THE IMPLICATIONS OF DOJ'S FOIA "LIES"

On Thursday, we learned it has been the practice of DOJ for nearly a quarter century to provide misleading information in response to FOIAs asking for certain kinds of information—broadly, ongoing investigations, informants, and foreign intelligence.

In this post I want to consider how the practice may be ripe for abuse.

Here's the statutory language in question, Section 552(c) of FOIA:

> (c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) **[ed: this is the law enforcement exception]** and — (A) the investigation or proceeding involves a possible violation of criminal law; and (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.
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> (2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.
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> (3) Whenever a request is made which involves access to records maintained by

> the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1) **[ed: this is the exemption for information that has been properly classified according to Executive Order]**, the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

Let's take each of these in order.

Ongoing Legal Investigation

The first exclusion—for information that might tip the subject of an investigation into a potential crime to that investigation and therefore lead her to, for example, destroy evidence—makes a bit of sense.

But it seems ripe for abuse in several ways.

First, DOJ can only exclude these files if "the subject of the investigation or proceeding is not aware of its pendency." But DOJ gets to decide whether the subject of an investigation really "knows" she is being investigated or not. As the Meese Guidelines governing this practice explain,

> Obviously, where all investigative subjects already are aware of an investigation's pendency, the "tip off" harm sought to be prevented through this record exclusion is not of concern. Accordingly, the language of this exclusion requires agencies to consider the level of awareness already possessed by all investigative subjects involved as they consider employing it. It is appropriate that agencies do so, as the statutory language provides, according to a good-faith, "reason to believe" standard, which closely comports with

> the "could reasonably be expected to" standard utilized both within this exclusion and in the amended form of Exemption 7(A).
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> This "reason to believe" standard for considering a subject's pre-existing awareness should afford agencies all necessary latitude in making such determinations. **As the exclusion is phrased, this requirement is satisfied so long as an agency determines that it affirmatively possesses "reason to believe" that such awareness does not in fact exist**. While it is always possible that an agency might possess somewhat conflicting or even contradictory indications on such a point, **it should be firmly resolved that a subject is aware of an investigation before an agency risks impairing it through any telling FOIA disclosure.**[38]
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> 38. Indeed, it is even conceivable that some investigative subjects seeking to force out sensitive information through the FOIA might attempt to evade the protective barrier of this exclusion by generally professing (*i.e.*, speculating) to agencies at the outset that they "know" of ongoing investigations against them. **Because such a ploy, if accepted, could defeat the exclusion's clear statutory purpose, agencies should rely upon their own objective indicia of subject awareness and consequent harm.** [my emphasis]

While DOJ could presumably claim a person who has been interviewed by the FBI, but has not been formally told he was the subject of an investigation, did not "know" he was the subject of the investigation, this broad leeway for DOJ (or other agencies—in another footnote Meese makes it clear that non-law enforcement agencies can use this exclusion as well) to determine

whether a subject of an investigation knows about that investigation seems most ripe for abuse for the object of surveillance. That is, FBI may be following a person in barely concealed surveillance or throwing multiple informants at him, but still claim it had reason to believe that the subject did not affirmatively know about the investigation.

DOJ's prerogative to decide whether or not a subject of an investigation knows about the investigation seems particularly open for abuse given the kind of drawn out investigations that have become more common since 9/11. If someone routinely gets stopped at the border, do they "know" they are the subject of an investigation? If peace activists realize there's an informant in their midst, do they "know" they are they subject of an investigation?

DOJ—or the CIA or the Customs and Border Patrol or DHS generally or the SEC or Treasury—get to decide, not the person himself. Which means this exclusion can be used a shield to hide abusive fishing expeditions.

Moreover, how does this exclusion work with "assessments," which can be initiated with no predicate? These, after all, involve possible violations of law (though there would be almost no evidence one way or another). Would FBI shield the assessments its agents had made, as part of its effort to hide how much information it collects on completely innocent people?

Informants

The second exclusion prevents people from asking for information on people they suspect might be informants by name. So, for example, if a peace group thinks Joe Smith asks too many question about group members' pot smoking and therefore might be an informant, their FOIA request for information on him could be excluded.

The practice makes sense when you're thinking primarily of the dangerous role mafia or drug informants play. But given the increasing use of informants both in the War on Drugs and the War

on Terror (not to mention the War on Peaceful Protest), this exclusion seems ripe to shield abuse. For example, even where an informant has made it obvious that she is an informant, the FBI can hide details about what they're paying her, how they've coerced her to becoming an informant, or even what predicate they used, if any, to justify sending an informant to spy on a group.

And with this exclusion, the FBI has set an even higher bar for making such records available—records can be excluded so long as the government hasn't officially confirmed an informant's role. Meese writes,

> Not unlike the (c)(1) exclusion, this exclusion is expressly conditioned so as to not apply where "the informant's status as an informant has been officially confirmed." 5 U.S.C.§ 552(c)(2). Although the temporal nature of this condition is made somewhat less clear through the structure and phrasing of exclusion (c)(2) than is the counterpart condition in exclusion (c)(1), it reasonably should be taken as likewise requiring that an agency employing (c)(2) protection cease doing so in the unlikely event that, during the pendency of a request, the informant involved becomes "officially confirmed" as such. In this regard, however, it should be remembered that, as a matter of well-recognized principle under the FOIA, "official confirmation" is a high standard indeed.

So in the case where an informant really fucks up or lies, the FBI can simply never acknowledge the informant's role (if the informant lied or engaged in ongoing crimes, he'd be less likely to ever serve as a witness at a trial where his role might be officially confirmed, after all). And that would prevent citizens from showing the abuse inherent in the use of informants.

Classified FBI records on "foreign intelligence or counterintelligence, or international terrorism"

As with the other two exclusions, there's some logic to the third, covering classified FBI records on foreign intelligence, counterintelligence, or international terrorism. In areas where the FBI acts as intelligence rather than law enforcement officers, you don't want the subject of their spying to learn they are being spied on.You don't want Anna Chapman or Robert Hanssen to know that you're hip to their role as a spy.

Or at, that logic held before 9/11 turned the "foreign intelligence" category into a giant grab bag.

In the guise of investigating potential terrorists, the FBI and related agencies have trolled First Amendment protected chat rooms, collected information on journalists, infiltrated houses of worship, developed lists of people who bought acetone and hydrogen peroxide, and used completely innocent people's cell phone signals to map the geolocation of wide swaths of this country. And yet if you, a completely innocent person, asked the FBI whether it had ever tracked your purchase of nail polish remover, it could simply deny it had records on those purchases.

So as with the other two exclusions, this one could be used to shield abuse, and, more specifically, racial profiling, or outright illegal surveillance. And on a more general level, it would prevent Americans from discovering how little protection minimization guidelines now offer them.

In other words, while there are very good reasons for these exclusions to exist, they are prone to abuse. And DOJ's practice of not identifying withheld information at all makes it a lot less likely for a judge to review such exclusionary decisions, which makes it likely FBI would get away with such abuse if they were

using the exclusions in this fashion.

Foreign intelligence and international terrorism information has simply become too encompassing to permit such exclusions to remain entirely secret.