

# The National Security Archive

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Via facsimile

27 January 2003

Headquarters Freedom of Information Staff  
Records, Privacy and FOIA Branch  
Office of Information Collection  
Office of Environmental Information  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
(Mail Code 2822T)  
Washington DC 20460

RE: FOIA Appeal  
FOIA Request HQ-RIN-02440-02

Dear Sir or Madame:

This letter constitutes an administrative appeal under the Freedom of Information Act, 5 U.S.C. Sec. 552, of two separate responses by entities of the Environmental Protection Agency concerning a FOIA request I filed dated September 4, 2002.

First, by letter dated October 7, 2002, EPA's Office of Environmental Information released three documents in their entirety, but denied another 39 documents in full citing exemption (b)(5) of the FOIA.

Second, by letter dated November 19, 2002, EPA's Office of General Counsel released 15 documents in their entirety, but denied 77 others in full, again, citing exemption (b)(5) of the FOIA.

For your reference, I have enclosed both letters.

With respect to the documents withheld on the basis of (b)(5), I ask that, at a minimum, you review these documents in the appeal process to release segregable, factual portions of documents found responsive to the request. Factual, post-decisional information, unless inextricably intertwined with other information, is not protected under the fifth exemption and must be released. See the Supreme Court's ruling in *EPA v. Mink*, 410 U.S. Further, the FOIA requires release of "any reasonably segregable portion of a record" "after deletion of the portions which are exempt". See 5 U.S.C. Sec. 552 (b). It seems certain that there

is releasable material in at least some of the 116 documents denied in their entirety.

Additionally, I would ask your reviewers to consider that the Ashcroft memorandum is by definition a policy directive and concluded and that EPA's implementing guidelines are likely also concluded and implemented. Correctly applied, exemption five protects deliberative material during the deliberative process. As the policy has been decided, there is likely no deliberative rationale remaining to properly withhold this material. Therefore, I seek the maximum disclosure of this information.

Attorney General Ashcroft's memorandum itself declares that the "Department of Justice and this Administration are committed to full compliance with the Freedom of Information Act". See <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>. Indeed, Attorney General Ashcroft's memorandum does not forbid disclosure of material that is deliberative or advisory in nature, but, as with other types of information, it advises agencies to "carefully consider" values and interests in determinations of disclosure.

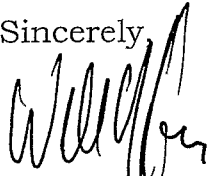
Consequently, I ask that you reexamine these initial determinations in light of the public interest in understanding the impact of Attorney General John Ashcroft's memorandum on FOIA, particularly at the EPA, which, due to its unique regulatory role, has developed advanced disclosure policies and mechanisms with far-reaching public impact.

I would also note that, in forwarding Attorney General Ashcroft's memorandum to departments and agencies, the Department of Justice's Office of Information and Privacy nevertheless advised "the presidential statement on the FOIA that was issue in 1993 remains in effect as well." See <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>. In that statement, President Clinton directed all executive branch departments and agencies to "renew their commitment to the Freedom of Information Act, to its underlying principles of government openness, and its sound administration." In particular, the President stressed that "(t)he existence of bureaucratic hurdles has no place in its implementation."

I look forward to receiving your decision on this appeal. If you have any questions, or believe that a discussion of this matter

would be beneficial, please contact me directly at [wferro@gwu.edu](mailto:wferro@gwu.edu)  
or (202) 994-7045.

Sincerely,

A handwritten signature in black ink, appearing to read 'William Ferroggiaro', written over the word 'Sincerely,'.

William Ferroggiaro  
Director, Freedom of Information Project

Enclosures



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

2002 0519 EPA001

OCT 7 2002

OFFICE OF  
ENVIRONMENTAL INFORMATION

RECEIVED OCT 11 2002

Mr. William Ferraggiaro  
The National Security Archive  
The George Washington University  
Gelman Library, Suite 701  
2130 H Street, N.W.  
Washington, D.C. 20037

RE: Freedom of Information Act Request HQ-RIN 02440-02

Dear Mr. Ferroggiaro,

This is in response to your Freedom of Information Act request of September 4, 2002. Specifically, you requested categories of documents concerning the Agency's implementation of Attorney General Ashcroft's October 21, 2001 memorandum concerning the Freedom of Information Act (FOIA). This response is from the Office of Environmental Information. Other Agency offices will be responding separately.

Enclosed you will find copies of three documents responsive to your request. Non-responsive portions of two of the documents have been removed. We are unable to provide you with the documents which have been determined to be exempt from mandatory disclosure by virtue of the deliberative process and attorney-client privileges of 5 U.S.C. 552(b)(5). An itemized list of the documents which are being withheld, along with the basis for withholding, is provided on the enclosure to this letter.

You may appeal this partial denial by submitting a written appeal to the Freedom of Information Officer, United States Environmental Protection Agency, 1200 Pennsylvania Ave (2822T), N.W., Washington, D.C. 20460, within 30 days of receipt of this partial denial. Your appeal should refer to the RIN number listed above, the date of this determination, and my name, title and address.

You should refer to RIN 02440-02 in any further correspondence concerning this matter.  
If you have any questions, please contact Alan D. Margolis of my staff at 566-1644.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Lutner", with a large, sweeping flourish at the end.

Mark Lutner  
Director  
Office of Information Collection

Enclosures

cc: FOI Office

**Index of Withheld Documents** – HQ-RIN- 02440-02

All documents are withheld pursuant to the **deliberative process privilege** of Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5). Additional privileges, as applicable, are listed next to the specific documents for which they are asserted.

**Briefing documents and drafts**

1. Briefing Document entitled “Memorandum and Guidance Concerning the Safeguarding and Protection of Sensitive Homeland Security Information” prepared by Alan Margolis, Attorney-Advisor, Office of Environmental Information. (3 pages)
2. Briefing Document entitled “Use of FOIA Exemption 2 for the Protection of Sensitive Critical Infrastructure Information” prepared by Alan Margolis, Attorney-Advisor, Office of Environmental Information. (1 page)
3. Draft of #1 above with handwritten comments.
4. Draft of #2 above with handwritten comments.

Documents 1-4 are withheld pursuant to the **attorney-client privilege** of Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5).

5.-9. Drafts (undated) of transmittal memo from the Administrator re: New Attorney General Memorandum on the FOIA.

10-11. Drafts (undated) of Memorandum from Kimberly T. Nelson, Assistant Administrator and Chief Information Officer, Office of Environmental Information, entitled “Guidance on Homeland Security Information.” *Portions non-responsive to request*

12. Draft of Memorandum from Kim Nelson, Assistant Administrator, OEI, entitled “Andrew Card Memorandum on Homeland Security Information” with handwritten comments from Doreen Sterling, Office of Environmental Information. *Portions non-responsive to request*

13. Draft of Memorandum from Kim Nelson, Assistant Administrator, OEI, entitled “Andrew Card Memorandum on Homeland Security Information” with handwritten comments dated 4/8/02 from Rebecca Moser, Office of Environmental Information. *Portions non-responsive to request*

14. Draft of Memorandum from Kim Nelson, Assistant Administrator, OEI, entitled “Andrew Card Memorandum on Homeland Security Information” with comments dated 4/11/02 from Nancy Ketcham-Colwill, Office of General Counsel, Office of Environmental Information. *Portions non-responsive to request*

15. Draft of Memorandum from Kim Nelson, Assistant Administrator, OEI, entitled “Andrew Card Memorandum on Homeland Security Information” with handwritten comments dated

4/12/02 from Odelia Funke, Office of Environmental Information. *Portions non-responsive to request*

Documents 5-15 are withheld pursuant to the **attorney-client privilege** of Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5).

*E-mail messages* All e-mails are one page unless otherwise indicated.

16-19. Four E-mails from Betty Lopez, Agency FOIA Officer, dated 10/17/2001 and 10/18/2001, re: new FOIA policy.

20. E-mail from Alan Margolis dated 10/18/2001, re: New Attorney General FOIA Memorandum Issued.

Documents 20 are withheld pursuant to the **attorney-client privilege** of Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5).

21. E-mail from Oscar Morales, Office of Environmental Information, dated 10/18/2001, re: new FOIA Policy.

22. E-mail from Oscar Morales, Office of Environmental Information, dated 10/18/2001, re: new FOIA Policy (two pages).

23. E-mail from Robert Friedrich, Office of General Counsel, dated 10/18/2001, re: New Attorney General FOIA Memorandum issued.

24. E-mail from Alan Margolis dated 10/19/2001 transmitting draft cover memo for the Administrator.

25. E-mail dated 10/22/2001 from Patricia Hirsch, Office of General Counsel, transmitting comment on draft transmittal memo

Documents 23 and 25 are withheld pursuant to the **attorney-client privilege** of Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5).

26. E-mail from Betty Lopez dated 10/22/2001 transmitting comment on draft transmittal memo.

27. E-mail from Alan Margolis dated 10/22/2001, re: revised transmittal memo.

28.-29. E-mails from Oscar Morales dated 10/22-23/2001, re: revised transmittal memo.

30. E-mail from Robert Friedrich dated 10/23/2001, re: new draft.

31. E-mail from Alan Margolis dated 10/24/2001 transmitting draft final version of transmittal memo.

32. E-mail from Mark Luttner dated 10/24/2001 transmitting comment on draft transmittal memo.

33. E-mail from Alan Margolis dated 10/31/2001, re: FYI Att'y Gen'l Ashcroft Issues Memorandum on FOIA.

34. E-mail from Alan Margolis dated 11/06/2001, re: revised draft of Administrator's memo transmitting the Ashcroft FOIA memo.

35-37. E-mails from Robert Friedrich dated 11/6-7/2001, re: revised draft of Administrator's memo transmitting the Ashcroft FOIA memo"

Documents 36-37 are withheld pursuant to the **attorney-client privilege** of Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5).

38. E-mail from Betty Lopez dated 11/09/2001, re: Transmittal Memo (Ashcroft)

39. E-mail from Patricia Hirsch, OGC, dated 11/13/2001, re: Ashcroft memo

This document is withheld pursuant to the **attorney-client privilege** of Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5).





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

NOV 19 2002

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OFFICE OF  
GENERAL COUNSEL

RECEIVED NOV 21 2002

Mr. William Ferroggiaro  
National Security Archive  
George Washington University  
Gelman Library, Suite 701  
2130 H Street, N.W.  
Washington, D.C. 20037

Re: Freedom of Information Act Request HQ-RIN-02440-02

Dear Mr. Ferroggiaro:

This is in response to your Freedom of Information Act (FOIA) request of September 4, 2002. Specifically, you requested documents concerning the Environmental Protection Agency's (EPA or Agency) implementation of Attorney General John Ashcroft's October 12, 2001 memorandum on the FOIA. This letter is the EPA Office of General Counsel's response to your request. I understand that EPA's Office of Environmental Information has responded to you separately.

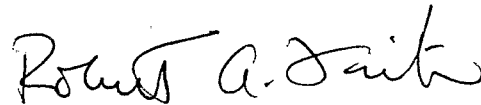
I am enclosing copies of 15 documents that are responsive to your request. I am withholding 77 other responsive documents that I have determined to be exempt from disclosure under Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5). A list of the documents that are being withheld, along with the basis for withholding, is provided in an enclosure to this letter.

If you are dissatisfied with this determination, you may appeal to the Headquarters Freedom of Information Staff, Records, Privacy and FOIA Branch, Office of Information Collection, Office of Environmental Information, Environmental Protection Agency, 1200 Pennsylvania Avenue, N.W. (Mail Code 2822T), Washington, D.C. 20460. The appeal must be made in writing, and it must be submitted to the Headquarters Freedom of Information Staff no later than 30 calendar days from the date of this letter. The appeal may include as much or as little related information as you wish, as long as it clearly identifies the determination being appealed (including the assigned FOIA request number, HQ-RIN-02440-02). For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

Mr. William Ferroggiaro  
National Security Archive  
FOIA Request HQ-RIN-02440-02  
Page 2

If you have any questions, please contact Patricia K. Hirsch, Assistant General Counsel for Information Law, at (202) 564-5462.

Sincerely,

A handwritten signature in black ink that reads "Robert A. Friedrich". The signature is written in a cursive style with a large initial "R" and "F".

Robert A. Friedrich  
Deputy Associate General Counsel  
Finance and Operations Law Office

Enclosures

cc: Betty Lopez, FOIA Officer  
Linda D. Smith, OGC

## DOCUMENTS RELEASED

Documents 1, 2, 6, 11, 31, 39, 43, 47, 62, 69, 71, 72, 73, 81, and 84.

## DOCUMENTS WITHHELD

The following documents were withheld under FOIA Exemption 5 and have been marked to indicate the basis: Deliberative Process Privilege (DP) or Attorney-Client Privilege (AC). Documents 1-69 were from the records of Patricia (Pat) Hirsch, Assistant General Counsel, EPA OGC. Documents 70-92 were from the records of Robert Friedrich, Deputy Associate General Counsel, EPA OGC.

<u>Document</u>	<u>Description</u>
3.	Email from Nancy Ketcham-Colwill, EPA OGC, to Pat Hirsch, EPA OGC. Dated 10/17/01; 11:09 am. (DP)
4.	Email from Betty Lopez, EPA Office of Environmental Information (OEI), to FOIA Officers, cc to Pat Hirsch, EPA OGC. Dated 10/17/01; 10:13 pm. (DP)
5.	Email from John Heinz, EPA OGC, to Pat Hirsch, EPA OGC. Dated 10/18/01; 8:42 am. (DP)
7.	Email from Mark Bialek, EPA Office of Inspector General (OIG), to Robert Friedrich, Marla Diamond, and Pat Hirsch, EPA OGC. Dated 10/18/01; 10:55 am. (DP)
8.	Email from Betty Lopez, EPA OEI, to Ray Spears, EPA Office of the Administrator; cc to Pat Hirsch, EPA OGC, et al. Dated 10/18/01; 1:08 pm. (DP)
9.	Email from Robert Heiss, EPA Office of Enforcement and Compliance Assurance (OECA), to Ariadne Goerke, EPA OGC, cc to Pat Hirsch, EPA OGC, et al. Dated 10/18/01; 1:46 pm; responding to Email from Ariadne Goerke, EPA OGC; Dated 10/04/01; 2:57 pm. (DP) (AC)
10.	Email from Orelia Merchant, EPA Office of Regional Counsel (ORC) Region 5, to Pat Hirsch, EPA OGC. Dated 10/18/01; 6:16 pm. (DP) (AC)
12-17.	Email from and to Pat Hirsch, EPA OGC, Alan Margolis, EPA OEI, and Robert Friedrich, EPA OGC, regarding drafts of transmittal memorandum for Administrator. Dated 10/22/01-10/24/01. (DP)
18-21.	Emails to and from Brian Grant, Hale Hawbecker, Carrie Wehling, Lisa Friedman, and Pat Hirsch, all EPA OGC. Dated 10/24/01-10/26/01. (DP)
22-23.	Emails from Renee Sarajian, EPA ORC Region 3, and Joanna Glowacki, EPA ORC Region 5, to Pat Hirsch, EPA OGC et al. Dated 10/31/01-11/01/01. (DP)
24.	Email from Ariadne Goerke, EPA OGC to Robert Heiss, EPA OECA, cc Pat Hirsch, EPA OGC. Dated 11/05/01; 11:44 am. (DP) (AC)
25.	Email from Pat Hirsch, EPA OGC, to Geoffrey Cooper, EPA OGC. Dated 11/05/01; 4:29 pm. (DP)

- 26-34. Emails between Pat Hirsch, Robert Friedrich, Marla Diamond, EPA OGC, Alan Margolis, EPA OEI, regarding drafts of Q & A's and transmittal memorandum for Administrator. Dated 11/05/01-11/13/01. (DP) (AC)
- 35-38,  
40-42. Emails between Pat Hirsch EPA OGC, and EPA Region 3 and 5 attorneys. Dated 11/13/01 and 12/12/01. (DP)
44. Email from Pat Hirsch, EPA OGC, to Scott Sherlock, EPA, Office of Prevention, Pesticides, and Toxic Substances. Dated 1/07/02; 10:12 am. (DP)
- 45-46. Emails between Nancy Ketcham-Colwill, Pat Hirsch, and Geoffrey Cooper, EPA OGC. Dated 1/10/02-1/11/02. (DP)
- 48-51. Emails between Betty Lopez, EPA OEI, and Ariadne Goerke and Pat Hirsch, EPA OGC. Dated 3/05/02-3/18/02. (DP) (AC)
- 52-63. Emails between EPA OGC attorneys (Pat Hirsch, Aron Golberg, et al.) and EPA ORC attorneys from Regions 3 and 7, and Alan Margolis, EPA OEI. Dated 3/20/02-5/31/02. (DP)
- 64-66. Emails between Pat Hirsch, Jocelyn Atkins, Marla Diamond, and Geoffrey Cooper, EPA OGC, regarding comments on draft report on access. Dated 6/19/02-6/21/02. (DP)
- 67-68. Emails from Pat Hirsch and Robert Friedrich, EPA OGC, to Marla Diamond, Geoffrey Cooper, Lisa Jaeger, EPA OGC, regarding transmittal memo from the Administrator. Dated 7/24/02-8/08/02. (DP)
70. Email from Robert Friedrich, EPA OGC, to Anna Wolgast, EPA OGC, et al. Dated 10/18/01; 10:54 am. (DP)
- 74-80, 85,  
88-92. Emails from and to Robert Friedrich and Pat Hirsch, EPA OGC, and Alan Margolis, EPA OEI, regarding drafts of the Administrator's transmittal memo. Dated 10/23/01-11/09/01. (DP)
82. Email from Betty Lopez, EPA OEI, to Robert Friedrich, EPA OGC, and Ray Spears, EPA Office of the Administrator. Dated 10/18/01; 1:08 pm. (DP)
- 83, 86. Emails from Pat Hirsch, EPA OGC, to OGC and ORC information attorneys. Dated 10/18/01-10/24/01. (DP)
87. Email from Renee Sarajian, EPA ORC Region 3, to Robert Friedrich, EPA OGC, et al. Dated 10/31/01; 5:11 pm. (DP) (AC)

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\*\*\* TX REPORT \*\*\*  
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## FAX COVER SHEET

Date: 27 January 2003

To: Headquarters Freedom of Information Staff

Organization: Office of Environmental Information, US EPA

From: William Ferroggiaro

Number of pages (including cover sheet) 13

If there is a problem with this transmission, please call us at 202-994-7000 as soon as possible.

### Message:

FOIA Appeal

EPA FOIA Case No. HQ-RIN-02440-02