Battling for an Open Government

A National Freedom of Information Summit

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Contents

Panels

Keynote Speech

Lectures

Letter to Bill Clinton

Wrap-up

At a dinner in Nashville's replica of the Parthenon, a statue of Athena towers over conference participants.

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Kennedy assassination files

How a movie made Congress realize that the FOIA failed

Jim Lesar
Lesar is a Washington, D.C., attorney who specializes in Freedom of Information Act litigation. The FOIA cases he has handled have resulted in more than 40 published decisions and have set many FOIA precedents. Lesar also has sought government information on assassinations and has helped win the release of more than 200,000 pages of records on the killing of John F. Kennedy. He is co-founder of the Assassination Archives and Research Center, which collects and disseminates information on political assassinations.

I have spent over two decades litigating some 40 cases pertaining to the assassinations of President Kennedy and Dr. Martin Luther King. I began in 1970. It was tough in those times. In those days, when you submitted a request to the FBI, the FBI assigned your request designation for domestic subversion.

In my first case, I assisted the late Bud Fensterwall, an author of the original Freedom of Information Act, in trying to get some records that the Warren Commission critic, Harold Weisberg, wanted, simply results of scientific tests that had been performed on items of evidence in the Kennedy assassination.

The case turned out disastrously. The FBI put in an affidavit saying that the heavens would fall if laboratory test results were released. The attorney representing the government got up before the trial judge, John Sirica, and told him that the attorney general of the United States had determined that it was in the national interest not to release these test results. Sirica, ruling from the bench, dismissed the case.

We appealed. A Court of Appeals panel reversed by a 2-to-1 vote. An impassioned, not to say hysterical, dissent by Senior Judge John Danaher derided FOIA requesters as rummaging writers and dismissively referred to Weisberg as some party off the street.

The government moved for rehearing *en banc*. This time we lost 10 to 1. The case set a very bad precedent, so bad that it took an act of Congress to reverse it.

The 1974 amendments, of which that was a part, ushered in a brief window of opportunity, but it was still a period beset with difficulties for those litigating under the FOIA.

Then came the Reagan/Bush administration, the nightmare years. Not content to leave the making of bad law to the judiciary, which had amply demonstrated its capability in that assignment, Congress got into the act in a fitting attribute to George Orwell, who the government seems to regard as the patron saint of freedom of information. It enacted the CIA Information Act of 1984, a law designed not to secure the release of information, but to insure that the CIA's most important files would remain untouched.

Not to be outdone, the Supreme Court piled on the following year with its decision in the Sims case, ruling that an intelligence source is any kind of a source that the CIA says it is. That pretty much finished off what access to CIA records was left after the passage of the CIA Information Act.

Then in 1986, Congress got back into the field, seizing on a piece of anti-drug legislation. It slipped in a little secrecy narcotic of its own, which did to law enforcement files pretty much what the CIA Information Act had done to the operational records of the CIA.

The remainder of the decade was characterized by a series of horrendous judicial decisions, which has left the FOIA a shambles. By 1991, the FOIA's future looked extremely bleak.

Then there was a bizarre development: Oliver Stone made a movie. A human cry arose about the suppression of the Kennedy assassination records, and Congress responded by passing the President John F. Kennedy Assassination Records Acts of 1992.

In one fell swoop, Congress overrode the bad results of 20 years of unceasing litigation over the Kennedy assassination files. The results were stunning.

• First, the scope was universal. The act includes congressional records. It includes judicial records. It includes all executive-branch records, including those of independent agencies in the executive office of the presidency.

• Second, the concept has been drastically altered. The act provides not for exemptions from disclosure, but merely postponement of the disclosure.

• Third, with respect to substantive withhold, Exemption 2 is gone. Exemption B-3 is out. With one exception, Section 6103 of the Internal Revenue Code, all B-3 statutes are gone. The rap sheets which the Supreme Court fought so valiantly to exempt in the Reporters Committee case is gone. There will be hundreds of pages of rap sheets released under the new law.

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There is no role under the law for an executive order on national security. There is a provision that the JFK Act take precedence over any other law, other than the Internal Revenue Code provision; any judicial decision construing such law; and any common law doctrine that would impede the release of this information.

Congress made a specific finding that this legislation was necessary because the FOIA was a failure. It did not do what it was intended to do. All that is left by way of grounds for withholding information are:

• An attenuated Exemption 1. There's a balancing test. The information that may be withheld is very narrowly drawn. You can withhold the name or identity of an intelligence agent if its current protection is required.

• There is a provision roughly analogous to Exemption 6.

• And there is a greatly weakened provision analogous to Exemption 7-D. It will protect a live source, not a dead source, but it will protect a live source only if there would be a substantial risk of harm in the disclosure of that source.

All records carry a presumption of immediate disclosure. The evidentiary standard has been tightened. Disclosure may occur only if it can be shown by clear and convincing evidence that it falls within the criteria set forth in the act.

I think that these and other provisions of the act are a guidepost that can be used for future reform of FOIA. It may be that the next step would be to follow up this legislation with special legislation on historical records, generally, because I think that is more likely to be politically acceptable than complete overhaul of the FOIA itself. I leave that thought with you. ■