

**THE ASHCROFT MEMO:**

**“Drastic” Change Or  
“More Thunder Than Lightning”?**

**The National Security Archive**

**Freedom of Information Act Audit**

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## **THE ASHCROFT MEMO: “Drastic” Change Or “More Thunder Than Lightning”?**

### **EXECUTIVE SUMMARY**

#### Findings Regarding Implementation of Attorney General Ashcroft’s FOIA Memorandum:

- 5 of 33 Federal departments or agencies surveyed (15 %) indicated significant changes in regulations, guidance, and training materials and that the Ashcroft Memorandum was widely disseminated.
- 8 of 33 Federal departments or agencies surveyed (24 %) indicated implementation activities concerning the Ashcroft Memo, including its dissemination and incorporation into FOIA regulations and procedures.
- 17 of 33 Federal departments or agencies surveyed (52 %) indicated awareness and dissemination of the Ashcroft Memo, but indicated little change in regulations, guidance or training materials reflecting the new policy.
- 3 of 33 Federal departments or agencies surveyed (9 %) indicated no changes in regulations, guidance or training materials, and little if no dissemination of the Ashcroft Memorandum.

#### Findings Regarding Administrative Processing of FOIA Requests:

- Inaccurate or incomplete information about agency FOIA contacts.
- Failure to acknowledge requests.
- Lost requests.
- Excessive Backlogs.
- Complete Decentralization Leading to Delay and Lack of Oversight.
- Inconsistent Practices Regarding the Acceptance of Administrative Appeals.
- Appealing FOIA Determinations May Delay Processing, But Also May Get The Agency’s Attention.
- Conflation of Fee Categorization and Fee Waiver Standards.

Pending: Audit Regarding Implementation Of White House Memorandum; Only 13 Of 35 Agencies Have Responded To Date.

Pending: Audit Of “10 Oldest” Requests; Only 15 Of 35 Agencies Have Responded To Date.

## **INTRODUCTION**

“More than any of its recent predecessors, this administration has a penchant for secrecy.”

-- David E. Rosenbaum, *The New York Times* Week in Review, 3 February 2002

“There is a veil of secrecy that is descending around the administration which I think is unseemly.”

-- Rep. Dan Burton (R-In.) to ABC News, 22 February 2002

“Why does the White House sometimes seem so determined to close the door on the people's right to know what their government is doing?”

-- Mark Tapscott, Heritage Foundation, *The Washington Post*, 20 November 2002

Commentators ranging from senior Republican members of Congress to the Reporters Committee for Freedom of the Press have described a dramatic new trend towards increased government secrecy – predating the terrible events of September 11<sup>th</sup>, but escalating since then as the United States moved to a war footing. Criticisms of the new secrecy have cited, among other exhibits, the October 12, 2001 [Freedom of Information Act policy guidance issued by Attorney General John Ashcroft](#). For example, an editorial in the *San Francisco Chronicle* asserted that the guidance effectively repealed the FOIA (“The Day Ashcroft Censored Freedom of Information,” January 6, 2002); and a recent Associated Press article referred to the guidance as meaning that “Ashcroft ended the practice of cooperating with Freedom of Information Act requests ...” (“The post-Sept. 11 John Ashcroft,” February 24, 2003). In contrast, senior career officials have characterized the Ashcroft guidance as “more continuity than change”; and line FOIA officers who process the hundreds of FOIA requests filed by the National Security Archive (“the Archive”) each year have in routine conversation downplayed the impact of the guidance.

To test these contrasting views, the National Security Archive last year initiated a “Freedom of Information Act Audit” – borrowing the methodology developed by state and local journalism groups to file simultaneous FOIA requests at multiple agencies and offices, and compile the results in order to identify the best and worst practices. The Archive began with the 25 agencies included in two recent General Accounting Office studies of implementation of the 1996 Electronic Freedom of Information Act Amendments [[2001 Report](#) – [2002 Report](#)], a group that accounts for 97% of all FOIA processing in the federal government. The Archive added 10 other agencies with significant FOIA efforts, for a total of 35 agencies in the audit. For the substantive focus of the audit, the Archive began with the Ashcroft memorandum, but soon expanded to include the March 19, 2002 [White House memorandum issued by Chief of Staff Andrew Card](#), as well as the long-standing issue of agency backlogs.

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This report summarizes the findings of the First Phase of the National Security Archive FOIA Audit, focusing on the Attorney General's guidance from October 2001. This report also includes preliminary findings from Phase Two of the Audit, regarding the White House memorandum from March 2002; but this portion of the Audit is not yet complete. Phase Three of the Audit is examining the backlog problem, as well as the inadequacy of agency reporting in the annual FOIA reports concerning delays in processing, through a set of FOIA requests for the "10 Oldest" pending requests at each of the 35 agencies. For a complete discussion of the methodology, the texts and dates of the FOIA requests, and the findings, see below. The Archive gratefully acknowledges the support of the John S. and James L. Knight Foundation in making this FOIA Audit possible.

## **METHODOLOGY**

As this study attempted to survey Freedom of Information Act (“FOIA”) policies and procedures, the Archive used requests under the Freedom of Information Act to generate data. By using the FOIA process, the Archive sought to enhance the insights into actual FOIA practice and policy. Consequently, the Archive submitted three separate FOIA requests to each of 35 different U.S. federal agencies or departments. The 35 agencies included the 25 agencies surveyed in the General Accounting Office (“GAO”) studies and ten additional agencies to which the Archive frequently submits FOIA requests. GAO’s studies considered 25 federal agencies accounting for an estimated 97% of all FOIA requests government-wide.

As an important caveat for all phases of the study, there are limitations to requesting documents under the FOIA. The Archive cannot be certain that every relevant office was searched, that every responsive document was found and that we have all the data on these issues without following through with administrative appeals and litigation in every case. Moreover, the wide range of types of responses received suggest that there almost certainly are additional responsive documents that were not disclosed. Nevertheless, the documents disclosed appear to offer sufficient information to describe the impact of the Ashcroft Memorandum and there likely will be sufficient information to subsequently analyze the impact of the White House Memorandum and “10 Oldest” Requests pending at Agencies.

### **PHASE ONE: FOIA Request Regarding Implementation of Attorney General FOIA Guidance**

On October 12, 2001, Attorney General John Ashcroft issued a new Department of Justice (“DOJ”) FOIA Policy Memorandum to the heads of all departments and agencies ([“Ashcroft Memorandum”](#)) to supersede the one issued by Janet Reno in October 1993 ([“Reno Memorandum”](#)). In replacing the Reno Memorandum, the Ashcroft Memorandum highlighted the importance of Exemption (b)(5) of the FOIA, which permits information to be withheld to protect the deliberative process and other recognized privileges, and counseled that any discretionary decision to release information protected under FOIA should fully consider the institutional, commercial and personal privacy interests that could be implicated by disclosure of the information. In addition, the Ashcroft Memorandum established a new “sound legal basis” standard governing the Department of Justice’s decisions on whether to defend agency actions under the FOIA. This differed from the “foreseeable harm” standard that was employed under the Reno Memorandum.

The Archive submitted requests to the 35 agencies that sought:

**All records, including but not limited to guidance or directives, memoranda, training materials, or legal analyses, concerning the [Agency]’s**

**implementation of U.S. Attorney General John Ashcroft's October 12, 2001  
memorandum on the U.S. Freedom of Information Act.**

The Ashcroft Memorandum requests were faxed to the central FOIA processing office of each agency, as identified on the Department of Justice "Principal Agency FOIA Contacts" list, on September 3 and 4, 2002. The 20-business day statutory time limit for a substantive FOIA response expired on September 30/October 1, 2002. On January 28, 2003, after 99-100 business days had expired, appeals were filed with nine (9) agencies that had not substantively responded to the requests. Two (2) appeals were filed based on substantive denials of records. In addition, Archive staff interviewed a senior FOIA official at each agency that provided a "no records" response to determine more details concerning the response.

In analyzing Agency responses and reaching our conclusions, we studied:

- (1) the variety of correspondence generated pursuant to our FOIA requests (letter, fax, email, telephone);
- (2) documents received from the Agency under FOIA;
- (3) documents obtained from Agency FOIA web-pages; and
- (4) notes from "not for attribution" interviews of FOIA officials at selected agencies.

In 'scoring' an agency based on the impact of the Ashcroft Memorandum, we considered the degree of implementation activities in terms of:

- (1) scope of dissemination of Ashcroft Memorandum;
- (2) change in Agency regulations;
- (3) change in Agency FOIA guidance;
- (4) change in Agency training materials; and
- (5) FOIA officials' descriptions of the impact.

## **PHASE TWO: FOIA Request Regarding Implementation of White House Classification and FOIA Guidance**

On March 19, 2002, Andrew H. Card, White House Chief of Staff, issued a memorandum to all agency and department heads ([“White House Memorandum”](#)). The White House Memorandum concerned “Action to Safeguard Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security.” Accompanying the White House Memorandum was a memorandum from the Information and Security Oversight Office (“ISOO”) and the Office of Information and Privacy (“OIP”) at the DOJ. The White House Memorandum directed all agencies and departments to “review their records management procedures and, where appropriate, their holdings of documents to ensure that they are acting in accordance with ...guidance” that (1) addresses the maintenance and extension of classification status, as well as reclassification of “information that could reasonably be expected to assist in the development or use of weapons of mass destruction”; and (2) highlights the use of Exemption (b)(2) of the FOIA, for records related to internal personnel rules and practices of an agency, and Exemption (b)(4), for confidential commercial information, as means of denying FOIA requests for “sensitive but unclassified information.” The memorandum further directed that agencies and departments within 90 days “report the completion, or status, of their review to [the White House] through the Office of Homeland Security.” For assistance regarding classification issues, the memorandum directed inquiries to the Information and Security Oversight Office or the Department of Energy, and “for assistance in applying exemptions of the Freedom of Information Act (FOIA) to sensitive but unclassified information,” readers were directed to the Department of Justice’s Office of Information and Privacy.

The Archive’s White House Memorandum requests were faxed to the central FOIA processing office of each of the same 35 agencies on January 8 and 9, 2003. The requests sought:

**All records, including but not limited to guidance or directives, memoranda, training materials, or legal analyses, concerning the March 19, 2002 memorandum issued by White House Chief of Staff Andrew Card to the heads of all federal departments and agencies regarding records containing information about Weapons of Mass Destruction (WMD). Attached with this memo was a supporting memorandum by the US Justice Department and Information Security Oversight Office.**

The 20-business day statutory time limit for an FOIA response expired on February 5/6, 2002. On February 7, 2003, after 21/22 business days had expired, appeals were filed with 30 agencies that had not substantively responded to the requests.

The inquiry into the implementation of the White House guidance remains ongoing and will be completed as Phase Two of the Archive FOIA Audit. Because

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agency responses are still not complete 45 days after the requests, this report includes only preliminary findings regarding Phase Two of the Archive's Audit.

### **PHASE THREE: FOIA Request Regarding “10 Oldest” Pending FOIA Requests Within Agency**

The third Phase of the Archive’s FOIA Audit focused on the problem of delays and backlogs in FOIA processing. The Electronic Freedom of Information Amendments of 1996 (“EFOIA”) were designed to speed up and improve the efficiency of agencies’ processing with respect to FOIA requests and bring the benefits of electronic communication into the FOIA system to enhance public access to records. At the request of Congress, the General Accounting Office (“GAO”) has completed the first two studies of a multi-phase evaluation of FOIA processing [[2001 Report](#) – [2002 Report](#)]. One of the key findings in the two GAO studies has been the persistent problem of agency backlogs of FOIA requests. 2002 GAO Report at 12. The GAO reports were based primarily on agency statutorily-mandated annual reports of FOIA statistics, which the GAO noted, in its studies, suffer from poor data quality and other reporting discrepancies. 2002 GAO Report at 59.

The Archive’s method for measuring the backlog problem was to file a FOIA request, by fax on January 31, 2003, to each of the 35 agencies, seeking:

**Copies of the [Agency’s] ten oldest open or pending Freedom of Information Act requests currently being processed or held pending coordination with other agencies.**

The request went to the central FOIA processing office of each agency. For agencies whose FOIA systems are highly decentralized the Archive limited the request to the “10 Oldest” FOIA requests pending in the Office of the Secretary, Solicitor, or other principal processing office. The statutory time limit for an FOIA response expired on March 3, 2003. Unlike the Ashcroft Memorandum requests and the White House Memorandum requests, each of 28 agencies with an outstanding “10 Oldest” request was contacted by telephone between February 24, 2003 and March 10, 2003 to ask for an update on the status of the request and to inquire as to why a seemingly simple FOIA for data that should be on hand in any FOIA office would take beyond 20 days to process.

The inquiry into the “10 Oldest” requests remains ongoing and will be completed as Phase Three of the Archive FOIA Audit.

## **FINDINGS REGARDING IMPLEMENTATION OF ATTORNEY GENERAL GUIDANCE REGARDING FOIA**

When the Ashcroft Memorandum was issued, the press and access advocates greeted it with serious concern. The 1993 [Reno Memorandum](#), which was issued along with a [Presidential memorandum](#) discussing the importance of openness in government and requesting enhanced administration of the FOIA, had provided that the U.S. Department of Justice would “no longer defend an agency’s withholding of information merely because there is a ‘substantial legal basis’” for withholding. Instead, the Reno Memorandum indicated that it would “apply a presumption of disclosure” and that the FOIA exemptions from disclosure should be used “with specific reference to [harm to governmental or private interests], and only after consideration of the reasonably expected consequences of disclosure in any particular case.” It specifically encouraged agencies to make “discretionary disclosures,” particularly where only a government interest in non-disclosure was at stake. The Reno Memorandum summarized that “it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption.”

The Ashcroft Memorandum replaced the FOIA memorandum issued by Attorney General Janet Reno in October 1993. In the months after it was distributed to department and agency heads, the Archive was told anecdotally by a few agency FOIA professionals that the Ashcroft Memorandum had had little impact on their FOIA processing, which was counter to the public perception. Indeed, one senior agency official indicated the Ashcroft Memorandum may have had the “softest landing” that could be expected. An agency lawyer characterized it as “more thunder than lightening.” One official administering the FOIA at the appellate level for an agency receiving several thousand requests per year noted his panel’s work “hasn’t been at all affected, virtually not.” And, a FOIA official at a defense agency reacted to the new Memorandum with a shrug: “Yeah. Okay.” Importantly, the memorandum does not direct any specific activity by agencies. The memorandum does, however, highlight the considerations that may counsel against discretionary releases and highlights the importance of invoking Exemption (b)(5) to protect recognized legal privileges such as the deliberative process privilege. Finally, we are not aware of similar studies of the impact of the Reno Memorandum that would allow for a valid comparison.

Readers should keep in mind three important caveats about our findings, however, one concerning policy, another concerning data. First, our survey indicated a divide between FOIA policy and FOIA processing; i.e., some agency officials who actually process requests indicated the Ashcroft Memorandum had little or no impact even though their agency might have undertaken significant policy changes or implementation activities. Second, as of today, 2 of the 35 agencies—the Social Security Administration and the Department of Veterans Affairs—have failed to provide documentation for this study and so are not included. Third, as noted in the Methodology section above, there may be still more data out there.

As a final consideration, our interviews also indicated some conflation of the concerns articulated in the Ashcroft Memo; the White House Memorandum on Weapons of Mass Destruction information; concerns stemming from the terror attacks of September 11, 2001; and, to some extent, concerns stemming from the Global War on Terrorism.

Agency policy-makers took a range of approaches upon receipt of the Ashcroft Memorandum. Generally, we find Agency implementation of the Ashcroft Memorandum varied by agency and can be characterized in terms of four categories:

- Significant Change
- Engaged in Implementation Activities
- Dissemination of Ashcroft Memo—Little Implementation or Change
- No Dissemination of the Ashcroft Memo—No Implementation or Change

- **Agencies That Adopted Significant Changes Resulting From the Ashcroft Memorandum**

**5 of 33 Federal departments or agencies surveyed (15 %) indicated significant changes in regulations, guidance, and training materials and that the Ashcroft Memorandum was widely disseminated.**

- Department of the Air Force (“Air Force”)
- Department of the Army (“Army”)
- Department of the Navy (“Navy”)
- Department of the Interior (“DOI”)
- Nuclear Regulatory Commission (“NRC”)

Most of the agencies that made significant changes in response to the Ashcroft Memorandum were from the Defense establishment. Part of this stems from the bureaucratic culture within the agencies that interprets guidance as ordering or directing activity and that looks for and responds to directives, rather than as guiding or advising policy. As one interviewee described it, “In DoD, we’re trained to take orders.” Nevertheless, this same person articulated a countervailing tendency that places limits on policy innovation in that an agency cannot and will take not make a policy change “unless there’s a requirement” to do so.

### **Discussion of Agencies**

Department of the Air Force. Air Force’s implementation of the Ashcroft Memorandum illustrates the duality of the bureaucratic response. For example, documents the Archive gained under FOIA reveal that Judge Advocate General (“JAG”) lawyers argued that the Ashcroft Memorandum reflects a “drastic” policy change, but that the Ashcroft Memorandum itself was disseminated to FOIA officers as “low priority” and without commentary. We have included the Air Force in this category of

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responses to the Ashcroft Memorandum, although it is difficult to determine from their disclosures the actual impact of the Memorandum. In the JAG document, which appears to be an article for publication, two USAF Majors postulate that the Ashcroft Memorandum constitutes “a marked shift in FOIA policy and will fundamentally change the way the federal government responds to FOIA requests.” They note that “a hailstorm of discussion has followed the [Attorney General] [M]emorandum among those who regularly work with FOIA policy,” and reference a November 19, 2001 Memorandum from Henry McIntyre, Department of Defense, Directorate for Freedom of Information and Security review regarding “DoD Guidance on Attorney General Freedom of Information Act (FOIA) Memorandum” (<http://www.defenselink.mil/pubs/foi/AGmemo.pdf> (“McIntyre Memorandum”) that references upcoming changes to internal Department of Defense FOIA regulations. The article posits that the Ashcroft Memorandum returns FOIA processing to pre-Attorney General Reno practices and the use of the low (b)(2) and (b)(5) exemptions. It also notes that the Ashcroft Memorandum “tacitly encourage[es] even greater withholding under the high-2 exemption and exemption 6.” It also encourages the use of the “high-2” exemption to meet the call for denying adversaries information expressed in an October 18, 2001 Deputy Secretary of Defense Paul Wolfowitz Memorandum ([http://www.defenselink.mil/pubs/foi/names\\_removal.pdf](http://www.defenselink.mil/pubs/foi/names_removal.pdf)) (“Wolfowitz Memorandum”). It is not clear from the disclosure how widely this article may have been disseminated within the Air Force. A second summary, entitled “General Law, New Trends in Freedom of Information Law,” also stresses the increased use of exemptions (b)(5) and (b)(2) and the increased weight given to privacy rights of military personnel. It specifically references the new policy of the military to “withhold lists of names and other identifying information of personnel . . . .” See November 9, 2001 Memorandum of David Cooke, DoD Director of Administration and Management. (<http://www.defenselink.mil/pubs/foi/withhold.pdf>). Notably, the actual forwarding of the Ashcroft Memorandum from the Air Force FOIA office, however, is labeled “Importance: Low.”

Department of the Army. The Department of Army disseminated both the Ashcroft Memorandum and the McIntyre Memorandum instructing that the Ashcroft Memorandum “supersedes” the Reno Memorandum. Although disseminated “throughout Army,” the emails note the new policy but don’t articulate it further. In addition, the Army is in the process of revising its internal regulations “to include the provisions of the Ashcroft memorandum.” As the regulation has not been finalized, it was withheld from disclosure to the Archive.

Department of the Navy. The Department of Navy also disseminated the memorandum to all components and implemented changes to its FOIA programs. It instructs:

- a. [Navy] activities will no longer use the “foreseeable harm” standard when adjudicating whether to release/deny information. Rather, DON activities will adopt the “Sound Legal Basis” standard reflected in the AG memo. DON

- activities will be responsible for presenting a rationale for denial that DOJ will be able to defend if the denial is litigated.
- b. While the [AG] memo does not eliminate the ability to make a discretionary disclosure, DON activities are no longer encouraged to do so.
  - c. Exemption low (b)(2) is available for use by DON activities to protect routine housekeeping information that is relatively trivial in nature. Activities are encouraged to consult the DOJ “Freedom of Information Act Guide & Privacy Act Overview” for man in depth discussion of law (b)(2).
  - d. DON activities should consider using high (b)(2) to protect vulnerability assessments, stockpile information, and security assessments.

While not specific to FOIA, it further advises:

On 18 Oct 01, the Deputy Secretary of Defense (DepSecDef) [Paul Wolfowitz] issued a memorandum entitled “Operations Security Throughout the Department of Defense.” The DepSecDef memo states “Much of the information we use to conduct DOD’s operations must be withheld from public release because of its sensitivity. If in doubt, do not release or discuss official information except with DOD personnel.” ([http://www.defenselink.mil/pubs/foi/names\\_removal.pdf](http://www.defenselink.mil/pubs/foi/names_removal.pdf) )

It includes detailed instructions for responding to FOIA requests for names. With respect to lists of DON personnel, the Memorandum indicates that the information should be considered exempt under “high (b)(2)” and (b)(6). It counsels that, in considering the release of individual names, “DON activities should weigh heavily the public’s right to know versus the individual’s personal privacy,” and offers the example that high ranking officials and individuals that interact with the public as their primary job should be releasable. It also notes that the case law is mixed as to the reliance on high (b)(2), suggesting that other potential bases for non-release should be considered. It indicates that issues may arise with respect to previously released information that now may pose a security risk. The memorandum then provides specific instructions regarding the impact of the changes on requests for credit card holders, directories and organizational charts, as well as the Department’s proactive placement of materials on its Web site.

Nuclear Regulatory Commission. The NRC engaged in a detailed examination of the impact of the Ashcroft Memorandum. It issued guidance within the agency on the discretionary release of information, including Web site postings. As part of a broader effort to protect against security risks, it shut down its Website while it engaged in an evaluation of what materials could be posted. The guidance on discretionary releases advised that the agency “continue to handle and process all FOIA requests in the same manner as before, but ... separately identify documents that fall within the [discretionary release] criteria.” Those criteria indicate that “you should consider **not** releasing a document if it contains” information about plants that implicates critical infrastructure vulnerabilities or materials. (emphasis in original). A later memorandum updates the criteria to account for the agency’s need to disclose certain information to the public. Like other agencies, it eliminated the need for “foreseeable harm” statements when records were determined to be withheld. Personnel were also instructed to pay close

attention to records that contain information that could be potentially helpful to an adversary for possible additional review and the application of exemptions from disclosure. Personnel were directed to draft sensitivity statements to explain their concerns. The various guidance memoranda issued within the agency repeatedly caution that FOIA exemptions should continue to be applied as they had been prior to September 11, 2001. The agency changed its internal regulations to incorporate the Ashcroft Memorandum.

Department of the Interior. The Department of Interior disseminated the Ashcroft Memorandum to all FOIA officers by e-mail entitled “News Flash – Foreseeable Harm is Abolished.” Departmental guidance implementing the memorandum required discretionary releases to be cleared by written approval of the Designated FOIA Attorney. The Department also advised that “bureaus/offices once again may use the ‘low 2’ exemption.” Other guidance within the Department indicates “[w]e wish to emphasize that the shift related to release of information under the FOIA has moved from a presumption of ‘discretionary disclosure’ of information to the need to safeguard institutional, commercial, and personal privacy interests.” After attending the OIP FOIA Officers’ meeting, Department personnel advised that OIP provided informal guidance on the use of “high (2)” in circumstances that might allow a terrorist to obtain information necessary to breach governmental security and the possibility of Exemption (b)(3) legislation being introduced to help protect such information. The Ashcroft Memorandum was also discussed at a departmental FOIA officers meeting. E-mails show that the meeting discussion included discussion of Exemption (b)(2). In addition, e-mails indicate internal discussion about Exemption 5, including one view that the elimination of “foreseeable harm” determinations means that all drafts can be exempt from disclosure under Exemption (b)(5). The Attorney General policy was also incorporated into training materials. In telephone contact with the Archive, the Departmental FOIA Officer indicated that the Chief Information Officer had issued a bulletin on January 6, 2003 and published it on the DOI website that sets into regulation the Departmental FOIA guidance.

- **Agencies Engaging in Activities Implementing The Ashcroft Memorandum**

**8 of 33 Federal departments or agencies surveyed (24 %) indicated implementation activities concerning the Ashcroft Memo, including its dissemination and incorporation into FOIA regulations and procedures.**

Department of Commerce (“Commerce”)  
Department of Defense (“DoD”)  
Department of Justice (“DOJ”)  
Department of State (“State”)  
Environmental Protection Agency (“EPA”)  
National Aeronautics and Space Administration (“NASA”)  
Office of Management and Budget (“OMB”)

Small Business Administration (“SBA”)

A number of agencies took a hard look at the Ashcroft Memorandum, disseminated it, and recognized the Memorandum as a change in their FOIA policy, but not a fundamental change in administering the law.

**Discussion of agencies**

Department of Commerce. Commerce’s Office of General Counsel disseminated the Ashcroft Memorandum to Commerce FOIA officers with a cover memorandum describing the new caution on discretionary disclosures and emphasis on the “institutional, commercial, and privacy interests”. It explained that the new policy “provides for withholding of information protected by FOIA exemptions, without requiring a foreseeable harm analysis.” It also indicates that “[w]hen 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.” Finally, it instructs that the written statement explaining a denial, “(formerly the foreseeable harm statement) must reflect why all withheld information falls within a FOIA exemption or exemptions.”

Department of Defense. Given the Department of Defense (DoD)’s central policy advisory role for defense agencies, components, and the military services, it is significant that DoD issued and widely disseminated its own “DoD Guidance on Attorney General Freedom of Information Act (FOIA) Memorandum,” the McIntyre Memorandum. (<http://www.defenselink.mil/pubs/foi/AGmemo.pdf>), implementing the Ashcroft Memorandum. The McIntyre Memorandum describes the Ashcroft Memorandum, indicates that there will be changes to Departmental FOIA program regulations, discusses the use of Exemption 2, and indicates that discretionary disclosures are no longer encouraged. The DoD indicated in its response to the Archive’s FOIA request that there are no records aside from the McIntyre Memorandum responsive to the request. While some DoD components are in the process of revising internal FOIA program regulations, no records were produced to indicate that the DoD revised its internal regulations or training documents. In keeping with this finding, two months after the Ashcroft Memorandum was issued and a month after issuing his own FOIA memo, DoD’s McIntyre downplayed the new policies, telling an audience of FOIA and information professionals “FOIA is the same; it is the law of the land.”

Department of Justice. As the agency charged with issuing and guiding the new FOIA policy, the DOJ undertook significant initiatives and instituted changes in FOIA policy. First, Justice’s Office of Information and Privacy (“OIP”) was the agency that drafted the Ashcroft Memorandum in conjunction with White House legal officials—as it did in prior administrations. Second, OIP issued a summary cover memorandum to accompany the Ashcroft Memorandum. Third, it posted the Ashcroft Memorandum on *FOIA Post*, its valuable FOIA reference Internet portal. The *FOIA Post* commentary summarized the Memorandum and the authority for the Memorandum, and highlighted the use of Exemption 2 to protect information regarding critical systems, facilities,

stockpiles or other assets from security breaches or harm. (<http://www.usdoj.gov/oip/foiapist/2001foiapist19.htm> ) Fourth, OIP and other Justice officials disseminated and incorporated the Ashcroft Memorandum into its Department-wide and government-wide training programs, including the October 2001 FOIA Officers Conference where the Ashcroft Memorandum had its debut before agency officials charged with its implementation.

Nevertheless, given its central role, several factors indicate DOJ may not have been the policy heavyweight it would seem. First, DOJ and specifically, OIP may well have undertaken similar activities and initiatives with the 1993 Reno Memorandum. Second, even as it implemented the directive, OIP counseled against interpreting the Ashcroft Memorandum as a reversal in overall FOIA policy. For example, in its *FOIA Post* guidance accompanying the Ashcroft Memo, OIP clarifies that the Clinton Memorandum on FOIA remains in effect. Third, OIP officials have argued in public forums that the Ashcroft Memorandum represents a change in “tone” or is a “policy emphasis.” Indeed, documents we received under our FOIA requests from agencies that attended OIP’s October 2001 FOIA Officers Conference indicate that OIP stressed the continuity of prior practices and did not treat the Ashcroft Memorandum as a fundamental change in FOIA policy.

Both in terms of their promulgation of the new policy and their caution about its implementation, OIP officials’ statements and activities carry weight because OIP is the lead Federal office for government-wide FOIA policy.

Department of State. Office of Information Resources Management Programs and Services officials, who administer the FOIA for State, reported on the issuance of the Ashcroft Memorandum with the comment that it “specifically ‘supersedes’ the Reno 1993 memorandum and replaces it with a ‘sound legal basis’ standard for defending FOIA withholdings.... One focus of the Ashcroft memorandum is the need to protect material covered by exemption 5 which was the subject of discretionary disclosure encouraged by the Reno memorandum.” DOS also revised internal materials to drop reference to “foreseeable harm.” Finally, in an email distributed to personnel engaged in records review, it foresees the Ashcroft Memorandum impacting the use of Exemptions 1, 7, 4, 6 and 5. Nevertheless, the guidance notes that “DOJ/OIP chose to emphasize continuity over change” with respect to agency practices and that “the Ashcroft Memorandum did not change the underlying statute and extensive case law on the FOIA.” It does find that “all things being equal” DOJ would be likely to defend “close calls” if the agency were to come down on the side of protecting confidential business information, law enforcement material and personal privacy interests. It notes that the “Ashcroft standard technically revives [low (b)(2)].” With respect to Exemption 5, it counsels that “reviewers should continue to make judgments based on possible harm from release, including such quintessentially deliberative documents as drafts.” Finally, under the heading “A More Robust (b)(2) Exemption,” the guidance offers details as to how to use high (b)(2). Nevertheless, dissemination and discussion of the Ashcroft Memorandum were limited within the FOIA and disclosure office.

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Environmental Protection Agency. EPA Administrator Christine Todd Whitman disseminated the Ashcroft Memorandum throughout the Agency. Her accompanying cover memorandum notes that the Ashcroft Memorandum supersedes the Reno Memo, urges adherence to the new policy, and references *FOIA Post*. However, her memorandum also urges compliance with the 1993 Clinton Memorandum and EPA's own FOIA procedures. This is may well be the only statement issued by an agency head to agency employees concerning the Ashcroft Memorandum. Within the General Counsel's Office, the Ashcroft Memorandum was understood to mean that "[I]n order to justify withholding a record, the agency no longer needs to be able to articulate a foreseeable harm that will befall us if the record is released." There was also extensive inter-and intra-office discussion of the Ashcroft Memorandum at EPA.

National Aeronautics and Space Administration. Following issuance of the Ashcroft Memo, NASA FOIA personnel attended an OIP meeting of all agencies to discuss the Memorandum at which they were alerted to the removal of information formerly posted on Web sites and the possibility of "new protective legislation ... to further support withholding restrictions under FOIA." At NASA, FOIA issues, Website information issues, and the later White House Memorandum regarding weapons of mass destruction were not considered in isolation. For example, in November 2001, NASA issued guidance on "NASA Web Site Registration and Internet Publishing Content Guidelines." The guidance provided for review and access controls to NASA Web sites. Further, in his August 2002 report on implementation of the White House Memo, NASA Administrator Sean O'Keefe noted "In response to the October 12, 2001 policy memorandum from Attorney General Ashcroft...NASA Headquarters instructed all of its Center FOIA offices to carefully review all requests for information and to report any security-related requests as well as any others that appear to be unusual or questionable to the Agency FOIA Officer for appropriate coordination with the Agency's Office of Security Management and Safeguards."

Office of Management and Budget. OMB incorporated the Ashcroft Memo, issuing a circular that summarizes the impact of the Memorandum. It states in full:

"Many agency budget documents that are subject to the Freedom of Information act (FOIA) are exempt from mandatory release pursuant to 5 U.S.C. §552(b)(5). Depending on the nature of the record requested, other FOIA exemptions may apply. When deciding whether to withhold a budget document that is exempt from mandatory release, follow the FOIA memorandum issued by the Attorney General on October 12, 2001. Any discretionary decision by an agency to disclose protected information should be made only after full and deliberate consideration of the institutional interests that could be implicated by disclosure, as well as after consultation with OMB. Agency heads are responsible for determining the propriety of records releases under FOIA."

Small Business Administration. The Small Business Administration disseminated the Ashcroft Memorandum to FOIA administrative officers and responded to inquiries

regarding the meaning of the “sound legal basis” standard. Its FOIA personnel advised that the Ashcroft Memorandum “now allows low 2 protection; the previous [Attorney General’s] memo had made low 2 ineffective.” They further explained “High 2 protects anything that can allow someone to breach the law.” Finally, it concluded “[a]s for Ex. 5, DOJ no longer affirmatively encourages discretionary disclosure . . . . As always, it is better to error [sic] on the side of caution, especially at the initial level as the requester still has two more levels of review available.”

- **Agencies That Disseminated The Ashcroft Memorandum But Undertook Little Implementation or Change in FOIA Policy**

**17 of 33 Federal departments or agencies surveyed (52 %) indicated awareness and dissemination of the Ashcroft Memo, but indicated little change in regulations, guidance or training materials reflecting the new policy.**

Agency for International Development (“AID”)  
Central Intelligence Agency (“CIA”)  
Drug Enforcement Administration (“DEA”)  
Defense Intelligence Agency (“DIA”)  
Department of Agriculture (“Agriculture”)  
Department of Education (“Education”)  
Department of Energy (“DOE”)  
Department of Health and Human Services (“HHS”)  
Department of Housing and Urban Development (“HUD”)  
Department of Labor (“DOL”)  
Department of Transportation (“DOT”)  
Department of Treasury (“Treasury”)  
Federal Bureau of Investigation (“FBI”)  
General Services Administration (“GSA”)  
National Archives and Records Administration (“NARA”)  
Office of Personnel Management (“OPM”)  
Securities and Exchange Commission (“SEC”)

### **Discussion of agencies**

Many agencies, including AID, DEA, Agriculture, Education, and FBI simply disseminated the memorandum—sometimes to components and field offices, sometimes only within the FOIA Office itself—apparently without any guidance on the significance or impact of the memorandum. DEA noted in its response to our FOIA request that “as a component of the Department of Justice, DEA conformed to the Agency Rules and guidance issued by the Department” and that it did not “issue any further directives or guidance.” Similarly, OPM and GSA circulated the memorandum to officials, but did little more than essentially restate what the Attorney General stated in the Memorandum.

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Some agencies considered the impact of the memorandum and implemented changes to their FOIA programs as a result, but did not view the changes as dramatic shifts. The CIA revised its “Overview of the Freedom of Information Act” training document to incorporate the Ashcroft Memorandum by simply stating:

“Note that the Department of Justice plays a major role in FOIA policy/implementation and particularly in litigation. New guidance issued October 12, 2001, by Attorney General Ashcroft uses “sound legal basis” test to defend withholdings.”

However, the Overview also notes that with respect to “Discretionary Disclosure” that “New DOJ policy memorandum still allows such disclosures.” The DIA disseminated the Ashcroft Memorandum internally and updated its Intranet FOIA training tutorial, describing it merely as new guidance, but did not issue guidance or change regulations.

At the Department of Energy, the Ashcroft Memorandum was incorporated into the agency’s training program and disseminated to all component FOIA officers, but was not treated as a change in the law. Indeed, DOE’s 1993 ‘openness’ regulations, which in some ways expand upon FOIA’s requirements for inherently DOE program information, remain in effect. At Housing and Urban Development, no documents were located pertaining to the Ashcroft Memo, although it did have some dissemination and HUD FOIA and General Counsel officials attended the OIP FOIA Officers’ Conference in October 2001. The Department of Labor discussed and disseminated the Ashcroft Memorandum in FOIA training seminars, but does not appear to have treated the Memorandum as indicating a change in the law or requiring supplemental Departmental or component guidance. Similarly, at the Department of Transportation, the Ashcroft Memorandum was distributed to all Departmental FOIA contacts, and the General Counsel issued a memorandum to the DOT Chief of Staff and Public Affairs director summarizing the Ashcroft policy and noting a change in the standard for DOJ defense of agency actions.

At Health and Human Services, the chief FOIA official noted the issuance of the Ashcroft Memorandum and described it by email to component FOIA officers, but did not forward it, referring recipients instead to the *FOIA Post* website. It was also incorporated into a General Counsel information law reference document. Finally, in a memorandum to heads of divisions, the HHS General Counsel noted “[w]hile the FOIA itself has not changed the new policy is somewhat more deferential to agency decisions” and that “the new policy is to defend agency decisions unless they lack a sound legal basis.”

The National Archives and Records Administration responded to our FOIA request that “NARA has not issued any new guidance, directives, memoranda, training materials or legal analyses” implementing the “sound legal basis” aspect of the Ashcroft Memorandum. However, NARA did adopt the Justice Department’s guidance to use Exemption Two to protect “records of concern” from FOIA disclosure.

The Securities and Exchange Commission also indicated no record of any implementation of the Ashcroft Memorandum. Finally, the Department of Treasury appears to have acted quite minimally upon the new policy, discussing the memorandum at least at an October 30, 2001 Departmental FOIA Officers meeting. No other documents were produced indicating any changes in policy or practice.

- **Agencies That Did Not Disseminate The Ashcroft Memorandum or Change Their FOIA Policy**

**3 of 33 Federal departments or agencies surveyed (9 %) indicated no changes in regulations, guidance or training materials, and little if no dissemination of the Ashcroft Memorandum.**

US Central Command (“CENTCOM”)  
Federal Emergency Management Agency (“EPA”)  
National Science Foundation (“NSF”)

### **Discussion of agencies**

US Central Command or CENTCOM, which is the lead military activity for both the war in Afghanistan and the impending war with Iraq, indicated that it did not disseminate or discuss the memorandum, did not change any of its FOIA programs, regulations, training or other activities, and that the Ashcroft Memorandum had no effect in terms of policy or daily workflow. This response might well be representative of agencies that deal primarily with classified information, in that there are specific guidelines for protection or release of classified information and such information is rarely if ever subject to discretionary disclosure. FEMA and the National Science Foundation, as very small agencies, indicated that dissemination and discussion of the Ashcroft Memorandum was limited to the Office of General Counsel. There were no changes in training materials, guidance or regulations at either agency.

## **PRELIMINARY FINDINGS REGARDING IMPLEMENTATION OF WHITE HOUSE GUIDANCE REGARDING FOIA AND CLASSIFICATION**

The White House Memorandum was issued in March 2002. Each agency was directed by the White House Memorandum to “review their records management procedures and their holdings of documents” and report to the White House Chief of Staff on “the completion, or status, of their review” by June 19, 2002. At the time of the issuance of this report, each agency will have had 45 days to respond to the Archive’s White House Memorandum FOIA request. Nonetheless, only 13 of the 35 agencies surveyed have provided substantive responses to the requests. Thus, the Archive’s research into the implementation of the White House classification and FOIA guidance remains ongoing. Although it is too early to reach final conclusions regarding the implementation of the White House Memorandum, this report includes preliminary findings based on completed FOIA responses from approximately one-third of the 35 agencies surveyed. A complete discussion, along with complete sets of the materials obtained from the agencies, will be included with the issuance of the Phase Two report.

In general, agencies have anecdotally told the Archive that the White House Memorandum required more action than the Ashcroft Memorandum. It directs specific activities from each agency, including the identification of classified or sensitive records, activities to safeguard those records, and a report back on implementation. One thing that stands out in the internal agency activities relating to the White House and ISOO/OIP memoranda is the consistent repetition that FOIA exemptions can be used to protect critical infrastructure information and commercial information.

- **Agencies Reporting Limited or No Activity Resulting From the White House Memorandum**

Several agencies, including OMB, Department of Education, FBI, and HUD, responded that they have no documents responsive to the FOIA request. These agencies failed to release any reports that may have been provided to the White House Chief of Staff regarding their reviews of records concerning weapons of mass destruction or sensitive, but unclassified, materials. For those agencies that do not deal with military or intelligence issues, it is not surprising that the White House Memorandum did not result in much activity. Nonetheless, Phase Two of the Archive Audit will include individual interviews with these agencies to determine what steps, if any, may have been taken.

FEMA indicated that it does not handle weapons of mass destruction, but did provide its report to the White House Chief of Staff, in which it verified that it complied with safeguards to protect against the release of potentially damaging information. Similarly, the NSF provided its report to the White House Chief of Staff, in which it indicated that it “completed reexamination of current measures for identifying and safeguarding information regarding weapons of mass destruction and other sensitive

documents related to homeland security” and that its safeguards and “restrictions to access to information, are consistent with existing law and policy.”

- **Agencies Treating White House Memorandum Primarily As FOIA/Disclosure Guidance**

Many other agencies that do not handle weapons of mass destruction, such as the Small Business Administration, did circulate the White House and ISOO/OIP memoranda and issue guidance to all agency staff regarding the importance of records management procedures to Homeland Security. Similarly, the GSA noted that it does not deal with information regarding weapons of mass destruction but viewed the guidance on FOIA exemptions as relevant; GSA reported that it is reviewing its FOIA regulations “to determine, in conjunction with counsel, whether the exemptions from disclosure need to be revised.” HHS also disseminated the memorandum to all its FOIA officers.

- **Agencies Taking Some Action In Response to White House Memorandum**

Still other agencies appeared to have requested internal reviews, but not to have imposed centralized policy authority over the conduct of the review by agency components. These agencies also disseminated the White House Memorandum’s guidance concerning FOIA disclosures. For example, the Treasury Department forwarded the White House and ISOO/OIP memoranda to Department officials and asked them to report on the existence of weapons of mass destruction information and related sensitive “Homeland Security” information and report on whether the records were protected in accordance with the ISOO/OIP guidance concerning classification, extension of classification, reclassification and protection of “sensitive but unclassified” information. The memorandum also highlighted the use of Exemption (b)(2) for sensitive critical infrastructure information and the use of Exemption (b)(4) for information voluntarily submitted to the government as means for withholding information from release under the FOIA. The Department’s review determined that they do not handle much information pertaining to weapons of mass destruction, except for information already classified by other agencies, and that the sensitive Homeland Security information is already protected from release. All FOIA and disclosure officials were informed “to use [FOIA] exemptions” if there are requests for sensitive Homeland Security information.

The Department of Commerce also initiated a review to determine whether its units handle “classified, sensitive but unclassified, For Official Use Only” or unprotected records and requested a report on the steps taken to protect classified or sensitive information. The Department’s Report on its efforts indicates that two units identified information regarding weapons of mass destruction or public harm scenarios, but the specific units and their corrective actions have been deleted from the report based on the “high” (b)(2) exemption to FOIA.

The Department of Navy distributed the White House Memorandum to all agency FOIA contacts with a cover memorandum that directed the recipient to “immediately adopt the steps addressed in the ISOO memorandum ... when conducting a review of documents requested under FOIA.” It also references the Ashcroft Memorandum and requests that particular attention be paid to “giving full and careful consideration to all applicable FOIA exemptions when processing documents that fall under this category.”

- **Agencies With Significant Activity In Response to White House Memorandum**

Some agencies appeared to initiate detailed review of their records, with centralized policy control exercised by the official responsible for the activity. For example, the Environmental Protection Agency forwarded the White House and ISOO/OIP memoranda to agency officials, noting that they do not constitute a change in EPA policy regarding the handling of information but “suggest a heightened awareness when dealing with classified or otherwise sensitive information.” The memorandum notes that the Agency does not have original classification authority (although this authority was granted to EPA in May 2002), but that the need to protect sensitive but unclassified information related to homeland security is relevant. It specifically recognizes that the risk of disclosure should be considered together with the benefits of disclosure. It counsels that FOIA requests must be filled as directed in the Ashcroft Memorandum and highlights that Exemption (b)(2) may be used to protect sensitive critical infrastructure information and that Exemption (b)(4) may be used to protect voluntarily submitted information from the private sector. The memorandum notes that the Agency is working to identify sensitive “electronic information resources.” An additional memorandum initiates a review of EPA websites, publicly disseminated information and information available to the public upon request. It too references the Ashcroft Memorandum and the use of Exemption (b)(2) to protect information that relates to critical infrastructure information. It specifically indicates that a decision to remove materials must be removed prior to any removal of the materials. The Agency’s report on its activities notes, among other things, that it removed materials from its web site.

NASA also took a similar approach. It issued “NASA’s Web Site Registration and Internet Publishing Guidelines” and blocked public access to all unapproved Web sites. It established a process for registration, review and approval of Web sites and materials. It also established an “Operational Security program” to educate all employees and contractors regarding security considerations, including the identification of critical information and the importance of protecting sensitive information. It disseminated the White House Memorandum among Center FOIA offices and discussed it at the agency’s annual FOIA conference. NASA indicated that it continued to review all current and historical records for the purpose of reclassifying, declassifying and downgrading records containing weapons of mass destruction information and other sensitive records related to homeland security. It also noted that it was “revising NASA policy directives regarding records management and security policy guidelines to further ensure that NASA personnel identify and safeguard homeland security information.”

The Department of the Interior took a similar tack, asking its offices to survey all records, websites, and information systems. It highlights the use of Exemption (b)(2) for sensitive but unclassified information. Seven bureaus within the Department were identified as handling weapons of mass destruction information or other information that could impact the security of the nation or threaten public safety. The steps taken by those bureaus to protect the information were not reported.

The sole response from the military to date has been from the Navy, which forwarded the White House Memorandum along with the Ashcroft Memorandum to all FOIA contacts. It directed “You are advised to immediately adopt the steps addressed in the ISOO memorandum [] when conducting a review of documents requested under FOIA. Please pay particular attention to Attorney General Ashcroft’s memorandum of October 12, 2001 [] by giving full and careful consideration to all applicable FOIA exemptions when processing documents that fall under this category.”

- **Still to Come**

After receiving substantive responses from all 35 of the agencies surveyed, the Archive will publish the results of the audit and all of the related correspondence, including each agency’s report to the White House Chief of Staff. The Archive plans to review each agencies 2002 annual FOIA report data to determine whether it is possible to detect a change in the patterns of exemptions used to deny access to records.

## **FINDINGS REGARDING ADMINISTRATION** **OPENNESS/SECRECY AGENDA**

The backdrop against which the Attorney General and White House memoranda were issued may well be as important as the policies themselves. The access community has seen efforts since the beginnings of the Bush administration to curtail disclosure:

- **Cheney Energy Task Force** – In April 2001, Rep. Waxman and Rep. John Dingell, ranking member of the Energy and Commerce Committee, began seeking information about the energy task force headed by Vice President Cheney. The request for information was prompted by news reports that the task force had met privately with major campaign contributors to discuss energy policy. The Bush Administration was unwilling to provide the information, even to the General Accounting Office (GAO), the investigative arm of Congress. The White House took the position that GAO's investigation would unconstitutionally interfere with the functioning of the Executive Branch. Even when GAO voluntarily scaled back its request – dropping its request for minutes and notes – the Vice President's office was intransigent. The Vice President acknowledged only that GAO was entitled to review the costs associated with the task force. The dispute led to GAO filing its first-ever suit against the Executive Branch to obtain access to information. GAO's effort failed at the trial level. In December, the district court in the case issued a decision ruling that GAO has no standing to sue the Executive Branch. GAO then decided not to appeal the decision.
- **Presidential Records Act** – When, on January 20, 2001, the Presidential Records Act (“PRA”), 44 U.S.C. § 2201 et seq., 12-year restriction period for records containing confidential communications among President Ronald Reagan, Vice President George H.W. Bush, and their advisers expired, the Bush White House first directed the National Archivist to withhold the records while it "studied" the matter, and then, on November 1, 2001, President George W. Bush promulgated Executive Order No. 13,233 (the “Bush Order”), which purports to give binding directions to the Archivist about how to administer presidential and vice presidential records under the PRA. The Bush Order turned the PRA's public access requirement on its head by granting former Presidents, Vice Presidents, and their "representatives" veto power over any release of materials by the Archivist simply by claiming executive privilege, regardless of the merits of the claim. Only with the "authorization" of a former President or Vice President does the Bush Order permit the Archivist to disclose any presidential or vice presidential records.
- **Detainees Names** – In the first few days after the September 11 attacks, some 75 individuals were detained on immigration violations. At the same time as the administration sought increased authority from the Congress to

detain foreign individuals on the grounds of national security with no judicial oversight, it picked up hundreds more individuals. The Attorney General announced that 480 individuals had been detained as of September 28; 10 days later another 135 had been picked up; and in one single week during October, some 150 individuals were arrested. As of November 5, the Justice Department announced that 1,147 people had been detained. The Attorney General asserted that the Justice Department was following the "framework of the law" and that detainees' rights were being respected. However, with no information released about the arrests, it was impossible to independently verify that claim.

- Homeland Security FOIA Exemption – On November 22, 2002, Congress passed H.R. 5005, the Homeland Security Act of 2002 to create a Department of Homeland Security. It was signed into law (Public Law 107-296) by President Bush on November 25th. The law includes a provision (Sec. 204) that will create a broad exemption from the Freedom of Information Act: "Information provided voluntarily by non-Federal entities or individuals that relates to infrastructure vulnerabilities or other vulnerabilities to terrorism and is or has been in the possession of the Department shall not be subject to section 552 of title 5, United States Code" (the Freedom of Information Act).
- Narrowing FOIA's Central Purpose – The Department of Justice recently sought a tremendously restrictive construction of the central purpose of the FOIA when it was pitted against the release of information from gun trace and sales databases. The DOJ argued in Department of Treasury, BATF v. City of Chicago that only the privacy interests in the information should be recognized, and no broader public interest in law enforcement or gun policy issues. DOJ's position would narrow the reach of the Freedom of Information Act in cases implicating privacy concerns by restricting the FOIA's disclosure requirements only to records that directly "cast light on the [agency] performance." Limiting access to such a narrow category of records would overlook the broad disclosure mandated by the FOIA's legislative history, which requires disclosure for any public or private purpose. (<http://www.gwu.edu/~nsarchiv/news/amicus0203/> ).
- Fee Category and Fee Waiver Litigation – The Department of Justice has also uncompromisingly litigated preferred fee categorization cases where long established rules would counsel in favor of the FOIA requester. These court cases provide reminders that case law can have a strong impact on the openness of government, and that the access community must be on the lookout for even seemingly innocuous cases in which important access issues are litigated.

Finally, it is anticipated that a new Executive Order regarding classification will be issued in April 2003 to replace E.O. 12958 issued by President Clinton ("[Clinton EO](#)"). The

Clinton EO had changed the administrative dynamic of information classification by requiring agencies to expend resources for any continued classification of a record, whereas under the old executive order agencies had been required to take specific actions and commit resources in order to declassify records which otherwise would retain their classification status indefinitely. Instead of open-ended classification periods, the Clinton EO provided for a ten-year classification period for most records, and automatic declassification after 25 years for most records that had previously been classified under another executive order on classification.

The current draft of the Bush Executive Order, obtained and published by Steven Aftergood of the Federation of American Scientists ([www.fas.org/sgp](http://www.fas.org/sgp)), retains some of the basic reforms of the Clinton EO, particularly the threat of automatic declassification without review as a means to force agencies to disgorge their 25-year-old classified files. Also, the draft order emphasizes training for officials on the criminal, civil and administrative penalties for leaking classified information, in lieu of an “official secrets act,” described by Attorney General Ashcroft in September 2002 as unnecessary. The draft also includes a single provision that breaks with the status quo, by authorizing emergency disclosure to non-cleared personnel in the event of an “imminent threat to life or in defense of the homeland.” Otherwise, the order backtracks on the reforms of the 1990s, by making foreign government information presumptively classified, by encouraging reclassification even of 25-year-old documents if the material is reasonably recoverable, and by giving the CIA a trump card against the decisions of the Interagency Security Classification Appeals Panel (ISCAP) on records involving sources and methods of intelligence. One particularly dramatic cut from the Clinton order removes the two provisions for “when in doubt,” which previously encouraged either disclosure or downgraded classification if there were doubts or ambiguities about the necessary level of classification. But doubts are not allowed in the Bush administration.<sup>1</sup>

The Administration has taken only two significant steps to enhance access.

- **Argentina Declassification.** – The State Department declassified more than 4,600 previously secret U.S. documents on human rights violations under the 1976-83 military dictatorship in Argentina. Former Secretary of State Madeleine Albright ordered the collection, review and declassification of U.S. records on Argentina following an August 16, 2000 meeting in Buenos Aires with leaders of the Grandmothers and Mothers of Plaza de Mayo, and with the Argentine human rights organization, the Centro de Estudios Sociales y Legales (CELS). The special declassification, initiated by the Clinton Administration was completed by the Bush administration and yielded hundreds of cables, memoranda of conversations, reports and notes between the State Department and the U.S. Embassy in Buenos Aires.

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<sup>1</sup> For additional discussion of secrecy initiatives of the Bush Administration, as well as their impact on the press, see “Homefront Confidential: How the War on Terrorism Affects Access to Information and the Public’s Right to Know” (The Reporters Committee for Freedom of the Press, Sept. 2002) (available at <http://www.rcfp.org/homefrontconfidential/>).

- Declassification of Iraq Intelligence -- Secretary of State Colin Powell used electronic intercepts of Iraqi official communications, current satellite photographs and other intelligence before the United Nations ("U.N.") Security Council to demonstrate that Iraq is actively working to deceive U.N. weapons inspectors. In what was viewed as many as an unprecedented display of U.S. intelligence capabilities, Secretary Powell made public information that is specifically exempt from disclosure under the FOIA and prohibited from release by criminal penalties.

Through the Ashcroft Memorandum and the White House Memorandum, the Administration has taken a strong rhetorical position that suggests an increase in secrecy through the aggressive use of FOIA exemptions and classification decisions to prevent the release of government records. It has specifically required the agencies to examine their classification programs and ensure they properly serve the purpose of protecting sensitive information. Yet, Administration policies have directed only small actual changes in policy or procedure, such as re-review of records to identify sensitive or classifiable materials. Instead, guidance has offered suggestions for ways to maintain secrecy without statutory or regulatory changes.

The practice of implementing small changes all tending towards secrecy, instead of taking dramatic steps to restrain access, makes it much harder to evaluate the impact and, indeed, to fight the changes. It is, undoubtedly, more difficult to garner public support for opposition to minor changes when more pressing issues, like an impending war, are competing for public attention. Thus, it is imperative that the access community, remain vigilant in its efforts to stem the slow tide of change and identify the real risks behind incremental policy changes and administrative acceptance of poor FOIA processing performance. Because the Administration's approach does not provide an easy target of attack for the access community, even though there may be a gradual shift over time towards additional secrecy, the access community must rigorously examine each change in policy and advocate, through comments, education and litigation, for these changes to be limited to what is truly necessary to protect the nation's security and the congressional intent behind the FOIA.

## **FINDINGS REGARDING ADMINISTRATIVE PROCESSING OF FOIA REQUESTS**

The Archive's initial findings regarding agency processing of FOIA requests and agency backlogs raised great concern. The FOIA process does not work well for the ordinary FOIA requester. During the course of the audit the Archive encountered a number of stumbling blocks and inconsistencies in the way that each agency processes FOIA requests that make it extremely likely that the average member of the public will be frustrated, discouraged and ultimately unsuccessful in obtaining access to federal government records. Fortunately there also are many best practices that alleviate barriers to access, and the Archive also highlights some of those practices in this report. The problems the Archive identified include:

- **Inaccurate or incomplete information about agency FOIA contacts.** During the course of the audit, the Archive made its FOIA requests to those persons listed on the Department of Justice's "Principal FOIA Contacts at Federal Agencies" page. [<http://www.usdoj.gov/04foia/foiacontacts.htm>] Then the Archive was frequently told by the agencies involved that requests and appeals should be transmitted to agency contacts other than those available on the "Principal FOIA Contacts" page. The information available on the DOJ "Principal FOIA Contacts" page and on individual agency websites also occasionally included inaccurate or incomplete listings of contact people, telephone and fax numbers, and addresses. The Archive also sought contacts on individual agency web pages and found that information provided was also often deficient. The CIA FOIA page, for instance, provides minimal contact information. It lists only:

Information and Privacy Coordinator  
Central Intelligence Agency  
Washington, D.C. 20505

There is no contact individual, telephone number or fax number, and no appeal instructions or contacts for the CIA. There is a contact listed for requests for retired files at the National Archive and Records Administration. The DOJ "Principal FOIA Contacts" page does include a phone number and contact name for CIA, but also does not include a fax number.

The Central Command ("CENTCOM") website also was deficient. There is no FOIA page link available from the CENTCOM homepage and the single Annual FOIA Report posted on its FOIA page is illegible. The FOIA site does provide a convenient e-mail FOIA template, but, when the Archive attempted to send a FOIA request to the listed e-mail contact, an error message was returned indicating that the address linked was undeliverable. The phone number listed as a contact on the website, (813) 828-6383 leads to a disconnection recording that does not forward the correct number. The correct number is (813) 828-6382. The website does not list a fax number and although it does list the addresses of the CENTCOM FOIA components, it does not provide a description of the duties of

these components and does not provide the name of any contact individuals or telephone or fax numbers. It would be quite difficult for an individual to submit a FOIA request to an office whose listed FOIA phone number and e-mail contact information are inaccurate and there is no given fax number. The DOJ listing of the “Principal FOIA Contacts,” does not provide any contact information for CENTCOM.

FOIA Requesters would be better served by an up-to-date, comprehensive listing of FOIA contacts that specifies each contact’s responsibilities. Thus, a standard part of assigning FOIA responsibilities to agency personnel should include updating the agency’s FOIA contact information available to the public.

- **Failure to acknowledge requests.** The Archive received acknowledgments within the 20-business day statutory time limit for a response to its Ashcroft Memorandum requests from only 15 of the 35 agencies. 12 agencies provided substantive responses within the 20-business day limit. The only agency to both send an initial acknowledgment and a substantive response within the 20-business statutory time limit was the CIA. Although the contents and the format of the initial acknowledgements varied widely, various agencies included the following information in acknowledgments: (1) agency tracking numbers; (2) actual fee determinations or, at least a statement of fee policy; (3) the name and contact information for a person, such as a FOIA specialist, who could assist the requester; (4) the estimated length of the backlog or position in the queue of outstanding requests; (5) the requester’s rights if the agency failed to meet its statutory time limit for substantively responding to the request; (6) an identification of the components that the request was forwarded to; (7) a Privacy Act notice; (8) conditions regarding the scope of the search; and (9) identification of the “track” on which the request was placed, such as the simple or complex track. Most acknowledgments were letters, although the Department of Defense and the Department of Education used lower-cost postcards.

Although the FOIA does not specifically require acknowledgment short of a substantive determination within 20 days of the submission of the FOIA request, it is clear from the Archive’s experience, that most agencies are unable to substantively respond to an FOIA request within 20 days. Where an agency is unable to meet its statutory obligation to respond within 20-days, an acknowledgment postcard has several benefits. First, information about the components who will search for records, the track the request is placed on, or the backlog, give the requester tools to work with the agency to narrow or focus a request, and to avoid unnecessary searches. The acknowledgement thus opens a channel for communication between the agency and the FOIA requester. Second, immediate assignment of a tracking number and acknowledgment of requests may prevent the problem of “lost” FOIA requests, as well as provide a means for requesters and others to track the progress of the request through the agency. Third, identification of the components to which the request is referred is critical for putting the FOIA requester in a position to know when the processing has

been completed and, if necessary, for appealing an actual or constructive denial of records. These impacts will both further the congressional intent to make disclosable records readily available to the public and will tend to reduce litigation against the agencies.

The use of a postcard probably is preferable than a letter in most instances. The Department of Defense uses a postcard to acknowledge all FOIA requests. The postcard can easily be completed by the FOIA officer by hand and immediately place it in the mail, without additional printing, folding, and envelope-stuffing time. Moreover the cost of the postcards, and the mailing of the cards, is lower than with other methods of acknowledgment.

- **Lost requests.** Out of the 35 Ashcroft Memorandum requests, three of the requests were not in agencies' FOIA processing systems when appeals were filed 99-100 days after the requests had been submitted. In each case the Archive confirmed that it had transmitted the request to the correct contact. Thus, 9% of the requests were missing. One additional request that was not in an agency's FOIA system was due to the Archive's own error. Only one agency, the Veteran's Administration, conceded that a request probably had been lost due to fax messages being picked up by personnel other than the FOIA specialists. Discussions with this and other agencies' FOIA offices disclosed conditions that make lost requests a significant possibility. For example, the Archive learned that some agencies do not have dedicated contact points for FOIA requests. The Department of Education informed the Archive that faxed FOIA requests are received on the same fax machine as many other general faxes sent to the agency. They suggested that non-FOIA personnel may inadvertently pick up a FOIA request and it could never make its way to the FOIA office. The Archive's experience was similar with its White House Memorandum and "10 Oldest" FOIA requests. One of the White House Memorandum requests was "lost" and two of the "10 Oldest" requests were lost. There was no one agency that "lost" more than one request. When a request is lost, the requester has little or no remedy, and may lose weeks or months in the processing of the request.
- **Excessive Backlogs.** The FOIA mandates that agencies respond to requests within 20 business days of submission. Courts have found a constructive denial when an agency has failed to provide a substantive response within the 20-day statutory time limit spelling out (1) the agency's determination of whether or not to comply with the request; (2) the reasons for its decision; and (3) notice of the right of the requester to appeal to the head of the agency if the initial agency decision is adverse. *See Oglesby v U. S. Dep't of Army*, 920 F.2d 57, 65 (D.C. Cir. 1990) (citing 5 U.S.C. § 552(a)(6)(A)(i)). Agency response times concerning the request for information regarding implementation of the Attorney General's memorandum ranged from 1 day to 127 days. Only 12 out of 35 agencies met the FOIA's statutory time limit of 20 business days. For the Ashcroft Memorandum requests, the Archive filed an appeal after 99-100 days. In many cases the

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Archive was contacted about the appeal within a short time of the filing and, in several cases, the processing delay was quickly addressed.

The Archive views the Ashcroft Memorandum FOIA request as a simple request. It related primarily to documents that should be in the possession of the agencies' FOIA offices and does not relate to any sensitive matters. Yet, the Archive frequently found the request being processed as a complex or substantive FOIA request. Repeatedly it was circulated to numerous component FOIA offices, delaying its processing with little apparent benefit. The Archive's request to the Department of Labor was sent to the Office of the Solicitor in that Department. An acknowledgement from the Department indicated that the request had been referred to unspecified "components." Twenty-four days after the Archive had faxed the initial request to the Office of the Solicitor, the Employment Standards Administration's Office of Labor-Management Standards and the Employment Standards Administration's Office of Worker's Compensation Programs sent two separate no documents responses to the Attorney General request. The response from the Office of Workers Compensation Programs indicated that "any guidance, directives or training" related to "the Department of Labor's implementation of U.S. Attorney General Ashcroft's October 12, 2001 memorandum" "would have been developed and conducted by the Office of the Solicitor of Labor." An administrative appeal to the Office of the Solicitor 99 days after the initial request yielded a call from the Department asking which component should be tasked to finish the search, although the agency contact could not say which components had originally received the referral from the Office of the Solicitor. After the Archive requested that the Officer of the Solicitor search its own records, three relevant documents totaling seventeen pages of material originating from that office were released. These materials were received 112 days after the original request was faxed to the Solicitor of Labor.

Moreover, to the credit of the agencies, they generally follow first-in, first-out policies. While this ensures that no requester is given preference over another, it may lead to extensive delay for even simple requests. Generally a requester who seeks documents that require extensive search and review will understand the reason for time extensions. For requesters who identify documents with reasonable specificity or seek information on a narrow topic, such delay is less reasonable. The EFOIA amendments sought to encourage agencies to utilize multiple queues to keep the FOIA system from grinding to a halt due to a few major requests. It does not appear that agencies are using the multiple queue systems effectively. One FOIA officer reported that she processes both simple and complex requests simultaneously and that all are actually processed in the order received. The Archive intends to address the backlog issue further in Phase Three of this audit.

- **Complete Decentralization Leading to Delay and Lack of Oversight.** Many agencies have decentralized FOIA processing systems, but also maintain principal

agency FOIA contacts. The Archive directed its FOIA requests to the principal FOIA contact at the agencies. Many agencies then referred the requests to agency components for processing, sometimes after several weeks already had passed since the time that the FOIA request had been received. In these cases the Archive often was informed that the response time for the agency would not begin to run until the component received the request.

To compound the issue, in most cases the Archive was not informed to which components the request had been referred. Thus, the Archive was not able to determine when processing had been completed, what component to follow up with, or how to properly couch its appeals. See, e.g., Discussion of Department of Labor under “Excessive Backlogs.” One agency refused to disclose to the Archive which components had not responded to the FOIA request.

Finally, the Archive learned that agencies such as the Department of Labor, the Army and the Navy do not maintain any central tracking or oversight over the requests once they have been referred to a component. In contacting the agencies about the “10 Oldest” requests, the Archive learned that at least 20 out of 35 agencies could not respond to a FOIA request that required them to locate their “10 Oldest” FOIA requests, within the 20-day statutory time limit required by FOIA. For those agencies that decentralize processing, there should be some centralized oversight over the process at the agency level.

- **Inconsistent Practices Regarding the Acceptance of Administrative Appeals.** The FOIA mandates that agencies respond to requests within 20 business days of submission. Courts have found a constructive denial when an agency has failed to provide a substantive response within the 20-day statutory time limit spelling out (1) the agency's determination of whether or not to comply with the request; (2) the reasons for its decision; and (3) notice of the right of the requester to appeal to the head of the agency if the initial agency decision is adverse. See *Oglesby v U.S. Dep't of Army*, 920 F.2d 57, 65 (D.C. Cir. 1990) (citing 5 U.S.C. § 552(a)(6)(A)(i)). While the audit did not require the Archive to file an appeal with each of the 35 agencies, the Archive was informed by several agencies – the Department of Housing and Urban Development, the Department of State, and the Social Security Administration – that those agencies do not permit a FOIA requester to administratively appeal an agency's failure to meet the statutory time limit. Instead, those agencies take the position that the only remedy for constructive denial of a FOIA request is a lawsuit in court. Of the 9 appeals filed concerning non-responsiveness with respect to the request for information regarding implementation of the Attorney General's memorandum, 7 agencies accepted the appeals. Limiting the right to administratively challenge a failure to meet statutory deadlines will have the tendency to increase agency litigation costs, does not promote judicial economy, and unfairly penalizes requesters seeking a timely response.

In enacting FOIA, Congress provided for both appeals to the agency processing the request, 5 U.S.C. § 552(a)(6)(A), and judicial review of adverse agency decisions, 5 U.S.C. § 552(a)(4)(B). Both serve important functions in promoting public access to information. Appeals within the agency allow for more rapid resolution of requests without the costs of litigation and give a high-level agency official an opportunity to review the agency processing of the request and adverse determination. Judicial review provides for independent review of agency determinations. Thus, judicial review is not intended to duplicate the administrative appeals process.

It is beneficial for both agencies and FOIA requesters to be able to use the administrative appeal process to resolve disclosure issues without recourse to a court. First, a rule that encourages litigation will tend to increase the agency litigation costs, as it generally will cost more to defend lawsuits, and potentially pay attorneys' fees to successful litigants, than it would have cost to resolve them through the administrative appeals process. Second, providing for administrative review of constructive denials of FOIA requests promotes judicial economy. Courts have consistently emphasized the need for judicial economy and the role that full administrative procedures play in ensuring that courts are not unnecessarily burdened by appeals of agency decisions. Since government agencies can generally resolve matters within their domain more quickly and efficiently than courts, it is in the best interests of all parties involved to see these matters resolved within the agency where possible. This is certainly true in the FOIA context, where the agency has access to the records at issue, but the court and the requester do not. To the extent that the agency has already begun processing the request, then this processing time will not be wasted. Moreover, FOIA appeal officers should be able to identify problems with agency handling of a request more quickly than a court. Third, the central goal of FOIA is to promote broad public access to government information in a timely fashion. A regulation that pushes FOIA requesters into court frustrates this purpose for requesters who wish to expeditiously resolve issues at the agency level. The burden on the requester is significant because these requesters, like the agency, will incur substantial costs in pursuing litigation, costs which could be avoided in many cases through the administrative appeals process.

- **The Effect of Appealing FOIA Determinations.** The Archive was consistently told that filing an administrative appeal due to an agency's lack of response would slow the processing of a request. The Archive was told that an appeal processed without an actual denial necessitated the involvement of another level of administration, frequently the Office of General Counsel, and would generate gratuitous paperwork that would ultimately slow processing. This information, although probably for the most part accurate, is something the Archive cannot confirm. The involvement of appellate personnel, however, appeared to often accelerate the response process. The Archive filed 9 appeals (to DOI, DOL, DOS, DOT, GSA, FDA, CDC, HUD, and VET) based on the lack of a substantive response to the Ashcroft Memorandum FOIA request. The FDA and CDC

appeals were withdrawn upon receiving a response from HHS that incorporated all HHS components. GSA and VET had no record of receiving the initial September request and therefore had to start processing the request at a later date. Of the five remaining agencies, DOI, DOL, DOS, DOT and HUD, all sent a substantive response to the initial request within 20 working days of receiving the administrative appeal.

- **Conflation of Fee Categorization and Fee Waiver Standards.** In the course of the audit, the Archive examined the practices of agencies regarding fee categorization and fee waiver. Fee categorization concerns the determination of the type of FOIA requester that has made a request. In particular, the FOIA provides for categorization as a commercial use request, an educational institution request, a noncommercial scientific institution request, a representative of the news media request, or other request. The determination of whether a FOIA requester is obligated to pay for search, review and/or duplication depends on the fee categorization of the requester. All requesters, other than commercial use requesters, regardless of their fee categorization, are entitled to receive the first 100 pages of duplication without charge and the first two hours of search without charge. A requester may also qualify to have all fees waived, however, if disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government. In the Archive's experience, the determination of fee categorization and fee waiver has been blended by many agency personnel.

The Archive observed a disturbing trend among federal agencies to conflate the standards for fee categorization and fee waiver or reduction. Agency response letters piled jargon upon boilerplate to the point that attorneys contacting the Archive could not distinguish between the fee categorization and fee waiver determinations. Yet, courts have overwhelmingly ruled in favor of the FOIA requester when agencies have conflated the fee categorization and fee waiver standards. The apparent confusion among agency personnel about the appropriate application of these standards potentially will have the impact of (1) discouraging FOIA requesters from exercising their right to view government records; (2) encouraging unnecessary litigation as FOIA requesters seek to challenge what appear to be incorrect determinations of the fee issues; and (3) denial of the appropriate fee status to FOIA requesters.

## **FURTHER RESEARCH**

Phase Two of the Audit will discuss implementation of White House FOIA and classification guidance. Phase Three of the Archive FOIA Audit will examine the problem of backlogs and annual report quality based on an evaluation of the “10 Oldest” FOIA requests pending at the reviewed agencies, a survey of the agencies’ websites, and the agencies’ 2002 annual reports, which should be available in April 2003. The Archive Audit will also look at the actual impact of these changes on the use of exemptions and the problem of backlogs based on the agencies’ annual report data for 2002.