

## Google Groups

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### RE: Example of DOJ taking a position solely to obtain a litigation advantage

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Posted in group: FOIA Advisory Committee

Dear Committee:

On 24 August 2014, I brought to your attention a case in which the CIA had appeared to argue that information was exempt under Exemption (b)(5) only long enough to prevail in Court, and then to change its position in a response to the National Security Archive. After I complained about this to the District Court, the CIA informed the Court that the citation of Exemption (b)(1) instead of Exemption (b)(5) was an administrative error. This does not mean that the Committee should not still discuss this "Opportunistic Argument Effect"; it should definitely do so, if only because of the recent court opinion criticizing the government for exactly that (available at [https://www.aclu.org/sites/default/files/assets/aclu\\_v\\_fbi\\_opinion.pdf](https://www.aclu.org/sites/default/files/assets/aclu_v_fbi_opinion.pdf)). However, it need not discuss this particular incident as an example of that effect.

This development does raise another issue that the Committee should consider, though. As a frequent requester, I am dismayed at the number of times these "administrative errors" happen and am particularly bothered by agencies' (and DOJ's) blasé or outright defensive reactions when they are pointed out. While this problem is greater than just the CIA, the CIA does serve as a good example of this phenomenon. I personally have a collection of response letters from the Agency claiming, for example, that information is exempt under one exemption when in fact it meant to claim another, and each time I catch the mistake and ask about it, I am informed that it was an "administrative error." Should the Committee wish it, I can document this extensively, but I will sum up a few examples here:

- 2/10/09 – The CIA stated that it accepted a FOIA request "in error" when it in fact meant to refuse to process four out of six items.
- 1/15/10 – The CIA stated (after an appeal was filed) that its earlier statement that it located records was "erroneous" when it in fact it meant to say that it had located no records despite "searches [that] were thorough and diligent."
- 4/1/10, 6/3/10 – The CIA stated that its claims in three separate letters that records were "currently and properly classified" was an "administrative error."
- 7/14/11 – The CIA stated that its final decision regarding an appeal invoking Exemption (b)(5) was an "error" and an "oversight."
- 8/25/11 – The CIA refused to accept two appeals for being untimely because it counted calendar days instead of business days (its appeal deadline is based on business days), an error it did not remedy until after I brought it directly to the FOIA Public Liaison's attention nine months later.
- 12/20/11 – The CIA informed a Court in a Vaughn index that it had not originally invoked Exemption (b)(5) (but meant to) in six instances after insisting for months to me that all of its

exemption claims were complete and accurate in an attempt to convince my client not to challenge withholdings before the filing of the Vaughn index.

- 5/26/12 – The CIA argued to a Court that it “mistakenly” informed two different requesters in two different letters that it had located records about each of them and invoked four exemptions each, when in fact it meant to say that it had located no records.
- 7/24/12 – The CIA informed a Court that it “discovered a 4 to 5 inch stack of records potentially responsive to plaintiff’s FOIA request that had been inadvertently overlooked during the CIA’s search.”

In none of these examples, and in fact in no cases I know of, has the CIA ever actually explained how the “administrative error” in question was made, and often the Agency fights vehemently against any insinuation that it should have to give specifics.

The main problem is, most requesters are simply not experienced enough to recognize the discrepancies that suggest the presence of an “administrative error,” and those requesters may be disinclined to file an appeal, for instance, if they are told that the records are “currently and properly classified” (as happened in this instance). Requesters should be able to trust that when an agency tells them how a request was processed, that is accurate.

FOIA analysts are human, and they make mistakes like everyone else. But when these mistakes become frequent occurrences, it becomes indicative of a greater problem. And this is not limited to the CIA. Another agency regularly lost FOIA requests submitted to its email address. Yet another agency repeatedly withheld information inconsistently, e.g., redacting it on one page while releasing it on another. That same agency once retroactively classified a document erroneously (apparently without reading it) and then affirmed that decision on appeal, only reversing its position and acknowledging the mistake years later after the requester sued.

What is more troubling than a high error rate, though, is these agencies’ responses when these errors are pointed out, especially in litigation. This case is a perfect example. When the government replied to this particular filing, it did not say, “The Agency made a mistake and apologizes for any confusion.” It said, “If Plaintiffs had consulted the CIA before filing this notice, they would have learned that this was simply a typographical error and could have avoided burdening the court’s docket with this issue.” (It should be noted that this “typographical error” included the calculation of a specific date when the material would be ripe for declassification review and the inclusion of an additional sentence explaining that calculation.) In another case, after aggressively arguing for months that a statement was correct and complaining about how I was continuing to “burden the Court” with complaints about the obvious errors, the government finally corrected its statement by filing a notice purporting to “clarify” its meaning because I “was confused,” prompting a judge to criticize the DOJ lawyer in open session for a “lack of candor [that] comes pretty close to bad faith” and say, “That filing was subterfuge, obfuscation, covering up of the government’s error, and I find very disturbing.”

When the government makes a mistake, it needs to acknowledge it the first time the mistake is realized, and when it makes a lot of them, it needs to stop treating each one like a single solitary occurrence and fix the underlying problem (likely by training). And under no circumstances should it try to shift the blame onto a requester for daring to complain about its mistakes. Earlier this week I had a conversation with Trina Porter at OPM. In that conversation I pointed out that it appeared that someone at OPM had

made an error in processing a request for my client. Once she understood the problem, she said she would look into it and fix it. Then she called me back the same day to admit that, upon further investigation, she discovered that she had been the one to make the mistake, and she explained how it happened. This is how agencies should respond when confronted with evidence of mistakes. Where Ms. Porter took affirmative measures not only to fix the mistake but to explain it to me, the CIA would have sent a generic letter informing me that its previous processing was "an administrative error," and if the matter was in litigation, the DOJ attorney would have filed a document with the Court complaining about how I was wasting the Court's time (if the agency even admitted the error).

Thank you for your time and your consideration of this problem.

Kel McClanahan

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Executive Director  
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"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