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This ‘seven years’ war’ is a battle over Pentagon secrecy and torture information

By Michael Doyle

12/13/2012

Penn State University faculty member Jonathan H. Marks wants interrogation documents that the Pentagon insists on locking up.

The resulting struggle over sensitive information, now entering its seventh year, has become an unexpected master class in government secrecy for the Oxford-educated Marks. Hoping to shed light on harsh U.S. interrogation techniques, he has simultaneously undertaken a long and instructive legal journey.

“What I did not expect is that we would still be at this in December of 2012,” Marks, director of the university’s Bioethics and Medical Humanities Center, said in an interview. “What’s striking to me is the resistance and the reluctance, and the (government’s) willingness to spend attorneys’ fees.”

The long fight for government documents has cast Marks, a 44-year-old associate professor of bioethics, humanities and law, into a wilderness only partially penetrated by the Freedom of Information Act. Others know similar terrain well. Federal information, it turns out, is not always free.

Defense Department agencies received 74,117 FOIA requests in fiscal 2011. Though nearly half of the requests are generally granted in full, according to the Pentagon’s annual FOIA report,

many others are denied or riddled with redactions. Some requests are resolved quickly. On the other hand, the Defense Intelligence Agency reports it is still processing a FOIA request filed Dec. 8, 1997. Frustrated, some information-seekers turn to litigation.

On Dec. 3, while Marks was in Pennsylvania, his attorney was on the sixth floor of a federal courthouse in Washington, arguing the latest round of a FOIA lawsuit filed by Marks and Georgetown University-based researcher Dr. M. Gregg Bloche in November 2007. The lawsuit followed up on the researchers' initial June 2006 FOIA request – the first of Marks' career – for interrogation documents kept by various Defense Department agencies.

In particular, the researchers sought records concerning the participation of health professionals in the interrogation of military prisoners and suspected terrorists. The topic hits many nerves.

During the George W. Bush administration, authorized interrogation techniques for selected prisoners included sleep deprivation, enforced stress positions and the partial drowning technique called waterboarding. Reports in the New Yorker magazine and elsewhere have recounted how U.S. psychologists applied lessons from the military's own survival school to help shape these harsh, real-world interrogation techniques.

In September 2007, the American Psychological Association advised the Senate Intelligence Committee that “psychologists have important contributions to make in eliciting information that can be used to prevent violence and protect our nation's security.” But, underscoring fears about abuses, the organization has felt moved to reiterate its opposition to “cruel, inhuman or degrading” treatment of subjects during interrogation.

To inform their inquiries into medical ethics, Marks and Bloche submitted requests to nine agencies, from the CIA and the Department of the Navy, to the Defense Advanced Research Projects Agency.

“Their original response was not to respond at all, or to say there were no responsive documents,” attorney Brian Wolfman recalled. “Then, when we pushed them a little, it turned out there were lots of responsive documents.”

Pressed, Pentagon officials subsequently released thousands of pages of documents. Despite numerous redactions, some have proven helpful. The researchers, for instance, obtained a 24-page October 2006 memo from the U.S. Army Medical Command on the proper use of “behavioral science consultants” in interrogations. Other documents have shed less light; except, perhaps, on the workings of the Freedom of Information Act itself.

“What's comical,” Marks said, “is that in some cases we've been sent back our own articles that have been photocopied.”

Penn State is among the top recipients of Defense Department contracts and grants for basic and applied research, according to the school.

A potential treasure trove remains in Defense Department vaults. Some of it may stay there. Even under FOIA, federal officials can withhold documents for reasons including attorney-client privilege and personal privacy. The Defense Department, for instance, blacked out the email domain addresses from some correspondence, thereby shielding the identity of the agencies involved.

“Agencies regularly redact email addresses,” Justice Department attorney Susan Ullman said at the Dec. 10 court hearing.

Ullman further argued in legal briefs that the Defense Department has “conducted a reasonable search and produced all responsive documents that are not exempt from release.” The Navy alone, Ullman noted in a brief, released 692 pages in 2008, while the Office of the Assistant Secretary of Defense for Health Affairs released some 1,700 pages. More has been released in the years since.

Following the Monday court hearing, Defense Department officials will be preparing a more detailed index of additional documents. This will be reviewed by Bloche, Marks and Wolfman, who directs the Institute for Public Representation at Georgetown University Law Center, which funds the ongoing FOIA lawsuit.

“I’m happy to report,” Marks said, “that I’m not paying for this myself.”