# 9TH CIRCUIT TO JEFFREY WHITE: GET BACK TO WORK ON EFF FOIA

The 9th Circuit wrote a really fascinating opinion in the EFF FOIA. The Circuit was dealing with three questions regarding EFF's FOIA of the documents pertaining to telecom lobbying leading up to the passage of PAA and FAA. Those three questions are:

- Whether FOIA Exemption 3 (protection of sources and methods) applies
- Whether FOIA Exemption 6 (privacy) applies to contractors who lobby
- Whether FOIA Exemption 5 (intra- and inter-agency communications) applies

While there's a lot of nuance in this decision (and it'll take a review of the actual Vaughn Indices to see what will definitely get released), the most exciting part of this ruling is the Circuit Court's ruling that the government can't protect the identities of the telecoms that lobbied for a Get Out of Jail Free Card, just because they needed one.

**FOIA Exemption 3: Remand because EFF Was Confused**

As to the question of whether the names of the telecoms should be protected as sources and methods and/or as a functional part of NSA, the Circuit didn't decide. Rather, it argued there was confusion regarding whether or not EFF had ceded this issue, and as a result, District Court Judge White had not addressed the issue of whether this should be protected.

> Under these statutes and Exemption 3,

> the government's summary judgment brief argued, "ODNI and DOJ withheld information that could reveal whether any particular telecommunications carrier has assisted, or may in the future assist, the government with intelligence activities." The government claimed disclosure "could deter telecommunications companies from assisting the government in the future," and disclosure "provides our adversaries with valuable information about our intelligence sources, methods, and capabilities."
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> [4] The government's argument was predicated on the following inference: Revealing the identity of carriers and their agents working for a carrier liability shield would allow foreign intelligence agents to determine contours of NSA intelligence operations, sources, and methods. In other words, knowledge of which firms were and were not lobbying for liability protection could lead to inferences regarding the firms that participate in the surveillance program. EFF disputes the propriety of this inference. However, because the district court did not address Exemption 3 due to confusion in the parties' summary judgment briefing, we remand for the district court to address these claims in the first instance.

This decision says nothing about whether White will rule in EFF's favor or not. But heck, I'll take that second bite at this apple.

**FOIA Exemption 6: The Public has a Compelling Interest**

This decision is, by far, the most interesting part of the opinion to me. Mind you, the Circuit was not determining whether or not contractors' identities could be protected. Rather, it was

determining whether lobbyists' identities could be protected, even if it would be easy to assume those lobbyists were in fact contractors.

And the Circuit Court said that, whatever privacy protection the lobbyist-contractors might have, the public's interest in knowing who was lobbying for legislation was more important.

> We next consider "whether release of the information would constitute a clearly unwarranted invasion of that person's privacy." Wash. Post Co., 456 U.S. at 602. "[T]o determine whether a record is properly withheld, we must balance the privacy interest protected by the exemptions against the public interest in government openness that would be served by disclosure." Lahr, 569 F.3d at 973.
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> The district court concluded "that there is some, although not a substantial, privacy interest in the withheld documents indicating the identities of the private individuals and entities who communicated with the ODNI and DOJ in connection with the FISA amendments." It found, however, "that the public interest in an informed citizenry weighs in favor of disclosure" because "there is a strong public interest in disclosure of the identity of the individuals who contacted the government . . . to protect telecommunications companies from legal liability for their role in government surveillance activities." We agree.
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> [snip]
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> [10] There is a clear public interest in public knowledge of the methods through which well-connected corporate lobbyists wield their influence. As the Supreme Court has explained, "[o]fficial information that sheds light on an agency's performance of its statutory

> duties" merits disclosure. Reporters Comm., 489 U.S. at 773.
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> [11] With knowledge of the lobbyists' identities, the public will be able to determine how the Executive Branch used advice from particular individuals and corporations in reaching its own policy decisions. Such information will allow the public to draw inferences comparing the various agents' influence in relation to each other and compared to the agents' or their corporate sponsors' political activity and contributions to either the President or key members of Congress. In short, we find the public interest in "government openness that would be served by disclosure" of how the government makes decisions potentially shielding firms lobbying (and donating to campaigns) from nine-figure liabilities to be plainly important.

As a sop to the government—which was trying to hide all this information—the Circuit Court ruled that the government did not have to make the email addresses for the individuals involved public.

Big whoop. We won't be able to email the executives who got their Get Out of Jail Free Card. I plan on emailing Ed Whitacre—former CEO of AT&T when they were doing this lobbying and currently CEO of GM—at his new GM email, anyway.

**FOIA Exemption 5: The Government Cheated**

In general, the Court found that White had too broadly claimed that the documents in question did not qualify for Exemption 5, agreeing that the government had shown that much of this was intra- or inter-agency communication. For those materials, the Court said the government would then have to go back and claim some privilege (such as deliberative privilege) to keep the documents hidden.

But the Court's more general ruling was that White hadn't looked closely enough at the Vaughn Index (and that he might have to look at the documents themselves). To justify that point, the Court cites this very amusing example.

> Examining the Vaughn indices themselves shows the importance of engaging in the admittedly time-consuming analysis not performed here. Nearly all of the characterizations in the government-offered declarations comport with the descriptions in the Vaughn indices of inter-branch or intrabranch communications. Thus, for these emails, the district court should have more closely examined the documents to determine whether they were in fact inter-agency or intraagency memorandums or letters. Including them in a broad disclosure order was error under any standard.
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> In addition, in at least two instances (OLC Vaughn Index numbers 46 & 74), the plain language of the declaration seems to imply an intra-Executive Branch email when, in fact, the Vaughn Index makes clear the communications at issue were between the Executive Branch and telecommunications company representatives. This highlights the need for a fact specific inquiry under Exemption 5.

That is, to justify its ruling that Judge White needs to go back and look more closely at the Vaughn index and individual documents, the Court agrees that most of the documents are claimed to be intra- or inter-agency documents. But then points to an example where the government claimed emails between the Executive Branch and telecoms was intra- or inter-agency.

Busted.

Now, before any of these get released, I think

the District Court will need to sort which exemptions were claimed for which documents. But the big takeaway, to me, is that the Circuit Court has ruled that the government can’t keep the identities of lobbyists hidden, even if those lobbyists were lobbying for telecoms that had helped the government break the law.