DOJ ADMITS IT HAS BEEN "LYING" FOR 24 YEARS; JOURNALISTS APPLAUD

I'm sort of mystified by yesterday's reporting on the DOJ letter to Chuck Grassley and Pat Leahy regarding FOIA. Basically, the letter announced that DOJ has been "lying" on FOIA responses for 24 years, and that DOJ will only change its approach if it finds a good alternative. And yet report after report said DOJ had decided to drop their "new" approach to FOIA (TPM is the sole exception I saw, though the article's title appears to reflect an earlier mistaken version).

As a reminder, the rule in question instructed FOIA respondents to respond to a FOIA request on ongoing investigations, informants, and classified foreign intelligence information as if the information didn't exist.

> (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.

The letter everyone is celebrating says this about DOJ's FOIA practice over the last 24 years.

> Since 1987, the Department has handled records excluded under [FOIA's Section 552(c)] according to guidance issued by Attorney General Meese. The Meese Guidelines provided, among other things, that where the only records responsive to a request were excluded from FOIA by

> statute, “a requester can properly be advised in such a situation that ‘there exist no records responsive to your FOIA request,'” and that agencies must ensure that its FOIA responses to requests that involve exclusions and those that do not involve exclusions “are consistent throughout, so that no telling inferences can be drawn by requesters.” The logic is simple: When a citizen makes a request pursuant to FOIA, either implicit or explicit in the request is that it seeks records that are subject to the FOIA: where the only records that exist are not subject to the FOIA, the statement that “there exist no records responsive to your FOIA request is wholly accurate. These practices laid out in Attorney General Meese’s memo have governed Department practice for more than 20 years.[my emphasis]

This paragraph makes it clear that the practice “proposed” in the “new” rule is actually the practice DOJ has followed for 24 years.

Here’s the language from the Meese Guidelines, which makes it clear DOJ has not been using Glomar’s “We can neither confirm nor deny” language for these exclusions—as some of the reports on this yesterday claimed—but has instead been denying any records exist.

> In addition to expanding the protective scope of the FOIA’s principal law enforcement exemptions, the FOIA Reform Act creates an entirely new mechanism for protecting certain especially sensitive law enforcement matters, under new subsection (c) of the FOIA. These three new special protection provisions, referred to as record “exclusions,” now expressly authorize federal law enforcement agencies, for certain especially sensitive records under certain specified circumstances, to “treat the records as not subject to the

> requirements of [the FOIA].” 5 U.S.C. § 552(c)(1), (c)(2), (c)(3), *as enacted by* Pub. L. No. 99-570, § 1802 (1986). In other words, an agency applying an exclusion in response to a FOIA request will respond to the request as if the excluded records did not exist.
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> [snip]
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> To be sure, the protection afforded through “Glomarization” can adequately shield sensitive abstract facts in certain categorically defined situations. However, the “Glomarization” principle, by its nature, operates necessarily on the basis of (and openly connected with) specified FOIA exemptions, and it is limited in such a way as to mask only an abstract fact related to a defined record category. *See FOIA Update*, Spring 1983, at 5; *see, e.g., FOIA Update*, Spring 1986, at 2. Thus, mere “Glomarization” simply is inadequate to guard against the harm caused by the very invocation of a particular exemption, nor is it capable of being applied realistically where the “category” of threatening requests can be as broad as, in effect, “all FOIA requests seeking records on named persons or entities.” It is precisely because “Glomarization” inadequately protects against the particular harms in question that the more delicate exclusion mechanism, which affords a higher level of protection, sometimes must be employed.[47]
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> By the same token, the utilization of the exclusion mechanism requires extremely careful attention on the part of agency personnel, lest it be undermined, even indirectly, by the form or substance of an agency’s actions. Agencies should pay particular attention to the phrasing of their FOIA-response

> communications in light of the new exclusions. Where an exclusion is employed, the agency is legally empowered to "treat" the excluded records as not subject to the FOIA at all. Accordingly, a requester can properly be advised in such a situation that "there exist no records responsive to your FOIA request." Such phrasing — as opposed to any more detailed statement that, for example, any records specified in a particular request "could not be located" — most rationally and fairly implements an exclusion's effect.

The DOJ letter, combined with the Meese Guidelines, makes it clear: DOJ has been responding for FOIAs throughout that period with the misleading language. There is nothing "new" about the practice whatsoever.

DOJ's prior use of this practice should be clear from the history of this rule—which was basically rushed through as Judge Cormac Carney's ruling made it clear that the FBI had used this practice in a response to CAIR. Contrary to DOJ's claim that it tried to push through this rule out of some concern for transparency, they only drafted it once it became clear their long-standing practice would be exposed in the Carney ruling.

And as I noted yesterday, while DOJ has dropped the language formalizing this from the rule…

> We believe that Section 16.6(f)(2) of the proposed regulations falls short by those measures, and we will not include that provision when the Department issues final regulations.

…it has not promised to drop the practice. On the contrary, it says it will only change the practice—the practice it has used for the last 24 years—if it can find something that works as well.

> 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.
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> [snip]
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> 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]

And why should it drop the practice? It doesn't need a rule to authorize it, it already has authority in the FOIA amendment passed in 1986, which the 9th Circuit referenced in its opinion on the Carney ruling just this spring with no complaint.

> In addition, Congress added section 552(c) to the FOIA in 1986 to allow an agency to "treat the records as not subject to the [FOIA] requirements" in three specific categories involving: (1) ongoing criminal investigations; (2) informant identities; and (3) classified foreign intelligence or international terrorism information. 5 U.S.C. § 552(c)(1)-(c)(3)4; see Benavides v. Drug Enforcement Admin., 968 F.2d 1243, 1246-47 (D.C. Cir. 1992) (discussing the legislative history of the "three

> exclusions of § 552(c)"). Only subsection (c)(3) deals with classified information, while subsections (c)(1) and (c)(2) apply to law enforcement records. Therefore, plaintiffs' contention that only classified information can be withheld under the FOIA is belied by the statute.

The 9th Circuit was not asked to review the constitutionality of this practice. But it certainly showed no discomfort with it. If the law endorses this practice and Appeals Courts have found no problem with it, what are the chances, really, that DOJ will change it substantially?

All yesterday's letter did was announce that DOJ will once again not explicitly describe how it is applying exclusions—it will return to the practice it has followed for 24 years. Sure, it may find a new way to handle exclusions. But all we have now is a promise that it is considering doing so.