

GENERAL LAW

New Trends In Freedom of Information Act Law

As anyone who has dealt with the Freedom of Information Act (FOIA) knows, policy often plays just as important a role as the law in deciding what government information will or will not be released in response to a FOIA request. This has especially been true since 4 October 1993 when then Attorney General Janet Reno issued a FOIA policy memorandum encouraging FOIA officers "to make 'discretionary disclosures' whenever possible under the Act." That memo explained that "[t]he Department [DoJ] will no longer defend an agency's withholding of information merely because there is a 'substantial legal basis' for doing so. Rather . . . we will apply a presumption of disclosure. . . . In short, 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."

This "Reno doctrine" was implemented within the Department of Defense through DoD Regulation 5400.7, *DoD Freedom of Information Act Program*, paragraph C1.3.1.1: "As a matter of policy, DoD Components shall make discretionary disclosures of exempt records or information whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption, but this policy does not create any right enforceable in court."

Under this policy, discretionary releases were considered to be especially appropriate when the requested records were related solely to the internal personnel rules and practices of any agency (exemption (b)(2)) or were inter-agency or intra-agency memorandums or letters (exemption (b)(5)). Discretionary releases were considered impermissible or at least less appropriate when the requested records involved classified matters (exemption (b)(1)), matters specifically exempted from disclosure by statute (exemption (b)(3)), privileged or confidential commercial information (exemption (b)(4)), personal privacy information (exemption (b)(6)), or (in most cases) law enforcement records (exemption (b)(7)).

When Attorney General Reno promulgated her new doctrine in 1993, she rescinded the longstanding 1981 guidelines that had been issued by then Attorney General William French Smith. Smith's policy had been to "defend all suits challenging an agency's decision to deny a request submitted under the FOIA unless" it was determined that (a) the agency's denial lacked a substantial legal basis; or (b) defense of the agency's denial presented an unwarranted risk of adverse impact on other agencies' ability to protect important records. Under Smith's policy, discretionary releases were not encouraged.

President Bush's Attorney General, John Ashcroft, on 12 October 2001 issued his administration's FOIA policy, which is essentially a reversal of the "Reno doctrine" and a return back to the "Smith doctrine" which was in effect from 1981 through 3 October

1993: "Any discretionary decision by your agency to disclose information protected under the FOIA [discretionary disclosure] should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information. . . . When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."

This new "Ashcroft doctrine" was implemented within the Department of Defense on 19 November 2001 by the DoD FOIA office via a policy memorandum.

The practical effect of Attorney General Ashcroft's policy will be the increased use of exemptions (b)(5) and (b)(2)--particularly "low" (b)(2)--as authority to withhold material. Exemption (b)(2) of the FOIA exempts from mandatory disclosure records "related solely to the internal personnel rules and practices of an agency." Courts through the years have distinguished between internal matters of a relatively trivial nature--sometimes referred to as "low 2" information and more substantial internal matters--sometimes referred to as "high 2" information. The legislative and judicial history make clear that "low 2" is based upon the rationale that the task of processing and releasing some requested records would place an administrative burden on an agency that could not be justified by any genuine public benefit.

Prior to 4 October 1993, "low 2" was used to legitimately deny FOIA requests for mundane administrative data such as facsimile cover sheets, file numbers, room numbers, mail routing stamps, data processing notations, and other trivial administrative matter of no genuine public interest. After Attorney General Reno's 4 October 1993 FOIA memorandum, nearly all administrative information covered solely by the "low 2" part of exemption (b)(2) was considered appropriate for discretionary disclosure. With Attorney General Ashcroft's return to the policy of not encouraging discretionary disclosures, "low 2" will once again be able to be used by federal agencies to deny burdensome FOIA requests for internal administrative records that shed little to no light on an agency's performance of its statutory duties (one of the core purposes of the FOIA per the Supreme Court, *U.S. Department of Justice v. Reporters Committee For Freedom of the Press*, 489 U.S. 749, 773 (1989)).

Not just changes in attorney general administrations affects release policy; current events can also change the way our government balances the public's right to know against other equally compelling societal values, such as privacy. This is especially noticeable since the 11 September 2001 terrorist attacks against the United States. On 14 September 2001 the President declared a national emergency by reason of these attacks. On 18 October 2001 Paul Wolfowitz, Deputy Secretary of Defense, issued a memorandum encouraging greater operations security "to deny our adversaries the information essential for them to plan, prepare or conduct further terrorist or related hostile operations against the United States and this Department."

This changed security posture prompted the DoD Director of Administration and Management, David Cooke, on 9 November 2001 to issue a policy memorandum for all DoD FOIA offices. Mr. Cooke noted that presently "all DoD components withhold, under 5 USC § 552(b)(3), the personally identifying information (name, rank, duty address, official title, and information regarding the person's pay) of military and civilian personnel who are assigned overseas, on board ship, or to sensitive or routinely deployable units. Names and other information regarding DoD personnel who did not meet these criteria have been routinely released when requested under the FOIA. Now, since DoD personnel are at increased risk regardless of their duties or assignment to such a unit, release of names and other personal information must be more carefully scrutinized and limited."

"I have therefore determined this policy requires revision. Effective immediately, personally identifying information (to include lists of e-mail addresses) . . . must be carefully considered and the interests supporting withholding of the information given more serious weight in the analysis. This information may be found to be exempt under 5 USC §552(b)(6) because of the heightened interest in the personal privacy of DoD personnel that is concurrent with the increased security awareness demanded in times of national emergency."

Mr. Cooke's memorandum sets a new release policy: "All DoD components shall ordinarily withhold lists of names and other personally identifying information of personnel currently or recently assigned within a particular component, unit, organization or office with the Department of Defense in response to requests under the FOIA. This is to include active duty military personnel, civilian employees, contractors, members of the National Guard and Reserves, military dependents, and Coast Guard personnel when the Coast Guard is operating as a service in the Navy. If a particular request does not raise security or privacy concerns, names may be released as, for example, a list of attendees at a meeting held more than 25 years ago. Particular care shall be taken prior to any decision to release a list of names in any electronic format."

This new DoD policy appropriately gives greater weight to the privacy rights of military personnel during times of national crisis. Whether the courts will agree with DoD's balancing analysis will be determined by future FOIA litigation.