




UNITED STATES DEPARTMENT OF COMMERCE
Office of the General Counsel
WASHINGTON, D.C. 20230

OCT 26 2001

MEMORANDUM FOR: Secretarial Officers
Heads of Operating Units

FROM: Barbara S. Fredericks 
Assistant General Counsel
For Administration

SUBJECT: Government-wide Freedom of Information Act (FOIA) Policy

Last week, the Attorney General issued a memorandum reminding agencies that discretionary disclosures under FOIA should be made only after full and deliberate consideration of the institutional, commercial, and privacy interests that could be implicated by disclosure of the information. This is a change in policy from the foreseeable harm standard, which operated on the presumption of disclosure and required that exemptions be asserted only after a determination that there would be foreseeable harm to governmental or private interests. The new policy provides for withholding of information protected by FOIA exemptions, without requiring a foreseeable harm analysis.

When determining whether to make discretionary disclosures, an agency should consider such interests as national security, law enforcement effectiveness, business confidentiality, internal Government deliberations, and personal privacy. As always, information cannot be withheld under FOIA unless it is protected by a FOIA exemption. The written statement drafted by operating units prior to issuing an initial FOIA denial (formerly the foreseeable harm statement) must reflect why all withheld information falls within a FOIA exemption or exemptions.

If you have any questions about this issue, please contact me or Judith Means of my staff at (202) 482-0387. We are available to meet with members of your staff to discuss these changes.

cc: Department of Commerce FOIA officers

Attachment



Office of the Attorney General

Washington, D. C. 20530

October 12, 2001

MEMORANDUM FOR HEADS OF ALL FEDERAL DEPARTMENTS AND AGENCIES

FROM: John Ashcroft
Attorney General

A handwritten signature in black ink, which appears to read "John Ashcroft", is written over the typed name and title.

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.



U.S. Department of Justice

Office of Information and Privacy

Telephone: (202) 514-3642

Washington, D.C. 20530

October 15, 2001

MEMORANDUM

TO: Principal FOIA Administrative and Legal
Contacts at All Federal Agencies

FROM: ~~Richard L. Huff~~
~~Daniel J. Metcalfe~~
Co-Directors
Office of Information and Privacy

SUBJECT: New Attorney General Memorandum on the FOIA

Enclosed is a new policy memorandum on the Freedom of Information Act that was issued by Attorney General John Ashcroft this past Friday evening, October 12, 2001.

As you can see, Attorney General Ashcroft's FOIA Memorandum establishes a new "sound legal basis" standard governing the defense of Freedom of Information Act lawsuits by the Department of Justice. It also recognizes the continued agency practice of making discretionary disclosures of exempt information under the Act, subject to statutory prohibitions and careful agency consideration of all institutional, commercial, and personal interests involved.

This new statement of FOIA policy supersedes the FOIA policy statement that was issued by the Department of Justice in October 1993, and it is effective immediately. The presidential statement on the FOIA that was issued in 1993 remains in effect.

Please ensure that this new FOIA policy memorandum is distributed widely within your agency as expeditiously as possible. Additionally, we will be distributing and discussing it at a FOIA Officers Conference to be held on Thursday, October 18, at the Commerce Department's Main Auditorium, at 10:00 a.m. It also is being made available through FOIA Post on the Department of Justice's FOIA Web site as of today.

Do not hesitate to contact OIP, through its FOIA Counselor service, at (202) 514-3642, with any question about this FOIA policy memorandum or any other aspect of FOIA administration.

Enclosure