

# THIS FOIA REQUEST WILL SELF-DESTRUCT IN 10 SECONDS

National Security Archive has an update on DOJ's efforts to limit FOIA in the guise of transparency (or, potentially, simply admit what they've been doing for some time). It describes some of the other crummy things DOJ is trying to do (including describing online news as not-news).

One of those is to introduce a loophole allowing DOJ to destroy records.

The Department of Justice's regulations also include a provision to allow the destruction of records. While the law currently states that "Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the FOIA," the Department of Justice wants to change the wording of this regulation to "Records that are identified as responsive to a request will not be disposed of or destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA." This narrows the scope of an agency's obligation to preserve records and grants it the authority to destroy records that are the subject of a pending request but not "identified as responsive to a request," which only the agency would be responsible for determining. **This proposal runs counter to the intent of the FOIA and would allow agencies to place records that may have been improperly withheld beyond judicial review.** [emphasis original]

Hmm. Back when we consulted Ed Meese on how to handle FOIAs of stuff like ongoing investigations, informants, and that old grab

bag of classified intelligence, here's how he said DOJ would respond:

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.

In other words, material that falls under these exclusions are "not subject to the FOIA at all."

Now put these two together: If something falls under an exclusion, it is deemed not-responsive to a request. And DOJ now says it is allowed to destroy records so long as they are not responsive to a request. Ergo, DOJ is now saying that if you request information about an investigation into yourself (or an informant or a broad range of classified intelligence information), they can first lie and say they don't have those records, and then quickly destroy them, in case a judge deems them responsive after all.