

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSAN B. LONG)
)
 and)
)
 DAVID BURNHAM)
)
 Plaintiffs,) Civil Action No. 1:00CV00211 PLF
)
 v.)
)
 DEPARTMENT OF JUSTICE)
)
 Defendant.)
 _____)

SECOND DECLARATION OF DAVID BURNHAM

I, David Burnham, declare as follows:

1. My name is David Burnham, I am a member of the research faculty at the Newhouse School at Syracuse University and co-director with Professor Susan Long of the Transactional Records Access Clearinghouse (“TRAC”). Before becoming co-director of TRAC, I wrote investigative books and was a reporter with the New York Times. I have specialized in the coverage of criminal enforcement matters since 1964. I am competent to make this declaration and the statements in this declaration are based on my personal knowledge.

2. TRAC is a data gathering, data research and data distribution organization. TRAC is one of the research centers associated with Syracuse University. TRAC collects masses of detailed data from federal agencies through the systematic use of the Freedom of Information Act. Since 1989, TRAC has collected data from federal agencies such as the Internal Revenue Service, Bureau of Alcohol, Tobacco and Firearms, Nuclear Regulatory

Commission, Environmental Protection Agency, and the Office of Personnel Management.

TRAC analyzes the data to determine what the government is doing and not doing, the accuracy of the government's claims about its actions and the reliability of the data on which those claims are based. TRAC also uses the data to examine whether the agency statistics presented to the public are selective and fail to disclose the entire story.

3. When possible, TRAC seeks to determine the consistency of government information by comparing data from one agency with that from another or with information from the federal courts. The case management data that TRAC has obtained under the FOIA from the Executive Office for the United States Attorneys ("EOUSA") is among the most important data sets that TRAC has compiled. One of the reasons that the EOUSA data is particularly valuable is that it contains information on the activities of agencies that refer matters to the United States Attorneys' Offices. The EOUSA case management data are supposed to contain records about every instance in which an investigative agency has recommended the prosecution of a criminal matter. This data allow researchers to investigate questions such as: Which agencies are referring matters for investigation?; What are the most important criminal charges involved in these referrals?; What types of matters are being declined for prosecution and which agencies referred these matters? Which referrals resulted in filing of formal charges?; Which referrals resulted in convictions and prison sentences? Moreover, because the EOUSA data tracks referrals made by all agencies, it allows TRAC to evaluate whether the enforcement claims reported by selected agencies are consistent with the EOUSA's records.

4. TRAC and other researchers have an interest in the disclosure of the entries in the EOUSA databases that provide numbers or codes for the corresponding matters in the databases

of law enforcement agencies that refer matters to the United States Attorneys' Offices. Comparisons of the EOUSA data with the data and the statistics reported by other federal agencies have raised important public policy issues. When two independent bodies produce data that is in agreement, the confidence in the accuracy of answers produced by such data is considerably enhanced. On the other hand, when the data of different agencies produce conflicting answers, questions are raised about whether the disagreement reflects flaws in the data of one or both agencies, or whether data have been systematically distorted to enhance the agency's ability to justify budget requests, defend itself against critics, or support claims that it is fulfilling policy goals. File numbers and other codes that allow researchers to directly compare records and identify the source of these real or apparent conflicts often are valuable in this context.

5. One example of this process concerns TRAC's effort to compare criminal enforcement activities reported by the Internal Revenue Service with the data on IRS matters that appears in the EOUSA case management databases. The EOUSA databases contain records that identify all IRS criminal enforcement actions for tax fraud and other matters, such as unreported income from illegal drug sales and money laundering. In 1997, TRAC compared the EOUSA data for FY92-FY96 on IRS matters to the statistics that the IRS reported in its annual reports and found that the IRS reported about 50% more tax prosecutions, 70% more convictions, and 100% more individuals sent to prison than the EOUSA database records. In addition, TRAC found that the counts derived from the EOUSA case management data were in substantial agreement with the information reported by the Administrative Office of the United States Courts concerning tax fraud matters. The similarity between the EOUSA and

Administrative Office data indicated that the substantially higher IRS statistics were inflated. Because of the serious management problems suggested by the inability of the IRS to accurately account for the activities of its criminal investigators, the Senate Finance Committee invited TRAC to testify during its 1997 oversight hearing. As a result of a variety of administrative lapses highlighted by the hearings, IRS Commissioner Charles O. Rossotti appointed former FBI Director William H. Webster to conduct a Review of the IRS Criminal Investigations Division. One aspect of Webster's 1988/1999 review concerned TRAC's findings that the division's claims about its investigative actions were not accurate. Partly because the Justice Department failed to provide additional information requested by the Webster staff, the study was not able to resolve the conflicts between the information developed by the EOUSA and the courts with the claims of the IRS. See "Review of the Internal Revenue Service's Criminal Investigation Division," 23-26 (April 1991), *available at* http://www.ustreas.gov/irs/ci/ci_structure/webster_report.pdf. As a result, the Webster Report recommended that the IRS Commissioner conduct a special audit of the data used by the agency to track IRS criminal investigations. To the best of my knowledge this audit was never conducted.

6. Because of the special privacy restrictions protecting tax information, TRAC's research necessarily focused on comparing the summary counts and trends presented in the agency's annual report with the counts and trends that emerged from the data collected by the EOUSA and the courts. The effort to fully understand IRS data problems, however, would have been greatly enhanced if TRAC had been able to match on a case-by-case basis the information collected by the EOUSA with that of the courts. It is for this reason that TRAC and other

researchers have an interest in using the court docket numbers, file name and litigant/defendant name entries in the EOUSA databases to compare the EOUSA records with corresponding cases in the databases of the Administrative Office of the United States Courts. In evaluating the accuracy of the EOUSA data concerning IRS matters, TRAC spent considerable time comparing the enforcement counts that emerge from the EOUSA data with the data available from the Administrative Office and found that the counts were quite similar. In other contexts, however, TRAC has found that there are substantial differences between the overall statistics reported by the EOUSA data and the Administrative Office data. The disclosure of the court docket numbers and information identifying the litigants would provide researchers a means to reconcile the EOUSA case management records with the Administrative Office data, and to determine why the databases sometimes produce different counts.

7. Disclosure of the names of businesses, governmental units, and organizations, and the identity of property will also allow researchers to obtain more information about the activities of the government agencies whose investigations are recorded in the EOUSA case management data. The EOUSA has withheld the names of all such entities from the most recent EOUSA civil and criminal files. As a result, there is no clean indicator that a particular investigation relates to a corporation, an item of property, or a governmental unit. If the names of these entities were released, TRAC and other researchers could investigate whether the data indicate that agencies differ in their treatment of large and small corporations, local and out-of-state businesses, businesses charged with civil rights violations and governmental units charged with similar violations.

8. The government's authority to forfeit property continues to be a subject of interest to the public because of the risk that officials may abuse this authority, and the government's interest in using such forfeitures to thwart criminal activity. If the EOUSA disclosed the identity of property listed in the EOUSA database entries concerning forfeiture actions, TRAC and other researchers could examine issues such as how often the government uses this authority with respect to different types of assets (e.g., real estate, chattels, cash); whether some United States Attorneys' Offices bring a disproportionate number of property forfeiture actions, and other matters that would contribute to the public debate on the current use of forfeiture, and proposals to authorize further use of this remedy.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed on _____.

David Burnham