

BOB MOLL

To: SOL- Ann-AllEmp

10/22/2001 10:12 AM

cc:

Subject: Important FOIA News

Everyone-

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

The Ashcroft Memorandum:

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

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

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

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

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

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

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



2001foiapost19.htr



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10/23/2001 12:42 PM

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Subject: New FOIA Policy Issued by Attorney General

As you may be aware, on October 12, 2001, Attorney General John Ashcroft issued this Administration's new FOIA policy which differs in several important respects from the policy issued by former Attorney General Janet Reno. The new FOIA policy articulated in the Ashcroft memorandum supersedes the prior policy that documents should be released even if exempt, unless a foreseeable harm would occur from the release. The new policy does not actively encourage discretionary disclosures. However, the policy does recognize the agencies' ability to make discretionary disclosures.

When considering whether to make a discretionary disclosure, the Attorney General advises agencies to carefully consider the facts and information in the documents and consider the interests that might be impacted by the disclosure, such as institutional, commercial, and privacy interests.

The Ashcroft memorandum and accompanying DOJ guidance also address the procedures for withholding documents. The memorandum states that in making decisions regarding disclosure, agencies should carefully consider the values and interests underlying the exemptions. Before withholding documents, agencies should be sure that they have both a sound factual and legal footing for withholding the documents. Under the new policy, DOJ has advised it will defend withholdings of documents unless they lack a sound legal basis for the withholding. (The Ashcroft memorandum and DOJ guidance may be found at <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>)

Under DOI's FOIA procedures (Chapter 5.2 of the Departmental FOIA Handbook (383 DM 15)), an exempted record may be released to a requester when, in the bureau's judgment, the interests of the Government, which underlie the exemptions, would not be jeopardized, unless disclosure is restricted by statute or Executive order. Bureaus are required to consult with their Designated FOIA Attorney prior to making a discretionary release of information.

Given the security issues we are now facing in light of the events of September 11, and the fact that there is a high turnover of FOIA personnel in the field with little or no FOIA training, we would like to go one step further and require the bureaus to obtain the written approval (i.e., surname) of their FOIA attorneys before making discretionary releases under the FOIA. I have discussed the proposed procedures with Dan Jorjani and Bob Moll, SOL-GL, and they concur. Please let me know if you agree with this approach. Thanks.

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