

At Justice, Freedom Not to Release Information

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Today, at the Justice Department, some laws are more equal than others.

One 36-year-old U.S. law can be broken, it seems. Attorney General John D. Ashcroft, who is sworn to enforce all laws, has told federal employees that they can bend -- perhaps even break -- one law, and he will even defend their actions in court.

That law is known as the Freedom of Information Act.

Last October, the Justice Department cited the Sept. 11 attacks in a memo to federal FOIA officers that stated, "When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions."

That memo superseded Attorney General Janet Reno's memo of 1993 that told FOIA officers to presume government documents are public. Citing the D.C. Circuit opinion *Hemenway v. Hughes*, Reno urged care to make sure that the government "is not unduly limiting the records found responsive to those requests."

It is not that the Reno Justice Department was particularly enamored with FOIA. But at least attorneys didn't have carte blanche to disregard the law. It is under this new Ashcroft dictum that we review the latest appalling turn in the long-running FOIA battle between the Justice Department and database investigators David Burnham and Sue Long.

Burnham, a legendary investigative reporter, teamed up with Long, a statistician, in 1989 to create Transactional Records Access Clearinghouse (TRAC) at Syracuse University to collect and analyze government data. TRAC is an incredibly useful tool to monitor the basic functions of government. It includes such things as the number of cases referred by the FBI to U.S. attorneys' offices around the country. It is one way to gauge the effectiveness of the front line of federal law enforcement in the United States.

(Full disclosure: The author of Hearsay, through his affiliation with Investigative Reporters and Editors, also advocates for public-access issues. IRE often features Burnham as an unpaid speaker at its conferences.)

Some of TRAC's most frequent users include networks and newspapers, such as The Washington Post, public interest groups -- from Common Cause to the National Rifle Association -- and Congress, particularly the Senate Judiciary Committee. "TRAC data is important and useful information for Congress to conduct its constitutional responsibility of oversight," Sen. Charles E. Grassley (R-Iowa) told Hearsay last week.

Five years ago, the Reno Justice Department stopped providing data to TRAC. The organization sued and the Justice Department settled out of court. Then the department reneged. TRAC sued again. The case is pending.

Meanwhile, the data were used to spotlight how the Clinton administration was pushing for new gun laws when its own enforcement of existing weapons laws was falling precipitously. Then-Deputy Attorney General Eric H. Holder Jr. employed a tactic that many Justice Department lawyers have tried over the years: He attacked the data as wrong. But internal records, released after the 2000 election, showed that the Justice Department knew the data were correct.

Fast forward to 2001. After the Sept. 11 attacks, TRAC data revealed that U.S. attorneys around the country had declined to prosecute a large proportion of terrorism cases referred by the FBI and other agencies. The Philadelphia Inquirer took the data, went to the courthouse and found the terrorism indictments brought really weren't terrorism cases at all.

Such embarrassments apparently have continued to upset Justice Department bureaucrats. In March, Teresa Davis of the Executive Office of U.S. Attorneys wrote that monthly FOIA requests for data would be delayed to make sure releasing data did not "jeopardize the department's counter-terrorism efforts or threaten national security."

Nevertheless, the Justice Department released the data in April. It wasn't a pretty post-Sept. 11 picture, at least not to Senate Judiciary Chairman Patrick J. Leahy (D-Vt.) and Grassley. "The information raises troubling questions about whether the FBI and Department of Justice are devoting sufficient resources to counter-terrorism efforts," the senators wrote in June, "whether the FBI continues to dedicate valuable resources to crimes [such as bank robberies] that other agencies are equipped to handle; how well the FBI conducts terrorism investigations; and what the FBI is doing with its intelligence and analysis personnel."

Around Halloween, TRAC received a letter from the Justice Department rejecting the release of records of ongoing criminal investigations, which it said could interfere with anti-terrorism investigations and endanger lives. On its face, such a denial might seem reasonable, except that the information TRAC gets is so vague and incomplete that it would be impossible to ascertain any specific cases, suspects or investigations.

Leahy and Grassley also aren't buying the Justice Department's arguments for the decision to suddenly stop releasing the data. They see it as part of a twofold attack on TRAC. "First, the department has attacked the validity of the data," the senators wrote. "Second, it is simultaneously trying to cut the flow of information that can be used by TRAC and the public to evaluate the Department and the FBI's performance."

Grassley asked the Justice Department to reconsider its FOIA response. "Bureaucrats may not like being held accountable for their actions, but that doesn't mean they can withhold information to cover up what they're doing or not doing," Grassley said.

Justice Department bureaucrats, with Ashcroft's blessing, are trying to muzzle the watchdogs. For that reason, Hearsay presents its annual Turkey Award to those bureaucrats. The FOIA officers, through spokesman Mark Corallo, said there is justification for their actions.

"Information that may seem innocuous to the average person, may in fact provide a great deal of guidance about the direction of our investigations to criminals or terrorists," Corallo said.

Burnham warns that the shutdown of the flow of information comes at a time when the federal government has been handed remarkable and historic new powers of investigation. "I am truly fearful we are going to see a lot more of this stuff," Burnham said.