Open Government Laws in the United States

第二東京弁護士会・大宮法科大学院大学主催
講演会「公益活動弁護論 — 情報公開訴訟を中心に」

アラン・モリソン氏紹介

Alan Morrison was selected by Ralph Nader to become the head of the new "Public Citizen Litigation Group" in 1972. He served at PCLG for more than thirty years, retiring in the spring of 2004. At the time of Morrison's departure, his longtime colleague David Vladeck (currently a professor at Georgetown University Law School) said:

“When Alan founded the Litigation Group in 1972, there was no trail to follow, no mentor to provide guidance. Alan was a pathblazer, inventing and refining the role of the public interest lawyer as he made his way. We owe our careers to Alan.”

Of the many important achievements of the PCLG, perhaps the most important work was PCLG‘s effort to promote government transparency by expanding America‘s open government laws. During Morrison‘s long tenure, the PCLG filed more than 300 freedom of information lawsuits, fighting government lawyers in order to get court orders to release government information and to improve government procedures for preserving and delivering information to requesters.

Sponsored by Omiya Law School and the Dai Ni Bengoshi Kai, on May 25, 2007, Alan Morrison delivered a speech at the Bengoshi Kaikan in Kasumigaseki. He described some of the most important features of American open government laws. The text of that speech follows.

アラン・モリソン氏はラルフ・ネーダー氏によって1992年に“Public Citizen Litigation Group”の新しい代表に選ばれました。彼は30年以上PCLGで働き，2004年春に退きました。モリソン氏が去るとき，長年の同僚であったDavid Vladeck氏(現在ジョージタウン大学ロースクール教授)は次のように述べました。

「アランが1972年にこのグループを設立した時には，たどるべき道や，導いてくれる指導者はいませんでした。アランは，前に進みながら公益弁護士としての役割を創造し，磨きをかけた開拓者です。私達がこの仕事でキャリアを築けたのは，アランのお陰です」

PCLGの多くの重要な業績の中で，おそらく最も重要な仕事は，アメリカの開かれた政府の法の透明性を促進したことです。モリソン氏の長い任期の中で，PCLGは300件以上の情報自由法の訴訟を行い，政府の情報の公開を命ずる裁判所命令を得るため，また請求者のために書類を保存，交付する手続を改善するため，政府の弁護士と戦いました。

アラン・モリソン氏は，大宮法科大学院と第二東京弁護士会の主催で2007年5月25日に霞ヶ関の弁護士会館で講演を行いました。彼はアメリカの開かれた政府の法の最も重要な特徴のいくつかを説明しました。以下がそのスピーチのテキストです。

Open Government Laws In The United States

Alan B. Morrison

Introduction

It is a great pleasure to be invited to address such a distinguished group of lawyers. I hope that I will be able to provide some useful information about the collection of laws in the United States that are generally referred to as "Open Government Laws." Some of you may ask, is the entire Government open for everyone to see? Of course, the answer is, "Not quite" or perhaps even, "Not close to it." But Americans, especially those who write our laws, love to give grandiose names to their handiwork, even when they know that the law does not come close to doing everything its name suggests. A more accurate description for these laws would be, "Laws that increase the openness of government over what it would be without them, but still keep many parts of government secret."

The laws on which I will focus my talk today apply only to the Executive Branch of the federal government, which includes all of the major departments — such as Defense, State, Justice, and Health & Human Services — as well as such important agencies such as the Environmental Protection Agency and the Central Intelligence Agency, but they do not apply to the President, who heads the Executive Branch, and his closest advisers. The Legislative Branch has no comparable laws, but in practice most of its business is conducted in the open. At the end of my talk, I will briefly discuss the doctrine of openness as applied to the Judicial Branch.

The first of these laws, on which I will spend most of my time, is the

Freedom of Information Act, 5 U.S.C. §552, or "FOIA" as it is referred to by those who use it or have to respond to requests made under it. It applies to records of all types, including written, photographic, tape, and electronic. The second, the Government-in-the-Sunshine Act, applies to certain meetings of government officials. 5 U.S.C. §552b. The third is the Federal Advisory Committee Act (called "FACA"), 5 U.S.C. Appendix 1, and it applies to both the records and meetings of certain groups that provide advice to the federal government, and thus is a combination of FOIA and the Sunshine Act. Most states have their own FOIA and Sunshine laws, but not laws covering advisory committees, which are used much less often at the state level.

Federal Records Act

Before explaining the theory behind these laws and how they operate, there is one other important federal law that pre-dates these open government laws, but is vital to their effectiveness. That law is the Federal Records Act, and it tells those who work in the Executive Branch both which records they must keep and which ones they must discard. The first aim of the law is to be sure that no one disposes of records of historic and operational importance, for example, after an election when a new administration takes office, or an agency runs out of filing space. The second aim is to assure that records no longer needed are discarded, both to save money in storing them and to make it possible to find those records that are important without having to search through those that are no longer needed. This process is generally accomplished by having the National Archives and Records Administration issue schedules or lists of general types of records kept by all agencies that can be disposed of (often after a certain period of time) — for example, routine correspondence or employment applications — and those that have to be kept for longer periods and sometimes forever. And, because each agency has types of records that are unique to it, there are similar schedules for them as well. Finally, the Federal Records Act does not apply to the records of the President, but there is a special law that requires that he and his staff keep their records intact until the President leaves office, at which time those that are not kept for use by his successor are transferred to the National Archives, and they become

public, with certain exceptions, no later than 12 years later.

Freedom of Information Act

Now to the specifics of these open government laws.

Before FOIA was passed in 1966, records of federal agencies were, in theory, open to the public, but a person who wanted a record had to show a proper purpose for the request. The agency decided, on its own, whether the purpose was proper, and there was no right to go to court if the request was denied. Since agencies were generally at liberty to make public most of their records without such a request, and did so when they thought it was to their advantage, the prior law added almost nothing to the goal of openness. Not surprisingly, when FOIA was being considered in Congress, the agencies, and especially the people who worked there, were not in favor of it — they understood that nothing good could come to them from having to disclose documents that they had decided to keep secret. But Congress disagreed, and President Lyndon Johnson sided with Congress and signed the bill into law.

The law begins with the presumption that all agency records are public unless there is a good reason for them to be secret. Congress designated the reasons that justify keeping records secret in the Freedom of Information Act itself, as I will explain in a moment. The key reasons behind the presumption of openness have been described as (1) agency officials are doing the business of the public, and hence the public is entitled to know what they are doing, and (2) the public paid for these records to be created, obtained, and maintained, and therefore the public should be able to see them. The important point is that FOIA reversed the prior law so that agencies now had to show a proper purpose for withholding a document, not the other way around. FOIA goes even further by requiring that agencies make public, without a specific request, certain categories of records that the public is likely to need on a regular basis, such as various rules and other broadly useful material. Perhaps most important of all, a person whose request is denied can sue the agency and ask the judge to review the denial, under procedures that I will discuss later.

Information Exempt from Disclosure

There are nine specific exemptions under FOIA. Rather than go through them in numerical order, I have divided them into two broad categories, although, as you will see, some of them fit into both. The first category includes those exemptions that primarily protect the interests of the government, and the second primarily protects private interests. There is a great deal of law applicable to most of these exemptions, but I will only be able to give you a general idea of what the exemptions cover and what the theory is behind each exemption. In discussing the exemptions, I will refer to them by their numbered paragraphs within subsection 552 (b).

Exemptions that Protect Government Interests

The first government–protective exemption is Exemption 1 that applies to information that has been properly classified in the interest of national security. This includes many of the records at the Departments of State and Defense, but not everything. There is a detailed Executive Order issued by the President, which he can change without needing approval of Congress, that sets the standards for classification. Those standards do contain some limits, but the breadth of the valid reasons for classification are such that almost anything an agency claims to be properly classified will be upheld. No one, including the strongest proponent of open government, believes that there should be no exemption that would allow, for example, the Defense Department to withhold its specific plans for dealing with a missile attack by a foreign power, or for the State Department to keep secret its negotiations for resolving the disputes between Israel and its neighbors in the Middle East. The debate is over both how broad the power to classify should be and how long agencies should be able to keep once properly-classified documents secret.

The other major area in which the protection of the exemption is mainly to assist the government is Exemption 7, which applies to certain law enforcement records. Much of the use of this exemption relates to the enforcement of criminal laws, but it also applies to the many laws for which the enforcement is mainly and, in some cases, entirely civil. The Department of Justice files all of the federal

criminal cases in court, but many agencies are charged with enforcing laws whose violations are crimes, and hence they may have records that come within this exemption as well. On the civil side, almost every agency has some laws that give rise to some kind of civil enforcement proceedings, ranging from environmental, to drug safety, to labor relations, to income taxes, to meat inspection.

As originally enacted, Exemption 7 was quite broad so that any document in a file relating to a law enforcement proceeding of any kind was exempt, even if its disclosure could no longer harm the government's law enforcement interest in any way. Congress changed that in 1974 and added requirements that limit the exemption to situations in which the disclosure of a record may cause a specific harm to a legitimate government interest in law enforcement. The most obvious situation is where disclosure would reveal the existence of a proposed law enforcement proceeding or would prematurely make public information that might be used against the government at trial. Other exclusions include documents that would interfere with a defendant's right to a fair trial, disclose the identity of a confidential informant, or reveal special law enforcement techniques, such as a particular method of surveillance by the Federal Bureau of Investigation, better known as the FBI. Although this exemption is designed mainly to help law enforcement, it also safeguards persons who are informants or who otherwise assist the government, but whose identities are not generally known.

As is true of almost every organization, public or private, for-profit or nonprofit, there are internal discussions and exchanges of memoranda before most important policy decisions are made. In addition, agency lawyers regularly give advice to their principals and staffs routinely report on events and make recommendations to their superiors. Like other organizations, government agencies recognize the value of obtaining candid advice, which often means advice that will not be spread beyond the person who receives it, and surely does not include making it available for anyone to see. Exemption 5 protects those internal agency records containing pre-decisional advice and similar documents exchanged between agencies where they have joint responsibilities. However, to the extent that such documents contained recitations of facts, apart from the recommendations,

the factual portions are not exempt. Again, the theory of this exemption is generally accepted, but its application has been questioned as the time between the recommendation and the request increases, and the interest of the person who gave the advice in keeping it secret diminishes and the historic interest in assessing the action taken becomes more significant. There is another exemption — number (2) — that covers other internal agency documents, but it pertains mainly to matters on which there is little public interest or which are also subject to other exemptions.

Exemption 3 is a catch-all provision that includes other statutes that create specific exemptions from disclosure. The theory behind this exemption is that FOIA should not supersede other non-disclosure statutes that Congress has enacted. Thus, the laws that restrict access to information collected by the Census Bureau from every American home, or that the Internal Revenue Services obtains when we file our income tax returns, are automatically incorporated in FOIA by Exemption 3. These statutes are considered largely government protective because it is thought that citizens would be much more reluctant to be forthcoming with the government, or would oppose the census or the tax laws in the first place, unless their privacy interests were safeguarded, but they also protect private interests as well. There are also very broad statutes that forbid disclosure of most records of the CIA and the National Security Agency (the agency that conducts intercepts of telephone calls, cable messages, and emails, among others), with the debate being whether those laws are too broad, given the interest of the public in these very invasive activities. The key fact about this exemption is that it applies only when Congress, not just an agency, has made the judgment that disclosure is not warranted, either by forbidding disclosure or by establishing narrow criteria under which an agency may withhold.

This raises another point that may not have been entirely clear before, but needs to be emphasized now. Unless a statute forbids disclosure, the exemptions are discretionary, and the agency can choose *not* to rely on them, with some limits that I will discuss in a few moments. This is especially significant for those exemptions that are for the agency's benefit, even in the national security area, where declassification is almost always an option — if the agency wants to release the information — a big "if."

Exemptions that Protect Private Interests

On the private side, Exemption 6 forbids the disclosure of medical, financial, or other personal records that would constitute a clearly unwarranted invasion of personal privacy. One of the main protections of this exemption is for the records of all federal employees, which can be disclosed only in very limited situations and which are also protected by the Federal Privacy Act, 5 U.S.C. §552a. In the main, this exemption is not controversial, although its application has led to some disagreement about when an invasion of personal privacy is overridden by a public interest. The courts have generally favored non-disclosure in those cases, saying that the public interest must be one relating to how the government is doing its job (or perhaps not doing its job, by not taking action against a famous or well-connected person), and not just the interest of members of the public in the person whose records are being sought.

The final significant exemption is Exemption 4, which protects trade secrets and confidential commercial and financial information. One aspect of this exemption is important to note: the records covered by it are mainly those that were created by persons outside the government, but submitted to the government for some legitimate government purpose. This is in contrast to the vast majority of records subject to FOIA that were created by government officials. Once obtained by an agency, the records become subject to FOIA and also subject to the Federal Records Act, which means they cannot be destroyed or given back to the submitter (unless a copy is made) except when authorized by that law. The theory behind this exemption is that businesses should not lose important secrecy protections simply because the government has the right to obtain certain information about the business as part of the government's regulatory or other responsibilities. The exemption also applies when a person voluntarily submits records to an agency, even if the agency might use its formal processes to obtain the same records. The theory here is that it is better for agencies to obtain records using cooperation, rather than having to go through the time, expense, and perhaps uncertainty of seeking to use the law to obtain them. Again, the theory of this exemption is not contested, but there are complaints from consumer groups and the press that this

exemption is used too often, not only to protect businesses, but also to shield agencies from charges that they are covering up their own deficiencies, a charge that is also made for other exemptions, such as national security and law enforcement. The final two exemptions are variations on Exemption 4, and they are Exemption 9 (oil and gas information) and 8 (banking information). The former has been the subject of very little use, and the latter somewhat more because it protects more information about banks than about other commercial activities.

Procedural Advantages for Requesters

The law allows agencies to impose charges for searching and reviewing for exempt material in response to FOIA requests and in some cases the cost of copying records. In general, those charges may be imposed only for large scale requests by commercial entities; the press and non-profit organizations, as well as individuals seeking records about themselves, are generally entitled to fee waivers.

None of these pro-disclosure rules would matter much at all without one additional change that FOIA made: it gave persons whose requests were denied the right to sue the agency that was withholding the records and provided a number of substantial advantages to the requester not normally found in litigation against the government.

First, the agency has the burden of establishing that one of the nine exemptions applies, contrary to the usual rule that presumes that the agency is correct and the challenger must persuade the court otherwise. The reason behind this change is simple: the general rule presumes that agencies are neutral in their decisions, but Congress knew that an agency decision not to release records was often the product of self-protection and thus was not entitled to the presumption of correctness.

Second, a suit may be brought by any person whose request was denied. Anyone in this room could make an FOIA request and sue in the federal court in Washington D.C. or any place where the records are located. There is no citizenship requirement, and corporations, partnerships, and unincorporated associations all can sue.

Third, the agency cannot simply claim an exemption: it must submit evidence, often in the form of public sworn statements by a person familiar with

the records, explaining why the exemption applies, and the requester is given a similar opportunity to submit counter-evidence. Thus, unlike most appeals from agency decisions, which are decided based on the administrative record made at the agency, FOIA cases are decided solely on the record made in court because that is the first opportunity a requester has to make any kind of a record in a neutral forum.

Fourth, the judge may examine the documents in camera, which means outside the presence of counsel for the requester. In some cases the court will also receive non-public testimony or affidavits explaining the basis for the withholding. And if the judge finds that only parts of the requested documents are properly withheld, the judge must order release of the remainder.

Fifth, if a requester substantially prevails in the lawsuit, the court will award attorneys' fees against the agency. This is an exception to the general rule in the United States that each party bears the costs of its own lawyer. The exception is necessary here because a prevailing requester does not receive any money to pay his lawyer, and the lawyer is not interested in copies of the documents that the government was forced to turn over as his legal fee.

Despite these many procedural advantages, winning a FOIA lawsuit is still a difficult task, largely because only the agency knows what is in the records, and it can describe them in the manner most favorable to its exemption claims. In addition, for a number of these exemptions — national security, law enforcement, and trade secrets — courts give agencies a large amount of deference, perhaps even more than Congress intended. But some of these lawsuits are won, and the filing of a lawsuit, or sometimes even the threat of it, can persuade an agency to release some, if not all, of the records sought. And without such a threat, the law would be largely ignored because all of the incentives for agency personnel are to maintain their secrets. No government employee ever received a promotion or a medal for making public records of his or her agency.

Electronic Records

When FOIA was enacted, the records sought were almost always paper records, but now the focus is on electronic records, not only for FOIA, but also for the rules on retention under the Federal Records Act. The government initially took the position that, if an electronic record were printed out, that satisfied both laws, but the courts rejected that notion, and have required agencies to keep and release records in electronic form, where they are often much more useful to the requester and more easily located by the agency. Keeping electronic records is not without its own problems, although it does save money on paper and file cabinets. Many such records were created on equipment no longer in use, with few technicians to service them, and spare parts very hard to locate. But overall, electronic records are generally preferred by most FOIA requesters and the agencies themselves.

"Reverse-FOIA" Cases

As noted before, most of the exemptions are discretionary, and even the mandatory ones are sometimes unclear in certain respects. Contrary to what I have suggested, in some cases the government actually decides to release documents that a private party (most often a business) has submitted and does not want made public. In those instances, after a submitter tells the agency why it should not release the documents, and the agency continues to disagree, the submitter can go to court and try to stop the release, in what are called "Reverse-FOIA cases." None of the advantages that are available to FOIA plaintiffs are available to submitters in reverse FOIA cases, but they do have a right to sue, which is better for them than no right at all.

The Open Meetings Act

The other two laws can be covered much more quickly, both because they are less significant and because they build on the basic FOIA concepts. The principal behind the Sunshine Act, which requires that certain government meetings be open to the public, is that the discussion of public business should take place in the open, that is under the bright light of the sun. The problem is that Congress did not enact a law that embodies that idea fully, but rather is much more limited. First, the law

applies only to the relatively small number of agencies that are composed of three or more members, and then only to the meetings of the members. Thus, because most agencies are headed by a single individual, including almost all of the most significant ones, the law does not apply to them. And it also does not apply to discussions between a member and his staff or among staff members only.

Second, the Act contains many exemptions similar to those in FOIA, but not including the internal-agency exemption, which would wholly undermine the law if it applied to meetings of the members. But there are other exemptions for meetings, including those at which personnel decisions are made — should we hire A or B to be the new general counsel — and meetings in which litigation is discussed.

Third, even the basic requirement of a public meeting can be evaded quite easily since it applies only if there is a quorum. For example, if there are five commission members, with a quorum of three, as long as only two members get together at a time, the law does not apply. Thus, a member can meet with all four colleagues separately, as can they, and the law becomes a nullity. Not only does the public not have the benefit of hearing these discussions, but the supposed benefit of a collegial debate among all commission members on important issues does not take place because all discussions are with only two people, and the others do not have the opportunity to hear those conversations. Despite these limitations, the Sunshine Act provides some public benefit at the federal level, and comparable laws at the state and local levels seem to be even more significant for reasons that are not entirely clear to me.

Federal Advisory Committee Act

The final law, the Federal Advisory Committee Act, was passed because agencies, as well as the President, were spending large amounts of money (relatively speaking compared to the overall budget for the government) to obtain advice from persons outside the government through specially convened advisory committees. There were no controls over their use and, significantly, their composition, and they met in secret and their records were not public. The most significant changes made by the law known as FACA are that meetings must be open, as

must the committee's records, with a few FOIA-like exemptions. In addition, the committee must have a balanced membership with respect to the viewpoints represented concerning the subject of the committee's work, so that the government does not receive one-sided advice or advice that simply rubber-stamps what the agency wanted to hear. Although far from perfect, FACA has made advisory committees far more open and far more balanced, although there are still some deficiencies. There is one other important limitation: the Act does not apply if all of the members of the committee are government officials, which is why the Vice President's Energy Task Force was found to be outside the law. Like FOIA and the Sunshine Act, persons who are denied access to meetings or committee records can go to court and sue the agency that established the committee.

Court Proceedings and Court Records

Finally, let me turn to access to court proceedings and court records where there is a long tradition of openness, based on both the common law and the First Amendment. The principal is that the courts are doing public business and should be open except in very limited circumstances in which the judge concludes that special reasons require secrecy. One category of cases that are generally closed involves criminal charges against young offenders, but otherwise civil and criminal cases are public, and anyone can watch them, if there is space in the courtroom. Similarly, all papers filed in court are open to the public, although the parties can ask the judge to seal certain records that might contain trade secrets or some kinds of extremely personal information about one of the parties. Even then, the law allows members of the press and other interested persons to challenge those secrecy orders, and the courts have been willing to examine the records closely to determine whether there is a justifiable basis for continued secrecy.

Conclusion

I have given you a very brief summary of open government laws in the United States. I have tried to convey their strengths and weaknesses, some inherent and some correctible if the lawmakers had the will to change them. Although they are not perfect, they remain a very important protection against abuses of power in the United States.