

Fundamental Shift in Freedom of Information Act

Or

Freedom of Information Act--Not so Free Anymore

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Any attorney who has dealt with the Freedom of Information Act (FOIA)¹ knows policy plays as important a role as the law in deciding what government information will be released in response to a FOIA request. Two recent events have certainly brought this fact home: the change in presidential administration (and the resultant end of the Reno doctrine), and the terrorist attacks of September 11, 2001.

The essence of these changes is captured in Attorney General John Ashcroft's October 12 announcement of the new administration's FOIA policy² and in the November 19, DoD implementing Memorandum.³ These new changes represent a marked shift in FOIA policy and will fundamentally change the way the federal government responds to FOIA requests. The changes are fundamental enough that they were implemented through a memorandum pending revision of implementing regulations.⁴ A hailstorm of discussion has followed the Ashcroft memorandum among those who regularly work with FOIA policy. As base level attorneys are often the only legal reviewers of a records release, it is important that they be familiar with the new policy's basic provisions.

Reno Doctrine

The FOIA, originally passed in 1966, requires the government to release information when requested unless the information is protected by one of the Act's nine

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¹ 5 U.S.C. § 552.

² Memorandum from John Ashcroft, Attorney General, for Heads of all Federal Departments and Agencies, The Freedom of Information Act, Oct. 12, 2001 [hereinafter Ashcroft Memo] *available at* U.S. DOJ Office of Information and Privacy FOIA POST: New Attorney General FOIA Memorandum issued, Oct. 15, 2001, *at* <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm> [hereinafter FOIA POST].

³ Memorandum from M. I. McIntyre, DoD Directorate of Information and Security Review, DoD Guidance on Attorney General Freedom of Information Act (FOIA) Memorandum [hereinafter DoD Memo] (recapping an Oct. 18 FOIA officers conference held in Washington D.C.) *available at* https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/GENERAL_LAW/SOURCE/agmemofoia.pdf

⁴ *Id.* The current FOIA regulation is DoD 5400.7-R/AF Supp., *DoD Freedom of Information Act Program*, July 22, 1999 [hereinafter DoD 5400.7-R] *at* <http://afpubs.hq.af.mil/pubs/majcom.asp?org=AF>.

specific exemptions.⁵ It was enacted to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”⁶ During the Reagan years, former Attorney General William Smith set the government tone in his 1981 guidelines—stating DOJ’s policy to “defend all suits challenging an agency’s decision to deny a request submitted under the FOIA unless ... the agency’s denial lacke[d] a sound legal basis; or ... present[ed] an unwarranted impact on other agencies’ ability to protect important records.”⁷ Under Smith’s policy, which lasted until the Clinton administration’s Attorney General, Janet Reno, replaced it, discretionary releases were not encouraged.

In October 1993, Attorney General Reno changed DOJ’s longstanding policy by issuing a FOIA policy memorandum encouraging FOIA officers “to make ‘discretionary disclosures’ whenever possible under the Act.”⁸ That memo explained that “[t]he Department [DoJ] will no longer defend an agency’s withholding of information merely because there is a ‘sound legal basis’ for doing so. Rather . . . we will apply a presumption of disclosure. . . . In short, it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption *only* in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption.”⁹ The Reno doctrine, as it was called, was implemented through the Defense Department’s FOIA regulation, DoD 5400.7-R, DoD *Freedom of Information Act Program*: “As a matter of policy, DoD Components shall make discretionary disclosures

⁵ 5 U.S.C. § 552(b). Of the nine exemptions in section (b), seven routinely apply to the military: (b)(1) classified information; (b)(2) internal matters of relatively trivial nature (low-2) or internal matters whose release would risk circumvention of a legal requirement (high 2); (b)(3) information protected by statute; (b)(4) certain trade secrets and financial information, (b)(5) information normally protected from civil discovery; (b)(6) protection of privacy interests; and (b)(7) protection of law enforcement information. For a complete discussion see DOJ FOIA Guide *infra* note 30.

⁶ NLRB v. Robbins Tire & Rubber Co., 473 U.S. 214, 242 (1978).

⁷ Memorandum from William French Smith, Memorandum Regarding FOIA, May 4, 1981, *text available at* http://www.usdoj.gov/oip/foia_updates/Vol_II_3/page3.htm.

⁸ Memorandum from Janet Reno, for Heads of Departments and Agencies, The Freedom of Information Act, Oct. 4, 1993 [hereinafter Reno Memo]. As each administration sets its FOIA policy, it tends to follow party lines: AG Bell, democrat, “demonstrably harmful” standard, *see* Justice Sets New FOIA Policy, at http://www.usdoj.gov/oip/foia_updates/Vol_II_3/page1.htm; AG Smith, republican, “sound legal basis;” AG Reno, democrat, “foreseeable harm;” AG Ashcroft, republican, “sound legal basis.”

⁹ Reno Memo, *supra* note 8.

of exempt records or information whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption”¹⁰

Although implementing the new presumption of disclosure under the “foreseeable harm standard” caused some initial confusion,¹¹ agencies came to realize that applying it proved especially appropriate when requested records related solely to the internal personnel rules and practices of the agency under the low-2 exemption or to agency deliberations under exemption 5.¹² Discretionary releases were less appropriate under the remaining exemptions—especially those relating to individuals’ privacy.

Ashcroft Doctrine

On October 12, 2001, President Bush’s Attorney General, John Ashcroft, reversed the Reno doctrine, in effect, reinstating the Smith doctrine: “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.”¹³ The Ashcroft doctrine was implemented within the DoD on November 19, 2001 by the DoD FOIA office via a policy memorandum which immediately superceded the current DoD FOIA regulation, DoD 5400.7-R.¹⁴

Reversing the Reno doctrine will primarily affect the application of the low-2 exemption and exemption 5. Before Reno’s policy encouraging waiver of discretionary exemptions, “low-2” was used to deny FOIA requests for mundane administrative data such as facsimile cover sheets, file numbers, room numbers, mail routing stamps, data processing notations, and other trivial administrative matter of no genuine public interest. Legislative and judicial history make it clear that the “low-2” exemption is based upon the rationale that the task of processing and releasing some requested records would place

¹⁰ ¶ C1.3.1.1.

¹¹ See e.g., *Public Interest Under the FOIA*, THE ACCORD, 9-10, Aug. 1996 (written to address confusion in applying the Reno Doctrine to privacy interests under exemptions 6 and 7(c)).

¹² See *supra* note 5 for a list of exemptions. Privacy interests are especially inappropriate for discretionary release because the interest being protected belongs to the individual and is not the government’s to waive. This is in contrast to discretionary disclosures under exemptions 2 and 5.

¹³ Ashcroft Memo, *supra* note 2 (emphasis added).

¹⁴ DoD Memo, *supra* note 3 (“Effective immediately, DoD components will adopt the **Sound Legal Basis** standard as reflected in the Attorney General Memorandum.”).

an administrative burden on agencies that could not be justified by any genuine public benefit. After Reno's 1993 FOIA memorandum, nearly all administrative information covered solely under "low-2" was considered appropriate for discretionary disclosure. In fact, DoD 5400.7-R forbids DoD use of the low-2 exemption.¹⁵ With Attorney General Ashcroft's return to a policy of not encouraging discretionary disclosures,¹⁶ many federal agencies will once again use low-2 to deny burdensome FOIA requests for internal administrative records that shed little light on an agency's performance of its statutory duties. This new policy is effective immediately for DoD offices while we wait for a revised DoD 5700.7-R.¹⁷

The Ashcroft doctrine also, more importantly, allows agencies a greater ability to withhold information under exemption 5.¹⁸ Exemption 5 protects agency information that is normally privileged under the rules of civil discovery. These privileges include the deliberative-process privilege, used to protect pre-decisional intra-agency deliberations, and the attorney-client privilege, which protects the majority of legal opinions. Of these two, the Ashcroft doctrine will primarily increase application of the deliberative process privilege.¹⁹ The decreased likelihood that such predecisional documents will be released will promote "candid and complete agency deliberations without fear that they will be made public."²⁰

Addressing Security Concerns

The new administration's decision to again defend agencies in federal court under a "sound legal basis" standard is not the only event driving a rethinking of FOIA policy--the September 11th terrorist attacks have also shaped how agencies are likely to respond to requests. Since these attacks, a greater concern for national security and the personal privacy interests of DoD employees has arisen. The Ashcroft memorandum addressed these concerns by not only promising to defend agencies, but also by tacitly encouraging even greater withholding under the high-2 exemption and exemption 6: "I encourage your agency to carefully consider the protection of all such values and interests when

¹⁵ DoD 5400.7-R, *supra* note 4 ¶ C.3.2.1.2. (superseded by DoD Memo, *supra* note 3).

¹⁶ See also DoD Memo, *supra* note 3 ("Discretionary disclosures are no longer encouraged.").

¹⁷ DoD Memo, *supra* note 3.

¹⁸ Ashcroft memo, *supra* note 2.

¹⁹ Even under the Reno doctrine, we have never had difficulty writing legal opinions protecting legal opinions.

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.”²¹ Accordingly, post-September 11th concerns will be primarily addressed using the high-2 exemption and exemption 6.

Following the attacks, President Bush declared a national emergency.²² Shortly thereafter, Paul Wolfowitz, Deputy Secretary of Defense, issued a memorandum encouraging greater operations security “to deny our adversaries the information essential for them to plan, prepare or conduct further terrorist or related hostile operations against the United States and this Department.”²³ One powerful means to address these security concerns when responding to FOIA requests is through the use of the high-2 exemption.

“High-2” applies to internal matters whose release would risk circumvention of a legal requirement. It has traditionally been used to deny information covering vulnerability assessments, stockpile information, security assessments, and the like.²⁴ Post September 11th, DOJ has encouraged even greater emphasis on the high-2 exemption: “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 terrorists attacks.”²⁵ As agencies pull previously posted material from their web pages, and, in some cases, refuse to release the same types of information once routinely released, significant waiver issues arise. Information once posted and now pulled presents the greatest challenge. If previously released information is requested, DOJ will have a hard time defending suits as agencies have already made the information public. Relief legislation may be the only answer for these cases.

²⁰ *Id.* ¶ 3.

²¹ *Id.* ¶ 4 (emphasis added). See *supra* note 5 for a listing of FOIA exemptions.

²² Proclamation 7463--Declaration of National Emergency by Reason of Certain Terrorist Attacks, Sep. 14, 2001 (66 FR 48199, Sep. 18, 2001) at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_register&docid=01-23358-filed.

²³ Memorandum for Secretaries of the Military Departments ..., Operations Security Throughout the Department of Defense, Oct. 18 2001, available as an attachment at https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/GENERAL_LAW/Briefings/Lists.pdf.

²⁴ See DOJ FOIA Guide *infra* note 30, for detailed discussion of “high-2.”

²⁵ FOIA POST *supra* note 2 (emphasis added).

If, on the other hand, a requestor asks for recently compiled information, even if it is almost identical to previously released information, DOJ would likely have greater ease in defending access suits arising from such requests. In certain cases, even revealing the existence of, or changes to, a sensitive vulnerability study or emergency plan could threaten an interest protected by high-2. The bottom line is that after September 11th, changes--or lack of changes--to sensitive information is arguably a protectable interest.

Even easier to defend would be denials for certain *types* of vulnerability assessment information that routinely changes from month to month. For example, even if the government previously routinely released certain stockpile inventories, it could be argued that previous releases of this type of information has not waived the right to protect it today. After all, the information for this month has changed from last month, and heightened domestic threats require that the federal government reevaluate what information it should release. Having waived release of an inventory or a security assessment in a previous month thus does not mean disclosure of the current month's inventory or assessment is necessary. It is *new* information (withheld in light of a new threat environment), and the right to exempt it should not be held to have been waived. Courts have not yet had to deal with waiver issues following a catastrophic event as the September 11th terrorist attacks and the resulting, immediate increase in domestic security interests. Whether courts will support liberal application of high-2, or whether legislative relief will be needed, is an open question.

The changed security posture not only affects application of the high-2 exemption; it has also prompted the DoD Director of Administration and Management, David Cooke, to issue a policy memorandum addressing privacy concerns under exemption 6.²⁶ Mr. Cooke's memorandum sets a new release policy pertaining to lists of personally identifying information for DoD: "All DoD components shall ordinarily withhold lists of names and other personally identifying information of personnel currently or recently assigned within a particular component, unit, organization or office with the Department of Defense in response to requests under the FOIA. This is to include active duty military personnel, civilian employees, contractors, members of the

National Guard and Reserves, military dependents, and Coast Guard personnel when the Coast Guard is operating as a service in the Navy. If a particular request does not raise security or privacy concerns, names may be released as, for example, a list of attendees at a meeting held more than 25 years ago. Particular care shall be taken prior to any decision to release a list of names in any electronic format.” Until the dust settles, units should clear release of lists they do not believe are protected by exemption 6 through higher headquarters even if the lists were once routinely released.²⁷

This new DoD policy appropriately gives greater weight to the privacy rights of military personnel during times of national crisis. Some may argue that withholding lists that were previously routinely released flies in the face of established FOIA waiver principles. However, as lists with personally identifying information shed little light on how the government conducts its business, it is crucial to recast the waiver issue as one of a pure balancing test between personal privacy interests and the public need to know. Because the interest protected here is the individual’s privacy interest and not the government’s, the government cannot *waive* it. Privacy interests of DoD personnel have increased since the September 11th attacks, making release of such information a “clearly unwarranted invasion of personal privacy.”²⁸ Although “clearly unwarranted” is a high standard, what it comes down to is a “balancing of the public’s right to disclosure against the individual’s right to privacy.”²⁹ In this light, withholding the lists from release should be defensible. In responding to FOIA requests for lists of names or other personal identifying information, offices should cite both exemption 2 and 6.

Conclusion

Between Attorney General Ashcroft’s return to the “sound legal basis” for discretionary denials, and the heightened security and privacy concerns following the September 11th terrorist attacks, FOIA policy has undergone a drastic change. The change is most noticeable in application of exemptions 2, 5, and 6. Base level attorneys

²⁶ Memorandum for DoD FOIA Offices, Withholding of Personally Identifying Information Under the Freedom of Information Act (FOIA), Nov. 19, 2001[hereinafter Cooke Memo] *available at* https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/GENERAL_LAW/Briefings/Lists.pdf.

²⁷ *See id.* (“When processing a FOIA request, a DoD component may determine that exemption (b)(6) does not fully protect the component’s or an individual’s interests. In this case, please contact ... Directorate of Freedom of Information and Security Review ...”).

²⁸ 5 U.S.C. 522(b)(6).

²⁹ DOJ FOIA Guide, *infra* note 30 at 282.

reviewing FOIA releases must understand the basis for the policy shift as well as its application. While FOIA *denials* go to the MAJCOM level, FOIA *releases* are generally made at the base level. A base level attorney may be the only legal oversight to catch improper releases. "Office-file research" is of little help after these recent changes. Fortunately, up-to-date assistance is available on the web.³⁰

³⁰ The Air Force's General Law Division has an excellent webpage available through the FLITE homepage at <https://aflsa.jag.af.mil>. Other useful sites include: DOJ FOIA Office at <http://www.usdoj.gov/04foia/index.html> (with comprehensive DOJ FOIA Guide available); Air Force FOIA Page at <http://www.foia.af.mil/> (with common DoD exemption 3 statutes at <http://www.foia.af.mil/b3.pdf>); ACC On-line FOIA Guide (providing flow-chart analysis for common requests); DoD FOIA Page at <http://www.defenselink.mil/pubs/foi/>. For Privacy Act information, see DOJ's site at http://www.usdoj.gov/04foia/04_7_1.html; DoD's site at <http://defenselink.dtic.mil/privacy/notices/> (listing agency specific routine disclosures).