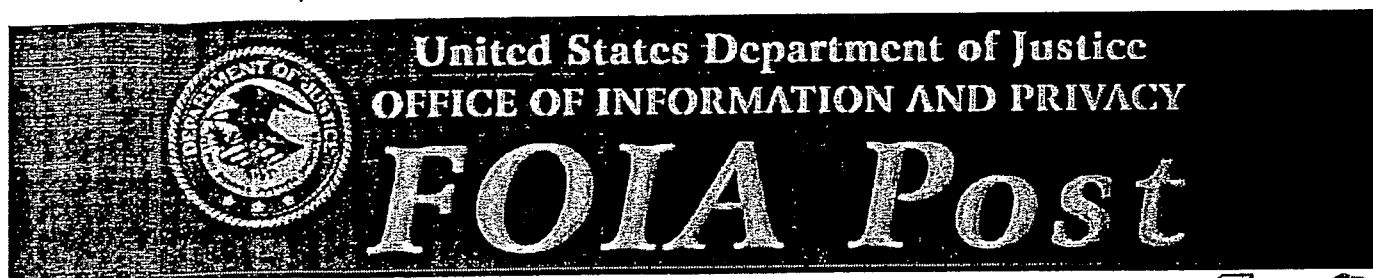
⁷⁰ Id.

⁷¹ See FOIA Post, "New Attorney General FOIA Memorandum Issued" (posted 10/15/01) (discussing new FOIA policy).

⁷² Attorney General Ashcroft's FOIA Memorandum, reprinted in FOIA Post (posted 10/15/01); see also FOIA Post, "New Attorney General FOIA Memorandum Issued" (posted 10/15/01) (reminding agencies that much FOIA-exempt information is subject to statutory disclosure prohibitions as well as standard prudential considerations).

⁷³ See Attorney General Ashcroft's FOIA Memorandum, reprinted in FOIA Post (posted 10/15/01); see also FOIA Post, "New Attorney General FOIA Memorandum Issued" (posted 10/15/01).

⁷⁴ Attorney General Ashcroft's FOIA Memorandum, reprinted in FOIA Post (posted 10/15/01); see also White House Memorandum for Heads of Executive Departments and Agencies Concerning Safeguarding Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security (Mar. 19, 2002), reprinted in FOIA Post (posted 3/21/02) (focusing on need to protect sensitive homeland security-related information); FOIA Post, "New Attorney General FOIA Memorandum Issued" (posted 10/15/01) (highlighting government's "need to protect critical systems, facilities, stockpiles, and other assets from security breaches and harm -- and in some instances from their potential use as weapons of mass destruction in and of themselves").



New Attorney General FOIA Memorandum Issued

A new statement of Administration policy on the Freedom of Information Act has been issued by Attorney General John Ashcroft and has been transmitted to all agencies across the executive branch of the federal government.

On October 12, Attorney General Ashcroft issued a memorandum to the heads of all departments and agencies that supersedes the Department of Justice FOIA policy memorandum that had been in effect since October 1993. The new Ashcroft FOIA Memorandum was effective immediately upon issuance, and the presidential statement on the FOIA that was issued in 1993 remains in effect as well.

The Ashcroft FOIA Memorandum emphasizes the Administration's commitment to full compliance with the FOIA as an important means of maintaining an open and accountable system of government. At the same time, it recognizes the importance of protecting the sensitive institutional, commercial, and personal interests that can be implicated in government records -- such as the need to safeguard national security, to maintain law enforcement effectiveness, to respect business confidentiality, to protect internal agency deliberations, and to preserve personal privacy.

In replacing the predecessor FOIA memorandum, the Ashcroft FOIA Memorandum establishes a new "sound legal basis" standard governing the Department of Justice's decisions on whether to defend agency actions under the FOIA when they are challenged in court. This differs from the "foreseeable harm" standard that was employed under the predecessor memorandum. Under the new standard, agencies should reach the judgment that their use of a FOIA exemption is on sound footing, both factually and legally, whenever they withhold requested information.

Significantly, the Ashcroft FOIA Memorandum also recognizes the continued agency practice of considering whether to make discretionary disclosures of information that is exempt under the Act, subject to statutory prohibitions and other applicable limitations. It also places particular emphasis on the right to privacy among the other interests that are protected by the FOIA's exemptions.

The text of the Ashcroft FOIA Memorandum is as follows:

Memorandum for Heads of all Federal Departments and Agencies

From: John Ashcroft, Attorney General

Subject: The Freedom of Information Act

As you know, the Department of Justice and this Administration are committed to full compliance with the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000). It is only through a well-informed citizenry that the leaders of our nation remain accountable to the governed and the American people can be assured that neither fraud nor government waste is concealed.

The Department of Justice and this Administration are equally committed to protecting other fundamental values that are held by our society. Among them are safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy.

Our citizens have a strong interest as well in a government that is fully functional and efficient. Congress and the courts have long recognized that certain legal privileges ensure candid and complete agency deliberations without fear that they will be made public. Other privileges ensure that lawyers' deliberations and communications are kept private. No leader can operate effectively without confidential advice and counsel. Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), incorporates these privileges and the sound policies underlying them.

I encourage your agency to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA. Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.

In making these decisions, you should consult with the Department of Justice's Office of Information and Privacy when significant FOIA issues arise, as well as with our Civil Division on FOIA litigation matters. When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions 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.

This memorandum supersedes the Department of Justice's FOIA Memorandum of October 4, 1993, and it likewise creates no substantive or procedural right enforceable at law.

* * * * *

This policy memorandum was issued pursuant to the Attorney General's specific statutory responsibility "to encourage agency compliance with [the Freedom of Information Act]," 5 U.S.C. § 552(e)(5) (2000), a responsibility that the Department of Justice discharges in several ways, including through statements of FOIA policy. See, e.g., Department of Justice Calendar Year 2000 Annual FOIA Report at 99-107 ("Description of Department of Justice Efforts to Encourage Agency Compliance with

the Act").

A new FOIA policy statement traditionally has been issued by the Attorney General at the beginning of a new Administration. Such statements were issued in May 1977 by Attorney General Griffin B. Bell, in May 1981 by Attorney General William French Smith, and in October 1993 by Attorney General Janet Reno. The Ashcroft FOIA Memorandum continues that tradition and in so doing calls attention to the administration of the FOIA at the highest levels of all agencies.

Additionally, the Office of Information and Privacy is disseminating this new FOIA policy memorandum to the principal administrative and legal FOIA contacts at all agencies, with the request that it be further disseminated as widely and expeditiously as possible through FOIA administrative channels within each agency. This dissemination should ensure that the memorandum reaches all FOIA personnel within each agency directly, in addition to through its distribution by each agency head.

OIP also will be both distributing and discussing the Ashcroft FOIA Memorandum at a FOIA Officers Conference to be held on October 18. A second topic to be discussed at this FOIA Officers Conference will be agency implementation of the electronic availability and annual reporting requirements of the Electronic Freedom of Information Act Amendments of 1996, in accordance with this past year's General Accounting Office Report entitled, "Progress in Implementing the 1996 Electronic Freedom of Information Act Amendments". OIP issued a policy guidance memorandum on that subject earlier this year, see *FOIA Post*, "GAO E-FOIA Implementation Report Issued" (posted 3/23/01), and issued follow-up guidance on the preparation of annual FOIA reports as well, see *FOIA Post*, "Supplemental Guidance on Annual FOIA Reports" (posted 8/13/01).

Lastly, a third topic that will be discussed at this FOIA Officers Conference is one that has become a subject of greatly increased significance since the horrific events of September 11. In light of those events, and the possibilities for further terrorist activity in their aftermath, federal agencies are concerned with the need to protect critical systems, facilities, stockpiles, and other assets from security breaches and harm -- and in some instances from their potential use as weapons of mass destruction in and of themselves. Such protection efforts, of course, must at the same time include the protection of any agency information that could enable someone to succeed in causing the feared harm.

Protection for such records or information, if requested under the FOIA, is available under Exemption 2 of the Act, 5 U.S.C. § 552(b)(2) (2000). Any agency assessment of, or statement regarding, the vulnerability of such a critical asset should be protected pursuant to Exemption 2. See *FOIA Update*, Vol. X, No. 3, at 3-4 ("OIP Guidance: Protecting Vulnerability Assessments Through Application of Exemption Two"). Beyond that, a wide range of information can be withheld under Exemption 2's "circumvention" aspect, sometimes referred to as "high 2," as is discussed in the "High 2': Risk of Circumvention" Subsection of the "Exemption 2" Section of the "Justice Department Guide to the Freedom of Information Act." Agencies should be sure to avail themselves of the full measure of Exemption 2's protection for their critical infrastructure information as they continue to gather more of it, and assess its heightened sensitivity, in the wake of the September 11 terrorist attacks.

Any question concerning the Ashcroft FOIA Memorandum, about implementation of the Electronic FOIA Amendments, about the use of Exemption 2 to provide necessary protection in the wake of terrorism, or about any aspect of FOIA administration can be raised through the Office of Information and Privacy's FOIA Counselor service, at (202) 514-3642. *(posted 10/15/01)*

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THE WHITE HOUSE
WASHINGTON
October 4, 1993

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: The Freedom of Information Act

I am writing to call your attention to a subject that is of great importance to the American public and to all Federal departments and agencies -- the administration of the Freedom of Information Act, as amended (the "Act"). The Act is a vital part of the participatory system of government. I am committed to enhancing its effectiveness in my Administration.

For more than a quarter century now, the Freedom of Information Act has played a unique role in strengthening our democratic form of government. The statute was enacted based upon the fundamental principle that an informed citizenry is essential to the democratic process and that the more the American people know about their government the better they will be governed. Openness in government is essential to accountability and the Act has become an integral part of that process.

The Freedom of Information Act, moreover, has been one of the primary means by which members of the public inform themselves about their government. As Vice President Gore made clear in the National Performance Review, the American people are the Federal Government's customers. Federal departments and agencies should handle requests for information in a customer-friendly manner. The use of the Act by ordinary citizens is not complicated, nor should it be. The existence of unnecessary bureaucratic hurdles has no place in its implementation.

I therefore call upon all Federal departments and agencies to renew their commitment to the Freedom of Information Act, to its underlying principles of government openness, and to its sound administration. This is an appropriate time for all agencies to take a fresh look at their administration of the Act, to reduce backlogs of Freedom of Information Act requests, and to conform agency practice to the new litigation guidance issued by the Attorney General, which is attached.

Further, I remind agencies that our commitment to openness requires more than merely responding to requests from the public. Each agency has a responsibility to distribute information on its own initiative, and to enhance public access through the use of electronic information systems. Taking these steps will ensure compliance with both the letter and spirit of the Act.

William J. Clinton



Office of the
Attorney General
Washington, D.C.

October 4, 1993

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: The Freedom of Information Act

President Clinton has asked me to take steps to ensure it is in the spirit of the Freedom of Information Act, § 552. The Department of Justice directive and stands ready to take this new policy.

First and foremost, we must ensure that government is applied in a nondisclosure decision that is in the spirit of the Act. Therefore, I hereby rescind the guidelines for the defense of Freedom of Information Act litigation. An agency's withholding of information is not a "substantial legal basis" for a presumption of disclosure, whether or not to defend a nondisclosure decision.

To be sure, the Act accommodates a structure, the countervailing interests of disclosure and nondisclosure while the Act's exemptions are applied to governmental and private information. Exemptions are best applied where necessary and only after consideration of the consequences of disclosure in each case.

In short, it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption where the agency reasonably believes that disclosure of the information would be harmful to an interest protected by the Act. If an exemption is asserted, it ought not to be withdrawn unless it need be.

It is my belief that this change in policy is in the public interest by achieving the Act's purpose of responsible disclosure of government information while preserving essential confidentiality. I encourage your FOIA officers to encourage your FOIA officers whenever possible under the Act, under a number of FOIA exemptions, governmental interest would be served by the exercise of the Department's Discretionary Disclosure Department Guide to the Freedom of Information Act. The Department discussion points out, agency disclosures as a matter of government interest. Future "waiver consequences" of nondisclosure can also readily be addressed by the Department's obligation under the Act to disclose information marginally exempt from disclosure to lessen an agency's administrative burden.

Office of the Attorney General
Washington, D. C. 20530

October 12, 2001

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SOLICITOR'S
GENERAL DIVISION

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FROM: John Ashcroft, Attorney General

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