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RELEASED IN PART

**From:** Murphy, Nicholas M  
**Sent:** Friday, March 08, 2002 4:50 PM  
**To:** IPS Reviewers  
**Cc:** IPS-Managers-DL  
**Subject:** Issues Discussed at February Meetings of Reviewers and Senior Reviewers; PART I

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This is Part I of a two-part message covering issues discussed at the February 13 Senior Reviewer Workshop and February 14 Reviewer Refresher Training. This part covers a discussion of the Ashcroft Memorandum and its impact to date, and the use of the (b)(2) exemption to protect sensitive infrastructure information. It summarizes the discussions and adds some new or related information which has since become available.

Part II will cover procedural issues discussed, including: visa issues; reclassifying NSC primary interests documents; reclassifying documents from presidential libraries; appeal of denial of NSC documents; arms export control laws; marking OADR documents.

### I. Ashcroft Memorandum

#### Background

On October 12, 2002 Attorney General Ashcroft issued a memorandum on the Freedom of Information Act replacing Attorney General Reno's "foreseeable harm" standard for defense of agency FOIA decisions with a "sound legal basis" standard. In his memorandum he noted the importance of protecting, in particular, national security, effective law enforcement, sensitive business information, and personal privacy, implicating respectively FOIA exemptions 1, 7, 4 and 6. He also singled out exemption 5 in emphasizing the importance of protecting the deliberative process and lawyers' advice and counsel.

In its original promulgation of this memorandum, and subsequently, the Justice Department's Office of Information and Privacy DOJ/OIP (which oversees FOIA implementation) has emphasized that the Ashcroft Memorandum recognizes "the continued agency practice of considering whether to make discretionary disclosures of information that is exempt under the Act." That is, DOJ/OIP chose to emphasize continuity over change.

#### Discussion

**Exemptions 4, 6 and 7.** We noted that the Ashcroft Memorandum did not change the underlying statute and extensive case law on the FOIA. The wording of the memorandum does suggest that all things being equal, our decisions would be defended in court if in well-reasoned but close calls we were to come down on the side of protecting confidential business information [(b)(4)], law enforcement material [(b)(7)] and personal privacy interests [(b)(6)]. In this last case, where the courts have identified a process for balancing the privacy interest against the public's right to know, there is the implication must be diligent to ensure that the full weight of the privacy interest is on the scale.

**Low (b)(2).** The rationale behind this exemption was that “the very task of processing and releasing some requested records would place an administrative burden on the agency that could not be justified by any genuine public benefit.” (DOJ FOIA Guide p.110). Under the Reno “foreseeable harm” standard, the low (b)(2) was virtually defined out of existence. The Ashcroft standard technically revives it, but it has never been widely used by IPS reviewers and its renewed availability is unlikely to change this. (But see discussion of “High (b)(2)” below

**Exemption 5.** As regards deliberative material, courts have used various language to explain why withholding may be justified, including to avoid a “chilling effect” on the process, or to not “stifle honest and frank communication within the agency”, or “diminish the candor of agency deliberations in the future.”

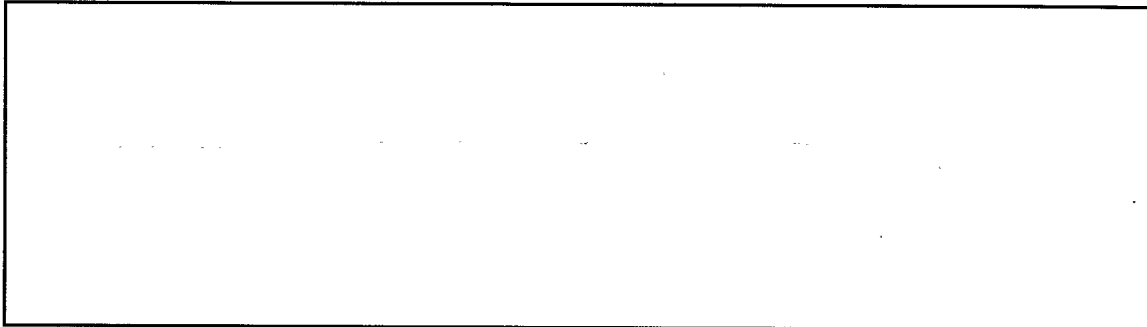
In light of this history and the FOIA’s own bias in favor of openness, IPS reviewers have most often withheld deliberative information if its release would: harm continued debate on the issue at question; make an individual less likely in the future to express himself candidly; or harm the deliberative process more generally. **Time has generally been considered a factor**; if the issue is no longer of general interest or sensitivity, or identified persons are not currently or prospectively likely to be active in government, there is less likely to be harm in release.. Notwithstanding this, **even quite old documents have the potential to damage the deliberative process.** One of many possible examples would be commentary on another agency’s position which is critical of that agency.

**Our conclusion was that IPS reviewers should continue to make judgments based on possible harm from release**, including on such quintessentially deliberative documents as drafts. At the same time, the Ashcroft memorandum’s emphasis on protecting the process provides assurance that a well considered decision to withhold is likely to be supported by the Justice Department if it comes to litigation.

## **II. A More Robust (b)(2) Exemption.**

The Ashcroft memorandum did not single out the “high (b)(2)” exemption, but it was highlighted by the DOJ/OIP in the October 16 FOIA Post Bulletin in which it distributed that memorandum. OIP noted agency concern post-September 11 with “the need to protect critical systems, facilities, stockpiles, and other assets from security breaches and harm...”. It noted that protection for such records, if requested under the FOIA, is available under Exemption 2 of the Act, “Any agency assessment of, or statement regarding, the vulnerability of such a critical asset should be protected pursuant to Exemption 2....Beyond that, a wide range of information can be withheld under Exemption 2’s ‘circumvention’ aspect, sometimes referred to as ‘high 2’ .... Agencies should be sure to avail themselves of the full measure of Exemption 2’s protection for their critical infrastructure information....”

Currently (March 8, 2002) there is circulating for agency comment a draft memorandum for issue by the Director of OMB setting forth guidance for Department and agency handling of Sensitive Homeland Security Information (SHSI). In the draft, SHSI is defined in part as:



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Our discussion of this issue touched on the likelihood that agencies would be using the high (b)(2) exemption more frequently and broadly than had been the case heretofore and that these new limits might soon be tested and further defined in court.

We concluded that pending additional guidance or new court interpretations, **IPS reviewers should be guided by several considerations:**

- a) **Do not use (b)(2) as a substitute for classifying** if that is feasible and appropriate;
- b) In order to apply (b)(2) **the document must be primarily “internal”**. This can mean internal to the Department, to the USG, or even to a segment of the law enforcement community. The intent is that it not apply to regulations governing the public, i.e. that it not be applied to “secret law” which the FOIA aims to make public.
- c) In addition to being primarily internal, the disclosure of the information **must risk circumvention of agency regulations or statutes, or at least of general legal requirements**, if there is a specific determination of foreseeable harm in each instance.

The final of the OMB memorandum and other guidance will be made available to reviewers as it becomes available.

End of Part I