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Example of DOJ taking a position solely to obtain a litigation advantage

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Posted in group: FOIA Advisory Committee

Dear Committee:

Many of us who litigate FOIA as a member of the Plaintiffs' bar often run into a phenomenon I like to call the "Opportunistic Argument Effect." An agency takes a position in litigation not because it has a good faith belief that the position is correct, but because taking the position in that particular case will improve its chances of winning, and perhaps get a piece of favorable case law out of it. Often we can only speculate that this is what is going on, but once in a while an agency shows its hand, as recently happened in one of my cases. I bring this issue to your attention in hopes that you can use it to address the underlying problem of DOJ defending anything the agency does or wants to do, rather than exercising some discretion in what positions it simply will not defend.

Your colleague Nate Jones wrote a blog last week about the example at hand. http://nsarchive.wordpress.com/2014/08/19/the-cia-misapplies-foia-exemptions-to-continue-its-covert-attack-on-mandatory-declassification-review-and-why-it-matters/. In the case in question, I file the attached Notice with the Court, explaining the matter further as it applied to that case. I provide both of these items for you for your attention.

Bottom line, in this case the agency (CIA) argued breathlessly about the harm that would come from a disclosure for almost two years, right up until it won the argument (in this case, because I decided not to pursue it any further). As soon as it could obtain no further litigation advantage from the argument, it immediately retracted it, saying, in effect, "Oops, guess there wouldn't be all that harm we said there would be." And DOJ uncritically defended it the whole time. If an agency can do that, representing to a federal judge a veritable flood of dire consequences which would accompany disclosure, only to then conveniently change its mind when the argument no longer helps it, then there is no place for any degree of deference to agency declarations, and DOJ, for its part, is not doing its job.

What is the solution? Personally, I would like for a judge to be able to trust in the good faith of agency declarations, and if DOJ civil litigators would critically evaluate agencies' positions before defending them, I would have much less of a problem with judicial deference. However, until that time, the presumption of agency regularity really doesn't work, so something needs to be done. Either judges should not automatically presume that agency declarations are made in good faith, or DOJ attorneys should be explicitly directed to only defend those positions that warrant it, and should be held accountable when they defend indefensible positions. As it stands now, there is absolutely no disincentive for a DOJ civil litigator to arguing for any position he pleases, and until there is, we simply cannot trust that DOJ is only making the arguments that the law calls for.

Thank you for your consideration of this matter.

Kel McClanahan

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Executive Director
National Security Counselors

"As a general rule, the most successful man in life is the man who has the best information."
Benjamin Disraeli, 1880

"Quis custodiet ipsos custodes?" ("Who watches the watchers?")
Juvenal, Satire VI

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL SECURITY COUNSELORS, *et al.*,	*	
Plaintiffs,	*	
v.	*	
	*	Civil Action No. 1:12-cv-00284 (BAH)
CENTRAL INTELLIGENCE AGENCY, *et al.*,	*	
Defendants.	*	

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NOTICE OF NEW FACTUAL DEVELOPMENT

Plaintiffs hereby bring a recent factual development to the Court's notice which may affect its consideration of Defendants' pending Motion for Summary Judgment.

As the Court is aware, Plaintiff National Security Counselors ("NSC") submitted the Freedom of Information Act ("FOIA") request formerly at issue in Count 3 to Defendant Central Intelligence Agency ("CIA") on 12 December 2011. (Lutz Decl., Dkt. #74-4, ¶ 18 (filed Apr. 24, 2014).) This request sought "copies of all CIA records documenting the decisionmaking process behind the decision to forgo notice and comment rulemaking for [Final Rules in the Federal Register at 76 Fed. Reg. 59031, 76 Fed. Reg. 59032, and 76 Fed. Reg. 59034], including, but not limited to, all legal analyses of the applicability or inapplicability of 5 U.S.C. [§] 553(b)(3)(A)." (*Id.*) On 3 June 2012, after the commencement of this litigation, CIA responded to this request (Req. No. F-2012-00432), stating that it had located five responsive documents that it was withholding in their entirety pursuant to FOIA Exemptions (b)(3) and (b)(5). (*Id.* ¶ 22.) After the Court's ruling in *National Security Counselors v. CIA*, 960 F. Supp. 2d 101 (D.D.C. 2013),

CIA reprocessed these five documents and released two in part on 5 February 2014. (Lutz Decl. ¶¶ 141, 143.) CIA again invoked Exemptions (b)(3) and (b)(5) for all withheld information. (*Id.* ¶ 143.) On 25 April 2014, CIA argued that this information was exempt under Exemption (b)(5) because:

> These documents are three different drafts of an internal memorandum for Director of IMS to submit up the chain to the Chief Information Officer and consist of recommendations and analysis regarding proposed changes to the Agency's FOIA, MDR, and Privacy Act regulations. Information reflecting consultation by and recommendations of subordinate IMS personnel to the Director of IMS has also been redacted from C05842727, which is an email that is also responsive to this request.

(*Id.* ¶ 198.) As a direct result of this sworn testimony, NSC agreed to no longer challenge the withholdings in these five documents, identified as Doc. Nos. 1-5 in CIA's *Vaughn* index. (*See* Pls.' Mem. P. & A. Opp'n Defs.' Mot. Summ. J. & Supp. Pls.' Cross-Mot. Part. Summ. J., Dkt. #77, at 43 (filed May 28, 2014).)

However, unbeknownst to NSC, at the same time as it was requesting these records, the National Security Archive ("the Archive") was also requesting them. On 21 February 2012, the Archive submitted a request to CIA to which the same documents were responsive. *See* Nate Jones, *The CIA Misapplies FOIA Exemptions to Continue its Covert Attack on Mandatory Declassification Review. and Why it Matters*, Unredacted (Aug. 19, 2014), *at* http://nsarchive.wordpress.com/2014/08/19/the-cia-misapplies-foia-exemptions-to-continue-its-covert-attack-on-mandatory-declassification-review-and-why-it-matters/ (last accessed Aug. 24, 2014). On 1 February 2013, CIA informed the Archive that it was withholding all documents in full pursuant to Exemptions (b)(3) and (b)(5), just as it had in this case. *See id.* On 12 March 2013, the Archive filed an administrative appeal of this determination. On 5 August 2014, CIA released to the Archive the records which it had released to NSC. At this time, CIA also

reversed its position on Exemption (b)(5) and instead cited Exemptions (b)(1) and (b)(3) for all withheld information. *See id.*

In other words, CIA argued vociferously for almost two years (June 2012-April 2014) that the information in these records was exempt under Exemption (b)(5) and that its withholding determination was vital to "permitting open and frank discussions between subordinates and superiors, protecting against premature disclosure of proposed policies before they are adopted, and protecting against the public confusion that might result from disclosure of reasons and rationale that were not in fact the basis for the Agency's actions." (Lutz Decl. ¶ 189.) Then, as soon as NSC agreed not to challenge this determination any further before this Court, CIA immediately reversed its position and decided that disclosure would not in fact hinder the deliberative process in any way.[1] This is not the behavior of an agency making a good faith argument that information was properly exempt; it is, rather, what you see when an agency is simply seeking any litigation advantage it can obtain, regardless of the merits of its position. Plaintiffs bring this to the Court's attention so that the Court may, if it chooses, take this behavior into account when evaluating CIA's equally vociferous assertions of how chilled its deliberative process would be if *other* documents were to be released.

[1] Additionally, apparently recognizing that no longer claiming Exemption (b)(5) might result in disclosure of these records, CIA then proceeded to retroactively classify these records that it had never previously claimed had any bearing on national security.

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Respectfully submitted,

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