No. 21-266

IN THE

Supreme Court of the United States

ROBERT S. CARLBORG,

Petitioner,

—v.—

UNITED STATES DEPARTMENT OF NAVY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO OPPOSITION

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REPLY ON WRIT OF CERTIORARI

This petition presents a clear circuit split on the meaning and effect of the Privacy Act ("PA") and ability of a requester to obtain information concerning himself from an agency in order to determine whether the records pertaining to him are accurate and for procedures for individuals to challenge information in their records and to seek amendments to the record if appropriate, under the provisions of the Privacy Act. Further, while there is few court decisions on point of the incongruity between the District of Columbia Circuit and the Eighth Circuit, military personnel, such as Petitioner, generally lack the funding to litigate through the Supreme Court.

Respondent's argument acknowledges the tension between the clear unambiguous PA authority providing access to Petitioner's first-party request for information under the Privacy Act.

Elements of the Privacy Act

The Privacy Act, is demarcated into two elements of "individual access to his record" and "to any information pertaining to him which is contained in the system." This identifies that there is a first-party requester access to one's own individual record as Petitioner has done in the instant case or as a third-party requester to all information pertaining to the third-party requester within the system. Records within a System of Record ("SOR") are indexed to an individual name or other identifier. Any information not in one's own individual record but is "information pertaining to him which is contained in the system" must by default be maintained in the overall record of

a different individual. There cannot exist a third category of information without retrieval by name or another identifier.

Sussman v. United States Marshals Service, 494 F.3d 1106 (D.C. Cir. 2007) was only required to analyze the second element, that of a third-party request "to any information pertaining to him which is contained in the system", and not as to the first element of first-party access by Sussman to *his own* individual record. This is the fatal error in the Respondent's reply and also highlights the misapplication of *Sussman* by agencies for the last 14 years. By analyzing only third-party access "to any information pertaining to him which is contained in the system," the lower court did not disturb a first-party access to the individual's record. The Court below incorrectly expanded the scope of the *Sussman* decision by failing to acknowledge the difference between a first-party request and a third-party request.

Respondent Focuses on the *Sussman* Footnote Rather Than A First Party Request.

The crux of Respondent's argument hinges on the footnote in *Sussman v. United States Marshals Serv.*, 494 F.3d 1106, 1121 n.9 (D.C. Cir. 2007). "If certain materials pertain to both Sussman and other individuals, from whom the Marshals Service has received no written consent permitting disclosure, the Privacy Act would both require (5 U.S.C. § 552a(d)(1)) and forbid (*id.* § 552a(b)) their disclosure. The lower court only analyzed third-party access "to any information * * * contained in the system." *Id.* It is reasonable to view the "other individuals" are only

that of other third-parties, as there is no mention of access by the Sussman plaintiff of his own record but rather a PA request for Sussman's information contained in Maydak's own first-party record.

Respondent asserts (Resp. Opp. at 6) that Petitioner is mistaken in his argument that the Navy "could not properly withhold any information in the documents it provided to him without invoking one of the 'Privacy Act statutory exemption[s],' " because the Secretary has promulgated rules. This declaration is simply not correct as the promulgation of rules under 5 U.S.C. § 552a(j) and (k) by the Secretary of Navy to exempt a SOR from certain subsections of the PA has only been established for 22 of the 196 SORs currently in use by the Department of Navy. None of these 22 SORs apply to this case and are specifically outside the scope of the Question Presented. Department of the Navy SORN Reference, htttps://dpcid.defense.gov/Privacy/SORNS.

Respondent's reply states "The Act defines a "'record'" to include 'any item * * * of information about an individual that is maintained by an agency * * * and that contains his 'name' or other 'identifying particular.' 5 U.S.C. § 552a(a)(4). Under that definition, a single document that contains information about multiple individuals and those individuals' personally identifying information, such as social security numbers, could constitute an agency "'record'" that pertains to each of the individuals." (Resp. Opp. at 7).

This argument is only persuasive if the Agency additionally can show that the "information was retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual," *id.* § 552a(a)(5), in order to constitute an agency "record" pertaining to

that individual. *See Marshal's Serv.*, 494 F.3d at 1121. "For an assemblage of data to qualify as one of Sussman's records, it must not only contain his name or other identifying particulars but also must be 'about' him. *Tobey v. NLRB,* 40 F.3d 469, 472 (D.C.Cir.1994). That is, it must actually describe him in some way. *Id.*" *See* Government District Court Motion, Dkt No 28-2 at 15.

"The D.C. Circuit has enumerated two criteria for information to be within a 'system of records' under this definition: (1) the 'information must be 'about' an individual,'" *Tobey*, 40 F.3d at 471, and it must be actually 'retrieved by the name' or identifier of an individual." *Henke v. U.S. Dept. of Commerce*, 83 F.3d 1453, 1460 (D.C. Cir. 1996).

Respondent refers repeatedly to access within the FOIA, Resp. Opp. at 8-9, which is irrelevant to Petitioner's PA request. Nonetheless, Respondent errs claiming FOIA exemption b(6) for third-party privacy relates to the Privacy Act: "[i]n sum, we do not think that Congress meant to limit Exemption 6 to a narrow class of files containing only a discrete kind of personal information. Rather, "'[t]he exemption [was] intended to cover detailed Government records on an individual which can be identified as applying to that individual.'" H. R. Rep. No. 1497, 89th Cong., 2d Sess. at 11 (1966), *quoted in Department of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). The signatories of documents requested by Petitioner in his PA request were not "about" the individuals other than their name in a signature block or an e-mail draft, and none of the information was actually retrieved by the name or identifier of the individuals' names in Petitioner's PA documents.

Respondent Misrepresented the Eighth Circuit *Voelker* Decision.

Contrary to Respondent's argument, *Voelker* is not difficult to square with *Sussman*. (Resp. Opp. at 11). *Sussman* is not on point in this case, and Respondent has inexplicably misconstrued the *Voelker* opinion by choosing only those portions that make the Eight Circuit's decision the exact opposite of what was decided. Respondent states "the court appeared to conclude that Section 552a(b) would not permit withholding the record from the requesting individual in those circumstances. *See id.* at 335 (stating that the Privacy Act does not contain any provision 'to shield from disclosure information in one person's record that pertains to another person,' and that Section 552a(b) does not 'create[] such an exemption')." (Resp. Opp. at 11-12).

This is completely inconsistent with the Eighth Circuit decision in *Voelker,* 646 F.2d at 335. Contrary to the Resp. Opp., the Eighth Circuit explicitly stated:

> [m]oreover, sections 3(j) and 3(k), 5 U.S.C. §§ 552a(j) & (k), provide explicit exemptions from the access provisions of the Act. <u>If Congress had intended to shield from disclosure information in one person's record that pertains to another person, it could have, and presumably would have, added an exemption to sections 3(j) or 3(k).</u>

Voelker v. IRS, 646 F.2d at 335 (emphasis added). Section 3(b) §§ 552a(b) creates such an exemption. As noted earlier, when properly construed, section 3(b) does not prohibit disclosure to a requesting individual of information contained in that individual's record.

Respondent claims that Petitioner has not shown any legitimate need for access to third-party information. (Resp. Opp at 12). While this is true, the Privacy Act does not mandate any such requirement within the statute; the only statutory requirement is a request for access to Petitioner's own record, which was lawfully made in the instant case.

While Respondent asserts that this PA issue has only come up twice in the courts of appeals and that the D.C. Circuit has special venue for Privacy Act suits, thus carrying significant weight, the D.C. Circuit has previously addressed this issue on point: "[o]ne of the Privacy Act's fundamental premises is that all records compiled on an individual must on request be revealed to that individual unless they fall within one or more specifically enumerated exemptions." *Londrigon v. F.B.I.,* 670 F.2d 1164, 1167, n. 28 (D.C. Cir. 1981). "Subsection 552a(d) of the Privacy Act affords general access by an individual to a federal agency record pertaining to him. 5 U.S.C. § 552a(d) (1976). This provision mandates disclosure, upon request by the individual, of all information contained in the agency record save that specifically exempted by subsections 552a(j) and 552a(k). *Id.* §§ 552a(j), (k).

Conclusion

Pursuant to the Privacy Act statute, where the requested information is contained in a system of records and retrieved by the requester's name, therefore is "about" *the requester* within the meaning of subsection (a)(4)'s definition of "record" and such information is subject to the subsection (d)(1) access provision. The clear contrary of interpretation of a federal statute; one that is routinely accessed by Americans, clears a plain and obvious circuit split and an opportunity to clarify the meaning of the PA statute. This case provides an excellent vehicle, solely based upon a matter of law and undisputed facts to establish personal access to Government records under the Privacy Act. The Court should grant the Petition.

Respectfully submitted,

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