DOJ LIES ABOUT ITS FOIA LIES

Patrick Leahy just released a letter DOJ sent him and Chuck Grassley regarding DOJ's effort to formalize their practice of lying in response to some FOIA requests. Now, Leahy claims the government has withdrawn its proposed rule—which I think overstates what DOJ has done.

> I commend Attorney General Holder and the Obama administration for **promptly withdrawing** the Department's proposed rule on the treatment of requests for sensitive law enforcement records under the Freedom of Information Act. For five decades, the Freedom of Information Act has given life to the American value that in an open society, it is essential to carefully balance the public's right to know and government's need to keep some information secret. **The Justice Department's decision to withdraw this proposal** acknowledges and honors that careful balance, and will help ensure that the American people have confidence in the process for seeking information from their government. [my emphasis]

While the letter does say,

> We believe that Section 16.6(f)(2) of the proposed regulations falls short by those measures [I think this refers to DOJ's promise of transparency, but it's not entirely clear], and we will not include that provision when the Department issues final regulations.

It also speaks conditionally of making changes to the practice itself.

> Having now received a number of comments on the Department's proposed regulations in this area, the Department is actively

> considering those comments and **is reexamining whether there are other approaches to applying exclusions** that protect the vital law enforcement and national security concerns that motivated Congress to exclude certain records from the FOIA and do so in the most transparent manner possible.
>
> [snip]
>
> That reopened comment period has recently concluded, and the Department is now in the process of reviewing those submissions. We are also taking a fresh look internally **to see if there are other options available** to implement Section 552(e)'s requirements in a manner that preserves the integrity of the sensitive law enforcement records at stake while preserving our continued commitment to being as transparent about that process as possible. [my emphasis]

In other words, DOJ has only committed to taking the language about exclusions out of the rule, not to changing the practice on exclusions it has followed for 20 years. It's only going to make a change in the practice if it can find some new practice that works as well.

And there's reason to doubt DOJ's overall good faith with this letter. That's because they claim their approach to exclusions "never involved 'lying'."

> While the approach has never involved "lying," as some have suggested, the Department believes that past practice could be made more transparent.

That's an out and out "lie" (I'm guessing that DOJ thinks those scare quotes make "lie" mean something other than what we think it means). As Judge Cormac Carney laid out in his ruling on this practice, the government "lied" to him about what FBI documents existed on CAIR.

> The Government previously provided false and misleading information to the Court. The Government represented to the Court in pleadings, declarations, and briefs that it had searched its databases and found only a limited number of documents responsive to Plaintiffs' FOIA request and that a significant amount of information within those documents was outside the scope of Plaintiffs' FOIA request. The Government's representations were then, and remain today, blatantly false. As the Government's in camera submission makes clear, the Government located a significant number of documents that were responsive to Plaintiffs' FOIA request. Virtually all of the information within those documents is inside the scope of Plaintiffs' FOIA request. The Government asserts that it had to mislead the Court regarding the Government's response to Plaintiffs' FOIA request to avoid compromising national security. The Government's argument is untenable. The Government cannot, under any circumstance, affirmatively mislead the Court.

And the letter's claim that this process "never" involved "lying" is all the more suspect given that DOJ tells a "lie" in this letter. It says,

> These practices laid out in Attorney General Meese's memo have governed Department practice for more than 20 years.

But Meese's memo envisioned judicial review.

> Accordingly, it shall be the government's standard litigation policy in the defense of FOIA lawsuits that wherever a FOIA plaintiff raises a distinct claim regarding the suspected use of an exclusion, the government

> routinely will submit an *in camera* declaration addressing that claim, one way or the other. **Where an exclusion was in fact employed, the correctness of that action will be justified to the court**. Where an exclusion was not in fact employed, the *in camera* declaration will simply state that fact, together with an explanation to the judge of why the very act of its submission and consideration by the court was necessary to mask whether that is or is not the case. [my emphasis]

DOJ, by "lying" to Carney (and probably a slew of other judges over the years) evaded any judicial review of its use of exclusions. DOJ was actually going beyond what even corrupt old Ed Meese laid out!

And then, if there were any doubt of DOJ's bad faith here, there's this:

> As you know, the initial comment period on these regulations closed earlier this year, with no public comment on the provisions in question. As a result, however, of this Administration's commitment to openness, the Department reopened the comment period on these regulations precisely so that it could receive additional input.

The reason they got no comments in the first period, of course, is that they snuck through the rule just before Carney would make his ruling public.

> March 21, 2011: Government first issues its rule on lying in FOIA
>
> March 30, 2011: The 9th rules that Carney may only release a redacted version of his opinion
>
> April 20, 2011: Original end of comment period for rule

> April 27, 2011: Carney releases his redacted opinion, including a link to the Ed Meese memo on which the government relied

That is, they only opened the second comment period because they got caught pulling a fast one, trying to push through the rule before the risks behind the rule became apparent.

Which is probably what they're doing here.

Of course they have to change the rule now. That's because every denial must now be assumed to be a "lie" which can only be exposed by litigating the issue. The rule is going to lead to a lot more FOIA lawsuits.

So in addition to assuming that they're "lying" in response to FOIA requests, it's probably safe to assume they're misleading with their suggestion that because they're going to take this practice out of their rule, they're ending the practice.