

REPORTERS COMMITTEE

FOR FREEDOM OF THE PRESS

1101 Wilson Blvd., Suite 1100
Arlington, Va. 22209-2211
(703) 807-2100
www.rcfp.org

Bruce D. Brown
Executive Director

STEERING COMMITTEE

SCOTT APPLEWHITE
The Associated Press

WOLF BLITZER
CNN

DAVID BOARDMAN
Seattle Times

CHIP BOK
Creators Syndicate

ERIKA BOLSTAD
McClatchy Newspapers

MICHAEL DUFFY
Time

RICHARD S. DUNHAM
Houston Chronicle

ASHLEA EBELING
Forbes Magazine

FRED GRAHAM
InSession

JOHN C. HENRY
Freelance

NAT HENTOFF
United Media Newspaper Syndicate

DAHLIA LITHWICK
Slate

JANE MAYER
The New Yorker

JOHN MCKINNON
The Wall Street Journal

TONY MAURO
National Law Journal

DOYLE MCMANUS
Los Angeles Times

ANDREA MITCHELL
NBC News

MAGGIE MULVIHILL
New England Center for Investigative Reporting

BILL NICHOLS
Politico

SANDRA PEDDIE
Newsday

JIM RUBIN
Bloomberg News

BOB SCHIEFFER
CBS News

ERIC SCHMITT
The New York Times

ALICIA SHEPARD
Freelance

MARGARET LOW SMITH
NPR

PAUL STEIGER
Pro Publica

PIERRE THOMAS
ABC News

SAUNDRA TORRY
USA Today

JUDY WOODRUFF
PBS/The NewsHour

*Affiliations appear only
for purposes of identification.*

January 30, 2013

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

*Re: Disclosure of federal booking photographs under
FOIA and U.S. Marshals Service Booking Photographs
Disclosure Policy Memorandum of December 12, 2012*

Dear Attorney General Holder:

The Reporters Committee for Freedom of the Press, along with 37 additional media organizations,¹ write to express our concern over recent U.S. Marshals Service efforts to restrict public access to booking photographs under the federal Freedom of Information Act, 5 U.S.C. § 552, *et seq.* ("FOIA"). We emphasize at the outset our previous attempt to engage the Marshals Service on this matter. That effort was met only with the attached reply.²

In a December 12, 2012, Marshals Service memorandum ("Memo"), its General Counsel announced, among other things, that the Marshals

¹ This includes ABC, Inc., Advance Publications, Inc., ALM Media, LLC, American Society of News Editors, Association of Alternative Newsmedia, The Associated Press, Associated Press Media Editors, Atlantic Media, Inc., Bay Area News Group, Belo Corp., Bloomberg L.P., Cable News Network, Inc., California Newspaper Publishers Association, Cox Media Group, Inc., Daily News, LP, Dow Jones & Company, Inc., The E.W. Scripps Company, Gannett Co., Inc., Hearst Corporation, Los Angeles Times, The McClatchy Company, Media General, Inc., National Press Photographers Association, Newspaper Association of America, The New York Times Company, The Newsweek/Daily Beast Company, North Jersey Media Group, Inc., NPR, Inc., Online News Association, Radio Television Digital News Association, Reuters America LLC, The Seattle Times Co., Society of Professional Journalists, Stephens Media LLC, Time Inc., Tribune Company and The Washington Post. Counsel/Contact designation for all parties is appended as Attachment A.

² Copies of our January 4, 2012, letter to William E. Bordley, Associate General Counsel, U.S. Marshals Service, along with the Marshals' January 30, 2012, reply are appended as Attachments B and C, respectively.

Service will no longer comply with its public disclosure obligations under FOIA regarding federal booking photograph records in accordance with the mandates of *Detroit Free Press v. Dep't of Justice*, 73 F.3d 93 (6th Cir. 1996).³ This abrupt policy change simply ignores federal appellate court precedent holding that under certain conditions such records do not implicate any recognizable personal privacy interest under FOIA and therefore must be disclosed to the public upon request. In the face of such established judicial authority, the Marshals Service cannot unilaterally decide that it no longer sees fit to adhere to the law. We ask that you immediately order the Marshals Service to rescind and reverse all portions of the Memo that instruct agency personnel to deny FOIA requests for federal booking photographs that qualify for public release under *Detroit Free Press*. We further request that you order the Marshals Service to retroactively honor any FOIA requests it has denied pursuant to its new policy that qualify for release under *Detroit Free Press*.

Recent FOIA denials to the media making requests for federal booking photographs from within the Sixth Circuit that qualify for release under *Detroit Free Press* document that the Marshals Service has begun implementing the withholding directives outlined in the Memo. The denials make no mention of the policy change and only state that the requester has failed to make an adequate showing that the public interest in disclosure outweighs personal privacy interests. *Detroit Free Press* holds that no balancing is required as there is simply no privacy interest to balance.

**The New Marshals Service Policy Violates
Established Law and DOJ FOIA Guidelines**

The new policy stifles the public's lawful access to booking photographs under FOIA without legal justification. Apparently emboldened by the two recent appellate court decisions that upheld the nondisclosure of booking photographs under FOIA's privacy exemptions, the Marshals Service altered its policy to categorically prohibit the release of all federal booking photographs, even to Sixth Circuit residents who may lawfully obtain them under FOIA.

Detroit Free Press held that such records must be disclosed upon request under FOIA when a named defendant has appeared in open court during the course of an ongoing criminal proceeding and that the disclosure implicates no personal privacy interest in the subjects of the photographs. In contrast, more recent decisions in the Tenth and Eleventh U.S. Circuit Courts of Appeal have held that such records do implicate some privacy interest under FOIA.⁴ In those particular cases, the courts held that the

³ A copy of the Memo is appended as Attachment D.

⁴ See *World Publ'g Co. v. Dep't of Justice*, 672 F.3d 825 (10th Cir. 2012); *Karantsalis v. Dep't of Justice*, 635 F.3d 497 (11th Cir. 2011) (per curiam), *cert. denied*, 132 S. Ct. 1141 (Jan. 23, 2012).

requester did not demonstrate that the public interest in their disclosure outweighed the privacy interest. Until the Memo, the Marshals Service applied *Detroit Free Press* in the strictest manner possible. It would honor FOIA requests for federal booking photographs originating from within the geographic bounds of the Sixth Circuit but continued to deny requests for the same records if originating from any other circuit. The only time a request from outside the Sixth Circuit would be honored was when the same record had been previously released pursuant to a Sixth Circuit request.⁵ The Marshals Service otherwise consistently maintains that the privacy/public interest balancing test under FOIA privacy exemption jurisprudence categorically tips in favor of non-disclosure.

But the Memo goes further and instructs Marshals Service personnel to disregard Sixth Circuit precedent and universally follow the law of the jurisdiction of its own election. It states that “effective immediately, the USMS will not disclose booking photographs under the FOIA, regardless of where the FOIA request originated, unless the USMS OGC determines that the requester has made the requisite showing that the public interest in the requested booking photograph outweighs the privacy interest at stake or that other factors specific to the particular FOIA request warrant processing that request consistent with existing Sixth Circuit precedent.”

This course is of additional concern as while the Memo instructs agency personnel to no longer consider *Detroit Free Press* controlling even within the Sixth Circuit it simultaneously suggests that disclosure can possibly be made “consistent with Sixth Circuit precedent.” This paradoxical statement only adds further confusion as to agency personnel responsibilities under FOIA and is an additional basis to order the Memo rescinded.

Although the new Marshals Service policy may reflect the *agency’s* position that booking photographs implicate personal privacy and are therefore not releasable under FOIA, this alone is insufficient to overturn Sixth Circuit precedent. On top of superseding judicial authority to adjudicate requesters’ rights under FOIA, the Marshals Service’s new policy also expresses a disregard for *stare decisis*. This bedrock of common law recognizes that previous decisions are binding, fostering respect for and reliance upon the rule of law. *Detroit Free Press* remains controlling circuit precedent “unless an inconsistent decision of the United States Supreme Court requires modification of the decision or [Sixth Circuit itself] sitting en banc overrules the prior decision.” *Salmi v. Secretary of Health and Human Services*, 774 F.2d 685, 689 (6th Cir. 1985). As neither condition is present here, the Marshals Service must respect the law

⁵ A copy of a February 14, 2011 declaration by William E. Bordley in connection with the Marshals’ attempt to protect the privacy rights of Tucson shooter Jared Lee Loughner (who subsequently confessed to a shooting spree that left 6 dead and 13 wounded) by withholding his federal booking photograph from the public is appended as Attachment E. Among other things, it sets forth the Marshals previous booking photograph release policy under FOIA and documents its efforts to limit *Detroit Free Press*’ disclosure obligations. See Bordley Declaration at ¶¶ 7-13.

and continue to honor FOIA requests for booking photographs made by Sixth Circuit residents.

Further, the new Marshals Service policy runs counter to 2009 Department of Justice FOIA Guidelines for all federal agencies. Specifically, the Justice Department stated it would defend an agency's FOIA denial "only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law." First, the Marshals Service cannot reasonably foresee that disclosing booking photographs to residents of the Sixth Circuit would harm an interest protected by one of the statutory exemptions because, as mentioned above, the court in *Detroit Free Press* expressly found Exemption 7(C) inapplicable. Hence, the Justice Department cannot let stand recent Marshals Service FOIA denials based on Exemption 7(C) for booking photographs from Sixth Circuit requesters.

Additionally, disclosure of booking photographs is not prohibited by law. The Memo states that the photographs cannot be released because they are stored in records systems protected by the Privacy Act of 1974, 5 U.S.C. § 552a. The Privacy Act, however, contains a well-known exception for records that are required to be released under FOIA. *See* 5 U.S.C. § 552a(b)(2). This exception clearly applies under *Detroit Free Press*. The Privacy Act is therefore not violated when booking photographs are released to FOIA requesters pursuant to *Detroit Free Press*.

**The Marshals Service is Presently Enforcing the Memo's
Directive on the Disclosure of Booking Photographs Under FOIA**

As referenced above, recent actions by the Marshals Service in response to requests from within the Sixth Circuit indicate that the agency is now enforcing the Memo's directives. On December 1, 2012, CNN freelancer Vanessa Hagedorn, made a FOIA request for the booking photographs of brothers Raees Alam Qazi and Sheheryar Alam Qazi, naturalized U.S. citizens originally from Pakistan, who are accused of plotting terrorist attacks in New York City.⁶ On December 27, the Marshals Service denied the request, citing FOIA's purported privacy rights in the images of alleged terrorists standing trial in U.S. courts. The denial further states that Ms. Hagedorn had failed to identify a countervailing public interest sufficient to warrant disclosure under FOIA despite the fact that no such showing is required under *Detroit Free Press*.

The Marshals Service is clearly here violating the law. The request satisfied the Sixth Circuit's test for finding that no cognizable privacy interest exists in the booking photographs. The subjects of the FOIA request are part of an ongoing criminal proceeding as the Department of Justice continues to prosecute the pair on terrorism and

⁶ A copy of Ms. Hagedorn's request and the Marshals Service reply is appended as Attachment F.

related charges. Second, the names of the subjects of the request had already been made public as DOJ officials announced the arrest and charges against the pair prior to the FOIA request. Finally, the pair made their initial appearance in court on Nov. 30,⁷ before Ms. Hagedorn made her FOIA request. Not only does this denial ignore the law but it further highlights the confusion over what “other factors specific to the particular FOIA request warrant processing that request consistent with existing Sixth Circuit precedent” means in relation to making a disclosure determination.

In another denial, the Marshals Service refused to provide a journalist with *The Oakland Press* in Pontiac, MI⁸ with the booking photograph of Roy Dixon, an Atlanta businessman who is accused of bribing Detroit officials, including ex-mayor Kwame Kilpatrick, in an effort to steer city pension investment business to his firm. Dixon is also accused of embezzling \$3 million in pension funds that his company received. Once again, the reporter’s request clearly met the requirements of *Detroit Free Press*, as DOJ officials had already made Mr. Dixon’s name public when he was indicted, he appeared in court before the request was made,⁹ and the case against him continues. Nonetheless, the Marshals Service denied the request in similar fashion to the CNN request described above.

We can only assume these are but two examples of what is now the routine Marshals Service practice of denying any and all FOIA requests for federal booking photographs.

The Marshals Service Ignored Our Previous Inquiries about a Potential Policy Change

Over a year ago, the Marshals Service alluded to the recent change to its booking photograph disclosure policies but refused to substantively respond to our inquiries seeking clarification as to its intentions. When the *Karantsalis* case was on petition for writ of certiorari at the U.S. Supreme Court, the agency’s petition stage opposition brief indicated that the agency was reconsidering its policy of recognizing the rights of Sixth Circuit FOIA requesters to access booking photographs. *See* Brf. for Respondents in Opp., n.5, *Karantsalis v. U.S. Dep’t of Justice*, No. 11-342 (Dec. 19, 2011).¹⁰

⁷ Docket entries in the case, *U.S. v. Qazi*, No. 12-60298 (S.D. Fla. Nov. 30, 2012), indicate that the pair made their initial appearance on Nov. 30.

⁸ A copy of the request and the Marshals Service response is appended as Attachment G.

⁹ The docket in the case, *U.S. v. Beasley et al.*, No. 2:12-cr-20030 (E.D. Mich. Jan. 9, 2013), indicates that Mr. Dixon made his initial appearance and was arraigned on Jan. 9. *The Oakland Press* journalist made his FOIA request on Jan. 10.

¹⁰ A copy of the relevant portion of the Marshals’ brief is appended as Attachment H.

In particular, footnote 5 of the brief stated in part that "In light of the recently developed division of authority and the associated potential for rehearing en banc in the Sixth Circuit, the Service will be able to reconsider its prior practice of granting mug-shot FOIA requests in the Sixth Circuit to facilitate further review by that court." *Id.*

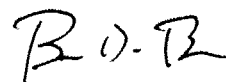
The statement was concerning to the Reporters Committee and members of the media, prompting us to send a letter to the Marshals Service on Jan. 4, 2012 (Attachment B) asking for an explanation of the statement and for the legal authority that would justify the policy revision. Particularly concerning was the implication that the Marshals Service could at its sole discretion determine the legal rights of FOIA requesters in the Sixth Circuit and disregard the *Detroit Free Press* decision, an action now made explicit by the recent policy revision. As you can see, we requested that the Marshals Service respond to the very issues now addressed in the Memo and it is now evermore clear that at that time the Marshals Service was already set on ignoring the Sixth Circuit decision.

The Marshals Service responded to our inquiry with a three-sentence, "no comment," reply (Attachment C) citing the then-pending *Karantsalis* petition. Yet even after the Supreme Court denied the certiorari petition in *Karantsalis*, ending the justification for the Marshals Service's silence, the agency did not provide any further information in response to our inquiry until announcing its policy change in the Memo. This lack of transparency regarding its policy change exacerbates the harm to FOIA requesters because the agency has refused to disclose any valid legal justification for its refusal to follow the *Detroit Free Press* decision.

To summarize, as the Marshals Service's new policy directly conflicts with controlling law in the Sixth Circuit and also violates the FOIA Guidelines promulgated by your office, the Reporters Committee and the undersigned media organizations respectfully ask that you direct the Marshals Service to immediately rescind those portions of the Memo addressing the public's right to access federal booking photographs under FOIA and to immediately process all FOIA requests made since its inception that would have qualified for release under *Detroit Free Press*.

We would welcome the opportunity to meet with you to resolve this issue but otherwise look forward to your redressing the Memo and ordering the Marshals Service to process FOIA requests for federal booking photographs in accordance with established law.

Very truly yours,

A handwritten signature in black ink, appearing to read "B.D.B.", written in a cursive, stylized font.

Bruce D. Brown

encs.

cc:

James Cole, Deputy Attorney General of the United States, U.S. Department of Justice

Tony West, Acting Associate Attorney General of the United States, U.S. Department of Justice

Stuart F. Delery, Principal Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice

Lanny A. Breuer, Assistant Attorney General, Criminal Division, U.S. Department of Justice

Melanie Ann Pustay, Director, Office of Information Policy, U.S. Department of Justice

Miriam M. Nisbet, Director, Office of Government Information Services, National Archives and Records Administration

Sen. Patrick J. Leahy

Sen. Charles E. Grassley

Attachment A

John Zucker
Indira Satyendra
ABC, Inc.
77 W. 66th Street
New York, NY 10023
*For ABC News and ABC's owned and
operated local television stations*

Richard A. Bernstein
Neil M. Rosenhouse
Sabin, Bermant & Gould LLP
4 Times Square, 23rd Floor
New York, NY 10036
Counsel for Advance Publications, Inc.

Elisa Miller
Stacey Lager
ALM Media, LLC
120 Broadway, 5th Floor
New York, NY 10271

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
*Counsel for American Society of News
Editors & Association of Alternative
Newsmedia*

Karen Kaiser
Associate General Counsel
The Associated Press
450 W. 33rd Street
New York, NY 10001

Brad Dennison
President
Associated Press Media Editors
350 Willow Brook Office Park
Fairport, NY 14450

Bruce L. Gottlieb
Atlantic Media, Inc.
600 New Hampshire Ave., NW
Washington, DC 20037

Marshall Anstandig
Senior VP/General Counsel
Andrew Huntington
General Counsel/Director of Labor
Relations
Bay Area News Group
750 Ridder Park Drive
San Jose, CA 95190

James Chadwick
Sheppard Mullin Richter & Hampton LLP
390 Lytton Avenue
Palo Alto, CA 94301
*Additional Counsel for Bay Area News
Group*

Russell F. Coleman
Belo Corp.
400 S. Record Street
Dallas, TX 75202

Charles J. Glasser, Jr.
Global Media Counsel
Bloomberg L.P.
731 Lexington Avenue
New York, NY 10022

David C. Vigilante
Johnita P. Due
Cable News Network, Inc.
1 CNN Center
Atlanta, GA 30303

Jim Ewert
General Counsel
California Newspaper Publishers
Association
2000 O Street, Suite 120
Sacramento, California 95811

Lance Lovell
Managing Attorney, Disputes
Cox Media Group, Inc.
6205 Peachtree Dunwoody Road
Atlanta, GA 30328

Attachment A (cont.)

Matthew A. Leish
Vice President & Assistant General Counsel
Daily News, LP
450 W. 33rd St., 3rd Floor
New York, NY 10001

Mark H. Jackson
Jason Conti
Dow Jones & Company, Inc.
1211 Avenue of the Americas, 7th Floor
New York, NY 10036

David M. Giles
Vice President/
Deputy General Counsel
The E.W. Scripps Company
312 Walnut St., Suite 2800
Cincinnati, OH 45202

Barbara W. Wall
Vice President/Senior
Associate General Counsel
Gannett Co., Inc.
7950 Jones Branch Drive
McLean, VA 22107

Jonathan Donnellan
Hearst Corporation
Office of General Counsel
300 W. 57th St., 40th Floor
New York, NY 10019

Karlene Goller
Los Angeles Times
202 West First Street
Los Angeles, CA 90012

Karole Morgan-Prager
Juan Cornejo
The McClatchy Company
2100 Q Street
Sacramento, CA 95816

Andy Carington
General Counsel
Media General, Inc.
333 E. Franklin Street
Richmond, VA 23219

Mickey H. Osterreicher
40 Wagon Wheel Drive
East Amherst, NY 14051
*Counsel for National Press Photographers
Association*

Kurt Wimmer
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
*Counsel for Newspaper Association
of America*

David McCraw
V.P./Assistant General Counsel
The New York Times Company
620 Eighth Avenue
New York, NY 10018

Randy L. Shapiro
Maya Menendez
The Newsweek/
Daily Beast Company
555 W. 18th St., 2nd Floor
New York, NY 10011

Jennifer Borg
General Counsel
North Jersey Media Group Inc.
P.O. Box 75
Hackensack, NJ 07602

Denise Leary
Ashley Messenger
NPR, Inc.
635 Massachusetts Ave., NW
Washington, DC 20001

Attachment A (cont.)

Jonathan D. Hart
Dow Lohnes PLLC
1200 New Hampshire Ave., NW
Washington, DC 20036
Counsel for Online News Association

Kathleen A. Kirby
Wiley Rein LLP
1776 K St., NW
Washington, DC 20006
Counsel for Radio Television Digital News Association

Gail C. Gove
Chief Counsel, News
Reuters America LLC
3 Times Square, 20th Floor
New York, NY 10036

Bruce E. H. Johnson
Davis Wright Tremaine LLP
1201 Third Ave., Suite 2200
Seattle, WA 98101
Counsel for The Seattle Times Co.

Bruce W. Sanford
Laurie A. Babinski
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
Counsel for Society of Professional Journalists

Mark Hinueber
Vice President/General Counsel & Director
of Human Resources
Stephens Media LLC
P.O. Box 70
Las Vegas, NV 89125

Andrew Lachow
Vice President and Deputy
General Counsel – Litigation
Time Inc.
1271 Avenue of the Americas
New York, NY 10020

David S. Bralow
Assistant General Counsel/
East Coast Media
Karen H. Flax
Assistant General Counsel/
Publishing & Litigation
Tribune Company
220 E. 42nd St., Suite 400
New York, NY 10017

Eric N. Lieberman
James A. McLaughlin
The Washington Post
1150 15th St., NW
Washington, DC 20071

REPORTERS COMMITTEE

FOR FREEDOM OF THE PRESS

1101 Wilson Blvd., Suite 1100
Arlington, Va. 22209-2211
(703) 807-2100
www.rcfp.org

Lucy A. Dalglish
Executive Director

STEERING COMMITTEE

SCOTT APPLEWHITE
The Associated Press

WOLF BLITZER
CNN

DAVID BOARDMAN
Seattle Times

CHIP BOK
Creators Syndicate

ERIKA BOLSTAD
McClatchy Newspapers

JESS BRAVIN
The Wall Street Journal

MICHAEL DUFFY
Time

RICHARD S. DUNHAM
Houston Chronicle

ASHLEA EBELING
Forbes Magazine

FRED GRAHAM
InSession

JOHN C. HENRY
Freelance

NAT HENTOFF
United Media Newspaper Syndicate

DAHLIA LITHWICK
Slate

TONY MAURO
National Law Journal

DOYLE MCMANUS
Los Angeles Times

ANDREA MITCHELL
NBC News

MAGGIE MULVIHILL
New England Center for Investigative Reporting

BILL NICHOLS
Politico

SANDRA PEDDIE
Newday

DANA PRIEST
The Washington Post

DAN RATHER
HD Net

JIM RUBIN
Bloomberg News

CRISTINE RUSSELL
Freelance

BOB SCHIEFFER
CBS News

ERIC SCHMITT
The New York Times

ALICIA SHEPARD
National Public Radio

PAUL STEIGER
Pro Publica

PIERRE THOMAS
ABC News

SAUNDRA TORRY
USA Today

JUDY WOODRUFF
PBS/The Newellton

*Affiliations appear only
for purposes of identification.*

January 4, 2012

VIA REGULAR MAIL

William E. Bordley
Associate General Counsel
Office of the General Counsel
United States Marshals Service
2604 Jefferson Davis Highway
Alexandria, VA 22301

*Re: Karantalis v. U.S. Dep't of Justice, et al.,
U.S. Supreme Court Docket No. 11-342*

Dear Mr. Bordley:

On behalf of the entities listed in the attachment, I write to express our concern over statements made in the government's December 19, 2011 filing (Brief for the Respondents in Opposition) in the above-referenced matter.

Specifically, footnote 5 of the brief states in part:

"In light of the recently developed division of authority and the associated potential for rehearing en banc in the Sixth Circuit, the Service will be able to reconsider its prior practice of granting mug-shot FOIA requests in the Sixth Circuit to facilitate further review by that court."

This statement is troubling and raises a host of concerns. Foremost, it strongly suggests that at its sole discretion the government now appears emboldened to disregard the long-standing decision in *Detroit Free Press, Inc. v. Dep't of Justice*, 73 F.3d 93 (6th Cir. 1996). As you are well aware, the U.S. Court of Appeals for the Sixth Circuit held in that case that there is no cognizable privacy interest in federal mug shot photographs under the federal Freedom of Information Act and therefore Exemption 7(C) to the act cannot be cited as a basis to withhold such records pursuant to a valid FOIA request.

Since 1996, the U.S. Marshals Service has narrowly applied the ruling. Its stated policy is that it will only disclose mug shot photographs under FOIA to those requesters making a request within the Sixth Circuit's jurisdiction with the caveat that once a mug shot is publicly released under FOIA to a requester within the Sixth Circuit it will thereafter honor requests from any jurisdiction on the determination that the information is now

already in the public domain. However, it continues to aggressively invoke Exemption 7(C) in all other jurisdictions when FOIA requests are made for mug shots and has defended this position in two other U.S. Circuit Courts of Appeal.

It appears now that the government believes it can flout established law and unilaterally deny FOIA requests for mug shots that originate within the Sixth Circuit to presumably try and incite a new legal dispute. If this is the case, we find such an unprovoked and antagonistic escalation an illegal repudiation of judicial authority. Moreover, it is entirely at odds with President Obama's and Attorney General Holder's explicit mandates to promote transparent government.

The U.S. Marshals Service should not be conspiring to manufacture a controversy by purposefully denying the public their legally established rights under the FOIA. Should the Marshals Service believe the Sixth Circuit now has a compelling occasion to revisit its 1996 decision *en banc*—as it states in its December 19 filing—it can, of course, proceed within the judicial system as it sees fit. What it cannot do is disregard the ruling of a United States appellate court in the capricious manner outlined in the December 19 filing.

Given our grave concern over this presumably intended course of action, we ask that you provide us answers to the following questions:

1. Who was responsible for developing, reviewing and/or authorizing the inclusion of the above-quoted language from footnote 5 in the brief?
2. Who was responsible for developing, reviewing and/or authorizing the Marshals Service to potentially “reconsider its prior practice of granting mug-shot FOIA requests?”
3. To the extent we have in any way mischaracterized the above quote, please fully explain its meaning, intent and proposed course of implementation. What course of action does the Marshals Service intend to take with respect to future FOIA requests originating within the Sixth Circuit in the future? Does the Marshals Service also intend to alter its policy regarding previously released mug shots?
4. What, if any, legal authorities authorize the Marshals Service to refuse to comply with the Sixth Circuit's ruling in *Detroit Free Press*?
5. If the Marshals Service intends to implement a policy revision, when will it occur? Will there be a particular triggering event? Will the Marshals Service forbear implementing any such policy change until the U.S. Supreme Court rules on Karantalis' petition for certiorari?

William E. Bordley
January 4, 2012
Page 3

We look forward to your prompt reply to all of the above inquiries.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lucy Dalglish", written in a cursive style.

Lucy A. Dalglish
Executive Director

enc.

cc (via regular mail):

Eric H. Holder, United States Attorney General
Donald B. Verrilli, Jr., United States Solicitor General
Melanie Ann Pustay, Office of Information Policy, United States Department of Justice
Miriam M. Nisbet, Office of Government Information Services, National Archives and
Records Administration

Attachment to letter to William E. Bordley dated January 4, 2012

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
for American Society of News Editors and
Association of Capitol Reporters and Editors

Karen Kaiser
The Associated Press

Johnita P. Due
Cable News Network, Inc.

James W. Ewert
California Newspaper Publishers
Association

David M. Giles
The E.W. Scripps Company

Barbara W. Wall
Gannett Co., Inc.

Jonathan Donnellan
Hearst Corporation

Karlene Goller
Los Angeles Times

Stephen J. Burns
The McClatchy Company

Mickey H. Osterreicher
for National Press Photographers
Association

David McCraw
The New York Times Company

René P. Milam
Newspaper Association of America

Barbara L. Camens
Barr & Camens
for The Newspaper Guild – CWA

John Davidow
OpenCourt/WBUR
Randy L. Shapiro
The Newsweek/Daily Beast Company LLC

Jennifer Borg
North Jersey Media Group Inc.

Kathleen A. Kirby
Wiley Rein LLP
for Radio Television Digital News
Association

Bruce E. H. Johnson
Davis Wright Tremaine LLP
for The Seattle Times Co.

Bruce W. Sanford
Bruce D. Brown
Laurie A. Babinski
Baker & Hostetler LLP
for Society of Professional Journalists

Andrew Lachow
Time Inc.



U.S. Department of Justice

United States Marshals Service

Office of General Counsel

Bldg. CS-4, 2604 Jefferson Davis Hwy.
Alexandria, VA 22301

January 30, 2012

Lucy Dalglish, Executive Director
Reporters Committee for Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209-2211

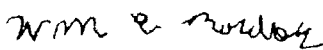
Re: *Karantalis v. U.S. Dep't of Justice*, et al.,
U.S. Supreme Court Docket No. 11-342

Dear Ms. Dalglish:

This is in response to your letter dated January 4, 2012, on behalf of the Reporters Committee for Freedom of the Press and 19 other media organizations and their legal counsel.¹ Your letter requests "answers to [several] questions" related to the government's brief in opposition in *Karantalis v. Department of Justice*, No. 11-342 (S. Ct.). The United States Marshals Service, like other components of the Department of Justice (including the Office of the Solicitor General, which filed the brief in question), does not comment on live issues that are raised in ongoing litigation.

Sincerely,

Gerald M. Auerbach
General Counsel

By: 

William E. Bordley
Associate General Counsel/FOIA Officer

¹ More specifically, your letter lists counsel representing the Associated Press; CNN, Inc.; the E.W. Scripps Company; the Gannett Company, Inc.; the Hearst Corporation; the L.A. Times; the McClatchy Company; the New York Times Company; the Newsweek/Daily Beast Company LLC; the Seattle Times Company; Time, Inc.; and eight other organizations.



U.S. Department of Justice

United States Marshals Service

Office of General Counsel

Washington, DC 20530-1000

December 12, 2012

MEMORANDUM TO: All United States Marshals
All Chief Deputy United States Marshals
All Associate Directors
All Assistant Directors

FROM: Gerald M. Auerbach
General Counsel

SUBJECT: Booking Photograph Disclosure Policy

This guidance supersedes all prior memoranda regarding USMS policy with respect to the release of USMS booking photographs (mug shots) to the public or media.

Release for Law Enforcement Purposes. It is USMS policy to release photographs of fugitives or other prisoners only for law enforcement purposes. *See* 28 C.F.R. § 50.2(b)(7); USMS Directive 1.3, Public Affairs-Media § (D)(3)(e) & (D)(7)(c)(2). Such photographs generally reside in a system of records protected by the Privacy Act, 5 U.S.C. § 552a. Accordingly, such photographs may only be released to the media or public pursuant to a Privacy Act exception, such as the published routine use permitting releases that would not constitute an unwarranted invasion of personal privacy. *See, e.g.,* System of Records Notice, Prisoner Processing and Population Management/Prisoner Tracking System ("PPM/PTS"), JUSTICE/USM-005, Routine Use (e), 72 Fed. Reg. 33515, 33520 (June 18, 2007). This requirement is met where a law enforcement purpose will be served by the release.

When a fugitive has not yet been captured, the Task Forces and district offices may determine whether a law enforcement purpose would be served by release of photographs to the media or public. *See* USMS Directive 1.3, Public Affairs-Media § (D)(7)(C)(2); 28 C.F.R. § 50.2(b)(8).

Once a prisoner has been arrested, the general rule is that no release should be made because release of photographs of that prisoner to the media or public would not serve law enforcement purposes. *See* USMS Directive 1.3, Public Affairs-Media § (D)(7)(c)(2) ("Do not release post-arrest booking photographs."). Nevertheless, there are certain post-arrest circumstances where public release of such photographs could serve a law enforcement function. *See id.* § (D)(3)(e) ("Post-arrest photographs of a prisoner will not be released to the news media unless a law enforcement purpose is served."). For example, photographs of arrested fugitives

may be disclosed for the purpose of informing the public that a particularly notorious fugitive, such as a fugitive on the USMS Fifteen Most Wanted list, has been apprehended. Furthermore, such a disclosure may be warranted to alert or encourage victims/witnesses to come forward for criminal proceedings. But at some point, after a certain period of time has elapsed or the case is closed, it would no longer be reasonable to conclude that release of an arrested fugitive's photograph serves any legitimate law enforcement function. *See id.* § (D)(7)(c)(1) ("Information concerning an investigation, arrest, release, prosecution, adjudication of charges, or correctional status is not to be disclosed if it is not currently relevant to the event.").

These factors are to be taken into consideration in determining which photographs of arrested fugitives may be released to the media or public following an arrest. The determination is left to the Task Forces and district offices with the assistance of the Office of Public Affairs and Office of General Counsel (OGC) as necessary. *See* USMS Directive 1.3, Public Affairs-Media § (D)(3)(e); *see also* USMS Directive 8.9, Fifteen Most Wanted Program/Major Cases.

Release in All Other Circumstances. When no specific law enforcement purpose would be served by the disclosure of a USMS booking photograph, public or media requests for such photographs must be handled under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. All such requests should be sent to the USMS OGC at usms.foia@usdoj.gov for processing in accordance with the FOIA. Booking photographs are generally not subject to *discretionary* release under the FOIA because they almost always reside in records systems protected by the Privacy Act. If the FOIA *requires* release, however, disclosure of the booking photographs would not violate the Privacy Act. *See* 5 U.S.C. § 552a(b)(2).

The USMS has consistently taken the position that booking photographs implicate personal privacy and should not be released under the FOIA unless a countervailing public interest is involved, i.e., the photographs somehow demonstrate something significant about the operations or activities of the government. *See* 5 U.S.C. § 552(b)(7)(C) (exempting records from release where "disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy"). This principle has recently been affirmed by two U.S. Courts of Appeals in decisions upholding USMS's refusal to release booking photographs in response to FOIA requests. *See World Publishing Co. v. Dep't of Justice*, 672 F.3d 825 (10th Cir. 2012); *Karantalis v. Dep't of Justice*, 635 F.3d 497 (11th Cir. 2011) (per curiam), *cert. denied*, 132 S. Ct. 1141, 2012 WL 171139 (U.S. Jan. 23, 2012). Until now, the USMS has employed an exception for FOIA requests originating within the jurisdiction of the U.S. Court of Appeals for the Sixth Circuit to accommodate that court's decision that "no privacy rights are implicated" by the booking photographs of a criminal defendant who has been publically named, who has "appeared in open court," and who has an "ongoing criminal proceeding." *See Detroit Free Press, Inc. v. Dep't of Justice*, 73 F.3d 93, 95, 97 (6th Cir. 1996) (declining to address whether a privacy interest exists in cases "involving dismissed charges, acquittals, or completed criminal proceedings").

In light of the weight of legal precedent now supporting the Department of Justice's conclusion that booking photographs generally should not be disclosed under the FOIA, the Department has decided that a uniform policy should be applied. Accordingly, effective immediately, the USMS will not disclose booking photographs under the FOIA, regardless of

where the FOIA request originated, unless USMS OGC determines either that the requester has made the requisite showing that the public interest in the requested booking photograph outweighs the privacy interest at stake or that other factors specific to the particular FOIA request warrant processing that request consistent with existing Sixth Circuit precedent.

If you have any questions, please contact Ed Bordley, Associate General Counsel and FOIA Officer, at (202) 307-8571 or Ed.Bordley@usdoj.gov.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

JARED LEE LOUGHNER,

Defendant.

Case No. 4:11-CR-00187 (LAB)

DECLARATION OF WILLIAM E. BORDLEY

I, William E. Bordley, hereby make the following Declaration under penalty of perjury pursuant to 28 U.S.C. § 1746.

1. I am an Associate General Counsel and the Freedom of Information/Privacy Act Officer of the United States Marshals Service ("USMS"), assigned to USMS Headquarters, Office of General Counsel ("OGC"), in Arlington, Virginia. I am experienced with the procedures for responding to requests made pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Privacy Act ("PA"), 5 U.S.C. § 552a, for information maintained in the records and files of the USMS. The USMS Headquarters OGC is responsible for processing all FOIA requests made to any USMS office located throughout the United States pursuant to USMS policy.

2. In the course of my official duties at USMS, I have become personally familiar with the FOIA requests regarding Jared Lee Loughner. The statements made herein are based upon my personal knowledge, upon information made available to me in my official capacity, and upon determinations made by me in accordance therewith.

3. Among other responsibilities, the USMS performs statutory law enforcement duties related to receiving, processing, transporting, and maintaining custody of federal prisoners from

the time of their arrest by a U.S. Marshal or their remand to a U.S. Marshal by the court, until the prisoner is committed by the court to the Attorney General for service of sentence, otherwise released from custody or returned to custody of the U.S. Parole Commission or Bureau of Prisons. *See* Rule 4, Federal Rules of Criminal Procedure, 18 U.S.C. § 4086, 28 U.S.C. § 566, and 28 C.F.R. § 0.111 (j), (k).

4. The USMS Privacy Act system of records routinely encompassed by a search for prisoner records is the Prisoner Processing and Population Management/Prisoner Tracking System (“PPM/PTS”), JUSTICE/USM-005, which is described in a system of records notice published at 72 Fed. Reg. 33515, 33519-20 (2007). This system of records is searched by an individual’s name and/or personal identifier, such as a prisoner registration number or social security number. This system of records assists the USMS in carrying out its statutory law enforcement responsibilities described in paragraph 3.

5. The PPM/PTS system of records contains booking photographs that are generated in local USMS district offices in connection with the processing, safekeeping, and disposition of individuals in the USMS’s custody. *See* 72 Fed. Reg. 33515, 33520. Booking photographs located in the PPM/PTS system of records are statutorily protected from disclosure without the consent of the subject individual under the Privacy Act, 5 U.S.C. § 552a, and may only be released in response to a FOIA request if the agency determines the information must be released under the FOIA, as these records are retrieved by the prisoner’s name or other identifying information. *See* 5 U.S.C. § 552a(b)(2).

6. USMS policy provides that post-arrest photographs of USMS prisoners, including booking photographs, will not be released to the news media unless a law enforcement purpose is served. *See* USMS Directive 1.3, Media, (A)(3)(c)(5) (attached as Exhibit A); *see also* 28 C.F.R.

§ 50.2(b)(7). USMS policy further specifies that prisoner bookings are confidential, and media representatives will not be advised of, or allowed to be present during, the proceedings. *See* USMS Directive 1.3, Media, (A)(3)(i). The only law enforcement purpose for which booking photographs are publicly released concerns fugitives, such as to aid in their capture or to notify potential victims. *See id.*; *see also* 28 C.F.R. § 50.2(b)(8).

7. The court ruling, *Detroit Free Press v. Dep't of Justice*, 73 F.3d 93, 97 (6th Cir. 1996), necessitates an exception to USMS policy regarding the public release of post-arrest photographs of USMS prisoners within the jurisdiction of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit"). Even where no law enforcement purpose is served, under the circumstances required by *Detroit Free Press* the USMS discloses booking photographs to FOIA requesters who could file suit within that jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B): when 1) the defendant has been publicly named, 2) the defendant has been indicted, 3) the defendant has made a court appearance in connection with the indictment, and 4) there is an ongoing trial or appeal related to the indictment. However, because the USMS believes that court decision is inconsistent with the FOIA, the USMS retains its policy as stated in paragraph 6 for all other jurisdictions.

8. On January 8, 2011, the USMS began to receive FOIA requests from individuals and news media outlets for the booking photograph of Jared Lee Loughner. Between January 8 and February 11, 2011, the USMS received at least fifteen such requests. Four of the FOIA requests for Mr. Loughner's booking photograph are from requesters who appear to reside or have their principal place of business in the states of Kentucky, Michigan, or Ohio. Most of the requests expressed the intent to publicize the photograph in the news media. The only "public interest" identified in the requests was the national interest in Mr. Loughner's case. *See* Exhibit B.

9. Subsequent to receipt of these FOIA requests, the USMS searched the PPM/PTS system by the name of Jared Loughner and identified two booking photographs which are maintained in that system – a front shot and a profile shot.

10. These photographs differ from the photograph publically released by Arizona state authorities on January 10, 2011, which was taken by the Pima County Sheriff's Department Forensic Unit and, according to that Department's spokeswoman, was not a mugshot. *See* Dylan Smith, *Photo of accused gunman Jared Loughner released*, Tucson Sentinel, Jan. 10, 2011, http://www.tucsonsentinel.com/local/report/011011_loughner_photo. Unlike that photograph, these photographs show Mr. Loughner in sharper resolution with abrasions on his face, and in prison garb, with a cinder block wall in the background.

11. Ordinarily, the USMS would deny the FOIA requests pursuant to FOIA Exemption (7)(C). Exemption 7(C) allows an agency to withhold records or information compiled for law enforcement purposes, to the extent that production of such records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(7)(C). As a categorical matter, booking photograph records meet the Exemption 7 threshold requirement of having been compiled for law enforcement purposes, because booking photographs are routinely compiled following a USMS law enforcement investigation and arrest of individuals charged with federal criminal offenses. The disclosure of booking photographs could cause a stigmatizing effect that could result in humiliation, and unwarranted attention to the individual federal detainee. In balancing the privacy interest against the public interest, the USMS could discern no legitimate public interest in the disclosure of Mr. Loughner's booking photograph that would outweigh his privacy interest. The requesters presented no public interest in disclosure of this information with his FOIA request. Nor did they indicate how disclosure

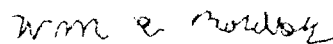
would meet the basic purpose of the FOIA, *i.e.*, to shed light on an agency's performance of its statutory duties. Disclosure to the requesters would be equivalent to disclosure to the public and, as such, could reasonably be expected to constitute an unwarranted invasion of personal privacy since no legitimate public interest would be served by disclosure. 5 U.S.C. § 552(b)(7)(C).

12. Nevertheless, because at least four of these requests appear to come within the jurisdiction of the Sixth Circuit pursuant to 5 U.S.C. § 552(a)(4)(B), and because Mr. Loughner's case matches the circumstances decided in *Detroit Free Press*, the USMS considers itself obligated to release the booking photograph to those requesters.

13. Once the USMS has released a record to a requester (other than a request for one's own records), the USMS considers itself obligated to release that record to subsequent requesters. For that reason, the USMS will release the booking photograph to all the requesters if any release is required.

14. The USMS has not yet released the booking photograph to any requester. When the statutory twenty day response period expired on February 7, 2011, USMS invoked the ten business day extension provision set forth in 5 U.S.C. § 552(a)(6)(B)(i) and (iii)(III) due to the need to consult with other components of the U.S. Department of Justice. That extension will expire on or about February 22, 2011.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my information and belief.



WILLIAM E. BORDLEY

Dated: February 14, 2011

Attachment F

From: Robinson, Nancy (USMS) [mailto:Nancy.Robinson@usdoj.gov]
Sent: Thursday, December 27, 2012 11:32 AM
To: vanessa.hagedorn@yahoo.com; USMS FOIA
Cc: Candiotti, Susan
Subject: RE: Urgent CNN FOIA Request 2013USMS22366



U.S. Department of Justice

United States Marshals Service

Office of General Counsel

2604 Jefferson Davis Hwy.
Alexandria, VA 22301

December 27, 2012

Vanessa Hagedorn
CNN Stringer
4386 Alleen Court
Independence, KY 41051

Re: Freedom of Information Act Request No. 2013USMS22366
Subject: Several Booking Photographs

Dear Requester:

The United States Marshals Service (USMS) is responding to your request for the booking photograph(s) of Raees Alam Qazi and Sheheryar Alam Qazi.

Absent a written release from the subject(s) of the request, your request is denied pursuant to Exemptions (b)(6) and (b)(7)(C) of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b). Exemption (b)(6) allows an agency to withhold personnel, medical and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Exemption (b)(7)(C) allows an agency to withhold records or information compiled for law enforcement purposes to the extent that their production could reasonably be expected to constitute an unwarranted invasion of personal privacy. You have not identified any public interest recognized under the FOIA that would be served by release of the mug

shot(s) and that would justify invading personal privacy. See U.S. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) (to qualify as "public interest" information must "contribute significantly to public understanding of the operations and activities of the government"). Further, a discretionary release of such records or information, if they exist, would be in violation of the Privacy Act of 1974, 5 U.S.C. § 552a.

If you are dissatisfied with my action on this request, you may appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, D.C. 20530-0001. Your appeal must be received by OIP within 60 days of the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information/ Privacy Act Appeal." In the event you are dissatisfied with the results of any such appeal, judicial review will thereafter be available to you in the United States District Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

Sincerely,

William E. Bordley
Associate General
Counsel/ FOIPA Officer
Office of General Counsel

-----Original Message-----

From: vanessa.hagedorn@yahoo.com [mailto:vanessa.hagedorn@yahoo.com]
Sent: Saturday, December 01, 2012 11:35 AM
To: USMS FOIA
Cc: Susan Candiotti
Subject: Urgent CNN FOIA Request

Dear Ms Robinson:

CNN is making an expedited FOIA request for all booking photos taken of federal defendants Raees Alam Qazi, a 20-year-old naturalized U.S. citizen from Pakistan, and his brother, Sheheryar Alam Qazi (Sheheryar), a 30-year-old naturalized U.S. citizen from Pakistan.

Both men are charged in the Southern District of Florida with conspiracy to use a weapon of mass destruction and conspiracy to provide material support to terrorists. They were arrested Thursday.

In addition to compelling and immediate public interest, we believe under the District 6 statute, that their booking photos should immediately be released. We would argue that under statute, the public deserves access to their booking photo.

I'm making this expedited request under the *Detroit Free Press v Department of Justice* case from the 6th

District Appeals Court and I live in that jurisdiction. Under that ruling, we maintain the Justice Department is compelled to make a timely release of the photographs. There should be no charge incurred for making or sending us the photograph(s.)

We ask for your urgent attention to this matter.

Please send me the photo(s) via email for CNN's use. If possible, please copy the photographs to

susan.candiotti@cnn.com

Thank you in advance .

Sincerely,

Vanessa Hagedorn
CNN Stringer
4386 Alleen Court
Independence, Kentucky 41051
408-781-5293

Cc: Susan Candiotti
CNN National Correspondent
Susan.candiotti@cnn.com <<mailto:Susan.candiotti@cnn.com>>
305 773 5146 Cell
212-275-7522 Wk

Sent from my Verizon Wireless BlackBerry

Attachments:

image001.jpg

17179869184
GB

Attachment G

From: Robinson, Nancy (USMS) [Nancy.Robinson@usdoj.gov]
Sent: Monday, January 14, 2013 10:36 AM
To: Dustin Blitchok
Subject: RE: Mug shot request 2013USMS22638



U.S. Department of Justice
United States Marshals Service
Office of General Counsel

2604 Jefferson Davis Hwy.
Alexandria, VA 22301

January 14, 2013

Dustin Blitchok
The Oakland Press
Pontiac, MI

Re: Freedom of Information Act Request No. 2013USMS22638
Subject: Booking Photographs of Roy Dixon

Dear Requester:

The United States Marshals Service (USMS) is responding to your request for the booking photograph(s) of Roy Dixon.

Absent a written release from the subject(s) of the request, your request is denied pursuant to Exemptions (b) (6) and (b)(7)(C) of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b). Exemption (b)(6) allows an agency to withhold personnel, medical and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Exemption (b)(7)(C) allows an agency to withhold records or information compiled for law enforcement purposes to the extent that their production could reasonably be expected to constitute an unwarranted invasion of personal privacy. You have not identified any public interest recognized under the FOIA that would be served by release of the mug shot(s) and that would justify invading personal privacy. See U.S. Department of Justice v. Reporters Committee for Freedom of the Press.

489 U.S. 749 (1989) (to qualify as "public interest" information must "contribute significantly to public understanding of the operations and activities of the government"). Further, a discretionary release of such records or information, if they exist, would be in violation of the Privacy Act of 1974, 5 U.S.C. § 552a.

If you are dissatisfied with my action on this request, you may appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, D.C. 20530-0001. Your appeal must be received by OIP within 60 days of the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information/ Privacy Act Appeal." In the event you are dissatisfied with the results of any such appeal, judicial review will thereafter be available to you in the United States District Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

Sincerely,

William E. Bordley
Associate General
Counsel/ FOIPA Officer
Office of General Counsel

From: Dustin Blitchok [mailto:dblitchok@oakpress.com]
Sent: Thursday, January 10, 2013 5:38 PM
To: USMS FOIA
Subject: Mug shot request

Hello,

The U.S. Marshals office booked Roy Dixon at their Detroit office on the afternoon of Wednesday, Jan. 9. He is criminally indicted in U.S. District Court Case #12-20030. I am a reporter at The Oakland Press in Pontiac, Mich. I covered Dixon's arraignment on Wednesday and was hoping to get his mugshot from you for publication.

Please call me at 248-745-4685 or email me at this address with any questions. Thanks!

Sincerely,

Dustin Blitchok
Reporter, The Oakland Press

The information contained in or attached to this e-mail contains confidential or privileged information. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this e-mail is PROHIBITED. If you have received this e-mail in error, please notify the sender and delete the e-mail immediately. Thank you.

The information contained in or attached to this e-mail contains confidential or privileged information. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this e-mail is PROHIBITED. If you have received this e-mail in error, please notify the sender and delete the e-mail immediately. Thank you.

--image001.jpg



Attachments:

image001.jpg

135 KB

No. 11-342

In the Supreme Court of the United States

THEODORE KARANTSALIS, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DONALD B. VERRILLI, JR.
*Solicitor General
Counsel of Record*

TONY WEST
Assistant Attorney General

LEONARD SCHAITMAN

STEVE FRANK

Attorneys

*Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

2. Petitioner correctly observes (Pet. 13-15) that the court of appeals' decision conflicts with the Sixth Circuit's decision in *Detroit Free Press*. That division of authority reflects disuniformity in the application of Exemption 7(C) to FOIA requests for prisoner booking photographs.⁵ In the government's view, however, the question presented does not warrant review by this Court at the present time.

In *Detroit Free Press*, a divided panel of the Sixth Circuit held that "no privacy rights are implicated" by the public disclosure of a defendant's mug shot when a FOIA request concerns (at the time it is submitted) "ongoing criminal proceeding[s], in which the names of the defendants have already been divulged and in which the defendants themselves have already appeared in open court." *Detroit Free Press*, 73 F.3d at 97; see *id.* at 95; cf. *id.* at 99-100 (Norris, J., dissenting) (concluding that the majority had "misconceive[d] the true nature of a mug shot"). Having found that disclosure would not invade any privacy interest protected by Exemption 7(C), the Sixth Circuit had no occasion to (and did not) "determine whether such an invasion would be *warranted*" by analyzing whether there would be a sufficient "public interest" to justify disclosure. *Id.* at 97-98.

⁵ The Marshals Service has implemented its policy of not disclosing booking photographs with an exception that has accounted for the precedential weight of the Sixth Circuit's decision in *Detroit Free Press*. Although the government disagrees with that decision, the Service has applied *Detroit Free Press* as binding precedent when processing FOIA requests from within the Sixth Circuit. See 635 F.3d at 501 (noting this practice). In light of the recently developed division of authority and the associated potential for rehearing en banc in the Sixth Circuit, the Service will be able to reconsider its prior practice of granting mug-shot FOIA requests in the Sixth Circuit to facilitate further review by that court.