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UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN JOSE DIVISION

MIRSAD HAJRO, JAMES R. MAYOCK,  
 Plaintiffs,

v.

UNITED STATES CITIZENSHIP AND  
 IMMIGRATION SERVICES;  
 T. DIANE CEJKA, Director,  
 USCIS National Records Center;  
 ROSEMARY MELVILLE, USCIS District  
 Director of San Francisco;  
 MICHAEL CHERTOFF, Secretary,  
 Department of Homeland Security;  
 ERIC HOLDER, Attorney General  
 Department of Justice,

Defendants.

No. C 08-1350 PSG

**DEFENDANTS' RESPONSE TO  
 COURT'S APRIL 12, 2011 REQUEST  
 FOR SUPPLEMENTAL BRIEFING**

**Introduction**

Plaintiffs bring nine causes of action against Defendants seeking primarily relief under the Freedom of Information Act (FOIA) and the Administrative Procedure Act (APA). The parties' fully briefed cross-motions for summary judgment were heard on October 27, 2009, and remain pending. (Dkt. No. 62, Minute Entry). On December 6, 2010, the case was reassigned to this Court (Dkt. No. 68), and on April 12, 2011, this Court asked the parties for additional briefing regarding the implications on this case, if any, of *Dent v. Holder*, 627 F.3d 365 (9<sup>th</sup> Cir. 2010) and *Milner v. Dep't of the Navy*, 131 S. Ct. 1259 (2011). (Dkt. No. 73). Defendants herein

respond to the Court's request and contend that neither case is applicable to this litigation.

## Background

For context, Plaintiff James R. Mayock is an immigration attorney in San Francisco. Am Compl., ¶ 2. Plaintiff Mayock was the plaintiff in *Mayock v. INS*, 714 F. Supp 1558 (N.D. Cal. 1989), *rev'd and remanded sub nom. Mayock v. Nelson*, 938 F.2d 1006 (9th Cir. 1991). Am Compl., ¶ 17. As a result of the litigation in that case, Plaintiff Mayock entered into a Settlement Agreement with the former Immigration and Naturalization Service (INS). Am Compl., ¶ 18; Exh. A (the 1992 Settlement Agreement). Under the 1992 Settlement Agreement, there is a provision for "Expedited Processing for Demonstrated Exceptional Need or Urgency" of FOIA requests made to the former INS and "Procedures for Expedited Processing." Am Compl., ¶ 19.

Plaintiff Mirsad Hajro is a Legal Permanent Resident, native and citizen of Bosnia, who made an expedited FOIA request for a copy of his Alien File to US Citizenship and Immigration Services (USCIS) in November 2007. Am Compl ¶ 42. In March 2008, Plaintiff Hajro was provided a copy of his Alien File, with relevant exemptions under the Privacy Act and FOIA invoked. Am Compl. ¶ 51. Plaintiff Hajro asks for release of 78 pages withheld from his Alien File. Am. Compl ¶ 12. Notably, no documents were withheld because of FOIA Exemption 2, 5 U.S.C. § 552(b)(2). Plaintiff Hajro applied for and was denied naturalization to become a United States' citizen on two occasions based on a finding by USCIS that he lacks sufficient good moral character.<sup>1</sup> Plaintiff Hajro is not in removal proceedings.

## *Dent v. Holder*, 627 F.3d 365 (9<sup>th</sup> Cir. 2010)

This case was on petition for review from an order of removal issued by the Board of Immigration Appeals and the Ninth Circuit Court of Appeals held that it would take judicial notice of the existence of naturalization applications previously submitted by Dent and his alleged adoptive mother, even though the applications were not part of administrative record, since applications were official agency records contained in alien's Alien File. The Ninth Circuit

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<sup>1</sup>Hajro is seeking review of the denial of his naturalization applications under 8 U.S.C. § 1421(c) in a separate case pending before Magistrate Judge James. *See Hajro v. Barrett*, C 10-1772.



1 relied on 8 U.S.C. § 1229a and noted that Congress provided that to meet his burden of proof in  
2 removal proceedings, “the alien shall have access” to his entry document “and any other records  
3 and documents, not considered by the Attorney General to be confidential, pertaining to the  
4 alien’s admission or presence in the United States.” 8 U.S.C. § 1229a(c)(2)(B). This holding is  
5 inapplicable to this case at least because Plaintiff Hajro is not in removal proceedings, and so 8  
6 U.S.C. § 1229a does not apply here. Further, Plaintiff Hajro requested under the FOIA, and was  
7 given, his Alien File with certain exemptions. The statute relied upon in *Dent* also provides for  
8 disclosure with an exception for material ‘considered by the Attorney General to be confidential,’  
9 which should be interpreted consistently with and is at least as protective as the FOIA  
10 exemptions. *Dent* does not address in any form the processing of expedited FOIA requests,  
11 which is the gravamen of the Amended Complaint.

12 While naturalization applications provide a remote similarity between *Dent* and Plaintiff  
13 Hajro, this does not make *Dent* relevant here. As noted above, Plaintiff Hajro has brought a  
14 separate judicial action in which the denial of his naturalization applications are subject to *de*  
15 *novo* review such that the discovery of relevant agency documents is available.

16 ***Milner v. Dep’t of Navy*, 131 S.Ct. 1259 (2011)**

17 It is undisputed that the FOIA, 5 U.S.C. § 552, requires federal agencies to make Government  
18 records available to the public, subject to nine exemptions for specific categories of material.  
19 *Milner* concerns the scope of Exemption 2, which protects from disclosure material that is  
20 “related solely to the internal personnel rules and practices of an agency.” § 552(b)(2). Here, the  
21 federal agency, Department of the Navy (Navy or Government), invoked Exemption 2 to deny a  
22 FOIA request for data and maps used to help store explosives at a naval base in Washington  
23 State. The Supreme Court held that Exemption 2 does not stretch so far as to include these  
24 documents. 131 S. Ct at 1262. This case does not apply because as noted above, the agency did  
25 not withhold any documents from Plaintiffs based on Exemption 2.

26 **Conclusion**

27 While the courts in *Dent* and *Milner* clearly emphasize the importance of Government  
28 transparency in the respective contexts, their holdings do not apply in any way to this case.

1 Defendants' motion for summary judgment should be granted as a matter of law.

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4 Dated: April 27, 2011

Respectfully submitted,

5 MELINDA HAAG  
6 United States Attorney

7 /s/  
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9 Assistant United States Attorney  
10 Attorneys for Defendants  
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