

OBAMA'S DOJ ADVOCATED LYING TO JUDGES IN JUNE 2009

Back in 2006, a bunch of Islamic groups FOIAed the FBI to find out what kind of records the FBI had on them. The FBI blew the request off, so in 2007, the groups sued. When the groups got their data, they complained the FBI had improperly labeled much of the files as outside the scope of their request and in the case of CAIR, clearly not provided all the documents it had. Upon review, Judge Cormac Carney realized the government had lied to him about what was in the documents and the reasons they withheld information. His opinion in response, first written in 2009, was just rewritten in unclassified form and released. It's a remarkable glimpse into the government's disdain for separation of powers.

Much of Carney's ruling responds to a government brief dated June 19, 2009 that remains sealed. But Carney's ruling makes it pretty clear what the government argued. It suggests the government took Subsection 552(c) of FOIA—which allows the government to withhold information on ongoing criminal investigations, informant identities, or national security—and argued that it permitted the government to lie not only to plaintiffs in a FOIA suit, but also to the judge overseeing the suit.

Subsection (c) thus applies in the rare circumstance in which identifying the basis for withholding information or even disclosing the existence of a record could itself compromise an ongoing criminal investigation, the identity of a confidential informant, or classified foreign intelligence or international terrorism information. *Id.* In this limited context, the FOIA authorizes an agency to withhold information from a requester without

disclosing its basis for doing so. Id. Nothing in Subsection (c), however, allows an agency to withhold information from the Court.

Carney's ruling goes on to make clear that the government used a 1986 Ed Meese memo interpreting this exemption—stating that the government could tell a FOIA requester that no responsive records exist—and argued that Meese had condoned telling a court that no responsive records exist.

The Government's policy is to inform a requesting party that there are no records in instances in which the agency determines that "disclosure of the very existence of the records in question 'could reasonably be expected to interfere with enforcement proceedings,'" or "the mere act of invoking Exemption 7(D) in response to a FOIA request tells the requester that somewhere within the records encompassed by the scope of his particular request there is reference to at least one confidential source," or "the very existence or nonexistence, is itself a classified fact." Id. at 20–21, 23, 25.

Despite its broad interpretation of the law enforcement exemptions and the new Section 552(c) exclusions, the Attorney General's Memorandum does not condone lying to the Judiciary. To the contrary, the Attorney General's Memorandum prohibits such conduct.

And finally, Carney's ruling makes it clear that the government argued that even filing an in camera filing telling the judge that it had withheld records under this subsection would compromise national security.

Filing an in camera declaration concurrently with its public filings

would not have compromised national security, and the Government's argument to the contrary is simply not credible.

All of which leads to this true, but seemingly outdated, conclusion from Carney.

The Government argues that there are times when the interests of national security require the Government to mislead the Court. The Court strongly disagrees. The Government's duty of honesty to the Court can never be excused, no matter what the circumstance. The Court is charged with the humbling task of defending the Constitution and ensuring that the Government does not falsely accuse people, needlessly invade their privacy or wrongfully deprive them of their liberty. The Court simply cannot perform this important task if the Government lies to it. Deception perverts justice. Truth always promotes it.

Now, aside from the fact that this ruling makes it clear that the Obama DOJ wrote a filing in June 2009 that advocated lying to judges, the suit is interesting for several reasons. As EFF notes, the revelation that the FBI lied on this FOIA response may suggest it has done so in other FOIA suits. And who know? We know Obama's DOJ submitted several versions of revised declarations in the al-Haramain case in 2009; so it's possible they were advocating lying to judges in that case, too.

But it's also interesting for what it says about the underlying case. As I noted, the most obviously incomplete response that led to this suit came in the case of CAIR and Hussam Ayloush, the Executive Director of CAIR in LA. Originally, the FBI gave them a single document each, which was simply not credible given the amount of FBI surveillance of CAIR that had already been made clear.

Just as importantly, even as the government told CAIR it had just one document on it, CAIR was getting increasingly involved in a suit representing the Islamic Center of Irvine (that Center was not a party to this FOIA, though the Islamic Centers of San Gabriel Valley and Hawthorne were, and the suit makes it clear the informant reported on eight other mosques in Orange County and that Monteilh was part of a “broader surveillance program”) in a suit regarding an FBI informant’s violations of their civil rights.

An ex-con, Monteilh began working for the FBI in 2003. In 2006, he was asked to infiltrate the popular Islamic Center of Irvine, where he started attending prayers five times a day and donning an Islamic robe.

In May 2007, Monteilh recorded a conversation in a car with two worshipers, in which Monteilh suggested blowing up buildings. In the tape, one man agrees with Monteilh. But a few days after the conversation, the two worshipers contacted the Los Angeles chapter of the Council on American-Islamic Relations and reported Monteilh as a potential terrorist. Other worshippers told mosque leaders that they were scared of Monteilh and felt as though he was trying to entrap them. In June 2007, the mosque obtained a restraining order against the informant.

His relationship with the FBI deteriorated shortly afterwards and, after threatening to go public, Monteilh says he signed a non-disclosure agreement in exchange for \$25,000. In December 2007, Monteilh was arrested on a grand-theft charge and went to jail for 16 months.

Monteilh’s role as an informant was exposed in February 2009. Cormac Carney is the judge

assigned to this suit.

In other words, back in 2007 when the government was withholding information on informants from CAIR and a bunch of southern California Islamic Centers, another Islamic Center and CAIR were exposing the offensive actions of what would turn out to be a FBI informant. And by the time the government claimed it could lie to Judge Carney in 2009, details of Monteilh's informant activities were already becoming clear. And by the time Judge Carney ended his revised opinion last month with the sentence,

By disclosing that there are other documents that are responsive to Plaintiffs' request, Plaintiffs will not learn anything they do not already know.

Groups affiliated with the plaintiffs in the FOIA case had already submitted a complaint to Carney laying out the type of information the FBI used an informant in one Islamic group to collect and stating that the FBI told the informant that "every mosque in the area" was under surveillance.

Not only did the government claim it could lie to Article III judges. It did so to hide information that was already being exposed as improper.

Update: I've reread the complaint on the informant, and note that they discovered Monteilh through the arrest of Ahmed Niazi in February 2009. (See PDF 42-43) At his bail hearing, the FBI testified to information collected via a confidential informant, who was Monteilh. But what's particularly interesting is that when Monteilh was trying to elicit comments about violence, he did so with Niazi, who reported them to the cops and Hussam Ayloush. Ayloush reported him to the FBI. So Ayloush is actually named in this suit.

Also note: the reason Carney is presiding in the Monteilh suit is because it was determined to be a related case. The FBI subsequently tried to

have this case transferred to the judge in
Monteilh's suit against the FBI, but the judge
in that case declined.