

## **When is the Pentagon exempt from revealing the truth?**

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### **Abstract**

Nothing defines the public's waning trust in government more than George W. Bush's treatment of the Freedom of Information Act (FOIA) as it relates to the Department of Defense.

In December 2005, The Defense Authorization Act was passed by the Congress of the United States which renders the Defense Intelligence Agency's operational files fully immune to FOIA requests. In short, the Department of Defense has been granted exemption from FOIA requests. Said requests are the central mechanism by which watchdog groups, journalists and the general public can access federal documents.

Naturally, the concern is that abuse is much more likely to occur because there is no public oversight of the activities of the Defense Intelligence Agency. This exemption expires, due to an imposed two-year sunset date, in December 2007.

If the U.S. government has nothing to hide, if its dealings are all above board, then why was this exemption ever granted to the Pentagon? The answer to this question and speculation about the impact of the government's abuse of power will be the subject of the forthcoming paper.

### **Introduction**

In America, the citizenry's right to access public information is considered sacred. Since 1966, with the adoption of the Freedom of Information Act (FOIA), access to public information has allowed watchdog groups, journalists and individuals to view federal documents. What some in the government would like to hide under a cloak of secrecy has been revealed through the efforts of those who subscribe to open information. But now this presumed right has been challenged. With the passage of The Defense Authorization Act in December 2005 by the Congress of the United States, which renders the Defense Intelligence Agency's operational files fully immune to FOIA requests, the Department of Defense has been granted exemption from openness (Phillips 2006, 61).

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Although there are certainly some documents that need protection from public scrutiny, the concern of those who oppose the DIA's new shroud focuses on "its new right to thwart access to files that may reveal human rights violations tied to ongoing 'counterterrorism' efforts" (Phillips 2006, 62). The fear is that without public oversight of DIA activity, abuse is more

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likely to occur. Then there is the debate over exactly what is an operational file. “According to language in the Defense Authorization Act, an operational file can be any information related to the conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services” (Phillips 2006, 62). It is understood that this garbled language is justified when the operational files deal with outlines of bombing sites during war or imminent acts of terrorism. Therefore, no-one would have wanted the Department of Defense to compromise its strategy when it planned to bomb Baghdad. No-one would have wanted the Department of Defense to reveal the alleged plot to bomb the New York City subway system until it was foiled. But, by the same token, most everyone wants to know about and act on the atrocities that occurred, for example, at Abu Ghraib.

### **Freedom of Information Act**

The Freedom of Information Act, signed into law by President Lyndon B. Johnson in 1966, allowed for the release of information controlled by U.S. government agencies. Americans are caught in a struggle between the public’s right to know vs. the individual’s right to privacy. When you add national security to the mix, some individuals may take advantage of this lopsided equation and err on the side of nondisclosure. The FOIA was designed to alleviate the confusion and so it has. “However, it is in the exemption to solicitation of information under these acts that problems and discrepancies arise. The nine exemptions to the FOIA address issues of sensitivity and personal rights” (FOIA 2007). And it is in the first exemption, to keep

secret information “in the interest of national defense or foreign policy” (FOIA Update 1996) that many problems lie.

It is important to note, for matters that will be treated here, that the FOIA applies only to federal government agencies. It is also noteworthy that in all cases, the President has unlimited power in declaring some information off-limits or classified due to a concern for national security. Thus, the question arises that, based on this power, why in 2005 did the Bush Administration push to achieve greater immunity from the FOIA? Were there numerous cases of abuse and misconduct to hide? Was the Pentagon tired of dealing with questionable acts in the name of national safety? The answers to these questions will be addressed after a look at several cases which needed to be classified.

### **Classified Information**

According to *Intelligence Encyclopedia*, “classified information is any data or material that belong to the federal government and relate to sensitive topics such as military plans or the vulnerabilities of security systems. . . . Access to information thus ‘classified’ is restricted on the basis of its relative importance, the consequences that would follow if it were passed to the wrong parties, and the individual’s ‘need to know’ that information” (*Intelligence Encyclopedia* 2003). In other words, there are those cases when the Pentagon should be exempt from revealing information. Case in point: the bombing of Iraq. In the evening hours of March 19, 2003, the United States began bombing Baghdad. The first strikes were on the outskirts of the city, but as time progressed so did the move into the heart of Baghdad. Had the Department of Defense

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revealed the bombing sites before the coalition forces moved in, the lives of many more American soldiers would have been lost. Although this seems like a given, when one is caught up in an FOIA request, it can be overlooked. It would have been a grave mistake for this information to have been released and published. But isn't this information protected under the first exemption cited earlier? Why, then, would the administration also need greater immunity granted in the 2006 National Defense Authorization Act?

Similarly, releasing information on a threatened plot to bomb the New York City subway system would have also been a mistake. Through surveillance information gathered by the New York City Joint Terrorism Task Force, three individuals were taken into custody before four or five cylindrical pipe bombs in their possession could be detonated. "According to a federal complaint . . . , Abu Mezer told investigators that he and his accomplices had planned to use the bombs on the subways and elsewhere in New York" (Daily Intelligence Report 1997). Had word of this been published, the act might have materialized. Before the Task Force could have accomplished its goal, the alleged bombers might have been successful. But the first exemption to FOIA worked; since this was a matter of keeping information secret in the interest of national defense, nothing was published. Again, then, why the need for a special exemption for the Pentagon?

The first exemption also worked for the following plots foiled by U.S. authorities:

- \*The West Coast Airliner Plot - mid-2002
- \*The East Coast Airliner Plot - mid-2003
- \*The New York Stock Exchange Plot - August 2004
- \*The Los Angeles-area Military Bases Plot - August 2005

In other words, all four of these plots, in addition to several others, never materialized. The first exemption protected information about them and the actions of U.S. authorities were not compromised.

Most recently, the first exemption to the FOIA worked as the plan to blow up the John F. Kennedy International Airport in New York was foiled. As far back as 2004, the U.S. government had an informant in place who helped compromise the work of the four men charged with conspiracy to blow up the airport. “The FBI had been tracking the alleged plot since 2006 . . . (it) stretched from New York to the Caribbean and South America . . . .” (Savage 2007, 1). Had the informant’s identity been obtained sometime between 2004 and 2007, the man’s surveillance trips to the airport with the suspects, travels abroad to meet with supporters” (McShane 2007, A2) may have been revealed. But this didn’t happen in 2004 and 2005 before the most recent clamp on the freedom of information was enacted. If the system worked, why was it changed?

### **The Exemption**

What makes 2006 and 2007 so different? What has the Pentagon done or failed to do that the current Bush Administration wanted to hide? His action at the end of 2005 was a departure from that of his predecessors. In fact, the Defense Intelligence Agency became “the fifth intelligence agency to receive this operational files exemption which permits it to exclude from its FOIA searches files that ‘document the conduct of foreign intelligence or counterintelligence operations’” (Public Policy News 2006). Under this proposal, “once officials designate a file as

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FOIA-exempt, there will essentially be no opportunity to remove the exemption until ten years later, when officials conduct an internal ‘decennial review’ of the file’s ‘public interest’ value. Critics charge that this review protocol is inefficient and lacks adequate oversight mechanisms to ensure accountability” (Chen 2005).

Looking at the FOIA requests from 2000-2005 may offer an explanation as to why the push for this exemption. Pentagon records reveal that in that five-year period, “more than 10,000 requests” were made (Byrne 2005). The requests included:

- \*Mistreatment of Prisoners in Iraq
- \*President George W. Bush’s National Guard Service
- \*Payroll Information for the Coalition Provisional Authority in Iraq
- \*Defense Department Contracts with Public Relations Firms
- \*Charge Sheets for Those Accused of Prisoner Abuse

And then one that appeared in May 2005 during the very same time that the exemption was being pushed by the Department of Defense. “Last week, the Pentagon released more than 700 photos taken at Dover Air Force base and other military facilities depicting honor guard ceremonies for soldiers killed in war, taken by official military photographers. There’s nothing terribly shocking in these images - just solemn processions of flag-draped coffins. But for the public, they were startlingly unfamiliar. The Pentagon bans media from Dover, and it wasn’t until University of Delaware Professor Ralph Begleiter sued that the Pentagon granted his FOIA request for the photos. Begleiter took his cue from journalist Russ Kick who last year won access to Dover pictures through a FOIA request. Begleiter says this latest release of photos should make it harder for the government to ‘hide the human cost of the war from the American people’” (Garfield 2005).

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These photos, this image of a war the public increasingly has become opposed to, is certainly one of the topics the Bush Administration would rather not see in the pages of the nation's newspapers or on the national television news broadcasts. The administration says it's a matter of privacy and sensitivity. But "no issue of privacy or sensitivity arose when a Bush campaign commercial showed a flag-draped firefighter being carried from ground zero in New York" (Schorr 2004). The difference is obvious. Flag-draped coffins of soldiers killed in Iraq can only hurt the administration's image; that of a firefighter who lost his life on 9/11 can only help the administration's cause. "I cannot avoid the suspicion that President Bush - who has yet to attend a funeral service for any of the honored dead that he sent to war - has no interest in calling attention to the mounting number of casualties . . ." (Schorr 2004). Since no individual identification is visible in any of the pictures, this action is not about privacy but rather the administration's heavy-handed censorship of the realities of war.

That same censorship became well known as information about prisoner abuse at Abu Ghraib and Guantanamo Bay began to surface. As early as June 2004, the Department of Defense withheld records concerning the abuse. At that point, however, the American Civil Liberties Union (ACLU) filed a Freedom of Information Act lawsuit which basically went unanswered. A review of documents released to the ACLU under FOIA in the months following the June 2004 lawsuit shows a decrease in explanations and an increase in those documents which "show Pentagon silence led to prisoner abuse" (aclu.org 2007). As time passed, the Bush Administration also put a clamp on the charge sheets filed as the abuse continued. These sheets are the definitive record of human rights violations. The Defense Department "has attempted to

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justify its denial using statutes in the current FOIA law that allow information to be withheld to protect national security” (Chen 2005).

On July 22, 2005, government officials were supposed to release photos and videos relating to the abuse and torture of prisoners held abroad, but they refused. “The government is raising newfound reasons for withholding records to which the public has an undeniable right,” said Amrit Singh, a staff attorney with the ACLU. ‘Instead of releasing these records and holding officials accountable for detainee abuse, the government now seeks to shield itself from public scrutiny by filing these reasons in secret’” (aclu.org 2005). In short, the photos and videos may never be made public. What has been made public came only as the result of the ACLU lawsuit.

One explanation for the government’s actions: to stop the flow of information which showed connections between Abu Ghraib abuse and Guantanamo Bay. Techniques such as using dogs to intimidate, clothing removal and sleep deprivation were learned in Guantanamo and provided as guidelines to interrogators at Abu Ghraib. This information was obtained from the charge sheets of those being accused; in tightening the knot around free information, the Bush Administration has included those sheets under the operational files definition.

Definitive records on the billions of U.S. taxpayers’ dollars unaccounted for in the Iraq War is yet another reason the Pentagon would prefer tightening the hold on its documents. One controversy involves a \$33 million contract between the Pentagon and about 150 Iraqi exiles orchestrated by then Deputy Defense Secretary Paul Wolfowitz, to plan a new government when

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Saddam Hussein fell (Calbreath 2004). “The exiles were placed on the payroll of Science Applications International Corp. The San Diego company . . . set them up in a heavily guarded office building not far from the Pentagon, where they sketched blueprints for a new Iraq” (Calbreath 2004). Once Baghdad fell, contract money in the billions of dollars began flowing to SAIC. These contracts covered everything from training Iraqi soldiers to launching a television network. But in June 2004, the U.S. General Accounting Office “ - echoing an earlier investigation by the Defense Contract Audit Agency - found that the Pentagon had ‘overstepped the latitude provided by competition laws’ by not requiring competitive bidding on some of the Iraq projects” (Calbreath 2004).

This questionable move was further underscored by the formation of the Coalition Provisional Authority (CPA). This agency, in existence for fifteen months, was a Division of the Department of Defense. “Today, no-one can account for billions of . . . dollars or even suggest how the money was spent. . . . Considerable fraud has been alleged regarding American companies, much of which can never be addressed because the Bush administration does not regard contracts with the CPA as pertaining to the U.S. government, even though U.S. taxpayer dollars were involved in some transactions” (Giraldi 2005). Between executive orders already in place and the use of no-bid contracts and non-overnment agencies to control the disbursement of funds without scrutiny, why was the 2006 exemption to the FOIA needed?

### **Proposed Defense Authorization Act for 2007**

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Operating on the basis of the 2006 Defense Authorization Act, the administration's bill for 2007 "includes language that would allow the Department of Defense to conceal information 'concerning' weapons of mass destruction by creating a new exemption to the Freedom of Information Act" (Sunshine in Government Initiative 2006). The Pentagon is concerned about all information relating to Weapons of Mass Destruction. The over broad exception not only duplicates existing secrecy rules but also endangers the free flow of local and state information. "The secrecy provision would pre-empt state and local disclosure laws. It would also encompass information held by private companies" (Sunshine in Government Initiative 2006).

It is apparent that Bush's defiance to provide WMD intelligence information is only getting worse. In 2005, the administration failed to answer questions or turn over documents requested by 52 Congressmen. "The democratic lawmakers are seeking information on whether President Bush doctored WMD intelligence data to justify the Iraqi War, a hotbed issue for millions of Americans with over 500,000 officially writing Bush, asking for immediate answers" (Szymanski 2005).

So nothing has changed. The Bush Administration did not want to answer questions about Iraq in 2003 or 2005 or 2007. The strength of the FOIA has been depleted by one exception after another as the desire to control information continues.

### **Summary**

On June 8, 2007, on the same day the toll of American soldiers lives lost in Iraq passed the 3,500 mark, an Associated Press poll revealed that the President's approval rating was once again at its lowest point. "The survey . . . indicated widespread discontent over how Bush is

handling the war in Iraq, efforts against terrorism, and domestic issues. . . Only 32 percent of the poll participants said they were satisfied . . . “ (Fram 2007, A4).

Knowing Americans’ thirst for openness in their government’s dealings and the administration’s efforts “to circumvent the entire FOIA system by protecting all so-called ‘operational files’ from ever being considered for release,” (Chen 2005) could be one explanation for the President’s growing unpopularity. The very methods of secrecy employed have lead to the public’s discontent with its leader and his administration.

Despite this fact, the desire to strangle the outpouring of information from the Pentagon increases. In 2004, Rep. Henry A. Waxman released a report which examined secrecy in the Bush Administration. “The report analyzes how the Administration has implemented each of our nation’s major open government laws. It finds that there has been a consistent pattern in the Administration’s actions: laws that are designed to promote public access to information have been undermined, while laws that authorize the government to withhold information or to operate in secret have repeatedly been expanded. The cumulative result is an unprecedented assault on the principle of open government” (Yurica Report 2004). The practice has only worsened in the past three years.

If the Bush Administration is willing to take such a hit in the polls, the only conclusion can be that the release of all the requested information would be more damaging. Or, giving in to requests for openness would be yielding power. Thus, with secrecy comes the power to

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control. Maybe George Bush learned that at Yale when he was a member of the infamous Skull and Bones Society, noted for its secrecy.

What all of this has done - the executive orders, the exemptions, the exceptions - has shaken the general public's faith in its government. The continued decline in ethical principles and moral obligations by the Bush Administration has threatened the very freedom the country was built upon. So, when is the Pentagon exempt from revealing the truth - only in **bona fide** cases of national security.

In the final analysis, maybe the Bush Administration has an appropriate justification for all the secrecy.

Maybe the security of America's citizenry is in jeopardy.

Maybe removing the blinders would keep Americans up at night.

Maybe learning of other heinous crimes like those at Abu Ghraib would be too overwhelming.

Maybe knowing of these atrocities would result in a push to change the government.

Maybe we should just trust in our government. Or maybe, just maybe, justice and morality are much too sacred for us to relinquish.

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