FOIA Cases

Lawsuits brought in connection to the Freedom of Information Act

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ACLU v. DOJ

ACLU v. DOJ

FOIA Case for Records Relating to Targeted Killing Law, Policy, and Casualties

In March 2015, the ACLU filed a Freedom of Information Act lawsuit demanding information about the government's targeted-killing program, including the Obama administration's Presidential Policy Guidance (PPG) under which the program operates. In a crucial victory, the government released a redacted version of the PPG and four other documents. Many other documents were kept secret, however, and the ACLU continues to seek additional records through additional FOIA requests and litigation concerning the specific legal standards the government invokes when using lethal force abroad, and how they apply in practice.

Summary

U.S. drone strikes have killed thousands of people, including hundreds of civilians, in at least half a dozen countries outside of armed conflict zones. Many of those killed have been children. The government's lethal force program raises critical legal and ethical concerns and is the source of

resentment and anger both in countries in which killings occur and more broadly. But despite efforts to make the program more transparent, it is still shrouded in excessive secrecy that shields it from public scrutiny.

The information we sought includes records on the law and policies the government uses to justify lethal force, how the government picks targets, how it conducts before-the-fact assessments of potential civilian casualties as well as "after-action" investigations into who was actually killed, and the number, identities, legal status, and suspected affiliations of those killed, intentionally or not.

In August 2016, the U.S. District Court for the Southern District of New York ordered the government to release a redacted version of the PPG and four other documents relating to the government's targeted-killing policies, but held that the government could keep the rest of the documents secret. The court also ruled that because government officials had publicly acknowledged certain information about the targeted-killing program, the government was no longer able to keep that information from the public. The court's ruling about the disclosed information was, and remains, entirely redacted. In January 2017, the government appealed that district court ruling. In response, the ACLU argued that it was hampered by excessive secrecy, but to the extent the issue concerned whether the government has officially acknowledged that the United States conducts targeted killings in Pakistan, including through the use of drones, the government had done so. The ACLU also argued that the district court's ruling was appropriate under FOIA. In July 2018, the Court of Appeals for the Second Circuit ruled in favor of the government, holding that the district court did not need to decide whether the specific secret issue was officially acknowledged, and ordered the redactions in the court's opinion to remain.

This case is one of three FOIA lawsuits the ACLU has litigated in pursuit of more transparency about the targeted killing program. One of them sought information about the strikes that killed three Americans in Yemen, and the other sought the legal and factual bases for the government's use of drones to kill people overseas.

SEE DOCUMENTS RELEASED UNDER this FOIA REQUEST

See documents released under all of the ACLU's targeted killing FOIA requests

ACLU v. CIA

ACLU v. CIA

FOIA Case for Records Relating to Drone Killings

Summary

VIEW ALL OF THE COURT FILINGS IN THE CASE HERE

The FOIA request was filed with the Department of Defense, the Department of Justice (including the Office of Legal Counsel), the Department of State, and the CIA. The Departments of Defense, Justice, and State responded by releasing some records and withholding others. The CIA denied the request by refusing to confirm or deny whether the CIA drone strike program even exists. The ACLU filed a lawsuit against the CIA in June 2010, arguing that the CIA's response was not lawful because the CIA Director and other officials had already publicly acknowledged the existence of the CIA's drone program. After the court ruled in favor of the CIA, the ACLU appealed to the D.C. Circuit Court of Appeals. In an important victory for transparency, in March 2013 the appellate court reversed the lower court's decision by a 3-0 vote, ruling that the CIA could no longer deny its interest in the program. The Court of Appeals remanded the case to the district court, where the ACLU narrowed the request to certain categories of documents, including legal analysis and information about who is being killed. After the district

court ruled the documents were properly classified, the ACLU appealed the decision in July 2015. The D.C. Circuit affirmed the judgment of the district court in April 2016.

See Documents Released Under this FOIA Request

Information on the ACLU's other targeted killing cases

See documents released under all of the ACLU’s targeted killing FOIA requests

Va. Supreme Court "Open Meetings"

Va. Supreme Court draws ‘bright line’ upholding open meetings

Court rejects argument public business only means what’s on official agenda

In a split opinion on transparency laws, the Supreme Court of Virginia on Thursday upheld a more expansive definition of what counts as a public meeting of government officials.

The case, which centered on an impromptu meeting that took place in Prince William County to discuss local unrest in May 2020 after the police killing of George Floyd, posed questions for the high court about what kinds of meetings the public should be notified about and what types of discussions count as “public business.”

Lawyers representing five members of the Prince William Board of County Supervisors had pushed for more leeway for public officials to hold informal gatherings, arguing public business should be narrowly defined as matters appearing on an official meeting agenda.

A majority of Supreme Court justices rejected that argument in an opinion that pointed to the “bright line” of the Virginia Freedom of Information Act’s “stated presumption in favor of open government.”

“To adopt the defendants’ construction — that a topic cannot be public business until it appears on a formal Board agenda — would gut the open meeting provisions of VFOIA,” Justice Wesley G. Russell Jr. wrote for the majority. “It would allow portions of or full boards of supervisors to meet, discuss and decide county business in secrecy by waiting until after their private discussions and decisions to place an item on a formal agenda.”

Two Prince William residents had sued the county over a community meeting that took place the day after a May 30, 2020, protest some county officials characterized as a riot. The lawsuit centered on gatherings of county officials to discuss the events of that night.

The entire Prince William Board of County Supervisors held an emergency meeting at 4 p.m. on May 31, but the litigation centered on an earlier meeting at 1 p.m. attended by five supervisors, police officials, county employees, members of the county’s Citizens’ Advisory Board for law enforcement and “more than sixty members of the community,” according to court documents. Despite “conflicting testimony,” the Supreme Court concluded the 1 p.m. gathering effectively served as a meeting of the Citizens’ Advisory Board. Though most of the county’s eight-member board of supervisors attended, three other supervisors weren’t invited.

The plaintiffs in the case argued the earlier gathering should have been treated as an official public meeting, triggering FOIA's rules about notice to the public and access for anyone who wanted to attend. The defendants insisted it was not a public meeting, which meant FOIA didn't apply.

In May 2021, the local circuit court sided with the supervisors, ruling that the gathering didn't meet the legal requirements to be considered a public meeting.

The Supreme Court overruled that decision and sent the case back to the circuit court for further proceedings, concluding that enough public officials attended the meeting to trigger open meeting laws and that the topic at hand met the definition of "public business" because it had a direct bearing on the county's response to an important event.

"Issues related to the riots, the use of force by police, the use of chemical agents to quell the riots and the property damage that was caused were all discussed," Russell wrote. "One of the first responsibilities of any government is to protect the lives, safety and property of its citizens. As such, it is hard to imagine any scenario in which the Board would not soon address a night of protest and unrest."

The court also emphasized that the protests were the main topic at a "properly noticed" meeting that took place just hours later, bolstering its view that the earlier discussion should have been treated as public business subject to FOIA.

In a dissenting opinion, Chief Justice S. Bernard Goodwyn and Justice Cleo E. Powell warned an overly broad definition of public business would constrain the free flow of information between elected officials and the communities they serve. The dissenting justices said they saw an important distinction

between information gathering and official action by public bodies, a line they felt the majority opinion would blur.

“The new definition discourages citizen-organized informational gatherings by requiring the application of VFOIA notice requirements, even if the purpose of the meeting is purely informational,” the dissent says.

In a footnote, Russell said the dissenting justices’ view, if taken to its “logical conclusion,” would allow a majority of board members to huddle in private with lobbyists, political parties or campaign donors to discuss “the locality’s budget, policing issues, tax rates, land use permits, and anything and everything else that properly could come before the board but had yet to appear on the agenda.”

“This cannot be so because such private meetings are exactly the type of back-room, secretive dealing that VFOIA was enacted to prevent,” the opinion states.

Megan Rhyne, a transparency advocate who serves as executive director of the Virginia Coalition for Open Government, said the ruling’s real-world impact probably won’t be a “broad sweeping thing” because most public bodies are already mindful of what does and doesn’t trigger open meeting rules. She said she took exception to the dissent’s focus on a phrase in Virginia’s transparency law saying nothing in FOIA should be construed to “discourage the free discussion by government officials or employees of public matters with the citizens of the Commonwealth.” Her view of that line’s meaning, she said, is that “people who work in government should still feel free to talk to citizens.”

“Even if you were trying to give that section credence, all we’re saying here is that you should’ve given notice of this meeting,” Rhyne said. “If it’s so

important to be able to have these conversations with the public, then the public should know about them.”

Major FOIA Cases

FOIA Case Law

- *Administrator, Federal Aviation Administration v. Robertso***n, 422 U.S. 255 (1975)**

The FAA was permitted to withhold analyses of performance of commercial airlines under a statute which gave the administrator the authority to withhold such information when he felt disclosure was not in the public interest. (Subsequent to this decision, Congress amended Exemption 3 requiring specific language requiring confidentiality.)

- *Baldridge v. Shapiro***, 455 U.S. 345 (1982)**

Two sections of the Census Bureau Act (13 U.S.C. §§ 8(b) and 9(a)) qualify as Exemption 3 statutes and prevent the bureau from releasing information collected from respondents, including the addresses used by the bureau to conduct the census.

- *Chrysler Corporation v. Brown***, 441 U.S. 281 (1979)**

Businesses that submit documents to the government may sue under the Administrative Procedures Act to challenge an agency's decision to release documents related to them when such documents are requested under FOIA.

- **Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102 (1980)**

The Consumer Product Safety Act requires the CPSC to ensure the accuracy of information about consumer products, if the manufacturer can be identified,

prior to releasing any information pursuant to a FOIA request. The CPSC accomplishes this by notifying the manufacturer and giving it an opportunity to correct or challenge any of the requested information.

- **Department of the Air Force v. Rose, 425 U.S. 352 (1976)**

Exemption 2 applies only to information in which there is little or no public interest and thus could not protect information about Ethics Code violations at the Air Force Academy. Furthermore, Exemption 6 requires an agency to balance the possible invasion of privacy against the public's interest in disclosure, and in this case the Court ordered disclosure of the information in a form which would not lead to any cadet being individually identified.

- **Department of the Interior v. Klamath Water Users Protective Association, 532 U.S. 1 (2001)**

The federal government may not use Exemption 5 to withhold documents created as a result of communications with an outside consultant, when the consultant's relationship with the government has been predicated on the consultant's own interests, rather than the government's interests.

- **Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989)**

In balancing the public's interest in disclosure against the intrusion on personal privacy that would occur from disclosure, an agency can only consider the public's interest in knowing what the government is "up to." If records are not informative on the operations and activities of government, there is no public interest in their release. In applying the balancing test under Exemption 7(C), agencies may "categorically" weigh public interest and privacy. Since criminal history rap sheets reveal nothing about the government, they may be withheld.

- **Department of Justice v. Tax Analysts, 492 U.S. 136 (1989)**

A two-pronged test determines whether material constitutes agency "records": An agency must create or obtain the records and must have them in its possession because of the legitimate conduct of agency business.

- **Department of State v. Ray, 502 U.S. 164 (1991)**

The privacy interest of Haitian deportees in their names and addresses outweighs any public interest that might be served by disclosure to an attorney who hoped to learn if the Haitian government mistreated them on their return. The court refused to decide whether "derivative" uses of names and addresses — later uses for other purposes — could ever serve the public's interest.

- **Department of State v. Washington Post, 456 U.S. 595 (1982)**

The "similar files" provision of Exemption 6 extends to any information of a "personal" nature, such as one's citizenship.

- **Environmental Protection Agency v. Mink, 410 U.S. 73 (1973)**

An agency has no obligation to segregate and disclose non-classified portions of otherwise classified documents, and the court is not required to view the documents in camera whenever there is an allegation that pre-decisional materials contain factual information. (Subsequent to this case, FOIA was amended to require agencies to segregate non-exempt material from that which can be protected under an exemption.)

- **Federal Bureau of Investigation v. Abramson, 456 U.S. 615 (1982)**

Records compiled for law enforcement purposes do not lose their exempt status when they are incorporated into records compiled for purposes other than law enforcement.

- **Federal Open Market Committee v. Merrill, 443 U.S. 340 (1979)**

Exemption 5 incorporates a privilege for commercially sensitive documents that are generated by the government. This privilege is similar to the protection provided by Exemption 4 for the commercial information submitted by those outside the government.

- **Forsham v. Harris, 445 U.S. 169 (1980)**

Records in the possession of federal grantees or contractors are not accessible under FOIA, even if the documents relate to the grantee's contract with a federal agency.

- **Federal Trade Commission v. Grolier, 462 U.S. 19 (1983)**

Exemption 5 is not limited to information that would actually be privileged in any particular litigation, but rather extends to any information which would "routinely" or "normally" not be available to a party in litigation.

- **Grumman Aircraft Engineering Corporation v. Renegotiation Board, 421 U.S. 168 (1975)**

The executive privilege, incorporated through Exemption 5, can protect from disclosure reports prepared by the Renegotiation Board's Regional Board since they are not "final reports" but rather inter- or intra-agency memos. This ruling is based on the Court's finding that only the full Board has authority to issue final orders, and these Regional reports are simply used by the full Board to make that decision.

- **GTE Sylvania v. Consumers Union, 445 U.S. 375 (1980)**

GTE Sylvania sued the Consumer Product Safety Commission to stop its release of accident reports to Consumers Union. The district court issued an order restraining release of the information pending the court's ruling on the disclosability of the

information. Meanwhile CU sued in a different court to compel disclosure. The Supreme Court ruled that while information is under a court order prohibiting disclosure, the agency has no authority to release it, and a requestor may not maintain a lawsuit to compel its disclosure.

- **Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980)**

FOIA does not provide a means by which private citizens can sue to force public officials to return records that they have wrongfully removed from the agency.

- **National Archives and Records Administration v. Favish, 541 U.S. 157 (2003)**

Exemption 7(C) encompasses the personal privacy rights of a deceased individual as well as the related privacy rights of his or her surviving family members. When the public interest in a FOIA request reflects an attempt to show that government officials acted improperly in performing their duties, the requester must produce evidence of such impropriety sufficient to convince a reasonable person in order to overcome the personal privacy rights cited.

- **National Labor Relations Board v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978)**

Exemption 7(A), allowing agencies to withhold investigatory records compiled for law enforcement purposes if disclosure would interfere with enforcement proceedings, does not require the agency to make a specific showing within the context of a particular case. Instead, the agency may demonstrate that disclosure of certain classes of documents (in this case witness statements filed as part of unfair labor practices complaints) would have the effect of interfering with agency enforcement.

- **National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132 (1975)**

Exemption 5 can never apply to the final opinion of an agency, but the exemption does incorporate the attorney work product privilege protecting memos prepared by a government attorney in contemplation of litigation and setting strategy for the case.

- **Sims v. Central Intelligence Agency, 471 U.S. 159 (1985)**

The Director of the CIA has exclusive authority to designate intelligence sources and methods that can be protected from public disclosure under the National Security Act.

- **Taylor v. Sturgell, 128 S.Ct. 2161 (2008)**

Two parties with similar, but not legally related, interests can separately litigate the same claim without resulting in "virtual representation" of one party by the other.

- **United States v. Weber Aircraft Corp., 465 U.S. 792 (1984)**

Exemption 5 incorporates a privilege protecting witness statements given to military personnel in the course of military air crash safety investigations.