

Rap sheets can be withheld as FOIA exemption

Law enforcement records about private citizens that do not contain information about the operation of government are exempt from disclosure under the Freedom of Information Act, the U.S. Supreme Court decided in late March.

The case involved a request by **CBS News** and the Reporters Committee for Freedom of the Press for access to the rap sheets on four members of a Pennsylvania family identified as having connections with organized crime. The FBI eventually provided the information on three family members who had died, but it withheld the information on the fourth.

The court said the rap sheets were covered by exemption 7(C), which says that law enforcement records may be withheld if disclosure would cause an unwarranted invasion of personal privacy. The decision was announced in an opinion written by Justice John Paul Stevens and joined by six members of the court. Justices Harry Blackmun and William Brennan concurred in the result but on somewhat narrower grounds.

FBI rap sheets are criminal identification records that contain physical descriptions of the subject and the person's history of arrests, convictions and incarcerations. The records are compiled from information provided by state and local authorities and are sometimes incomplete and inaccurate.

A federal district court upheld the agency's denial on the grounds that the rap sheet came under three exemptions to the FOIA. A federal appeals court reversed that decision. When the case was appealed to the Supreme Court, the only issue was the applicability of exemption 7(C).

The Supreme Court concluded that rap sheets contain the kind of information in which an individual has a substantial privacy interest. This interest is reflected in federal laws that limit dissemination of FBI rap sheets and state laws that restrict access to criminal histories.

The court's opinion displays at least three lines of thought that may work against freedom of information in future cases. The first involves the idea that a privacy interest attaches to information that is public, although located in scattered sources, once that information is compiled in a central location. Stevens bases this conclusion on a dictionary definition of "private" as meaning "not freely available." The fact that the FBI spent a great deal of time and money compiling the rap sheets indicated that the individual pieces of

information were not freely available and, therefore, private.

The second troubling line of reasoning has to do with the assessment of the public interest in disclosure. The court said the purpose of the FOIA is to inform people about the activities of government, but rap sheets tell only about the activities of private individuals. This analysis ignores the fact that a rap sheet is not only a person's criminal history but also a history of how law enforcement agencies and courts have dealt with that person. A rap sheet that showed a number of arrests but no convictions might be evidence of ineffective law enforcement or harassment of an individual.

The third area of concern is the court's decision that certain kinds of law enforcement records may always be exempt under 7(C). This is what the court called "categorical balancing."

The phrase "unwarranted invasion of personal privacy" in 7(C) has been held to require a balancing of interests. In any case where release of documents might invade personal privacy, the agency and the courts must weigh whether the interest in disclosure is so slight that the invasion of privacy would be unwarranted.

Until now, the courts have held that the balancing process required by 7(C) must be undertaken on a case-by-case basis. This was the approach the Supreme Court endorsed in a 1978 decision, although the issue then was the interpretation of exemption 7(A). It is also the approach the District of Columbia U.S. Court of Appeals applied in a 1984 case involving exemption 7(C) where it said that "per se rules" about what information might constitute an unwarranted invasion of privacy were "generally disfavored." The case-by-case approach means that while the privacy interests in some kinds of information may be very strong, the courts will consider specific circumstances that might tip the balance in the other direction. But when courts apply categorical balancing, as they have in interpreting other exemptions, they find entire classes of information exempt from disclosure without regard to individual circumstances.

In the Reporters Committee case, the court suggested that other kinds of law enforcement information besides rap sheets might be categorically exempt. Any request from a third party for law-enforcement records about a private citizen can reasonably be expected to invade personal privacy, and if the records contain no "official information" about a government agency but only information the government is storing, then disclosure would be in all cases an unwarranted invasion of privacy, Stevens' opinion said.