United States Department of Justice
OFFICE OF INFORMATION AND PRIVACY
FOIA Post

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)***

Go to: Main *FOIA Post* Page// DOJ FOIA Page // DOJ Home Page