UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY and CHARLES SAVAGE,	:	
Plaintiffs,	:	
	:	No. 10 Civ. 7920 (RPP)
- against -	:	
FEDERAL BUREAU OF INVESTIGATION,	:	
Defendant.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN REPLY IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S CROSS-MOTION

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PRELIMINARY STATEMENT

Plaintiffs The New York Times Company and Charles Savage (jointly, "NYT") respectfully submit this memorandum of law in further support of their motion for summary judgment on their Complaint brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and in opposition to the cross-motion filed by Defendant Federal Bureau of Investigation ("FBI"). The motions arise from NYT's request for statistics related to assessments that the FBI conducted to collect information about individuals or organizations who may pose national security threats (the "Assessment Statistics").[1]

Rather than attempting to justify its assertion that FOIA Exemptions 2 and 7(E) apply to the Assessment Statistics, the FBI now argues that the issue is moot because the FBI exercised its discretion under FOIA and released the Assessment Statistics. To claim mootness under the doctrine of voluntary cessation, the FBI bears a heavy burden to demonstrate to the Court that its unlawful application of FOIA will not continue and that its practice has changed. Tellingly, however, the FBI does not concede that the Assessment Statistics are public records, that it erred in initially withholding the Assessment Statistics, or that Exemption 2 and 7(E) cannot be applied in the future to withhold statistics about the number of assessments conducted by the agency. In short, the FBI's practice has not changed. Therefore, the claim is not moot.

The Supreme Court's decision last month in *Milner v. Dep't of Navy*, 131 S.Ct. 1259, 2011 U.S. LEXIS 2101 (2011), makes explicitly clear that statistics about FBI assessments cannot be withheld under Exemption 2. Following *Milner*, Exemption 2 protects only materials that relate to "'personnel rules and practices' as that term is most naturally understood." *Milner*, 2011 U.S. LEXIS 2101, at *19. And Exemption 7(E), exempting law enforcement records that

[1] In NYT's motion for summary judgment, NYT also raised the issue of obtaining "identifiers" for shooting incident reports compiled by the FBI. NYT has now agreed to dismiss that part of its claim and the parties will be submitting an appropriate stipulation to the Court.

would reveal techniques or procedures that risk circumvention of law, is patently inapplicable to aggregate statistical data that shows nothing about any particular investigation.

Accordingly, this Court should find that documents showing the number of assessments conducted by the FBI are public records pursuant to FOIA.

ARGUMENT

I

RELEASE OF THE ASSESSMENT STATISTICS DOES NOT MOOT NYT'S CLAIM

A. Voluntary Cessation of an Unlawful Practice or Policy Does Not Moot a Claim

Defendant FBI argues that NYT's claim is moot because the FBI has now released the Assessment Statistics. A controversy is moot when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (citation and quotation omitted). However, in cases of "voluntary cessation" – when a defendant engages in an unlawful practice but then ceases to implement the challenged practice, once litigation has been commenced – this correction alone does not moot the claim. "A defendant's voluntary cessation of a challenged practice ordinarily does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 169-70 (2000); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (same); *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974) (per curiam) (holding voluntary cessation does not deprive the tribunal of power to hear and determine a case). The government's own FOIA guide recognizes this, stating that "in instances where an agency has released documents, but other related issues remain

unresolved, courts frequently will not dismiss the action" as moot. Guide to the Freedom of Information Act, U.S. Dep't of Justice Office of Information Policy, 767-68 & n. 180 (2009 ed.).

In order to moot the claim through voluntary cessation, defendant FBI bears the additional burden of showing that its unlawful action – withholding statistics about FBI assessments – will not occur again. *See Laidlaw,* 528 U.S. at 170 ("The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness."). "Voluntary cessation does not moot a case or controversy unless 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (quoting *Laidlaw,* 528 U.S. at 189) (alteration in original); *see also United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (party whose actions threaten to moot a case must make "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur"); *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-633 (1953) (voluntary cessation of illegal activity will not render case moot unless there is "no reasonable expectation that the wrong will be repeated" (internal quotation omitted)). If the rule were otherwise, "courts would be compelled to leave 'the defendant . . . free to return to his old ways.'" *Laidlaw*, 528 U.S. at 169-70 (quoting *Concentrated Phosphate Export Assn.*, 393 U.S. at 203). The FBI has not even attempted to meet this burden.

B. Defendant FBI Has Not Changed Its Position That the Assessment Statistics Can Be Withheld Under FOIA Exemptions 2 and 7(E)

Despite its release of the Assessment Statistics, the FBI continues to maintain that FOIA does not require their release. (Second Declaration of David McCraw, dated April 15, 2011 ("Second McCraw Dec."), at ¶¶ 4-5.) The FBI cannot moot this issue by exercising its discretion under FOIA and releasing the specific records at issue. *See City News & Novelty, Inc. v. City of*

Waukesha, 531 U.S. 278, 284 n.1 (2001) ("[A] party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior."). On this point, the Supreme Court has spoken plainly and forcefully:

> [V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot. A controversy may remain to be settled in such circumstances, *e.g.*, a dispute over the legality of the challenged practices. The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.

W.T. Grant, 345 U.S. at 632.

In FOIA cases where the agency releases the requested documents prior to the court's decision, the release of the records does not moot the claim if the agency's policy or practice remains in place. *See, e.g., Beacon Journal Publ'g Co. v. Gonzalez*, No. 5:05 cv 1396, 2005 U.S. Dist Lexis 34363, *4 (N.D. Ohio Aug. 30, 2005); *Ctr. For Biological Diversity v. Gutierrez*, 451 F. Supp. 2d 57, 70 (D.D.C. 2006) ("[A] party's challenge to the policy or practice cannot be mooted by the release of the specific documents that prompted the suit."); *Oregon Natural Desert Ass'n v. Gutierrez*, 409 F. Supp. 2d 1237, 1245 (D.Or. 2006) (When it is not "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur . . . the case is not moot"); *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988) (Defendants' "weak assurance" that the contested practice will not be reinstated does not meet "the heavy burden of showing that there is no reasonable expectation that the wrong will be replaced."). After all, "[s]o long as an agency's refusal to supply information evidences a policy or practice of delayed disclosure or some other failure to abide by the terms of FOIA, a party's

challenge to the policy or practice cannot be mooted by the release of the specific documents that prompted the suit." *Payne Enterprises, Inc.*, 837 F.2d at 491.

In order to moot a claim, the agency's voluntary cessation must be coupled with definite actions that make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Nat'l Sec. Archive v. CIA*, 564 F. Supp. 2d 29, 35 (D.D.C. 2008) (quoting *Laidlaw*, 528 U.S. at 189). For example, in *National Security Archives v. CIA*, the plaintiff sued over the CIA's denial of media representative status to its FOIA request. *Id.* at 32. After litigation commenced, the CIA reversed its decision and conceded the original determination had been unlawful. However, the court mooted the plaintiff's claim only after the CIA represented that future requests would be accorded such status and revised CIA regulations so that the error could not reasonably be expected to recur. *Id.* at 35. This heavy burden on the agency to show the harm will not recur is imposed because the voluntary cessation doctrine "protects plaintiffs from defendants who seek to evade sanction by predictable protestations of repentance and reform." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66-67 (1987) (quotation omitted).

In this case, the FBI has not made *any* repentance or reform. (See Second McCraw Dec. ¶ 5.) Unlike the CIA in *National Security Archive*, the FBI has offered no assurance that it will treat assessment statistics as public records in the future. The FBI has not come close to satisfying the heavy burden of demonstrating "that 'there is no reasonable expectation …' that the alleged violation will recur." *County of Los Angeles*, 440 U.S. at 631 (quoting *W.T. Grant*, 345 U.S. at 633).

In an analogous case, *Beacon Journal Publishing Co,* 2005 U.S. Dist. LEXIS 34363, the defendant U.S. Department of Justice denied a FOIA request for two booking photographs.

During the course of litigation, the agency released the records and then sought dismissal of the claim as moot. However, the agency did not concede that the initial denial was contrary to law. *Id.* at *7. The court concluded, pursuant to *Laidlaw*, that the agency had "not shown that the challenged conduct cannot reasonably be expected to start up again" and therefore the claim was not moot and the plaintiff remained "entitled to a declaration of whether Defendants' refusal . . . violated F.O.I.A." *Id.* at *6. The court invited the Department of Justice to admit that a FOIA violation occurred and that booking photos are public records as a matter of law. *Beacon Journal Publishing Co., Inc. v. Gonzales*, 2005 U.S. Dist. LEXIS 28109 *4-5 (N.D. Ohio Nov. 16, 2005). The Department of Justice declined and, as a result, the court granted summary judgment on the plaintiff's claim. *Id.* The same reasoning applies in this case.

While NYT has now obtained the limited statistics that prompted this claim, it has not obtained the declaratory relief that it sought: a ruling that assessment statistics are public records pursuant to 5 U.S.C. § 552, not subject to any FOIA exemptions, and therefore – as a matter of law – the FBI does not have discretion to withhold them in response to any future FOIA requests that NYT will make. (Second McCraw Dec. ¶¶ 6-7.)

C. The FBI's Unlawful Policy Will Continue to Deny NYT and the Public Access to Information About Assessments

On April 15, 2011, NYT filed a second FOIA request for the most current information on assessments. (Declaration of Charles Savage, dated April 15, 2010 ("Savage Dec."),¶ 12 & and Exhibit E.) Without further data on the numbers of assessments conducted by the FBI, NYT and the public cannot meaningfully assess the significance of the Assessment Statistics already released. (*See* Savage Dec. ¶¶ 8-10 & Ex. C.) The Assessment Statistics released by the FBI are a snapshot of approximately a four-month period. Without further statistics, it is impossible to know whether the number of assessments increased as a result of the 2008 FBI Guidelines,

whether the four-month period is an anomaly or represents the normal rate at which FBI agents open new assessments, or what the rate at which assessments are investigated and closed is. (*Id.* at ¶ 9.)

In short, the unlawful conduct complained of by NYT will continue, and under *Laidlaw*, NYT's claim is not moot.

II

THE ASSESSMENT STATISTICS MAY NOT BE WITHHELD UNDER FOIA EXEMPTION 2 OR 7(E)

A. As *Milner v. Dep't of Navy* Makes Clear, Exemption 2 Cannot Justify Withholding

It is no coincidence that the FBI released the Assessment Statistics only hours after the Supreme Court's decision in *Milner*, 131 S.Ct. 1259, 2011 U.S. LEXIS 2101, a case that ended any ambiguity about Exemption 2 and the Assessment Statistics. In *Milner*, the plaintiff made a FOIA request for Explosive Safety Quantity Distance information – data and maps calculating and visually portraying the magnitude of hypothetical detonations at a Navy base. The Navy denied the request, citing the so-called "High 2" version of Exemption 2. Under the High 2 theory, Exemption 2 could be applied – despite the plain language of that exemption – to records whose disclosure would risk circumvention of the law. *See Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir 1981). The Supreme Court not only rejected the Navy's position, it explicitly rejected the line of cases establishing the High 2 exemption. *Milner*, 2011 U.S. LEXIS 2101, at *16 ("Low 2 is all of 2 . . . High 2 is not 2 at all" (internal citation omitted)).

As a result, following *Milner*, Exemption 2 only applies to "Low 2" materials: "They concern the conditions of employment in federal agencies – such matters as hiring and firing, work rules and discipline, compensation and benefits." *Id.*, at *15. To be withheld:

> Government records also must satisfy the other requirements of Exemption 2 . . . . Information must "relat[e] solely" -- meaning, as usual, "exclusively or only," Random House [Dictionary] 1354 [(1966)] -- to the agency's "personnel rules and practices." And the information must be "internal"; that is, the agency must typically keep the records to itself for its own use. *See* Webster's [Third New International Dictionary] 1180 [(1966)] ("internal" means "existing or situated within the limits . . . of something").

Id., at *16 n.4. The FBI cannot meet that standard in this case. There is no relationship between the Assessment Statistics and "personnel rules and practices."

B. Exemption 7(E) Does Not Apply to the Assessment Statistics

The Assessment Statistics also cannot be withheld under Exemption 7(E). As set forth in our moving memorandum of law (pp. 15-18), that exemption protects from disclosure records or information compiled for law enforcement purposes to the extent that disclosure "would reveal 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." 5 U.S.C. § 552(b)(7)(E). It is readily apparent that statistics about the number of FBI assessments are neither "guidelines" nor "techniques and procedures" under Second Circuit precedent. *See, e.g.*, *Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Sec.*, 626 F.3d 678, 682 (2d Cir. 2010). Additionally, Exemption 7(E) covers only records that disclose investigative techniques and procedures *not generally known* to the public. *See Rosenfeld v. U. S. Dep't of Justice*, 57 F.3d 803, 815 (9th Cir. 1995) (emphasis added); *Doherty v. U. S. Dep't of Justice*, 775 F.2d 49, 52 n.4 (2d Cir. 1985); *Nat'l Sec. Archive v. FBI*, 759 F. Supp. 872, 885 (D.D.C. 1991). Because a wide

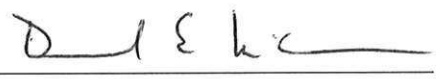
range of techniques may be used in assessments, the mere existence and number of assessments does not disclose that any particular technique is being relied on by the FBI. For a full discussion of Exemption 7(E)'s inapplicability to NYT's FOIA request, we respectfully refer the Court to our moving memorandum of law (pp. 15-18).

CONCLUSION

For each of the reasons set forth here and those presented in our opening brief, NYT respectfully asks this Court to (i) grant summary judgment as to Count I of NYT's Complaint; (ii) declare the Assessment Statistics are public records under 5 U.S.C. § 552; (iii) award Plaintiffs the costs of this proceeding, including reasonable attorney's fees under 5 U.S.C. § 552 (a)(4)(E); and (viii) grant such other and further relief as the Court deems just and proper.

Dated: New York, NY
April 15, 2011

Respectfully submitted,



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