UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

FEB 15 1978

James H. Lesar, Esquire
910 Sixteenth Street, N. W.
Suite 600
Washington, D. C. 20006

Dear Mr. Lesar:

This responds to your letter of January 7, 1978, requesting access to copies of internal memoranda pertaining to the application of 5 U.S.C. 552(b)(2) and (7)(C). Those memoranda are enclosed. I have also included two other fairly recent policy items that may be of interest and use to you.

Sincerely,

Quinlan J. Shea, Jr., Director
Office of Privacy and Information Appeals

Enclosures

OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR 141 CFR 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : Professional Staff

DATE: MAY 25 1977

FROM : Quinlan J. Shea, Jr., Director
Office of Privacy and Information Appeals

SUBJECT: The Privacy Exemptions, 6 and 7(C)

At the same time we strive for the maximum possible "openness" within this Department, we cannot forget that we are also charged with protecting legitimate personal privacy interests. After reviewing with me the manner in which we have been applying the privacy exemptions, Deputy Attorney General Flaherty has given me certain general, preliminary guidance in this area. To the extent it differs from our prior practice, this guidance is effective immediately and, for the purpose of adjudicating administrative appeals, retroactively.

In the context of the "naked" third party request, the rules are unchanged. Almost any invasion of privacy can be termed "unwarranted" and most can be called "clearly unwarranted," if there is no offsetting public benefit flowing from release, or a private need so strong that it can be viewed as supported by a public interest, etc. Accordingly, we will continue to refuse to confirm or deny the existence of F.B.I. or other investigative files on the subjects of requests, who are not also the requesters (or in privity with them). Vigorous assertion of this "threshold" privacy position is to continue. Putting it bluntly -- in the absence of a reason making it someone else's business, it is the business of no one but the subject whether we do or do not have an investigative file on him. Under our precedents, the "reason" for making or considering release of requested records on a third party can arise from the historical nature of the material in a file, the public figure status or other notoriety of the subject, etc. But, if the balancing test does not produce a result where the "reason" outweighs the protectable privacy interest -- however slight it may be -- the privacy interest will be asserted. This will also continue to be our position as to requests "without reasons" seeking to rummage around in other persons' personnel files. Subject to the remainder of this memo, these same general rules also apply to the protection of 7(C) privacy material contained in records the existence of which is known or must be admitted.

The most difficult area to apply privacy tests is in the context of investigative records. By their very nature, these are records about more than one person. Mr. Flaherty feels that we have been excising and withholding too much material in those instances where the requester is one of the persons whose activities are chronicled in the file. If the F.B.I. has a file on John Doe -- our requester -- and information has been deliberately placed in that file which pertains to Richard Roe, that Roe information is presumptively information about Doe as well and should not ordinarily be withheld from him on 7(C) grounds. If it does not pertain to Doe, one may well ask why it is in the Doe file at all? If the information is intimate or very personal, and does not actually involve Doe, it may be appropriate for continued denial of access on privacy grounds. These cases should be carefully reviewed by you, however, and the routine excising/denial of all "third party information" is to cease. The test under the statute is unwarranted invasion of personal privacy, not simply invasion of privacy. The burden under the statute and our regulations is on the one who would deny access. These concepts are to be applied strictly in reviewing cases on administrative appeal.

I realize that I have given you little specific guidance. As before, privacy will continue to be a vexatious and difficult area of our operations. Mr. Flaherty does anticipate that the overall effect of his guidance will be the release of a good deal of information to requesters who are the subjects of files that might hitherto have been withheld solely on the basis of 7(C). It will change nothing if some other exemption (e.g., 7(A) or 7(D)) protects the same material. Furthermore, even if it is determined under this guidance that the information about someone else is also information about the requester, you must still continue to apply the "balancing test," as well as your best judgment and common sense, to make the right calls in the myriad of individual fact situations with which we are faced in the privacy area. Multi-subject files, as well as those on organizations, will warrant your particular attention in this regard. The bottom line, however, is that access to requested material about a requester will not be denied on privacy grounds unless it is legally correct and logically appropriate to do so.

Approved _____
Peter F. Flaherty

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JULY 1973 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : Professional Staff

DATE: MAY 25 1977

FROM : Quinlan J. Shea, Jr., Director
Office of Privacy and Information Appeals

SUBJECT: Administrative Markings

As you already know, Deputy Attorney General Flaherty has directed me to apply as rigorously as possible a "harm test" before recommending to him the affirmance of a denial of access to any requested record or portion thereof. He has particularly indicated that what we usually term "low 2" materials -- administrative markings, routine instructions, etc. -- will not be withheld. If such markings were excised from released records, or materials were denied in their entireties on the basis that they are purely internal and/or administrative, the proposed letter for Mr. Flaherty's signature should address the point. If the supplemental release has already been made by the component, the decision letter should indicate the availability on specific request of substitute pages, without cost, to replace those from which such excisions were made. Pages withheld in their entireties on this basis will be provided, upon specific request and agreement to pay the reproduction charge of ten cents per page. If the supplemental release has not been made (or there would have been no supplemental release), the materials within the scope of the request that have already been released will be reprocessed by the component and released with nothing withheld on the basis of "low 2." If there is any question whether the scope of a request extends to purely administrative pages, containing no substantive information on the subject of the request, it is probably better at both the initial request and appeal stages not to send (and charge for) such materials. Instead, simply indicate their availability, just as if a supplemental release had already been made.

What if administrative markings or materials are believed to be appropriate for withholding under the "harm test?" In that event, exemption 2 should be cited as a basis for continued denial of access. I expect, however, that there will

ordinarily be another exemption [e.g., 7(A) or, particularly, 7(D)] applying to it as well. There may, of course, be cases in which another exemption cannot or should not be cited in addition to exemption 2. An obvious example would be where the excised/withheld material has "high 2" implications.

Lastly, if a page contains substantive material within the scope of a request, all of which will continue to be withheld on a basis not involving "low 2," the page should not be released with nothing but "low 2" markings, and charged for, unless it is certain that the requester desires it. Again, the better procedure is to advise the requester of the availability of such material, if he wants and is willing to pay for it.

Approved _____
Peter F. Flaherty

NATIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : Heads of All DOJ Components DATE: JUN 15 1977

FROM : Quinlan J. Shea, Jr., Director
Office of Privacy and Information Appeals

SUBJECT: Freedom of Information Act

Deputy Attorney General Flaherty has asked me to send you the attached copy of a letter from Attorney General Bell to the heads of all Federal Departments and Agencies, advising them of this Department's position on defending suits against the Government under the Freedom of Information Act. The basic standard enunciated in his letter is that denial of access to requested records should not occur unless the public interest requires it, because actual harm to some legitimate public or private interest would result from release. This must also be the basis on which this Department takes action at the administrative stage of processing requests for access to records under this Act.

The intent of the Freedom of Information Act is to produce the maximum possible disclosure of government records to the public. Each of you may want to review the standards and policies now being followed within your component to insure that this goal is being met. When this Department, at the direction of the Attorney General, is telling other agencies that we will not defend F.O.I. suits against them unless the test of "actual harm" is satisfied, it is obvious that we must apply that same rigorous standard to ourselves.

Your cooperation and support will be appreciated.

May 5, 1971

Office of the Attorney General
Washington, D. C. 20530

LETTER TO HEADS OF ALL FEDERAL DEPARTMENTS AND AGENCIES

Re: Freedom of Information Act

I am writing in a matter of great mutual concern to seek your cooperation.

Freedom of Information Act litigation has increased in recent years to the point where there are over 600 cases now pending in federal courts. The actual cases represent only the "tip of the iceberg" and reflect a much larger volume of administrative disputes over access to documents. I am convinced that we should jointly seek to reduce these disputes through concerted action to impress upon all levels of government the requirements, and the spirit, of the Freedom of Information Act. The government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding. In order to implement this view, the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions in the Act. Let me assure you that we will certainly counsel and consult with your personnel in making the decision whether to defend. To perform our job adequately, however, we need full access to documents that you desire to withhold, as well as the earliest possible response to our information requests. In the past, we have often filed answers in court without having an adequate exchange with the agencies over the reasons and necessity for the withholding. I hope that this will not occur in the future.

In addition to setting these guidelines, I have requested Barbara Allen Babcock, Assistant Attorney General for the Civil Division, to conduct a review of all pending Freedom of Information Act litigation being handled by the Division. One result of that review may be to determine that litigation against your agency should no longer be continued and that information previously withheld should be released. In that event, I request that you ensure that your personnel work cooperatively with the Civil Division to bring the litigation to an end.

Please refer to 28 CFR 50.9 and accompanying March 9, 1976 memorandum from the Deputy Attorney General. These documents remain in effect, but the following new and additional elements are hereby prescribed:

In determining whether a suit against an agency under the Act challenging its denial of access to requested records merits defense, consideration shall be given to four criteria:

(a) Whether the agency's denial seems to have a substantial legal basis,

(b) Whether defense of the agency's denial involves an acceptable risk of adverse impact on other agencies,

(c) Whether there is a sufficient prospect of actual harm to legitimate public or private interests if access to the requested records were to be granted to justify the defense of the suit, and

(d) Whether there is sufficient information about the controversy to support a reasonable judgment that the agency's denial merits defense under the three preceding criteria.

The criteria set forth above shall be considered both by the Freedom of Information Committee and by the litigating divisions. The Committee shall, so far as practical, employ such criteria in its consultations with agencies prior to litigation and in its review of complaints thereafter. The litigating divisions shall promptly and independently consider these factors as to each suit filed.

Together I hope that we can enhance the spirit, appearance and reality of open government.

Yours sincerely,

Griffin Bell

Griffin B. Bell
Attorney General

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UNITED STATES GOVERNMENT

Memorandum

O : Quin Shea
Director
Office of Information and Privacy Appeals

DATE: June 2, 1977

ROM : Peter F. Flaherty
Deputy Attorney General

Pete Flaherty

JBJECT: FOIA Appeals

The protections of 5 U.S.C. 552(b)(7)(A) -- intended to preclude interference with law enforcement activities -- should not be used to conceal unlawful activities, regardless of the intent with which those activities were conducted. Similarly, just as this Department will not obtain information directly by means of unlawful activities, we will not shield with 5 U.S.C. 552(b)(7)(D) information which was initially obtained through the use of such means by other persons or law enforcement organizations. Neither the use nor methodology of unlawful investigative techniques or procedures is to be protected by reliance on 5 U.S.C. 552(b)(7)(E).