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Via E-mail

MEMORANDUM TO PROFESSOR DANIEL CAPRA

FROM: HENRY WIGGLESWORTH & HEATHER WILLIAMS

SUBJECT: SOCIAL SECURITY NUMBERS IN DISTRICT COURT CASE FILES

BACKGROUND

On December 1, 2007, Federal Rule of Criminal Procedure 49.1 and Federal Rule of Civil Procedure 5.2 (“the privacy rules”) took effect, providing that any “electronic or paper filing” in district court that contains a social security number (SSN) must be redacted so that only the last four digits of the SSN appear in the filing. In October 2008, Carl Malamud, President of Public.Resource.Org, sent Judge Lee H. Rosenthal a letter concerning the appearance of unredacted SSN’s in the electronic case files of federal district courts – publicly available through PACER – notwithstanding the redaction requirement of the privacy rules. Mr. Malamud referred in his letter to having found 2,282 “suspect documents” in the case files of 32 different districts. He provided a CD to Judge Rosenthal containing a spreadsheet of these 32 districts. A copy of Mr. Malamud’s letter and spreadsheet are attached as **Appendix A**. This memorandum analyzes the post-2007 cases from Mr. Malamud’s list.

RESULTS OF ANALYSIS

As shown in **Table A** below, we found 217 documents containing 368 SSN’s filed after December 1, 2007. This number excludes 93 documents (30% of the 310 documents on Malamud’s list), which were inaccessible either because they were illegible or had been sealed by the district court after the court had become aware that the document contained one or more SSN’s. Table A also shows the number of SSN’s that were either waived by the party filing it (91 SSN’s) or exempted from the redaction requirement (23 SSN’s). Please note that, for the purposes of this analysis, multiple filings of the same document containing the same SSN were counted only once.

Approximately 70% of the SSN's we found (260 out of 368)¹ did not fall into either the waiver or exemption categories. Two thirds of this amount (178) appear to have been filed by a handful of actors in eight districts. For example, in Alaska, 10 of the 11 unredacted SSN's appeared in applications for writs of garnishment filed by the U.S. Attorney; in Massachusetts, all 7 SSN's were filed by defendants in a single case who were seeking to obtain the criminal history of plaintiff's witnesses; and in the Southern District of California, 81 out of 85 SSN's were filed as part of a list of shareholders by a defendant corporation. This information is detailed in **Table B**, below.

As Table A further demonstrates, 24% of the SSN's we located (91 out of 368) were filed by the possessor of the SSN and therefore constituted a waiver under the privacy rules. Of this amount, one tenth (9 out of 91) were filed by a party proceeding pro se. In addition, about 6% of the total number of SSN's (23 out of 368) were exempt from the redaction requirement. These exemptions fell largely into categories related to law enforcement: records of other courts or agencies, arrest or search warrants, and official records of state-court proceedings.

The remaining SSN's that were neither exempt from the redaction requirement, nor waived, nor filed by one of the handful of actors mentioned above, thus constituted 22% of the total (82 out of 368). They fell into a variety of categories, from pleadings themselves to various medical, financial, employment, and law-enforcement records. A specific break-down of *all* the SSN's is provided in **Table C**.

Finally, seven of the 32 districts on Malamud's list – the Districts of Arizona, Oregon, Southern Texas, Eastern Louisiana, Southern Ohio, Middle Pennsylvania, and Puerto Rico – had no SSN's filed after December 1, 2007. In addition, one district – the Central District of Illinois – did not list dates of filings and therefore could not be analyzed. Another – the Eastern District of Pennsylvania – had only one case, but that case was unavailable on PACER.

METHODOLOGY

We analyzed the data from the 32 district courts submitted by Mr. Malamud using PACER to access the electronic case file for each case that appeared to have had a SSN posted after December 1, 2007, the effective date of the privacy rules. We examined the specific document and page number cited by Mr. Malamud where one or more SSN's supposedly appeared. Once we located a document that contained one or more SSN's, we printed the page where the SSN appeared and also the first page of the document in which it appeared. These print-outs are attached as **Appendix B** and are numbered, sequentially within each district. These numbers correspond to handwritten numbers in the left-hand margin of the list provided by Mr. Malamud.

After locating the documents, we analyzed each appearance of a SSN to determine whether it fell into an exemption to the privacy rules. Due to the volume of SSN's, this determination was made based upon a plain reading of the rule, rather than extensive research

¹ There is a discrepancy of six SSN's between this amount (260), as reflected in Table C, and the number of non-exempt, non-waived SSN's that can be derived from Table A (254).

into case law interpreting the rule. The privacy rules exempt the following documents from the redaction requirement:

- (1) a financial account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
- (2) the record of an administrative or agency proceeding;
- (3) the official record of a state-court proceeding;
- (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;
- (5) a filing covered by Criminal Rule 49.1(d) ["Filings made Under Seal"] or Civil Rule 5.2(c) or (d) ["Social Security Appeals and Immigrations Cases"]
- (6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255;
- (7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;
- (8) an arrest or search warrant; and
- (9) a charging document and an affidavit filed in support of any charging document.

We also looked at each SSN to determine whether it fell under the waiver provision of the privacy rules, which provides that a person waives the protection of the rules as to that person's own information by filing it without redaction and not under seal. *See* Fed. Crim. P. 49.1(h); Fed. R. Civ. P. 5.2(h).

TABLE A: Incidence of SSN's in District Court Case Files

District Court	Documents on Malamud's List Filed After 12/01/07 That Contain SSN'S	Inaccessible Documents	Number of SSN's ²	Waivers	Exemptions
M.D. Ala.	78	9	67	32	13
D. Alaska	11	0	11	0	0
N.D. Cal.	17	0	15	2	1
S.D. Cal.	14	0	93	7	1
D. Col.	2	0	2	2	0
D. Conn.	1	0	1	1	0
D. Del.	11	1	13	3	0
D.D.C.	25 ³	24	1	1	0
S.D. Fla.	1	0	2	0	0
D. Guam	5	1	4	0	0
D. Haw.	1	0	1	0	0
N.D. Ill.	19	0	71	6	1
D. Md.	2	0	2	2	0
D.N. Mar. I.	1	0	1	1	0
D. Mass.	14	11	7	0	0
D. Minn.	1	0	1	1	0
D. N.J.	3	0	3	2	0
S.D. N.Y.	41 ⁴	0	58	21	4
W.D. Pa.	4	1	2	0	2
D. R.I.	6	2	4	2	1
D. Vt.	1	1	N/A	N/A	N/A
E.D. Va.	9	0	9	8	0
Fed. Cl.	43	43	N/A	N/A	N/A
Total	310	93	368	91	23
% of Total	100%	30%	100%	24%	6%

² Approximately 24% (69) of these SSN's had been redacted by the court or parties. (Almost all redacted SSN's – 65 out of 69 -- were from the Middle District of Alabama).

³ Two of the SSN's on Malamud's list appear to be hearing numbers, not SSN's, and were not counted.

⁴ Several of the SSN's on Malamud's list appear to be inmate identification numbers and were not counted.

TABLE B: Multiple Filings of SSN's by Same Actor

District Court⁵	Number of SSN's Filed by One Actor Out of Total Number of Non-exempt, Non-waived SSN's Filed in This District	Type of Actor	Type of Filing
D. Alaska	10/11	United States Attorney	Applications for writ of garnishment
N.D. Cal.	6/12	Attorneys on both sides	Guaranty form as an exhibit to a variety of pleadings and motions
S.D. Cal.	81/85	Defendant corporation	Shareholder list
D. Del.	5/10	Represented plaintiff trustees of litigation trust	Creditor mailing list as an exhibit to an Affidavit of Mailing
D. Guam	3/4	United States Attorney	Exhibit Lists
N.D. Ill.	50/64	Two labor unions (two separate cases)	Exhibits to a variety of pleadings and motions
D. Mass.	7/7	Defendants in one case	Seeking to obtain the criminal history of plaintiff's witnesses
S.D. N.Y.	16/33	(1) Defendant company; (2) Attorney for defendant	(1) Payroll audit as an exhibit to a statement of damages; (2) Declarations of Service
Total	178/226	N/A	N/A

⁵ This chart does not contain all district courts from Malamud's list. It contains only those courts whose records included multiple filings of SSN's by the same actor.

TABLE C: Types of Filings with SSN's

Type of Filing	Number of Such Documents Filed After 12/01/07 That Contain SSN's⁶	Number of SSN's in This Type of Document
Pleadings ⁷	24	29
Declaration/Affidavit of Service	14	18
Payroll Information	9	48
Guaranty Waiver	8	13
Criminal Offender Information	8	16
Medical Records	6	6
Personnel Records	5	10
Declaration of IRS Agent	4	4
Plaintiff Profile Form	3	4
Employee Service Record	3	3
Exhibit List	3	3
Subpoena	3	3
Report of Investigation	3	3
Report and Recommendation	2	3
Sharehold List	2	87
Income Tax Return	2	2
Accident Report	1	2
Inventory of Procured Evidence	1	1
Curriculum Vitae	1	1
Record of Arrest	1	1
Military Records	1	1
Record of Judgment	1	1
Authorization for Interpreting Services	1	1
Total	106	260

⁶ This column does not include documents that were sealed, waivers, or exemptions.

⁷ This category includes all SSN's that were located in a pleading, rather than in an exhibit. Pleadings included writs of garnishment (10 documents, 11 SSN's), complaints (4 documents, 4 SSN's), replies to motions (4 documents, 5 SSN's), motions (3 documents and 3 SSN's), and one answer (1 document, 1 SSN).