

May 1, 2012

VIA FIRST CLASS MAIL

Ms. Melanie Pustay
Director, Office of Information Policy
U.S. Department of Justice
1425 New York Avenue, N.W., Suite 11050
Washington, D.C. 20530-0001

Re: Appeal of Request No. 2012USMS19679 (USMS)

Dear Ms. Pustay:

I represent USA TODAY, and I write to appeal the U.S. Marshals Service's denial of a Freedom of Information Act request for mugshots by reporter Dennis Cauchon. On March 1, Mr. Cauchon, a reporter in the newspaper's Ohio bureau, requested copies of 66 mugshots of prisoners who were the subject of pending civil commitment proceedings under the Adam Walsh Child Protection and Safety Act, 18 U.S.C. § 4248. Despite repeated assurances that the photographs would be disclosed, the Marshals Service ultimately denied Mr. Cauchon's request in its entirety, asserting that the records were exempt under the privacy protections embodied in Exemptions 6 and 7(C).

Controlling law in the Sixth Circuit, where Mr. Cauchon resides, dictates otherwise. The Sixth Circuit has expressly held that "no privacy rights are implicated" by the disclosure of booking photographs of people whose names "have already been divulged" and who "have already appeared in open court." *Detroit Free Press v. Dep't of Justice*, 73 F.3d 93, 97 (6th Cir. 1996). Even were that not the case, the court concluded that defendants' privacy interests were outweighed by the public's interest in "subject[ing] the government to public oversight." *Id.* at 98. The Marshals Service is free to disagree with this interpretation, but not to disregard it. *See Beacon Journal Publ'g Co. v. Gonzales*, No. 05-cv-1396, 2005 U.S. Dist. LEXIS 28109, at *3-4, *14 (N.D. Ohio Nov. 16, 2005) (awarding summary judgment to a requester seeking mugshots and awarding attorneys' fees).

Each of the mugshots at issue in Mr. Cauchon's request fits comfortably within the Sixth Circuit's *Detroit Free Press* holding. As the Marshals Service was aware, all individuals named in the request were the subject of ongoing court proceedings in which their names had been publicly divulged and in which they had appeared in open court.¹ The Marshals Service is accordingly required to release their mugshots.

¹ Subsequent to that request, another reporter, Brad Heath, informed the Marshals Service that proceedings against John Volungus and Richard Villegas had concluded. At this point, the federal district court proceedings against Robert Brown, Steven Wiseman, Robert Fiscus, Charles Yates, George Hamelin, Carlos Ofarrit-Figueroa

Even leaving the rule of *Detroit Free Press* aside, the Marshals Service's denial is without merit because these inmates' privacy interests cannot outweigh the public's interest in scrutinizing how the Department is fulfilling its statutory obligations. As you know, both Exemptions 6 and 7 of the FOIA apply only when the public's interest in disclosure is outbalanced by an individual's privacy interest. *See Kimberlin v. Dep't of Justice*, 139 F.3d 944, 948 (D.C. Cir. 1998) (requiring a case-by-case weighing of the public and private interests at stake).

Had it undertaken such a balancing, the Bureau of Prisons would have readily understood that the privacy interests implicated by this request are significantly diminished because nearly all of the men who have been certified under the Adam Walsh Act will be required to register as sex offenders in their home states, meaning their photographs will become public and be posted online as a matter of state law. *See, e.g., Ark. Code Ann. § 12-12-913 (j)(1)(A)(vii)* (requiring disclosure of registered offenders' most recent photograph). It is difficult to imagine that prisoners can claim any meaningful privacy interest in such photographs. *See Long v. U.S. Dep't of Justice*, 450 F. Supp. 2d 42, 69 (D.D.C. 2006) (finding privacy interests "significantly less substantial" when the information has been disclosed previously); *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1234 (10th Cir. 2007) (ordering disclosure of records identifying government employees whose identities had previously been disclosed).

Such a weak privacy interest cannot outweigh the public's significant interest in examining the manner in which the Justice Department has operated a controversial system for detaining accused sexual predators. It is beyond dispute that the public has a compelling interest in assessing how well federal agencies are carrying out their statutory duties. *See News-Press v. Dep't of Homeland Sec.*, 489 F.3d 1173, 1190 (11th Cir. 2007) (ordering the government to disclose the addresses of disaster-aid recipients to further an inquiry into the government's response to natural disasters). Access to the photographs at issue in this request will, among other things, offer insight into the approximate age and physical health of the detainees. Those facts are of critical importance for determining whether someone poses a significant risk of re-offending, which is a key consideration in determining whether they may be civilly committed under the Adam Walsh Act. Access to the mugshots would also offer information about the racial and ethnic makeup of the population being held for possible civil commitment, which would provide insight into whether the Justice Department's administration of the Adam Walsh Act has had a disproportionate impact on certain ethnic groups.

In light of these arguments, I hope the Marshall's Service will reconsider its denial of Mr. Cauchon's request for the mugshots. As you know, the FOIA grants your office no more than twenty working days in which to respond to this appeal. I look forward to your help in resolving this matter without delay, and please do not hesitate to contact me with any questions.

Sincerely,

Barbara W. Wall

Cc: Dennis Cauchon
Brad Heath

and Barclay Van Buren have similarly concluded, though some remain the subject of motions for reconsideration or for appeal.