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CASE COMMENTS

Administrative Law—First Circuit Decides Qualified Federal Law Enforcement Privilege Outweighs State’s Prerogative to Enforce Criminal Code—*Puerto Rico v. United States*, 490 F.3d 50 (1st Cir. 2007)

In 1946, Congress enacted the Administrative Procedure Act (APA), establishing the standards under which federal courts may review the decisions of government agencies.¹ In addition, pursuant to the so-called housekeeping statute, agency heads may regulate the distribution of agency records.² In *Puerto Rico v. United States*,³ the United States Court of Appeals for the First Circuit considered both of these statutes in determining whether a state had a nonstatutory cause of action to obtain information from the Federal Bureau of Investigation (FBI) to aid in its criminal investigation of the FBI.⁴ The court

1. See 5 U.S.C. §§ 701-706 (2006) (stating purpose of Act, specifying types of actions reviewable, and establishing standard of review). See generally Steven P. Croley, *The Administrative Procedure Act and Regulatory Reform: A Reconciliation*, 10 ADMIN. L.J. AM. U. 35 (1996) (summarizing history of APA from 1946 to 1996).

2. See 5 U.S.C. § 301 (2006) (authorizing agency heads to create protocol for record distribution); see also Pub. L. No. 85-619, 72 Stat. 547 (1958) (codified as amended at 5 U.S.C. § 301 (2006)) (authorizing heads of agencies to create regulations for employees to follow when distributing materials). In 1958, Congress added, “This section does not authorize withholding information from the public or limiting the availability of records to the public.” 5 U.S.C. § 301; see also *Exxon Shipping Co. v. U.S. Dep’t of Interior*, 34 F.3d 774, 779 (9th Cir. 1994) (providing legislative history of housekeeping statute); Don Lively, *Government Housekeeping Authority: Bureaucratic Privileges without a Bureaucratic Privilege*, 16 HARV. C.R.-C.L. L. REV. 495, 498-502 (1981) (providing history of housekeeping statute, including amendments and related cases). Although it has been misinterpreted as conferring an additional privilege on agencies, the housekeeping statute does not, by itself, authorize the withholding of material. See Lively, *supra*, at 500. The 1958 amendment to the statute was designed to facilitate the public’s access to government information; the fact that this amendment did not have its full, anticipated effect may have been Congress’s motive in subsequently enacting the Freedom of Information Act. See *id.* at 496; see also *infra* note 28 and accompanying text (explaining Freedom of Information Act).

3. 490 F.3d 50 (1st Cir. 2007).

4. *Id.* at 54 (stating issue presented in case). See generally Clark Byse & Joseph V. Fiocca, Note, *Section 1361 of the Mandamus and Venue Act of 1962 and “Nonstatutory” Judicial Review of Federal*

held that Puerto Rico did not have a nonstatutory cause of action and that it would instead have to obtain the requested materials under the APA.⁵

In October of 2005, the Puerto Rico Department of Justice (PRDOJ) issued a subpoena demanding that the U.S. Attorney produce documents and photographs relating to an FBI operation that resulted in the death of a Puerto Rican citizen, Filiberto Ojeda Ríos (Ojeda).⁶ The FBI initially indicated that its regulations prohibited the disclosure of such materials; following further communications among the U.S. Attorney, the FBI, and the PRDOJ, the U.S. Attorney subsequently offered to allow the PRDOJ to inspect some of the items in the presence of an FBI official.⁷ The PRDOJ initially acquiesced but later demanded full access to the materials.⁸ When the FBI refused to comply, the PRDOJ filed suit in January of 2006 to compel the release of the items.⁹

The following month, an FBI agent used pepper spray to control an agitated crowd gathered outside of a building the FBI was searching pursuant to a warrant relating to the Ojeda case.¹⁰ The PRDOJ issued subpoenas for photographs of the incident, the names of agents involved in the operation, and FBI protocol on the use of force.¹¹ When the FBI moved to quash the subpoenas, the PRDOJ filed a second complaint to compel the release of the materials.¹² The district court ruled in favor of the United States, holding that

Administrative Action, 81 HARV. L. REV. 308 (1967) (explaining nonstatutory judicial review). A litigant may institute court proceedings even in the absence of a provision authorizing judicial relief. *See id.* at 321.

5. 490 F.3d at 54, 71 (rejecting Puerto Rico's argument for nonstatutory cause of action but finding APA review appropriate).

6. *See id.* at 54-55 (listing materials requested by PRDOJ). The PRDOJ requested the equipment used in the intervention, the names and contact information of the officials who participated in the raid or who made decisions leading up to it, and copies of general FBI intervention protocols. *Id.* The PRDOJ stated it needed those materials to help in its investigation of the operation that led to the death of Ojeda, an individual who had robbed a bank in the United States. *Id.* at 54. In 1985, Ojeda shot FBI agents who entered his home pursuant to a warrant, and he subsequently skipped bail. *Id.* In 2006, the FBI learned of his new residence, and, once again, Ojeda shot at agents when they came to execute a warrant. *Id.* During the operation, Ojeda himself was fatally wounded, and the PRDOJ commenced its investigation into the raid shortly thereafter. *Id.*; *see also* OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, A REVIEW OF THE SEPTEMBER 2005 SHOOTING INCIDENT INVOLVING THE FEDERAL BUREAU OF INVESTIGATION AND FILIBERTO OJEDA RÍOS (2006), *available at* http://www.usdoj.gov/oig/special/s0608/full_report.pdf [hereinafter D.O.J. REPORT] (analyzing chronology of events of operation and assessing FBI's actions).

7. *See* 490 F.3d at 55 (noting FBI's responses and conditions it placed on inspection). The FBI also informed Puerto Rico that its decision was a final agency decision, which could be reviewed by a court. *Id.*; *see also* 5 U.S.C. § 704 (2006) (stating party must obtain "final agency action" before seeking review of agency's decision).

8. *See* 490 F.3d at 55 (observing PRDOJ's initial acceptance, and following rejection, of FBI's offer).

9. *Id.* (indicating progression of action).

10. *Id.* (providing facts surrounding incident related to more recent subpoenas).

11. *Id.* (detailing PRDOJ's requests). The building incident prompted the PRDOJ to subpoena the FBI for additional materials. *See id.*

12. 490 F.3d at 56 (noting Puerto Rico's insistence on requested materials); *see* Puerto Rico v. United States, No. 06-1305, 2006 U.S. Dist. LEXIS 70236, at *12 (D.P.R. Sept. 26, 2006), *aff'd*, 490 F.3d 50 (1st Cir. 2007) (indicating U.S. Attorney faced possible contempt charges if he failed to comply with subpoena). Puerto Rico's two complaints were originally assigned separate case numbers but were later consolidated because of

the issue was not reviewable because there had been no final agency action.¹³ On appeal, the First Circuit affirmed the holding that the FBI's decision to withhold the materials was appropriate.¹⁴ The court also recognized a qualified privilege for law enforcement procedures.¹⁵

Under the APA, "[a] person suffering legal wrong because of agency action . . . is entitled to judicial review thereof."¹⁶ A court will only find an agency's decision to withhold information to be "unlawful" if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"¹⁷ The Department of Justice (DOJ) has specific regulations for the production or disclosure of material or information in state and federal proceedings.¹⁸ In *United States ex rel. Touhy v. Ragen*,¹⁹ the Supreme Court held that the Attorney General was permitted to restrict disclosure of FBI documents by forbidding his subordinates from releasing them.²⁰

Several circuit courts have addressed whether a non-party government agency's failure to comply with a subpoena should be reviewed pursuant to the APA standards or the Federal Rules of Civil Procedure (FRCP) concerning

the similarity of their legal issues. 2006 U.S. Dist. LEXIS 70236, at *4-5.

13. 490 F.3d at 55-56 (noting results of district court action). The district court advised Puerto Rico that it would have to obtain a final agency action before it could file suit and that the mere filing of a motion to quash did not constitute such action on the part of the United States. *Id.* at 69.

14. *Id.* at 54 (stating holding of case). In light of its recognition of the law enforcement privilege, the court found that the FBI's withholding of the materials was appropriate. *See id.* at 64.

15. *Id.* at 64 (providing rationale for recognizing privilege). The court reasoned that Puerto Rico's interest in a thorough criminal investigation was outweighed by the detrimental impact the release of the sensitive materials would have on FBI investigations. *See id.* at 68.

16. 5 U.S.C. § 702 (2006) (stating action brought against federal agency official shall not be dismissed on sovereign immunity grounds); *see also* William P. Hardy, Note, *Nonstatutory Judicial Review of Federal Agency Action: A New Approach to Sovereign Immunity*, 24 ME. L. REV. 123, 123-130 (1972) (providing background on sovereign immunity). Waiver reconciles judicial review and the common law doctrine of sovereign immunity under the APA. *See Hardy, supra*, at 130.

17. 5 U.S.C. § 706(2)(A) (2006); *see* *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (stating Court not empowered to substitute its judgment for that of agency); William Bradley Russell, Jr., Note, *A Convenient Blanket of Secrecy: The Oft-Cited but Nonexistent Housekeeping Privilege*, 14 WM. & MARY BILL RTS. J. 745, 761 (2005) (suggesting court may only determine whether agency adhered to its own standards).

18. *See* 28 C.F.R. §§ 16.21-16.29 (2007) (setting forth procedure for production or disclosure in federal and state proceedings). The procedure for cases in which the United States is not a party differs from those in which the United States is a party; in the former, disclosure is generally restricted. *See* 28 C.F.R. §§ 16.22, 16.23 (2007).

19. 340 U.S. 462, 468 (1951).

20. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951) (finding Attorney General's regulations valid pursuant to housekeeping statute). *See generally* Gregory S. Coleman, Note, *Touhy and the Housekeeping Privilege: Dead but Not Buried?*, 70 TEX. L. REV. 685 (1992) (explaining *Touhy* holding and its relationship to housekeeping privilege). Although *Touhy* is frequently cited for the proposition that an agency head may decline to produce evidence requested in a subpoena even without invoking a specific privilege, Coleman argues the holding of the case was not actually that broad. *See id.* at 687; *see also* *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 776-77, 780 (9th Cir. 1994) (stating housekeeping regulations, as interpreted in *Touhy*, do not provide independent privilege against judicial discovery).

discovery.²¹ The United States Court of Appeals for the D.C. Circuit held in *Houston Business Journal, Inc. v. Office of the Comptroller of the Currency*,²² that a litigant seeking materials from a federal agency must follow the agency's own protocol.²³ If the agency refuses to release the requested items, the litigant's sole remedy is to file an action under the APA.²⁴ On the other hand, the Court of Appeals for the Ninth Circuit came to the opposite conclusion in *Exxon Shipping Company v. U.S. Department of Interior*,²⁵ holding that the FRCP concerning discovery apply to government agencies regardless of whether a United States government agency is a party to the underlying action.²⁶ A court may also allow a party to invoke a nonstatutory cause of action following an agency's refusal to produce requested materials.²⁷

21. See *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 274 (4th Cir. 1999) (holding agency noncompliance reviewable under APA); *Houston Bus. Journal, Inc. v. Office of the Comptroller of the Currency*, 86 F.3d 1208, 1212 (D.C. Cir. 1996) (same); *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774 (9th Cir. 1994) (holding review of agency's decision should be pursuant to FRCP); see also 5 U.S.C. §§ 701-706 (2006) (setting forth APA judicial review protocol); FED. R. CIV. P. 26(b) (providing discovery limitations). A party need not produce materials that are "privileged," or those whose discovery would result in "undue burden or cost." FED. R. CIV. P. 26(b)(1); FED. R. CIV. P. 26(b)(2)(b). A party is also justified in withholding if the materials sought are "unreasonably cumulative or duplicative," or if the burden on the producing party outweighs the likely benefit the materials would have for the requesting party. FED. R. CIV. P. 26(b)(2)(C)(i); FED. R. CIV. P. 26(b)(2)(C)(ii); see also Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 34 (1996) (emphasizing importance of Court resolving circuit splits with respect to APA interpretation); Coleman, *supra* note 20, at 687 (arguing only permissible for agencies to withhold information pursuant to "straightforward application" of FRCP); Robert R. Kiesel, Note, *Every Man's Evidence and the Ivory Tower Agencies: How May a Civil Litigant Obtain Testimony from an Employee of a Nonparty Federal Agency?*, 59 GEO. WASH. L. REV. 1647, 1675-80 (1991) (considering merits of *Alex v. Jasper Wyman & Son*, 115 F.R.D. 158 (D. Me. 1986)). The *Jasper Wyman* court proposed a two-step analysis: "(1) applying a need/burden assessment that recognizes the agency's efficiency concerns; and (2) allowing the agency to assert . . . FOIA privileges, irrespective of the need of the litigant for the information." Kiesel, *supra*, at 1683; see *Alex v. Jasper Wyman & Son*, 115 F.R.D. 158, 159 (D. Me. 1986) (noting ways in which court could limit discovery). Compare *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 776, 780 (9th Cir. 1994) (holding FRCP apply to agencies and private litigants alike, regardless of whether government party), with *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 274 (4th Cir. 1999) (holding APA sole means for review of agency nondisclosure when government not party), and *EPA v. Gen. Elec. Co.*, 197 F.3d 592, 598 (2d Cir. 1999) (rejecting *Exxon* approach and remanding for review of agency's decision under APA standard), and *Houston Bus. Journal, Inc. v. Office of the Comptroller of the Currency*, 86 F.3d 1208, 1212 (D.C. Cir. 1996) (holding APA action remedy for agency's refusal to produce documents).

22. 86 F.3d 1208 (D.C. Cir. 1996).

23. *Houston Bus. Journal, Inc. v. Office of the Comptroller of the Currency*, 86 F.3d 1208, 1212 (D.C. Cir. 1996) (noting procedure for state-court litigant to request documents).

24. See *Houston Bus. Journal, Inc. v. Office of the Comptroller of the Currency*, 86 F.3d 1208, 1212 (D.C. Cir. 1996) (stating "sole remedy" is to bring APA action in federal court). When a collateral action is brought under the APA, a federal court will have jurisdiction over the case. See *id.*

25. 34 F.3d 774 (9th Cir. 1994).

26. *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 779-80 (9th Cir. 1994) (providing rationale for applying FRCP to all parties). The court also noted "collateral APA proceedings can be costly [and] time-consuming . . . to litigants . . ." *Id.* at 780 n.11.

27. See *R.I. Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 42-43 (1st Cir. 2002) (citing *Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin. Inc.*, 502 U.S. 32, 43-44 (1991)) (discussing two necessary conditions for party to invoke nonstatutory cause of action). The federal agency's action must "wholly deprive the [party] of a meaningful . . . means of vindicating its . . . rights," and Congress must have "clearly intended"

The Freedom of Information Act (FOIA), which mandates the release of agency records to the public unless they are protected by an exemption, may, in effect, limit agencies' housekeeping authority.²⁸ The law enforcement exemption recognizes the interest law enforcement agencies have in safeguarding information pertaining to their investigations.²⁹ This privilege is also grounded in case law: prior to *Puerto Rico v. United States*, the First Circuit recognized a privilege for information that could thwart government investigations.³⁰

In *Puerto Rico v. United States*, the First Circuit affirmed the district court's decision, determining Puerto Rico did not have a nonstatutory cause of action against the United States, but could instead seek the requested material pursuant to the APA.³¹ Rather than simply addressing whether there had been final agency action by the FBI, the court resolved the case on its merits.³² The court reasoned that Puerto Rico could adequately vindicate its rights through the APA, thus rejecting Puerto Rico's request for nonstatutory review.³³ Furthermore, the court determined the FBI's decision to withhold materials was reasonable under the APA's deferential standard of review.³⁴ In recognizing the law enforcement privilege, the court emphasized that it was a qualified privilege that would be overridden if the requesting party's interest in obtaining

to preclude judicial review of the agency's action. *Id.* at 42. A court will also weigh "equitable considerations" in determining whether relief should be based on nonstatutory review. *Id.* at 43. In considering these factors, the *RIDEM* court held that Rhode Island had a nonstatutory cause of action. *Id.* That case does not, however, stand for the proposition that a court will automatically allow nonstatutory review if a party requests it. *See* 490 F.3d at 59-60.

28. *See* 5 U.S.C. § 552 (2006) (listing materials required for and exempt from disclosure); *see also* *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979) (providing legislative history of FOIA and noting FOIA enactment followed lack of disclosure under APA); Lively, *supra* note 2, at 496 (arguing Congress enacted FOIA because agencies relied heavily on housekeeping authority when withholding information).

29. *See* 5 U.S.C. § 552(b)(7) (2006) (listing situations where law enforcement exemption applies). Information compiled for law enforcement purposes is only protected in some circumstances, including those in which its release "could reasonably be expected to interfere with enforcement proceedings, . . . would disclose techniques and procedures for law enforcement investigations, or . . . could reasonably be expected to endanger the life or safety of any individuals." *Id.*; *see also* *Jones v. F.B.I.*, 41 F.3d 238, 244-49 (6th Cir. 1994) (discussing FOIA exemptions).

30. *See* *United States v. Cintolo*, 818 F.2d 980, 1002 n.13 (1st Cir. 1987) (concluding similar policies justified adopting law enforcement privilege as had justified adopting informer's privilege); *see also* *In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 569 (5th Cir. 2006) (arguing law enforcement privilege necessary in modern times because disclosure could harm national security).

31. *See* 490 F.3d at 60 (rejecting Puerto Rico's argument that right to criminal code enforcement authorized nonstatutory cause of action); *see also* *Puerto Rico v. United States*, No. 06-1305, 2006 U.S. Dist. LEXIS 70236, at *33 (D.P.R. Sept. 26, 2006), *aff'd*, 490 F.3d 50 (1st Cir. 2007) (suggesting Puerto Rico sought nonstatutory review because more liberal than APA).

32. 490 F.3d at 70 (indicating final agency action determination would resolve court's jurisdictional question); *see infra* note 37 (providing court's rationale for not addressing final agency action question).

33. 490 F.3d at 59-60 (distinguishing case from *RIDEM*). Here, although there is no indication that Congress specifically intended to prohibit nonstatutory review, "the existence of the APA as a means for reviewing the FBI's actions at least implies that nonstatutory review is inappropriate." *Id.* at 60.

34. *Id.* at 62 (emphasizing FBI's interest in protecting sensitive materials).

the materials outweighed the government's interest in preserving its law enforcement techniques.³⁵ The court also stressed that the DOJ had issued a thorough report, including recommendations for future situations, after investigating Ojeda's death.³⁶

In *Puerto Rico v. United States*, the court did not determine whether it had jurisdiction to hear the case but instead resolved the case on its merits.³⁷ To answer the jurisdictional question, the court would have determined whether there was final agency action on the part of the United States when it moved to quash Puerto Rico's subpoena.³⁸ In its decision, the court joined other circuits in recognizing a qualified law enforcement privilege.³⁹

Although the court framed the issue in terms of a nonstatutory cause of action and sovereign authority, it asserted its holding in terms of the APA.⁴⁰

35. *Id.* at 67-68 (reasoning disclosure of materials would jeopardize future investigations). The court performed a balancing test, weighing Puerto Rico's interest in enforcing its criminal laws against the United States's interest in safeguarding FBI operations. *Id.* The court stressed, however, that courts must be cautious in assessing each party's interests when there are conflicts between federal and state governments, as there were in this case. *Id.* at 64. Although the court rejected Puerto Rico's argument that the law enforcement privilege must necessarily yield to a state's sovereign authority to enforce its criminal laws, it agreed with the United States's argument that a court usually balances the parties' interests "in the course of underlying . . . litigation." *Id.* at 67. Here, however, there was no such litigation; "the 'need' [was] Puerto Rico's assertion that the requested materials might be of aid to a criminal investigation." *Id.* at 67. The United States also argued that the materials were covered by the investigatory files privilege. *Id.* at 66. The court rejected Puerto Rico's argument that the United States waived its privilege by disclosing some information, reasoning that it would be unfair to penalize the United States for its voluntary disclosure of some materials by requiring it to disclose the remainder of the privileged material. *See id.*

36. *See* 490 F.3d at 69 (noting depth of report); *see also* D.O.J. REPORT, *supra* note 6, at 89-168 (assessing Ojeda arrest operation and offering recommendations for future operations). Although the court recognized that "a federal agency [may] thwart state criminal proceedings against . . . its own employees by refusing to disclose information that might lead to prosecution," the court reasoned that the FBI's compliance with some of Puerto Rico's requests and its issuance of a thorough report provided a safeguard, albeit an imperfect one, against that risk. 490 F.3d at 69.

37. 490 F.3d at 70 (avoiding difficult jurisdictional question and instead resolving case on "more straightforward" merits).

38. *See id.*

39. *See id.* at 64, 71 (adopting law enforcement privilege and quoting other circuit courts recognizing privilege); *see also In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 568, 569, (5th Cir. 2006) (reasoning privilege essential to protect national security); *In re Dep't of Investigation of the City of N.Y.*, 856 F.2d 481, 484 (2d Cir. 1988) (finding privilege necessary to "prevent interference with . . . investigation"); *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 542, 545 (D.C. Cir. 1977) (reasoning investigations ineffective in absence of privilege).

40. *See* 490 F.3d at 54. The issue presented is significantly different from that presented in *Houston Business Journal*. *See Houston Bus. Journal, Inc. v. Office of the Comptroller of the Currency*, 86 F.3d 1208, 1212 (D.C. Cir. 1996) (providing issue in *Houston Business Journal* as set forth by Ninth Circuit); *supra* text accompanying note 4 (stating question presented in case-in-chief). In the latter case, the court phrased the issue as, "when the underlying litigation is in state court, can a litigant eager to avoid the limitations on the state court's subpoena power obtain a federal-court subpoena instead?" *Houston Bus. Journal, Inc. v. Office of the Comptroller of the Currency*, 86 F.3d 1208, 1212 (D.C. Cir. 1996). Notwithstanding this substantial difference, in *Puerto Rico v. United States*, the First Circuit relied on *Houston Business Journal* for the proposition that a party requesting a subpoena from a state entity must do so pursuant to the APA. *See* 490 F.3d at 58.

The First Circuit goes one step further than the *EPA v. General Electric*⁴¹ court, holding that the agency's decision was neither arbitrary nor capricious, instead of remanding the case to the district court for that determination.⁴² Despite the court's dismissing Puerto Rico's "commandeering" argument due to a "lack of developed argumentation," it addressed the possible applicability of the FOIA, even though Puerto Rico had not sought materials pursuant to that Act.⁴³

The court did not, however, address the controversial *Exxon* proposition that a court should apply the FRCP concerning discovery.⁴⁴ Although the court cited *Exxon*, it merely quoted it for the proposition that *Touhy* regulations provide a procedure that parties seeking information must follow and do not create an independent privilege.⁴⁵ Had the court applied the FRCP, the result in this case would have likely been similar to that in *Exxon*, and the United States would not have been forced to comply with the subpoena.⁴⁶

In his concurring opinion, Chief Judge Boudin recognized the overlap among the privileges authorizing an agency to withhold material.⁴⁷ Ironically, courts performing an APA analysis discuss maximizing an agency's resources while differentiating between various privileges, the application of which generally leads to the same result: nondisclosure.⁴⁸ The more efficient *Exxon* procedure treats government agencies as ordinary litigants, thus avoiding the superfluous APA analysis.⁴⁹

41. 197 F.3d 592, 599 (2d Cir. 1999).

42. Compare *EPA v. Gen. Elec. Co.*, 197 F.3d 592, 599 (2d Cir. 1999) (remanding for determination of whether agency's action was "arbitrary" or "capricious"), with 490 F.3d at 69 (finding agency's decision neither arbitrary nor capricious). The *EPA* court reasoned that the district court would be better suited to weigh the plaintiffs' interests in obtaining the information and the government's interest in conserving limited resources and maintaining confidentiality. See *EPA v. Gen. Elec. Co.*, 197 F.3d 592, 599 (2d Cir. 1999). In *Puerto Rico v. United States*, however, the First Circuit weighed these factors, instead of leaving the balancing for the district court on remand. See 490 F.3d at 68.

43. See 490 F.3d at 57 n.3 (denying APA review gives federal government control of state criminal investigations); *id.* at 63 (discussing FOIA application to case). The court stated that the law enforcement exemption would preclude the PRDOJ from obtaining the desired information pursuant to the FOIA. *Id.* at 63. In his concurring opinion, Chief Judge Boudin suggested Puerto Rico chose not to raise the FOIA argument precisely because of that exemption. See *id.* at 72 (Boudin, J., concurring).

44. See *id.* at 61 (citing *Exxon* for only time in opinion); see also *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 780 (9th Cir. 1994) (stating *Touhy* regulations do not create independent privilege).

45. See 490 F.3d at 61-62 (quoting *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 780 (9th Cir. 1994)) (reasoning *Touhy* regulations provide protocol for parties requesting information but do not create independent privilege).

46. See FED. R. CIV. P. 26(b)(1) (providing privileged information not discoverable).

47. 490 F.3d at 73 (Boudin, J., concurring) (stating sovereign immunity renders law enforcement privilege "icing on the cake"); see also Byse & Fiocca, *supra* note 4, at 336-43 (discussing sovereign immunity).

48. See *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 779 (9th Cir. 1994) (recognizing importance of conserving agency resources); see also *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 278 (4th Cir. 1999) (holding agency did not have to comply with subpoena).

49. See Kiesel, *supra* note 21, at 1675-80 (discussing *Jasper Wyman*). The first part of the *Jasper Wyman* test is similar to the holding in *Exxon* because the need/burden assessment mirrors that employed under Federal Rules of Civil Procedure 26(b)(2)(c)(ii). See *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 780

In *Puerto Rico v. United States*, the court addressed whether a state had a nonstatutory cause of action to obtain information from the FBI to help in its investigation of FBI activity. The First Circuit joined other circuit courts in recognizing a qualified law enforcement privilege and holding that a party must seek information from non-party government agencies pursuant to the APA. The court did not explicitly reject the *Exxon* holding regarding the application of the FRCP concerning discovery. In most cases, the result will be the same, regardless of which standard—the FRCP or the APA—the court applies. For this reason, notwithstanding the split in authority, the effect in most cases is minimal. For agencies not dealing with privileged information, however, the application of the APA standard could mean the difference between mandated disclosure and authorized withholding.

Alyssa B. Minsky