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ACCESS RESTRICTIONS TO RECORDS IN THE CUSTODY OF THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION OF THE UNITED STATES OF AMERICA

GREG BRADSHER

The United States system of government depends upon a well-informed citizenry and the ability for it to access information, including information contained in government records. Our democratic principles also require that the American people be informed of the activities of their Government. Despite our belief in access to information, throughout our history, the national interest has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, and our participation within the community of nations. Determining what government information should be withheld, from whom and for how long, is addressed by laws, regulations, and executive orders. This brief article's purpose is to explain how the National Archives and Records Administration (NARA) of the United States is governed by and implements those laws, regulations, and executive orders.

The National Archives and Records Administration¹ has custody of those Federal Government records that have been appraised as having continuing value to the Government and the public. It attempts, to the fullest extent possible, to make these records available to researchers. Most accessioned records are open to the public in their entirety. However, NARA has a responsibility to screen² some series of records to identify and withhold information that cannot be made available to researchers. Records are screened under the provisions of the Freedom of Information Act (FOIA; 5 U. S. C. 552, as amended). This Act requires that all information contained in the records of Executive Branch agencies of the Federal Government be made available to the public unless the information falls within one of the nine exemptions outlined in the Act.

There are nine categories of exemptions: National security-classified information (b)(1) (these are the sections in the Act where the exemption is cited); Information related solely to the internal personnel rules and practices of an agency (b)(2); Information that is specifically exempted from disclosure by statute (b)(3); Trade secrets and commercial or financial information obtained from a person and privileged or confidential (b)(4); Inter-agency or intra-agency memorandums or letters which would not be available by law to a party ■ 69

other than an agency in litigation with the agency (with NARA in this case) (b)(5); Personnel and medical files and similar files which, if released, would cause a clearly unwarranted invasion of personal privacy (b)(6); Information compiled for law enforcement purposes and could reasonably be expected to interfere with enforcement proceedings, deprive a person of a right to a fair trial or impartial adjudication, constitute an unwarranted invasion of personal privacy, disclose the identity of a confidential source, disclose sensitive techniques and procedures for law enforcement procedures, or endanger the lives or physical safety of any individual (b)(7); Information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions (b)(8); and, Geological and geophysical information and data, including maps, concerning wells (b)(9). Exemptions (b)(5), (b)(8), and (b)(9) are rarely subject to NARA review.

NATIONAL SECURITY INFORMATION – FOIA EXEMPTION (B)(1)

National security information is exempted from disclosure. NARA may disclose records containing national security-classified information only in accordance with the provisions of Executive Order No. 12958 Classified National Security Information (April 17, 1995).³ Although NARA cannot release any classified information, without appropriate agency guidelines, it does process all requests for declassification and sees that the appropriate review is carried out.

INFORMATION ABOUT INTERNAL PERSONNEL RULES AND PRACTICES OF AN AGENCY AND PROTECTION AGAINST TERRORIST ATTACK AND POTENTIAL TARGETS – FOIA EXEMPTION (B)(2)

Records that contain information on substantial internal matters of agencies that could risk circumvention of a legal requirement, such as a statute or an agency regulation, may be withheld from disclosure. This exemption allows for the protection of information relating to critical systems, such as computer security plans or law enforcement or other sensitive communications systems; plans detailing the physical security of a Government building or facility; law enforcement training manuals or investigative manuals used by agencies; agency litigation strategy and tactics; and other information, which if disclosed would

70 ■ impede the effectiveness of an agency's law enforcement activities or would

facilitate the circumvention of a statute or agency regulation. The United States Department of Justice has stated that this exemption also protects the release of information that assesses an agency's vulnerability to some form of outside interference or harm by identifying those programs, systems, or facilities deemed most sensitive and describing specific measures that can be used to counteract such vulnerabilities.

INFORMATION EXEMPTED FROM DISCLOSURE BY FEDERAL STATUTE – FOIA EXEMPTION (B)(3)

By Federal statute some records are closed to researchers. Some statutory restrictions apply to certain records of a specific agency, such as the population census records of the Bureau of the Census.⁴ Other statutory restrictions apply to specific types of information wherever it occurs, such as Restricted Data and Formerly Restricted Data (atomic energy information).⁵ Among the major statutory restrictions are Grand Jury Information. This includes documents that identify the exact investigative focus of the grand jury or show the inner workings of the grand jury, such as transcripts of grand jury testimony, lists of grand jury witnesses or jurors, grand jury subpoenas, marked grand jury exhibits, and electronic indices to these types of records.⁶ Another important statutory restriction involves Federal tax returns and documents that incorporate tax return information.⁷ Another type of statutory restriction is Electronic Surveillance Records. This includes transcripts of wiretaps, documents that include information gathered from wiretaps, and logs of and subpoenas authorizing wiretaps.⁸ Statutory restricted records also include Intelligence Sources and Methods. These include records containing information about intelligence sources and methods, the names of intelligence agents, the names of certain agency personnel, and agency budgets.⁹ Also restricted are records containing information pertaining to the location of protected sites of historic, archeological, or other value the disclosure of which might harm the resource or impede its use.¹⁰

TRADE SECRETS AND COMMERCIAL OR FINANCIAL INFORMATION – FOIA EXEMPTION (B)(4)

Records containing trade secrets and commercial or financial information are subject to restrictions. This exemption protects the interests of the Government and submitters of information. This protection does not apply to commercial or ■ 71

financial information created by the Federal Government; rather this applies to information supplied to the Government by outside commercial entities. Information that meets the standard of a trade secret includes any secret, commercially valuable plan, formula, process or device that is used in making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort. Trade secret protection has been recognized for product manufacturing and design information. Information is commercial or financial if it relates to commerce. Examples of items generally regarded as commercial or financial include business sale statistics, research data, technical designs, overhead and operating costs, and information on financial condition. This category of information may be disclosed if, in the judgment of NARA, enough time (usually 10 years) has passed that release of the information would not result in substantial competitive harm. In the case of records less than 10 years old, NARA must notify the party that provided the information of its potential release and must weigh the party's views in the decision to withhold or release the information.

INFORMATION THAT WOULD INVADE THE PRIVACY OF AN INDIVIDUAL – FOIA EXEMPTION (B)(6)

Restricted are records that contain information about a living specifically identifiable individual that reveals details of a highly personal nature, which if released would constitute a clearly unwarranted invasion of privacy. This generally includes records that include medical information, personal financial data, Social Security numbers, intimate details of an individual's personal or family life, or similar personal data. NARA considers some personal information less sensitive if it concerns individuals who are well-known nationally, regionally, or locally (for instance, politicians and celebrities) because individuals in the public eye generally have less claim to privacy than private citizens.

The majority of the current case law states that the privacy of the dead is not protected. In a few very limited situations, such as for the families of the astronauts killed in the Apollo 1 fire or the Space Shuttle Challenger, NARA has extended privacy protection to the families of the decedents.

Under limited circumstances (such as researchers conducting statistical studies) NARA may make available privacy information to authorized researchers. The information in some cases may also be made available to the person who is the subject of the file.¹¹

INFORMATION RELATING TO LAW ENFORCEMENT INVESTIGATIONS – FOIA EXEMPTION (B)(7)

Investigative records from criminal, civil, or administrative (including background) investigations or information compiled during these investigations may be exempt from disclosure but *only* to the extent that such records or information could: a) Reasonably be expected to interfere with ongoing enforcement proceedings; b) Deprive a person of a right to a fair trial or an impartial adjudication; c) Reasonably be expected to constitute an unwarranted invasion of personal privacy;¹² d) Reasonably be expected to disclose the identity of a confidential source or information furnished by a confidential source;¹³ e) Disclose confidential law enforcement techniques;¹⁴ or f) Reasonably be expected to endanger the life or physical safety of any individual. The age and the sensitivity of the particular investigation are especially pertinent in screening and exempting from release law enforcement records. Some matters that were extremely sensitive upon the creation of a file become much less so with the passage of time. Other files may retain their sensitive nature for a much longer time, such as files that pertain to investigations of organized crime, espionage, terrorism, or those in which a foreign Government provides an agency with assistance or information.

WITHHELD ITEMS

When a record or file falls within one of the FOIA exemptions, the withheld item is removed from the file and replaced with a withdrawal card that provides a general description of the item (without revealing the exempted information), the date of review, and the reason for withholding. The reason for withholding is a specific FOIA exemption. When researchers request records that are exempted or security-classified NARA informs them that certain information is withheld under specific exemption(s) of the FOIA. A researcher may request that information cited on a withdrawal card filed with open records be made available. The exempted information is reviewed to determine if it can be opened. If records cannot be opened researchers may request information under the FOIA. When they do NARA must make available all segregable information from the record that does not fall within one of the specific exemptions. Often this involves “redacting” specific information.¹⁵

CONCLUSION

NARA takes its responsibility of withholding information just as seriously as it does its responsibilities of preserving and making available records. The terrorist events of September 11, 2001 and subsequently have made the NARA staff all that more thorough in its screening of records before releasing them to the public. Yet, the NARA staff devotes considerable energies to making as much information as possible available. They, like most all archivists, understand the ultimate importance of archival records to providing the basis for understanding where we have been, helping orient us to our present, providing guidance for our progress into the future.

Notes

- 1 For information about the holdings and locations of the archival facilities of the National Archives and Records Administration, as well as laws, regulations, and executive orders dealing with access see www.archives.gov.
- 2 "Screening" is the process of determining if a document contains "exempted information" that is not national security-classified. Records that are over 75 years old usually do not require screening, unless a Federal statute specifically covers them. In addition, many records that are less than 75 years old do not require screening because they are unlikely to contain exempted information or they have been made available to the public previously by the originating agency. "Exempted information" refers to information that may be legitimately withheld under one or more of the nine exemptions of the Freedom of Information Act.
- 3 This order prescribes a uniform system for classifying, safeguarding, and declassifying national security information. It was slightly amended by Executive Order 13142, Amendment to Executive Order 12958, Classified National Security Information on November 19, 1999.
- 4 Information collected by the Census Bureau under authority of Title 13 of the United States Code is restricted. This includes records containing demographic or economic information collected during the Decennial Censuses or periodic surveys of economic establishments. Only sworn Census Bureau employees may have access under 13 U. S. C. 9. Personal census information is open to the public 72 years after the Census.
- 5 Atomic Energy Information, including records containing information about weapons of mass destruction, is closed under 42 U. S. C. 2162.
- 6 Grand Jury information is closed under rule 6(e) of the Federal Rules of Criminal Procedure in perpetuity unless opened by court order.
- 7 Closed under 26 U. S. C. 6103 (Internal Revenue Code).
- 8 Closed under 18 U. S. C. 2510.
- 9 Closed under 50 U. S. C. 403g and 50 U. S. C. 402note.
- 10 Closed under the Archeological Resources Protection Act (16 U. S. C. 470), the National Historic Preservation Act (16 U. S. C. 470), or comparable provision.
- 11 The authorization must be in writing from NARA's Access Review Committee – 36 CFR 1256.4(c)(2). Records may be disclosed to staff of the agency that originated the information in the records in the performance of their official duties – 36 CFR 1256.16(b)(2).

- 12 NARA may withhold information in law enforcement files under exemption (b)(7)(C) about a living person that reveals details of a highly personal nature. Law enforcement files often contain information about witnesses and confidential sources in addition to the subject of the file. Privacy concerns apply to all individuals in a file. Such personal information may include, but is not limited to, medical records or information, financial data, discussions of legally or socially forbidden behavior, and unproven allegations of wrongdoing. These decisions are very subjective, but generally involve, drug use, excessive drinking/alcoholism, prostitution, sexually transmitted diseases, and other issues are recognized as “socially forbidden behavior”. Whether the person discussed is a private citizen or a public figure makes a difference in how NARA treats the information. Information of this nature is more sensitive in 1970 than in 1930, as an example of how time lessens sensitivity to certain information. (The parties are more likely to still be living if the information was obtained in 1970.) NARA may withhold this kind of information under (b)(6), but in this case it is the circumstance of an investigation that yields this information, which may or may not be true, so it is exempt under (b)(7)(C) as well. NARA may withhold information under both exemptions if the information meets the requirements of both exemptions.
- 13 NARA may withhold under exemption (b)(7)(D) the identities of sources that received promises of confidentiality. NARA also must withhold the information confidential sources provided, if the information would serve to identify them. This can occur in cases where only one individual or very few people knew the information and the identity of the source(s) can be determined through a process of elimination. NARA provides this protection to individuals, state, local and foreign authorities, or private institutions that have been promised confidentiality.
- 14 NARA withholds under exemption (b)(7)(E) the discussion of sophisticated law enforcement techniques whose use outside the Government is basically unknown. Investigative techniques, such as wiretapping, physical surveillance, fingerprint evaluation, mail covers, body wires, and other types of information collection, are generally well known to the public and mentions or discussions of these techniques in general would not be sensitive. However, a discussion of these techniques in more detail, such as how wiretaps are installed, the methods and personnel used to conduct a mail cover, or a detailed description of the type of body wire used for different types of surveillance, may be sensitive and subject to protection. In addition, NARA must protect commonly known information or publicly available information about these matters when, according to the Department of Justice, “the circumstances of their usefulness [...] may not be widely known”, or “their use in concert with other elements of an investigation and in their totality directed toward a specific investigative goal constitute a ‘technique’ which merits protection”. In these cases, the context of investigative techniques is exempted from release.
- 15 “Redaction” is the process of removing exempted information from a copy of a record made for this purpose in order to release the remaining information to the public.

RESUME

DES LIMITATIONS D'ACCES AUX ARCHIVES NATIONALES DES ETATS-UNIS

Le système de gouvernement des Etats-Unis repose sur l'existence d'une communauté bien informée et sur la capacité pour cette communauté d'accéder à l'information, y compris celle contenue dans les archives gouvernementales. Nos principes démocratiques exigent aussi que le peuple américain soit informé des activités de son gouvernement.

En dépit de notre foi en l'accès à l'information à travers nos archives, l'intérêt national a exigé que certaines informations soient maintenues confidentielles pour protéger nos citoyens, nos institutions démocratiques et notre action dans la communauté des nations.

Déterminer quelle information gouvernementale doit faire l'objet d'une réserve de communication, de qui émane cette réserve et pour combien de temps, est le rôle des lois, des règlements, et des ordres exécutifs. Le but de ce bref article consiste à expliquer comment la NARA est régie et comment sont mises en application ces lois, ces règlements et ces ordres exécutifs.

La NARA a la garde des données du gouvernement fédéral dont la valeur archivistique à long terme a été reconnue tant pour le gouvernement que le public. Elle cherche, au sens le plus large possible, à rendre ces données accessibles aux chercheurs. De fait, la plupart des données sont consultables sans restriction. Cependant, la NARA a la responsabilité de trier certaines séries de données pour identifier et retenir l'information qui ne peut pas être mise à disposition des chercheurs.

Les données sont triées selon les dispositions de la loi concernant la liberté d'information (FOIA; 5 U. S. C. 552, comme amendé). Cette loi exige que toute information contenue dans les dossiers des agences exécutives gouvernementales fédérales soit mise à disposition du public sauf à tomber sous le coup de réserves inscrites dans neuf cas d'exception.

On compte neuf catégories d'exceptions. Celles-ci concernent la NARA et les chercheurs lorsqu'ils font face

- à des informations relevant de la sécurité nationale;
- à des informations relevant uniquement des règlements internes du personnel et des pratiques d'une agence;
- à des informations qui sont statutairement non divulguables;
- à des secrets touchant les échanges, l'information privilégiée ou confidentielle obtenue d'une personne touchant le commerce ou la finance;

76 ■ – à des fichiers de personnel et des fichiers médicaux ainsi que tous les fichiers

similaires qui, s'ils étaient diffusés, constitueraient une atteinte clairement injustifiée de la sphère intime;

- à l'information compilée en vue de l'application de la loi et qui pourrait raisonnablement interférer avec les procédures d'exécution et qui priverait une personne du droit à un procès équitable ou à un jugement impartial, qui constituerait une atteinte injustifiée à la sphère intime, qui dévoilerait l'identité d'une source confidentielle ou de techniques et des procédures sensibles pour l'application de la loi, ou qui occasionnerait un risque pour la vie ou la sûreté physique de n'importe quel individu.

Lorsqu'une donnée ou un fichier relèvent d'une des exceptions de la FOIA, et que les données ne sont pas transmises aux chercheurs, ils peuvent demander que cette information soit mise à leur disposition. L'information soumise à réserve est alors réexaminée pour déterminer s'il est tout de même possible de la mettre à disposition.

Si finalement les données ne peuvent pas être consultées, les chercheurs peuvent demander l'information sous le sceau de la FOIA. Quand ils le font, la NARA doit mettre à leur disposition toute information tirée des enregistrements qui ne relève pas d'une des exceptions.

Il est de la responsabilité de la NARA de mettre autant de sérieux à retenir l'information qu'à préserver et mettre à disposition les données.

Les événements terroristes du 11 septembre 2001 et les événements subséquents ont eu pour effet que toute l'équipe de la NARA a analysé encore plus minutieusement les données avant de les mettre à disposition du public. Pourtant, le personnel de NARA développe une énergie considérable pour rendre l'information aussi accessible que possible. Comme la plupart des archivistes, le personnel de la NARA comprend l'importance ultime des données archivées: fournir la base nécessaire à la compréhension de ce que nous avons été, aider à nous orienter au présent et fournir une direction pour notre progrès dans l'avenir.

(Traduction: Frédéric Sardet)