

THE FREEDOM OF INFORMATION ACT

Public access to information under FOIA has been declining steadily in the wake of September 11, 2001. Most dramatically, on October 12, 2001, Attorney General John Ashcroft issued a new FOIA directive to the heads of executive agencies, encouraging the presumptive refusal of requests.¹ Previously, the Department of Justice (DOJ) would defend an agency's refusal to release information under FOIA only when it could be argued that releasing the information would result in "foreseeable harm."² Under the new directive, however, Ashcroft urged agency employees to consider all potential reasons for non-disclosure, and announced that the DOJ would defend court challenges to decisions to withhold information as long as those decisions rested on "a sound legal basis," a much lower standard. Although the directive was issued shortly after September 11, 2001, the new policy had been planned well before the attacks.³

In November 2002, Congress further undermined FOIA by acceding to an expansive new "critical infrastructure" exemption in the Homeland Security Act.⁴ Under Section 214 of the Act, "critical infrastructure information" voluntarily provided to the Department of Homeland Security (DHS) is not subject to disclosure under FOIA. As defined in the Act, critical infrastructure information encompasses all "information not customarily in the public domain and related to the security of critical infrastructure or protected systems."⁵

Despite the dry, circular language, the exemption is extremely far-reaching. The term "critical infrastructure" encompasses a broad sweep of private and governmental systems that include (but are not limited to) telecommunications, energy production, banking and finance, transportation, water systems and emergency services.⁶ In the United States, more than 85 percent of "critical infrastructure" is under private sector control.⁷ Furthermore, although the exemption applies only to information submitted to the new DHS, the department itself is massive, amalgamating 22 separate federal agencies and more than 170,000 federal employees.

The administration has insisted that the "critical infrastructure" exemption is necessary to facilitate information-sharing with the government in the wake of September 11. Companies had claimed they would be reluctant to provide information if they

¹ See Attorney General John Ashcroft, "Memorandum for Heads of All Federal Departments and Agencies," October 12, 2001, available at <http://www.doi.gov/foia/foia.pdf> (accessed March 2, 2003).

² See Attorney General Janet Reno, "Attorney General Reno's FOIA Memoranda," October 4, 1993, available at http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm (accessed March 2, 2003).

³ See Adam Clymer, "Government Openness at Issue as Bush Holds on to Records," *New York Times*, January 3, 2003.

⁴ See The Homeland Security Act of 2002, available at <http://news.findlaw.com/wp/docs/terrorism/hsa2002.pdf> (accessed March 2, 2003).

⁵ See *ibid.*, at § 212(3).

⁶ See "The Clinton Administration's Policy on Critical Infrastructure Protection: Presidential Decision Directive 63," available at <http://www.epic.org/reports/epic-cip.html> (accessed February 2, 2003).

⁷ See Dan Caterinicchia, "Sharing Seen as Critical for Security," *Federal Computer Week*, May 9, 2002.

thought it would become public.⁸ FOIA already contained an exemption for confidential business information,⁹ however, as well as for national security information,¹⁰ and sensitive law enforcement information.¹¹ Now, evidence of simple ineptness or wrongdoing may also be exempted from disclosure, without any confidential business justification. Exempting such information from disclosure across the board seems counterproductive, weakening private-sector incentives to solve problems and implement reforms. For example, the wholesale suppression of information about environmental hazards could directly threaten community safety, while the extent of its contribution to national security remains questionable.

The four Democratic Representatives on the House Select Committee on Homeland Security warned that the new exemption threatened the United States' "strong tradition of open and accountable government" and "needlessly curtail[ed] the public's right to health and safety information."¹² In order to highlight the practical implications of the new exemption, they cited the example of an energy company, which could now "hide information from the public about a leak at a nuclear facility by simply submitting their documents, unsolicited, to the DHS."¹³ Other examples of exempted material might include information about the safety of drinking water or the dependability of transportation infrastructure such as railways, bridges, and tunnels.¹⁴

Senator Carl Levin (D-MI), the ranking Democrat on the Senate Armed Services Committee, also criticized the exemption for "unnecessarily limit[ing]" the public's right to information.¹⁵ Senator Levin emphasized that the exemption effectively ties the DHS's hands, preventing it from warning other government agencies (as well as the public at large) about known threats to public safety, without the written consent of the submitter.¹⁶ Government employees who improperly disclose the information will not only lose their jobs, they will be subject to imprisonment and fines — even if their sole motivation is protecting the public.¹⁷

Under the new Act, moreover, any information accepted as "critical infrastructure information" cannot be used against the submitter in any civil action arising in federal or state court, providing it was submitted in good faith.¹⁸ The breadth of the new exemption

⁸ See, e.g., "Protecting the Homeland by Exemption: Why the Critical Infrastructure Information Act of 2002 Will Degrade the Freedom of Information Act," 2002 *Duke Law and Technology Review* 0018, September 20, 2002, available at <http://www.law.duke.edu/journals/dltr/articles/2002dltr0018.html> (accessed March 2, 2003).

⁹ See 5 U.S.C. § 552(b)(4).

¹⁰ See 5 U.S.C. § 552(b)(1)(A).

¹¹ See 5 U.S.C. § 552(b)(7).

¹² H.R. Rep. No. 107-609, p. 220 (2002).

¹³ *Ibid.*

¹⁴ See "Editorial: Secrecy Isn't Security," *Denver Post*, November 3, 2002.

¹⁵ Senator Carl Levin, "Statement of Senator Carl Levin (D-Mich.) on Confirming Governor Ridge as Department of Homeland Security Secretary," January 22, 2003, available at <http://levin.senate.gov/floor/012203fs1.htm> (accessed March 3, 2003).

¹⁶ *Ibid.*

¹⁷ *Ibid.*; Homeland Security Act of 2002, § 214(f).

¹⁸ Homeland Security Act of 2002, § 214(a)(1)(C).

has raised concerns that corporations will use it proactively, to shield themselves from civil liability. Even if the information reveals that the submitter is clearly violating federal health, safety, or environmental laws, for example, the DHS can not bring civil enforcement actions on the strength of that information.¹⁹

Not surprisingly, many of the companies benefiting from the new exemption had been seeking these kinds of protections for years.²⁰ Senator Patrick Leahy (D-VT) called the exemption a “big-business wish list gussied up in security garb.”²¹ He warned that it represented the “most severe weakening” of FOIA to date.²²

¹⁹ See Center for Democracy and Technology, “Coalition Letter Opposing Bennett-Kyl Legislation (S. 1456) Creating FOIA Exemption for Information on Critical Infrastructure Security,” May 7, 2002, available at <http://www.cdt.org/security/critinfra/020507coalition.shtml> (accessed March 3, 2003); Matt Bivens, “Holes in the Homeland Security Act,” *Nation*, December 19, 2002, available at <http://www.thenation.com/failsafe/index.mhtml?bid=2&pid=229> (accessed March 3, 2003).

²⁰ See “Too Many Secrets,” *Orlando Sentinel Tribune*, January 10, 2003; David Banisar, “Reject the Corporate Secrecy Grab: Industry’s Push for New Exemptions from the Freedom of Information Act is Unnecessary and Dangerous,” *Security Focus*, January 28, 2002, available at <http://online.securityfocus.com/columnists/56> (accessed February 5, 2003).

²¹ See Reporters Committee for the Freedom of the Press, “Committee Warns of Severe Restrictions in Homeland Security Bill,” November 19, 2002.

²² See “Homeland Insecurity: Excessive Secrecy Protects No-one,” *Columbia Journalism Review*, January/February 2003.