



U.S. Department of Justice

Office of Information and Privacy

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October 30, 2002

**Attorney General Ashcroft's FOIA Memorandum and
Homeland Security FOIA Policy Issues**

- I. Attorney General Ashcroft's October 12, 2001 FOIA Memorandum
- A. Site: <http://www.usdoj.gov/04foia/011012.htm>
 - B. Underscores commitment to full compliance with FOIA
 - C. Important interests in maintaining open and accountable government
 - D. Important institutional, commercial, and personal interests to be protected
 - E. Recognition of continued agency practice of making discretionary disclosure of exempt information
 - F. Discretionary disclosures to be made only after careful consideration of interests protected by applicable exemption
 - G. "Sound legal basis" standard governing Department of Justice's decision as to whether to defend agency's action in court
- II. Safeguarding Information Regarding Weapons of Mass Destruction and Other Sensitive Information Related to Homeland Security
- A. Site: <http://www.usdoj.gov/oip/foiapost/2002foiapost10.htm>
 - B. Memorandum by White House Chief of Staff Andrew Card
 - 1. Includes chemical, biological, radiological, and nuclear weapons
 - 2. Required reexamination of current measures for identifying and safeguarding such information
 - C. Memorandum by Information Security Oversight Office and Office of Information

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and Privacy

1. Classified information: Exemption 1
 - a. Currently classified information
 - *Abbotts v. NRC*, 766 F.2d 604 (D.C. Cir. 1986)(security of nuclear power plant)
 - b. Previously unclassified or declassified information not previously disclosed to the public
 - *Public Citizen v. Dep't of State*, 100 F. Supp. 2d 10 (D.D.C. 2000), *aff'd*, 276 F.3d 674 (D.C. Cir. 2002)
2. Sensitive but unclassified information
 - a. Exemption 2 ("high 2")
 - i. Vulnerability studies
 - *Schreibman v. United States Dep't of Commerce*, 785 F. Supp. 164 (D.D.C. 1991) (computer system)
 - ii. Critical infrastructure information
 - *Inst. for Policy Studies v. Dep't of the Air Force*, 676 F. Supp. 3 (D.D.C. 1987) (Groundwave Emergency Network)
 - b. Exemption 4
 - *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992) (en banc) (protecting voluntarily submitted nuclear power plant safety reports)
 - Second prong of *Nat'l Parks & Conservation Ass'n v. Morton*, 489 F.2d 765 (D.C. Cir. 1974): required submissions the disclosure of which would cause substantial competitive harm
 - Third prong of *Nat'l Parks*: required submissions the disclosure of which would cause harm to agency program effectiveness

D. Related issues

1. Exemption 3

- a. 42 U.S.C. § 7412(r)(7)(B)(iii) (offsite-consequence analysis of risk-management plans)
- b. Retroactive effect: *Sw. Ctr. for Biological Diversity v. USDA*, 170 F. Supp. 2d 931 (D. Ariz. 2000) (appeal pending; oral argument held July 8, 2002)

2. Exemption 7(F): law enforcement records the disclosure of which could reasonably be expected to endanger the life or physical safety of any individual