

# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, D.C. 20240



20020533 DOI001

February 25, 2003

Mr. William Ferroggiaro  
Director, Freedom of Information Project  
National Security Archive  
George Washington University  
Gellman Library, Suite 701  
2130 H Street, N.W.  
Washington, DC 20037

RECEIVED FEB 27 2003

Dear Mr. Ferroggiaro:

On September 4, 2002, you filed Freedom of Information Act (FOIA) request 2002-C-376, addressed to the Departmental FOIA Officer, asking for a copy of "all records, including but not limited to guidance or directives, memoranda, training materials, or legal analyses, concerning the US Department of the Interior's implementation of US Attorney General John Ashcroft's October 12, 2001 memorandum on the US Freedom of Information Act."

On January 31, 2003 we acknowledged your request, advised you of your fee status, under the FOIA, advised you that the Office of the Secretary would be responding to your request on behalf of the Department, and provided you with our first installment of responsive documents.

We are writing today to provide you with the second installment of the Department of the Interior's response to your request.

Enclosed are copies of 24 documents, totaling 79 pages.

**Portions of seven of these documents have been deleted, pursuant to Exemption 5 of the FOIA (5 U.S.C. § 552 (b)(5)). Five additional documents, totaling 12 pages, have also been withheld in full, pursuant to Exemption 5 of the FOIA.**

**Withheld in part:**

March 8, 2002 e-mail message from William Wolf, FOIA Appeals Officer, to Julia Laws, OCIO, et al., regarding "FOIA/Privacy ASAP Conference."

March 14, 2002 e-mail message from Alexandra Mallus, DOI FOIA Officer, OCIO, to DOI Bureau/Office FOIA Officers regarding "FOIA/Privacy ASAP Conference."

October 26, 2001 e-mail message from Karen Mouritsen, DGL, to Johnny Hunt, FWS, et al., regarding "Guidance Concerning the Ashcroft Memo."

November 13, 2001 e-mail message from Bob Moll, DGL, to Karen Mouritsen, DGL, regarding "Comments on the FOIA REGS."

November 13, 2001 e-mail message from Bob Moll, DGL, to Timothy Murphy, DGL, regarding "Comments on the FOIA REGS."

October 26, 2001 e-mail message from Johnny Hunt, FWS, to Jack Kraus, FWS, regarding "Guidance Concerning the Ashcroft Memo."

October 25, 2001 e-mail message from Johnny Hunt, FWS, to Jack Kraus, FWS, regarding "Interpretation of Ashcroft Memo on FOIA."

**Withheld in full:**

October 25, 2001 e-mail message drafted by Alexandra Mallus, DOI FOIA Officer, OCIO, which was sent to Robin Friedman on October 26, 2001, for review and surname (2 pages).

October 19, 2001 e-mail message from Karen Mouritsen, DGL, to Bob Moll, DGL, regarding "Important FOIA News" (2 pages).

October 24, 2001 e-mail message from Alexandra Mallus to Daryl White, et al., regarding "New FOIA Policy Issued by Attorney General. (2 pages).

Attachment to October 26, 2001 e-mail message from Johnny Hunt, FWS, to Karen Mouritsen, DGL, et al., regarding "Guidance Concerning the Ashcroft Memo. (2 pages).

November 16, 2001 e-mail message from Johnny Hunt, FWS, to Martin Miller, FWS, et al., regarding "Who's Property" (4 pages).

Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the

agency.”(5 U.S.C. § 552 (b)(5)). As such, the privilege "exempt[s] those documents . . . normally privileged in the civil discovery context." National Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132 (1975) (NLRB). The exemption incorporates several of these privileges from discovery in litigation, including the deliberative process privilege. Id. at 149.

The deliberative process privilege "protect[s] the decisionmaking process of government agencies" and "encourage[s] the frank discussion of legal and policy issues" by ensuring that agencies are "not forced to operate in a fish bowl." Mapother v. United States Dep't of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (citing Wolfe v. United States Dep't of Health & Human Services, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc)) (Mapother). Three policy purposes have been advanced by the courts as the bases for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. See, e.g., Russell v. United States Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (Russell); Coastal States Gas Corp. v. United States Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

The deliberative process privilege protects materials that are both predecisional and deliberative. Mapother, 3 F.3d at 1537; Access Reports v. United States Dep't of Justice, 926 F.2d 1192, 1195 (D.C. Cir. 1991); Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). A "predecisional" document is one "prepared in order to assist an agency decisionmaker in arriving at his decision," and may include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." Maricopa Audubon Society v. United States Forest Service, 108 F.3d 1089, 1093 (9th Cir. 1997). A predecisional document is part of the "deliberative process" if "the disclosure of the materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." Id.

Those documents and portions of documents that have been withheld pursuant to Exemption 5 are both predecisional and deliberative. They consist of or contain the opinions and recommendations of Departmental employees pertaining to the Ashcroft memorandum. As such, they are quintessential draft documents, prepared by agency subordinates to assist the work of administration superiors. They do not contain or represent formal or informal agency policies or decisions. Public dissemination of this information would have a chilling effect on the agency's deliberative processes. It would

expose the agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine its ability to perform its mandated functions.

Robin Friedman, Attorney-Advisor, in the Office of the Solicitor, was consulted in reaching this decision. Sue Ellen Sloca, Office of the Secretary FOIA Officer, is responsible for making this decision.

If you believe that the decision to withhold this information is incorrect, you may file an FOIA appeal by writing to the FOIA Appeals Officer, Office of the Assistant Secretary - Policy, Management and Budget, U.S. Department of the Interior, 1849 C Street, NW, Mail Stop 5312, MIB, Washington, D.C. 20240. Your appeal letter must be received no later than 20 calendar days (excluding Saturdays, Sundays and legal holidays) after the date of our response (this letter.) Your appeal letter must be marked, both on its envelope and at the top of its first page, with the legend "FREEDOM OF INFORMATION APPEAL." Your appeal letter must be accompanied by a copy of your original FOIA request (a copy of which is enclosed with our response, for your convenience,) and a copy of this letter, along with a brief explanation of why you believe that this decision is in error.

The FOIA fee for the processing of this portion of your request is \$38.17, calculated as follows:

1 ½ hours of professional search time	@ \$4.65 per 1/4 hour
79 pages of photocopying	@ \$ .13 per page

This brings the total fee for processing your request thus far within the Department of the Interior to \$58.85, calculated as follows:

2 1/2 hours of professional search time	@ \$4.65 per 1/4 hour
95 pages of photocopying	@ \$.13 per page

However, insofar as we have classed your request as a media-use request, and have determined that you are entitled not to be charged for the cost of search time and are entitled to receive 100 pages of document reproduction without charge before you can be asked to pay a portion of the fees incurred in the processing of your request, your FOIA fee thus far, after the subtraction of your entitlements, is \$0.00, rendering your request for a fee waiver moot.

This completes the second installment of the Department's response to your FOIA

request. We hope to be able to send you the final installment of it shortly.

If you have any questions regarding this portion of our response, you may contact me by phone at 202-208-6045, by fax at 202-219-2374, by e-mail at osfoia@nbc.gov, or by mail at U.S. Department of the Interior, MS 1413 MIB, Washington, D.C. 20240. Alternatively, you can provide us with a phone number at which you can be reached, along with the time of day that you prefer to be contacted, and we can attempt to contact you, at our expense, to answer any questions that you might have, regarding your request. Within the Office of the Secretary, we are committed to providing you, our customer, with the highest quality of service possible.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sue Ellen Sloca".

Enclosures

Sue Ellen Sloca  
Office of the Secretary  
FOIA Officer

**PRIVACY ACT notice:** *Before you choose to contact us, electronically, there are a few things you should know. The information you submit, including your electronic address, may be seen by various people. We will scan a copy of your request into our electronic OS FOIA administrative/image file. We will key the information that you provide to us into our electronic OS FOIA tracking file. We may share it with other individuals, both within and without the Department, involved in Freedom of Information Act administration. You may be contacted by any of these individuals. In other limited circumstances, including requests from Congress or private individuals, we may be required by law to disclose some of the information you submit. Also, e-mail is not necessarily secure against interception. If your communication is very sensitive, or includes personal information like your bank account, charge card, or social security number, you might want to send it by postal mail, instead.*

**The National Security Archive**

The George Washington University  
Gelman Library, Suite 701  
2130 H Street, N.W.  
Washington, D.C. 20037

Phone: 202/994-7000  
Fax: 202/994-7005  
nsarchive@gwu.edu  
www.nsarchive.org

Via Facsimile

September 4, 2002

**COPY**

Alexandra Mallus  
Departmental FOIA Officer (MS-5312 MIB)  
Office of Information Resources Management  
US Department of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240

Re: Archive FOIA Request #20020533DOI001

Dear Ms. Mallus:

Pursuant to the Freedom of Information Act (FOIA), I hereby request disclosure of the following documents for inspection and possible copying:

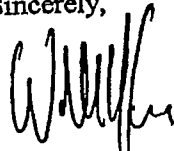
**All records, including but not limited to guidance or directives, memoranda, training materials, or legal analyses, concerning the US Department of the Interior's implementation of US Attorney General John Ashcroft's October 12, 2001 memorandum on the US Freedom of Information Act.**

If you regard any of these documents as potentially exempt from the FOIA's disclosure requirements, I request that you nonetheless exercise your discretion to disclose them. As the FOIA requires, please release all reasonably segregable nonexempt portions of documents. To permit me to reach an intelligent and informed decision whether or not to file an administrative appeal of any denied material, please describe any withheld records (or portions thereof) and explain the basis for your exemption claims.

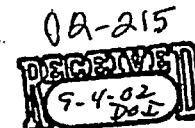
As you know, the National Security Archive qualifies for waiver of search and review fees as a representative of the news media. This request is made as part of a scholarly and news research project and not for commercial use. For details on the Archive's research and publication activities, please see our Web site at the address above. Please notify me before incurring photocopying costs over \$100.

To expedite the release of the requested documents, please disclose them on an interim basis as they become available to you, without waiting until all the documents have been processed. If you have any questions regarding the identity of the records, their location, the scope of the request or any other matters, please contact me directly at (202) 994-7045 or wferro@gwu.edu. I look forward to receiving your response within the twenty-day statutory time period.

Sincerely,



William Ferroggiaro  
Director, Freedom of Information Project



An Independent non-governmental research institute and library located at the George Washington University, the Archive collects and publishes declassified documents obtained through the Freedom of Information Act. Publication royalties and tax deductible contributions through The National Security Archive Fund, Inc. underwrite the Archive's Budget.