

GAO

Report to the Ranking Minority Member,
Committee on the Judiciary, U.S. Senate

September 2003

FREEDOM OF INFORMATION ACT

Agency Views on Changes Resulting from New Administration Policy



G A O

Accountability * Integrity * Reliability

Highlights of [GAO-03-981](#), a report to the Ranking Minority Member, Committee on the Judiciary, U.S. Senate

Why GAO Did This Study

The Freedom of Information Act (FOIA) is based on principles of openness and accountability in government. FOIA establishes that federal agencies must provide the public with access to government information, unless the information falls into one of nine specifically exempted categories (for example, certain information compiled for law enforcement purposes). However, agencies can use their discretion to disclose information even if it falls into one of the nine exempted categories; this is known as a “discretionary disclosure.”

At the beginning of a new administration, the Attorney General traditionally issues a policy memorandum regarding FOIA, including policy on discretionary disclosure. Attorney General Ashcroft issued such a memorandum on October 12, 2001, replacing Attorney General Reno’s 1993 FOIA memorandum.

GAO was asked to determine (1) to what extent, if any, Department of Justice guidance for agencies on FOIA implementation has changed as a result of the new policy; (2) the views of FOIA officers at 25 agencies regarding the new policy and its effects, if any; and (3) the views of FOIA officers at 25 agencies regarding available FOIA guidance.

www.gao.gov/cgi-bin/getrpt?GAO-03-981.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Linda Koontz at (202) 512-6240 or koontzl@gao.gov.

FREEDOM OF INFORMATION ACT

Agency Views on Changes Resulting from New Administration Policy

What GAO Found

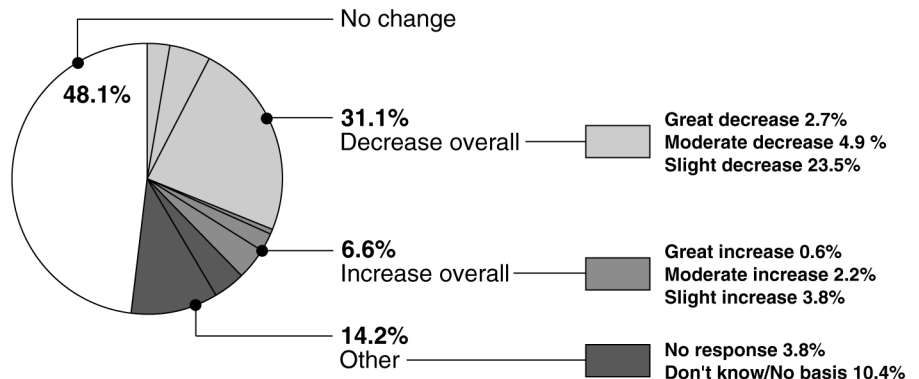
Following the issuance of the Ashcroft memorandum, Justice changed its guidance for agencies on FOIA implementation to refer to and reflect the two primary policy changes in the memorandum. First, under the Ashcroft memorandum, agencies making decisions on discretionary disclosure are directed to carefully consider such fundamental values as national security, effective law enforcement, and personal privacy; the Reno memorandum had established an overall “presumption of disclosure” and promoted discretionary disclosures to achieve “maximum responsible disclosure.” Second, according to the Ashcroft memorandum, Justice will defend an agency’s withholding information if the agency has a “sound legal basis” for such withholding under FOIA; under the Reno policy, Justice would defend an agency’s withholding information only when the agency reasonably foresaw that disclosure would harm an interest protected by an exemption.

Regarding effects of the new policy, FOIA officers most frequently reported that they did not notice changes in their agencies’ responses to FOIA requests compared to previous years. For example, as shown in the figure, of the FOIA officers surveyed, 48 percent reported that they did not notice a change with regard to the likelihood of their agencies’ making discretionary disclosures. About one third of the FOIA officers reported a decreased likelihood; of these FOIA officers, 75 percent cited the new policy as a top factor influencing the change.

When FOIA officers were asked to consider all the existing FOIA guidance and reference material according to various topic areas, the largest proportion (ranging from 50 percent to 75 percent, depending on the type of guidance) reported that guidance was adequate to a great or very great extent (that is, at 4 or 5 on a 5-point scale, where 1 was “to no extent”).

In commenting on a draft of this report, Justice officials generally agreed with its contents.

Effect of Ashcroft Policy on Likelihood of Agencies’ Making Discretionary Disclosures



Source: GAO.

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Appendix I: Agency Views on Changes Resulting from New Administration Policy

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Abbreviations

DOJ	Department of Justice
FOIA	Freedom of Information Act
ISOO	Information Security Oversight Office
OIP	Office of Information and Privacy

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United States General Accounting Office
Washington, D.C. 20548

September 3, 2003

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate

Dear Mr. Leahy:

Based on principles of openness and accountability in government, the Freedom of Information Act (FOIA) establishes that federal agencies must provide the public with access to government information (unless the information falls into certain categories), thus enabling them to learn about government operations and decisions. Under FOIA, nine categories of information are specifically exempted from disclosure; examples of these categories include trade secrets, personnel files, and certain information compiled for law enforcement purposes. However, agencies can use their discretion to disclose information, even if it falls into one of the nine exempted categories; this is known as a “discretionary disclosure.”

Under FOIA, the U.S. Department of Justice is to encourage agency compliance with the act.¹ Accordingly, the Attorney General has traditionally issued a policy memorandum regarding FOIA at the beginning of new administrations. Attorney General Ashcroft issued one such memorandum on October 12, 2001, replacing Attorney General Reno’s 1993 FOIA memorandum.

The Ashcroft memorandum has two primary differences from the Reno memorandum. Under the Ashcroft memorandum, agencies making decisions on discretionary disclosure are directed to carefully consider such fundamental values as national security, effective law enforcement, and personal privacy; the Reno memorandum had established an overall “presumption of disclosure” and promoted discretionary disclosures to achieve “maximum responsible disclosure.” Second, according to the Ashcroft memorandum, Justice will defend an agency’s withholding information if the agency has a “sound legal basis” for such withholding under FOIA, while under the Reno policy, Justice would defend an agency’s withholding information only when the agency reasonably anticipated that disclosure would harm an interest protected by an exemption.

¹5 U.S.C. §552(e)(5).

You requested that we review the effect of these changes in policy on FOIA implementation. We agreed to determine (1) to what extent, if any, Justice guidance for agencies on FOIA implementation has changed as a result of the new policy; (2) the views of FOIA officers at 25 agencies regarding the new policy and its effects, if any; and (3) the views of FOIA officers at 25 agencies regarding available FOIA guidance.

To fulfill the first objective, we analyzed Justice guidance on FOIA implementation. To determine the views of FOIA officers regarding the new policy and its effects, if any, and regarding the available FOIA guidance, we administered Web-based and paper-based surveys. Our work was conducted from October 2002 to April 2003 in accordance with generally accepted government auditing standards.

On June 18, 2003, we provided a briefing to your office on the results of our work. The briefing slides² are included as appendix I. The purpose of this report is to provide the published briefing slides for dissemination to you and the Attorney General.

Results in Brief

Changes have been made in Justice's FOIA guidance to refer to and reflect current policy as stated in the Ashcroft memorandum, which superseded the previous administration's policy. These changes reflect the "careful consideration" policy for making discretionary disclosures and the "sound legal basis" standard for defending agencies that withhold information based on FOIA exemptions.

When asked about views regarding the effects of the new policy, FOIA officers most frequently reported that they did not notice changes in their agencies' responses to FOIA requests when compared with previous years. Of the FOIA officers surveyed, 48 percent reported that they did not notice a change with regard to the likelihood of their agency making discretionary disclosures. About one third of the FOIA officers reported a decreased likelihood; and of these officers, 75 percent cited the new policy as a top factor influencing the change. When FOIA officers were asked about changes in the use of particular FOIA exemptions, 62 percent reported no change with regard to the use of these exemptions. One fourth of the officers reported a change in this regard. Among these respondents, the

²We have amended the briefing slides as of August 15, 2003, to include technical corrections and clarifications.

two factors cited most frequently as influencing this change were the policy stated in the Ashcroft memorandum and concerns over protecting critical infrastructure information and other sensitive information related to homeland security.

When FOIA officers were asked to consider all the existing FOIA guidance and reference material according to various topic areas, the largest proportion reported that guidance was adequate to a great or very great extent (that is, at 4 or 5 on a 5-point scale, where 1 was “to no extent”). In response to questions regarding specific Justice guidance, such as that in the *FOIA Guide* and the “FOIA Post” Web site (the Department of Justice’s main vehicles of disseminating guidance), the largest proportion of FOIA officers responding reported satisfaction with the guidance to a great or very great extent.

In providing oral comments on a draft of this report, a Justice Office of Information and Privacy (OIP) co-director and another staff member stated that the department generally agreed with the report’s facts and conclusions. The OIP officials also made a number of technical comments, which we incorporated as appropriate.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 5 days from the date of this letter. We are sending copies of this report to the Attorney General and the heads of other interested congressional committees. Copies will be made available to others on request. In addition, this report will be available at no charge on our Web site at www.gao.gov.

If you have any questions concerning this report, please call me at (202) 512-6240 or contact me by E-mail at koontzl@gao.gov. Key contacts and major contributors to this report are Thomas Beall, Elizabeth Bernard, Barbara Collier, Katherine Howe, David Plocher, Jamie Pressman, and Joan D. Winston.

Sincerely yours,

A handwritten signature in cursive script that reads "Linda D. Koontz".

Linda D. Koontz
Director, Information Management Issues

Agency Views on Changes Resulting from New Administration Policy



Freedom of Information Act: Agency Views on Changes Resulting from New Administration Policy

Briefing for staff of the
Senate Committee on the Judiciary

June 18, 2003



Agenda

-
- Introduction
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 - Results in Brief
 - Background
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 - Views of FOIA Officers Regarding the New Policy
 - Views of FOIA Officers Regarding Available FOIA Guidance
 - Conclusions
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 - Attachment 1: List of FOIA Exemptions
 - Attachment 2: Views on FOIA Guidance Regarding Homeland Security and Critical Infrastructure Information
 - Attachment 3: 25 Agencies Surveyed



The Freedom of Information Act (FOIA) was enacted in 1966. Based on principles of openness and accountability in government, FOIA establishes that federal agencies must provide the public with access to government information, unless the information falls into nine specifically exempted categories (see attachment 1). Agencies can use their discretion to disclose information, even if it falls into one of the nine exempted categories; this is known as a “discretionary disclosure.”

At the beginning of a new administration, the Attorney General has traditionally issued a memorandum concerning FOIA policy.

On October 12, 2001, Attorney General Ashcroft issued a FOIA policy memorandum (also referred to as the “new policy”), which superseded the previous memorandum issued by Attorney General Reno in 1993. According to Justice, the new policy has two primary differences from the Reno policy (see next slide).



Policy for discretionary disclosure

The Ashcroft memorandum stresses that when making decisions on discretionary disclosure, agencies should carefully consider protecting fundamental values held by our society, including safeguarding national security, enhancing the effectiveness of law enforcement agencies, and preserving personal privacy.

The Reno memorandum established an overall “presumption of disclosure” and promoted discretionary disclosures to achieve “maximum responsible disclosure” under FOIA.

Standard for defense of agency decisions to withhold information

According to the Ashcroft memorandum, Justice will defend an agency’s withholding of information if the agency has a “sound legal basis” for withholding information under FOIA.

Under the Reno policy, Justice would defend an agency’s withholding of information only when the agency reasonably anticipated that disclosure would harm an interest protected by an exemption (a “foreseeable harm” standard).



Objectives

As requested by the Ranking Member of the committee, our objectives were to

1. determine to what extent, if any, Justice guidance for agencies on FOIA implementation has changed as a result of the new policy;
2. determine the views of FOIA officers at 25 agencies regarding the new policy and its effects, if any; and
3. determine the views of FOIA officers at 25 agencies regarding available FOIA guidance.

We also agreed to obtain FOIA officer views regarding guidance on (1) sensitive information related to homeland security and (2) critical infrastructure information. The results of our inquiries on these two areas are presented in attachment 2.



To determine the extent to which Justice guidance for agencies on FOIA implementation has changed as a result of the new policy, we analyzed Justice guidance on this topic, which is disseminated by the following:

- *Freedom of Information Act Guide and Privacy Act Overview* (also referred to as the *FOIA Guide*). We compared the most recent edition (2002) with the previous one (2000).
- *FOIA Post*. We reviewed documents posted to Justice's *FOIA Post* Web site between October 2001 and April 2003 to identify any guidance related to implementation of the new policy.



Scope and Methodology (cont'd)

To determine FOIA officers' views regarding the new policy and its effects, if any, and regarding available FOIA guidance, we did the following:

- We administered a Web-based survey to 205 agency-identified department-level and component-level FOIA officers at 25 agencies. These 25 agencies, which were the subject of our previous FOIA reviews,¹ are the 24 agencies specified under the 1990 Chief Financial Officer Act and the Central Intelligence Agency. Together, these agencies handle over 97 percent of FOIA requests governmentwide (attachment 3 lists the agencies).
 - Our survey had a response rate of 89 percent (183 out of 205 FOIA officers) with at least 1 FOIA Officer responding from 23 of the 25 agencies.
 - We did not independently verify responses to this survey.

¹ U.S. General Accounting Office, *Information Management: Update on Implementation of the 1996 Electronic Freedom of Information Act Amendments*, GAO-02-493 (Washington, D.C.: Aug. 30, 2002).



Scope and Methodology (cont'd)

- We also administered a paper-based questionnaire to department-level FOIA officers at the 25 agencies to obtain an agency response on any agency actions taken to implement the new policy as well as agency guidance.
 - We received 24 of 25 agency responses.
 - We did not independently verify agency responses to the paper-based questionnaire.
- We performed our work from October 2002 to April 2003 in accordance with generally accepted government auditing standards.



Results in Brief: Objective 1
Changes to guidance

As a result of the new policy, Justice made the following changes to its guidance for agencies on FOIA implementation:

- Changes in Justice guidance refer to and reflect the new policy, as stated in the Ashcroft memorandum, which superseded the previous administration's policy:
 - for discretionary disclosures, the “careful consideration” policy for making discretionary disclosures and
 - for Justice’s defense of agencies, the “sound legal basis” standard for defending agencies that withhold information based on FOIA exemptions.



Results in Brief: Objective 2
Effect of new policy

FOIA officers reported most frequently that they did not notice changes resulting from the new policy when compared with previous years. Specifically:

- With regard to the likelihood of their agency making discretionary disclosures, the largest proportion of respondents (88 of 183, or 48%) reported that they noticed no change.
 - About one third of FOIA officers reported a decreased likelihood (57 of 183, or 31%). Most of these (43 of 57, or 75%) cited the new policy as a top factor influencing the change.
 - 12 FOIA officers (7% of the total) reported an increased likelihood, and 26 (14% of the total) reported “don’t know/no basis to judge” or made no response.
- With regard to the use of particular FOIA exemptions, about two-thirds of FOIA officers responding (114 of 183, or 62%) reported that they noticed no change.
 - One fourth of FOIA officers did report a change (45 of 183, or 25% of respondents). Most of these (28 of 45, or 62%) cited the new policy as a top factor influencing the change.



Results in Brief: Objective 3
Available guidance

When asked to consider all the existing guidance and reference material according to various topic areas, the largest proportion of responding FOIA officers (ranging from 50% to 75%, depending on the particular type of guidance) reported that guidance was adequate to a great or very great extent (that is, at 4 or 5 on a 5-point scale, where 1 was “to no extent”).

In response to questions regarding specific Justice guidance, such as that in the *FOIA Guide* and *FOIA Post*, the largest proportion of FOIA officers responding reported satisfaction with guidance to a great or very great extent; percentages ranged from 56 to 74 percent, depending on the particular type of guidance.



Results in Brief: Agency Comments

In providing oral comments on a draft of this briefing, officials of Justice's Office of Information and Privacy (OIP) generally agreed with the facts and conclusions as presented. The OIP officials also made a number of technical comments, which we incorporated as appropriate.



Enacted in 1966, FOIA generally provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exemptions (see attachment 1). There are also FOIA exclusions for specific sensitive records held by law enforcement agencies.

Agencies may use their administrative discretion to disclose information in many cases when an exemption might otherwise be used to withhold information.

FOIA amendments in 1974, 1976, 1986, and 1996 made procedural changes, exempted or otherwise protected certain material from disclosure under FOIA, created fee and fee waiver provisions, established timeliness and reporting requirements, and required certain material to be made available electronically.

Regarding fees, FOIA provides for three levels of fees that agencies may assess in response to FOIA requests, depending on the categories of FOIA requestors and the intended use of the information sought. A fee waiver may be granted when it is determined that such action is “in the public interest because furnishing the information can be considered as primarily benefiting the general public.”



Under FOIA, the U.S. Department of Justice is to encourage agency compliance with the act. Justice will also defend agencies in court when litigation is filed against them on FOIA-related matters.

Justice's OIP has lead responsibility for providing FOIA guidance and support for agencies, including training sessions and a counselor service. The main vehicles of disseminating guidance are the following:

- *FOIA Guide*, OIP's primary reference volume, contains an extensive discussion of FOIA exemptions and procedures. Prepared by the attorney staff of OIP, it is published every 2 years. May 2002 is the most recent published edition.
- *FOIA Post* serves as a primary means of FOIA policy dissemination and is OIP's vehicle for communicating FOIA-related information to agency FOIA personnel and others who are interested in the act's administration.



Changes in Justice guidance

Justice guidance on FOIA implementation has been changed to incorporate the new policy set forth in the Ashcroft memorandum.

Language referring specifically to the Reno memorandum was updated with references to the Ashcroft memorandum. For example, in the 2000 edition of the *FOIA Guide*, the following sentence appears:

- As a general rule, an agency's ability to make a discretionary disclosure of exempt information in accordance with Attorney General Reno's FOIA memorandum will vary according to the nature of the FOIA exemption and the underlying interests involved.

In the 2002 edition of the *FOIA Guide*, the sentence reads:

- As a general rule, an agency's ability to make a discretionary disclosure of exempt information as recognized in Attorney General Ashcroft's FOIA memorandum will vary according to the nature of the FOIA exemption and the underlying interests involved.



Changes in Justice guidance

In other cases, language referring to the Reno memorandum and policy was deleted.

Other changes reflect the two main points of the Ashcroft memorandum in which the Ashcroft policy differs from the Reno policy:

- Throughout the 2002 edition of the guide, references are deleted to the “foreseeable harm” standard for withholding information and to the “maximum responsible disclosure,” regarding discretionary disclosures.
- In the introduction to the 2002 *FOIA Guide*, language is added referring to the Ashcroft policy, specifically, the “sound legal basis” standard for withholding information and the need to carefully consider the interests of public disclosure with protecting sensitive information.

Justice made changes to guidance on exemptions, fees, or fee waivers to refer to the new policy, but the large majority of changes were to reflect the development of new case law.



Views regarding effects of new policy
Awareness

Agencies and FOIA officers reported being aware of the Ashcroft memorandum.

- Of the 183 FOIA officers who responded, 161 (88%) stated they had read the Ashcroft FOIA memorandum.
- Of the 24 agencies that responded, 20 (83%) have distributed the Ashcroft FOIA memorandum to agency FOIA personnel.
- Approximately half of the agencies (11 of 24) indicated that they prepared and disseminated additional written guidance (e.g., directives, memorandums, legal analyses) on implementing the new policy to their FOIA processors.



Views regarding effects of new policy
Areas of possible change

Agencies and FOIA officers most frequently reported that in comparison with previous years, they did not notice changes in the following areas, as a result of the new policy:

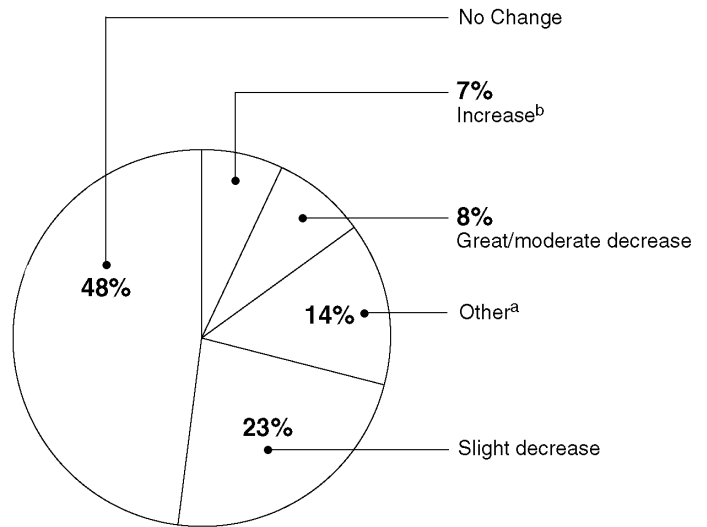
- likelihood of making discretionary disclosures,
- use of exemptions,
- factors affecting FOIA processing, and
- factors affecting administrative appeals and litigation.



Views regarding effects of new policy Discretionary disclosures

As shown in the chart, the largest proportion of FOIA officers responding (88 of 183, or 48%), noticed no change compared with previous years in the likelihood of their agency making discretionary disclosures under FOIA.

About one third of respondents noticed a decreased likelihood (combining the 23% who reported a slight decrease and the 8% who reported a great or moderate decrease).



Source: GAO.

^a Other includes "don't know/no basis" and "no response."
^b Increase includes slight, moderate, and great increase.



Views regarding effects of new policy
Discretionary disclosures (cont'd)

The approximately one-third of FOIA officers who noticed a decreased likelihood of discretionary disclosures totaled 57 (31% of 183). Among these, the following three factors were cited most frequently as influencing this change:

- the policy stated in Attorney General Ashcroft's FOIA memorandum (43 of 57, or 75%);
- concerns over privacy protections (38 of 57, or 67%); and
- concerns over protecting critical infrastructure information and other sensitive information related to homeland security (37 of 57, or 65%).

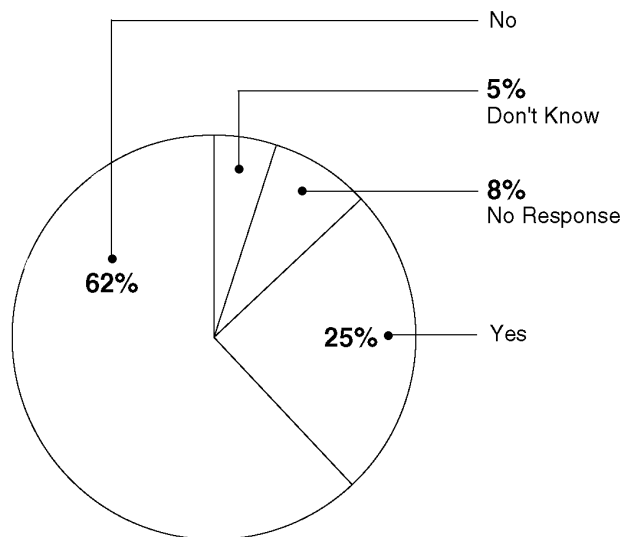
Of the 24 agencies responding, 20 (83%) indicated that they had not further specified or elaborated on criteria or factors to be used in deciding whether to make a discretionary release of information under the policy.



Views regarding effects of new policy Exemptions

FOIA officers were asked, “Subsequent to Attorney General Ashcroft’s FOIA memorandum, have you noticed any changes in the use of particular FOIA exemptions when compared to previous years?”

Of the 183 FOIA officers who responded, 114 (62%) said they did not notice a change in application of exemptions compared with previous years. (See chart.)



Source: GAO.



Views regarding effects of new policy
Exemptions (cont'd)

One fourth of the respondents (45 of 183, or 25%) indicated that they had noticed a change in the use of particular exemptions over previous years. These respondents most frequently cited the following two factors as influencing the change in the use of FOIA exemptions:

- the policy stated in the Ashcroft memorandum (28 of 45, or 62%) and
- concerns over protecting critical infrastructure information and other sensitive information related to homeland security (23 of 45, or 51%).

(Attachment 2 provides further discussion of our results regarding critical infrastructure information and other sensitive information related to homeland security.)



Views regarding effects of new policy
FOIA processing

FOIA officers were asked to select the top 4 factors, from a list of 13, that influence various FOIA processing areas: the time required to process FOIA requests, the number of pending FOIA requests, and the age of pending FOIA requests.

About 3 percent or less of responding FOIA officers reported that the new policy was one of four top factors influencing each of the FOIA processing areas:

- time required to process FOIA requests (6 of 178, or 3%);
- number of pending FOIA requests (3 of 179, or 2%); and
- age of pending FOIA requests (2 of 179, or 1%).

Of the factors suggested as influential, FOIA officers most frequently selected scope or complexity of requests, volume of responsive material, and resources available.



Views regarding effects of new policy
Administrative appeals and litigation

FOIA officers were asked to select the top 4 factors, from a list of 16, that influence the likelihood of requestors filing administrative appeals and litigation.

About 3 percent of responding FOIA officers reported that the new policy was among the top factors in influencing

- likelihood of requestors filing administrative appeals (6 of 179, or 3%) and
- likelihood of requestors filing litigation (6 of 179, or 3%).

Of the factors suggested as influential, FOIA officers most frequently selected requester concerns about the use of particular exemptions and requester concerns over the extent of redaction in material supplied in response to requests.



Views Regarding Available Guidance
Areas of guidance

When asked to consider existing guidance and reference material for areas cited in the table below, the largest proportion of FOIA officers responding reported that guidance was adequate to a great or very great extent (that is, at 4 or 5 on a 5-point scale, where 1 was “to no extent”). The table shows responses according to specific areas of guidance.

Guidance to determine	Percentage and number of respondents (n =183) who reported that guidance was adequate on a 5-point scale			
	Great or very great extent ^a	Moderate extent	Small or no extent ^a	Other ^b
Whether an exemption applies to information requested under FOIA	75% (138)	14% (25)	3% (6)	8% (14)
Whether to make a discretionary disclosure	50% (92)	24% (44)	15% (27)	11% (20)
Whether to waive part or all of applicable fees	57% (104)	20% (37)	13% (23)	10% (19)
Whether the records being requested under FOIA were for commercial use	58% (107)	20% (37)	12% (22)	9% (17)
Whether the party making a FOIA request was an educational or noncommercial scientific institution	60% (109)	20% (36)	11% (21)	9% (17)
Whether the party making a FOIA request was a representative of the news media	62% (114)	16% (30)	13% (24)	8% (15)
Whether disclosure of the requested information was in the public interest when a fee waiver was being requested	51% (94)	24% (44)	15% (27)	10% (18)

Source: GAO.

Note: Percentages may not equal 100 percent due to rounding.

^aCombined responses. ^b“Other” includes “don’t know/no basis” and “no response.”



Views Regarding Available Guidance
Sources of guidance

In response to questions regarding specific sources of Justice guidance, the largest proportion of FOIA officers responding reported satisfaction with guidance to a great or very great extent. The table shows responses according to specific sources of guidance.

Guidance	Percentage and number of respondents (<i>n</i> = 183) reporting satisfaction with guidance on a 5-point scale			
	Great or very great extent ^a	Moderate extent	Small or no extent ^a	Other ^b
The Department of Justice's <i>FOIA Guide</i>	74% (135)	11% (20)	7% (13)	8% (15)
The FOIA guidance that Justice has issued via <i>FOIA Update</i> and now issues via <i>FOIA Post</i>	63% (115)	17% (31)	9% (17)	11% (20)
The FOIA training that the Department of Justice provides	63% (116)	11% (21)	7% (12)	19% (34)
Other information resources that Justice provides via OIP's Web site	56% (102)	19% (34)	8% (15)	17% (32)

Source: GAO.

^aCombined responses. ^b“Other” includes “don’t know/no basis” and “no response.”



Conclusions

As a result of the new policy, changes to Justice guidance for agencies on FOIA implementation have been largely limited to reflecting the two points of difference between the Ashcroft and Reno memorandums: that is, the policy for discretionary disclosure and the standard for defense of agency decisions to withhold information.

Overall, FOIA officers are aware of the Ashcroft memorandum; however, most of them report that they have not noticed an impact on the application of exemptions and the likelihood of agencies making discretionary disclosures.

The largest proportion of FOIA officers responding consider that the guidance they have received from the Department of Justice is adequate to a great or very great extent.



Agency Comments

On June 12, 2003, one of the co-directors and other staff members of OIP provided oral comments on a draft of these briefing slides. These officials generally agreed with the facts and conclusions as presented. The OIP officials also made a number of technical comments, which we incorporated as appropriate.



Attachment 1: Freedom of Information Act Exemptions

Exemption number	Matters that are exempt from FOIA
(1)	(A) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.
(2)	Related solely to the internal personnel rules and practices of an agency.
(3)	Specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issues, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.
(4)	Trade secrets and commercial or financial information obtained from a person and privileged or confidential.
(5)	Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.
(6)	Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Source: 5 U.S.C. § 552(b)(1) through (b)(6).



Attachment 1: Freedom of Information Act Exemptions
(cont'd)

Exemption number	Matters that are exempt from FOIA
(7)	<p>Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information</p> <ul style="list-style-type: none">(A) could reasonably be expected to interfere with enforcement proceedings;(B) would deprive a person of a right to a fair trial or impartial adjudication;(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;(D) could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or(F) could reasonably be expected to endanger the life or physical safety of an individual.
(8)	<p>Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.</p>
(9)	<p>Geological and geophysical information and data, including maps, concerning wells.</p>

Source: 5 U.S.C. § 552(b)(7) through (b)(9).



Attachment 2: Homeland Security and Critical Infrastructure Information

When asked to respond to questions regarding the adequacy of guidance related to (1) sensitive information related to homeland security and (2) critical infrastructure information, the largest proportion of FOIA officers did not respond to the questions or reported that they had no basis to judge whether the guidance and reference materials were adequate.

The following guidance on information related to homeland security is available:

- On March 19, 2002, the Assistant to the President and Chief of Staff issued a memorandum to all heads of federal departments and agencies instructing them to safeguard information regarding weapons of mass destruction and other sensitive documents related to homeland security.
- Accompanying this memorandum was a joint memorandum issued by the National Archives' Information Security Oversight Office (ISOO) and the Department of Justice's Office of Information and Privacy (OIP). The memorandum provided additional guidance on safeguarding homeland security information, including the instruction to make determinations on disclosure of such information under FOIA in accordance with the Ashcroft memorandum.



Attachment 2: Homeland Security and Critical
Infrastructure Information (cont'd)

The Homeland Security Act (enacted November 25, 2002) exempts certain critical infrastructure information from disclosure under FOIA. In the *Federal Register* of April 15, 2003, the Department of Homeland Security proposed for public comment procedures for protecting critical infrastructure information.

The act also includes provisions for the development of guidance on protecting sensitive homeland security information; however, this guidance was not available at the time of our review.



Attachment 2: Homeland Security and Critical
 Infrastructure Information (cont'd)

A large proportion of FOIA officers (40 to 45 percent) either did not respond to the questions or reported that they had no basis to judge whether guidance and reference materials were adequate in the areas of guidance shown in the table. The remainder of the responses were distributed as shown below.

Total number of respondents = 183

Area of guidance	Extent to which guidance and reference materials are adequate					Don't know/ no basis to judge or no response
	Very great extent	Great extent	Moderate extent	Small extent	No extent	
Whether unclassified records contain sensitive information related to homeland security	8% (14)	15% (28)	18% (33)	12% (22)	5% (9)	42% (77)
Whether to disclose sensitive information related to homeland security	11% (20)	14% (26)	20% (37)	10% (19)	4% (8)	40% (73)
Whether material is critical infrastructure information	8% (14)	11% (21)	17% (32)	15% (28)	5% (9)	43% (79)
Whether to disclose critical infrastructure information	10% (18)	13% (23)	17% (32)	12% (22)	3% (6)	45% (82)

Source: GAO.

Note: Percentages may not equal 100 percent due to rounding.



Attachment 3: 25 Agencies Surveyed

- Central Intelligence Agency
- Department of Agriculture
- Department of Commerce
- Department of Defense
- Department of Education
- Department of Energy
- Department of Health and Human Services
- Department of Housing and Urban Development
- Department of the Interior
- Department of Justice
- Department of Labor
- Department of State
- Department of Transportation
- Department of the Treasury
- Department of Veterans Affairs
- Environmental Protection Agency
- Federal Emergency Management Agency (now part of Department of Homeland Security)
- General Services Administration
- National Aeronautics and Space Administration
- National Science Foundation
- Nuclear Regulatory Commission
- Office of Personnel Management
- Small Business Administration
- Social Security Administration
- U.S. Agency for International Development

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