EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER, FOUNDATION,	:	
	:	Civil Action No. 06-1773
Plaintiff,	:	
v.	:	
DEPARTMENT OF JUSTICE	:	
Defendant.	:	

ORDER

Currently before the Court is the plaintiff's motion to stay the proceedings "pending issuance of new guidelines governing the [Freedom of Information Act] by the Attorney General, as directed by President Obama on January 21, 2009" (internal quotations omitted). So that the Court is fully apprised of the issues, it is

ORDERED that within 60 days from the date of this Order, the defendant shall file a Notice to the Court advising the Court as to whether the defendant's position has changed. It is further

ORDERED that the Court's consideration of the plaintiff's motion to stay the proceedings is stayed pending filing of the defendant's Notice.

SO ORDERED on this 11th day of February, 2009.

/s/_____
REGGIE B. WALTON
United States District Judge

EXHIBIT 2

The FOIA blog

Everything FOIA (and government disclosure)

January 30, 2009

Department of Justice Email to FOIA Professionals

Here is the email sent by the Office of Information and Privacy to all agency FOIA Offices subsequent to President Obama's Presidential Memorandum on the FOIA. As far as I can tell, OIP has not posted this on its website as of today.

FOIA Professionals:

On January 21, 2009, President Obama signed the "Presidential Memorandum for the Heads of Executive Departments and Agencies on the Freedom of Information Act," which establishes a new policy for Executive Branch departments and agencies concerning disclosure and transparency. The President directed all agencies to administer the FOIA with a clear presumption in favor of disclosure, to resolve doubts in favor of openness, and to not withhold information based on "speculative or abstract fears." In addition, the President called on agencies to ensure that requests are responded to with "a spirit of cooperation," that disclosures are timely, and that modern technology is used to make information available to the public even before a request is made.

To implement these objectives, the President directed the Attorney General to issue new guidelines governing the FOIA. Those guidelines will reaffirm the Executive Branch's "commitment to accountability and transparency." The Department of Justice looks forward to issuing the guidelines directed by the President and to working directly with other departments and agencies to ensure that the President's goal of making his administration the most open and transparent in history is realized.

The President's memorandum was effective immediately and supersedes former Attorney General Ashcroft's Memorandum on the FOIA dated October 12, 2001. As a result, agency personnel should immediately begin to apply the presumption of disclosure to all decisions involving the FOIA, as the President has called for.

Once the new FOIA guidelines are issued by the Attorney General, OIP will conduct comprehensive training on those guidelines and provide additional advice and guidance to departments and agencies to ensure that our government is accountable and transparent, in keeping with the President's commitment.

Melanie Ann Pustay
Director
Office of Information and Privacy
U.S. Department of Justice

Posted at 01:20 PM | Permalink ShareThis

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EXHIBIT 3

FAS Intro: In October 1993, the Attorney General issued the following press release and memorandum announcing a new policy intended to increase the utility of the Freedom of Information Act. In particular, the Attorney General committed the Government to opposing FOIA Appeals only when there was a legitimate national interest in doing so.

Department of Justice

FOR IMMEDIATE RELEASE
MONDAY, OCTOBER 4, 1993

Government Adopts New Standard for Openness

WASHINGTON, D.C.-- President Bill Clinton and Attorney General Janet Reno today took action to substantially increase the amount of government information that is made available to the public.

They rescinded a 1981 rule which encouraged federal agencies to withhold information whenever there was "a substantial legal basis" for doing so. In its place, the Attorney General said, a "presumption of disclosure" should be applied.

She said the Justice Department would defend agencies that are sued tor non-disclosure only when it was "reasonably foreseeable that disclosure would be harmful" to an interest protected by the law, and only when it need be.

In a statement issued at the White House, President Clinton called upon all federal departments and agencies to renew their commitment to the Freedom of Information Act and to its underlying principles of government openness. The President said this was an appropriate time for them to take a fresh look at how they comply with the law, and to reduce backlogs.

The Attorney General said she "strongly encouraged" each agency to make discretionary disclosure of technically exempt information whenever possible.

She also instructed Justice Department personnel to review pending FOIA litigation to implement the new policy, and ordered a review of all forms and correspondence utilized by the Department in responding to FOIA requests to make them more clear, consistent and complete.

In her directive to federal departments and agencies, the Attorney General said, "The American public's understanding of the workings of its government is a cornerstone of our democracy. The Department of Justice stands prepared to assist all federal agencies as we make government throughout the executive branch more open, more responsive and more accountable."

THE WHITE HOUSE
WASHINGTON
October 4, 1993

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

Subject: The Freedom of Information Act

I am writing to call your attention to a subject that is of great importance to the American public and to all Federal departments and agencies -- the administration of the Freedom of Information Act, as amended (the "Act"). The Act is a vital part of the participatory system of government. I am committed to enhancing its effectiveness in my Administration.

For more than a quarter century now, the Freedom of Information Act has played a unique role in strengthening our democratic form of government. The statute was enacted based upon the fundamental principle that an informed citizenry is essential to the democratic process and that the more the American people know about their government the better they will be governed. Openness in government is essential to accountability and the Act has become an integral part of that process.

The Freedom of Information Act, moreover, has been one of the primary means by which members of the public inform themselves about their government. As Vice President Gore made clear in the National Performance Review, the American people are the Federal Government's customers. Federal departments and agencies should handle requests for information in a customer-friendly manner. The use of the Act by ordinary citizens is not complicated, nor should it be. The existence of unnecessary bureaucratic hurdles has no place in its implementation.

I therefore call upon all Federal departments and agencies to renew their commitment to the Freedom of Information Act, to its underlying principles of government openness, and to its sound administration. This is an appropriate time for all agencies to take a fresh look at their administration of the Act, to reduce backlogs of Freedom of Information Act requests, and to conform agency practice to the new litigation guidance issued by the Attorney General, which is attached.

Further, I remind agencies that our commitment to openness requires more than merely responding to requests from the public. Each agency has a responsibility to distribute information on its own initiative, and to enhance public access through the use of electronic information systems. Taking these steps will ensure compliance with both the letter and spirit of the Act.

[signed]
William J. Clinton

Office of the Attorney General
Washington, D.C. 20530

October 4, 1993

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES
Subject: The Freedom of Information Act

President Clinton has asked each Federal department and agency to take steps to ensure it is in compliance with both the letter and the spirit of the Freedom of Information Act (FOIA), 5 U.S.C. Sec. 552. The Department of Justice is fully committed to this directive and stands ready to assist all agencies as we implement this new policy.

First and foremost, we must ensure that the principle of openness in government is applied in each and every disclosure and nondisclosure decision that is required under the Act. Therefore, I hereby rescind the Department of Justice's 1981 guidelines for the defense of agency action in Freedom of Information Act litigation. The Department will no longer defend an agency's withholding of information merely because there is a "substantial legal basis" for doing so. Rather, in determining whether or not to defend a nondisclosure decision, we will apply a presumption of disclosure.

To be sure, the Act accommodates, through its exemption structure, the countervailing interests that can exist in both disclosure and nondisclosure of government information. Yet while the Act's exemptions are designed to guard against harm to governmental and private interests, I firmly believe that these exemptions are best applied with specific reference to such harm, and only after consideration of the reasonably expected consequences of disclosure in any particular case.

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. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be.

It is my belief that this change in policy serves the public interest by achieving the Act's primary objective -- maximum responsible disclosure of government information -- while preserving essential confidentiality. Accordingly, I strongly encourage your FOIA officers to make "discretionary disclosures" whenever possible under the Act. Such disclosures are possible under a number of FOIA exemptions, especially when only a governmental interest would be affected. The exemptions and opportunities for "discretionary disclosures" are discussed in the Discretionary Disclosure and Waiver section of the "Justice Department Guide to the Freedom of Information Act." As that discussion points out, agencies can make discretionary FOiA disclosures as a matter of good public policy without concern for future "waiver consequences" for similar information. Such disclosures can also readily satisfy an agency's "reasonable segregation" obligation under the Act in connection with marginally exempt information, see 5 U.S.C. Sec. 552(b), and lessen an agency's administrative burden at all levels of the administrative process and in litigation. I note that this policy is not intended to create any substantive or procedural rights enforceable at law.

In connection with the repeal of the 1991 guidelines, I am requesting that the Assistant Attorneys General for the Department's Civil and Tax Divisions, as well as the United States Attorneys, undertake a review of the merits of all pending FOIA cases handled by them, according to the standards set forth above. The Department's litigating attorneys will strive to work closely with your general counsels and their litigation staffs to implement this new policy on a case-by-case basis. The Department's Office of Information and Privacy can also be called upon for assistance in this process, as well as for policy guidance to agency FOIA officers.

In addition, at the Department of Justice we are undertaking a complete review and revision of our regulations implementing the FOIA, all related regulations pertaining to the Privacy Act of 1974, 5 U.S.C. Sec. 552a, as well as the Department's disclosure policies generally. We are also planning to conduct a Department-wide "FOIA Form Review." Envisioned is a comprehensive review of all standard FOIA forms and correspondence utilized by the Justice Department's various components. These items will be reviewed for their correctness, completeness, consistency, and particularly for their use of clear language. As we conduct this review, we will be especially mindful that FOIA requesters are users of a government service, participants in an administrative process, and constituents of our democratic society. I encourage you to do likewise at your departments and agencies.

Finally, I would like to take this opportunity to raise with you the longstanding problem of administrative backlogs under the Freedom of Information Act. Many Federal departments and agencies are often unable to meet the Act's ten-day time limit for processing FOIA requests, and some agencies -- especially those dealing with high-volume demands for particularly sensitive records -- maintain large FOIA backlogs greatly exceeding the mandated time period. The reasons for this may vary but principally it appears to be a problem of too few resources in the face of too heavy a workload. This is a serious problem -- one of growing concern and frustration to both FOIA requesters and Congress, and to agency FOIA officers as well.

It is my hope that we can work constructively together, with Congress and the FOIA-requester community, to reduce backlogs during the coming year. To ensure that we have a clear and current understanding of the situation, I am requesting that each of you send to the Department's Office of Information and Privacy a copy of your agency's Annual FOIA Report to Congress for 1992. Please include with this report a letter describing the extent of any present FOIA backog, FOIA staffing difficulties and any other observations in this regard that you believe would be helpful.

In closing, I want to reemphasize the importance of our cooperative efforts in this area. The American public's understanding of the workings of its government is a cornerstone of our democracy. The Department of Justice stands prepared to assist all Federal agencies as we make government throughout the executive branch more open, more responsive, and more accountable.

[signed]
Janet Reno

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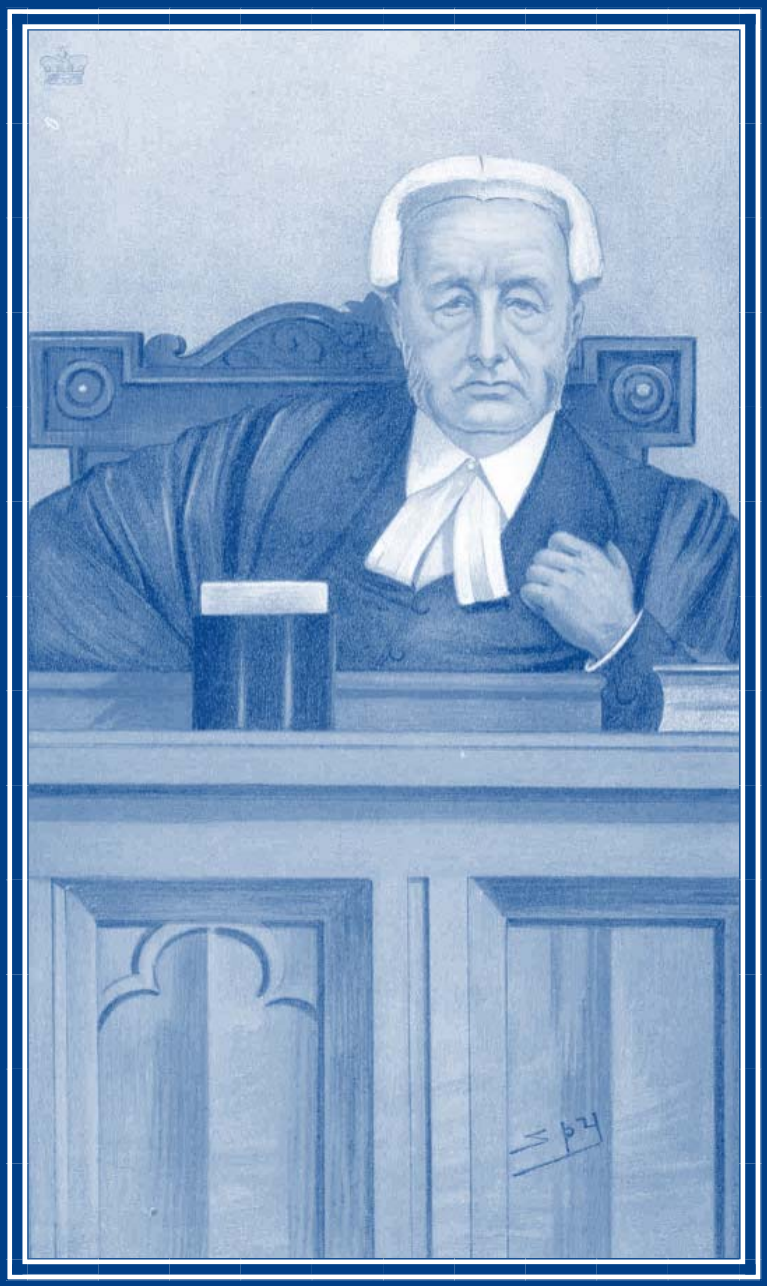
EXHIBIT 4

The Reporter

December 2001

OFFICE OF THE JUDGE ADVOCATE GENERAL



AIR FORCE RECURRING PERIODICAL 51-1, VOLUME 28 NUMBER 4

FREEDOM OF INFORMATION ACT: NOT SO FREE ANYMORE

Anderson and Anderson

INTRODUCTION

Any attorney who has dealt with the Freedom of Information Act (FOIA)[1] knows policy plays as important a role as the law in deciding what government information will be released in response to a FOIA request. Two recent events have certainly brought this fact home: the change in presidential administration (and the resultant end of the Reno doctrine), and the terrorist attacks of September 11, 2001.

The essence of these changes is captured in Attorney General John Ashcroft's October 12 announcement of the new administration's FOIA policy[2] and in the November 19, DoD implementing Memorandum.[3] These new changes represent a marked shift in FOIA policy and will fundamentally change the way the federal government responds to FOIA requests. The changes are fundamental enough that they were implemented through a memorandum pending revision of implementing regulations.[4] A hailstorm of discussion has followed the Ashcroft memorandum among those who regularly work with FOIA policy. As base level attorneys are often the only legal reviewers of a records release, it is important that they be familiar with the new policy's basic provisions.

THE RENO DOCTRINE

The FOIA, originally passed in 1966, requires the government to release information when requested unless the information is protected by one of the Act's nine specific exemptions.[5] It was enacted to ensure we have "an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[6] During the Reagan years, former Attorney General William Smith set the government tone in his 1981 guidelines—stating DOJ's policy to "defend all suits challenging an agency's decision to deny a request submitted under the FOIA unless … the agency's denial lacke[d] a sound legal basis; or … present[ed] an unwarranted impact on other agencies' ability to protect important records."[7] Under Smith's policy, which lasted until the Clinton administration's Attorney General, Janet Reno, replaced it, discretionary releases were not encouraged.

In October 1993, Attorney General Reno changed DOJ's longstanding policy by issuing a FOIA policy memorandum encouraging FOIA officers "to make 'discretionary disclosures' whenever possible under the Act."[8] That memo explained that "[t]he Department [DoJ] will no longer defend an agency's withholding of information merely because there is a 'sound 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."[9] The Reno doctrine, as it was called, was implemented through the Defense Department's FOIA regulation, DoD 5400.7-R, DoD *Freedom of Information Act Program*: "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 … ."[10]

Although implementing the new presumption of disclosure under the "foreseeable harm standard" caused some initial confusion,[11] agencies came to realize that applying it proved especially appropriate when requested records related solely to the internal personnel rules and practices of the agency under the low-2 exemption or to agency deliberations under exemption 5.[12] Discretionary releases were less appropriate under the remaining exemptions—especially those relating to individuals' privacy.

THE ASHCROFT DOCTRINE

On October 12, 2001, President Bush's Attorney General, John Ashcroft, reversed the Reno doctrine, in effect, reinstating the Smith doctrine: "When you

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Maj Lawrence Anderson (J.D., William Mitchell School of Law) is the head of the Information/Privacy Branch of HQ USAF/JAG.

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."[13] The Ashcroft doctrine was implemented within the DoD on November 19, 2001 by the DoD FOIA office via a policy memorandum which immediately superceded the current DoD FOIA regulation, DoD 5400.7-R.[14]

Reversing the Reno doctrine will primarily affect the application of the low-2 exemption and exemption 5. Before Reno's policy encouraging waiver of discretionary exemptions, "low-2" was used to 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. Legislative and judicial history make it clear that the "low-2" exemption is based upon the rationale that the task of processing and releasing some requested records would place an administrative burden on agencies that could not be justified by any genuine public benefit. After Reno's 1993 FOIA memorandum, nearly all administrative information covered solely under "low-2" was considered appropriate for discretionary disclosure. In fact, DoD 5400.7-R forbids DoD use of the low-2 exemption.[15] With Attorney General Ashcroft's return to a policy of not encouraging discretionary disclosures,[16] many federal agencies will once again use low-2 to deny burdensome FOIA requests for internal administrative records that shed little light on an agency's performance of its statutory duties. This new policy is effective immediately for DoD offices while we wait for a revised DoD 5700.7-R.[17]

The Ashcroft doctrine also, more importantly, allows agencies a greater ability to withhold information under exemption 5.[18] Exemption 5 protects agency information that is normally privileged under the rules of civil discovery. These privileges include the deliberative-process privilege, used to protect pre-decisional intra-agency deliberations, and the attorney-client privilege, which protects the majority of legal opinions. Of these two, the Ashcroft doctrine will primarily increase application of the deliberative process privilege.[19] The decreased likelihood that such predecisional documents will be released will promote "candid and complete agency deliberations without fear that they will be made public."[20]

ADDRESSING SECURITY CONCERNS

The new administration's decision to again defend agencies in federal court under a "sound legal basis" standard is not the only event driving a rethinking of FOIA policy--the September 11th terrorist attacks have also shaped how agencies are likely to respond to requests. Since these attacks, a greater concern for national security and the personal privacy interests of DoD employees has arisen. The Ashcroft memorandum addressed these concerns by not only promising to defend agencies, but also by tacitly encouraging even greater withholding under the high-2 exemption and exemption 6: "I encourage your agency to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA. Any discretionary decision by your agency to disclose information protected under the FOIA *should be made only after* full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information."[21] Accordingly, post-September 11th concerns will be primarily addressed using the high-2 exemption and exemption 6.

Following the attacks, President Bush declared a national emergency.[22] Shortly thereafter, 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."[23] One powerful means to address these security concerns when responding to FOIA requests is through the use of the high-2 exemption.

"High-2" applies to internal matters whose release would risk circumvention of a legal requirement. It has traditionally been used to deny information covering vulnerability assessments, stockpile information, security assessments, and the like.[24] Post September 11th, DOJ has encouraged even greater emphasis on the high-2 exemption: "Agencies should *be sure to avail themselves of the full measure* of Exemption 2's protection for their critical infrastructure information as they continue to gather more of it, and assess its heightened sensitivity, in the wake of the September 11 terrorists attacks."[25] As agencies pull previously posted material from their web pages, and, in some cases, refuse to release the same types of information once routinely released, significant waiver issues arise. Information once posted and now pulled presents the greatest challenge. If previously released information

is requested, DOJ will have a hard time defending suits as agencies have already made the information public. Relief legislation may be the only answer for these cases.

If, on the other hand, a requestor asks for recently compiled information, even if it is almost identical to previously released information, DOJ would likely have greater ease in defending access suits arising from such requests. In certain cases, even revealing the existence of, or changes to, a sensitive vulnerability study or emergency plan could threaten an interest protected by high-2. The bottom line is that after September 11th, changes--or lack of changes--to sensitive information is arguably a protectable interest.

Even easier to defend would be denials for certain *types* of vulnerability assessment information that routinely changes from month to month. For example, even if the government previously routinely released certain stockpile inventories, it could be argued that previous releases of this type of information has not waived the right to protect it today. After all, the information for this month has changed from last month, and heightened domestic threats require that the federal government reevaluate what information it should release. Having waived release of an inventory or a security assessment in a previous month thus does not mean disclosure of the current month's inventory or assessment is necessary. It is *new* information (withheld in light of a new threat environment), and the right to exempt it should not be held to have been waived. Courts have not yet had to deal with waiver issues following a catastrophic event as the September 11th terrorist attacks and the resulting, immediate increase in domestic security interests. Whether courts will support liberal application of high-2, or whether legislative relief will be needed, is an open question.

The changed security posture not only affects application of the high-2 exemption; it has also prompted the DoD Director of Administration and Management, David Cooke, to issue a policy memorandum addressing privacy concerns under exemption 6.[26] Mr. Cooke's memorandum sets a new release policy pertaining to lists of personally identifying information for DoD: "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." Until the dust settles, units should clear release of lists they do not believe are protected by exemption 6 through higher headquarters even if the lists were once routinely released.[27]

This new DoD policy appropriately gives greater weight to the privacy rights of military personnel during times of national crisis. Some may argue that withholding lists that were previously routinely released flies in the face of established FOIA waiver principles. However, as lists with personally identifying information shed little light on how the government conducts its business, it is crucial to recast the waiver issue as one of a pure balancing test between personal privacy interests and the public need to know. Because the interest protected here is the individual's privacy interest and not the government's, the government cannot *waive* it. Privacy interests of DoD personnel have increased since the September 11th attacks, making release of such information a "clearly unwarranted invasion of personal privacy."[28] Although "clearly unwarranted" is a high standard, what it comes down to is a "balancing of the public's right to disclosure against the individual's right to privacy."[29] In this light, withholding the lists from release should be defensible. In responding to FOIA requests for lists of names or other personal identifying information, offices should cite both exemption 2 and 6.

CONCLUSION

Between Attorney General Ashcroft's return to the "sound legal basis" for discretionary denials, and the heightened security and privacy concerns following the September 11th terrorist attacks, FOIA policy has undergone a drastic change. The change is most noticeable in application of exemptions 2, 5, and 6. Base level attorneys reviewing FOIA releases must understand the basis for the policy shift as well as its application. While FOIA *denials* go to the MAJCOM level, FOIA *releases* are generally made at the base level. A base level attorney may be the only legal oversight to catch improper releases. "Office-file research" is of little help after these recent changes. Fortunately, up-to-date assistance is available on the web.[30]

[1] 5 U.S.C. § 552.

[2] Memorandum from John Ashcroft, Attorney General, for Heads of all Federal Departments and Agencies, The Freedom of Information Act, Oct. 12, 2001 [hereinafter Ashcroft Memo] *available at* U.S. DOJ Office of Information and Privacy FOIA POST: New Attorney

General FOIA Memorandum issued, Oct. 15, 2001, *at* http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm [hereinafter FOIA POST].

[3] Memorandum from M. I. McIntyre, DoD Directorate of Information and Security Review, DoD Guidance on Attorney General Freedom of Information Act (FOIA) Memorandum [hereinafter DoD Memo] (recapping an Oct. 18 FOIA officers conference held in Washington D.C.) *available at* https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/GENERAL_LAW/SOURCE/agmemofoia.pdf

[4] *Id*. The current FOIA regulation is DoD 5400.7-R/AF Supp., *DoD Freedom of Information Act Program*, July 22, 1999 [hereinafter DoD 5400.7-R] *at* http://afpubs.hq.af.mil/pubs/majcom.asp?org=AF.

[5] 5 U.S.C. § 552(b). Of the nine exemptions in section (b), seven routinely apply to the military: (b)(1) classified information; (b)(2) internal matters of relatively trivial nature (low-2) or internal matters whose release would risk circumvention of a legal requirement (high 2); (b)(3) information protected by statute; (b)(4) certain trade secrets and financial information, (b)(5) information normally protected from civil discovery; (b)(6) protection of privacy interests; and (b)(7) protection of law enforcement information. For a complete discussion see DOJ FOIA Guide *infra* note 30.

[6] *NLRB v. Robbins Tire & Rubber Co*., 473 U.S. 214, 242 (1978).

[7] Memorandum form William French Smith, Memorandum Regarding FOIA, May 4, 1981, *text available at* http://www.usdoj.gov/oip/foia_updates/Vol_II_3/page3.htm.

[8] Memorandum from Janet Reno, for Heads of Departments and Agencies, The Freedom of Information Act, Oct. 4, 1993 [hereinafter Reno Memo]. As each administration sets its FOIA policy, it tends to follow party lines: AG Bell, democrat, "demonstrably harmful" standard, *see* Justice Sets New FOIA Policy, at http://www.usdoj.gov/oip/foia_updates/Vol_II_3/page1.htm; AG Smith, republican, "sound legal basis;" AG Reno, democrat, "foreseeable harm;" AG Ashcroft, republican, "sound legal basis."

[9] Reno Memo, *supra* note 8.

[10] ¶ C1.3.1.1.

[11] *See e.g*., *Public Interest Under the FOIA*, THE ACCORD, 9-10, Aug. 1996 (written to address confusion in applying the Reno Doctrine to privacy interests under exemptions 6 and 7(c)).

[12] *See supra* note 5 for a list of exemptions. Privacy interests are especially inappropriate for discretionary release because the interest being protected belongs to the individual and is not the government's to waive. This is in contrast to discretionary disclosures under exemptions 2 and 5.

[13] Ashcroft Memo, *supra* note 2 (emphasis added).

[14] DoD Memo, *supra* note 3 ("Effective immediately, DoD components will adopt the **Sound Legal Basis** standard as reflected in the Attorney General Memorandum.").

[15] DoD 5400.7-R, *supra* note 4 ¶ C.3.2.1.2. (superceded by DoD Memo, *supra* note 3).

[16] *See also* DoD Memo, *supra* note 3 ("Discretionary disclosures are no longer encouraged.").

[17] DoD Memo, *supra* note 3.

[18] Ashcroft memo, *supra* note 2.

[19] Even under the Reno doctrine, we have never had difficulty writing legal opinions protecting legal opinions.

[20] *Id*. ¶ 3.

[21] *Id*. ¶ 4 (emphasis added). *See supra* note 5 for a listing of FOIA exemptions.

[22] Proclamation 7463--Declaration of National Emergency by Reason of Certain Terrorist Attacks, Sep. 14, 2001 (66 FR 48199, Sep. 18, 2001) *at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_register&docid=01-23358-filed.

[23] Memorandum for Secretaries of the Military Departments …, Operations Security Throughout the Department of Defense, Oct. 18 2001, *available as an attachment at* https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/GENERAL_LAW/Briefings/Lists.pdf.

[24] See DOJ FOIA Guide *infra* note 30, for detailed discussion of "high-2."

[25] FOIA POST *supra* note 2 (emphasis added).

[26] Memorandum for DoD FOIA Offices, Withholding of Personally Identifying Information Under the Freedom of Information Act (FOIA), Nov. 19, 2001[hereinafter Cooke Memo] *available at* https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/GENERAL_LAW/Briefings/Lists.pdf.

[27] *See id*. ("When processing a FOIA request, a DoD component may determine that exemption
(b)(6) does not fully protect the component's or an individual's interests. In this case, please
contact … Directorate of Freedom of Information and Security Review … .).

[28] 5 U.S.C. 522(b)(6).

[29] DOJ FOIA Guide, *infra* note 30 at 282.

[30] The Air Force's General Law Division has an excellent webpage available through the FLITE homepage *at* https://aflsa.jag.af.mil. Other useful sites include: DOJ FOIA Office *at* http://www.usdoj.gov/04foia/index.html (with comprehensive DOJ FOIA Guide available); Air Force FOIA Page *at* http://www.foia.af.mil/ (with common DoD exemption 3 statutes *at* http://www.foia.af.mil/b3.pdf); ACC On-line FOIA Guide (providing flow-chart analysis for common requests); DoD FOIA Page *at* http://www.defenselink.mil/pubs/foi/. For Privacy Act information, *see* DOJ's site *at* http://www.usdoj.gov/04foia/04_7_1.html; DoD's site at *at* http://defenselink.dtic.mil/privacy/notices/ (listing agency specific routine disclosures).