Nos. 10-5159 & 10-5167

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Appellants/Cross-Appellees

v.

DEPARTMENT OF JUSTICE,

Appellee/Cross-Appellant.

On appeal from the
United States District Court
for the District of Columbia
(No. 08-cv-1157 (JR))

BRIEF FOR APPELLANTS/CROSS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

The plaintiffs-appellants/cross-appellees (hereinafter "plaintiffs-appellants") are the American Civil Liberties Union and the American Civil Liberties Union Foundation.

The defendant-appellee/cross-appellant (hereinafter "defendant-appellee") is the United States Department of Justice.

B. Ruling Under Review

The ruling under review is the district court's opinion and order of March 26, 2010 (per Robertson, J.), granting in part defendant-appellee's motion for summary judgment. The opinion is available at 2010 WL 1140868 (D. D.C. Mar. 26, 2010) and can be found at app. 81. The order can be found at app. 92.

C. Related Cases

This case has not previously been before this Court or any other court. Plaintiffs-appellants' appeal (No. 10-5159) and defendant-appellee's cross-appeal (No. 10-5167) raise substantially the same issues. Counsel are not aware of any other related cases.

/s/ Catherine Crump

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Catherine Crump

CORPORATE DISCLOSURE STATEMENT

No publicly held company has any ownership interest in any of the plaintiffs-appellants. Plaintiffs-appellants are non-profit organizations, and none have parent companies nor do any publicly held companies own ten percent or more of their stock.

/s/ Catherine Crump

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Catherine Crump

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JURISDICTIONAL STATEMENT

The district court exercised subject-matter jurisdiction over this case pursuant to 5 U.S.C. § 552(a)(4)(B), 28 U.S.C. § 1331, § 2201(a), and § 2202.

The jurisdiction of this Court is based on 28 U.S.C. § 1291. This appeal is from a final order or judgment that disposes of all parties' claims, which the district court entered on March 26, 2010. Plaintiffs-appellants' timely notice of appeal was filed on May 24, 2010.

STATEMENT OF ISSUES

1. Whether the Department of Justice ("DOJ") properly invoked Exemptions 6 and 7(C) of the Freedom of Information Act ("FOIA") to withhold from disclosure a list of docket information—case number, case name, and court—of criminal cases in which the government previously had engaged in warrantless cell phone tracking of the defendant and in which the defendant was acquitted, the charges were dismissed, or the case remains under seal; and
2. Whether the DOJ properly invoked FOIA Exemptions 6 and 7(C) to redact docket information—case number and case name—from applications for warrantless cell phone tracking, where the disclosure of the information would not lead to release of personally identifiable information about surveillance targets who have yet to be prosecuted.

STATEMENT OF THE CASE

Plaintiffs-appellants American Civil Liberties Union and American Civil Liberties Union Foundation (together, "ACLU") seek records under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, that shed light on government use of cell phone location tracking without a warrant. The dubious legality of this practice is an issue that has been of great public concern.

Because of the limited public information available on the scope and nature of the government's warrantless cell phone tracking practices, the ACLU filed FOIA requests with the Drug Enforcement Administration and the Executive Office for United States Attorneys on November 29, 2007. App. 19-34. The requests sought, *inter alia*:

> The case name, docket number, and court of all criminal prosecutions, current or past, of individuals who were tracked using mobile location data, where the government did not first secure a warrant based on probable cause for such data.

…

> Policies, procedures, and practices followed to obtain mobile phone location information for law enforcement purposes.

App. 28.

On July 1, 2008, the ACLU brought suit against the Department of Justice ("DOJ") to enforce this request. App. 8. After the production of some records and

a *Vaughn* index, both parties moved for summary judgment on whether the FOIA exemptions had been applied correctly.

In parts relevant to this appeal, the ACLU challenged the DOJ's withholding of two categories of records. First, the ACLU challenged the DOJ's invocation of Exemptions 6 and 7(C) to withhold a list of case names, case numbers, and court of criminal prosecutions of individuals who were the subjects of warrantless cell phone tracking.

Second, the ACLU challenged the DOJ's withholding of the case names and docket numbers on applications to engage in cell phone tracking. As described in greater detail below, when the government wishes to track an individual's location through his or her cell phone, it submits an application to a judge, typically a magistrate judge, requesting an order compelling a cell phone company to give it access to this data. *See infra* pp. 14-15. In its *Vaughn* index describing records responsive to the ACLU's request for records regarding "policies, procedures, and practices followed to obtain mobile phone location information for law enforcement purposes," defendant-appellee listed documents that appear to be such applications. App. 52, 54. The ACLU challenged DOJ's decision to invoke Exemptions 6 and 7(C) to withhold the docket numbers on two such applications to

engage in cell phone tracking, and the case name on one of these applications.[2] As for the case name, the ACLU requested only those portions of the case name that do not contain personally identifying information (i.e. the surveillance target's name or phone number).

On March 26, 2010, the district court issued a memorandum opinion and order granting in part and denying in part the parties' respective summary judgment motions. App. 81. With respect to the DOJ's invocation of Exemptions 6 and 7(C) to withhold the list of case names and docket numbers of criminal prosecutions, the court held that the public interest in disclosure outweighed the privacy interest of persons who have been convicted of crimes or have entered public guilty pleas, but not the privacy interest of those who have been acquitted, whose cases have been sealed and remain under seal, or against whom charges have been dismissed. App. 86. The court therefore concluded that the DOJ must produce the list of case names, case numbers, and court of criminal prosecutions resulting from warrantless cell phone tracking, but only to the extent the prosecution ended in a conviction or a public guilty plea. App. 92.

[2] More concretely, the documents plaintiffs-appellants seek are listed on defendant's *Vaughn* index. App. 52, 54. Plaintiffs seek the case name and docket number contained in Document 22, and the docket number contained in Document 29. In the district court, plaintiffs also sought docket information contained in Document 67. Plaintiffs are not pursuing that information on appeal.

With respect to the applications, the district court upheld the DOJ's invocation of Exemptions 6 and 7(C) to withhold the case names and numbers from applications. The court stated that requiring the production of case names would be "meaningless" because after personally identifiable information is redacted "nothing would be left but variants of the phrase 'In re: Application for Cell Site Authority.'" App. 86-87. The court further held that the DOJ could withhold docket numbers because disclosure of that information could reveal surveillance targets yet to be prosecuted, either because the cases are not sealed or because the ACLU (or another party) could bring a potentially successful motion to unseal. App. 87.

The ACLU filed a timely notice of appeal on May 24, 2010. App. 3. The DOJ also filed a notice of appeal, from that portion of the district court's decision ordering it to produce case names and docket numbers of criminal prosecutions of persons who have been convicted or have entered public guilty pleas. App. 3.

STATEMENT OF FACTS

Over the past decade, cell phones have gone from being a luxury good to an essential communications device. As of December 2008, over 87% of the overall population of the United States subscribed to cell phone service—an estimated 270 million people. App. 76. While cell phones are best known as devices used to make voice calls and send text messages, they are also capable of being used as

tracking devices. App. 77. As a result, cell phone technology has given law enforcement a new surveillance tool of previously unimagined magnitude. With assistance from mobile phone carriers, the U.S. government now has the technical capability to track any one of the nation's hundreds of millions of cell phone owners, for 24 hours a day, for as long as it likes.

Cell phones yield several types of information about their users' past and present location. The most basic type of cell phone location information is "cell site" data, which refers to the identity of the cell tower the phone is nearest and the sector of the tower facing the phone. App. 77. This data is generated because, whenever users have their cell phones on, the phones automatically scan for the cell tower and the sector of that tower that provides the best reception and, approximately every seven seconds, the phones register their location information with the network.[3] Two types of cell site location data are usually available: historical cell site data, which can be used to retrace previous movements, and prospective cell site data, which can be used to track the phone in real-time, whenever the phone is turned on. App. 78.

The precision of cell site location information depends, in part, on the size of the coverage area of each cell tower. App. 78. This means that as the number of

[3] *See In re the Application of the U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to the Gov't*, 534 F. Supp. 2d 585, 589-90 (W.D. Pa. 2008), *rev'd on other grounds*, ___ F.3d ___, 2010 WL 3465170 (3d Cir. Sept. 7, 2010).

cell towers have increased and the coverage area for each cell tower has shrunk in response to demand for wireless technology, cell site location information has become more precise.[4] The government's expert stated in 2006 that cell site location information can be as accurate as 200 meters in some areas.[5] But the latest generation of cellular towers now may cover an area as small as a tunnel, subway, specific roadway, particular floor of a building, or even an individual home or office.[6] Further improvement in precision can be expected given the explosive demand for wireless technology and its new services, to the point that "[t]he gap between the locational precision in today's cellular call detail records and that of a GPS tracker is closing, especially as carriers incorporate the latest technologies into their networks."[7]

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[4] *Hearing on ECPA Reform and the Revolution in Location Based Technologies and Services Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on Judiciary*, 111th Cong. (2010) (statement of Professor Matt Blaze at 7-9), http://judiciary.house.gov/hearings/pdf/Blaze100624.pdf (hereinafter, "Blaze testimony"); CTIA The Wireless Association, *CTIA's Semi-Annual Wireless Industry Survey* at 9 (2009) (showing increase in the number of active cellular towers), http://files.ctia.org/pdf/CTIA_Survey_Midyear_2009_Graphics.pdf.

[5] Declaration of Henry Hodor, Feb. 23, 2006, *available at http://www.aclu.org/pdfs/freespeech/cellfoia_release_4805_001_20091022.pdf* (last visited Sept. 9, 2010). The Hodor declaration was obtained from the government through this FOIA litigation.

[6] Blaze testimony, *supra* note 4, at 9; Thomas Farely & Ken Schmidt, Cellular Telephone Basics: Basic Theory and Operation (2006), http://www.privateline.com/mt_cellbasics/iv_basic_theory_and_operation/.

[7] Blaze testimony, *supra* note 4, at 13-14.

In addition to cell site location information, the government can also obtain more precise location data, although this information is generally only available in real time. App. 79. The government can currently obtain precise location data at a high level of accuracy through "triangulation," which entails collecting and analyzing data of the precise time and angle at which the cell phone's signal arrives at multiple cell towers. App. 79. Current technology can pinpoint the location of the cell phone to an accuracy of within 50 meters or less, and the accuracy will improve with newer technology.[8] For cell phones that have special GPS satellite receiver hardware built into them, the cell phone can determine its precise location by receiving signals from global position satellites. App. 79. How often the cell phone reports location information using the GPS to the network depends on the application software that the phone is running.[9] Current GPS technology is able to pinpoint location with accuracy when it is outdoors, typically achieving accuracy of within 10 meters.[10] With "assisted GPS" technology, which combines GPS and triangulation, it is possible to obtain such accurate location information even when the cell phone is inside a home or a building.[11]

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[8] *Id.*
[9] *Id.* at 5-6.
[10] *Id.*
[11] *The Privacy Implications of Commercial Location-Based Services: Testimony Before the Subcomm. on Commerce, Trade, & Consumer Protection and Subcomm. on Communications, Technology, and the Internet of the H. Comm. on Energy & Commerce*, 111th Cong. (2010) (statement of John B. Morris, Jr.,

There is limited public information available on the scope of the government's use of cell phone tracking information. Prosecutors appear to routinely take the view that the government can obtain cell site location information without a warrant, by simply presenting to a magistrate "specific and articulable facts showing that there are reasonable grounds to believe that . . . the records or other information sought, are relevant and material to an ongoing criminal investigation."[12] Although the DOJ recommends that prosecutors seek a Rule 41 warrant for the more-precise GPS and triangulation location information, some prosecutors do not follow this advice and obtain GPS or triangulation information on the low "relevant and material" standard. App. 79.

There is reason to believe that prosecutors are acting contrary to law when they obtain any form of cell phone location information without first showing probable cause and getting a warrant, as the Fourth Amendment and the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986), compel the government to obtain a warrant based on probable cause for all forms of cell phone tracking. Warrantless cell phone tracking raises serious

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General Counsel, and Director of Internet Standards, Technology & Policy Project, Center for Democracy & Technology, at 4), http://energycommerce.house.gov/Press_111/20100224/Morris.Testimony.2010.02.24.pdf; James Connell, *Can Galileo Locate the Money?*, International Herald Tribune, May 23, 2006.

[12] *See, e.g.*, *In re Application of the U.S. for an Order for Disclosure of Telecomm. Records & Authorizing the Use of a Pen Register & Trap & trace*, 405 F. Supp. 2d 435, 444 (S.D.N.Y. 2005).

constitutional issues about the use of technology that continuously monitors a person's movements and thus intrudes on his or her reasonable expectations of privacy. *See United States v. Maynard*, No. 08-3030, 2010 WL 3063788, at *14 (D.C. Cir. Aug. 6, 2010) (holding that warrantless GPS surveillance violates the Fourth Amendment); *In re Application for Pen Register & Trap/Trace Device with Cell Site Location Authority*, 396 F. Supp. 2d 747, 765 (S.D. Tex. 2005) ("permitting surreptitious conversion of a cell phone into a tracking device without probable cause raises serious Fourth Amendment concerns, especially when the phone is monitored in the home or other places where privacy is reasonably expected"). Moreover, as the majority of courts to address the issue in public decisions have held, the Electronic Communications Privacy Act does not permit warrantless access to prospective cell phone tracking information.[13] In 2005, for example, all of the magistrate judges of the District Court of the District of Columbia signed a joint order stating that they would no longer grant cell site location applications based on less than probable cause unless the government came up with a new legal theory authorizing them to do so.[14]

[13] *See In re the Application of the U.S. for an Order Directing a Provider of Elec. Comm'n Serv. to Disclose Records to the Gov't*, 534 F. Supp. 2d at 600-01.
[14] *In re Applications of U.S. for Orders Authorizing Disclosure of Cell Site Info.*, Nos. 05-403, 05-404, 05-407, 05-408, 05-409, 05-410, 05-411, 2005 WL 3658531 (D.D.C. Oct. 26, 2005).

Despite these decisions rejecting the legality of the government's warrantless cell phone tracking practice, there is still little public information about when prosecutors are applying for the cell phone location information without a warrant, which courts are granting or rejecting such applications, what quality and quantity of information prosecutors are able to obtain with such court orders, how often the cell phone tracking information allows law enforcement agents to apprehend criminals, how often subjects of cell phone tracking are subsequently prosecuted and how often the resulting prosecution is successful, in what circumstances cell phone tracking is an advantageous law enforcement technique, whether motions to suppress warrantless cell phone tracking evidence have been filed or granted, and how the information is being used as evidence in prosecutions.

The government's warrantless cell phone tracking practice has received widespread media attention, and is currently the subject of a congressional inquiry regarding the need to update the electronic surveillance laws.[15] The ACLU designed its FOIA request to obtain records that would help inform the debate by

[15] *See, e.g.* Editorial, *Should Police Use Your Cellphone to Track You?,* Denver Post, June 27, 2010, at D3; *With Location-Tracking Technology, Cell Users Paying Price of Privacy*, PBS Newshour, June 22, 2010, *transcript available at* http://www.pbs.org/newshour/bb/science/jan-june10/cell_06-22.html; Steve Chapman, *Big Brother in Your Cell*, Chi. Trib., April 1, 2010, at 17; Miguel Helft, *Technology Coalition Seeks Stronger Privacy Laws*, N.Y. Times, Mar. 31, 2010, at B1; Michael Isikoff, *The Snitch in Your Pocket*, Newsweek, Mar. 1, 2010, at 40.

bringing to light the scope of the government's warrantless cell phone tracking practices, their use, and their effectiveness.

SUMMARY OF ARGUMENT

In this appeal, the ACLU requests the disclosure of basic, publicly available docket information—case number, case name, and court—of (1) criminal cases in which the government engaged in warrantless cell phone location tracking and the defendant was acquitted, the charges were dismissed, or the case remains under seal; and (2) cases in which prosecutors filed an application for warrantless cell phone location tracking. The district court upheld the DOJ's invocation of the privacy-based exemptions 6 and 7(C) of FOIA to withhold this information.[16]

The district court's application of Exemptions 6 and 7(C) should be reversed with respect to both categories of records. That docket information in criminal cases implicates some minimal privacy interest is not enough to exempt the records from disclosure under FOIA. Here, the public interest in learning about the government's warrantless cell phone tracking practice, its use, and its effectiveness, which will be possible from the disclosure of docket information about criminal cases in which the government engaged in warrantless cell phone tracking, far outweighs the individual defendants' privacy interest in protecting

[16] To the extent the case remains under seal, plaintiffs-appellants request only the publicly-available information. In other words, if the portion of the docket listing the defendant's name is sealed, but the docket number itself is not sealed, plaintiffs-appellants request only the docket number.

from disclosure docket information that is already publicly available. The same is true of disclosure of docket information about applications for warrantless cell phone tracking; in fact, for that information the imperative for disclosure is even stronger because disclosure will not implicate any privacy interest once personally identifiable information is redacted.

ARGUMENT

The district court erred in holding that FOIA's privacy-based exemptions 6 and/or 7(C) permit DOJ to withhold the docket information of criminal cases and cell phone tracking applications involving warrantless cell phone location tracking. Exemption 7(C) does not apply because the disclosure of docket information does not amount to an "unwarranted invasion of personal privacy." *A fortiori*, the less protective Exemption 6 does not apply.

Exemption 7(C) exempts from disclosure:

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.

5 U.S.C. § 552(b)(7)(C).

Exemption 6 exempts from disclosure:

> personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

5 U.S.C. § 552(b)(6). Both exemptions are analyzed together below, as the difference between the two exemptions is "of little import" when identifying the privacy interest or the public interest implicated by a FOIA request. *U.S. Dep't of Defense v. FLRA*, 510 U.S. 487, 496 n.6 (1994).

This Court reviews *de novo* the district court's grant of summary judgment. *See Multi Ag Media LLC v. Dep't of Agriculture*, 515 F.3d 1224, 1227 (D.C. Cir. 2008). The Court should reverse the decision below because the DOJ has not met its burden of demonstrating that requested records are exempt from disclosure. *Id.*

I. FOIA REQUIRES DISCLOSURE OF DOCKET INFORMATION OF CRIMINAL CASES IN WHICH THE GOVERNMENT ENGAGED IN WARRANTLESS CELL PHONE TRACKING.

The district court erred in holding that the DOJ is exempt from disclosing docket information of criminal cases in which the government engaged in warrantless cell phone tracking and the defendants were acquitted, charges were dismissed, or cases continue to be sealed. Disclosure of these records would not result in an "unwarranted invasion of personal privacy" under Exemption 6 or 7(C) because: (1) the privacy interest in the disclosure of information available on public dockets is minimal; (2) the public interest in learning about the government's warrantless cell phone tracking practice is significant and the disclosure advances that interest; and (3) the public interest outweighs any privacy interest implicated. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157,

171-72 (2003) (requiring courts considering Exemption 7(C) to balance the competing interests in privacy and disclosure).

A. Privacy Interest In Publicly Available Docket Information Is Minimal.

The privacy interest implicated by the ACLU's request is minimal because the docket information that the ACLU seeks is already publicly available. Although it will reveal the identity of the defendant and thus implicates some privacy interest, this interest is minimal where individuals have already been publicly prosecuted. To the extent the ACLU seeks docket information regarding cases that are under seal, the ACLU seeks only that docket information which is not sealed. In other words, where a case name is sealed but the associated docket number is not sealed, the ACLU seeks only the docket number.

It is well established that although the public availability of a piece of information does not necessarily eliminate an individual's right to privacy in that information, it greatly diminishes the privacy interest. *See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 & n.15 (1989) ("The common law recognized that one did not necessarily forfeit a privacy interest in matters made part of the public record, albeit the privacy interest was diminished and another who obtained the facts from the public record might be privileged to publish it"); *Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 603 n.5 (1982) ("The public nature of information may be a reason to conclude, under all

the circumstances of a given case, that that the release of such information would not constitute a 'clearly unwarranted invasion of personal privacy'"). This Court has thus rejected FOIA exemption claims where the same information is publicly available, for example because the material had been played in open court, *see, e.g.*, *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) (requiring disclosure of tapes played in open court despite Title III because "materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record"); because the information is available in public documents, *see, e.g.*, *Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274, 282 (D.C. Cir. 1997) (affirming agency's decision to release documents because the privacy interest under Exemption 6 was minor as the information was available in public documents); *Common Cause v. Nat'l Archives & Records Serv.*, 628 F.2d 179, 185 (D.C. Cir. 1980) (listing the public availability of campaign contribution information as a reason for lesser privacy interest); or because the government has already disclosed the information, *see, e.g.*, *Steinberg v. U.S. Dep't of Justice*, 179 F.R.D. 366, 371 (D.D.C. 1998) (holding that the DOJ's interest in preserving the privacy of its sources is low where the identities of the sources have already been disclosed), *aff'd*, 1999 WL 1215779 (D.C. Cir. Nov. 5, 1999).

An individual's right to privacy is therefore at its nadir when a criminal case progresses from investigation into prosecution, because the fact of his or her

prosecution becomes a matter of public record. After all, "a trial is a public event, and what transpires in the court room is public property." *Cottone*, 193 F.3d at 554 (internal quotation marks omitted); *Detroit Free Press, Inc. v. Dep't of Justice*, 73 F.3d 93, 97 (6th Cir. 1996) (holding that no privacy interests are implicated by the release of mug shots relating to an ongoing criminal proceeding where name and identity of the defendant has already been made public); *Tennessean Newspaper, Inc. v. Levi*, 403 F. Supp. 1318, 1321 (M.D. Tenn. 1975) (requiring disclosure of information on public records regarding individuals arrested or indicted). At the point of prosecution the defendant's name becomes available as part of the public criminal docket. The Department of Justice is well aware of this is, as it regularly issues press releases on such occasions.[17] A criminal defendant's privacy interest in the fact of his or her prosecution is thus decidedly minimal compared to the privacy interest of an unindicted individual who is being investigated, because the fact of the pre-indictment investigation is not public and the unindicted individual "will not have an opportunity to prove [his or her] innocence in trial." *United States v. Smith*, 776 F.2d 1104, 1113-14 (3d Cir. 1985) (*Smith I*) (holding that the

[17] The government regularly holds press conferences and issues press releases to publicize the names of criminal defendants. *See, e.g.*, Press Release, Federal Grand Jury Indicts Two Men For Rash Of Break-Ins At TVA Substations (Sept. 2, 2010), http://www.justice.gov/usao/aln/Docs/September%202010/SEPT%202,%202010%20FEDERAL%20GJ%20INDICTS%202%20MEN.html; Press Release, Goddard Nurse Indicted On Charge Of Diluting Patients' Morphine (Sept. 2, 2010), http://www.justice.gov/usao/ks/press/Sept2010/Sept2a.html.

privacy interest of unindicted individuals outweighs First Amendment and common law right of access in part for this reason). This Court's cases recognizing the privacy interest of those identified in non-public law enforcement files is therefore inapposite here. *See, e.g.*, *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991); *Bast v. Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981).

Similarly inapposite is the privacy interest that the Supreme Court recognized in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). In *Reporters Committee*, the Court held that individuals have a privacy interest in their rap sheet—a compilation of their criminal history in one document—even when each piece of criminal history is a matter of public record. *See id.* at 764. The Court explained that this was because a compilation of information about a specific individual "alters the privacy interest implicated by disclosure of that information," *id.*, even when there is little or no privacy interest in the disaggregated information. In other words, the Supreme Court upheld the application of Exemption 7(C) in that case because the subjects of the rap sheets "had a privacy interest in the aggregated 'whole' distinct from their interest in the 'bits of information' of which it was composed." *Maynard*, 2010 WL 3063788 at *12 (describing *Reporters Committee*). Here, the ACLU is not seeking the "whole" of information about anyone. It is simply seeking the "bits of

information" that already exist in the public record, organized by the law enforcement method used rather than by the individual involved. Reviewing the list of criminal cases in which the government engaged in cell phone tracking would not reveal any more information about each defendant than what is publicly available on each docket.

B. The Public Interest In Learning About the Government's Warrantless Cell Phone Tracking Practice Is Significant and the Requested Disclosure Advances That Interest.

Plaintiffs-appellants' FOIA request advances the public interest that is at the heart of FOIA—that of ensuring that "the Government's activities be opened to the sharp eye of public scrutiny." *Reporters Comm.*, 489 U.S. at 774 (emphasis omitted). Through its request, the ACLU seeks to bring to light the scope and effectiveness of warrantless cell phone tracking, a practice about which there is currently little public information, and the legality of which is open to serious question. *See supra* pp. 14-15. The public interest sought to be advanced is therefore "significant" and the information requested "is likely to advance that interest." *Favish*, 541 U.S. at 172.

The information requested "is likely to advance" two types of "significant" public interests. *Favish*, 541 U.S. at 172. First, there is a significant public interest in learning about law enforcement practices because "matters of substantive law enforcement policy . . . are properly the subject of public concern." *Reporters*

Comm., 489 U.S. at 766 n.18. Court records and criminal proceedings are a well-recognized source of understanding about such practices. *See Richmond Newspapers v. Virginia*, 448 U.S. 555, 573-75 (1980) (recognizing First Amendment right to attend criminal trials based on historical understanding that open trials provide opportunity for the public to understand the criminal system); *Nixon v. Warner Comm'ns, Inc.*, 435 U.S. 589, 597 (1978) (recognizing common law right to inspect judicial records and documents for purposes such as monitoring the workings of public agencies and informing the public about the workings of the government). The requested disclosure would promote public understanding of law enforcement practices by identifying the public criminal docket sheets of cases in which cell phone tracking occurred. Among the information that the public will most likely immediately be able to learn from such dockets is:

1. **What crimes people subject to warrantless cell phone tracking are alleged to have committed.** This information will inform the public about which crimes are investigated using cell phone tracking. In the context of wiretapping, Congress balanced privacy interests with law enforcement need by permitting wiretapping for only the most serious crimes. *See* 18 U.S.C. § 2516. If the requested records show that cell

phone tracking is used for less serious crimes, the invasion of privacy would be particularly offensive, and might spur legislative reform.

2. **Whether prosecutions brought against people who have been tracked are successful.** This information will allow the public to evaluate the value of warrantless cell phone tracking.

3. **Whether defendants ever learned that they were tracked without a warrant.** Unless prosecutors use cell tracking evidence in their case-in-chief, nothing in Federal Rule of Criminal Procedure 16 obligates them to reveal to defendants that they have been the targets of cell phone tracking. Learning which defendants have been tracked through this FOIA, and then determining whether defendants ever became aware that they were tracked, will ascertain whether defendants simply do not learn that they were tracked, and whether they had opportunities to challenge warrantless cell phone tracking through motions to suppress.

4. **Whether defendants' counsel filed motions to suppress and whether such motions were successful.** This information will help evaluate the effectiveness of warrantless cell phone tracking, as law enforcement techniques that lead to suppression are not effective.

This may also reveal judicial opinions on warrantless cell phone tracking that are not published.

5. **What type of information the government is able to obtain from cell phone tracking.** Records of prosecutions in which evidence of cell phone tracking was introduced will disclose details of the tracking, such as its duration and the accuracy of the positional information obtained. This will reveal the invasiveness of the technology. Surveillance technology that allows continuous, pinpoint monitoring of people's movement is offensive to the Fourth Amendment if conducted without a warrant. *Maynard*, 2010 WL 3063788 at *14.

6. **How the government used the evidence in any cases in which the evidence was introduced.** This will illustrate how the government is able to use cell phone tracking evidence in criminal cases, and may further illuminate the invasiveness of the technology.

The docket information for criminal cases at issue here will therefore shed light on the scope and effectiveness of cell phone tracking as a law enforcement practice, and advance the public debate, including in the congressional hearings on Electronic Communications Privacy Act reform, on the permissibility of warrantless cell phone tracking. That public debate is essential to ensuring that

new technology like cell phone tracking does not eviscerate privacy. *See Maynard*, 2010 WL 3063788 at *15 ("the advent of GPS technology has occasioned a heretofore unknown type of intrusion into an ordinarily and hitherto private enclave"); *United States v. Pineda-Moreno*, No. 08-30385, 2010 WL 3169573, *5 (9th Cir. Aug. 12, 2010) (warning against "advance ripples to a tidal wave of technological assaults on our privacy," including cell phone tracking) (Kozinski, C.J., dissenting from denial of rehearing en banc). The records disclosed pursuant to this FOIA request will help inform the American public. As the Third Circuit recently noted, "it is unlikely that cell phone customers are aware that their cell phone providers collect and store historical location information." *In re Application of the U.S. for an Order Directing a Provider of Elec. Comm'n Serv. to Disclose Records to the Gov't*, ___ F.3d. ___, 2010 WL 3465170 * 11 (3d Cir. Sept. 7, 2010). If customers do not know that tracking information is being collected, they are certainly unaware that the government routinely accesses this information.

Second, there is a public interest in exposing the fact that "responsible officials acted negligently or otherwise improperly in the performance of their duties." *Favish*, 541 U.S. at 174. This public interest is supported here because the evidence "warrant[s] a belief by a reasonable person that the alleged Government impropriety might have occurred." *Id.* Specifically, the evidence

currently available establishes that various prosecutors around the country have repeatedly applied for cell phone location information—including the precise GPS and triangulation information—without probable cause, despite constitutional concerns, despite DOJ advice to the contrary with respect to precise location information, and despite a growing body of law holding that ECPA requires the government to obtain a warrant before accessing this information.[18]

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[18] *See Maynard*, 2010 WL 3063788, at *14; *see also In re Application of U.S. for an Order: (1) Authorizing the Use of a Pen Register & Trap & Trace Device; (2) Authorizing Release of Subscriber Info.; & (3) Authorizing the Disclosure of Location-Based Servs.*, No. A-10-561-M, 2010 WL 3021950 (W.D. Tex. July 29, 2010); *In re Application of U.S. for an Order Relating to Target Phone 2*, No. 07 GJ 628-2, 2009 WL 6767391 (N.D. Ill. May 21, 2009); *In re Application of the U.S. for an Order Authorizing the Use of a Pen Register With Caller Identification Device Cell Site Location Authority on a Cellular Tel.*, 2009 WL 159187 (S.D.N.Y. Jan. 13, 2009); *In re Application of the U.S. for an Order: (1) Authorizing the Installation & Use of a Pen Register & Trap & Trace Device; (2) Authorizing Release of Subscriber & Other Info.; and (3) Authorizing the Installation & Use of a Mobile Tracking Device*, No. Misc-07-145, 2007 WL 4591731 (S.D. Tex. 2007); *In re Application of the U.S. for an Order Authorizing the Installation & Use of a Pen Register Device, a Trap & Trace Device, & for Geographic Location Info.*, 497 F. Supp. 2d 301 (D. PR. 2007); *In re Application of the U.S. for an Order Authorizing (1) Installation & Use of a Pen Register & Trap & Trace Device or Process, (2) Access to Customer Records, and (3) Cell Phone Tracking*, 441 F. Supp. 2d 816 (S.D. Tex. 2006); *In re Application for an Order Authorizing the Installation & Use of a Pen Register & Directing the Disclosure of Telecomm'ns Records for the Cellular Phone Assigned the Number [Sealed]*, 439 F. Supp. 2d 456 (D. Md. 2006); *In re Application of the U.S. for an Order Authorizing the Installation & Use of a Pen Register and/or Trap & Trace for Mobile Identification No. (585) 111-111 & the Disclosure of Subscriber & Activity Info. Under 18 U.S.C. § 2703*, 415 F. Supp. 2d 211 (W.D.N.Y. 2006); *In re Application of the U.S. for an Order Authorizing the Disclosure of Prospective Cell Site Info.*, No. 06-MISC-004, 2006 WL 2871743 (E.D. Wis. 2006); *In re Application of the U.S. for an Order (1) Authorizing the Use of a Pen Register & a*

Furthermore, the disclosure of the docket information would also advance the public interest by permitting the public to engage in a variety of "derivative uses" that would reveal further valuable information about government practices. A derivative use is use of information disclosed under FOIA to obtain additional information outside government files, for example by interviewing those whose names are disclosed. This Court has recognized that public benefit from such derivative use may factor into the significance of the public interest. *See, e.g.*, *Painting & Drywall Work Pres. Fund, Inc. v. Dep't of Housing & Urban Dev*, 936 F.2d 1300, 1303 (D.C. Cir. 1991) (recognizing the public interest in using disclosed names of workers to conduct interviews); *FLRA v. U.S. Dep't of the Treasury*, 884 F.2d 1446, 1452 (D.C. Cir. 1989) (recognizing public interest where "the names of current workers might provide leads for an investigative reporter seeking to ferret out what the "government is up to'"); *Getman v. NLRB*, 450 F.2d 670, 677 (D.C. Cir. 1977) (recognizing public interest in disclosing names and addresses so that researchers can interview individuals).

Trap & Trace Device & (2) Authorizing Release of Subscriber Info. and/or Cell Site Info., 396 F. Supp. 2d 294 (E.D.N.Y. Oct. 24, 2005); *In re Application of the U.S. for Orders Authorizing the Disclosure of Cell Cite Info.*, No. 05-403, 05-404, 05-407, 05-408, 05-409, 05-410, 05-411, 2005 WL 3658531 (D.D.C. 2005). *But cf. In re Application of the U.S. for an Order Directing a Provider of Elec. Comm'n Serv. to Disclose Records to the Gov't*, ___ F.3d. ___, 2010 WL 3465170 at * 13 (holding that, for historical cell site information, as a statutory matter, magistrates are free to require prosecutors to establish probable cause but are not obligated to do so).

Here, armed with docket information, members of the public (including the ACLU) could contact defendants or their counsel to learn more about their cases, or to inform them that cell phone tracking was used in their cases. Individuals who learn that they have been subject to warrantless cell phone tracking could also bring suit to challenge the legality of this practice. For example, they could file a motion to suppress in an open case, or a *Bivens* action for damages against the law enforcement agents who engaged in the tracking. This Court must consider the benefit to the individuals of bringing such a challenge, because "FOIA analysis . . . must include consideration of any interest the individual might have in the release of the information, particularly when the individuals who are 'protected' under this exemption are likely unaware of the information that could benefit them." *Lepelletier v. FDIC*, 164 F.3d 37, 48 (D.C. Cir. 1999) (holding that the Federal Deposit Insurance Corporation cannot invoke Exemption 6 to refuse to release the names of depositors with unclaimed deposits over a certain amount because "it is overly paternalistic to insist upon protecting an individual's privacy interest").

Both the direct and derivative public interest in the requested disclosure is therefore significant. Because the disclosure of docket information directly advances the public interest, this case is unlike others in which this Court found that disclosure of personally identifiable information in investigation records would not be "probative of an agency's behavior or performance." *Safecard*

Servs., Inc., 926 F.2d at 1205 (names and addresses of persons appearing in SEC investigation files is not probative of agency's behavior); *see also, e.g.*, *Senate of the Commonwealth of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987) (names and identities of individuals who were related to an investigation); *Bast*, 665 F.2d at 1254-55 (same). In those cases, the names of individuals did not reveal any additional information about government conduct. Here, by contrast, because the names of individuals are used as part of case names that link to publicly available information, i.e. other information contained in court files, the names themselves are valuable to understanding government conduct.

C. The Significant Public Interest Outweighs Any Existing Privacy Interest.

The significant public interest in learning about the government's warrantless cell phone tracking practice outweighs any privacy interest implicated by the criminal docket information. Courts have consistently favored public availability of docket information in similar circumstances requiring them to weigh the public interest in the openness of dockets with any interest in maintaining secrecy. [19] *See, e.g.*, *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004); *United States v. Valenti*, 987 F.2d 708 (11th Cir. 1993).

[19] Although a few district court decisions have permitted the government to withhold case names and case numbers, in the decision below, Judge Robertson reviewed these cases and found that "each of those decisions is distinguishable for one reason or another." App. 84. The best interpretation of these cases is that

The district court implicitly recognized that the balance tips in favor of the public interest in this case when it held that Exemptions 6 and 7(C) do not apply to docket information for prosecutions that ended in convictions or public guilty pleas. App. 86. The court erred, however, in applying the exemptions to those individuals who were acquitted or the charges against whom were dismissed. App. 86. Even if such individuals have greater privacy interests than those who were found guilty, those interests would not be sufficient to overcome the public interest in obtaining the publicly available docket information. *Cf. Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 510 (1st Cir. 1989) (holding that "a blanket restriction on access to the records of cases ending in an acquittal, a nolle prosequi, or a finding of no probable cause, is unconstitutional, even if access is not denied permanently").

The court also erred in applying the exemptions to those cases that remain sealed. App. 85-86. Release of the docket information will provide no private

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where a requester fails to demonstrate there is a public interest in disclosure, even a minimal privacy interest justifies withholding. *Long v. U.S. Dep't of Justice*, 450 F. Supp. 2d 42, 69-70 (D.D.C. 2006) (privacy interest prevailed relative to overbroad rationales that failed to demonstrate how disclosure would advance the public interest); *Harrison v. Executive Office for U.S. Attorneys*, 377 F. Supp. 2d 141 (D.D.C. 2005) (requester failed to identify public interest in disclosure); *Lawyers Committee for Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (dealing not with case names and docket numbers, but with "local police arrest reports, bail bond information by and concerning private individuals that were filed in court.").

information,[20] but will enable plaintiffs-appellants or other members of the public to move the appropriate court to unseal all or part of the record. If the court with jurisdiction over the underlying case determines that there are valid reasons to keep the case under seal, then no private information will be disclosed. But if that court determines to lift the seal, the impact on the privacy interest of the defendant will be no greater than the impact on the privacy interest of a defendant who was openly convicted, and valuable information will have been brought into public light.

Plaintiffs-appellants are simply seeking disclosure of docket information that will allow the public to identify cases that contain information about warrantless cell phone tracking. This request is far afield from the type of requests that were intended to be denied under the narrow Exemptions 6 and 7(C)—requests for "information about private citizens that happens to be in the warehouse of the Government." *Reporters Comm.*, 489 U.S. at 774; *see Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) ("The[] limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act"). By contrast, this FOIA request should be enforced because it falls precisely within "the FOIA's central purpose . . . to ensure that the Government's activities be opened to the sharp eye of public scrutiny." *Reporters Comm.*, 489 U.S. at 774.

[20] If a sealing order in an individual case covers the defendant's name, then plaintiffs seek only the docket number and court of that case.

II. FOIA REQUIRES DISCLOSURE OF THE DOCKET INFORMATION INCLUDED IN APPLICATIONS FOR CELL PHONE TRACKING THAT WOULD NOT LEAD TO RELEASE OF PERSONALLY IDENTIFIABLE INFORMATION.

The district court also erred in holding that DOJ properly invoked Exemptions 6 and 7(C) to withhold the case name and docket number on two applications requesting cell phone tracking, even where all personally identifiable information would be redacted. App. 86-87.

The specific documents at issue are Documents 22 and 29 on defendant-appellee's *Vaughn* index.[21] *See* App. 52, 54. Document 22, which was withheld in full, is labeled a "Draft Application" on defendant-appellee's *Vaughn*. App. 52. However, according to defendant-appellee, it contains a docket number, suggesting that it was likely filed with a court. Def.'s Mem. in Further Support of its Mot. for Summ. J. at 14 n.6. Plaintiffs-appellants seek those parts of the case name that do not contain personally identifiable information, as well as the docket number.

Document 29 was released in part and can be found in the Appendix. App. 67. Although, on defendant-appellee's *Vaughn*, the document is labeled as a "Template Application," App. 54, the document itself reveals that it bears a redacted docket number, suggesting that it was likely filed with a court, App. 67.

[21] Plaintiffs-appellants initially also sought the docket number contained in Document 67, but are no longer pursuing that information. Thus, the only documents in dispute are Documents 22 and 29.

The only part of Document 29 that plaintiffs-appellants currently seek is the docket number.

None of the information plaintiffs-appellants seek is personally-identifying information. They seek only two docket numbers and one case name *with personally identifying information redacted*, assuming the case name even contains any such information. Moreover, and in contrast to the case names and docket numbers of criminal prosecutions, absent a successful motion to unseal, it is highly unlikely it will lead to the discovery of personally identifying information, because applications for cell phone tracking are, in plaintiffs-appellants' experience, invariably filed under seal. Defendant-appellant has not denied that the court files associated with the docket numbers plaintiffs-appellants seek are filed under seal, and defendant-appellant is the only party capable of ascertaining whether or not this is the case.

Because plaintiffs-appellants do not seek personally identifying information, Exemptions 6 and (7) are wholly inapplicable. Without personally identifying information, plaintiffs-appellants' request does not implicate a privacy interest. *See Favish*, 541 U.S. at 172 (holding that public interest and privacy interest should be balanced *where privacy concerns are present*); *Multi Ag Media LLC*, 515 F.3 at 1230 (holding, in the context of Exemption 6, that "if no significant privacy interest is implicated . . . FOIA demands disclosure"). Where an

exemption does not apply, the default rule is disclosure. *See Favish*, 541 U.S. at 172 ("When documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information. . . . The information belongs to citizens to do with as they choose."). Courts thus routinely require disclosure of records where personally identifiable information is redacted. *See, e.g.*, *Rose*, 425 U.S. at 375, 378-82; *Jaffe v. Central Intelligence Agency*, 516 F. Supp. 576, 585 (D.D.C. 1981) (holding that withholding of a paragraph "that contains neither the name or any identifying information that might invade the privacy of a third party" under Exemption 7(C) was impermissible).

The reason that the district court gave for not requiring the disclosure of case names—that such disclosure would be "meaningless" because the disclosure would result in variants of the phrase "In re: Application for Cell Site Authority"—is not a ground for withholding that information. Moreover, plaintiffs-appellants additionally seek the docket numbers. Obtaining the docket numbers is not meaningless. It will enable the public to locate the cases. It will lead the public to personally-identifying information only if cases are not sealed. If the cases are not sealed, then there is no reason why plaintiffs-appellants and the public should not be permitted to see them. If they are sealed, then plaintiffs-appellants and the public should be able to move to unseal. The public interest thus outweighs the non-existent privacy interest in these records.

The district court also erred when it suggested that privacy interests of surveillance targets yet to be prosecuted might be implicated by the disclosure "because the cases are not actually sealed, or because the ACLU's promised motion to unseal could be successful." App. 87. If the case is not sealed, then presumably neither the court nor the U.S. Attorney believed there was a need to seal it—and for the same reasons discussed above, the public interest in learning the information on the docket outweighs the privacy interest in the public case information. *See supra* Part I. Moreover, the public interest in obtaining the docket numbers of cell phone tracking applications is strong because it will permit members of the public to determine whether those applications were granted or denied and, by extension, whether judges permit warrantless cell phone tracking in a given jurisdiction. Thus, it will enable the public to determine what the "rule of law" is in a particular jurisdiction, an especially important objective given that, in most of the country, there are no public opinions stating whether cell tracking is permitted absent probable cause.[22] If the case is sealed, then no private information will be disclosed unless the appropriate court unseals it. And if the case is sealed and the appropriate court unseals it, that means that the First

[22] *Hearing on ECPA Reform and the Revolution in Location Based Technologies and Services Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on Judiciary*, 111th Cong. (2010) (statement of United States Magistrate Judge Stephen Wm. Smith, Exhibit B (collecting cases)), http://judiciary.house.gov/hearings/pdf/Smith100624.pdf.

Amendment or common law right of access to judicial documents compelled the conclusion in the particular case that the public benefit from access outweighs any privacy interests. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 511 (1984); *In re Application of Newsday, Inc.*, 895 F.2d 74, 79-80 (2d Cir. 1990). The court with jurisdiction over the underlying case is in a far better position to conduct that analysis than the district court in this case hypothesizing about whether the underlying cases might or might not be sealed.

Given that *no* privacy interest is implicated so long as names and other personal identifiers are redacted, DOJ has failed to meet its burden of showing that case names and docket numbers on cell phone tracking applications are subject to Exemptions 6 and 7(C). *See Multi Ag Media LLC*, 515 F.3d at 1227.

CONCLUSION

For the reasons stated above, the judgment of the district court should be reversed to the extent that it granted in part the DOJ's motion for summary judgment and denied in part plaintiffs-appellants' motion. The Court should direct the district court to require DOJ to disclose the docket information (case name, case number, and court) of all prosecutions resulting from the use of warrantless cell phone tracking and of all applications for cell phone tracking.

/s/ Catherine Crump

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,984 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

(s) Catherine Crump
Attorney for American Civil Liberties Union
Dated: September 10, 2010

CERTIFICATE OF SERVICE

On September 10, 2010, I served upon counsel for defendant-appellee one copy of plaintiffs-appellants' BRIEF FOR APPELLANTS/CROSS-APPELLEES and one copy of plaintiffs-appellants' APPENDIX via this Court's electronic filing system.

/s/ Catherine Crump

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Catherine Crump

Executed on September 10, 2010.

ADDENDUM

TABLE OF CONTENTS

Freedom of Information Act, 5.U.S.C. § 552

United States Code Annotated
Title 5. Government Organization and Employees
Part I. The Agencies Generally
Chapter 5. Administrative Procedure
Subchapter II. Administrative Procedure
➡ **§ 552. Public information; agency rules, opinions, orders, records, and proceedings**

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer

telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term “search” means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to--

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule

of fees for all agencies.

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section--

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[**(D)** Repealed. Pub.L. 98-620, Title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357]

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either--

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall--

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except--

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, “unusual circumstances” means, but only to the extent reasonably necessary to the proper processing of the particular requests--

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having

a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records--

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure--

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means--

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall--

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including--

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(b) This section does not apply to matters that are--

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute--

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and--

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation

pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include--

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency--

(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;

(N) the total amount of fees collected by the agency for processing requests; and

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term--

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of

the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes--

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including--

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(h)(1) There is established the Office of Government Information Services within the National Archives and Records Administration.

(2) The Office of Government Information Services shall--

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) recommend policy changes to Congress and the President to improve the administration of this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(k) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency--

(1) have agency-wide responsibility for efficient and appropriate compliance with this section;

(2) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

(3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(4) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; and

(6) designate one or more FOIA Public Liaisons.

(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.