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10/22/01 02:05 PM

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Subject: Important FOIA News - Reminder FOIA Officer Meeting - Wednesday, Oct. 24, 10 am, Room 1352-MIB [Virus checked]

**BUREAU/OFFICE FOIA OFFICERS:**

As you are aware, on Oct. 12, 2001, the Attorney General issued a FOIA policy memorandum which rescinds the "foreseeable harm standard" established under the former administration. Last week, DOJ held a Government-wide meeting to discuss the change in FOIA policy established by the Ashcroft memorandum. At the meeting, DOJ also provided informal guidance on the difficult issue of how to deal with FOIA requests for materials relating to security plans at Government installations, blueprints of buildings, dams or other structures, and other materials that might be used to harm national security interests, even if that harm had not been anticipated prior to the recent terrorist attacks in NYC and at the Pentagon. I attended the meeting along with representatives from SOL and the Office of Managing Risk and Public Safety--please see Bob Moll's notes, below.

**We will be discussing both of these issues, along with the FOIA annual report, at our meeting on Wednesday, Oct. 24, at 10 am in Room 1352, MIB.**

I look forward to seeing all of you at the meeting. If you are unable to attend, please make sure someone is there to represent the bureau/office.

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----- Forwarded by Alexandra Mallus/PIR/OS/DOI on 10/22/01 11:52 AM -----

**KAREN MOURITSEN**  
10/22/01 10:45 AM

To: Alexandra Mallus  
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Subject: Important FOIA News

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----- Forwarded by KAREN MOURITSEN/HQ/SOL/DOI on 10/22/01 10:48 AM -----

**BOB MOLL**  
10/22/01 10:12 AM

To: SOL- Ann-AllEmp  
cc:  
Subject: Important FOIA News

Everyone-

There are two recent developments in the FOIA field that could potentially impact the work all of us do. First, Attorney General John Ashcroft has issued a new FOIA policy that differs in several important respects from the policy issued by former Attorney General Janet Reno. Second, DOJ has given some informal guidance on the difficult issue of how to deal with requests under the FOIA for materials relating to security plans at government installations, blueprints of buildings, dams or other structures, and other materials that might be used to harm national security interests, even if that harm had not been anticipated prior to the recent terrorist attacks in NYC and at the Pentagon. Several of us from the Solicitor's Office, as well as other Departmental staff including the FOIA Officer and a representative of the Office of Managing Risk and Public Safety, attended a government-wide meeting held by DOJ to discuss these important matters. I have elaborated on these two issues below. If you have further questions or concerns, please contact me or any of the rest of the staff in the Branch of General Legal Services.

The Ashcroft Memorandum:

The new FOIA policy articulated in the Ashcroft memorandum supersedes the prior policy that documents should be released even if exempt, unless there is foreseeable harm from the release. The new policy does not actively encourage discretionary disclosures. However, the policy does recognize the agencies' ability to make discretionary disclosures. To make a discretionary disclosure, an agency must first carefully consider the facts and information in the documents and consider the interests that might be impacted by the disclosure, such as institutional, commercial and privacy interests. One result of this new policy is that agencies can once again use the "low (2)" exemption to withhold information on trivial administrative matters.

The Ashcroft memorandum and DOJ guidance also address the procedures for withholding documents. The memorandum states that in making decisions regarding disclosure, agencies should carefully consider the values and interests underlying the exemptions. Before we withhold documents, we should be sure that we have both a sound factual and legal basis for withholding the documents. DOJ emphasized in the meeting the need to thoroughly understand the factual information in the withheld documents and the context in which the documents were created and used. We should also have a sound legal theory for withholding documents. DOJ will defend withholdings of documents if we have a sound legal and factual basis for the withholding.

DOJ also emphasized, in the meeting and in the Ashcroft memorandum, that they are willing to consult with us and assist on difficult legal questions. The Division of General Law is happy to consult with you as you advise your clients on the initial withholdings of documents.

The Ashcroft memorandum and DOJ guidance are attached below or can be found at:  
<http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>

Requests for Information relating to security plans, dam and building structural plans, etc:

DOJ also discussed the "high (2)" FOIA exemption that allows us to withhold information about internal agency practices if the disclosure would "risk circumvention of law or agency regulation." DOJ believes that a good case can be made that the "high (2)" exemption can be used to protect information that could possibly allow a terrorist to breach the security of a government or non-government installation, etc. We probably have the strongest grounds to use "high (2)" to withhold "vulnerability assessments" that analyze security at government installations, based on Crooker v. ATF, 670 F.2d 1051 (D.C.Cir. 1981) and Founding Church of Scientology v. Smith, 721 F.2d. 828, (D.C.Cir. 1983). There are likely to be other circumstances in which information that raises security concerns could be withheld under "high (2)." Because the law of "high (2)" is evolving, we request that if you have FOIA requests for information you think may be withholdable under "high (2)", you consult with us or DOJ. We can give you more information on the legal theories and risks to using "high (2)."

We also understand that thought is being given to seeking exemption (3) legislation to address these issues, and General Law hopefully will have some input in these efforts; therefore we would appreciate you alerting us to the types of documents that you are attempting to protect with "high (2)."



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