

THE SECRET PATRIOT FOIA

To cap off Sunshine week, there was a slew of FOIA news today. For now, I'm just going to look at the response the ACLU got on its request for "OLC legal opinions and memoranda concerning or interpreting Section 215 of the USA Patriot Act."

Josh Gerstein noted one interesting aspect of this response: the government has withheld two documents on Exemption 5—or deliberative privilege grounds. Now, the government usually claims deliberative privilege on these memos, arguing that the memos are just interpretation for whatever Executive Branch client who makes the final decision.

But this also suggests they may not be claiming these memos are classified.

Except the DOJ response does note they've referred one of two documents to OLC for further review.

... the Office of Information Policy has referred one document to OLC for direct response to ACLU. The document is the same as one of the two documents described above.

I wonder whether they have referred this document for full classification review.

And then there is DOJ's all but admission that they've carved out the most sensitive documents on this topic—which we believe to be the use of phone GPS to get geolocation in the US. They say,

the ACLU has stipulated in *ACLU v. FBI*, 11 Civ. 7562 (S.D.N.Y.) that the request is limited to OLC legal opinions and memoranda concerning or interpreting Section 215 of the USA Patriot Act.

As Gerstein notes, the documents that really explain Secret PATRIOT are FISA Court opinions.

It is possible is that the OLC documents in question are not the holy grail senators, the ACLU and the Times have been seeking, but some more mundane interpretations of Section 215. Wyden and Udall suggested in their letter that the key documents amounting to “secret law” are actually classified opinions of the Foreign Intelligence Surveillance Court. Any administration legal interpretations of those opinions may also not have come from OLC, but from lawyers at the FBI or elsewhere in the intelligence community. The government is withholding other documents in the FOIA litigation as classified.

Like I say, this is a nice cap to Sunshine week—yet more obfuscation.