No. 07-371

In The
Supreme Court of the United States

BRENT TAYLOR,

Petitioner,

v.

ROBERT A. STURGELL, Acting Administrator,
Federal Aviation Administration, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals For
The District Of Columbia Circuit**

BRIEF OF *AMICI CURIAE* THE NATIONAL SECURITY ARCHIVE, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, OPENTHEGOVERNMENT.ORG, THE NATIONAL WHISTLEBLOWER CENTER, AND THE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF PETITIONER

MEREDITH FUCHS
General Counsel
THE NATIONAL SECURITY ARCHIVE
GEORGE WASHINGTON UNIVERSITY
Gelman Library, Suite 701
2130 H Street, NW
Washington, DC 20037
202-994-7000

Attorney for Amici Curiae

February 27, 2008

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT.. 5

I. The Freedom of Information Act creates – and depends for enforcement upon – an individual right for any member of the public to request, and pursue through litigation, access to government records...................... 5

II. Litigation by one FOIA requester does not protect the individual or public interests of other FOIA requesters................................. 8

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

EPA v. Mink, 410 U.S. 73 (1973) 5

FEC v. Akins, 524 U.S. 11 (1998) 6

Herrick v. Garvey, 298 F.3d 1184 (10th Cir. 2002) 15

NLRB v. Robbins Tire & Rubber, 437 U.S. 214 (1978) 5

Oglesby v. United States Dep't of Army, 920 F.2d 57 (D.C. Cir. 1990) 12

Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976) 13

Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1 (1974) 5

Richards v. Jefferson County, Ala., 517 U.S. 793 (1996) 11, 16

Taylor v. Sturgell, 490 F.3d 965 (D.C. Cir. 2007) 15

Tyrus v. Schoemehl, 93 F.3d 449 (8th Cir. 1996) 11, 12

United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) 5, 7

Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973) 14

STATUTES

5 U.S.C. § 551(2) 5

5 U.S.C. § 552(a)(1) 8

TABLE OF AUTHORITIES – Continued

Page

5 U.S.C. § 552(a)(2)(D) 8

5 U.S.C. § 552(a)(3)..5, 7, 12

5 U.S.C. § 552(a)(4)..6, 12

5 U.S.C. § 552(a)(6)(E)..13

5 U.S.C. §§ 552(b)(6), (b)(7)(C) 12

OTHER AUTHORITIES

Agencies Continue E-FOIA Implementation, FOIA Post (Department of Justice, Washington, D.C.), Mar. 14, 2001 8

Amendment Implementation Guidance, FOIA Update (Department of Justice, Washington, D.C.) 1997, Vol. XVIII, No. 1......................................9

Congress Enacts FOIA Amendment, FOIA Update (Department of Justice, Washington, D.C.) 1996, Vol. XVII..9

Department of Justice, *Freedom of Information Act Guide* 29-30 (2007)...10

Exec. Order No. 12,958 (as amended by Exec. Order No. 13,292), 68 Fed. Reg. 15315 (Mar. 25, 2003) 13

National Security Archive, *File Not Found: 10 Years After E-FOIA, Most Federal Agencies Are Delinquent* (Mar. 12, 2007) 10

New Attorney General FOIA Memorandum Issued, FOIA Post (Department of Justice, Washington, D.C.), Oct. 15, 2001 13

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIALS

Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996) 7

H.R. Rep. No. 104-795 (1996).......7, 9

S. Rep. No. 89-813 (1965).......6

INTEREST OF *AMICI CURIAE*[1]

The Freedom of Information Act (FOIA) is the principle tool for members of the public to seek records from the government. *Amici Curiae* are all organizations that rely on the FOIA for their work and that support the openness of government operations. *Amici* are concerned that the decision below could adversely affect the ability of Freedom of Information Act requesters to seek judicial review of agency withholding, thereby hindering government transparency.

The National Security Archive (the "Archive") is an independent, non-governmental research institute and library located at the George Washington University that collects and publishes declassified documents, concerning United States foreign policy and national security matters, obtained through the Freedom of Information Act. As part of its mission to broaden access to the historical record of the U.S. government, the Archive is a leading user of the FOIA.

The Reporters Committee for Freedom of the Press ("the Reporters Committee") is a voluntary, unincorporated association of reporters and editors

---

[1] Letters of consent to the filing of this brief have been filed with the Clerk. No counsel for any party authored the brief in whole or in part, and no person or entity other than *amici curiae* made any monetary contribution to its preparation or submission.

that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and freedom of information litigation in state and federal courts since 1970.

OpenTheGovernment.org is a coalition of more than 65 consumer and good government groups, journalists, environmentalists, library groups, labor and others across the political spectrum united to make the federal government a more open place in order to make us safer, strengthen public trust in government, and support our democratic principles.

The National Whistleblower Center ("NWC") promotes public access to information and government accountability through research, public education and advocacy. NWC has provided support and advocacy on behalf of employee whistleblowers who have exposed abuse of civil liberties and civil rights by the Federal Bureau of Investigation.

The Electronic Frontier Foundation ("EFF") is a not-for-profit membership organization with offices in San Francisco, California and Washington, DC. EFF works to inform policymakers and the general public about civil liberties issues related to technology, and to act as a defender of those liberties. In support of its mission, EFF uses the Freedom of Information Act to obtain and disseminate information concerning the activities of federal agencies.

SUMMARY OF ARGUMENT

The Freedom of Information Act (FOIA) provides a right for *any person* to make a FOIA request seeking federal agency records for *any purpose*. It also provides a private right of action for any complainant – a person who has been denied records requested under the law – to bring a lawsuit in federal court to enforce the FOIA. This private right of action is a crucial component of the law because the FOIA is enforced *solely* by individuals who bring lawsuits against federal agencies.

The broad availability of FOIA is also critical to the success of the law, which does not place any individual or group above another with regard to access to government records. Thus, FOIA is designed to accommodate multiple requests for the same records. For example, the statute includes a "frequently requested records" provision, which instructs agencies to make records that "have become or are likely to become the subject of subsequent requests for substantially the same records" available electronically to the public, but also requires agencies to continue to process additional FOIA requests for the same records. Indeed, many members of the public may be interested in the same records but for different reasons, each of which is legitimate under the law. Only by protecting individual rights under FOIA one request at a time is the core public purpose of FOIA fulfilled.

Against this background, the concept of virtual representation applied in a FOIA matter raises serious concerns. FOIA requests are filed by many different people for many different reasons. Historians, journalists, public interest advocates, individuals, and businesses do not have the same incentive to request records – even if they all are interested in release of the same records – and do not have any incentive to litigate in a way that protects the interests of others. Because a FOIA request depends on a series of deliberate actions by an individual, rather than a government action that generally affects the public, it is unlike the "public law" cases that some courts have described as more appropriate for a finding of virtual representation. No one lawsuit will achieve FOIA's public purpose (or, indeed, another requester's individual interest); the statute is designed to fulfill the public part of its purpose through many individuals each reminding federal agencies that they cannot operate in secret.

Finally, FOIA requesters have developed a professional community that exchanges information and ideas. Those relationships should not be imputed to create some sort of "special relationship" that is evidence of virtual representation.

ARGUMENT

I. The Freedom of Information Act creates – and depends for enforcement upon – an individual right for any member of the public to request, and pursue through litigation, access to government records.

In enacting the Freedom of Information Act ("FOIA"), Congress was "principally interested in opening administrative processes to the scrutiny of the press and general public," *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 17 (1974), and sought "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber*, 437 U.S. 214, 242 (1978). The FOIA creates "a judicially enforceable public right to secure [government records] from possibly unwilling hands." *EPA v. Mink*, 410 U.S. 73, 90 (1973).

To accomplish these purposes, FOIA confers a right on "any person" to request and obtain records held by the government, subject to published regulations regarding time, place, fees, and procedure. 5 U.S.C. § 552(a)(3); *cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) ("the identity of the requesting party has no bearing on the merits of his or her FOIA request"). The term "person" is defined in 5 U.S.C. § 551(2) to include individuals, partnerships, corporations, associations, or public or private organizations other than an agency.

There is no distinction in the statute between the "person" entitled to make a FOIA request and the "complainant" entitled to sue for judicial enforcement of that right under 5 U.S.C. § 552(a)(4)(B). Thus, FOIA creates a private right of action for the benefit of "any person" whose request for records has been denied by the government agency. *See FEC v. Akins*, 524 U.S. 11, 21 (1998) (recognizing inability to obtain information as an injury in fact). Indeed, this private right of action is a crucial component of the FOIA enforcement scheme because, unlike many other laws designed to grant rights to members of the public or to protect the public, there are no federal or state agencies that will independently enforce those rights and protections in the FOIA context; the statute is exclusively enforced through litigation by members of the public.

Further, FOIA permits requests to be made for any purpose. The passage of FOIA in 1966 was specifically intended to eliminate "the test of who shall have the right to different information." S. Rep. No. 89-813, at 40 (1965). The law does not permit the agency to consider the requester's need or intended use in determining whether to disclose the records. As long as the records do not fall within one of the statutory exemptions, an agency, "upon *any* request for records which (A) reasonably describes such records and (B) 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." 5 U.S.C. § 552(a)(3) (emphasis added).

Courts have affirmed this basic principle of FOIA, noting that Congress "clearly intended the FOIA to give any member of the public as much right to disclosure as one with a special interest in a particular document." *Reporters Comm.*, 489 U.S. at 771 (internal quotation marks omitted); *see also* H.R. Rep. No. 104-795, at 6 (1996) ("Requesters do not have to show a need or reason for seeking information."), *as reprinted in* 1996 U.S.C.C.A.N. 3448, 3449.

Congress has repeatedly emphasized this intention. Thus, the 1996 amendments to the Freedom of Information Act include congressional findings that "the purpose of [FOIA is to] . . . establish and enable enforcement of the right of any person to obtain access to the records of [agencies of the Federal Government], subject to statutory exemptions, *for any public or private purpose*." Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3048 (1996) (emphasis added). The restriction against federal agencies considering the purpose of the request makes particular sense in the context of FOIA, where the underlying principal of the law is that the government agencies act as custodians of public records that over time, and as sensitivities recede, will be made available to the public.

Thus, FOIA provides each and every person who is interested in government records, separately, the

right to request the information and pursue the matter in court if the requested records are withheld.

II. Litigation by one FOIA requester does not protect the individual or public interests of other FOIA requesters.

Congress enacted the FOIA with a full understanding that there would be instances when multiple FOIA requesters were interested in the same or similar records. In addition to requiring affirmative publication in the Federal Register and electronically of several categories of information that are of wide interest to the public, 5 U.S.C. § 552(a)(1), the law requires that agencies make available electronically those records that the agency determines "have become or are likely to become the subject of subsequent requests for substantially the same records," 5 U.S.C. § 552(a)(2)(D). These are now commonly referred to as "frequently requested records."[2] As the Department of Justice's guidance has noted, this electronic availability requirement applies when there are multiple FOIA requests for the same records.

Importantly, even if frequently requested records are posted in electronic reading rooms, Congress still anticipated the likelihood that there could be additional requests for the same records and indicated

[2] *See Agencies Continue E-FOIA Implementation*, FOIA Post (Department of Justice, Washington, D.C.), Mar. 14, 2001, http://www.usdoj.gov/oip/foiapost/2001foiapost2.htm.

that those requests should be fulfilled. *See* H.R. Rep. No. 104-795, at 21 (1996) ("Since not all individuals . . . are near agency public reading rooms, requestors would still be able to access previously-released FOIA records through the normal FOIA process."), *as reprinted in* 1996 U.S.C.C.A.N. 3448, 3464; *see also Congress Enacts FOIA Amendment,* FOIA Update (Department of Justice, Washington, D.C.) 1996, Vol. 17, http://www.usdoj.gov/oip/foia_updates/Vol_XVII_4/page1.htm; *Amendment Implementation Guidance,* FOIA Update (Department of Justice, Washington, D.C.) 1997, Vol. XVIII, No. 1, http://www.usdoj.gov/oip/foia_updates/Vol_XVIII_1/page3.htm.

Although there are records in government files that may generate numerous inquiries from the public, it is rare that all of the FOIA requesters will have the same interest in the records. Indeed, the same collection of records may serve several purposes all at once. Historians may be seeking to document important events. Advocacy groups may seek to bring affirmative litigation or to advance legislative goals. Reporters may seek to inform the public about recent events or to cast a new light on historical events. An individual may be trying to establish entitlement to benefits or to advance private interests. Businesses might seek the records to pursue commercial opportunities. Requesters with each of these motivations and more can be found among the individuals who are responsible for surges of requests for records concerning Hurricane Katrina, the Iraq war and reconstruction effort, and other significant matters.

For these reasons, the denial of records pursuant to a FOIA request does not on its own provide the incentive for the requester to pursue the records through litigation. Nor does it provide the incentive to protect another FOIA requester's interest in the records, which may stem from different reasons for requesting the records.

Similarly, the release of records to one FOIA requester does not provide any guarantee that the record will be made available with immediacy to other members of the public. Government agencies do not systematically make released records available to the general public.[3] In addition, even FOIA requesters who intend to disseminate records may not do so immediately, and those who do not want the record shared will not inform others of the release. Thus, the release of records under FOIA typically serves only the purpose of the individual FOIA requester who received the record.

---

[3] The "frequently requested records" requirement only applies when there are three or more requests for the *same* record or when the agency anticipates that there will be at least three requests for a given record, and thus does not require any dissemination of released records that fail to meet that standard. Department of Justice, *Freedom of Information Act Guide* 29-30 (2007), http://www.usdoj.gov/oip/foia_guide07/foia_rrws.pdf. In addition, a study by *amicus* National Security Archive determined that agencies have substantially failed to comply with that provision of the FOIA. National Security Archive, *File Not Found: 10 Years After E-FOIA, Most Federal Agencies Are Delinquent* (Mar. 12, 2007), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB216/index.htm.

Indeed, the "public" purpose of FOIA is achieved through the efforts of many individual members of the public, journalists, and organizations who seek records for any of a wide range of individual reasons. This is the reason why FOIA does not distinguish between requesters or their purposes in seeking records. The gradual and consistent opening of public records pursuant to FOIA requests from diverse sources and FOIA litigation keeps federal agencies on notice that they cannot hide their activities. It provides countervailing pressure against the natural bureaucratic tendency to keep secrets.

Thus, under no circumstances will one lawsuit achieve the public purpose that is served by FOIA. A record released to one requester neither ensures that other members of the public will see that record, nor guarantees that another individual will get a record through his or her own FOIA request. Thus, a lawsuit brought under FOIA cannot be characterized as a "public action that has only an indirect impact on [the individual party's] interests." *Tyrus v. Schoemehl*, 93 F.3d 449, 456 (8th Cir. 1996) (quoting *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 803 (1996)). The FOIA request and the FOIA lawsuit are, instead, specifically associated with the interests of the individual FOIA requester.

Nor, indeed, are FOIA cases the type in which "the number of plaintiffs with standing is potentially limitless." *Tyrus*, 93 F.3d at 456 (voting rights case in which plaintiffs alleged redistricting diluted their vote). A FOIA dispute does not arise because of some

action that the government has taken that impacts the public generally. FOIA requires requesters to take a number of deliberate steps, including filing a proper request that "reasonably describes" the records sought, 5 U.S.C. § 552(a)(3)(A), in some circumstances agreeing to pay fees prior to processing, § 552(a)(4)(A)(v), paying fees for processing, § 552(a)(3)(A), and exhausting administrative remedies by filing an administrative appeal, *Oglesby v. United States Dep't of Army*, 920 F.2d 57, 61-62 (D.C. Cir. 1990), before the dispute would ever become ripe for litigation. The vast majority of FOIA requesters go no further than filing an initial FOIA request, paying for its processing, and obtaining responsive records. Thus, the FOIA context is not like the situations in which the analysis of virtual representation was impacted by the "public law" context. *Cf. Tyrus*, 93 F.3d at 456.

In particular, the concept of adequate representation in a FOIA case by another party seeking the same records is extremely questionable. First, the perspective of the FOIA requester influences the arguments that he or she makes for release of records in several ways. In cases raising privacy issues, the identity of the requester may affect whether a court would find a "clearly unwarranted invasion of privacy" under Exemption 6 or an "unwarranted invasion of privacy" under Exemption 7(C) of the FOIA. 5 U.S.C. §§ 552(b)(6) and (b)(7)(C). The purpose for which the record is sought also is relevant under the privacy exemptions because it informs the court's evaluation of the public interest served by the requested release. In a different

way, the purpose for which a request is sought might be used to support an argument that an overburdened agency should nonetheless handle a request out of turn or grant expedited processing to a particular requester. *See Open Am. v. Watergate Special Prosecution Force,* 547 F.2d 605, 615-16 (D.C. Cir. 1976) (recognizing situations of exception need or urgency for records); § 552(a)(6)(E) (expedited processing provision). The knowledge base of any particular requester litigating a case also may vary widely. A subject matter expert or historian may be more able to marshal facts about what already is in the public record on a particular issue, while an individual with a more personal purpose may be able to provide facts that are particular to that individual.

Second, the timing of the suit may directly affect the releasability of records. FOIA policy changes over time, as illustrated by the different policy memoranda issued by Attorney General Reno and Attorney General Ashcroft. *See New Attorney General FOIA Memorandum Issued*, FOIA Post (Department of Justice, Washington, D.C.), Oct. 15, 2001, http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm. Thus, government agencies may change their policy with respect to making discretionary releases under the FOIA. The application of exemptions also changes over time. For example, a record classified under Executive Order 12,958 one day may be declassified a year later. *See* Exec. Order No. 12,958 (as amended by Exec. Order No. 13,292), 68 Fed. Reg. 15315 (Mar. 25, 2003). Similarly, a law enforcement investigation

may end, rendering records about the investigation newly releasable.

In addition, the court below also cast its net far too wide as it examined the contours of the relationship between two litigants for the purpose of virtual representation. It is not uncommon for people who seek U.S. Government records to communicate with each other. This is particularly true among the FOIA bar, which is not large. FOIA requesters from public interest, academic or journalism perspectives, who are not attorneys themselves, often seek legal assistance from a small community of FOIA advocates, just as other litigants seek experienced attorneys who are best able to pursue their cases. The choice of attorney should not be held against the FOIA requester who chooses to enforce his or her rights in court.

Moreover, as the courts have long recognized, FOIA disputes are heavily weighted towards the government, which has access to all the information about the records in dispute while the FOIA requester has none. *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) ("In many, if not most, disputes under the FOIA, resolution centers around the factual nature, the statutory category, of the information sought. . . . [O]nly one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information.") Thus, individuals and attorneys who pursue litigation in FOIA matters regularly share ideas and information in an effort to better

advocate for release of records in response to their requests. As for any specialized legal bar, there are electronic list serves, newsletters, conferences, academic centers at universities, and informal gatherings that provide fora for the discussion of cases and issues. Participants in these activities exchange information, advice, and ideas, just as all lawyers, journalists, academics, and individuals do when they participate in other professional associations, or through networking and educational programs. They are not "mere strangers," yet those relationships do not alter the purposes of the individual requestors seeking records. Thus, the Court should use extreme care before attributing any form of privity to those relationships.

Against this background, the decision below, which excluded evidentiary submissions and legal arguments for procedural and timing reasons, *see Taylor v. Sturgell*, 490 F.3d 965, 972-73, 975 and notes (D.C. Cir. 2007), should be viewed with significant skepticism.[4] In addition to casting doubt on the propriety of the decision below, the reasoning below should cause the Court to be extremely wary of

---

[4] Similarly, in *Herrick v. Garvey*, 298 F.3d 1184, 1194 and n. 10 (10th Cir. 2002), the case that was relied on as a basis for dismissal of Petitioner's lawsuit, the timing of the plaintiff's legal arguments led to the anomalous result that the court concluded the records in dispute had lost their FOIA Exemption 4 protection, but nonetheless would not be released because of assumptions about the result of two legal questions that the plaintiff had not raised or had not raised in a timely manner.

establishing rules that overturn the "deep-rooted historic tradition that everyone should have his own day in court." *Richards*, 517 U.S. at 798 (citation omitted). In FOIA cases, the important concerns behind the law, the strong need for individual enforcement of the law, and the diverse incentives for members of the public to seek records should counsel against a court finding that it is a "type" of case in which a theory of virtual representation is appropriate.

CONCLUSION

The decision of the D.C. Circuit should be reversed.

Date: February 27, 2008

Respectfully submitted,

MEREDITH FUCHS
General Counsel
THE NATIONAL SECURITY ARCHIVE
GEORGE WASHINGTON UNIVERSITY
Gelman Library, Suite 701
2130 H Street, NW
Washington, DC 20037
202-994-7000

Attorney for Amici Curiae