



# United States Department of the Interior

FISH AND WILDLIFE SERVICE  
Washington, D.C. 20240



In Reply Refer To:  
FWS/PDM

Memorandum

To: Service Directorate

From: <sup>Acting</sup> Deputy Director *K Odams* NOV - 7 2001

Subject: New Attorney General Memorandum on the Freedom of Information Act (FOIA)

Attached is the subject memorandum, from Attorney General John Ashcroft that supersedes an October 4, 1993, memorandum by former Attorney General Janet Reno.

### The previous Attorney General's policy

On October 4, 1993, Attorney General Reno issued a memorandum outlining government policy related to the disclosure of information under the FOIA. In that memo the Attorney General recognized the importance of an informed citizenry and the role of FOIA in maintaining the principle of openness in government and asserted the following:

- 1) FOIA is a law whose presumption is on disclosure.
- 2) The Department of Justice would no longer defend an agency's withholding merely because there was a "substantial legal basis" for doing so.
- 3) Instead, there must be a specific reference to harm to an interest protected by the exemption used.
- 4) There is an **emphasis** on "discretionary disclosures" (we disclose information even though technically there is an exemption that can be applied).
- 5) Agencies had a 'reasonable segregation' obligation under the FOIA (i.e., the agency must attempt to separate factual information from predecisional and deliberative information).

### The current Attorney General's policy

Attorney General John Ashcroft's October 12, 2001, memorandum, is similar in that it recognizes the following: the importance of a well-informed citizenry, the FOIA's role in preserving government accountability, the opportunity for 'discretionary disclosures'; and the obligation to 'reasonably segregate' factual information from predecisional and deliberative information. However it **emphasizes** the following.

- 1) There is a need to safeguard national security, enhance the effectiveness of law enforcement operations, protect sensitive business information, and preserve personal privacy.
- 2) Confidential advice and counsel prepared in the conduct of agency deliberations must be preserved to operate effectively.
- 3) 'Discretionary disclosures' may be made but only after full and deliberate consideration of the institutional, commercial, and personal privacy interests.

**How does this affect your processing of FOIA requests?**

Attorney General Ashcroft's memorandum establishes a shift in FOIA policy and does the following.

- 1) It preserves the opportunity for 'discretionary disclosures' but does not establish a presumption for such disclosures.
- 2) It allows 'discretionary disclosures' of information only after a thorough analysis of the effects upon institutional, commercial, and personal privacy interest; and in consultation with and under surname of the Office of the Solicitor.
- 3) It eliminates the need to prepare a 'foreseeable harm statement' related to exemption 5 (predecisional and deliberative) withholdings.
- 4) It reinvigorates the application of exemption 2 (circumvention of internal agency rules and procedures) in order to withhold institutional information.

We wish to emphasize that the shift related to release of information under the FOIA has moved from the presumption of 'discretionary disclosure' of information to the need to safeguard institutional, commercial, and personal privacy interests. The application of Attorney General Ashcroft's policy will be further defined by the interpretation of future case law. This information will be provided to bureau FOIA contacts as soon as it becomes available.

All other procedures including, the requirements to seek review from the Office of the Solicitor and to provide the requester appeal rights when withholding information are still in effect. If you have further questions or need additional information, please contact the Service FOIA Officer, Johnny Hunt, on 703/358-2504.

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

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.