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Washington Focus: CREW and OpenTheGovernment.org have collaborated on a report assessing the progress made by the Obama administration on increasing transparency under FOIA. The report, "Measuring Transparency Under the FOIA: The Real Story Behind the Numbers," found not only that the administration's progress was less than hoped for, but also that much of the government's data is flawed, making it impossible for outside parties to accurately assess the statistics reported by agencies in their annual reports. The report noted that results were mixed, with agencies generally processing more requests more quickly, but relying on exemptions more often. The report underlined the potential problems with flaws in the data. "Quite obviously, if the data agencies are reporting is flawed, or if the data being reported is not meaningful, neither Congress nor the public can accurately monitor the true status of agency delays – a central component of agency transparency. Flaws in FOIA.gov only compound this problem, and leave us with no tools to pierce the administration's rhetoric and determine whether it has made good on its promise to turn the tide of secrecy embraced by the Bush administration." The report is available at: www.citizensforethics.org and www.openthegovernment.org.

Determination to Comply with Request Triggers Obligation to Appeal

Judge Colleen Kollar-Kotelly has ruled that an agency, in making a determination on a FOIA request, need only indicate its intention to comply with the request and provide an adequate description of how it intends to do so to trigger a requester's obligation to exhaust administrative remedies by filing an administrative appeal. In so doing, the ruling suggests that agencies may be able to tailor their routine acknowledgement letters in such a way as to provide enough of an explanation of how a search and review would be conducted as to constitute a determination for purposes of the statute.

The case involved a request by CREW for records from the Federal Election Commission related to correspondence pertaining to agency business between three commissioners and any outside entities. The FEC acknowledged receipt of the request by email the next dat and granted CREW a fee waiver. During the next ten days, the parties agreed to exclude certain records from the initial search and to provide

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documents on a rolling basis. CREW sent a letter clarifying the scope of its request a month after its initial request. About two months after the initial request was submitted, the FEC informed CREW that it had received the first set of potentially responsive documents from its searches, was still performing more searches, and was reviewing thousands of potentially relevant documents. CREW claimed the agency had said it could release the first batch of responsive documents within two weeks, and filed suit when the agency failed to do so. The FEC responded with the first batch of records about three weeks later, and completed its response ten days after that by releasing two more batches of records. At that time, the FEC provided an explanation of its exemption claims and told CREW that it could file an appeal.

The FEC contended that CREW's complaint was moot and, alternatively, that it had failed to exhaust administrative remedies. On the matter of mootness, the FEC argued that "its production of *any* documents in response to the request moot's CREW's complaint, which sought to compel *some* response to CREW's request." Indicating that the agency's argument "has some intellectual appeal," Kollar-Kotelly noted that "defendant implicitly argues that a claim under the [timeliness] section would not have been ripe at the time Plaintiff filed suit because the agency had not yet produced or withheld documents such that the Court could evaluate the adequacy of the agency's response. It does not appear that courts inside or outside of this Circuit take such a formalistic approach to complaints filed pursuant to the FOIA." She pointed out that "the FEC is correct that to the extent that Plaintiff's Complaint challenged the timeliness of [the records'] production, it is now moot. However, the Court is not willing to dismiss the Complaint in its entirety because the Complaint does assert a substantive challenge to the agency's response [under the section allowing challenges to exemption claims and the adequacy of the search]."

Kollar-Kotelly then turned to the exhaustion claim. She cited the constructive exhaustion provision, § 552(a)(6)(C)(i), that provides that a requester constructively exhausts administrative remedies "if the agency fails to comply with the applicable time provisions of this paragraph." She next cited §552(a)(6)(A)(i), which requires an agency to determine within 20 working days "whether to comply with such request" and to provide "the reasons therefor" and "the right of such person to appeal to the head of the agency any adverse determination." CREW argued that "a response from an agency is not a 'determination' – for purposes of complying with § 552(a)(6)(A)(i) or triggering the renewed duty to exhaust administrative remedies—unless it is the final substantive response, including a notice of the requesting party's right to appeal." CREW pointed to the Justice Department's Office of Information Policy's FOIA Guide that stated that "an agency response that merely acknowledges receipt of a request does not constitute a 'determination' under the FOIA in that it neither denies records nor grants the right to appeal the agency's determination."

But Kollar-Kotelly noted that "the Guide fails to elaborate on what *would* amount to a 'determination' under the FOIA." She explained that "the plain text of the actual statute indicates three things are required in the notice to the requesting party: (1) whether the agency intends to comply with the request; (2) the reasons for the agency's compliance or non-compliance; and (3) notice of the right to appeal *if* the determination was adverse." She pointed out that a provision in § 552(a)(6)(C)(i) required that "'[u]pon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making a request,' would guard against any abuse by responding agencies."

Kollar-Kotelly indicated that "clearly, the FOIA does not require the responding agency to respond and produce responsive documents within twenty days in order to require exhaustion of administrative remedies. Rather, in the event the agency intends to produce documents in response to the request, the agency need only (1) notify the requesting party within twenty days that the agency intends to comply; and (2) produce the documents "promptly." She observed that "in this case, the FEC did more than acknowledge receipt of Plaintiff's request before it filed suit. CREW concedes that within *two* days of transmitting the request to the FEC, the FEC agreed to produce responsive documents on a rolling basis. The FEC was also

reasonably prompt in producing documents to CREW: the parties did not finalize the scope of CREW's request until [nearly a month after it was originally submitted]; the FEC performed the relevant searches and began reviewing potentially responsive documents within four weeks; and the FEC produced the responsive documents six weeks later. Ten weeks to search, review, and produce documents in response to relatively broad requests in this context is not unreasonably long as to require a finding of constructive exhaustion."

Kollar-Kotelly relied primarily on *Oglesby v. Dept of Army*, 920 F.2d 57 (D.C. Cir. 1990) for support. She noted that the *Oglesby* court held an agency's response "is sufficient for purposes of requiring an administrative appeal if it includes: the agency's determination of whether or not to comply with the request; the reasons for its decision; and notice of the right of the requester to appeal to the head of the agency if the initial agency decision is adverse." But she indicated that several other recent decisions, particularly *Love v. FBI*, 660 F. Supp. 2d 56 (D.D.C. 2009), bolstered her analysis as well. In *Love*, Judge Reggie Walton ruled that Love failed to exhaust his administrative remedies because he had not appealed the DEA's notification that it was processing his request. CREW argued that a case the FEC had originally cited—*Petit-Frere v. U.S. Attorney's Office for the Southern District of Florida*, 664 F. Supp. 2d 68 (D.D.C. 2009), in which Judge Richard Roberts found the plaintiff had failed to appeal a notification from EOUSA that processing of his request could take nine months—was wrong because it contradicted both *Oglesby* and *Spannaus v. Dept of Justice*, 824 F.2d 52 (D.C. Cir. 1987), in which the D.C. Circuit held that a letter acknowledging receipt of a request and indicating the request would be forwarded to FBI headquarters was not a "determination." Kollar-Kotelly agreed that it was hard to square *Petit-Frere* with *Spannaus*, but noted that the *Oglesby* analogy was a closer call. She pointed out that in *Oglesby*, the D.C. Circuit indicated that "it was still an open question as to whether a response indicating the agency was 'processing' a claim was a sufficient determination to satisfy the time limits provided in FOIA." She explained that "ultimately, the adequacy of a response indicating a request is being 'processed' is irrelevant to this case, as the FEC indicated it would in fact produce records in response to CREW's request. Thus, the FEC provided the response that the *Oglesby* court noted is a sufficient 'determination' under the FOIA to trigger the administrative exhaustion requirement. . ."

CREW also argued that Congress intended to allow direct access to courts in the face of agency delay and that to require exhaustion here "would deprive this judicially sanctioned approach of any utility." But Kollar-Kotelly disagreed. She noted that "this is incorrect. Under the Court's interpretation of § 552(a)(6)(A), requesting parties still have immediate access to the courts in the event that the agency fails to (1) respond at all; or (2) merely indicates it is 'processing' the request, but does not indicate whether the agency will comply." She added that "the Court is not unsympathetic to the Plaintiff's concern that this interpretation could theoretically lead to the situation where, as in *Petit-Frere*, the agency failed to produce documents for nearly a year, yet the requesting party was still unable to seek judicial intervention. The Court notes that adherence to the language of the third sentence of § 552(a)(6)(C)(i), which requires 'prompt' production of responsive documents if an agency intends to comply with the request, will guard against any abuse by responding agencies."

Kollar-Kotelly pointed out that "exhaustion also pays an important role in ensuring consistency in responding to FOIA requests. In this case, she observed, exhaustion would further the goals of the statute. She explained that "the FEC has not had the opportunity to address any of the objections CREW lodges to the scope of the production, adequacy of the searches, or claimed exemptions and withheld documents. Providing the FEC the opportunity to review CREW's objections through the administrative appeals process would among other things allow the agency time to correct any errors alleged by CREW and create a full record for the Court to review should CREW seek additional review of the FEC's decision. Requiring exhaustion in this case will only further the ends of justice." (*Citizens for Responsibility and Ethics in Washington v. Federal*

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Election Commission, Civil Action No. 11-951 (CKK), U.S. District Court for the District of Columbia, Dec. 30, 2011)

Views from the States…

The following is a summary of recent developments in state open government litigation and information policy.

Arizona

A court of appeals has ruled that the City of Phoenix must disclose records pertaining to the police security detail assigned to Mayor Phil Gordon, but may redact security-related information. Judicial Watch requested the records, which consisted of hand-written annotations on the Mayor's daily public calendar, and unscheduled worksheets, which provided information about police staffing during non-scheduled events—in significant part, the Mayor's personal business, such as eating lunch or shopping. The worksheets occasionally identified individuals whom the Mayor was meeting during unscheduled events. The City disclosed the annotated calendars, but refused to release the worksheets, claiming the information could undermine the Mayor's safety, that the information was private and confidential, and that it was protected by the deliberative process privilege. The trial court found the public interest in disclosure outweighed the Mayor's privacy interest, but not the security concerns. The trial court concluded that redaction of the worksheets would provide no more information than the annotated calendars and found that redaction was neither feasible nor necessary. But the appeals court found that "redaction of security-related and confidential information from the Worksheets would result in a document containing information that is different than any reflected in the Annotated Calendar. . .[T]he purpose of the Worksheets was to account for the security detail's time and activities *outside* the Mayor's publicly announced events. Thus, the Worksheets were not designed to duplicate the Annotated Calendar, and they do not." The City argued that non-security-related information constituted only a small portion of the worksheets. The appeals court responded that "but the quantity of information subject to inspection, while impacting the *feasibility* of inspection, is irrelevant to resolving whether inspection is *necessary* in light of other produced documents. Because the Worksheets contain information subject to inspection. . .the superior court erred by ruling that production of redacted Worksheets was unnecessary." The court also rejected the City's claim that redaction of the worksheets was not feasible. The court noted that "the City has not met its burden to demonstrate that redaction of security-related and confidential information from the Worksheets would be so onerous that the City's interest outweighs the public's interest in inspection." Addressing the City's claim that redaction was impossible within the ten-day response time of the statute, the court observed that "the City's inability to meet this timetable, however, is insufficient, standing alone, to excuse compliance with the request." Finally, the appeals court found the City had not met its burden to show how disclosure would harm the Mayor's privacy interest. The court observed that "as the superior court correctly noted, public officials like the Mayor do not sacrifice all privacy rights in order to take and maintain office. But if a government entity declines an inspection request and judicial review is sought, that entity is not excused from specifically demonstrating how release of particular information would adversely affect an official's privacy interest." (*Judicial Watch, Inc. v. City of Phoenix*, No. 1 CA-CV 11-0006, Arizona Court of Appeals, Division I, Department A, Dec. 22, 2011)

California

A court of appeals has ruled that the California Department of Corrections and Rehabilitation must disclose the names of drug manufacturers from which it obtained sodium thiopental, a drug used as part of the three-drug lethal injection protocol, because the agency failed to justify its claims that disclosure would harm privacy and security interests. The court also found that the Public Records Act allowed the agency to decline to release non-responsive information, but that the agency had again failed to justify why such information was non-responsive. After the State's previous drug protocol was found to violate the Eighth Amendment's prohibition against cruel and unusual punishment, the State established the new three-drug protocol. A condemned inmate challenged the new protocol and a federal court gave him the option of using the three-drug protocol or just sodium thiopental. The federal Ninth Circuit Court of Appeals overturned the federal judge's decision to give the inmate a choice and found that the State apparently did not have a sufficient supply of sodium thiopental to implement the one-drug option. The CDCR announced, however, that it had found a new supply of sodium thiopental, and the ACLU of Northern California filed a Public Records Act request for information about where the department had purchased the drug, how much it had paid for it, and all communications concerning the department's search to locate a source for the drug. The agency indicated that it would withhold many responsive documents because they were privileged. When the ACLU filed suit, the trial court found the department could withhold the names of pharmaceutical companies and their employees, the names of department employees who were not decision-makers, and the names of the execution team. The trial court held an *in camera* review to determine what documents could be withheld as non-responsive and concluded that some information was legitimately non-responsive. The ACLU appealed the ruling only as to the identities of the pharmaceutical companies and the issue of what constituted non-responsive records. The CDCR had argued that the intensity of the debate over the death penalty supported a finding that disclosure could harm individuals involved in supplying or using the drug, an argument the trial court had accepted. But the appeals court noted that "the passionate nature of the death penalty debate, which *heightens* public interest in the information at issue in this case, justifies nondisclosure *only* to the extent it may show that disclosure of that information would pose a potential security threat of some sort to any of the pharmaceutical companies or other entities from which CDCR sought to obtain sodium thiopental." The court added that "accepting, as we do, that a court may consider *potential* threats to security when weighing the public interest in withholding information against that supporting disclosure, the question is the nature of evidence of such a threat that may be used to find a public interest in withholding information." The court pointed out that "the threat to security that justifies non-disclosure cannot be conjectural or speculative." Rejecting the agency's claims, the court indicated that "as CDCR offered no evidence of any potential threat to the security of any pharmaceutical company or an employee of such company, or potential invasion of privacy, the record provides no basis upon which to exempt the information at issue. . ." The court then found that language in the PRA that limited an agency's disclosure obligation to records and information "that are responsive to the request or to the purpose of the request" provided a statutory basis for an agency to withhold non-responsive records. But the court noted that "at no time has CDCR provided petitioner *any* explanation of its determination that the redacted information at issue is outside the scope of petitioner's PRA request." The appeals court criticized the trial court for conducting an *in camera* review to determine what records were non-responsive, indicating that the burden was on the agency to prove by affidavit that the records were truly non-responsive. The court sent the case back to the trial court for further proceedings. (*American Civil Liberties Union of Northern California v. Superior Court of San Francisco County; California Department of Corrections and Rehabilitation, Real Party in Interest*, No. A131111, California Court of Appeal, First District, Division 2, Dec. 20, 2011)

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District of Columbia

The court of appeals has ruled that the trial court judge erred when she refused to consider new evidence of the burden that responding to requests from the Fraternal Order of Police for police trial board records and EEO investigation files would place on the police department because, since the case was already on appeal, the judge believed she did not have jurisdiction to make any changes to her order that might affect the case while on appeal. While the appeals court agreed the judge could not change the appealed order, it observed that the judge should have considered the new evidence and indicated how she would have ruled on remand. The trial court originally told the police to make full production of the records with redactions to protect privacy interests. But once the police began to consider the difficulties entailed by the redaction of personal information from thousands of pages, the District went back to the trial court judge asking her to reconsider. Although she indicated she was inclined to offer some kind of relief, she felt she could not modify her order while on appeal. However, the appeals court pointed out that it would probably remand the case back to the trial court in light of the burden issue and it was perfectly appropriate for the trial court judge to indicate how she would rule on the issue if it were remanded. In her concurrence, Associate Judge Vanessa Ruiz suggested how the trial court judge should approach the FOIA issues. She noted that the police had failed to justify their exemption claims before the trial court, resulting in a ruling against them. But once the police provided an *in camera* affidavit explaining the burden issue, the trial court should have considered it. Ruiz pointed out that in the *in camera* affidavit, the police changed their "previous assessment and [asserted] that proper redaction could *not* 'be done' within [the police department]. It is incumbent upon the trial court to take that information into account in deciding whether to grant [relief]." Ruiz acknowledged that *in camera* review was normally frowned upon in FOIA litigation, but explained that "in this case *in camera* inspection by the trial court is the most efficient way—both from the point of view of allocation of responsibility and timeliness—to determine the validity of the District's claim that the exempt information in the trial board files could not reasonably be segregated so that intelligible documents could be disclosed." She added that "in this case there has not been a determination by the trial judge that the redactions required to ensure privacy of confidential and personal information would render the requested documents unintelligible. That is a task for the trial court on remand. Without such a determination it would not be appropriate, as the District has urged in the trial court and on appeal, to permit the [police department] to withhold entire documents based solely on the burden of redacting documents for production." (*District of Columbia v. Fraternal Order of Police Metropolitan Police Labor Committee*, No. 09-CV-255, et al., District of Columbia Court of Appeals, Dec. 22, 2011)

Nevada

The full supreme court has ruled that agencies are required to provide a plaintiff an index identifying the records withheld and the statutory basis for withholding them. The court also concluded that the Governor's Office had failed to provide an adequate explanation for withholding a series of emails from former Gov. Jim Gibbons to specific individuals from the Reno *Gazette-Journal*. Although the newspaper urged the court to adopt the *Vaughn* index from federal FOIA litigation, the court noted that "while we agree that the RGJ should have been provided with a log under the circumstances of this case, we disagree that this log was required to be in the specific form of a *Vaughn* index or that a log is required each time records are withheld." The court added that "if we were to require a log—in the form of a *Vaughn* index or otherwise—each time a lawsuit is brought after the denial of an [Nevada Public Records Act] request, we would essentially be rewriting the [Nevada Public Records Act] because it imposes no such unqualified requirement." Nevertheless, the court decided that "after the commencement of an NPRA lawsuit, the requesting party generally is entitled to a log unless, for example, the state entity withholding the records demonstrates that the requesting party has sufficient information to meaningfully contest the claim of confidentiality without a log. We decline to spell out an exhaustive list of what such a log must contain or the precise form that this log must take because, depending on the circumstances of each case, what constitutes an

adequate log will vary. For purposes of this opinion, it is sufficient to simply explain that in most cases, in order to preserve a fair adversarial environment, this log should contain, at a minimum, a general factual description of each record withheld and a specific explanation for nondisclosure." The court then noted that "we decline to adopt the *Vaughn* index as a pre-litigation requirement under the NPRA." But the court found the Governor's Office had not provided an adequate explanation for withholding in this case. The court observed that "we cannot conclude that merely pinning a string of citations to a boilerplate declaration of confidentiality satisfies the State's pre-litigation obligation under the [statute]." (*Reno Newspapers, Inc. v. Jim Gibbons*, No. 53360, Nevada Supreme Court, Dec. 15, 2011)

New Jersey

A court of appeals has ruled that notes taken by staff of the Evesham Township elementary school on the advice of the school board's attorney documenting their interaction with the father of two children who had been the victims of bullying at school are not protected by the attorney-client privilege, but are covered by the attorney work-product privilege. The court noted that one element of the attorney-client privilege was that the records needed to constitute communications between the client and the attorney. The court pointed that here, "the record before us does not establish that the notes were ever communications from school personnel to the Board's attorneys until plaintiff made his January 26, 2010 request under [the Open Public Records Act]. Documents or records kept by a client do not gain protection under the attorney-client privilege simply because the attorney advised that the client keep them and they were eventually sent to the attorney." The court added that "the Board did not present evidence that school personnel did anything with the notes before plaintiff's January 2010 request other than communicate them within the school district and maintain them in school files. . .The only communication between attorney and client pertinent to the notes was the original advice from [the school board's attorney] to school personnel to maintain the notes. That communication was voluntarily disclosed by the Board as part of its initial submissions in response to plaintiff's OPRA complaint. We conclude the attorney-client privilege does not apply to the notes because they were not 'communications' with the Board's attorneys at the time plaintiff requested access to school records." But the court concluded they were nevertheless protected as attorney work-product. The court pointed out that "to help refresh memories in the event litigation occurred, [the school board attorney] instructed his client to maintain detailed notes of contacts with plaintiff and his children. The dominant purpose of the notes was anticipated litigation. The notes are attorney work product." The court also found that a referral pertaining to another student who hit the plaintiff's son was an educational record of both students. "Under FERPA, the Board was not permitted to disclose information about the other student to the plaintiff, but it was required to provide access to the parts of the records that pertain to plaintiff's own son. The Board fulfilled that obligation by redacting the name of the other student and providing the redacted disciplinary referral form to plaintiff." (*K.L. v. Evesham Township Board of Education*, No. A-1771-10T3, New Jersey Superior Court, Appellate Division, Dec. 12, 2011)

The Federal Courts…

The D.C. Circuit has ruled that the CIA did not officially acknowledge the existence of information about Sveinn B. Valfells, an Icelandic textile merchant who spent time in the U.S. during the 1940s and 1950s and allegedly had ties to the Icelandic Communist Party, when it asked the FBI to withhold information that had originated with the CIA in response to Thomas Moore's request to the FBI for records on Valfells. The FBI released to Moore a redacted report that contained the information that "T-1, an agency of the U.S. Government which conducts intelligence investigations," furnished the FBI with information that Valfells had

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ties to the ICP. Although the FBI report did not identify the CIA as the source, another section of the report identified the CIA as a source of information in the report. Moore argued that implicit mention of the agency in the FBI report waived the CIA's right to issue a *Glomar* response neither confirming nor denying the existence of records on Valfells. But the D.C. Circuit rejected Moore's claim. The court noted that in its earlier decision in *Wolf v. CIA*, 473 F.3d 370 (D.C. Cir. 2007), Wolf had shown that the agency had identified the existence of records on a source through public congressional testimony, thus waiving a *Glomar* response. However, in *Wolf*, the court only provided Wolf access to the exact information contained in the congressional testimony and nothing more. But here, the CIA's affidavit "does not identify specific records or dispatches matching Moore's FOIA request. Indeed, because the CIA-originated information was redacted before the FBI released its Report to him, Moore cannot show that the redacted information even relates to Valfells. All Moore can establish is that some unspecified 'CIA-originated information' was redacted from the Report. Whereas Wolf identified specific records that had been officially acknowledged by [agency] testimony quoting therefrom, Moore can only speculate as to what (if any) records the CIA might have about Valfells. In the highly sensitive context involving issues of national security, however, '[a]n agency's official acknowledgement. . .cannot be based on. . .speculation no matter how widespread.'" (*Thomas E. Moore, III v. Central Intelligence Agency*,, No. 10-5248, U.S. Court of Appeals for the District of Columbia Circuit, Dec. 20, 2011)

The Tenth Circuit has upheld the Bureau of Prisons' use of **Exemption 7(E) (investigative methods and techniques)** and **Exemption 7(F) (harm to safety of an individual)** to withhold various records from Mark Jordan, a prisoner at the Supermax facility in Colorado who was serving time for armed robbery and the later murder of an inmate. In accepting the BOP claims, the court also decided to adopt the "per se" rule for Exemption 7 coverage of law enforcement agencies, already used by the First, Second, Sixth and Eighth Circuits, instead of the "rational nexus" test used by the Third, Ninth, and D.C. Circuits. BOP withheld 495 pages of Jordan's mail that prison officials had copied for investigative purposes under 7(E) and the staff roster under 7(F). Jordan urged the court to limit Exemption 7 coverage to only those law enforcement functions that could lead to sanctions, but the court found that test was both far too limiting and not supported by case law. Instead, the court examined the per se rule that holds that documents compiled by law enforcement agencies are inherently compiled for law enforcement purposes sufficient to meet Exemption 7's threshold requirement. By contrast, the "rational nexus" test depends on whether law enforcement is the primary function of an agency and requires an agency to establish a rational nexus between the records and its law enforcement authority. After concluding that BOP was a law enforcement agency, the court pointed out that "all records and information it compiles are in furtherance of its law enforcement function and therefore may be withheld from disclosure under Exemption 7 provided that the agency carries its burden of establishing that release would cause one or more of the harms enumerated in § 552(b)(7)(A) through (b)(7)(F)." The court also approved of BOP substituting 7(E) as the basis for protecting a document originally withheld under the circumvention prong of **Exemption 2 (internal practices and procedures)**. When the Supreme Court's ruling in *Milner v. Dept of Navy* eliminated the use of the circumvention prong in Exemption 2, the agency recognized that it could no longer use the exemption to protect the disputed record. Instead, it switched to 7(E) and Jordan complained that the agency had not cited 7(E) to protect this document in the trial court. But the panel instead found the substitution was appropriate. The court noted that "Exemption 7(E) is essentially the same as former High 2, with the added requirement that material be 'compiled for law enforcement purposes.' As defendants argued for both High 2 and the 'per se rule' in the district court, they effectively presented all elements of Exemption 7(E). Mr. Jordan had ample opportunity in the district court and again on appeal to address the circumvention aspect of High 2 and the 'law enforcement purposes' requirement of Exemption 7. Therefore, we do not consider that defendants waived or forfeited Exemption 7(E)." (*Mark Jordan v. United States Department of Justice*, No. 10-1469, U.S. Court of Appeals for the Tenth Circuit, Dec. 23, 2011)

Judge Paul Friedman has granted CREW further discovery in a case the organization brought against the Department of Veterans Affairs for emails pertaining to a March 2008 email sent by Dr. Norma Perez, who was then a psychologist and coordinator of the clinical post traumatic stress disorder team at the VA medical center in Temple, Texas, that seemed to suggest that diagnoses of PTSD should be curtailed because of the cost. After CREW filed suit, a declaration filed by VA FOIA Service Director John Livornese explained that the agency could not search for emails prior to December 2008 because back-up tapes were recycled and overwritten. CREW indicated it was concerned that records had been destroyed and moved to depose Livornese. The agency resisted the motion for discovery and said it would submit a further affidavit by Livornese and an IT specialist to explain the limitations of the electronic search. Instead, Friedman ordered Livornese's deposition, which took place on July 23, 2010. Although Livornese and an IT specialist signed further affidavits in March, Livornese's affidavit was not provided to CREW until his deposition in July and the IT specialist's affidavit was not provided to CREW until the agency filed a renewed motion for summary judgment in August 2010. The IT specialist's affidavit contradicted what Livornese had said twice before under oath—that Dec. 9, 2008 was the oldest date of available emails—indicating instead that the Dec. 9 tape was the oldest monthly recovery tape available at the time of the electronic search and might include emails for earlier dates. In further affidavits, the IT specialist admitted the agency had no backup tapes for 2008 until the December tape. CREW argued the agency had improperly destroyed records and asked Friedman to order the agency to obey its obligations to retain responsive materials, to order the deposition of the IT specialist as well as Dr. Perez and others who had received her email, and to order the agency to reconstruct the records. Friedman noted that "the Court is not yet ready to conclude that the myriad declarations, the way they evolved and changed, and the timing of their disclosure means that the VA improperly destroyed responsive records. Nor is the Court ready to order at this time the VA to attempt to reconstruct any of its records, since such an order must be based on a finding of improper document destruction." But he concluded that the agency, for purposes of litigation strategy, had been less than forthcoming. He noted that "these litigation tactics—which at the very least contradict the fundamental purpose of the FOIA—rendered Mr. Livornese's deposition at best incomplete, and perhaps useless. The Court therefore agrees with CREW that it should be permitted to take additional discovery for the purpose of determining whether the explanation for the current state of affairs is document destruction, incompetence, or something in between." (*Citizens for Responsibility and Ethics in Washington v. U.S. Department of Veterans Affairs*, Civil Action No. 08-1481 (PLF), U.S. District Court for the District of Columbia, Dec. 15, 2011)

Judge Richard Leon has ruled that Jefferson Morley is not entitled to **attorney's fees** from the CIA for forcing the agency to process further materials it had sent to the National Archives as part of its Kennedy Assassination records. The agency originally told Morley to go to NARA, but ultimately released a handful of documents. On appeal to the D.C. Circuit, the appellate court ruled that the CIA should have searched its operational files and instructed it to search its records that had been transferred to NARA. As a result, the agency disclosed an additional 113 records from the NARA materials, as well as another 293 records from its own files. Morley then petitioned for attorney's fees. Morley argued that his suit was in the public interest because it forced disclosure of more documents about the Kennedy assassination. But Leon noted that "while the Kennedy assassination is surely a matter of public interest, this litigation has yielded little, if any public *benefit*—certainly an insufficient amount to support an award of attorney's fees." Noting that Morley contended that the public benefit came primarily from the JFK Assassination records that were released, Leon pointed out that "this litigation did not, however, lead to the publication of the Kennedy-assassination documents. Instead, the Kennedy-assassination documents obtained by Morley through this FOIA litigation are *identical* to the documents which were previously released under the President John F. Kennedy Assassination Records Act of 1992. As such, Morley cannot claim that any of this information 'add[s] to the

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fund of information that citizens may use in making vital political choices.'" Morley claimed success by getting the documents under FOIA rather than paying what he considered exorbitant copying charges assessed by NARA. But Leon explained that "Morley's using FOIA to sidestep these copying costs and to compel the CIA to search these records did not exactly further the public benefit." Morley also argued that the litigation had made clear that the CIA still had Kennedy assassination-related records that it had not reviewed and released under the JFK Records Act. However, Leon observed that "those documents were properly withheld under FOIA and therefore his argument must fail." Leon also found because Morley received minimal compensation and benefitted from receiving the NARA documents at a lower cost, "these two factors indicate that Morley has a sufficient private interest in pursuing these records without attorney's fees." Finally, Leon found the agency had relied on reasonable legal interpretations and noted that "there is no indication in the record that the CIA has engaged in any recalcitrant or obdurate behavior." (*Jefferson Morley v. United States Central Intelligence Agency*, Civil Action No. 03-2545 (RJL), U.S. District Court for the District of Columbia, Dec. 14, 2011)

A federal court in California has ruled that the Interior Department improperly denied a **fee waiver** to the Friends of Oceano Dunes, a non-profit organization devoted to protecting and monitoring developments at the Oceano Dunes State Vehicular Recreation Area. The agency denied the organization's fee waiver request because "we have no information to agree or disagree that disclosure would be primarily in your commercial interest." But while Judge Edward Chen indicated that he disagreed with FOOD's claim that its non-profit status alone qualified it for a fee waiver, he noted that "the commercial interest and contribution to public understanding prongs—through formally distinct inquiries—are somewhat intertwined." He pointed out that "FOOD sought disclosure of information related to a proposed rule on critical habitat designation for the plover and intended to analyze and distribute the results of its analysis to a reasonably broad segment of the interested public." The agency questioned FOOD's ability to disseminate the information, but Chen observed that "FOOD intends to disseminate via its website and emails, which is comparable to [dissemination techniques that were found adequate by the D.C. and Tenth Circuits in other cases]." The agency also found the organization had not adequately explained its ability to understand the information. Chen pointed out that the organization had hired an experienced attorney to help analyze the materials and that members of its board had assisted State Parks with its successful plover conservation program at Oceano Dunes. Chen indicated that "while arguably this claim by FOOD is lacking in some specificity, there are facts which indicate the claim is not without basis—in particular, the fact that, previously, FOOD participated in the 2005 rule-making by submitting comments to the agency to which the agency provided a response. The above circumstances are sufficiently comparable to those in which courts have found that a requester is in a position to analyze the information requested." (*Friends of Oceano Dunes, Inc. v. Ken Salazar*, Civil Action No. C-11-1476 EMC, U.S. District Court for the Northern District of California, Dec. 22, 2011)

Judge John Bates has ruled that three individuals who in 2006 either were denied job interviews for the Attorney General's Honors Program or were assigned to be interviewed by a DOJ component not of their choosing have not shown that political appointees who served on that year's screening committee improperly compiled information from Internet searches and used that information in violation of subsection (e)(7) of the **Privacy Act**, which prohibits the collection of information about the exercise of an individual's First Amendment rights. As part of allegations that hiring at DOJ was frequently based on political affiliation, an anonymous letter to the Chairmen of the House and Senate Judiciary Committees accused the screening committee of rejecting a number of applicants because of their Democratic or liberal affiliations. In June 2008, the Justice Department's Office of Inspector General and Office of Professional Responsibility issued a report summarizing their findings and leading to a suit filed by some of the rejected applicants. After Bates dismissed a number of constitutional and Privacy Act claims, the three remaining plaintiffs continued with

claims of violations of the First Amendment activities prohibition and subsection (e)(5), which requires agencies to maintain fair and accurate records. But Bates first noted that in order to succeed, the plaintiffs had to show that DOJ created or compiled records that had an adverse effect on the plaintiffs. He pointed out that "the Department of Justice's use of political or ideological affiliation in civil service hiring does not, in and of itself, violate the Privacy Act. This conduct is certainly inappropriate, and could conceivably be the basis of some other claim. But as far as the Privacy Act is concerned, in order to prevail plaintiffs must show that an inappropriately maintained record caused their injury." He observed that "the Court has been presented with evidence regarding [screening committee member Esther McDonald's] Internet search history, but not with any direct evidence as to which of her searches resulted in the creation of annotations or print-outs. The actual materials used by the Screening Committee were apparently destroyed shortly after the Committee's decisions were made. Plaintiffs argue that this destruction violated the Federal Records Act and therefore constituted spoliation, entitling them to an inference that Ms. McDonald did, in fact, create inappropriate records about them. The Court is unconvinced." Explaining that both the parties had put forth credible, but contrary, reasons for why the plaintiffs were not selected, Bates then turned to an examination of whether the destruction of the deliberative materials used by the screening committee constituted a violation of the Federal Records Act. He pointed out that "in this case, however, the Justice Department, in accordance with the FRA, made a records disposition decision with respect to Honors Program materials; the materials sought by plaintiffs were simply outside the bounds of the applicable records dispositions schedule." The plaintiffs argued that the FRA and its implementing regulations supported their position that the records had been improperly destroyed. But Bates found that "the FRA requires agency heads to make decisions about what records to preserve, but does not itself directly classify specific materials as records requiring preservation." He added that "one can argue whether or not DOJ made the right judgment regarding whether preserving informal deliberation records would contribute to a 'proper understanding' of how Honors Program decisions were made. But it is nonetheless true that this regulation does not directly apply to the materials in question." He explained that "where, as in the present case, an agency has made a policy decision about the disposition of certain materials under the FRA, action taken in compliance with that policy does not warrant a spoliation inference." He added that "the Court cannot, after the fact, infer spoliation from the destruction of documents in accordance with Department policy." Bates then concluded that, without the spoliation inference, the plaintiffs could not make their case and granted the agency's summary judgment motion. (*Sean M. Gerlich, et al. v. United States Department of Justice*, Civil Action No. 08-1134 (JDB), U.S. District Court for the District of Columbia, Dec. 15, 2011)

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The fifth edition of "Litigation Under the Federal Open Government Laws, 2010," published by EPIC through a partnership with Access Reports and the James Madison Project, is now available. The book, edited by Harry Hammitt, Ginger McCall, Marc Rotenberg, John Verdi and Mark Zaid is a comprehensive discussion of the FOIA and includes chapters on the Privacy Act, Sunshine Act, and Federal Advisory Committee Act as well. With a foreword by Sen. Patrick Leahy, the 2010 edition includes the Obama and Holder FOIA memoranda, the Open Government Directive, and the new Executive Order on Classification. Cost of the book is $75; postage is $7 within the U.S. The book can be purchased from Access Reports.

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