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March 7, 2011

VIA FACSIMILE AND FIRST-CLASS MAIL

Ms. Melanie Pustay
Director, Office of Information and Privacy
U.S. Department of Justice
Flag Building, Suite 570
Washington, DC 20530-0001

Re: Appeal of EOUSA Request No. 11-346

Dear Ms. Pustay:

I write to appeal the Department's erroneous denial of the above-referenced Freedom of Information Act request.

By way of background, on January 10, I submitted a request to the Executive Office for United States Attorneys (EOUSA) seeking copies of all Evaluation and Review Staff (EARS) and Direct Self Evaluation Survey (DSES) reports filed within the past ten years. The reports memorialize EOUSA's periodic assessment of the performance of each U.S. Attorney's office. They contain final objective assessments of the offices' effectiveness, as well as their compliance with Department policy and existing law. They include both overall conclusions about particular offices, and specific facts and data underlying those determinations.

EOUSA responded on February 16 that these reports are "protected from disclosure in their entireties" under the deliberative process privilege recognized in Exemption 5, 5 U.S.C. § 552(b)(5). Letter from William G. Stewart II, at 1 (Feb. 16, 2011) (attached). (EOUSA's denial letter also indicated that portions of the reports are independently exempt from disclosure under §§ 552(b)(2)-(3), (b)(6), and (b)(7)(E), though it did not indicate either the type or extent of material that the Office believed could be withheld. Without that information, it is obviously impossible to challenge that portion of the denial through this appeal.) Notwithstanding this assertion, EOUSA nonetheless released partial copies of four

EARS reports that had "been previously released." *Id.* I have enclosed copies of this correspondence for your reference.

EOUSA's denial was erroneous because it applied Exemption 5's deliberative process privilege to final, objective assessments of the agency's compliance with existing policy in a manner that is contrary to settled law. In addition, EOUSA failed to segregate and disclose any non-exempt portions of the requested records. I therefore respectfully ask that you remand this matter to EOUSA with instructions to locate and produce the relevant records. In the alternative, I ask that the Department release the records in their entirety as a matter of discretion.

The deliberative process privilege embodied in Exemption 5 shields only a narrow and well-defined class of agency records. It permits an agency to withhold only records that are both predecisional and deliberative. *Mapother v. DOJ*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). The records sought in this request are neither, particularly when the statutory exemption is construed narrowly, as it must be. *E.g. Milner v. Dep't of the Navy,* 562 U.S. ___ (2011) (slip op. at 8) (exemptions must be "given a narrow compass"); *Multi AG Media L.L.C. v. U.S. Dep't of Agric.*, 515 F.3d 1224, 1227 (D.C. Cir. 2008) (quoting *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991)). Even if portions of the reports could properly be withheld, EOUSA has a statutory duty to disclose any non-exempt portions of the records. *E.g.*, *EPA v. Mink*, 410 U.S. 73, 91 (1973); *Stolt-Neilsen Transp. Group v. United States*, 543 F3d 728, 734 (D.C. Cir. 2008); 5 U.S.C. § 552(b). The Department should undertake this analysis with an eye toward the President's command that the FOIA "be administered with a clear presumption: In the face of doubt, openness prevails." Memorandum for the Heads of Executive Dep'ts and Agencies, 74 Fed. Reg. 15, 4683 (Jan. 26, 2009).

I. <u>The Department's EARS and DSES reports are not part of a deliberative process, and therefore cannot be withheld under Exemption 5.</u>

The deliberative process privilege embodied in Exemption 5 shields only those records that are generated as part of a process by which the agency formulates its policy or legal positions. *Jordan v. DOJ*, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc) (citing *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975), cert denied 415 U.S. 977 (1974)). A document therefore qualifies as an exempted deliberative record only to the extent that it "makes recommendations or expresses opinions on legal or policy matters." *Jordan*, 591 F.2d at 774.; *see also Public Citizen, Inc. v. OMB*, 598 F.3d 865, 876 (D.C. Cir. 2009). This privilege is meant to protect the consultative "give-and-take" essential to sound policymaking; it is designed to ensure that agencies not be required to make policy or legal decisions "in a fishbowl." *Jordan*, 591 F.2d at 773 (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)). Under no circumstances, however, does the deliberative process privilege shield records related to polices that have already been developed. *Jordan*, 591 F.2d at 774 ("Communications that occur after a policy has already been settled upon … are not privileged."). Similarly, "purely factual reports . . . cannot be cloaked in secrecy by an exemption designed to protect only 'those internal working papers in which opinions are expressed and policies formulated and recommended.'" *Bristol-Myers Co. v. Federal Trade*

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Commission, 424 F.2d 935, 939 (D.C. Cir. 1970) (citing *Ackerly v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969)).

In its seminal case on the subject, *Vaughn v. Rosen*, the D.C. Circuit Court of Appeals held that the deliberative process protection does not shield the U.S. Civil Service Commission's Evaluation and Management reports because they were primarily objective assessments of how the government was carrying out existing policy, and were therefore not deliberative. 523 F.2d 1136. The reports at issue in that case contained the Commission's "evaluation of the way [other] agencies' managers and supervisors are carrying out their professional management duties," *Id.* at 1139; they included a wide variety of assessments on subjects ranging from compliance with cyclic review standards to whether training programs were appropriately coordinated. *Id.* at 1144 n. 3. The *Vaughn* Court concluded that Exemption 5 allows agencies to withhold only truly deliberative documents such as advisory opinions, policy recommendations, and position papers. *Id.* at 1140. The "factual, investigative, and evaluative" portions of the Commission's reports could not fit within that classification because they were "final objective analyses of agency performance under existing policy." *Id.* at 1140. The *Vaughn* Court held that Exemption 5 does not shield records which "reveal whether the agencies' policies are being carried out." *Id.* As a result, the Court ordered that although staff recommendations could be redacted, the assessments themselves could not be withheld under the deliberative process privilege. *Id.* at 1147.

Not surprisingly, courts regularly order agencies to disclose final assessments of their performance under existing policy, even if officials might someday draw on those evaluations in future policy decisions. *See, e.g.*, *Cowdery, Ecker & Murphy, L.L.C. v. U.S. Dep't of the Interior*, 511 F. Supp. 2d 215, 221 (D. Conn. 2007) (requiring an agency to disclose an employee's "self-assessment and his supervisor's recommendations and assessment of his performance" because they were not "deliberations or recommendations on Department policy"); *Chicago Tribune Co. v. U.S. Dep't of Health and Human Servs.*, No. 95-C-3917, 1997 U.S. Dist. LEXIS 2308 (N.D. Ill. Feb. 26, 1997) (requiring disclosure of factual assessments by agency auditors reviewing an outside study).

The EARS and DSES reports at issue in this appeal are just such a backward-looking evaluation of U.S. Attorneys' offices' compliance with existing law and policy. EARS and DSES reviews are "used to assess how well [U.S. Attorneys offices] are following DOJ polices and the Attorney General's priorities." U.S. Dep't of Justice, Office of the Inspector Gen., *Resource Management of United States Attorneys' Offices*, Audit Report No. 09-03, at 3 (Nov. 2008), available from http://www.justice.gov/oig/reports/EOUSA/a0903/final.pdf (last visited March 1, 2011). They are conducted as part of the Department's duty to evaluate U.S. Attorneys' offices, 28 C.F.R. 0.22(a)(1), and they "provide information to DOJ on performance, management, and various priorities and objectives," U.S. Gen. Accounting Office, *U.S. Attorneys, Performance-Based Incentives are Evolving,* GAO-04-422 (May 28, 2004), at 49 n. 3. The result of this process is a "final report" assessing the performance of the U.S. Attorney's office, as well as its compliance with existing law and Department policies. U.S. Dep't of Justice, Executive Office for U.S. Attorneys, *Request for records Disposition Authority*, at 2 (March 22, 1999), http://www.archives.gov/records-mgmt/rcs/schedules/departments/department-of-justice/rg-0118/n1-118-99-

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002_sf115.pdf (last visited March 1, 2011) (describing the types of records produced in an EARS evaluation); *see also Mansfield v. DOJ*, Mansfield v. DOJ, No. PH-0752-08-0096-I-2, 2009 MSPB LEXIS 2798, at *34 (M.S.P.B. May 8, 2009); U.S. Dep't of Justice, *Final Report, Northern District of Alabama*, at 1 (Aug. 19-23, 2002) (attached).

The four partial EARS reports that EOUSA released are strikingly similar to the records that were at issue in *Vaughn*. The 2002 evaluation of the Northern District of Alabama, to take just one example, includes conclusions that the "USAO adhered to Department policies and practices with respect to the sentencing guidelines" and that the "Criminal Division was adequately staffed to handle its current caseload and increased referrals." U.S. Dep't of Justice, *Final Report, Northern District of Alabama*, at 1-2 (Aug. 19-23, 2002) (attached). The report also contains purely factual data, such as its reference to the fact that "the forfeiture caseload increased from 18 in Fiscal Year 2002 to 28 during Fiscal Year 2003." *Id.* at 4. By comparison, the records at issue in *Vaughn* included such observations as "improvements need to be made in planning, work organization, and position management" and "too few promotions are made through competitive procedures, because supervisors don't understand this program." 523 F.2d at 1144 n. 33. Viewed side by side, the EARS and DSES reports are almost indistinguishable.

EARS and DSES reports are, in other words, a "final objective analyses of agency performance under existing policy," *Vaughn.* 523 F.2d at 1140, and must be disclosed.

It is difficult to imagine how such hindsight assessments could possibly be considered part of the Department's policymaking process, let alone how disclosure could harm that process. Even if policymakers might someday rely on these assessments, that fact alone cannot cloak them from public scrutiny. *Vaughn*, 523 F.2d at 1145 (finding the reports "provide the raw data upon which decisions can be made; they are not themselves a part of the decisional process"). Indeed, *Vaughn* specifically rejected any such rationale. *Id.* at 1143-44 ("[F]actual reports or summaries of past administrative decisions are frequently used by decisionmakers in coming to determination, and yet it is beyond dispute that such documents would not be exempt from disclosure."). In addition, EARS reports assess offices' compliance with various Congressional enactments such as the Speedy Trial Act, 18 U.S.C. §§ 3161, which cannot be modified by the Department. *See Mansfield,* 2009 MSPB LEXIS 2798, at *30 (noting an EARS report that referenced a Speedy Trial Act violation). Those portions of the reports cannot possibly be said to be part of the Department's policymaking process, because they relate to policy not made by the Department.

It also bears mentioning that the Department regularly discloses audits of its compliance with existing policy in other contexts (most notably through the Office of the Inspector General), and that these releases impose none of the harms the deliberative process privilege is designed to prevent. *See Jordan*, 591 F.2d at 773 (quoting S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)). Indeed, both the Inspector General and the U.S. Government Accountability Office release their audit reports to the public as a matter of course.

The EARS and DSES assessments should be similarly disclosed.

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II. The Department's EARS and DSES reports are not predecisional.

EARS and DSES reports are not predecisional to the extent that they memorialize actions previously taken by the U.S. Attorneys' offices. Only predecisional records — those documents that are "antecedent to the adoption of an agency policy" — fall within the scope of Exemption 5's deliberative process privilege. *E.g., Jordan*, 591 F.2d at 774. The privilege does not shield records that merely describe or explain decisions that have already been made. *E.g., Taxation With Representation Fund, Inc. v. IRS*, 646 F.2d 666, 677-78 (D.C. Cir. 1981).

EARS and DSES reports extensively document decisions that the U.S. Attorneys' offices have already made. For example, Department's assessment for the Northern District of Alabama notes, among other things, that the office had begun more closely monitoring attorneys' caseloads, and had reassigned some financial litigation matters to paralegal specialists. U.S. Dep't of Justice, *Final Report, Northern District of Alabama*, at 1, 3 (Aug. 19-23, 2002) (attached). Other reports memorialize various other past agency actions, including decisions to discipline employees for violating Department policies or professional rules. *Mansfield*, 2009 MSPB LEXIS 2798, at *37-*39 (summarizing the contents of a 2007 EARS report for the Eastern District of Pennsylvania, including detailed, though anonymous, information about the performance of particular attorneys).

Such factual recounting of decisions that have already been made obviously fall outside the deliberative process protection. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153-54 (1975); *Judicial Watch, Inc. v. HHS,* 27 F. Supp. 2d 240, 245 (D.D.C. 1998); *Badhwar v. DOJ*, 622 F. Supp. 1364, 1372 (D.D.C. 1985) ("There is nothing predecisional about a recitation of corrective action already taken."). The portions of the EARS and DSES reports that record past agency actions are no different; they must be released.

III. EOUSA failed to segregate non-exempt portions of the DSES and EARS reports.

Even if the Department believes that some portions of the EARS and DSES reports may be withheld under Exemption 5, it nonetheless failed to segregate and disclose those portions of the records that are not exempt. Its duty to do so is well-settled. *E.g. ,Mead Data Central v. U.S. Dep't of the Air Force*, 566 F.2d 242, 260, (D.C. Cir. 1977); 5 U.S.C. § 552(b). Documents cannot be withheld in their entirety "unless redacting the portions of the documents that reveal deliberations is impossible." *NLRB v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 309 (D.D.C. 2009) (citing In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997)).

Even assuming the EARS and DSES reports contain some protectable deliberative information, portions of those records are also quintessentially factual. For example, the four reports that were disclosed by EOUSA include information such as workload statistics, U.S. Dep't of Justice, *Final Report, Northern District of Alabama*, at 4 (Aug. 19-23, 2002) (attached) ("[T]he forfeiture caseload increased from 18 in Fiscal Year 2002 to 28 in Fiscal Year 2003."), and organizational structure, *Id.* ("The USAO had recently created an Appellate division that handles civil and criminal appeals."). In addition, EARS and DSES reports include backward-looking factual information about instances in which courts

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determined that Department attorneys violated the law, summaries of attorneys' performance, and instances in which the Department failed to meet filing deadlines. *See Mansfield*, 2009 MSPB LEXIS 2798, at *37-*39. Both the reports provided by EOUSA and the Merit System Protection Board's extensive review of EARS reports in *Mansfield v. DOJ* amply demonstrate that these reports contain a wealth of purely factual information, and that expressions of opinion (if any) are easily redactable.

EOUSA appears not to have even attempted to do so, despite the law's unambiguous requirement to the contrary.

IV. Even if the records are exempt, the Department should release them as a matter of discretion.

Should you remain unpersuaded that EARS and DSES must be disclosed under the FOIA, I nonetheless urge the Department to release them as a matter of discretion. As the Attorney General has made clear, "an agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exception." Attorney Gen.'s Memorandum for Heads of Executive Dep'ts and Agencies Concerning the Freedom of Info. Act, at 1. (Mar. 19, 2009). Instead, the Attorney General instructed agencies "to make discretionary disclosures of information." *Id*.

EARS and DSES reports reference matters of compelling public interest. They make it possible for the public to better understand whether the Department is effectively carrying out its awesome constitutional duty to ensure "that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). When that system fails, it has "a powerful impact on individuals entitled to Due Process and a cancerous effect on the administration of justice," *United States v. Jones*, No. 07-10289, 2009 WL 1396385, at *17 (D. Mass. May 18, 2009), and can "undermine[] confidence" in criminal prosecutions, *United States v. Conley*, 415 F.3d 183, 188 (1st Cir. 2005).

Such matters are sufficiently serious to merit prompt and full disclosure, particularly when, as here, disclosure threatens no countervailing harm.

Conclusion

For these reasons, I ask the Department to reverse EOUSA's determination, and to disclose responsive records with all due speed.

EOUSA's denial is incompatible with the basic fact that FOIA exists to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). It is also inconsistent with the President's clear instruction that "[a]ll agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government." 74 Fed. Reg. 15 at 4683.

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In the face of any doubt on this question, the Department's course is clear: "openness prevails." *Id*.

Please do not hesitate to contact me should you have any questions regarding this appeal. I may be reached at (202) 906-8177, or by electronic mail at bheath@usatoday.com.

I look forward to your help in resolving this matter.

Sincerely,

Brad Heath

Enclosures

Cc: Ms. Barbara Wall, Vice President and Senior Assoc. Gen. Counsel, Gannett Co., Inc.

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