THE PACER INVESTIGATION DOJ REVEALED IN 2009 BUT DID NOT REVEAL IN 2011

In 2009, Aaron Swartz requested his FBI file. It showed the surveillance the FBI did in response to his liberation of 20% of federal court files. He posted excerpts from that file on October 5, 2009 (note: I don't believe he ever posted all the contents of this and DOJ's files; I presume they'll all be released when FBI responds to the multiple FOIAs for Aaron's file).

Slightly more than a year later—as Jason Leopold reported—Swartz made a similar request to DOJ's Criminal Division.

> All records related to me, Aaron Swartz, including in connection with the PACER system

Because Aaron asked for all records, including anything in connection with PACER, it would have also returned anything new.

On March 11, 2011, the Criminal Division responded that no new records had been created since his previous request for the information on October 8, 2010. But it also referred Aaron's request to the Executive Office of the US Attorney (which would have records on investigations led by US Attorneys).

On January 11, 2011—just five days after Aaron was arrested in Cambridge—the EOUSA responded that there were 72 pages of records pertaining to him, but none of the could be turned over. They cited the following exemptions:

> (b)(3): Prohibited by statute, citing FRCP 6(e) grand jury secrecy
>
> (b)(5): Intra or interagency communications

> (b)(7)(C): Privacy of those who might be mentioned in an investigation
>
> (j)(2): Privacy Act

Basically they were exempting saying they couldn't turn over any of the 72 pages they had because it would infringe on someone else's privacy—the (b)(7)(C) and (j)(2) exemptions. More comprehensively, they couldn't turn it over because at least some of it was grand jury material—the (b)(3)/FRCP 6(e) exemption. And finally, they wouldn't turn over inter/intra-agency memos, which is often a deliberative privilege exemption.

The entirely innocent explanation for this response is that some US Attorney's office—almost certain Washington DC—had grand jury materials related to the PACER investigation which they could not by law turn over, and which affected another person's privacy as well (the PACER investigation would probably have also covered Carl Malamud).

That is, by far, the most likely explanation. The only question, then, is why it didn't come up in the October 8, 2010 response, especially given that the PACER case was closed, per the FBI file, in October 2009. Though it may be that because Criminal Division had their own records, they didn't refer it to the US Attorney's office in question. In any case, that is the far most likely explanation.

Also note, EOUSA doesn't cite (b)(7)(A), which is often invoked to protect an ongoing investigation. Though at the time, DOJ still operated (and still largely does operate) under its contention that it can hide ongoing investigations by lying about them.

Again, the most likely explanation here is entirely innocent: that DOJ was just telling Aaron there were documents that hadn't previously been released—those pertaining to whatever comparatively negligible number of documents a grand jury reviewed or a grand jury

subpoena returned—that for bureaucratic reasons they hadn't revealed to him on any of his earlier requests.

But here's what I find most interesting. As Criminal Division indicated, Aaron had just FOIAed this material in October 2010. Something led him to FOIA it again in December. So it may be worth noting that on December 1, the NYT reported on DOJ's plan to prosecute Julian Assange and WikiLeaks. And on December 7, NYT further reported on the creative theories DOJ might use to prosecute Assange.

Update: Check out this quote in the December 7 NYT story:

> "This is less about stealing than it is about copying," said John G. Palfrey, a Harvard Law School professor who specializes in Internet issues and intellectual property.

So someone Aaron had presumably interacted with at Harvard was thinking about the distinction between stealing and copying three days before Aaron FOIAed something he had FOIAed 2 months earlier—something that had to do with the difference between stealing and copying.