1

From: Carol Ann Reed
To: Hilton, Nick
Date: Tue, Mar 5, 2002 3:21 PM
Subject: Re: FOIA Clarification

The policy about releasing drafts containing editorial changes and withholding drafts containing substantive changes has been in place since the 1980s long before the Reno/Clinton requirement of foreseeable harm. The establishment of our policy on drafts was not at all related to the foreseeable harm issue

Although you have a point regarding consistency, there are other factors to consider. Drafts, like other documents, must be reviewed against the exemptions. Drafts with substantive changes have been withheld on the basis that the mere selection of issues which are incorporated in or dropped from various drafts in a series shows the actual deliberative process of the agency. Drafts with only editorial changes are by their very nature similar to the final versions and would have to be reviewed and segregated just as the final versions are reviewed and segregated. If a final document was released in its entirety, I'm not sure there is a sound factual and legal basis for withholding the draft. The Aschroft policy states that withholdings must have both a sound factual and legal basis. When I spoke to Mary Pat Siemien regarding your e-mail [redacted] EX. 5

Therefore, the long-standing policy concerning drafts will continue to be implemented as it has in the past. If you have any questions or want to discuss this further, just let me know.

Carol Ann

>>> Nick Hilton 02/08/02 11:19AM >>>
A question has been raised that I believe reflects a potential misunderstanding on my part.

In general, when OE concurrs on an enforcement action, that action has been drafted by a region and sent to OE for review. OE has normally retained the regions submittal. Sometimes there is very little change, sometimes substantial change, but typically somewhere in between.

Until recently, we generally released the regions draft when captured by a FOIA request if there was little change - or "harm" - in releasing it, even though it was clearly pre-decisional and Exemption 5 could have legally been used. I understand that recently we had a "clarification," if you will, to the FOIA from DOJ, and that it is now acceptable to withold documents that can legally be held. Since, under our previous system, there was inconsistency regarding whether to release or not, definition of significant changes, etc. I suggested that we just withold all of the region's drafts under Exemption 5. Then we're consistent and within the law.

When that recommendation on a specific request was forwarded to your office, OE was challenged as to whether there were substantial changes between the draft and the issued document. To me, that sounds like the old implementation, not the more current. Could you tell me if I've missed something? I may be one, or more, versions out of current thought, too. .

Thanks,

Nick

CC: Brown, Natalie; Pool, Mary Jean; Rammling, Gigi; Siemien, Mary Pat

C/2