Chapter III

Expanding Privacy Rationales under the Federal Freedom of Information Act: Stigmatization as Talisman

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Abstract

Access to government information in a post-September 11 often involves the resolution of conflicts between privacy rights and the public interest inherent in information flow. On the one hand, information about any individual investigated by the government, or merely landing in an investigative file, might very well invade the privacy of the detainee by unduly stigmatizing them. In fact, such reasoning reflects a line of argumentation central to the federal government’s justification for denial of access: privacy interests, particularly the risk of stigmatization. This chapter reviews the origins and expansion of stigmatization as grounds for protection of information under the FOIA. Examination of several key post-Reporters Committee cases decided by the federal courts illustrates the scope of the problem, as stigmatization has gained a great deal of legal traction in recent years.
Introduction

In the days and months following the terrorist attacks of September 11, 2001, United States Justice Department agents detained more than 1,000 people for immigration violations and criminal violations. A small number were arrested as material witnesses who authorities believe may have information vital to prosecutors. In most cases, officials declined to release any information about the detainees, including where they were being held, the names of their lawyers, or the progress of their cases.

On November 27, 2001, at the height of the controversy over detainee secrecy, then-U.S. Attorney General John Ashcroft defended his refusal to release the names of hundreds of people detained in connection with the September 11 terrorist attacks, saying that doing so would create “a public blacklist” that would violate the detainees’ privacy rights (Eggen, 2001).1

“The law properly prevents the department from creating a public blacklist of detainees that would violate their rights,” Ashcroft said at a news conference, adding that none of those detained had been denied access to a lawyer. “They are not being held in secret,” he said.2

Such a contention depends entirely upon one’s conceptualization of secrecy. Certainly, those entrusted with detaining and prosecuting those swept up in the post-September 11 investigation knew the identities of those in custody; equally certainly, the public and press did not.

It is important to note that the basis of Attorney General Ashcroft’s contention—that providing public access to the names of those detained after the terrorist attacks would invade the privacy of the detainees by unduly stigmatizing them—was a well-calculated legal position and not the posturing of a public official defending secrecy for secrecy’s sake. Rather, this language reflects a line of argumentation central to the Justice Department’s most common justification for denial of access: privacy interests as defined by the United States Supreme Court in Reporters Committee for Freedom of the Press v. Department of Justice, a 1989 decision that dominates the FOIA landscape before and certainly after September 11.

Until Reporters Committee, courts weighing privacy claims made by federal agencies seeking to block a FOIA disclosure request had balanced the public and social interest in disclosure against the individual’s interest in protecting personal privacy.3 However, in Reporters Committee, the Department of Justice successfully argued for a change in this analysis.4 This new judicial analysis expands the scope of privacy under the FOIA while it restricts the scope of acceptable public interest arguments in favor of disclosure.5

The expansion of a central tenet of Reporters Committee—that disclosure of information about private individuals contained in certain investigative records can “stigmatize” those individuals and thus violate their right to privacy—constitutes