

## FREEDOM OF INFORMATION ACT

### Court Ordered Sealed Records

You have asked whether the Freedom of Information (FOIA) requires the release of court-martial records that were ordered sealed by a military judge when a FOIA exemption does not otherwise specifically apply to the subject matter of the sealed record. In our view, the FOIA does not require the Air Force to violate such an order by a military judge by requiring release of the record pursuant to a FOIA request. Further, to the extent Air Force records ordered sealed by a military judge pertain to personal information about any individual, FOIA exemptions (b)(6) and (b)(7)(C) can also be used to withhold the records in question.

The Supreme Court held that the FOIA does not require a federal agency to violate court orders sealing agency records to which the agency is subject to. As explained in pertinent part by the DC Circuit Court of Appeals in *Morgan v. United States Department of Justice*, 923 F.2d 195, 196-197 (DC Cir. 1991):

...the FOIA gives federal courts jurisdiction to compel an agency to produce records only if the agency has "(1) improperly (2) withheld (3) agency records." *Id.*; see also 5 U.S.C. § 552(a)(4)(B). Because a district court had already enjoined the CPSC from disclosing the accident reports, the Court in *GTE Sylvania* held that the CPSC did not "improperly" withhold the reports within the meaning of the FOIA. *Id.* at 387, 100 S.Ct. at 1202.

The Court based its holding in *GTE Sylvania* on two factors: (1) an agency does not abuse its discretion under the FOIA by honoring a court order enjoining the agency from releasing records because in such a case there "simply [is] no discretion for the agency to exercise," 445 U.S. at 386, 100 S.Ct. at 1201; and (2) respect for the judicial process requires the agency to honor the injunction, even if the agency objected to the issuance of the injunction in the first place. *Id.* at 386-87, 100 S.Ct. at 1201-02. The reasoning of *GTE Sylvania* thus indicates that the proper test for determining whether an agency improperly withholds records under seal is whether the seal, like an injunction, prohibits the agency from disclosing the records. If it does, the FOIA does not compel the agency to release the information.

In addition to the above basis for withholding the records under the FOIA, we understand in your situation the records pertain to an individual that otherwise would not be withheld under a FOIA exemption. However, in this case, it can be reasonably argued that the military judge's decision sealing these records in the context of the courts-martial substantially increased the personal privacy expectation of the individual that the records would not be released to the public; a bona-fide, substantial privacy interest that is not outweighed by the public interest. In such a case, FOIA exemptions (b)(6) and (b)(7)(C) can also be cited as authority to withhold the records.

Accordingly, we recommend the FOIA requester be informed of the above bases for withholding the requested records. The response letter to the requester should reference the *GTE* and *Morgan* decisions as well as, if applicable, FOIA exemptions (b)(6) and (b)(7)(C).

There may be (rare) situations where a FOIA requester is seeking Air Force records that were sealed by court order in a case where the Air Force (or DoD) was not a party or interested party in the litigation. In those situations, a case-by-case determination will have to be made based on the above holdings and other applicable guidance. To the extent one of the entities involved in the litigation was another Federal Agency, referral of the FOIA request to that Federal Agency is appropriate.

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