

# DOJ'S "NEW" FOIA RULE JUST ATTEMPT TO FORMALIZE PRACTICE THEY'VE BEEN FOLLOWING FOR YEARS

As you no doubt have read, the government wants to issue a rule that says they can lie when people request FOIA information. The language reads,

- (1) In the event that a component identifies records that may be subject to exclusion from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), the head of the FOIA office of that component must confer with the Office of Information Policy (OIP) to obtain approval to apply the exclusion.
- (2) When a component applies an exclusion to exclude records from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), the component utilizing the exclusion will respond to the request as if the excluded records did not exist. This response should not differ in wording from any other response given by the component.

In effect, this rule would allow the government to shield information relating to an ongoing investigation, an informant, or classified information "pertaining to foreign intelligence or counterintelligence, or international terrorism" from FOIA by basically lying about whether such information exists or not. It would permit the government, upon finding years of surveillance of a person, to then tell the person that no such surveillance information exists.

The government says it is issuing this rule, "to reflect developments in the case law."

Together, the reference to case law and the timing of this rule suggest the government is, in fact, simply trying to pass a rule that formalizes the practice they've used for years.

The case law in question almost certainly pertains to *Islamic Shura Council v FBI*, a FOIA request initially submitted in May 2006. Ultimately, in 2009, Judge Cormac Carney ruled in that case that the government had properly withheld information that would have revealed the substance of the FBI's investigation of the Muslim organization, though his ruling was just released this spring. When Carney issued that ruling, the fact that the government had been lying to FOIA requesters all along became public.

Here's a post I wrote when Carney's ruling became public earlier this year, and here's a short timeline:

May 15, 2006: CAIR and other SoCal Muslim organizations submit a broadly worded FOIA for information on investigations or infiltration of the organizations

April 27, 2007: The government informs nine of the organizations that no information had been found

May 2007: The government informs CAIR and Hussam Ayloush it has a few pages of documents on each

June 2007: The government releases redacted versions of those documents

September 18, 2007: Organizations sue

March 21, 2008: In support of a motion for summary judgment, FBI's David Harvey submits a declaration stating the government had done an adequate search, resulting in those few pages

April 20, 2009: Carney issued an order calling for an in camera review

May 1, 2009: Harvey submits a new declaration, stating that it had withheld responsive information from CAIR and Ayloush

May 14, 2009: Carney held an in camera hearing on whether the government can mislead the court

June 23, 2009: Carney issued a sealed ruling finding that for the most part the government had properly withheld the documents, but chewing out the government for lying in the first Harvey declaration; he said he would unseal it unless otherwise directed by the 9th Circuit

July 6, 2009: The 9th Circuit stays the unsealing

November 1, 2010: The case is argued

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

September 29, 2011: DOJ reopens rule for comment

October 19, 2011: Second end of comment period for rule

So look what the timing makes clear: The government knew Carney wanted to reveal that the government lied to him—but also that it routinely lied to FOIA requesters—in June 2009. But they only issued a rule trying to formalize their practice of lying to FOIA requesters in

the days before the 9th ruled, 21 months later. Rather conveniently, the timing of the rule meant the comment period would expire before it became public that the government has been going beyond Glomar and instead lying to FOIA requesters.

No wonder the ACLU and others objected.

But that doesn't change what the facts in this case seem to suggest: that the government has been operating under Meese's memo for years—certainly at least as far back as 2007 when the government first lied to CAIR and Ayloush to hide the big stash of documents pertaining to them.

Mind you, the ruling upholds the principle that the government can't lie to judges to hide their lies to FOIA requesters—a principle that (as Carney pointed out) even Meese didn't propose. Here's that hippie Meese describing 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. In either case, the government will of course urge the court to issue a public decision which does not indicate whether it is or is not an actual exclusion situation. Such a public decision, not unlike an administrative

appeal determination of an exclusion-related request for review, should specify only that a full review of the claim was undertaken and that, if an exclusion in fact was employed, it was, and continues to remain, amply justified.

And here's the hippies on the 9th Circuit (Schroeder, Tallman, and Smith) reaffirming the principle of judicial review in FOIA.

When the government does not provide the court with accurate or complete information, the court's function in overseeing FOIA actions and monitoring litigation is compromised. The government may withhold relevant information from plaintiffs to protect "the secret nature of the information," *id.* at 826, but it must disclose to the court all relevant and responsive information in order for the court to evaluate whether the withholding was appropriate.

[snip]Therefore, if the government believes that submitting a detailed affidavit would compromise the information it is seeking to protect, then it must seek an in camera review. It cannot, however, represent to the district court that it has produced all responsive documents when in fact it has not.

We thus agree with the district court that the FOIA does not permit the government to withhold information from the court. Indeed, engaging in such omissions is antithetical to FOIA's structure which presumes district court oversight.

And just for good measure, here's that hippie Carney scolding the government for trying to pull something that even Ed Meese didn't

sanction.

The Government argues that there are times when the interests of national security require the Government to mislead the Court. The Court strongly disagrees. The Government's duty of honesty to the Court can never be excused, no matter what the circumstance. The Court is charged with the humbling task of defending the Constitution and ensuring that the Government does not falsely accuse people, needlessly invade their privacy or wrongfully deprive them of their liberty. The Court simply cannot perform this important task if the Government lies to it. Deception perverts justice. Truth always promotes it.

I actually suspect that the 9th Circuit's clear reaffirmation of judicial review for FOIA elicited the rule change. After all, even the Obama Administration argued the claim that they could just lie to judges to protect exclusion issues. But if they're going to get judges to go along with their secret exclusions, folks outside of DOJ will need to know about the practice.

Of course to get there—assuming the rule is enacted—we will have to appeal every single FOIA decision, assuming always that the government is lying.

Which is a great way to run a democracy—to force citizens to always assume the government is lying.