HOMELAND SECRECY 2012:
WHERE WILL WE BE HEADED AND WHY?

Prof. Jim O’Reilly

I’d like to read to you a legal notice from page 32 of the Wednesday issue of the Pakistan Gazette:

“Next Thursday at 2 pm local time at No. 17 Quetta Street in Islamabad, there will be an advisory committee meeting of the Mujahadeen Taliban’s Loya Jurga. The topics will be a treasurer’s report on the Saudi Halawa transfers for 2011, a report on the results of expanded deployment of IEDs and the responses to the capture of 12 identified collaborators in southeastern Afghanistan. The keynote presenters will be significant leaders of the Afghan jihad presenting a powerpoint presentation on the defenses of Camp Yankee.”

Just kidding. The real content of any such report would be buried deep in intelligence targeting files that would never be disclosed by the CIA even after the Predator drone attacks the meeting. This gives new meaning to the complaint that “today’s meeting just droned on….” I wouldn’t sell life insurance to the attendees of such a meeting. Transparency may be the ideal, but the reality of what can be disclosed was extremely guarded … until the WikiLeaks affair.

WikiLeaks is a moment of challenge and opportunity for the federal government’s transparency initiatives. It is a challenge because it strips the comfort from the comfort zone of classifying documents. Many other large leaks can be anticipated. The less popular the conflict is, the more likely that the conflict will result in the use of information as a weapon against the leaders. Tired of having historians uncover the real facts belatedly, WikiLeaks illustrates how instantaneous release can intervene as a force against current policies today.

If you are an advocate of confidentiality, WikiLeaks is an opportunity, because it shows the news media and public that real people really die from certain disclosures. You don’t need spies like Robert Hanson or Aldrich Ames to give up the list of secret agents before people realize there are valid rationales for classified documents in some cases.

I find myself as a student of the history of government secrecy somewhere in the middle between the two sets of advocates. But I see the whole WikiLeaks affair as just one of the symptoms of 2011, the Year the Rubber Band Snapped. Yes, you heard it right. The rubber band of covering up government action was stretched and stretched and snapped in 2011 in 4 different settings.

I have been writing about disclosure, openness and secrecy since 1972, and my big book on FOIA was first issued in 1977, so when I tell you 2011 is historic, there is plenty of background for the statement. There are 4 ways in which the rubber band has snapped this year:

• WikiLeaks allowed the average reader, lawyer or dictator to read what’s really happening behind the façade of foreign relations politeness;
• The Supreme Court’s slam-dunk of the *Milner* case sharply limited secrecy of details about potential disasters hidden on government property;

• The Supreme Court’s *AT&T* case rebuffed the hubris with which industry has claimed privacy rights;

• And the retreat from openness by the once-vigorous advocates of open government in the Obama policy team was a remarkable reversal of course.

The first setting is now world famous. Sitting in a military prison on suicide watch without any underwear, the PFC who gave up the US Army’s intelligence transmissions has had more impact than a battalion of generals. We now will be living in a world of copycat leakers whose penetration of the façade of government “niceness” shows a face that is far more complex and nuanced. Sure, there will be a harsh reaction. There will be more attention paid to efforts toward compartmentalizing secret knowledge, and that’s an expected response.

Inside the FOIA access world, the WikiLeaks hemorrhage has blasted the system at its core. Releasing the most confidential classified documents, what in FOIA slang is are exemption b1 and b3 crown jewels, will have a long term consequence for the system. I predict that fewer agency and military managers will be authorizing classified status now that they know an eventual leak will break open the “cone of silence”. The old ways of stacking secrets upon secrets inside the classified documents “puzzle place” had predated FOIA. Indeed it was the reason for the 1963 hearings that led to FOIA, as the daily weather report distributed by Andrews Air Force Base was officially a classified document, and lots of newspaper clippings were stamped as classified.

We as a society and as a community of legal scholars are forced by the WikiLeaks affair to look into the reasons for government’s use of confidentiality. It seems hard to justify why some of these messages were ever written in the first place. Dumb and dumber messages looked terrible in the world press. The role of embarrassment as a justification for classified document status has been exposed. The face of the secrecy system is now on view, and it ain’t pretty, folks.

In a way, the WikiLeaks event shows a serious generational gap. The U.S. government classified documents system is artificial and complex, whether or not you agree with it. The structure of secrecy probably seems like an alien planet for a person like the 19 year old who took out the secret documents on an MP3 player disk device for whatever motive and delivered them to a Swedish entrepreneur.

The young Army leaker’s generation grew up on in-your-face self-disclosure like Facebook and Twitter and Foursquare where immediate self-disclosure is a given state of existence. The generational disconnect is apparent: the pro-secrecy “aliens” that live on this planet inside the Washington Beltway wonder why the leak occurred, just as millions of his young peers outside wonder why secrecy was ever demanded in the first place. I can relate to the private first class who was skeptical of our secrecy system. As a draftee during Vietnam, I questioned the system in 1970 as I was opening the mail for my Army unit. The secret clearance for Private Jones arrived in the mail – but it came the day after we received notice that Jones would be in Texas state prison for the next 4 years for breaking probation for a felony that led to his arrest before he enlisted. Somehow his felony conviction was overlooked by those who
assigned “secret” status. We among the older generation all have bizarre stories of the secrecy system’s weak points during the Cold War; the younger generation, or a subset of them like this PFC, just ignored the system and disclosed these documents.

Let’s look around for a similar disconnect from reality in today’s news. On April 14 a House subcommittee reauthorized secrecy for 4,755 chemical plant security plans in the CFATS program. This is a real stretch of secrecy in some places, where the chemical plant is in the middle of town or along the river or at the rail line. Most mayors and elected local officials like me knew the factory was there, but have never heard that this plant had such a need for federal secrecy. We did not know that the secrecy law or even the plan had existed, like the fraternity in the movie “Animal House” that faced “double secret probation”. The party line vote in the House subcommittee favoring this CFATS program made 2 significant mistakes, in my view. The House majority members rejected an amendment that would have required the participation of employees at chemical facilities in developing security plans. Who better to know the risks than those whose lives are at risk inside the plant? The members of the party in power also rejected an amendment that would mandate that chemical companies engage in safety reviews. The lobbying for secrecy follows a familiar pattern: the industry bought and paid for those votes with their PAC money, fair and square. That industry was not going to allow their favored candidates to vote for adoption of an Inherently Safer Technology (IST) mandate, which would have required chemical facilities to assess whether switching to alternative, less toxic chemicals would reduce the potential impact of a terrorist attack. So secrecy had the votes inside the Capitol building. You may have bought the votes but you have not convinced – no, you have not even dialogued – with the locals around the plant that announced that it is a target.

But do a reality check in the city that I lead or our neighboring rust belt towns. Go spend some time in a factory’s neighborhood bar and walk around the outside of a plant, and talk to local elected officials like me. They would laugh you out of their town if you talked about secrecy to them like the industry lobbyists who sold this 4,755 site secrecy plan to the House members of the majority party. We local elected officials need to know this. There is a rail siding with 4 rail cars of an explosive liquid parked there. The factory chose that material for its formulation because it is a cost savings over a more stable powdered material. Explosion would wipe out a school full of kids; fears of evacuation would devastate the housing prices in that neighborhood; volunteer firefighters would drive the other way if they knew what this company is parking on these tracks. Homeland Security may have a wonderful concept in this CFATS legislation, but if it fails in practice, watch out. If the secrecy plan fails for lack of explanation, if the chemical companies’ lobby can dominate the congressional decisions, then local elected officials will do our own rebelling, not like Fort Sumter but like a miniature version of WikiLeaks, and the news will be out – and locals will be heroes to their voting public.

Of course, those who try to stretch the rubber band of secrecy are sincere and nice people. But it won’t take a WikiLeaker thief to burst their bubble of expectations. The local elected officials like me, and local office clerks like my front office staff who have the building

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1 Jeremy Jacobs, CHEMICAL SECURITY: Bill to reauthorize DHS program passes out of subpanel, Energy & Environment E-Report, April 15, 2011.
plans in the 3rd drawer on the left, are not going to play along with their claims that the public should not be told of significant risks. If the plant is a danger of explosion or fire or Bhopal-type release, its neighbors want to know.

The Beltway insiders who are advocates for secrecy have won their subcommittee party line votes on April 14, but they are clueless about what happens out in the real communities of America. Neighbors ask neighbors about the risks and some of the neighbors who work there will inevitably tell. Try to prosecute them and guess who’ll be on the jury? More neighbors. Let’s rethink CFATS; let’s not create a crime of disclosure, where the prospect of jury nullification is so overwhelming.

In practical terms, the WikiLeaks and the local resistance to industry secrecy are two symptoms of the strong aversion that young people feel toward secrecy. The Department of Homeland Security has shown a weakness for military secrecy solutions, like some kind of junior infantry or “Army Lite”. They have failed to communicate with the general public and with us local officials about the reasons why secrets matter. There may be leadership from DHS favoring secrecy, but there is not followship on the ground because we have not been convinced that it is justified. Walk into the county building permits desk, smile, and ask the nice clerk for the file on Acme. Ask the fire chief what’s in that big tank across from your store. See the foreman of the train unloading crew at the coffee shop and ask him what’s in those tankers. None of us want the Libyan or Cuban culture of fear of government agents. But the government agents from DHS must do more explaining and more training of us elected officials who hold the local files on our local facilities. When that styrene tank car leaked and 4,000 residents of my neighboring city were evacuated, did they look at who Congressman Jean Schmidt sided with on the party line votes?

The second illustration of the stretched rubber band popping is the death of the Freedom of Information Act’s exemption known as “High 2”, in the Supreme Court decision in the Molnar case. Friends, no matter what neighborhood you live in, regardless of your neighbor’s drunk or temperamental outbursts, your neighbor will not explode and leave a deep crater where your house had been. But the Navy bomb storage for the Pacific Fleet could do that. The FOIA does not have a provision that prevents the public from knowing how badly the future accidental explosions of bombs will devastate a small community in western Washington state. Nearby residents in fear of those bombs wanted to know what the likely consequence of an explosion would be. The Navy owned the bombs and it also owned the exemption 1 classified-documents stamp, but it chose instead to claim that exemption 2 covered the plans, and so they were withheld. Bad choice, Navy, you have sunk this exemption for the whole fleet of agencies. The Supreme Court chopped off the thick branch of judicially made case precedents that had expanded the text coverage of FOIA exemption 2 beyond personnel matters. Now exemption 2 will be available only for agency personnel related matters and not for wide variety of other claims. There will need to be a rethinking and a retrenchment. We’ll see on remand if the actual predictions of explosion effects will reach the neighbors, or whether the classified documents stamp will come out once again.

I can speculate that the loss of high 2 will lead to specific exemption 3 secrecy provisions in the next defense appropriations bills; that has been the preferred vehicle for the DoD and subunits getting their exemptions. But please note that Congressional rules now require that
exemption 3 provisions be visibly tagged as such. There are some in the Senate who would like to have an open discussion of the tradeoffs for justifying secrecy. So the push to keep things secret from neighbors of the bomb warehouse may bring up some embarrassing matters when the hearings on legislative change are held. Of course we don’t want all the world to see all of our actual vulnerabilities, but the role of legislative bodies in a democracy should be to make tough societal impact judgments. Exemption 2 was stretched; the rubber band broke; we now have a challenging environment for the newest expansions of withholding. I predict that the bankers who are sitting on reasons for the financial collapse are hugging exemption 8 and worrying that a reopener of FOIA exemptions will undo what their lobbyists bought in 1964 when that exemption 8 for financial audits was accepted.

The third phenomenon in the 2011 breaking of the rubber band was a sharp rebuke by the Supreme Court to corporate advocates, who argued that AT&T should enjoy personal privacy as a basis for withholding records under FOIA’s exemption 7. Stretching exemptions for individual privacy rights to cover a private sector giant corporation was a real stretch. Let’s give their lawyers 2 bonus points for creative hubris, and then bench them for the rest of the game for a technical foul. The massive telecomm company had something to hide. It just could not hide it under protections designed for individual humans and their feelings. It does not take a boring law professor to explain to you that corporations are not people. The FOIA law enforcement exemption properly protects the privacy rights of individuals. When inanimate legal fiction like AT&T walks and talks, the American corporate form will be treated like a person. Until that happens, the law should continue to regard personal privacy as applicable to the human species, not the Delaware registered stock corporation.

Watch for any fallout from this AT&T case. Cutting off secrecy will boost public visibility of enforcement cases. We may see AT&T grease the skids for an exemption 3 statute that meets their desires. But please, companies, no longer waste the legal fees constructing claims of personal privacy for corporate reports of violations. As the rarely-witty Supreme Court Chief Justice John Roberts told the giant mega-corporation when it refused to allow its claim of personal privacy, Gee, AT&T, don’t take it personally!

The fourth and final way in which the rubber band of secrecy was stretched and ultimately broken is the retreat from openness by the allegedly vigorous advocates of open government in the Obama policy team. Their retreat from disclosure is a remarkable reversal of course. Please read the Office of Management & Budget directive titled Wikileaks, and look at some of the briefs filed in federal courts. The ghost of Cheneys past rattles its chains in the current climate of wars and economic problems, and the withholding is not gone and forgotten as one would have once believed.

**ACCOMMODATING THREE STEPS**

Now let’s come back to the lessons of history as we search for the ideal. FOIA is not an ideal. A philosopher once wrote that in heaven all things will be known, but here on earth we have to expect that some things will remain unseen. To the extent that the homeland security ideal clashes with the reality of local non-cooperation, let’s diagnose a few steps that could be taken.
First, DHS must reach out to local officials about the conscious tradeoff they are making. The local officials read about domestic terrorism and the recruitment of jihadists. Some would say, it can’t happen here. DHS needs to be a better educator about what could go wrong if the wrong people got the right information. This is not rocket science but it can be done. There is a need for the intersection of federal preferences with the needs of local governing bodies of the 4,755 locations of explosive or vulnerable chemical plants. That educating effort is not happening today. Mayors and city managers are more likely to see the Extension Service agent or the FHA housing support educator; if DHS expects help, DHS needs to do considerably more outreach. I was concerned about the lobbyists in the recent House subcommittee vote: if the chemical companies continue to resist efforts to reduce vulnerability by reducing toxics use, tell mayors about that resistance as well. Chances are that the mayor knows the chemical plant managers and other large employers. If she or he doesn’t, the fire chief does, and the elected officials ought to know them. Wiser managers at DHS understand local needs. So work through the awkwardness of explaining chemical risks to non-chemists, prize the cooperation with locals about these risks, and you’ll come a long way toward earning the trust of the locals.

Secondly, what should DHS do after the Supreme Court’s pair of recent cases in FOIA disputes? First, tighten up the amount of privacy claims you accept at DHS after the AT&T decision. Make the company justify why it merits confidentiality, with the attendant hassles and potential for litigation. Dan Metcalfe also asked me what I would expect to see when FOIA is reopened after the Milner decision. I anticipate that the loss of credibility of the federal government will be asserted from the right – see the Tea Party – and from the left – see the battles over reauthorizing the PATRIOT Act.

DHS is in the middle. The political right wing community doubts the ability of the Obama Administration to manage the defense of the nation – just watch any videotape of a Palin speech – but they have not yet connected the dots on how they would do it better. The right wants to support our troops over there – never mind where or why “there” is – but they have not yet developed a policy position on beneficial secrecy over here. If a group of private residents of a seaside community took boats at night and attacked a freighter, destroying cargo of a private company for political reasons of sensing a message against that company, we would call it an act of political terrorism. In 1775 that’s exactly what was called Tea Party patriotism. In the field of domestic security decisions, I think that the conservative movement needs to develop a cogent FOIA policy. They must articulate their preferred tradeoffs. They voted against the extension of the PATRIOT Act, before they voted for it. Now the conservative voting bloc leaders must articulate their tradeoffs between secrecy and disclosure, as political leaders; we cannot look for policy leadership from the conspiracy theorists among some of the tea partiers who are hostile to any form of a secret government cabal. But the right is not the only problem for DHS.

The political left has to chill its strident opposition to secrecy for those cases where there is a legitimate justification for confidential handling. A prudent approach would be to argue about tougher standards for supportive criteria, improving the norms in Executive Order 12600, and not simply talk about the existence or lack of a need for some secrecy in some cases.

**WHAT IF FOIA IS REOPENED?**

FOIA reopening will inevitably bring out the theater aspects of public hearings, and it will be a sideshow with TV cameras and intensive blog coverage in some House or Senate
subcommittee. Political theater is a smaller problem than the question of what else comes into jeopardy once FOIA is reopened.

One of the federal government’s risks that come with re-opening FOIA is the loss of the pro-government presumption in the Reporters Committee case. That case sweeps in a lot of presumptive government wins, an easy set of precedential cases that the Justice Department would not wish to jeopardize. So the reopening of FOIA puts some chips on the craps table that the government might not wish to bet; disliking the Milner result is a sure thing, but asking for a reopener is a gamble. Will FOIA get better or worse, and from whose perspective? This is not done lightly. I assume that the resident administrative law Wonks in the White House, Stephen Croley and Cass Sunstein, will have strong views after teaching about FOIA for years. I am sure the Justice Department will have strong views against a reopener. Once industrial lobbyists see what is at stake if their business confidentiality standard were to be tightened, the subcommittee would find this a very controversial piece of legislation in 2012 when elections draw near.

What is the Obama Administration alternative if FOIA is not reopened? The Administration can do what others have done, and can issue a new Executive Order on classified documents that covers this type of record. The new Executive Order would trigger exemption 1 coverage, so there would not be a need to alter the other exemptions. Part of the problem is that current classified document practices have been overextended so greatly, that it is likely that there would be push-back against a domestic classified documents mandate.

Would it be worse than the reopening of FOIA? Probably not; there would be faster recognition of the secrecy issues, since the Congress would not be involved as the author of the text (though surely it will be reviewed in hearings as an oversight function). The best reason for not doing things this way is that classified document over-use was cited as one explanation for the WikiLeaks soldier’s conduct. As we classify records of what is already visible about the 4,755 domestic sites that are vulnerable, the whole concept of a benign wise master deciding on the coverage of secrecy will be challenged quite vocally.

**WHAT SHOULD DHS DO NEXT?**

So a 3-part approach by leaders of the Department of Homeland Security would help. First, isolate in on the several hundred real risk zones, not all 4700; and work with the site managers to educate those local government leaders about why they should care about the protection of confidential information. Make sure that the computer vulnerability assessments done for utilities like pipelines are up to date, and explain to the utility that you expect them to protect this information internally, in the event that its status as a secret were to be challenged. Those assessments really should be confidential because hacking of computer systems is well understood and these are a hacker’s road map.

Second, make up the best case for the profitability of the local government’s investment in security. It is not self-evident to the local officials that the money spent on maintenance of private secrecy has been well spent. The costs to local government of remedial action after an attack had been borne by the federal government in Oklahoma City and the World Trade Center attacks, but there is no guarantee that such coverage will continue. We who raise taxes on our citizens are inevitably cost-conscious, or we don’t get re-elected. Show us the benefit to us of
putting effort behind confidentiality of risk information about the particular factory or refinery or pipeline or data center.

Third, DHS should come to Congress with a proposed new form of exemption, one that takes into account the Supreme Court’s Milner decision which leaves “low 2” exemption cases in place. Perhaps a new exemption for homeland security “target defenses” could be crafted that is site specific. “Records containing specific maps, assessments, diagrams and other objective data for which affidavits by federal or state security officials assert there would be the potential for its use in a terrorist or criminal attack against a utility, commercial enterprise or government-owned facility.” Note the elements:

Specific + objective + affidavit + author of affidavit + content of affidavit + attack + 3 categories

Take note that opponents of re-opening FOIA will have to be convinced that a need exists after Milner. To do so, consider this kind of approach; with a text that is both substance and procedure, the DHS drafters of the new exemption can link the higher level proof standard into the very focused classes in the substantive exemption. An affidavit by the Homeland Security official for the state or region must assert that specific credible evidence exists that the information would (not might) aid potential attack on the particular site for which the withholding is justified. We can talk more about the parameters but let’s agree that this or any other reopening of FOIA will be controversial.

I look forward to your questions. Thank you.