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November 2, 2011

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Dear Attorney General Holder,

I request the Justice Department provide a detailed justification for a recently proposed rule that appears to permit the government to lie in response to certain Freedom of Information Act (FOIA) requests. The proposal authorizes the Justice Department, in some limited instances, to deny the existence of records when in fact those records do exist, even if the records may be exempt from disclosure for national security or other reasons.

The rule appears to contradict both transparency principles fundamental to a functioning democracy and the President's commitment to make "his administration the most open and transparent in history."[1] The Department should explain why it believes answering truthfully along the lines of "we can neither confirm nor deny records exist" has proven to be inadequate to protect sensitive information.

On March 21, 2011, the Department proposed a new rule for 28 C.F.R. The proposed section 16.6(f) would govern the manner in which the Department responds to requests for certain law-enforcement-sensitive information that FOIA excludes from disclosure. Specifically, it would authorize the Department to answer requests for such information "as if the excluded records did not exist."[2]

This directive seems inconsistent with the purposes for which FOIA was enacted.

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[1] Macon Phillips, *Change has come to WhiteHouse.gov*, THE WHITE HOUSE BLOG, Jan. 20, 2009, http://www.whitehouse.gov/blog/change_has_come_to_whitehouse-gov/.
[2] Freedom of Information Act Regulations, 76 Fed. Reg. 15236, 15239 (proposed Mar. 21, 2011) (to be codified at 28 C.F.R. pt. 16).

Congress passed FOIA in 1966 to establish a "philosophy of full agency disclosure" because an "informed electorate" is "vital to the proper operation of a democracy."[3] FOIA gives individuals presumptive access to identifiable, non-public agency records outside of nine categories of sensitive materials exempt from disclosure.

FOIA contains provisions that authorize an agency to withhold certain sensitive materials, but generally requires the agency to cite the applicable statutory exception in its reply.

Recognizing that there are cases in which merely admitting the existence of the material could expose confidential informants, tip-off the targets of investigations, or otherwise compromise classified information, Congress added section 552(c) to FOIA in 1986. This section permits agencies to treat covered records as "not subject to the requirements" of FOIA.

Some legislative history suggests Congress merely intended to permit agencies to issue so-called "Glomar" responses to "refuse to confirm or deny the existence of records" when disclosing their mere existence would harm law enforcement interests. However, citing other evidence, Attorney General Meese, issued a 1987 memo taking the position that section 552(c) could be used by agencies to deny falsely the existence of covered records.[4]

It is unclear to me which interpretation the Department and other executive branch agencies have been relying on in the intervening time.

To help me better understand the Department's interpretation of 552(c) and any circumstances that led it to propose the new rule, please answer the following questions in advance of publishing the final rule.

1. Under this Administration, has the Department interpreted 552(c) to require a "neither confirm nor deny"-type response or a "no records exist"-type response?
2. Since the 1987 Meese memo, how many times in 552(c) cases has the Department claimed no records exist when in fact they did?
3. If the Department has been using a "neither confirm nor deny"-type response since 1987 what specific events prompted it to decide that was inadequate and to propose 16.6(f) authorizing it to lie instead?
4. How many specific examples of cases can the Department provide in which a "neither confirm nor deny"-type response would not adequately protect law enforcement interests?

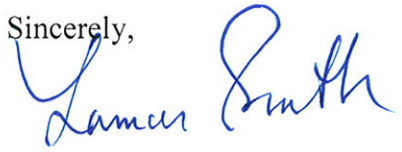
In a January 21, 2011, memorandum, the President directed that FOIA "should be administered with a clear presumption: In the face of doubt, openness prevails." You cited this as the guiding principle for your much touted 2009 revision to FOIA guidelines "restoring the

[3] S. REP. NO. 89-813, at 3 (1965).
[4] Memorandum from Edwin Meese III, U.S. Attorney General, on the 1986 Amendments to The Freedom of Information Act to the Executive Departments and Agencies (Dec. 1987).

presumption of disclosure."[5] That you now propose to authorize lying suggests you believe a truthful "we neither confirm nor deny" response would undoubtedly compromise sensitive records.

As Chairman of the House Judiciary Committee responsible for Justice Department oversight, I would like to examine and understand the Department's rationale for the new rule. Without adequate justification, I would worry that proposed section 16.6(f) could hinder the ability of private citizens to act in an informed manner in exercising their political rights.

Sincerely,



Lamar Smith
Chairman

cc: The Hon. John Conyers, Jr.

[5] Memorandum from Eric H. Holder, Jr., U.S. Attorney General, on The Freedom of Information Act to the Heads of Executive Departments and Agencies 1 (Mar. 19, 2009) (available at http://www.justice.gov/ag/foia-memo-march2009.pdf); Press Release, Department of Justice, Attorney General Issues New FOIA Guidelines to Favor Disclosure and Transparency (Mar. 19, 2009) (available at http://www.justice.gov/opa/pr/2009/March/09-ag-253.html).