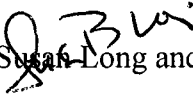





Transactional Records Access Clearinghouse
Syracuse University

MEMORANDUM

To: Robert F. Bauer and Steven P. Croley, Executive Office of the President
Miriam Nisbet, Office of Government Information Services

From:  Susan Long and  David Burnham, Transactional Records Access Clearinghouse (TRAC)

Date: April 5, 2011

Subject: ICE Resists Abiding by the Supreme Court FOIA Ruling

In an important ruling on March 7 – *Milner v. Department of the Navy* – the Supreme Court greatly reduced the authority of government to withhold records under an exemption to the Freedom of Information Act (FOIA) that some agencies have long used to limit the disclosure of records to the public.

Last week, however, an official in Immigration and Customs Enforcement (ICE) told TRAC that those who had requested and been denied access to documents under the FOIA prior to the court's ground-breaking decision was rendered had no right to obtain them.

While the changed standard mandated by the court presumably will apply to those formally seeking documents after the publication of the ruling who had not previously requested the same records, the official said that under the law previous requesters have no right under FOIA to obtain the withheld documents even though the grounds ICE cited had now been rejected by the Supreme Court as unlawful.

He said that any request submitted by pre-ruling filers, either to reopen their old request or submit a new one, would be considered "duplicative" of their prior request and thus could be summarily closed without consideration by the agency.

The high-handed position of ICE-- unilaterally limiting the applicability of the Supreme Court ruling to new matters-- is important to the Transactional Records Access Clearinghouse (TRAC) and to an unknown number of others who have had similar requests unlawfully rejected by the agency for many years.

Here is the background. TRAC on March 22 requested that ICE promptly release previously withheld information from user manuals to its ENFORCE database system – the official source of statistics maintained by DHS on its detention and removal of noncitizens from this country. This withheld material contained instructions to staff on information to be entered along with the online forms used for data entry. The original withholding by ICE had been surprising since this type of information now is usually publicly posted online by other agencies, or is released by them when responding to FOIA requests.

Citing the recent Supreme Court decision, in its March 22 letter TRAC noted that the Court had rejected as unlawful the very same exemption claim ICE had used and asked that ICE revisit its earlier decision and release the withheld records.

However, last week TRAC was informed that the FOIA office had closed our request without acting upon it since it considered the request "duplicative." The spokesperson informed Long by phone that the agency was under no legal obligation -- despite being explicitly requested to by TRAC -- to release to us these records even if they may have been unlawfully withheld originally.

As a courtesy the spokesperson said the FOIA office had forwarded our request up to Appeals. Appeals would, of course, not have any jurisdiction to examine the matter unless as a discretionary matter Appeals decides to waive the time limits on appeals. And there the matter stands.

Surely, if in the light of an intervening Supreme Court decision the government's withholding of the documents was improper, the agency is legally required when requested under FOIA to correct that past unlawful action. An agency assertion that it can administratively close a request as "duplicative" to avoid its legal obligations is clearly not in accord with FOIA requirements. Equally important, however, ICE's arbitrary administrative action directly conflicts with the announced transparency policies of both President Obama and Attorney General Holder.