



United States Department of the Interior

OFFICE OF THE SECRETARY
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To: Assistant Secretaries
Solicitor
Inspector General
Heads of Bureaus and Offices
Bureau Chief Information Officers
Bureau and Office FOIA Officers
Designated FOIA Attorneys

From: W. Hord Tipton
Chief Information Officer

Subject: Additional Guidance for Implementing Attorney General Ashcroft's Freedom of Information Act Policy

Background:

On October 12, 2001, Attorney General John Ashcroft issued a memorandum setting forth this Administration's Freedom of Information Act (FOIA) policy, which replaced the policy issued by former Attorney General Janet Reno in 1993. On October 29, 2001, the Departmental FOIA Officer issued guidance on this new policy to Bureau/Office FOIA Officers and Designated FOIA Attorneys in the Department of the Interior (DOI). This bulletin formalizes that guidance and reminds bureaus/offices of their revised obligations under the Attorney General's new policy.

The Attorney General's policy emphasizes that the Administration is committed 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 safeguarding national security, maintaining law enforcement effectiveness, protecting sensitive business information, protecting internal agency deliberations, and preserving personal privacy. Under the Ashcroft policy, an agency should deny a FOIA request for any information protected from release by the FOIA unless the agency, after due deliberation, determines that a discretionary release is appropriate. Agencies should make discretionary disclosures of information protected from release "only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information." The previous Administration's policy was to defend suits seeking records withheld under the FOIA only where a "foreseeable harm" could be demonstrated if the exempt information were released. In this Administration, the Attorney General makes it clear that the Department of Justice will defend agency decisions to

withhold documents unless the decision (1) lacks a sound legal basis for the withholding, or (2) could adversely impact the ability of other agencies to protect other important records.

Purpose:

Consistent with the policy, this bulletin reiterates the policy and procedures to be followed in responding to FOIA requests and administering the FOIA in the DOI. It incorporates the provisions set forth in the policy discussed above and reaffirms the guidance that the Departmental FOIA Officer issued to Bureau/Office FOIA Officers and Designated FOIA Attorneys on this subject on October 29, 2001.

Scope:

This bulletin applies to all Departmental bureaus and offices.

Time Frame:

This bulletin is effective immediately.

Policy:

Bureaus and offices are expected to comply fully with the Attorney General's FOIA policy as follows:

1. When a bureau/office believes records are exempt from release and intends to withhold them, it must consult with its Designated FOIA Attorney to ensure that it has both a sound factual and legal footing for withholding the records. The bureau/office should include the justification for denying the records in the FOIA case file in the event an appeal or lawsuit is filed by the requester. In its response to the requester, the bureau/office will describe the records that are being withheld, and provide an explanation of the reason(s) for the denial along with a reference to the specific exemption authorizing the withholding.
2. When considering whether to make a discretionary release of information that is exempt under the FOIA, a bureau/office must review the facts and the information in the documents and carefully consider the institutional (the Government), commercial (business entities) and personal privacy (individuals) interests that might be impacted by disclosure. A record that is exempt from disclosure under the FOIA may be released to a requester when, in the bureau's judgment, the interests which underlie the exemptions would not be jeopardized by disclosure, unless disclosure is restricted by statute. Disclosure of documents that are protected under exemptions (1), (3), (4), (6) and (7)(C) (to the extent that information protected by exemptions (6) and (7)(C) is covered by the Privacy Act) are prohibited from discretionary release by a statute or Executive order. Such documents are not subject to discretionary release.

On the other hand, documents covered by exemptions “low (2)”, (5), (6) and (7)(C) (to the extent the information protected by exemptions (6) and (7)(C) is not covered by the Privacy Act) and exemption (9) may be considered for discretionary release under certain circumstances. While it is technically possible to consider documents covered by exemption “high (2)” and the remainder of exemption (7) for discretionary release, it is highly unlikely. In making decisions regarding disclosure, a bureau/office will carefully consider the values and interests underlying the exemptions. The bureau/office must consult with its Designated FOIA Attorney, Office of the Solicitor (SOL), and obtain his/her surname before making a discretionary release of information (see Chapter 5.2 of the Departmental FOIA Handbook (383 DM 15)). The bureau/office will document the FOIA case file to reflect the fact that it has considered the interests that could be implicated by disclosure and include the reasons why a discretionary release is appropriate. The bureau/office will advise the requester in its response that the requested information is exempt from disclosure under the FOIA, but that the bureau office has decided to exercise its discretion to release the information.

3. Exemption (2). Exemption “low 2” of the FOIA allows the Government to protect records containing information about internal personnel practices and procedures of a trivial nature, e.g., leave slips and time and attendance sheets. Under the Ashcroft policy, bureaus/offices once again may use the “low 2” exemption providing there is a sound legal basis for withholding the information.
- 4 Exemption (5). In his memorandum, Attorney General Ashcroft notes that 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. Exemption (5) incorporates these privileges and the policies underlying them. The Attorney General’s memorandum reinforces the appropriateness of using exemption (5) to protect internal deliberative information (e.g., drafts), attorney-client communications, and attorney work-product information providing there is a sound legal basis for withholding the information.

Contacts:

If you have any questions concerning this bulletin, please consult the FOIA Officer or the Designated FOIA Attorney for your bureau/office. You also may contact Alexandra Mallus, the Departmental FOIA Officer, by telephone at (202) 208-5342, or by email at alexandra_mallus@ios.doi.gov, or Bob Moll, the Assistant Solicitor for General Legal Services, by telephone at (202) 208-5216. Please assure that this bulletin is disseminated promptly to all employees involved with processing FOIA requests.