NO. ____

In the
Supreme Court of the United States

PRISON LEGAL NEWS,

Petitioner,

v.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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June 14, 2011

QUESTION PRESENTED

Whether the Government can refuse to disclose records by successfully invoking an exemption to the Freedom of Information Act, 5 U.S.C. § 552, when it has already disclosed those very same records elsewhere by placing them in the public domain as unsealed evidence in a public trial.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner Prison Legal News states that its parent corporation is the Human Rights Defense Center. No publicly held corporation owns 10% or more of Human Rights Defense Center's stock.

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals entered judgment on January 11, 2011. On February 25, 2011, Prison Legal News filed a timely petition for rehearing en banc. On March 16, 2011, the Tenth Circuit denied en banc review. Prison Legal News timely filed this petition on June 14, 2011.

STATUTORY PROVISIONS INVOLVED

Exemption 7(C) of the Freedom of Information Act ("FOIA") exempts from mandatory disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

The appendix sets out other pertinent FOIA provisions. App. 70–73.

STATEMENT OF THE CASE

The Tenth Circuit held below that the Government could successfully rely on a FOIA exemption to refuse to disclose audiovisual records — even though the Government had already disclosed those very same records in open court. The panel concluded that the Government did not waive its right to rely on exemption 7(C) by doing such an about-face; that airing this evidence in open court was a disclosure of a "limited nature" only to the people in the courtroom; and that Prison Legal News and the public would learn little from viewing these materials first hand when they could read about them second hand. App. 8–10, 17–19.

This Court should grant certiorari and reverse. The Tenth Circuit's decision creates a circuit split on an important question of federal law — one that goes to the heart of whether public records are, in fact, truly available to the public. Under the Tenth Circuit's approach, when the Government uses records as evidence in open court, they are only temporarily accessible to whomever happens to make it to court while the trial is ongoing. This decision thus significantly shrinks the set of people who can view audiovisual evidence first hand. The D.C. Circuit and the Second Circuit have adopted the opposite view, holding that the Government cannot rely on an otherwise applicable FOIA exemption to defeat a request for the very same records that it has already disclosed as unsealed evidence in open court. *See, e.g., Cottone v. Reno*, 193 F.3d 550, 553–56 (D.C. Cir. 1999); *Inner City Press/Cmty. on the Move v. Bd.*

of Governors of the Fed. Reserve Sys., 463 F.3d 239, 248–49 (2d Cir. 2006).

In particular, the decision below squarely conflicts with *Davis v. U.S. Dep't of Justice*, 968 F.2d 1276 (D.C. Cir. 1992). As here, *Davis* involved a FOIA request for audiovisual materials that implicated exemption 7(C). *Id*, at 1278–79. But unlike the Tenth Circuit, the D.C. Circuit held that once the Government played tapes at a public trial, exemption 7(C) could no longer apply and the Government was required to disclose those exact tapes. *Id.* at 1280. The Tenth Circuit reached the opposite result below on materially identical facts. It held that exemption 7(C) prevented release of the video and photos here — notwithstanding that the Government had aired those very same records in open court not once but twice. App. 17–19.

The Tenth Circuit's cramped view that a public disclosure of evidence at a public trial is only a "limited" disclosure to the courtroom audience, App. 10, minimizes the constitutional notion of a public trial and runs counter to a longstanding tradition of making public records generally accessible to the public at large. The decision below thereby threatens to undermine significantly the ability of the press and people to learn from past records about "what the Government [was] up to." *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 780 (1989). Moreover, at a time when modern technology has given new meaning to the old adage that a picture is worth a thousand words — as this Court itself has recognized, *see, e.g., Brown v. Plata*, 131 S. Ct. 1910 (2011); *Scott v. Harris*, 550 U.S.

372 (2007) — the Tenth Circuit's decision makes these valuable materials particularly difficult for the public to see. To resolve the split between the circuits on an important question of federal law, this Court should grant certiorari and reverse.

A. The Freedom of Information Act

FOIA generally requires every federal agency to make "promptly available" records that any person requests. 5 U.S.C. § 552(a)(3)(A). Congress enacted FOIA to implement "a general philosophy of full agency disclosure." *Reporters Committee*, 489 U.S. at 754 (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 360 (1976)). FOIA's purpose is "crystal clear": "[T]o pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Rose*, 425 U.S. at 361 (quotation marks omitted).

Congress exempted several categories of documents from FOIA's disclosure requirements. *See* § 552(b). These exemptions "must be narrowly construed," as "disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361. "Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious," FOIA "expressly places the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter de novo.'" *Reporters Committee*, 489 U.S. at 755 (quoting § 552(a)(4)(B)).

As relevant here, exception 7(C) exempts records compiled for law enforcement purposes "but only to the extent" that their production "could reasonably be expected to constitute an unwarranted invasion of

personal privacy." § 552(b)(7)(C). The "personal privacy" interest protected by exemption 7(C) includes that of "surviving family members" with respect to unpublished images of a "close relative's death-scene." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 170 (2004). To determine whether such an invasion is "unwarranted," courts must "balance the family's privacy interest against the public interest in disclosure." *Id.* at 171; *see Reporters Committee*, 489 U.S. at 762. "[C]itizens' right to be informed about 'what their government is up to'" is not advanced by "information about private citizens that . . . reveals little or nothing about an agency's own conduct." *Reporters Committee*, 489 U.S. at 773. But this right to be informed is advanced by disclosures that "shed any light on the conduct of any Government agency or official." *Id.*

FOIA Exemption 6 also protects personal privacy. Its protection is limited, however, to "personnel and medical files and similar files" and it requires that the invasion be "clearly" unwarranted. § 552(b)(6). The Government waived exemption 6 and thus it is no longer at issue here. App. 5 n.4.

B. Factual Background

1. The United States Penitentiary in Florence, Colorado ("USP-Florence") is a high-security prison that is part of the Florence Federal Correctional Complex ("FCC"). App. 64 (Wright Decl. ¶ 5). USP-Florence and the FCC have a history of grave security problems, including inmate-on-inmate violence. There have been numerous murders in USP-Florence, and at least three in its "Special Housing Unit,"

which is intended to "securely separat[e]" prisoners "from the general inmate population." Bureau of Prisons, Program Statement, Special Housing Units § 541.21 (June 9, 2011) ("BOP Statement");[1] *see, e.g.*, Alan Prendergast, *Marked for Death*, Westword, May 25, 2000;[2] Robert Boczkiewicz, *Gang Inmates' Murder Trial Resumes Today*, Pueblo Chieftain, May 31, 2011.[3] Further, several former correctional officers at USP-Florence were convicted of federal crimes for "widespread abuse of prisoners," including beating prisoners while they were restrained and "falsif[ying] . . . records to cover up that abuse." *United States v. LaVallee*, 439 F.3d 670, 677–79 (10th Cir. 2006).

Prison Legal News publishes a legal journal and a website concerning prisoners' rights issues, and has been covering conditions at USP-Florence and the FCC since 1995. App. 64 (Wright Decl. ¶ 5).[4] Prison Legal News' coverage has focused, in particular, on the "high levels of violence experienced at the prison complex in Florence." *Id.* Other media outlets have also covered conditions at USP-Florence. The Denver *Westword* has published numerous articles covering inmate-on-inmate violence and reports of officers abusing prisoners. App. 57–58 (Prendergast Decl. ¶ 5); *e.g.*, Alan Prendergast, *Cowboy Justice*,

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[1] http://www.bop.gov/policy/progstat/5270_010.pdf

[2] http://www.westword.com/2000-05-25/news/marked-for-death/

[3] http://www.chieftain.com/news/local/gang-inmates-murder-trial-resumes-today/article_3d76c81a-8b3d-11e0-9b14-001cc4c002e0.html

[4] http://www.prisonlegalnews.org/

Westword, June 26, 2003.[5] *60 Minutes* aired a segment on the FCC titled "A Clean Version of Hell."[6] App. 51 (Schuster Decl. ¶ 2). "Prison Legal News is," however, "the only national media outlet that has regularly reported on these facilities" and conditions therein. App. 64 (Wright Decl. ¶ 5).

2. On October 10, 1999, two prisoners at USP-Florence, William Concepcion Sablan and Rudy Cabrera Sablan, brutally murdered their cellmate, Joey Jesus Estrella. App. 2, 23. The Bureau of Prisons had assigned the three men, including the two Sablan cousins, to a single cell in the prison's Special Housing Unit. App. 2.

Bureau of Prisons ("BOP") personnel videotaped the aftermath of the violent murder. "The first portion of the video depicts the interior of the shared cell and the Sablans' conduct inside the cell" after the murder. App. 2. This portion of the video captures the Sablans' heinous and gruesome mutilation of Estrella's body, which was extraordinarily degrading and disrespectful. *Id.*; *see* App. 23–24. "The second portion of the video depicts BOP personnel extracting the Sablans from the cell and does not contain any images of Estrella's body." App. 2. "BOP personnel also took still autopsy photographs of Estrella's body." *Id.*

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[5] http://www.westword.com/2003-06-26/news/cowboy-justice/

[6] http://www.cbsnews.com/stories/2007/10/11/60minutes/main3357727.shtml

The Government tried the Sablans separately and sought the death penalty in each trial. *Id.* They were both convicted of first degree murder, but were sentenced to life imprisonment rather than death. App. 2–3.

The Sablans' trials were public and attracted press coverage. *E.g.*, Mike McPhee, *Pair May Face Death in Prison Slaying*, Denver Post, Jan. 27, 2001, at B1. In both trials, the Government introduced the full video and autopsy photographs into evidence — without moving to seal. App. 2. Indeed, rather than seeking to keep these materials private, the Government displayed the video and photographs on "monitors placed for the sole purpose of enabling members of the public seated in the courtroom audience to view the images." Compl. ¶ 33, 47–49; Answer ¶ 33, 47–49. Prison Legal News was unable, however, to send a reporter to attend either of the two trials. "Prison Legal News is a small organization with a small budget," and "do[es] not have the ability to send staff journalists to attend every federal trial that [it has] an interest in reporting on." App. 65 (Wright Decl. ¶ 8).

Local court rules required the video and photographs to remain in the custody of the clerk during the trials. D. Colo. L. Crim. R. 55.1. "At the completion of trials, the photographs and video were returned to the United States Attorneys Office pursuant to a standard order regarding the custody of exhibits." App. 3. The Government still possesses these records. App. 24.

C. Procedural History

1. On March 12, 2007, Prison Legal News sent a FOIA request to the United States Attorney's Office for the District of Colorado, seeking the production of "the complete videotape" and the autopsy photographs. App. 42. The request specifically identified the video as the Government's Exhibit 20 and the photographs as the Government's Exhibits 168 through 177D in the trial of William Concepcion Sablan, *United States v. Sablan*, No. 00-cr-531-WYD-01 (D. Colo. Jan. 22, 2007). *Id.*

The Executive Office for United States Attorneys ("EOUSA") denied the request and the Department of Justice ("DOJ") denied Prison Legal News' subsequent administrative appeal. App. 44–45, 48. DOJ asserted that the Government had properly withheld the records pursuant to FOIA exemptions 7(A), 7(B), and 7(C). App. 48–49.

2. On May 20, 2008, Prison Legal News filed a complaint in the United States District Court for the District of Colorado, challenging the denial of its request for the video and photographs. *See* § 552(a)(4)(B). In response, the EOUSA defended its refusal to release the records on the basis of exemptions 6 and 7(C), dropping its reliance on exemptions 7(A) and 7(B). App. 25–26. The parties cross-moved for summary judgment. As relevant here, Prison Legal News argued that, under the "public domain" doctrine, the Government was required to disclose these materials because it had already introduced them as unsealed evidence at a

public trial. Prison Legal News Mot. for Summ. J. 3–4; *see Cottone*, 193 F.3d at 554–56.

The District Court granted and denied each motion in part, ordering the Government to disclose some of the materials but not others. As to the video itself, the court ordered the Government to disclose only the second part of the video, that is, the portions that do not depict Estrella's body. App. 40. As for the audio track, the court ordered the Government to disclose only the audio of BOP officials but to redact any other audio, including the Sablans' voices. *Id.* The Court affirmed the Government's refusal to turn over the autopsy photographs. *Id.*; *see also* App. 3 & n.1.

Prison Legal News appealed. While the appeal was pending, the EOUSA disclosed the materials required by the district court's order. App. 3. The EOUSA also dropped its reliance on exemption 6. App. 5 n.4. The only live question on appeal was thus whether the EOUSA could rely on exemption 7(C) to resist disclosing: (1) the first portion of the video and the autopsy photographs, which depict Estrella's body; and (2) the redacted audio of the Sablans' voices from the second portion of the video, which "pertain to what [the Sablans] were doing to Estrella's body." App. 14.

3. On January 11, 2011, the Tenth Circuit dismissed the appeal in part as moot with respect to materials the EOUSA had released. App. 18–19. It otherwise affirmed. *Id.*

First, the court ruled that the Government had not waived its ability to rely on exemption 7(C), even

though it had publicly disclosed the materials in two separate trials. "The government cannot waive individuals' privacy interests under FOIA." App. 8. According to the court of appeals, there was no waiver because "Estrella's family members did not take any affirmative actions to place the images in the public domain." App. 9.

Second, the court ruled that, although the Government used the records as unsealed evidence at two public trials, it had not made those records truly public. Rather, the court characterized the Government's display of the records at two public trials as disclosure of a "limited nature." App. 10. "[O]nly those physically present in the courtroom were able to view the images"; "the images were never reproduced for public consumption beyond those trials"; and "the images are no longer available to the public." App. 9–10. Accordingly, the court of appeals concluded that "Estrella's family retains a strong privacy interest in the images." App. 10.

Third, the court concluded that the "public domain" doctrine did not apply here. The Tenth Circuit recognized that the D.C. Circuit had held in broad terms that "materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record." App. 16 (quoting *Cottone*, 193 F.3d at 554). But instead of applying *Cottone*'s rule, the Tenth Circuit derived a different rule from part of *Cottone*'s reasoning. The Tenth Circuit concluded that the "public domain" doctrine does not apply to exemption 7(C) because unsealed evidence disclosed in open court is not "truly public" and thus that

exemption could still "fulfill its purposes" of protecting the family's privacy. *Id.* (quotation marks omitted).

The Tenth Circuit acknowledged that the D.C. Circuit's opinion in *Davis* also involved exemption 7(C). App. 17. But the Tenth Circuit concluded that *Davis* "decline[d] to apply the ['public domain'] doctrine because of a failure of the plaintiff to demonstrate with specificity the information that is in the public domain." *Id.*

The court of appeals denied a timely petition for rehearing and rehearing en banc on March 16, 2011. App. 20.

REASONS FOR GRANTING THE PETITION

1. This Court should grant certiorari because the Tenth Circuit's decision below conflicts with decisions of the D.C. Circuit and Second Circuit applying the "public domain" doctrine. It is well-settled in those circuits that the Government must grant a FOIA request for records that the Government has previously disclosed in open court. "[U]ntil destroyed or placed under seal, tapes played in open court and admitted into evidence — no less than the court reporter's transcript, the parties' briefs, and the judge's orders and opinions — remain a part of the public domain." *Cottone*, 193 F.3d at 554; *accord Inner City Press*, 463 F.3d at 249. The Tenth Circuit adopted a different rule of law. In the Tenth Circuit, the "public domain" doctrine does not apply where the Government has invoked FOIA exemption 7(C). App. 17. The court reasoned that exemption 7(C) is not the Government's to waive and that its purposes "can still

be served" following the disclosure of records as unsealed evidence in a public trial because such disclosure is "limited" to "only those physically present in the courtroom." App. 10, 17–18. This decision thus conflicts with decisions of the D.C. Circuit and Second Circuit and creates a circuit split.

In particular, the decision below squarely conflicts with *Davis*. In *Davis*, the D.C. Circuit applied the "public domain" doctrine where exemption 7(C) otherwise would have allowed the Government to resist disclosing audiovisual records. 968 F.2d at 1279, 1281. To give the requester the opportunity to show the "exact portions" that the Government had released into the public domain, the court remanded. *Id*. at 1280, 1282. On remand, the requester carried his burden as to most of the portions of the tapes, and the Government released those portions that it still possessed. *See Davis v. Dep't of Justice*, 460 F.3d 92, 96 (D.C. Cir. 2006) ("*Davis IV*"). By contrast, under the Tenth Circuit's rule — that exemption 7(C) trumps the "public domain" doctrine, rather than vice versa — there would have been no remand and no disclosure. Rather, the court would have held that the Government did not need to disclose any of the tapes. Accordingly, the decision below squarely conflicts with *Davis*.

2. Certiorari is further warranted because the decision in this very case misconstrues FOIA and threatens to shield valuable information from public view. At the outset, the Tenth Circuit is simply wrong to hold that the Government cannot waive exemptions protecting personal privacy. It is well-

settled that the Government can waive any FOIA exemptions, and indeed the Government waived exemption 6 below.

The decision below also undermines the longstanding and important principle that unsealed judicial records are truly matters of public record. In the Tenth Circuit's view, evidence used at a public trial has only been disclosed in a "limited" fashion to "those physically present in the courtroom." App. 10. If that were true, our public record would be remarkably inaccessible to the public. But it is not true. Absent a motion to seal, disclosure of materials at a public trial is a real public disclosure, making those records part of the permanent public record that is generally accessible under longstanding principles. Having disclosed those documents for its own purposes, the Government is not free to claw them back from the public domain and to relegate the public to second-hand reports.

The Tenth Circuit's view that use of evidence at a public trial is a "limited" disclosure to the courtroom audience has particularly pernicious implications for audiovisual evidence. The Tenth Circuit maintained that such evidence adds little to the public understanding, because "[a]ll of the information" was disclosed in the court transcript or was reported elsewhere. App. 13. But it is widely understood — including by the court below in its discussion of the privacy interests at stake — that "a picture is worth a thousand words" and that video may pack an even stronger punch. At a time when audiovisual evidence is becoming increasingly prevalent and important,

this Court should ensure that the public retains its right to see this evidence for itself.

I. THE CIRCUITS ARE SPLIT ON THE QUESTION PRESENTED

A. The Decision Below Conflicts with the "Public Domain" Doctrine that the D.C. Circuit and Second Circuit Embrace

1. If this case had arisen in the D.C. Circuit or the Second Circuit, it would have come out the other way. Under the "public domain" doctrine, "materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record." *Cottone*, 193 F.3d at 554. The FOIA requester first bears the burden to "demonstrat[e] precisely which recorded conversations were played in open court" and thus are part of the public domain. *Id.* at 555. The burden then shifts to the Government to show that "the specific tapes or records identified" have been destroyed or placed under seal. *Id.* at 556. "[U]ntil destroyed or placed under seal, tapes played in open court and admitted into evidence — no less than the court reporter's transcript, the parties' briefs, and the judge's orders and opinions — remain a part of the public domain." *Id.* at 554. This doctrine is "firmly anchored" in the D.C. Circuit. *Id.* at 553. The Second Circuit has adopted this same rule of law. *Inner City Press*, 463 F.3d at 248–49; *see also Watkins v. U.S. Bureau of Customs & Border Prot.*, ___ F.3d ___, No. 09-35996, 2011 WL 1709852, at *8 (9th Cir. May 6, 2011) (Rymer, J., concurring in part and dissenting in

part) (the "public domain" doctrine is "embraced by the D.C. Circuit and the Second Circuit").

These courts have primarily grounded the "public domain" doctrine in principles of waiver. *See, e.g., Cottone*, 193 F.3d at 553. The rationale is powerful and straightforward: The Government cannot affirmatively release information into the public domain and then turn around and assert that it cannot release that very same information because it is too private. The "public domain" doctrine is also grounded in the "venerable common-law right to inspect and copy judicial records," under which "audio tapes enter the public domain once played and received into evidence." *Id.* at 554; *see, e.g., In re Application of CBS, Inc.*, 828 F.2d 958, 959 (2d Cir. 1987). "A trial is a public event. What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947).

If the Tenth Circuit had applied the "public domain" doctrine, it would have required the Government to disclose the files that Prison Legal News requested. It is undisputed that Prison Legal News identified the exact materials that the Government "played in open court." *Cottone*, 193 F.3d at 555. Indeed, Prison Legal News' FOIA request specifically listed the exhibit numbers of each requested item. App. 42; *see also* Compl. ¶¶ 23–37, Answer ¶¶ 23–37. The Government still possesses these records and they have not been sealed. App. 24. Accordingly, the records "remain a part of the public domain." *Cottone*, 193 F.3d at 554.

The Tenth Circuit dismissed *Cottone* as limited to cases involving exemption 3, which protects records that must be withheld under another statute. App. 16. But that is a limitation of the Tenth Circuit's own creation. It is immaterial under *Cottone* which FOIA exemption the Government has invoked; what matters is whether the requester can show that the Government aired those very same records in open court. *Cottone*, 193 F.3d at 554. Furthermore, the D.C. Circuit and Second Circuit have applied *Cottone*'s "public domain" doctrine in cases involving a wide spectrum of FOIA exemptions — including exemption 7(C). *See, e.g., Public Citizen v. Dep't of State*, 11 F.3d 198, 201–03 (D.C. Cir. 1993) (exemption 1); *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990) (exemption 1); *Cottone*, 193 F.3d at 554–55 (exemption 3); *Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999) (exemption 4); *Inner City Press*, 463 F.3d at 253 (exemption 4); *Davis*, 968 F.2d at 1278–80 (exemptions 3, 7(C), and 7(D)); *Wolf v. CIA*, 473 F.3d 370, 378–80 (D.C. Cir. 2007) (exemptions 1 and 3); *Afshar v. Dep't of State*, 702 F.2d 1125, 1130–34 (D.C. Cir. 1983) (exemptions 1 and 3).

B. The Decision Below Squarely Conflicts with the D.C. Circuit's Decision in *Davis*

Crucially, in *Davis*, the D.C. Circuit applied the "public domain" doctrine in a setting identical to this one — yet the two courts reached polar opposite results. As here, *Davis* involved a request for audiovisual records: undercover recordings that the Government made during an investigation into organized crime in New Orleans. 968 F.2d. at 1278.

As here, the Government invoked exemption 7(C) to protect the privacy of third parties who were recorded or mentioned on the tapes: the defendants, their coconspirators, and others mentioned as being under Mafia influence. *Id.* at 1278–79, 1281. As here, the Government had played the tapes in open court as unsealed evidence, although in *Davis* it had played only segments of the tapes (and only played them once). *Id.* And as here, the tapes were no longer physically available at court; they were in the Government's possession. *Id.*

Unlike the court below, however, the D.C. Circuit applied the "public domain" doctrine. The D.C. Circuit held that "the government cannot rely on an otherwise valid exemption claim to justify withholding" records where the requester has carried his burden of showing that the Government has already released that "specific information" into the "public domain." *Id.* at 1279. "But for the publication of the tapes," the D.C. Circuit underscored, exemption 7(C) would have blocked their disclosure. *Id.* Because the requester had not had the opportunity to show which "exact portions" of the tapes had been played at trial, the court remanded. *Id.* at 1279, 1282. On remand, the requester carried this burden by "produc[ing] docket entries and transcripts" showing that the Government had played at trial 158 of the 163 segments he requested. *Davis IV*, 460 F.3d at 96. The Government in turn released every one of

those segments that it still possessed. *Id.*[7] Faced with an indistinguishable scenario, the Tenth Circuit below reached the opposite result, holding that the Government *could* rely on exemption 7(C) even after airing the exact same records in a public trial.

The Tenth Circuit dismissed *Davis* as merely "declin[ing] to apply the ['public domain'] doctrine because of a failure of the plaintiff to demonstrate with specificity the information that is in the public domain." App. 17. But the D.C. Circuit did not "decline to apply" the "public domain" doctrine in *Davis*; its application of that doctrine was essential to the outcome of the case. Indeed, the D.C. Circuit made clear that the prior publication of the tapes altered the outcome by stating that exemption 7(C) would apply "[b]ut for the publication of the tapes." *Davis*, 968 F.2d at 1279. If the D.C. Circuit had "declined to apply" the "public domain" doctrine, it would have ruled that the Government correctly denied the FOIA request as a whole and left it at that. Instead, the D.C. Circuit remanded to give the requester the opportunity to show which exact segments the Government had played at trial — and after remand the Government disclosed these segments. *Id.* at 1282; *Davis IV*, 460 F.3d at 96. In *Davis*, the "public domain" doctrine thus made all the difference.

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[7] The Government continued to assert exemption 7(C) as to the five segments that Davis did not show had been played at trial, leading to a series of further appeals. *See Davis IV*, 460 F.3d at 96–97.

This sequence of events would never have occurred under the Tenth Circuit's rule. If the D.C. Circuit had applied the Tenth Circuit's rule, it would have affirmed — not remanded — in *Davis*. Conversely, if the Tenth Circuit had followed *Davis*, it would have reversed — not affirmed — the judgment below. Because Prison Legal News *did* "demonstrate with specificity" that the precise information it requested had been played in open court, *Davis* would have required disclosure. App. 17. Accordingly, *Davis* and the decision below squarely conflict.[8]

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[8] The Ninth Circuit has decided a case with similar facts, but it is too ambiguous to squarely implicate the split. In *Fiduccia v. U.S. Dep't of Justice*, 185 F.3d 1035 (9th Cir. 1999), the Ninth Circuit held that the Government could rely on exemption 7(C) to reject a request for a trove of documents about an FBI search, where "some documents relating to the search [were] necessarily public in various courthouses." *Id.* at 1047. *Fiduccia* can be read as rejecting an all-or-nothing request that, simply because *some* of the trove's contents were public, the Government must turn over *all* of its contents. Or it can be read as rejecting a request for public documents that failed to identify which documents were public. On these readings, *Fiduccia* is uncontroversial and does not implicate the split here. But *Fiduccia* can also be read as rejecting a request for specifically-identified documents that the Government placed into the public record. This reading would put *Fiduccia* on the Tenth Circuit's side of the split, but it would also be in tension with the Ninth Circuit's subsequent decision in *Watkins*, 2011 WL 1709852 at *7–*8. Given the ambiguity, *Fiduccia* is best viewed as not part of the split.

II. THE TENTH CIRCUIT'S DECISION MISCONSTRUES FOIA AND MAKES PUBLIC RECORDS SIGNIFICANTLY LESS PUBLIC

The Tenth Circuit's decision not only opens a circuit split, but also is profoundly wrong. Under the Tenth Circuit's approach, records that the Government uses in open court cannot truly be considered part of the public record. They are not in fact generally available to the public, but instead can only be seen by the people who happen to access them while the Government is still using them to support a prosecution. The question presented thus goes to the heart of what it means for a trial and judicial record to be "public."

A. The Government Can Waive Any FOIA Exemption

First, the Tenth Circuit was wrong to conclude that the Government did not waive exemption 7(C) because it "cannot waive individuals' privacy interests under FOIA." App. 8. This reasoning misunderstands that exemption 7(C) is the Government's to assert or waive, not the family's. FOIA gives the Government — not third parties — "the option" of asserting or waiving an exemption "if it so chooses." *Rose*, 425 U.S. at 361 (quotation marks omitted); *see also Halbert v. Michigan*, 545 U.S. 605, 637 (2005) ("Legal rights, even constitutional ones, are presumptively waivable."). Indeed, the Government recognized that it is free to waive exemptions that protect individuals' privacy interests by waiving exemption 6 below. *See* App. 5 n.4. If the

Government had also waived exemption 7(C), either as a litigation decision or by failing to assert it, Estrella's family would have been unable to object to the release of the materials or to sue the Government or Prison Legal News for invasion of privacy. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975). Control over exemption 7(C) thus rests firmly with the Government.

The real question is not whether the Government *can* waive exemption 7(C); it is whether the Government does in fact waive exemption 7(C) when it discloses records in open court. Basic principles of equity dictate that the Government cannot take a position in one court and then do a nearly 180-degree reversal to prevail in another. *E.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). The Government thus waived its own right to contend that the video and photos here were too private to disclose when it disclosed them publicly twice.

B. The Tenth Circuit's Decision Threatens to Shield Public Records from Public View

1. The Tenth Circuit clearly erred in holding that exemption 7(C) prevents disclosure when the Government has previously disclosed the exact same records in open court. The crux of the Tenth Circuit's ruling was that the Government made only a "limited" disclosure to those "physically present in the courtroom[s]" when it put the video and photos into the public record at trial. App. 10. That fundamentally subverts the notion of a public trial. Once unsealed materials are introduced in a public

trial, the documents are part of the public domain, generally available to the public under longstanding principles. The Government cannot claw them back, shielding them from access that would otherwise be available at court. Once the disclosure occurs, the press is free to report — either contemporaneously or years later — without fear of invasion of privacy liability. By the same logic, the Government may no longer successfully invoke exemption 7(C).

"[M]atters of public record" are, by definition, public. Restatement (Second) of Torts § 652D cmt. b. (1976). A "public record" is "[a] documentary account of past events, usu[ally] designed to memorialize those events," that is "generally open to view by the public." Black's Law Dictionary 1301 (8th ed. 2004). "Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media." *Cox Broadcasting*, 420 U.S. at 495. "With respect to judicial proceedings in particular," the free availability of public records to the press "serves to guarantee the fairness of trials" and "bring[s] to bear the beneficial effects of public scrutiny upon the administration of justice." *Id.* at 492.

Because public records must be available to the public to fulfill their purposes, there is a "venerable" common-law right "to inspect and copy public records and documents, including judicial records and documents." *Cottone*, 193 F.3d at 554; *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). The right to access public records is grounded in an informed citizenry's need "to keep a watchful

eye on the workings of public agencies" and to "preserv[e] the integrity of the law enforcement and judicial processes." *Nixon*, 435 U.S. at 598; *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985). That concern is at its pinnacle "in cases where the government is a party." *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987). "[I]n such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch." *Id.* Under the common-law, unsealed evidence thus is ordinarily *not* limited only to those who see it in the courtroom; it is presumptively available to the public at large. Of course, the common-law right of access is "not absolute." *Nixon*, 435 U.S. at 598. Trial courts have discretion to deny access that would, *inter alia*, "gratify private spite or promote public scandal" with "no corresponding assurance of public benefit." *Id.* at 599, 603 (quotation marks omitted). But this case is far removed from that situation. There is a strong public interest in disclosure of the evidence here because the Government relied on it in two capital cases, and it also sheds light on the Government's abject failure to protect federal inmates in its care from extreme violence. *See infra* 29–30, 32–33.

Indeed, the "public's right to know" the contents of public records is so important that the First Amendment flatly prohibits the Government from "expos[ing] the press to liability for truthfully publishing information released to the public in official court records." *Cox Broadcasting*, 420 U.S. at 496. Absolute First Amendment protection for reporting on matters of public record extends even

where reporting would significantly expand the audience for material that would have been profoundly private — for example, the name of a deceased rape victim — but for its inclusion in the public record. *Id.* at 471, 496.

The common-law rule is similar. "There is no liability" for invasion of privacy "when the defendant merely gives further publicity to information about the plaintiff that is already public." Restatement § 652D cmt. b.; *cf.* Samuel Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 196 (1890). Only "if the record is one not open to public inspection" can there be an actionable invasion of privacy. Restatement §652D cmt. b. Quite simply, a person "has no objectively reasonable expectation of privacy in matters in the public domain." David A. Elder, Privacy Torts § 3:5 (2002) (quotation marks and footnote omitted).

To be sure, the Government has the tools to use sensitive materials in court while preventing public disclosure. Most obviously, the Government can redact, move to seal records in whole or part, or even close the courtroom for part of the proceedings. *See* Fed. R. Crim. P. 49.1(a), (d), (f); Fed. R. Civ. P. 5.2(a), (d). Those tools, however, are subject to procedural protections, constitutional limits, and the strict oversight of a judicial officer, who is able to balance all the interests at stake. *See, e.g., Waller v. Georgia*, 467 U.S. 39, 48–50 (1984). The Tenth Circuit's approach effectively relegates that *ex ante* balancing of interests to an *ex post* determination by an executive branch official deciding whether to invoke a FOIA exemption.

The Tenth Circuit's holding undermines the value of public judicial records by making them available to a much narrower portion of the populace. Under its rule, only a select few — those with the time and resources to make it to court — can learn first hand "what the executive branch is about" or "appraise the judicial branch"; the opportunity ends as soon as the trial is over and the Government retakes possession of its exhibits. *Standard Fin. Mgmt.*, 830 F.2d at 410. At that point, the Tenth Circuit's decision effectively removes the records from the public domain, and the public can never access them ever again.

The Tenth Circuit's decision is so at odds with our constitutional and common-law traditions that it leads to anomalous results. To be sure, "the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution." *Favish*, 541 U.S. at 170. But it is not "reasonable" to expect that disclosing records in response to a FOIA request will constitute an "unwarranted invasion of personal privacy," § 552(b)(7)(C), when the Government has already fully aired those records twice, thereby eliminating any "objectively reasonable expectation of privacy" that the common law otherwise would have protected in those records, David A. Elder, Privacy Torts § 3:5 (2010); *accord* Restatement § 652D cmt. b. Disclosure of unsealed judicial records is also not "unwarranted," as it advances the values of "guarantee[ing] the fairness of trials" and "bring[ing] to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting*, 420 U.S. at 492. Conversely, allowing privacy concerns to trump public scrutiny in this context would allow the Government to invoke

the former to avoid disclosure of materials that shed light on the Government's own shortcomings and thus subject it to adverse publicity or embarrassment.

2. The Tenth Circuit read this Court's decision in *Reporters Committee* as supporting its cramped conception of the "public domain." App. 9–11. But *Reporters Committee* cuts the other way. *Reporters Committee* held that the Government could rely on exemption 7(C) to refuse FOIA requests for "rap sheets" — compilations of the history of arrests and convictions of individuals. 489 U.S. at 780. The Court defined information as "private" if it is "not freely available to the public." 489 U.S. at 763–64 (quotation marks omitted). And rap sheets fit the bill: They had always been treated as "nonpublic documents." *Id.* at 753, 764–65. Rap sheets in turn compiled arrest data that was itself not public, *id.* at 754 n.2; *see also id.* at 767, as well as information that was public but scattered in "courthouse files, county archives, and local police stations throughout the country," *id.* at 764. In holding that exemption 7(C) applied to rap sheets, *Reporters Committee* thus established a clear rule: FOIA does not guarantee access to government compilations that have always remained private, simply because some of the compiled data is publicly available elsewhere.

Reporters Committee undermines, rather than supports, the Tenth Circuit's position. Prison Legal News is not asking for records that have never been made freely available. Nor is it asking for a compilation of publicly available but otherwise scattered data in an effort to avoid the trouble of compiling the data itself. Prison Legal News is

instead asking for *exactly the same records* that the Government made "freely available to the public" in open court. *Id.* at 764. Moreover, *Reporters Committee* underscores the key point that "courthouse files" are public records even if they contain countless items implicating privacy interests and the public faces practical burdens accessing them. Under the definition this Court applied in *Reporters Committee*, the materials here are public, not private.

Reporters Committee also stressed that the public does not gain a better understanding of "what their Government is up to" "by disclosure of information about private citizens . . . that reveals little or nothing about an agency's own conduct." *Id.* at 773; *see id.* at 774. The invasion of privacy associated with a third party's request for law enforcement records is thus unwarranted "when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing." *Id.* at 780. But here, Prison Legal News seeks records that speak to "what the government [was] up to" as prison warden, as prosecutor, and in its courts. *See* App. 12–13; *infra* Part II.C.

Lastly, whereas in *Reporters Committee* the Government consistently kept the requested records private, the Government's behavior here is strikingly inconsistent: The Government initially made the video and photographs "available to the general public" in two courts without seeking to place the materials under seal either time. 489 U.S. at 759. Further, the Government frequently discloses directly to the press unsealed audiovisual evidence that it

relies on in court, including surveillance videos depicting inmate-on-inmate murders. *See* App. 69 (Wright Supp. Decl. ¶ 4). But now, the Government is refusing to make these records available at all, contending that they are too private to share.

Reporters Committee thus confirms that the D.C. Circuit was correct in *Davis* and therefore that the Tenth Circuit was wrong to conclude that the records here need not be released.

C. The Tenth Circuit's Decision Particularly Hampers Access to Audiovisual Evidence

1. The Tenth Circuit acknowledged that there is a public interest in learning about the contents of the video and photos here. App. 12–13. These materials "shed . . . light on," and draw attention to, "what [the] government is up to" when operating prisons, prosecuting crimes, and adjudicating them in courts. *Reporters Committee*, 489 U.S. at 773. "[P]rison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners." *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (quotation marks omitted). And one would expect the Bureau of Prisons to keep violent crimes to a minimum in the Special Housing Unit, which is supposed to be particularly secure. *See* BOP Statement § 541.21. But the video and photographs here depict a horrific inmate-on-inmate attack that bespeaks a total breakdown in prison security. Moreover, the brutality underscores the severity of the problem of violence in federally-run prisons more broadly. Finally, these materials also shed light on, and draw

attention to, the Government's decision as prosecutor to seek the death penalty in two separate trials; the evidence that it relied on in those two prosecutions; and the rejection of the death penalty in the courts.

The Tenth Circuit nonetheless found that the video and photographs would not "add anything new to the public understanding" of these important matters because the events they depict had already been "discussed in detail at trial and reported in the press." App. 12. "All of the information" bearing on the Government's conduct was "already publicly known." App. 13. Indeed, the panel analogized Prison Legal News' request to a group's request for an electronic copy of map coordinates that the group already possessed in hardcopy format. *Id*. (citing *Forest Guardians v. FEMA*, 410 F.3d 1214, 1219 (10th Cir. 2005)).

The Tenth Circuit missed the point. Prison Legal News does not seek sterile "information" that duplicates what it knows, like the coordinates in *Forest Guardians*. Prison Legal News seeks photographs and a video showing a horrific crime committed in the most secure cellblock in a high-security federal prison. This crime has been described many times, including by the courts below. But "[t]he adage that 'one picture is worth a thousand words' reflects the common-sense understanding that illustrations are an extremely important form of expression for which there is no genuine substitute." *Regan v. Time, Inc.*, 468 U.S. 641, 678 (1984) (Brennan, J., concurring in part and dissenting in part). The communicative force of a video may be even more potent. "Video evidence is always the best

evidence available, when it is available." App. 65 (Wright Decl. ¶ 8). For example, the infamous video of the Rodney King beating was undoubtedly "discussed in detail at trial and reported in the press." App. 12. But it was not "discuss[ions]" of this "information" that had such a profound impact on the public's understanding of the government's activities — it was seeing the video itself.

The Tenth Circuit's failure to recognize the stronger public interest in viewing audiovisual evidence over a dry written record is particularly striking because the court recognized the flip side of the same coin: a dry record is less invasive of privacy than photos and video. "Although descriptive information about what the images contain may now be widely available," the court wrote, "there is a distinct privacy interest in the images themselves." App. 10. By taking the unique impact of audiovisual evidence into account only on one side of the balance, the court rendered a decision that was sure to be out of balance.

2. This Court's own conduct confirms the importance of giving the public access to video and photographs. For example, in *Scott v. Harris*, 550 U.S. 372 (2007), the lower court suggested that a driver who was fleeing from police was "cautious and controlled," but this Court found that the "[t]he videotape [told] quite a different story." *Id.* at 379–80. "[W]hat we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort . . . ." *Id.* But rather than leaving readers with only that colorful prose, this Court attached the videotape to its opinion "to allow the

videotape to speak for itself." *Id.* at 379 n.5. Similarly, in *Brown v. Plata*, 131 S. Ct. 1910 (2011), this Court described conditions in California's prisons, but it recognized that the public's engagement and understanding might be incomplete unless the public could see those conditions first hand. Accordingly, the Court attached a series of photographs to its opinion. *Id*. at 1924 & Appx. B, C.

Prison Legal News primarily seeks the video and photographs here so that it can report from first-hand materials on this crime, which is emblematic of the Bureau of Prisons' inability to quell violence in the prisons it operates. *See* App. 62–64 (Wright Decl. ¶¶ 1, 5–6). If Prison Legal News also publishes the video and photos here so that its readers can draw their own conclusions from them, some readers may choose not to look. By all accounts, they depict an extraordinarily violent and depraved crime, and viewing these materials will be too much for many people. But "[i]n this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast" as well as the judgment of potential viewers regarding what to watch. *Cox Broadcasting*, 420 U.S. at 496. No one will be forced to view these materials.

The violence these materials depict also cannot be dismissed as gratuitous or incidental to the public interest in disclosure — *the violence is the story*. When Government officials engage in affirmative acts of violence, such as beating a prisoner or a suspect, it is obvious that the violence weighs strongly in favor of disclosure, not against. The situation is no different if violence ensues because the Government fails to

protect federal prisoners who by necessity must depend on the Government for protection. *See Farmer*, 511 U.S. at 833. The public is aware that, notwithstanding the Government's duty to protect prisoners, inmate-on-inmate violence is a persistent problem in federal prisons. But it is particularly appalling that a crime this brutal could occur under the Government's watch in the most secure cellblock in a high-security prison. The video and photographs make this point far more powerfully than a dry record ever could.

The public is also aware that the Government sought the death penalty in two separate trials and that the video and photographs were central to the Government's case both that the Sablans were guilty and that they deserved the ultimate penalty. But the public also knows that the two juries that viewed this evidence rejected the death penalty and instead sentenced the Sablans to life imprisonment. The public cannot fully evaluate the Government's judgment as a prosecutor or the conduct of the courts and juries in two death-penalty prosecutions — and might be less inclined to train their focus on these important matters — without seeing the video and photographs first hand. The second-hand descriptions that are available here are "no genuine substitute" for the originals. *Regan*, 468 U.S. at 678.

3. The Tenth Circuit's view that reading about the video and photographs is roughly equivalent to seeing them not only contradicts widely shared understandings and practices, but it also has serious practical consequences. Due to technological advances, video and photographs are increasingly

being collected and used as evidence. Tens of millions of Americans carry cellphones that can take photos and video and upload them to the internet. *See* Pew Research Ctr., Generations and their Gadgets 8 (Feb. 3, 2011).[9] And making a copy of a video or a photograph is now as easy as copying any other computer file.

FOIA is a valuable tool for the press and public to access these materials first hand. In many courts, once a criminal trial is complete, transcripts and other documents remain in the court's possession, but audiovisual evidence is often returned to the Government. *E.g.*, App. 9–10; *United States v. Novaton*, 271 F.3d 968, 992 (11th Cir. 2001); *United States v. Graham*, 257 F.3d 143, 152 n.5 (2d Cir. 2001). The Tenth Circuit's position — that the Government can use audiovisual records in open court to secure a conviction, but then rely on exemption 7(C) to resist disclosure of those records when the trial is over — makes it more difficult for the public to see audiovisual evidence at a time when it is becoming increasingly important to public understanding of "what the Government is up to." *Reporters Committee*, 489 U.S. at 780.

III. THIS CASE IS AN IDEAL VEHICLE

This case is an excellent vehicle for resolving the circuit split here. First, this case stands or falls on the difference between the Tenth Circuit's rule and

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[9] http://pewinternet.org/~/media//Files/Reports/2011/PIP_Generations_and_Gadgets.pdf

the rule applied in the D.C. Circuit and Second Circuit. The Tenth Circuit held that the Government could rely on exemption 7(C) to resist disclosure here. But if the Tenth Circuit had followed *Davis*, the Government could not have relied on this exemption. Prison Legal News requested exactly the same materials that the Government used publicly at trial, and thus under *Davis* the Government "cannot rely on an otherwise valid exemption claim to justify withholding [that] information." *Davis*, 968 F.2d at 1279 (quotation marks omitted).

Second, the only question in this case is the question presented. Although the Government invoked exemption 6 and other exemptions in the district court, it waived those arguments on appeal. App. 5 n.4. The Government's waiver makes exemption 7(C) the Government's only defense against disclosure. This is therefore an ideal vehicle for resolving a conflict between the circuit courts on an important question of federal law.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

RESPECTFULLY SUBMITTED

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June 14, 2011

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APPENDIX

TABLE OF APPENDICES

Appendix A

United States Court of Appeals,
Tenth Circuit

NO. 09-1511

PRISON LEGAL NEWS,
Plaintiff–Appellant,

v.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS,
Defendant–Appellee.

60 Minutes, The Associated Press, Westword, The American Society of News Editors, The Association of Capitol Reporters and Editors, The Society of Professional Journalists, and The American Civil Liberties Union of Colorado, Amici Curiae.

Jan. 11, 2011.

Before MURPHY, McKAY, and TYMKOVICH, Circuit Judges.

MURPHY, Circuit Judge.

I. Introduction

Prison Legal News ("PLN") appeals the partial grant of summary judgment to the Executive Office for United States Attorneys ("EOUSA") exempting from mandatory disclosure under the Freedom of Information Act ("FOIA") video depicting the aftermath of a brutal prison murder and autopsy

photographs of the victim. Exercising jurisdiction under 28 U.S.C. § 1291, this court DISMISSES AS MOOT the portion of the appeal pertaining to records that have now been released by EOUSA, and AFFIRMS the district court's order as to the remaining portions of the withheld records because the disclosure of the death-scene images in this case "could reasonably be expected to constitute an unwarranted invasion of personal privacy" of the victim's family. 5 U.S.C. § 552(b)(7)(C).

II. Background

In October 1999, William Sablan and Rudy Sablan, two prisoners at the United States Penitentiary in Florence, Colorado, murdered their cellmate, Joey Jesus Estrella. Bureau of Prisons ("BOP") personnel filmed the aftermath of Estrella's death. The first portion of the video depicts the interior of the shared cell and the Sablans' conduct inside the cell, including the mutilation of Estrella's body. The audio of the first portion contains both the Sablans' voices and prison officials' voices. The second portion of the video depicts BOP personnel extracting the Sablans from the cell and does not contain any images of Estrella's body. BOP personnel also took still autopsy photographs of Estrella's body.

The Sablans were tried separately on first degree murder charges and the United States sought the death penalty in both cases. At each trial, the video, with audio, and autopsy photographs of Estrella's body were introduced as evidence and shown in open court to the jury and to the public audience. The exhibits were not sealed. Both of the Sablans

were convicted and in each case a sentence of life in prison was imposed. At the completion of trial, the photographs and video were returned to the United States Attorneys Office pursuant to a standard order regarding the custody of exhibits.

PLN is an organization that publishes a legal journal concerning prisoners' rights issues. PLN filed a request under FOIA for the videotape and autopsy photographs introduced as evidence at William Sablan's trial. EOUSA denied the FOIA request in full and the Department of Justice denied PLN's subsequent administrative appeal. Thereafter, PLN filed a complaint in district court alleging EOUSA's withholding of the requested records under FOIA was improper.

The parties filed cross-motions for summary judgment. EOUSA argued the autopsy photographs and video taken after Estrella's death were properly withheld under FOIA Exemptions 6 and 7(C) based on the privacy interests of Estrella's family. The district court granted in part and denied in part each party's motion, ordering the release of the second portion of the video plus the audio of BOP officials' voices in the first portion of the video.[1]

Both parties filed notices of appeal, but EOUSA subsequently voluntarily dismissed its appeal. In conjunction with the dismissal, EOUSA released the second portion of the video, including the accompanying audio, and the audio track only of the first portion with four of the Sablans' statements

[1] As to the second portion of the video, the district court further ordered images of the Sablans' genitalia to be obscured. On appeal, PLN does not challenge that aspect of the order.

deleted.[2] At oral argument, the parties agreed EOUSA had released more than the district court order required.[3] The materials EOUSA continues to withhold are now limited to the first portion of the video, four redactions of the audio accompanying the first portion of the video, and the autopsy photographs. PLN's appeal as to all other materials, which have now been released, is moot. *See Anderson v. U.S. Dep't of Health & Human Servs.*, 3 F.3d 1383, 1384 (10th Cir. 1993) (noting that once requested records are released, FOIA claims as to those records are moot).

III. Discussion

A. Standard of Review

When the underlying facts of a FOIA case are undisputed and a district court has granted summary judgment in favor of a government agency, we review the district court's legal conclusion that the requested records are exempt from disclosure de novo, applying the same standard

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[2] PLN and EOUSA have differing interpretations of the district court's order. PLN views the district court's order as not requiring EOUSA to release the audio track accompanying the second portion of the video and therefore appeals the denial of the audio track. EOUSA interpreted the district court's order to require release of the audio accompanying the second portion of the video. Because EOUSA has now released that portion of the audio, we need not decide the issue.

[3] In addition to the audio track accompanying the second portion of the video, about which the parties dispute whether the order required release, EOUSA also released audio from the first portion that the parties agree was not required to be released by the district court's order as it went beyond the statements of the BOP officials.

as the district court. *Herrick v. Garvey*, 298 F.3d 1184, 1190 (10th Cir. 2002). As part of this review, this court has con ducted an in camera inspection of the requested records.

B. FOIA Overview

Congress enacted FOIA to "open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361, 96 S. Ct. 1592, 48 L.Ed.2d 11 (1976) (quotation omitted). To promote government accountability, "disclosure, not secrecy, is the dominant objective of the Act." *Id.* Recognizing, however, certain instances in which disclosure would harm legitimate interests, Congress exempted from FOIA's disclosure mandate nine categories of records. *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1225–26 (10th Cir. 2007); 5 U.S.C. § 552(b). The government bears the burden of demonstrating the requested records fall within one of FOIA's enumerated exemptions, which we construe narrowly in favor of disclosure. *Trentadue*, 501 F.3d at 1226.

Relevant here, Exemption 7(C)[4] allows an agency to withhold "records or information compiled for law

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[4] The government does not rely on Exemption 6 in this appeal. The balancing under Exemption 7(C) is more protective of privacy interests than under Exemption 6, which applies to personnel, medical, and similar records rather than law enforcement records. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 165–66, 124 S. Ct. 1570, 158 L.Ed.2d 319 (2004); *see* 5 U.S.C. § 552(b)(6), (b)(7)(C). Because there is no dispute the records at issue here constitute law enforcement records, and because Exemption 7(C) is broader than Exemption 6, an Exemption 6 analysis is, in any event, unnecessary.

enforcement purposes, but only to the extent that the production of such law enforcement records or information … could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). We therefore first determine whether there is a personal privacy interest at stake, and, if so, balance the privacy interests against the public interest in disclosure. *See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 776, 109 S. Ct. 1468, 103 L.Ed.2d 774 (1989).

C. Autopsy Photographs and Video

We consider the autopsy photographs and the images from the first portion of the video together. We agree with the district court that the same considerations apply to both sets of images, and the parties have briefed the issues as such.

The parties agree that the relevant privacy interests are the interests of Estrella's family.[5] The Supreme Court recently considered a privacy claim under FOIA concerning photographs of the body of Vincent Foster, Jr., deputy counsel to President Clinton, at the scene of his death. *Favish*, 541 U.S. at 161, 124 S. Ct. 1570. Tracing the types of personal privacy interests protected under FOIA, the Court held that Exemption 7(C) recognizes "family members' right to personal privacy with respect to their close relative's death-scene images." *Id.* at 170, 124 S. Ct. 1570.

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[5] The government has not argued that either Estrella's own privacy interests or the Sablans' privacy interests are implicated.

EOUSA has identified members of Estrella's family whose interests are at stake. Moreover, based on this court's in camera review of the autopsy photographs and the first portion of the video at issue in this appeal, the records unquestionably reflect death-scene images. The photographs depict close-up views of the injuries to Estrella's body and the first portion of the video prominently features Estrella's body on the floor of the prison cell. If anything, the privacy interest in these images is higher than the privacy interest in the photographs at issue in *Favish*. The photographs in *Favish* depicted the victim of an apparent suicide, *see id.* at 161, 124 S. Ct. 1570, but the images did not involve grotesque and degrading depiction of corpse mutilation as do the images at issue here. Additionally, the images in *Favish* were all still photographs, whereas the video at issue here depicts corpse mutilation as it occurs. The privacy interest of the victim's family in images of this nature is high.

PLN argues, however, that in the circumstances of this case, Estrella's family has no privacy interest. PLN first asserts that because Estrella was a prisoner and the images were taken in a prison cell, Estrella himself had no expectation of privacy and his family likewise can have none. Second, PLN contends that the use of the photographs and video at the Sablans' trial, combined with the family's failure to object to the introduction of the evidence in open court, effectively constituted a waiver of the privacy interests at stake. Finally, PLN urges this court to require an evidentiary showing that

Estrella's family objects to the release of these images or otherwise will be harmed.

Any diminishment of Estrella's expectation of privacy as a result of his status as a prisoner does not bear on his family's privacy interest in not having gruesome images of his body publicly disseminated. As the Supreme Court stated in *Favish*, family members have a right to personal privacy "to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility, not for the sake of the deceased." *Id.* at 166, 124 S. Ct. 1570. Accordingly, contrary to PLN's contention that any privacy interest of Estrella's family is derivative of Estrella's own privacy interest, family members' privacy interests under FOIA are independent interests. Estrella's status as a prisoner only has the potential to affect his own, and not his family's, privacy interests.

Estrella's family did not waive their privacy interests in the video and photographs as a result of the government's use of these materials at the Sablans' trials. The government cannot waive individuals' privacy interests under FOIA. *See Sherman v. U.S. Dep't of Army*, 244 F.3d 357, 364 & n.12 (5th Cir. 2001) (holding the government's prior disclosure of requested information could not waive individual's privacy interests under Exemption 6 and collecting cases involving Exemption 7(C)). As such, neither the government's conduct in introducing the records nor its failure to have them admitted under seal is relevant to a waiver analysis.

The family's failure to object at the time of trial is also not sufficient to waive their own privacy interests under FOIA. An individual can waive his privacy interests under FOIA when he affirmatively places information of a private nature into the public realm. For example, when Ross Perot made public statements concerning his offer to assist government agencies with certain law enforcement matters, he waived any privacy interest he had in his name appearing on records concerning those matters. *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995). In contrast, Estrella's family members did not take any affirmative actions to place the images in the public domain.

That the video and photographs were, at the time of the trials, displayed publicly, may impact the family's expectation of privacy in those materials but does not negate it. In *Reporters Committee*, the Supreme Court held that even though criminal conviction information was publicly available in individual court records, individuals still maintained a privacy interest in compilations of such information that would otherwise be difficult to assemble. 489 U.S. at 762–63, 109 S. Ct. 1468. As the Court explained, "the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information." *Id.* at 770, 109 S. Ct. 1468 (quotations omitted). *Reporters Committee* thus requires an examination whether, as a practical matter, the extent of prior public disclosure has eliminated any expectation in privacy.

Here, the images are no longer available to the public; they were displayed only twice (once at each

Sablan trial); only those physically present in the courtroom were able to view the images; and the images were never reproduced for public consumption beyond those trials. Although descriptive information about what the images contain may now be widely available, there is a distinct privacy interest in the images themselves. *See N.Y. Times Co. v. NASA*, 920 F.2d 1002, 1006 (D.C. Cir. 1990) (en banc) (recognizing the possibility of family's privacy interest in an audiotape of Space Shuttle Challenger astronauts' voices just prior to their death even when transcript had already been publicly released), *remanded to* 782 F.Supp. 628 (D.D.C.1991) (concluding the audiotape was exempt from disclosure on that basis). A member of the public would have to go to even greater lengths to see the images at issue in this case than to access the individual criminal records considered difficult to compile in *Reporters Committee*. Because of the limited nature of the prior public disclosure, we conclude Estrella's family retains a strong privacy interest in the images.

PLN's suggestions that the government was required to offer evidence of the family's objection and that the district court improperly made findings regarding the particular harm the family would suffer are incorrect. Exemption 7(C) covers records, the release of which "could reasonably be expected" to be an unwarranted invasion of privacy interests. 5 U.S.C. § 552(b)(7)(C). By its plain language, the test is an objective one and does not depend on the affected individuals' statements of objection or their personal views of the harm they might suffer. Likewise, the district court's observation that

release of the records "could impede the family's ability to mourn Mr. Estrella's death in private and achieve emotional closure" is a proper statement of the general type of harm the Supreme Court recognized as implicating a legitimate privacy concern in *Favish*. *See* 541 U.S. at 168, 124 S. Ct. 1570.

The determination of a privacy interest in the requested images does not end the Exemption 7(C) inquiry. The privacy interest at stake must be weighed against the public interest in disclosure. Only if disclosure would constitute an "unwarranted" invasion of personal privacy can the records properly be withheld under Exemption 7(C). *See Reporters Comm.*, 489 U.S. at 771, 109 S. Ct. 1468. The Supreme Court has defined the relevant public interest narrowly, and we therefore consider only the public's interest in obtaining information likely to contribute to its understanding of an agency's performance of its duties. *Id.* at 773, 109 S. Ct. 1468.

Here, PLN argues the first portion of the video and the autopsy photographs will aid the public's understanding of agency activities in two ways. First, it contends the records will shed light on the BOP's performance of its duty to protect prisoners from violence perpetrated by other prisoners, including its obligations to provide adequate conditions of confinement and to prevent prisoners from falling under the influence of alcohol and other prohibited substances. Second, it argues that if the records are released, the public will better understand the prosecutor's decision to seek the

death penalty against the Sablans, a decision significantly increasing the cost of prosecution.

While the BOP's protection of prisoners and the government's discretionary use of taxpayer money may be matters of public interest, there is nothing to suggest the records would add anything new to the public understanding. *See Forest Guardians v. FEMA*, 410 F.3d 1214, 1219 (10th Cir. 2005) (concluding release of requested records would not add to the public's knowledge about the agency's performance because the information was already available). The video does not begin until Estrella has already been murdered and therefore does not depict any BOP conduct prior to Estrella's death. The second portion of the video depicting BOP personnel interacting with the Sablans to extract them from the cell has now been released in full. All statements made by BOP personnel in the first portion of the video have also been released in an audio file. At oral argument, the parties indicated that the length of time between the beginning of the video and the time BOP personnel extracted the Sablans from the cell is publicly known. Thus, all aspects of the video documenting BOP's response to the situation have been fully disclosed.

PLN's argument that the video may shed light on the conditions of confinement also rings hollow, as the size of the cell and conditions therein are public knowledge because they were discussed in detail at trial and reported in the press. The Sablans' state of intoxication, about which PLN also argues there is a public interest, has likewise been discussed in the media. To the extent their behavior in the video can add anything to the understanding of the Sablans'

state of intoxication, that behavior can be observed in the second portion of the video, now released.

The same problem plagues PLN's argument that the public would benefit in understanding the prosecutor's decision to seek the death penalty in the Sablans' trials. All of the information PLN claims would shed light on the issue, including the heinous nature of the mutilation of Estrella's corpse, is already publicly known. The images at issue were viewed by members of the media at the Sablan trials, and the media widely reported on the contents of the video and photographs.

PLN argues that news media reporting on the video and photographs is not the same as the ability of the media to provide the video and photographic images to the public. Nonetheless, to the extent any additional information can be gained by release of the actual images for replication and public dissemination, the public's interest in that incremental addition of information over what is already known is outweighed by the Estrella family's strong privacy interests in this case. Thus, any additional disclosure would be an unwarranted invasion of the family's personal privacy.

D. Redacted Audio

EOUSA also withheld from PLN certain segments of the audio track accompanying the first portion of the video. Those segments amount to four statements made by the Sablans. PLN argues no portion of the audio track is exempt and the district court erred in ordering EOUSA to release only the portions of the audio containing statements made by BOP officials.

The district court, stating that access to records under FOIA was limited to records that shed light on governmental activity, concluded that only the statements of government officials fell within the ambit of FOIA's disclosure requirement. FOIA's disclosure requirement, however, has no such limitation. Rather, under FOIA, agencies are required to release any requested agency records unless they fall within one of the exemptions. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 150–51, 109 S. Ct. 2841, 106 L.Ed.2d 112 (1989). The district court thus incorrectly permitted EOUSA to withhold portions of the audio without deciding whether those portions were exempt from disclosure.

This court may nonetheless affirm on any ground that is supported in the record and raised on appeal. *Pullman v. Chorney*, 712 F.2d 447, 449 (10th Cir. 1983). As the government represented at oral argument and verified by in camera examination, the redacted statements of the Sablans pertain to what they were doing to Estrella's body. The government made clear at oral argument that these statements were also withheld under Exemption 7(C) on the same grounds as the images discussed above.

For the same reasons that Estrella's family has an interest in not being subjected to the public display of gruesome images of their deceased relative, they also have a privacy interest in the voices of the perpetrators themselves describing the heinous acts in progress. Like the images, these audio recordings add little or nothing to the large amount of public knowledge about the crimes and

the government's response to them. The Sablans' voices describing their actions are part and parcel of the images of corpse mutilation. Because the same considerations apply to these audio records as to the images, the statements were properly withheld under Exemption 7(C).

E. The Public Domain Doctrine

PLN urges us to hold that, under the public domain doctrine, even if the records here are exempt they must nonetheless be released because they were previously introduced at the Sablans' trials. The public domain doctrine, a doctrine applied by the D.C. Circuit, comes into play once a court has concluded that a record falls within an exemption to disclosure under FOIA. It allows a court, in certain circumstances, to disregard that otherwise applicable exemption based on a prior public release of the requested materials. *See Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999).

PLN relies primarily on *Cottone v. Reno* for its argument that the public domain doctrine overrides the application of any FOIA exemption when records are introduced as unsealed exhibits at a public trial.[6] 193 F.3d at 550. In *Cottone*, the D.C.

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[6] Many of the other cases on which PLN relies for its argument that the public domain doctrine should apply here, including decisions of this court, are inapposite. Rather than concluding records are exempt but under the public domain doctrine must be released anyway, those cases recognize that in some circumstances the public availability of information renders the exemption inapplicable at the outset. *See, e.g., Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1236 (10th Cir. 2007) (concluding there was no privacy interest in certain readily available information and the records therefore did not

Circuit held that "materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record." *Id.* at 554. The justification for the D.C. Circuit's rule under FOIA's statutory framework, however, is critical to understanding when the doctrine applies. The D.C. Circuit explained that "the logic of FOIA mandates that where information requested is truly public, then enforcement of an exemption cannot fulfill its purposes." *Id.* (internal quotation and citation omitted).

In *Cottone*, the requester sought tape recordings of wiretapped conversations that had been introduced at a public trial. *Id.* at 552–53. Recordings obtained by wiretap may be withheld under FOIA Exemption 3, which protects records that must be withheld under another statutory provision—in *Cottone*, the Omnibus Crime Control and Safe Streets Act of 1968. *Id.* at 554. Once the tapes in *Cottone* were played at a public trial, the purpose of the Exemption 3 statute could no longer be fulfilled because the government had already revealed the intercepted information. *See id.* at 555. Importantly, there was no argument in *Cottone* that any additional interest attached to the tape

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fall within Exemption 7(C)); *Herrick v. Garvey*, 298 F.3d 1184, 1193–94 (10th Cir. 2002) (holding records did not qualify as exempt confidential commercial information under Exemption 4 because the information was not actually confidential); *Anderson v. Dep't of Health & Human Servs.*, 907 F.2d 936, 952 (10th Cir. 1990) (same as *Herrick*). Thus, these cases do not provide support for PLN's position.

recordings, which had already been disclosed and thus easily disseminated further.

By contrast, the purpose of Exemption 7(C) in this case remains intact despite the government's use of the records at a public trial. The nature of the family's strong privacy interest in the photographs, video, and accompanying audio is distinct from information about what those images and recordings contain. The Sablans' conduct is already publicly known and written descriptions have been widely republished. Enforcement of Exemption 7(C) here would not protect any privacy interest that might exist merely in a description of the conduct. As discussed above, however, the actual images have been viewed by a limited number of individuals who were present in the courtroom at the time of the trials. Thus, enforcement of Exemption 7(C) can still protect the privacy interests of the family with respect to the images and recordings because they have not been disseminated. Aside from *Cottone*, every case cited by PLN in support of its reading of the public domain doctrine declines to apply the doctrine because of a failure of the plaintiff to demonstrate with specificity the information that is in the public domain. *See, e.g., Davis v. U.S. Dep't of Justice*, 968 F.2d 1276, 1280 (D.C. Cir. 1992).

The public domain doctrine is limited and applies only when the applicable exemption can no longer serve its purpose. Given that the public domain doctrine appears nowhere in the statutory text of FOIA, only the failure of an express exemption to provide any protection of the interests involved could justify its application. Even if this court adopted the public domain doctrine, it would not

defeat Exemption 7(C)'s applicability in this matter because the purposes of Exemption 7(C) can still be served.

Finally, we reject PLN's suggestion that admission of certain records at trial is different from other types of public disclosures under FOIA. Without doubt, the public has some common law rights to court records and such rights protect important interests in public adjudications. *See United States v. McVeigh*, 119 F.3d 806, 811–12 (10th Cir. 1997); *see also Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 55 L.Ed.2d 570 (1978). Nonetheless, we have no occasion to decide whether the autopsy photographs and death-scene video were properly removed from the public record or whether those records should have been available for public copying.[7] The claim presented here is a claim brought under FOIA and, for the purposes of FOIA, the only relevant fact about the trial is the extent of disclosure.[8]

IV. Conclusion

For the foregoing reasons, this court DISMISSES AS MOOT the portion of PLN's appeal that pertains to records already released and AFFIRMS the

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[7] The same is true for PLN's claim, if such a claim can be made, under the First Amendment. *See United States v. Gonzales*, 150 F.3d 1246, 1256 (10th Cir. 1998).

[8] We likewise decline PLN's invitation to examine the various United States Attorneys' Offices' policies on the public release of videos it uses at trial. To the extent PLN feels the policy is inconsistently applied, it is a matter to be taken up with the executive branch or with Congress.

judgment of the district court in all other respects.[9] EOUSA's motion to strike the amicus brief filed by media organizations is DENIED.

[9] EOUSA's motion to file the requested records under seal, having been previously provisionally granted, is now permanently GRANTED, but only to the extent of the unredacted full-length video, the unredacted audio track accompanying the videotape, the autopsy photographs, and the unredacted transcript of the audio track. All other materials are to be maintained on the public docket. This court orders that EOUSA confer with the clerk of this court to arrange for the permanent sealing of only the designated records and that PLN then confirm with the clerk that the proper records are unsealed.

Appendix B

United States Court of Appeals,
Tenth Circuit

NO. 09-1511

PRISON LEGAL NEWS,
Plaintiff–Appellant,

v.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS,
Defendant–Appellee.

60 Minutes, et al., Amici Curiae.

Filed: March 16, 2011

ORDER

Before MURPHY, McKAY, and TYMKOVICH, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,
ELISABETH A. SHUMAKER, Clerk

Appendix C

United States District Court,
District of Colorado

CIVIL ACTION NO. 08-CV-01055-MSK-KLM

PRISON LEGAL NEWS,

Plaintiff,

v.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS,

Defendant.

Filed: September 16, 2009

OPINION AND ORDER DIRECTING RELEASE OF SOME REQUESTED INFORMATION AND DENYING RELEASE OF OTHER INFORMATION

Honorable Marcia S. Krieger

THIS MATTER comes before the Court pursuant to (1) Defendant Executive Office for United States Attorneys' (the "Executive Office") Motion for Summary Judgment (#18) and supporting brief (#19), to which Plaintiff Prison Legal News responded (#22) and (2) Prison Legal News's Motion for Summary Judgment (#20), to which Executive Office responded (#21), and Prison Legal News later supplemented with a Supplemental Declaration

(#25). Having considered the same and other pertinent portions of the record, the Court

FINDS and CONCLUDES that

I. Jurisdiction

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

II. Issue Presented

In this action, Prison Legal News seeks disclosure under the Freedom of Information Act ("FOIA")[1] of certain video and photographic records that were used in the prosecution of a federal death penalty case. The Executive Office maintains that the records are not subject to disclosure because they fall within two enumerated exemptions in FOIA. Therefore, the sole issue presented in this case is whether, as a matter of law, the records requested are properly withheld under an enumerated exemption in FOIA.[2]

III. Material Facts

On October 10, 1999, William Sablan and Rudy Sablan murdered Joey Jesus Estrella in their shared prison cell at the United States Penitentiary in Florence, Colorado ("USP-Florence"). The Bureau of Prisons ("BOP") videotaped William and Rudy Sablan's actions after the murder, which tape

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[1] Particularly, 5 U.S.C. § 552(a)(4)(B).

[2] Although the parties have submitted cross motions for summary judgment, the only issue presented to the Court is for a legal determination on the application of FOIA exemptions. No material facts are in dispute. Therefore, the Court construes the cross motions for summary judgment as motions for determination of legal issues on undisputed facts.

displays William Sablan's mutilation and handling of Mr. Estrella's body and internal organs and his purported drinking of Mr. Estrella's blood. Inevitably, the video also shows the numerous physical injuries that were inflicted on Mr. Estrella. The video also depicts the BOP's removal of William and Rudy Sablan from the cell, their initial physical exams, and their placement in four-point restraints in separate cells.

In separate trials, the government prosecuted William and Rudy Sablan for Mr. Estrella's murder. *See* 00-cr-00531-WYD-1 (William Sablan); 00-cr-00531-WYD-2 (Rudy Sablan). During the trials, the video and autopsy photographs were introduced as evidence and played for the courtroom audience. After the trials, all exhibits were returned to the parties pursuant to court policy and order by Judge Wiley Y. Daniel. The United States Attorney's Office for the District of Colorado is currently in possession of the records at issue—the video and autopsy photographs.

On March 12, 2007, Prison Legal News sent a FOIA request to the U .S. Attorney's Office seeking disclosure of the video and the "still photographs of the body of" Mr. Estrella[3] that were used in the trials. The Executive Office denied the request in full on May 15, 2007. Prison Legal News's administrative appeal was denied on November 19, 2007. This lawsuit followed.

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[3] The parties appear to be in agreement that this request was in reference to the autopsy photographs.

IV. Analysis

FOIA provides for public access to government agency records. *See* 5 U.S.C. § 552. Access, however, is permitted only with respect to information that sheds light on the government's performance of its duties. *Forest Guardians v. U.S. Fed. Emergency Mgmt. Agency*, 410 F.3d 1214, 1217 (10th Cir. 2005). There is a strong presumption for disclosure under FOIA and the statute's provisions are broadly construed to effectuate this goal. *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1226 (10th Cir. 2007). Nevertheless, FOIA includes nine exemptions which permit government agencies to withhold requested records. See 5 U.S.C. § 552(b). These exemptions are construed narrowly; the federal agency resisting disclosure bears the burden of justifying the application of an exemption. *See Trentadue*, 501 F.3d at 1226. In addition, to keep with the purpose of facilitating disclosure, FOIA requires governmental agencies to delete or redact any "reasonably segregable portion" that falls within an exemption and disclose the remainder of the record. *See* 5 U.S.C. § 552(b). Whether, and to what degree, a particular record is covered by an exemption is a question of law. *See Trentadue*, 501 F.3d at 1226. When an agency withholds documents under an exemption, the district courts have jurisdiction to review the application of the exemption *de novo. See* 5 U.S.C. § 552(a)(4)(B).

The exemptions asserted by the Executive Office in this case are Exemption 6 and Exemption 7(C), which excuse disclosure of:

> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy [("Exemption 6")];
>
> (7) records or information complied for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy [("Exemption 7(C")].

Under Exemption 6, the term "similar files" is construed broadly and generally incorporates all information that applies to a particular individual. *Trentadue*, 501 F.3d at 1232 (citing *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602, 102 S. Ct. 1957, 72 L.Ed.2d 358 (1982)). The privacy interest protected by Exemption 6 is an "individual's control of information concerning his or her person." *U.S. Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 500, 114 S. Ct. 1006, 127 L.Ed.2d 325 (1994) (hereinafter "*FLRA* ").

Although similar to Exemption 6, Exemption 7(C) provides greater protection for privacy interests. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756, 109 S. Ct. 1468, 103 L.Ed.2d 774 (1989). The statutory language demonstrates this disparity in breadth. Exemption 6 covers disclosures that "would constitute" a "clearly unwarranted" invasion of privacy, whereas Exemption 7(C) extends to disclosures that "could

reasonably be expected" to constitute an "unwarranted" invasion of privacy.[4]

To determine whether and to what degree either exemption authorizes the government to withhold disclosure, a court must balance the public interest in disclosure with the private interest at stake. *See id.* at 776. The public interest in disclosure is that which contributes to the public's understanding of government actions or operations. *See FLRA*, 510 U.S. at 495 (quoting *id.* at 775). When privacy interests are at stake, the requesting party must demonstrate a sufficient reason for disclosure by showing that (i) the public interest sought to be advanced is a significant interest and (ii) disclosure would likely advance the articulated public interest. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172, 124 S. Ct. 1570, 158 L.Ed.2d 319 (2003). If the public interest asserted is to show negligence or improper action by government officials, more than conclusory allegations of government misconduct is required. *See id.* at 174. The requesting party is required to make a meaningful evidentiary showing of the misconduct such that a reasonable person would believe that the alleged misconduct occurred.

The Supreme Court has recognized that with regard to "death scene images" the personal privacy rights under FOIA include those of the family of the deceased. *Id.* at 170. Death scene images include those records that reflect a death, the scene of a

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[4] These two differences in the statutory language were the products of specific amendments to the statute. *Reporters Comm.*, 489 U.S. at 756.

death, or pertain to graphic details surrounding a death. For example, death scene images in which families of the deceased have a privacy interest have included suicide scenes, the deceased's last words (Challenger explosion), JFK's autopsy photographs, and MLK's assassination. In recognizing the privacy interest of family members in such records, the Supreme Court examined cultural traditions and common law which respect a family's right to control the disposition of the body of a loved one as well as posthumous photographs of the deceased. Cultural norms and common law traditions recognize a family's need to honor and mourn their loved one without interference from the public. Indeed, the Supreme Court reasoned that "personal privacy" must include a family's privacy rights, otherwise perpetrators of crimes could use FOIA to obtain and publish the death scene images of their victims, an untenable result.

However, one circuit has held that the government's reliance on an otherwise applicable exemption may be precluded if the information sought was admitted as evidence in a criminal trial. *See Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999).

A. Autopsy Photographs

Prison Legal News seeks disclosure of the autopsy photographs of Mr. Estrella's body. The Executive Office claims that the photographs have been properly withheld under either Exemption 6 or Exemption 7(C). As Exemption 7(C) is broader than Exemption 6, the Court will begin its analysis with Exemption 7(C).

As a threshold matter, there is no disagreement between the parties that the autopsy photographs were compiled for law enforcement purposes as required by Exemption 7(C). On one side of the balancing test, the public interest in disclosure of the autopsy photographs is limited. Prison Legal News articulates the public interests as: (i) allowing the public to be fully informed about the circumstances of Mr. Estrella's murder; and (ii) allowing the public to scrutinize the circumstances under which the government pursued the death penalty.

With respect to the first articulated interest, the Court observes that the espoused public interest does not necessarily concern a governmental activity. The circumstances of a murder, even one that occurs in a federal penitentiary, do not alone infer a governmental activity. In this case, there is nothing that directly links the circumstances of Mr. Estrella's murder to a governmental activity. Prison Legal News offers nothing more than vague suggestions that perhaps a governmental employee, practice, or policy had something to do with the murder. It suggests that the BOP did not provide suitable living quarters for the three inmates or was negligent in protecting Mr. Estrella from his cellmates. Such suggestions are insufficient to demonstrate a governmental activity that warrants disclosure of government information. How the BOP responded to Mr. Estrella's murder is arguably a governmental activity, but that takes the Court to the second justification.

The government's request for imposition of the death penalty is clearly a governmental activity. However, Prison Legal News does not tie the autopsy

photographs to this decision. There is no showing that some aspect of the photographs caused, influenced, or particularly impacted the government's decision to seek the death penalty. The photographs depict the nature of Mr. Estrella's injuries, but they do not reveal the factors that the government considered in determining that the death penalty was a proper punishment. Therefore, disclosure would at most provide a glimpse into the government's decision to seek the death penalty.

Assuming, without determining, that the autopsy photographs did have some relationship to the government's decision to seek the death penalty, it is also important to note that the jury in each criminal case rejected the government's request. Had the death penalty been imposed against either William or Rudy Sablan, the public's interest in understanding why it was requested and upon what evidence the jury based its determination could be quite significant. Here, however, the public's interest is diminished because the death penalty was not imposed. Under these circumstances a showing of the importance of the public interest and how it ties to the autopsy photographs must be more nuanced and specific. In the absence of such a showing, the Court finds that the public interest in the autopsy photographs to be small.

On the other side of the balancing analysis is the family's privacy interest. In this case, it is significant.[5] Mr. Estrella's sister and aunt are close

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[5] The Court finds Prison Legal News's suggestion that Mr. Estrella's family has no privacy interest in the autopsy photographs because they did not submit affidavits asserting

relatives that hold a privacy right in the photographs of his autopsy. The autopsy photographs show, in detail, the exceptionally heinous nature of Mr. Estrella's injuries. Given the graphic nature of the photographs, public dissemination of these images could impede the family's ability to mourn Mr. Estrella's death in private and achieve emotional closure.

Balancing the family's strong privacy interest against the public's interest in disclosure to evaluate the government's choice to pursue the death penalty, the Court concludes that the disclosure could reasonably result in an unwarranted invasion of privacy. Therefore, the Court finds that Exemption 7(C) applies to the autopsy photographs.[6]

B. Video

Prison Legal News also seeks disclosure of the video depicting the treatment of Mr. Estrella's body following his murder. The Executive Office again asserts that both Exemption 6 and Exemption 7(C)

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this right unpersuasive. Exemption 7(C) does not require an assertion of the right to privacy, but protects against disclosure that could "reasonably be expected to constitute an unwarranted invasion of personal privacy." The Court also concludes that Mr. Estrella's family did not waive its privacy rights by not objecting to the government's use of the video and autopsy photographs in the trials. It was the government's, not the family's, decision to use the materials at trial and, therefore, such use did not waive the family's privacy interests. *See Sherman v. U.S. Dep't of the Army*, 244 F.3d 357, 364 (5th Cir. 2001).

[6] Because Exemption 7(C) applies, analysis of Exemption 6 is not necessary.

justify its withholding of the video. The Court begins with an analysis of Exemption 7(C).

Again, there is no disagreement between the parties that the video was created for law enforcement purposes as required by Exemption 7(C). After in camera review of the video, the Court finds that the video can be divided into two distinct, segregable portions: (i) William and Rudy Sablan's actions within the prison cell ("Section One") and (ii) the BOP's treatment of William and Rudy Sablan during and after their removal from the cell ("Section Two").[7] Mr. Estrella's body and injuries are clearly visible in Section One; they are completely omitted in Section Two.

As to Section Two, the analysis is straightforward. Section Two falls within the scope of FOIA because it depicts the government's operations with respect to dealing with William and Rudy Sablan following the murder. In addition, there is no family privacy interest at issue because these are not death scene images. There are, however, portions in Section Two that depict William or Rudy Sablan's genitalia. As to these portions, the Sablans have a privacy interest. *See Poe v. Leonard*, 282 F.3d 123, 138-39 (2d Cir. 2001). In the absence of any apparent public interest relative to views of the Sablans' genitalia, the Court concludes that disclosure of the video without obscuring their

[7] Section One runs from the beginning of the video up through time-code 15:52 of the entire video. Section Two runs from time-code 15:52 through the end of the video. Time-code 15:52 occurs at approximately 3:52:07 a.m. as identified in the video.

genitalia could reasonably be expected to constitute an unwarranted invasion of their personal privacy. Therefore, with the exception of the portions of Section Two depicting the genitalia of William and Rudy Sablan,[8] the Court concludes that no exemption excuses the release of Section Two.

With respect to Section One, the Court's analysis is similar to that applied with regard to the autopsy photographs. Prison Legal News argues that disclosure would allow the public to scrutinize the BOP's operations at USP-Florence, the size of the prison cell, the alleged intoxication of William and Rudy Sablan, the lack of a timely response by the BOP, the sharp weapon used in mutilating Mr. Estrella's body, and the government's decision to pursue the death penalty. Of these articulated public interests, only the size of the cell, the timeliness of the response of BOP officials, and the government's decision to seek the death penalty relate to governmental activity. Although at least some of these are arguably significant interests that would be advanced by release of the video, others are not so clear. For example, the size of the cell is not unique to the video, and the response time is not apparent from the video, alone, because it does not reveal when BOP authorities became aware of the activities in the cell. As to these aspects, Prison Legal News offers little justification for disclosure—merely an insinuation of governmental action/inaction. As to the treatment of Mr. Estrella's body, as noted

[8] The portions of Section Two that depict William or Rudy Sablan's genitalia should be electronically or otherwise obscured to preserve their privacy interests.

earlier, the jury's rejection of the government's request for imposition of the death penalty reduces public interest in the decision. In addition, the horrendous manner in which the murder occurred which creates a public interest also is the characteristic that most greatly impacts the privacy interest of Mr. Estrella's family.

Mr. Estrella's family has a strong privacy interest similar to that which they have in the autopsy photographs. The video includes graphic images of Mr. Estrella's body and injuries, which, in many ways, are more graphic than the autopsy photographs because the video was taken at the scene with the perpetrators present and continuing to act and comment. Indeed, the video depicts William Sablan's brutal treatment of Mr. Estrella's body following the murder. As noted earlier, public display or dissemination of these images would likely interfere with the family's ability to mourn Mr. Estrella's death and achieve emotional closure.

The Court concludes that upon balancing the factors, the asserted public interests do not outweigh the family's privacy interest. Therefore, with respect to Section One, the Court concludes that Exemption 7(C) is applicable.[9]

Although neither party has addressed segregation of the audio track from the video track, the Court addresses this issue as part of its de novo review. After close in camera review, the Court finds that the only audio portion evidencing governmental activity is that accompanying Section One. As to this

[9] Therefore, analysis of Exemption 6 is not necessary.

section, it is the statements of BOP officials that reflect governmental action; the statements by William and Rudy Sablan fail to shed light on the government's activities. Because Mr. Estrella's family has no privacy interest in statements by BOP officials, the statements are not subject to either Exemption 6 or 7(C). Accordingly, the statements of BOP officials in Section One are subject to disclosure under FOIA.

C. Public Domain

Notwithstanding any exemption, Prison Legal News argues that the video and autopsy photographs entered the public domain when they were admitted as evidence at the Sablan trials. Because they entered the "public domain", Prison Legal News contends that no exemption applies. Prison Legal News bases this argument upon the opinion of the D.C. Circuit in *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999). Due to distinguishable facts, the Court finds the reasoning in *Cottone* unpersuasive.

As in this case, in *Cottone*, evidence presented in a criminal trial was later sought through a FOIA request. Mr. Cottone was convicted, then requested copies of documents and tape recordings that mentioned his name, including wiretap tapes used at his trial. The government disclosed many documents and two tape recordings, which it heavily redacted. The government claimed Exemption 3[10] excused

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[10] Exemption 3 excuses disclosure for matters that are: specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from

disclosure of certain wiretap tape recordings because Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III") required secrecy of intercepted material. Mr. Cottone argued that the government had waived Exemption 3 by playing the tape recordings at his trial. He characterized the presentation of the evidence at trial as it having been placed in the "public domain".

The D.C. Circuit observed that Exemption 3 and Title III would ordinarily excuse the disclosure of the wiretapped recordings under FOIA. The D.C. Circuit referred to the wiretap evidence as having entered the "public domain", but it essentially reasoned that when the government made the information public by presenting it at trial, there was no purpose for maintaining its secrecy. Essentially, the government had waived its right to assert a secrecy interest or obligation under Exemption 3.

Cottone is limited by its facts and its reasoning. First, and most importantly, *Cottone* concerns only Exemption 3, which addresses governmental obligations to maintain confidentiality of certain information. Exemption 3 does not address individual privacy rights. The court in *Cottone* dealt with two competing public interests—the public interest in disclosure and the public interest in maintaining the secrecy of certain governmental information. It did not address a balancing between

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> the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld[.]

5 U.S.C. § 552(b)(3).

a public interest in disclosure and individual privacy rights such as those of family members in materials that reflect the death of their beloved. Second, implicit in *Cottone* is an underlying notion that the government could waive its right or extinguish its obligation to keep information secret through its prosecutorial actions. The court did not address, nor did it need to address, whether the government in its prosecutorial capacity can waive or extinguish privacy rights of individuals. As to this issue, Prison Legal News has not cited and the Court is not aware of any court that has determined that the public domain doctrine as applied in *Cottone* trumps personal privacy interests under FOIA. Indeed, the Fifth Circuit has declined to extend the *Cottone* reasoning in this way. *See Sherman v. U.S. Dep't of the Army*, 244 F.3d 357, 364 n. 13 (5th Cir. 2001).

With these limitations, *Cottone* offers little guidance to this Court. It simply does not stand for the proposition asserted by Prison Legal News that once evidence is presented at trial, that it has entered the public domain and therefore all privacy interests under FOIA are extinguished. Undoubtedly, there could be circumstances where information is so public that it might negate a personal privacy exemption under FOIA.[11] One could imagine, for example, death scene material that has become so widespread in the media or on the internet that maintaining the privacy interest of a deceased's family is impractical. One could also imagine that a person with a privacy interest could waive such interest by voluntarily disclosing death

[11] Or it could eliminate the need for a FOIA request.

scene material to the media or voluntarily testifying with regard to it during a trial or another legal proceeding.

There has been no showing in this case, however, of such circumstances. It does not appear that the autopsy photographs or the video entered the public domain except as part of the Sablan trials and trial record. With regard to that record, the government may have waived it's right to assert an interest in confidentiality of the information, but one cannot assume that it waived the individual privacy rights of Mr. Estrella's family. Ordinarily, family members of a murder victim do not decide whether a trial occurs nor control the selection of the evidence to be admitted. Therefore, the presentation of evidence in which they have a privacy right at a criminal trial would not automatically constitute a waiver of their rights. Indeed, no showing of any waiver by Mr. Estrella's family has been made.

Even assuming that some waiver had been shown, this Court would nevertheless be cautious in concluding that presentation of evidence in a criminal trial would automatically vitiate individual privacy rights under a FOIA exemption. In *Reporters Comm.*, 489 U.S. at 763-70, the Supreme Court recognized that privacy interests are not necessarily extinguished by previous limited public disclosure. *Reporters Comm.* addressed disclosure of an individual's "rap sheet"—the government's comprehensive compilation of public criminal records on a particular individual. The Supreme Court reasoned that because the passage of time and/or the limited circumstances of the earlier disclosure could result in the information being forgotten, it was

possible for an individual to maintain a privacy interest in the information regardless of the previous disclosure. Therefore, the Supreme Court categorically concluded that further disclosure of the rap sheets could reasonably be expected to invade the individual's privacy, notwithstanding that the information was otherwise publicly available.

Here, the scope of the public exposure associated with a criminal trial is vastly different from the public exposure that can result from the release of the same information pursuant to FOIA. A trial is of limited duration, and once completed, the evidence presented becomes part of the trial record. This record may never have public exposure, and even under the worst of circumstances—a reversal of a conviction and subsequent retrial—the death scene evidence would have public exposure only for a limited time and a limited purpose. In contrast, the release of death scene material through FOIA is absolute, unrestrained, and perpetual. Once released, the information can be publically displayed, by multiple persons, in multiple venues, and on multiple occasions. A decedent's family would have no expectation that the exposure would necessarily end.

For these reasons, the Court concludes that use of the autopsy records and video at the Sablan trials does not negate the application of Exemption 7(C).

IT IS THEREFORE ORDERED that:

(1) Defendant Executive Office for United States Attorneys' Motion for Summary Judgment (#18) is GRANTED IN PART AND DENIED IN PART.

(2) Prison Legal News's Motion for Summary Judgment (#20) IS GRANTED IN PART AND DENIED IN PART.

(3) Defendant Executive Office shall disclose to Plaintiff Prison Legal News only (i) the portion of the video that does not depict Mr. Estrella's body (Section Two—all portions after time-code 15:52) except it shall electronically or otherwise obscure the video portion showing William Sablan or Rudy Sablan's genitalia and (ii) the audio of BOP officials in the remaining portion of the video (Section One—all portions prior to time-code 15:52).

(4) This Order having resolved all issues in this case, the Clerk of the Court is directed to close the case.

Dated this 16th day of September, 2009

BY THE COURT:

Marcia S. Krieger
United States District Judge

Appendix D

EXHIBIT A-2

PRISON LEGAL NEWS
Dedicated to Protecting Human Rights

2400 NW 80th Street #148, Seattle WA 98117
206-246-1022 fax 206-505-9449

www.prisonlegalnews.org
pwright@prisonlegalnews.org

Reply to Vermont Office:
Prison Legal News
972 Putney Road, PMB 251
Brattleboro, VT 05301
802-257-1342

March 12, 2007

Kurt J. Bohn
U.S. Attorney's Office
1225 Seventeenth Street #700
Denver, CO 80202

RE: Freedom of Information Act Request for video/photos related to the Oct. 10, 1999 death of Joey Jesus Estralla and subsequent cell extraction of William and Rudy Sablan

Dear Mr. Bohn:

On behalf of *Prison Legal News*, a monthly publication that reports on prison, jail and corrections-related issues, I am making a formal

request under the Freedom of Information Act (5 U.S.C. § 552, et seq.) for the following public records:

> The complete videotape and/or the DVD created therefrom taken by USP Florence staff related to the October 10, 1999 death of Joey Jesus Estrella at USP Florence, listed as Exhibit No. 20 on an Exhibit List dated Jan. 22, 2007 that was filed by the U.S. Attorney's Office in *USA v. Sablan*, U.S. District Court for Colorado, Case No. 1:00-cr-00531-WYD. We are further requesting still photographs of the body of Joey Jesus Estrella, listed as Exhibits 168 through 177D, inclusive, on an Exhibit List dated Jan. 22, 2007 that was filed by the U.S. Attorney's Office in *USA v. Sablan*, U.S. District Court for Colorado, Case No. 1:00-cr-00531-WYD.

If this public record request involves any charges, please advise me prior to said charges being incurred, for authorization. Please note that *Prison Legal News*, as a news media agency, is hereby requesting a waiver of all charges for producing the requested records. The district court, in *Prison Legal News v. Lappin*, 436 F. Supp. 2d 17 (D.D.C. 2006), held that we are a media entity entitled to the waiver of FOIA fees. That is a final, unappealed order.

If you claim the records requested in this letter are not public records, or if you claim a privilege not to disclose such records, please advise what information this pertains to and why you claim it is not a public record or why it is privileged or confidential. Please cite the relevant sections of the

FOIA which you believe support the exemption from disclosure. I expect all public records for which you do not claim an exemption or privilege to be produced as requested in this letter. If an exemption or privilege is asserted, the validity of said claim will be resolved in the appropriate legal forum.

Please respond to this request within 20 days of receipt of this letter. Failure to respond to this request by April 1, 2007 will be considered a denial of my public records request and I will duly take appropriate action. If you need additional time in which to produce the records, please advise in writing so the request for an extension of time may be considered.

If you are not the records custodian for the requested records, please forward this letter to the appropriate records custodian for a response as set forth herein and notify me accordingly, including the name of the person or department to which this request was forwarded.

Thank you for your time and attention to this matter. If you have any questions or comments or require additional information, please do not hesitate to contact me at the above e-mail or phone number. Please reply to the Vermont address above. I look forward to your reply.

Sincerely,

Paul Wright
Editor, PLN

EXHIBIT A-3

May 15, 2007

U.S. Department of Justice

Executive Office for United States Attorneys
Freedom of Information/Privacy Act Staff
600 E Street, N.W., Room 7300
Washington, D.C. 20530
202-616-6757 Fax 202-616-6478

Requester: Paul Wright

Request Number: 07-903

Subject of Request: USA v. Sablan (Exhibits)

Dear Requester:

Your request for records under the Freedom of Information Act/Privacy Act has been processed. This letter constitutes a reply from the Executive Office for United States Attorneys, the official record-keeper for all records located in this office and the various United States Attorneys' Offices.

To provide you the greatest degree of access authorized by the Freedom of Information Act and the Privacy Act, we have considered your request in light of the provisions of both statutes.

The records you seek are located in a Privacy Act system of records that, in accordance with regulations promulgated by the Attorney General, is exempt from the access provisions of the Privacy Act. 28 CFR § 16.81. We have also processed your request under the Freedom of Information Act and are making all records required to be released, or

considered appropriate for release as a matter of discretion, available to you. This letter is [ ] partial [X] full denial.

Enclosed please find:

_____ page(s) are being released in full (RIF);
_____ page(s) are being released in part (RIP);
_____ page(s) are being withheld in full (WIF). **The redacted/withheld documents were reviewed to determine if any information could be segregated for release.**

The exemption(s) cited for withholding records or portions of records are marked below. An enclosure to this letter explains the exemptions in more detail.

	Section 552		Section 552a
[ ](b)(1)	[ ](b)(4)	[X](b)(7)(B)	[X](j)(2)
[ ](b)(2)	[X](b)(5)	[X](b)(7)(C)	[ ](k)(2)
[X](b)(3)	[ ](b)(6)	[X](b)(7)(D)	[ ](k)(5)
Court-Sealed	[X](b)(7)(A)	[ ](b)(7)(E)	[ ]_____
_____		[ ](b)(7)(F)	

[ ] In addition, this office is withholding grand jury material which is retained in the District.

[ ] A review of the material revealed:

[ ] _____ page(s) originated with another government component. **These records were found in the U.S. Attorney's Office files and may or may not be responsive to your request.** These records will be referred to the following

component(s) listed for review and direct response to you: _____

[ ] There are public records which may be obtained from the clerk of the court or this office, upon specific request. If you wish to obtain a copy of these records, you must submit a new request. These records will be provided to you subject to copying fees.

[ ] See additional information attached.

This is the final action this office will take concerning your request.

You may appeal my decision to withhold records in this matter by writing within sixty (60) days from the date of this letter, to:

Office of Information and Privacy
United States Department of Justice
Flag Building, Suite 570
Washington, D.C. 20530

Both the envelope and letter of appeal must be clearly marked "Freedom of Information Act/Privacy Act Appeal."

After the appeal has been decided, you may have judicial review by filing a complaint in the United States District Court for the judicial district in which you reside or have your principal place of business; the judicial district in which the requested records are located; or in the District of Columbia.

Sincerely,

William G. Stewart II
Acting Assistant Director

Enclosure(s)

EXHIBIT 3-B

U.S. Department of Justice
Office of Information and Privacy

Telephone: (202) 514-3642
Washington, D.C. 20530

November 19, 2007

Mr. Paul Wright
Prison Legal News
No. 251
972 Putney Road
Brattleboro, VT 05301

RE: Appeal No. 07-1937
Request No. 07-903
KAH:CG

Dear Mr. Wright:

You appealed from the action of the Executive Office for the United States Attorneys (EOUSA) on your request for access to records pertaining to the matter of *USA v. Sablan*, U.S.D.C. No. 1:00-CR-00531 WYD. I regret the delay in responding to your appeal.

After carefully considering your appeal, and following discussions between EOUSA and a member of staff, I am affirming, on partly modified grounds, EOUSA's action on your request. EOUSA properly withheld certain information that is protected from disclosure under the Freedom of Information Act pursuant to:

5 U.S.C. § 552(b)(7)(A), which concerns records or information compiled for law

enforcement purposes the release of which could reasonably be expected to interfere with enforcement proceedings;

5 U.S.C. § 552(b)(7)(B), which concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to deprive a person of a right to a fair trial or an impartial adjudication; and

5 U.S.C. § 552(b)(7)(C), which concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to constitute an unwarranted invasion of the personal privacy of third parties.

If you are dissatisfied with my action on your appeal, you may seek judicial review in accordance with 5 U.S.C. § 552(a)(4)(B).

Sincerely,

Janice Galli McLeod
Associate Director

Appendix E

EXHIBIT 1

United States District Court,
District of Colorado

CIVIL ACTION NO. 08-CV-01055-MSK-KLM

PRISON LEGAL NEWS,

Plaintiff,

V.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS,

Defendant.

DECLARATION OF HENRY SCHUSTER IN SUPPORT OF PRISON LEGAL NEWS'S MOTION FOR SUMMARY JUDGMENT

I, Henry Schuster, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:

1. Since January 2007, I have worked as a Producer for CBS's Sunday evening television magazine show, 60 Minutes. For twenty-five years prior to that, I was at CNN, most recently as Senior Investigative Producer. I am the co-author of a nonfiction book, *Hunting Eric Rudolph: An Insider's Account of the Five-Year Search for the Olympic Bomber* (Berkley, 2005). I have covered a number of

court cases in my career as a television producer, including federal criminal cases.

2. In October 2007, 60 Minutes aired a segment I produced about the federal "Supermax" prison in Florence, Colorado, U.S. Administrative Maximum (ADX), titled "A Clean Version of Hell." This segment took many months of investigative and production work on the part of me and my colleagues. Although the murder of federal inmate Joey Estrella by William and Rudy Sablan occurred in USP Florence and not at ADX, the Sablans were transferred to ADX after the Estrella murder, and thus I paid particular attention to their federal criminal cases because of my work on ADX. Our segment on ADX included the first-ever footage from inside the prison since it opened. This was seen by millions of Americans and generated a strong reaction, indicating that there is a great deal of public interest in conditions inside federal prisons.

3. As a television journalist, I have a continuing interest which, as noted, I believe is shared by the public in the operations of, conditions at, and events occurring in the Bureau of Prisons' maximum and high security prisons such as ADX and USP Florence. I am aware, for example, that two inmates were killed by guards at USP Florence earlier this year.

4. I believe the Estrella murder raises issues that are important to the public interest. When a murder can be committed in a cell within a prison such as USP Florence that is supposed to be a high-security federal facility—presumably one of the best

secured facilities in the U.S.—that is a matter of significant public concern. Access to the videotape showing the aftermath of the Estrella murder would help journalists and the public scrutinize the workings of the Bureau of Prisons and its facility at USP Florence.

5. As a long-time producer of television news, I am keenly aware of the differences between communicating information in writing and communicating information via televised video images. Based on my lengthy experience in the television news industry, it is my opinion that there simply is no substitute for the power of video footage. For example, 60 Minutes recently obtained and aired video footage of a mentally ill inmate in a Michigan state prison who was placed in physical restraints over a period of time in his bed before he died. That segment, too, generated strong reaction. Of course journalists can write about something like that, but being able to show the public actual videotaped footage is completely different and vastly superior. Indeed, to some extent, videotape allows the public to form their own opinions based on the raw data, unmediated by a journalist.

6. In my opinion, there are many ways in which release of the videotape of the Estrella murder scene and the Sablans' conduct following the murder would help inform the public about the operations of the BOP. The crowded nature of the small cell would be best communicated via videotape. Whether William and/or Rudy Sablan were intoxicated at the time of the murder is also something that could be informed by scrutiny of the video of their conduct soon after

the killing. The videotaped images of the cell extraction of the Sablans by BOP staff would also inform the public about the workings of the BOP.

7. In my opinion, the release of this videotape and the Estrella autopsy photographs would also inform the public about the federal government's decision to seek the death penalty (unsuccessfully) against William and Rudy Sablan. Federal capital prosecutions are necessarily expensive, and journalists and the public have an interest in accessing information that would shed light on the circumstances underlying the government's decision to pursue the death penalty against William and Rudy Sablan.

8. In my extensive experience as a television news journalist, once something has been shown or played in open court, it is routinely released to the media. This has been true even in cases that involve national security. For example, in 2002, I covered a RICO trial in Charlotte, North Carolina against alleged members of Hezbollah involving allegations of tobacco smuggling and terrorism. There, the government showed footage of the tobacco smuggling and played videos obtained from the defendants; once these were played in open court, they were released to the media. Similarly, in 2005, an American citizen named Hamid Hayat was interrogated by the FBI after his return from Pakistan, and the interrogation sessions were recorded. Mr. Hayat was tried in federal court in California on charges of providing material support for terrorism and making false statements to federal agents. Portions of the 2005 interrogation were

played in court, and the tapes were entered into the record in that case. The Court made sure that the entire set of interrogations was released to the news media. The U.S. Attorney's Office made no objection to that release, to my knowledge, and in fact assisted in the release of the material. The release of the Hayat interrogation tapes also illustrates the principle that the value of media access to primary materials extends beyond the potential to broadcast and publish those materials; it was important for my team (I was then employed by CNN) to have access to the Hayat interrogation tapes when we subsequently interviewed Hayat's family members in Pakistan. Similarly here, I believe the release of the records sought by Prison Legal News in this case could be important not just for the educative value presented by the prospect of broadcasting and publishing the materials themselves but also to allow journalists to do a better job crafting and executing their investigative reporting regarding violence within BOP facilities.

9. Another example that comes to mind is the recent federal criminal trial of Senator Ted Stevens. In that case, once the wiretap recordings were played in open court in Senator Stevens's trial, they were released to the media within hours.

10. Based on my knowledge of these and other cases, I believe that the government's position in refusing to produce materials shown in open court during the Sablan trials to be an inexplicable and disappointing departure from standard practice. Indeed, I am surprised that the government would take this position when it has voluntarily released

analogous materials shown or played in open court in cases involving matters of national security. In my opinion, the government's assertion of the privacy interests of the Estrella family as grounds for declining to produce the requested materials is unfounded. The government apparently seeks exemption from disclosure in every case involving a criminal act, which would be an exemption from disclosure that is breathtaking in scope and unprecedented in practice, in my opinion and experience.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: November 19, 2008

/s/ Henry Shuster
Henry Schuster
Producer, 60 Minutes, CBS

EXHIBIT 2

United States District Court,
District of Colorado

CIVIL ACTION NO. 08-CV-01055-MSK-KLM

PRISON LEGAL NEWS,

Plaintiff,

v.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS,

Defendant.

DECLARATION OF ALAN PRENDERGAST IN SUPPORT OF PRISON LEGAL NEWS'S MOTION FOR SUMMARY JUDGMENT

I, Alan Prendergast, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:

1. For the past 28 years, I have been a professional journalist based in Denver, Colorado. I am the author of a nonfiction book, *The Poison Tree: A True Story of Family Violence and Revenge* (Putnam, 1986). My work has appeared in a variety of regional and national publications, including the New York Times, the Los Angeles Times, USA Today, Rolling Stone, and Outside. For the past decade, I have also taught journalism courses as a visiting instructor at Colorado College, a private liberal arts college in Colorado Springs.

2. Since 1995, I have worked as a staff writer at Westword, a Denver weekly newspaper with a circulation of approximately 100,000. During that time, I have written extensively on criminal justice matters and particularly corrections issues at a local, state, and federal level.

3. I have also participated in several panel discussions addressing prison reporting and access issues at national conferences sponsored by professional journalism associations, including those hosted by Investigative Reporters and Editors (IRE), the Society of Professional Journalists (SPJ), and the Association of Alternative Newspapers (AAN).

4. Several of my articles reporting on conditions of confinement within the U.S. Bureau of Prisons have been finalists or winning entries in national journalism awards competitions; one is featured in a recently published anthology, *The Best American Crime Reporting 2008*.

5. In May 2000, Westword published the first of what would become a series of articles and blogs authored by me dealing with inmate-on-inmate violence and security problems at the U.S. Penitentiary in Florence, Colorado (USP Florence). One of the events examined in that article was the 1999 murder of Joey Estrella in the USP Florence Special Housing Unit (SHU). Because the Bureau of Prisons (BOP) is notoriously reluctant to release any but the barest of details concerning any homicide that occurs inside one of its facilities, I relied to a great extent on public records and court documents in my initial reporting on the Estrella murder. However, it was apparent even at that point, many

years before either William or Rudy Sablan would be brought to trial, that the circumstances of Estrella's death raised several matters of public interest and concern regarding the operation of the USP Florence SHU. These circumstances included, for example: (i) the high level of alcohol found in Estrella's body; (ii) the presence of three inmates in a cell designed to hold one (as well as the fact that two of the inmates were related to each other and had a history of assaulting other prisoners); (iii) the sharp weapon used to remove organs from the victim's body; and (iv) the apparent lack of timely supervision that allowed this evisceration to take place. These circumstances all presented serious questions about prison safety, BOP policy, and staff training.

6. As I proceeded further in reporting on these issues, I discovered other contemporaneous incidents of violence in the USP Florence SHU, including at least one other cellmate-on-cellmate homicide. I also learned that the U.S. Department of Justice was investigating certain BOP employees assigned to the USP Florence SHU for allegedly falsifying reports, assaulting inmates, and self-inflicting injuries to provide a pretext for the assaults—a development that seemed not entirely unconnected to the failure of staff to respond to Estrella's efforts to seek assistance before and during his own fatal attack.

7. I eventually learned that BOP employees had recorded sound and images of Estrella's cellmates, William and Rudy Sablan, as well as of Estrella's body, in the aftermath of the murder. However, in reporting on the Estrella murder, I was forced to rely on secondhand accounts from sources who had some knowledge of the recordings, as the materials were

not released to the media. Like any journalist who prizes accuracy, context, and thoroughness, I would strongly prefer to have access to primary source materials in a situation such as this one, rather than being forced to rely on the possibly faulty recollections of secondary witnesses. Given the total lack of comment or official cooperation from the BOP, access to such materials is critical.

8. Over the past eight years, federal prosecutors have brought William and Rudy Sablan to trial, unsuccessfully seeking the death penalty in each instance. Prosecutors also brought charges against numerous employees of USP Florence for assaulting inmates and falsifying documents and secured a few convictions. But many questions remain unanswered about operations at USP Florence and possible staff complicity in the Estrella murder, in part because the BOP refuses to address these issues.

9. It is my understanding that the video record made by BOP staff of the Sablans' words and behavior after the Estrella murder was introduced as an exhibit and played in open court by the government on at least two occasions, first at William Sablan's trial and then at Rudy Sablan's trial. It is also my understanding that some or all of the Estrella autopsy photographs were introduced into evidence and shown in open court at each of these trials. Unfortunately, I was not able to be present in court when these exhibits were shown in open court. My employer, Westword, does not have the resources necessary to allow one staff writer to sit through the entirety of two lengthy death penalty trials.

10. I believe that public release of the materials requested by Prison Legal News in this case would advance the public interest in many ways.

11. It should be noted that public interest and concern about operations at USP Florence is ongoing. I have published several reports in recent years regarding claims of inadequate staffing, gang-related violence, and other operational issues at USP Florence. For example, an inmate uprising at USP Florence in April 2008 resulted in officers firing on prisoners and killing two of them. The facility is, to quote one of my reports, "a deeply dysfunctional prison with a violent history," and the Estrella homicide warrants particular examination in light of the ongoing problems at USP Florence.

12. The release of the exhibits shown in open court would provide journalists and the public with a better understanding of Estrella's killers and the conditions, motivations, and other circumstances that led to their horrific actions. It may also provide some insight into their physical and mental condition when staff arrived—if, for example, they were intoxicated, which apparently remains a matter of some dispute.

13. These records would also provide journalists and the public with a better understanding of the conditions of confinement experienced by the Sablans and Estrella in terms of the cramped quarters resulting from the fact that the BOP had triple-celled these inmates at the time of Estrella's murder.

14. These records may also shed some light on staff comments and reaction to the homicide and

regarding the larger issues surrounding management and operational failures at USP Florence at the time.

15. Furthermore, public release of the materials could possibly help to answer unresolved questions about how inmates in the most secure unit of one of the highest security prisons in the federal system obtained the weaponry, opportunity, intoxicants, leisure, and will to commit such a gruesome crime.

16. Finally, the records would significantly contribute to the public's understanding of the operations of the U.S. Department of Justice with respect to the authorization of federal death penalty prosecutions against William and Rudy Sablan.

17. In my opinion, these are all significant matters of public interest and concern that would be well-served by the release of the entire video record and autopsy photographs sought by Prison Legal News in this case.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: November 19, 2008

/s/ Alan Prendergast
Alan Prendergast
Staff Writer, Westword

EXHIBIT 3

United States District Court,
District of Colorado

CIVIL ACTION NO. 08-CV-01055-MSK-KLM

PRISON LEGAL NEWS,

Plaintiff,

v.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS,

Defendant.

DECLARATION OF PAUL WRIGHT IN SUPPORT OF PRISON LEGAL NEWS'S MOTION FOR SUMMARY JUDGMENT

I, Paul Wright, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:

1. I am the editor of Prison Legal News, the Plaintiff in this case. Prison Legal News is a 501(c)(3) non-profit organization that, via a monthly legal journal as well as on its website, reports news and provides analysis concerning prisoners' rights issues, prisoners' rights litigation, and other news about prison issues. I have been the editor of Prison Legal News since its founding in 1990. Prison Legal News's subscribers include judges, lawyers, academics, journalists, libraries, law schools,

universities, prison and jail officials, and prisoners, among others.

2. According to its non-profit charter, Prison Legal News's mission includes educating the public about prison conditions. In its national coverage of detention issues, Prison Legal News frequently uses public records laws to obtain information about prison and jail operations. A lack of transparency and government accountability are common problems around the nation, and Prison Legal News has had to resort to litigation to obtain records to which it was entitled, *See Prison Legal News v. Washington Dep't of Corrections*, 115 P.3d 316 (Wash. 2005) (holding that Prison Legal News is entitled to records of medical misconduct and neglect by prison employees); *Prison Legal News v. Lappin*, 436 F. Supp. 2d 17 (D.D.C. 2006) (holding that Bureau of Prisons wrongly denied Prison Legal News a fee waiver for production of records of settlement payments resulting from prison condition litigation). Prison Legal News has the ability to disseminate the information it gleans from its FOIA requests to an audience specifically interested in prison and jail conditions and litigation.

3. In response to the FOIA request that I submitted on behalf of Prison Legal News to the U.S. Attorney's Office for the District of Colorado seeking disclosure of the videotape and autopsy photographs that were shown at William Sablan's federal criminal trial (later designated by the government "Request No. 07-903"), I received a two-page response from the Executive Office for United States Attorneys (EOUSA) date-stamped May 15, 2007 (but not received by me until June 13, 2007 via facsimile).

A true and correct copy of that response is attached hereto as Exhibit 3-A.

4. On behalf of Prison Legal News, I filed an administrative appeal of EOUSA's denial of Request No. 07-903 (later designated by the government "Appeal No. 07-1937"). The U.S. Department of Justice's Office of Information and Privacy denied the appeal in a single-page letter date-stamped November 19, 2007. A true and correct copy of that appeal denial is attached hereto as Exhibit 3-B.

5. Prison Legal News has been covering the federal prison complex in Florence, Colorado, since it opened in 1995. Prison Legal News's coverage of the U.S. Administrative Maximum facility (ADX) and the U.S. Penitentiary (USP Florence) in particular has been extensive. Prison Legal News is the only national media outlet that has regularly reported on these facilities. Our coverage includes the high levels of violence experienced at the prison complex in Florence.

6. The murder of Joey Estrella by his cellmates at USP Florence is emblematic of that high level of violence. Even in context of prison murders, the Estrella murder was unusually violent. The level of negligence by Bureau of Prisons (BOP) staff and/or their lack of supervision is also extremely unusual. For journalists, it is important to have access to primary source materials where available, rather than being forced to rely on descriptions by others of events.

7. Based on my years of experience reporting on local, state and federal detention facilities around the county, the BOP is renowned for its lack of

transparency. Within media circles, the BOP is notorious for being hostile to media requests for documents or information that would shed light on its operations and functions. In my view, this makes access to the primary videotape and autopsy photographs from the Estrella murder all the more important.

8. Prison Legal News is a small organization with a small budget relative to other national magazines. We do not have the ability to send staff journalists to attend every federal trial that we have an interest in reporting on. One of key means by which we are able to maintain our far-ranging coverage of prison-related litigation around the country is through making FOIA requests and receiving primary documents and material through FOIA disclosures. Video evidence is always the best evidence available, when it is available.

9. In my opinion, these materials implicate several aspects of public interest. First, the further disclosure of these materials to the public would shed light on the level of security within the segregation unit at USP Florence. It is my understanding that this murder occurred under circumstances in which three inmates were placed together in what was essentially designed to be an isolation cell for solitary confinement.

10. Second, in my view, the public has an interest in being able to assess whether the Sablans were drunk on alcohol at the time of the murder.

11. Third, I believe that the public has an interest in investigating the nature of the weapons used in Estrella's killing and how they were obtained.

12. Fourth, the release of the materials would shed light on BOP staff response to the assault and murder of Estrella. Several inmates have been murdered at the Florence prison complex since it opened. The government has an obligation to keep prisoners in its care safe from harm. It is in the public's interest to be able to analyze and assess the response by BOP staff to the Estrella murder.

13. Fifth, federal capital prosecutions are relatively rare. The fact that the federal government sought the death penalty against both Sablan cousins and then failed to secure a death verdict against either of them despite enormous expense is another matter of public concern. Disclosure of the materials sought in this case would shed light on the prosecutorial decision to seek the death penalty against the Sablans.

14. Sixth, I believe there is a public interest in being completely and correctly informed about the circumstances surrounding the Estrella murder and its aftermath. There was a lot of speculation and rumors about what actually happened after the murder, including rumors of cannibalism by one of the Sablans. Indeed, BOP staff was quoted in the media saying that one of Sablans had taken a bite out of Estrella's liver. Allowing journalists and the public to view the videotape and autopsy photos themselves could help dispel any unfounded rumors or incorrect speculations. One of critical roles of the media is to provide the public with concrete facts so that we do not devolve into a society awash in unsubstantiated rumor and gossip.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: November 20, 2008

/s/ Paul Wright
Paul Wright
Editor, Prison Legal News

UNITED STATES DISTRICT COURT,

District of Colorado

CIVIL ACTION NO. 08-CV-01055-MSK-KLM

PRISON LEGAL NEWS,

Plaintiff,

v.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS,

Defendant.

SUPPLEMENTAL DECLARATION OF PAUL WRIGHT IN SUPPORT OF PRISON LEGAL NEWS'S MOTION FOR SUMMARY JUDGMENT

I, Paul Wright, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:

1. I am the editor of Prison Legal News, the Plaintiff in this case. I previously submitted a declaration in support of Prison Legal News's Motion for Summary Judgment on November 20, 2008.

2. On Friday, January 23, 2009, I learned that the federal government recently released to the Chicago Tribune a surveillance video depicting an inmate-on-inmate murder in Chicago's downtown federal prison. A true and correct copy of the website page from the Chicago Tribune where the video is

available is attached hereto.[1] I have reviewed the article and the video on the Chicago Tribune's website.

3. The article on the Chicago Tribune's website explains that this surveillance video "was provided to the Tribune by the U.S. Attorney."

4. The article on the Chicago Tribune's website further explains that on Tuesday (January 20, 2009), the video was played in court during the trial of the inmate who is charged with having murdered the other inmate. The date of the article on the Chicago Tribune's website is January 21, 2009. Thus, it appears that within one day of having played the surveillance video in open court, the U.S. Attorney's Office for the Northern District of Illinois provided the surveillance video to the media. This is consistent with my general experience as a journalist that once an exhibit has been introduced in open court, it is routinely released to the media (where there is media interest in the exhibit).

I declare under penalty of perjury that the foregoing is true and correct.

DATED: January 27, 2009

/s/ Paul Wright
Paul Wright
Editor, Prison Legal News

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[1] *See* http://www.chicagotribune.com/news/local/chi-mcc_deathjan21,0,2833043.story.

Appendix F

The Freedom of Information Act, 5 U.S.C. § 552, provides in pertinent part:

Public information; agency rules, opinions, orders, records, and proceedings

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

* * * * *

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

* * * * *

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

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

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

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

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

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

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

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

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

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

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a

confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

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

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

* * * * *

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

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

the President), or any independent regulatory agency; and

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

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

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

* * * * *