

Government Lawyers and Confidentiality Norms

Alberto Mora served as General Counsel of the Department of the Navy from 2001 to 2005. Mora was concerned about the government's treatment of prisoners at Guantanamo Bay. He had led an internal Defense Department effort to ensure that the government would begin to treat those prisoners humanely. But he had met powerful opposition—including Secretary of Defense Donald Rumsfeld and Defense Department General Counsel William Haynes—who wanted the government to have a free hand to treat the Guantanamo Bay prisoners more harshly during interrogations. Mora fought an internal, bureaucratic battle on this issue, marshalling allies from within the uniformed services, but he never revealed to anyone outside the government this internal struggle over prisoner treatment. Eventually, after the Abu Ghraib scandal, he wrote a lengthy memorandum to the Navy Inspector General describing how he and Judge Advocate General lawyers argued for humane treatment, and how Haynes and other Defense Department officials responded.

Mora left the Defense Department in December of 2005 and was approached by a journalist, Jane Mayer of The New Yorker, who had obtained a copy of his memorandum. Mayer wanted to speak with Mora to better understand the policy battle that had taken place within the Defense Department. Mora agreed to speak with her, and Mayer wrote about the internal Defense Department battle and profiled Mora in The New Yorker.

When asked why he agreed to speak with a journalist about this issue after remaining publicly silent for so long, Mora noted that his memorandum to the Inspector General was unclassified, and thus the government had deemed that release of the information could not cause damage to national security. Someone had provided Mayer with a copy of the memorandum, and so Mora thought that he could legitimately amplify and give her additional background on the memorandum. When asked whether his duty of confidentiality as a lawyer prevented him from revealing further information, Mora responded that, because Mayer already had some information, it seemed that the duty of confidentiality had been waived.



A **LAWYER'S DUTY** of confidentiality is not subject to the kind of waiver that Alberto Mora posited. A client's revelation of some information about a topic does not give her lawyer the option of revealing additional information about that same topic. In most states, a lawyer's duty of confidentiality is defined very broadly and applies to all information relating to the representation of the client. The lawyer is required to be discreet with such information whether or not it could harm or embarrass a client, and whether or not the client has revealed the information to others. In most states, the professional confidentiality rule does not distinguish between government and private-sector lawyers. Thus, government lawyers appear to be bound by the same broad confidentiality obligation as lawyers for private-sector clients.

This broad confidentiality obligation would seem to prohibit a former government lawyer like Mora from giving any information about his work. Although there are exceptions to this duty of confidentiality (the professional confidentiality rule identifies eight in particular), it is not clear that any of these exceptions would permit Mora's disclosure.

Was Mora permitted to discuss these internal Defense Department debates about prisoner treatment? This article is an attempt to answer that question for Mora and for the more than 100,000 federal, state, and local government lawyers who need to determine which information they can ethically reveal.

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Surprisingly little has been written on the question of government lawyer confidentiality. A spate of law review articles and student notes about the government’s attorney–client privilege were published after the high-profile legal battle on this issue between Independent Counsel Kenneth Starr and President Bill Clinton. But outside the context of Freedom of Information requests, the issue of attorney–client privilege arises relatively rarely for government lawyers. On the other hand, government lawyers face the confidentiality issue every day when they decide which information they can share with friends and colleagues both inside and outside of government.

This article makes several significant contributions to the literature on government lawyers. First, it provides a theoretical basis for identifying the client of a government lawyer. There is no single answer to the question of client identity for government lawyers. Instead, one must examine the structure of authority within government to identify which of several possible entities is actually the client.

SECOND, THE ARTICLE EXPLAINS how government and private sector lawyers’ confidentiality duties differ even though the ethics rules do not differentiate between them. Government lawyers’ confidentiality duties are not based solely on the broad mandate of confidentiality found in the legal ethics rules, but also on the complex regime for control of government information. While lawyers are normally bound by a broad duty of confidentiality (applying to all “information relating to representation”) under the legal ethics rules, a client can consent to disclosure of otherwise confidential information. One of the insights of this article is that government clients have consented to large amounts of disclosure by their lawyers through enactment of open government laws.

In other words, to determine whether the client of a government lawyer has consented to a specific disclosure, the lawyer need not rely solely on a particular government official’s ad hoc decision about whether to consent. Instead, that official is bound to respect the legal regime controlling government information. If that legal regime requires that information be disclosed, then the institutional client has consented to its disclosure. If that legal regime prohibits the information from being disclosed, then the institutional client has withheld consent to disclosure.

The third significant contribution of this article is that it identifies for the first time the need to revise the confidentiality rule to clarify that government lawyers have the discretion to

disclose government wrongdoing. Examination of case law and statutes suggests a norm that governments—unlike private-sector clients—do not have a legitimate interest in keeping secret information about their own wrongdoing. Other scholars have not previously recognized that the implication of this norm is that government lawyers may be able to disclose government wrongdoing.

IT IS NOT UNCOMMON for current and former government lawyers to disclose information that appears to be covered by their professional obligation of confidentiality. In their memoirs, these lawyers generally do not acknowledge their professional confidentiality obligation. The actual practice of current and former government lawyers and the degree to which they acknowledge and comply with their professional duty of confidentiality are issues that deserve further attention.

This article...began with the story of Alberto Mora, who told a reporter about the internal Defense Department legal debates over the treatment of prisoners at Guantanamo. This information about the content of a lawyer’s advice to his client would be subject to the attorney–client privilege, and thus is not subject to mandatory disclosure under the Freedom of Information Act. But Mora was describing what he saw as misconduct on the part of other government officials. Under the analysis in this article, as a substantive matter, Mora would be able to disclose government misconduct. As a procedural matter, Mora attempted to address the problem within the government, going all the way up to the Defense Department’s General Counsel.

As a substantive matter, government lawyers may disclose government wrongdoing and may reveal information that is subject to disclosure under freedom of information laws. But as a procedural matter, state supreme courts and governments need to establish procedures for government lawyers to follow when disclosing wrongdoing or other information that would be subject to disclosure under freedom of information laws. ||||

Kathleen Clark, professor of law, concentrates her research and teaching in the areas of ethics and national security law.

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