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Editor/Publisher:
Harry A. Hammitt
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1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

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Washington Focus: A coalition of open government groups is continuing its opposition to a provision in S. 2105, the Cybersecurity Act of 2012. In a letter to Senators, the coalition points out that the current bill "includes an exceedingly broad definition of 'critical infrastructure information,' encapsulating information that is crucial for the public to understand public health and safety risks and information already protected under one of the FOIA's other exemptions. Furthermore, the proposed exemption conflicts with Congress' recent effort in the National Defense Authorization Act of 2012 to limit the scope of CII information that can be withheld by the Department of Defense." Shortly after circulating its letter, Senate staff informed the coalition that consideration of the bill was being postponed until later in the session.

Photos of bin Laden Raid Properly Classified by CIA

In a decision that has undertones of the kind of hot potato issue that was dumped in his lap, Judge James Boasberg has ruled that the CIA properly classified all photos and video taken during and after the raid which resulted in the death of Osama bin Laden. He also ruled that although the Defense Department found no responsive records, it conducted an adequate search. The case involved a May 2, 2011 request from Judicial Watch to Defense for any video taken during or after the bin Laden raid. Judicial Watch followed up with a May 4, 2011 request to the CIA for the same records. After Defense indicated it could not process the request within 20 days, Judicial Watch filed suit against the agency. It amended its complaint to include the CIA after that agency also indicated it could not process the request within the statutory time limit. Defense searched three offices—the Office of the Joint Chiefs of Staff, the U.S. Special Operations Command, and the Department of the Navy. Its search located no responsive records. However, the CIA found 52 responsive records, but withheld them all under Exemption 1 (national security) and Exemption 3 (other statutes). Judicial Watch argued the Defense Department's search was inadequate and that the CIA had committed both procedural and substantive errors in invoking Exemption 1. Boasberg, however, rejected both arguments.

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Boasberg addressed DOD's search first. The agency's affidavit explained that a single officer at OCJCS maintained all documents on the bin Laden operation and he searched all hard-copy records and the only computer used to store electronic records. The email files of Chief of the Joint Staff Adm. Mike Mullen were also searched. Special Command searched all hard copy and electronic records, including emails from May 1 – through May 31. Finally, because bin Laden's body was buried at sea from the Navy aircraft carrier *USS Carl Vinson*, the ship's records were also searched. That search confirmed that no *USS Carl Vinson* personnel took photographs or videos of the burial and that there were no email discussions on the ship's computer system.

Judicial Watch challenged the search on three grounds. First, it contended DOD had failed to search the Office of the Secretary. Judicial Watch pointed out that press reports indicated Secretary Robert Gates had advised President Obama about whether or not to release post mortem photos of bin Laden and argued that it was inconceivable that DOD did not have copies of the photographs. But Boasberg replied that "even if Secretary Gates gave such advice, it does not necessarily follow that he ever saw the photos. And even if he did see them, that does not mean that he actually possessed them and also retained them in his office. Plaintiff's speculation that Secretary Gates must have kept copies of these classified records is just that: speculation. . . [S]uch bald conjectures do not undermine the agency's position." Judicial Watch indicated that DOD had failed to search the Joint Worldwide Intelligence Communications System, which allows Defense to transmit classified information to the Department of State. Since the press had reported that Secretary of State Hillary Clinton also advised Obama about the disclosure of the photos, Judicial Watch argued that it was highly likely the photos had been transmitted between the two agencies. Rejecting that contention, Boasberg noted that "again, Judicial Watch would have the Court infer from the media's reports that Secretary Clinton advised President Obama concerning the photographs' release that she in fact possessed copies of those photographs—or, more specifically, that she viewed them through JWICS. As with Secretary Gates, however, this inference is entirely unsupported by evidence."

Judicial Watch argued that the DOD affidavit did not specifically state that the agency searched for photographs or videos taken after the SEALS left Pakistan with bin Laden's body. Rejecting the claim, Boasberg indicated that "more broadly, [the agency's affidavit] repeatedly explains that the searches of the various components revealed no 'responsive' records. Because Judicial Watch requested all photographs and videos 'taken during and/or after' the operation in Pakistan, [the agency's] statements that no responsive records were located clearly includes those records 'created subsequent to the completion of the intelligence mission within Pakistan.' Judicial Watch cannot seriously argue otherwise." Boasberg added that "it should be emphasized that this case was not a request for some broadly defined class of documents the existence and whereabouts of which the agency was likely unaware and that might be maintained in any number of records systems. On the contrary, Judicial Watch's request related to a discrete set of extraordinarily high-profile records. . .If DOD has possession of these records, the relevant individuals are well aware of that fact."

Because the CIA admitted to having 52 photos, Boasberg turned next to the question of whether or not they were protected by Exemption 1 or Exemption 3. He noted that since "the agency has properly withheld the photographs and/or video recordings of bin Laden's body pursuant to Exemption 1, [the court] will grant summary judgment without reaching the question of Exemption 3's applicability."

Judicial Watch argued the CIA had failed to identify the individual who originally classified the photos. But the agency identified two individuals, both of whom had original classification authority, who had derivatively classified the photos. Because there was no doubt that the two individuals had properly derivatively classified the photos, Boasberg pointed out that "even if there had been some procedural defect in the original classification, it was cured by proper derivative classification and by [the two individuals'] subsequent reviews. Second, even if no cure had taken place, any hypothetical defect would not require that

the documents be released so long as it did not undermine the agency's assessment of the substantive criteria for classification." He added that "where. . .the individual who conducts the derivative classification himself has original classification authority, and where two additional individuals with original classification authority review the classified records and attest to their compliance with EO's procedural and substantive requirements, speculative defects in the original classification procedure are immaterial." Judicial Watch also claimed the agency had failed to indicate the date on which the classification occurred, making it impossible to determine if the photos might have been classified after Judicial Watch's FOIA request. Boasberg dismissed the claim, noting that "the CIA received [Judicial Watch's] FOIA request, which was dated May 4, 2011, on May 5. Even according to Plaintiff's own timeline, however, classification occurred before then. Indeed, the formal announcement that the records would not be released came on May 4. Judicial Watch's suggestion that the operative date is May 3, the day DOD received its request, rather then the day the CIA received its request, moreover is flawed, since the request at issue was made to the CIA."

The agency had classified the photos based on the exceptions in the Executive Order 13526 on Classification pertaining to military plans, intelligence activities, and foreign relations or foreign activities. Judicial Watch argued that, while some of the exceptions applied to various records, none of them applied to all the records. While he agreed that the military plans exception or the intelligence exception did not apply to every photo, Boasberg indicated that "it is patently clear, however, that all fifty-two records—which, by the terms of Judicial Watch's own request, depict bin Laden during and after the May 1, 2011, operation in Abbottabad, Pakistan—pertain to the 'foreign activities of the United States. . .Given that the records in question 'were the product of a highly sensitive, overseas operation that was conducted under the direction of the CIA,' no further information is required to conclude that each of them 'pertains'—notably, not a very demanding verb—to the United States' foreign activities."

Boasberg then assessed whether the agency had sufficiently made its case as to whether disclosure of the photos would harm national security. He noted that "while Judicial Watch expresses concern that deferring to an agency's assessment of generalized risks related to potential propagandizing and the inflammation of anti-American sentiment opens the door to potentially unlimited withholdings, such justifications will only pass muster where, as here, they are sufficiently detailed and both plausible and logical. If the risks [the agency's affidavits] anticipate are speculative, such is the nature of risk. . .The United States captured and killed the founding father of a terrorist organization that has successfully—and with tragic results—breached our nation's security in the past. [The agency's] testimony that the release of images of his body could reasonably be expected to pose a risk of grave harm to our future national security is more than mere speculation. While al Qaeda may not need a reason to attack us, that does not mean no risk inheres in giving it further cause to do so." Boasberg concluded that "the Court is also mindful that many members of the public would likely desire to see images of this seminal event. . .Yet, it is not this Court's decision to make in the first instance. In the end, while this may not be the result Plaintiff or certain members of the public would prefer, the CIA's explanation of the threat to our national security that the release of these records could cause passes muster." (*Judicial Watch, Inc. v. U.S. Department of Defense, et al.*, Civil Action No. 11-890 (JEB), U.S. District Court for the District of Columbia, Apr. 26)

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Views from the States…

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

Arkansas

The supreme court has ruled that litigation files prepared to defend three doctors who practiced at the University of Arkansas Medical Center are not records subject to FOIA. The law firm of Harrill & Sutter had filed a medical malpractice suit against the doctors and subsequently filed a FOIA request for the files of their private attorney, claiming they were public records because she was defending public employees. Even though the law firm requested a voluntary non-suit for its complaint, the trial court ruled in favor of the doctors on their counterclaim that FOIA was not applicable. The supreme court first found that the request to dismiss the original complaint did not moot a validly filed counterclaim. Upholding the trial court's ruling, the supreme court noted that "while Harrill & Sutter made an attempt to make its suit against [the doctors] appear as if it was against public individuals by naming them supposedly in their official capacities, to do so was meaningless. . .Simply changing the request to name the doctors in their official capacity did not change the nature of the documents requested, converting them from private to public." The court added that "the litigation file requested was created in the course of [representing the doctors], not in the course of public business. This is clearly not a case in which the private attorneys represented a public entity subject to the FOIA, preparing records that would be subject to FOIA and serving as the custodian of those records. The records requested here are simply not public records subject to disclosure under the FOIA." (*Harrill & Sutter, PLLC v. Hank Farrar, et al.*, No. 11-894, Arkansas Supreme Court, Apr. 26)

Colorado

A court of appeals has ruled that the Supreme Court Regulation Counsel, which conducts investigations and prosecutes disciplinary actions against Colorado attorneys, is part of the state judiciary and as such its records are not subject to the Colorado Open Records Act. Judicial Watch filed requests with the Regulation Counsel for records concerning its appointment to investigate charges against the former Maricopa County, Arizona, Attorney and two deputy county attorneys at the request of the Chief Justice of the Arizona Supreme Court, which was approved by the Chief Justice of the Colorado Supreme Court. After the Regulation Counsel declined to answer Judicial Watch's requests, both Judicial Watch and the Regulation Counsel filed suit asking the trial court to resolve the issue. The trial court found that some of the requests qualified under CORA while others did not. Both parties appealed. The court of appeals found that none of the requests were subject to CORA because since the Regulation Counsel was part of the judiciary, its records constituted judicial records not subject to CORA. The appeals court noted that "CORA does not include the judiciary within the terms 'state' and 'state agency.' Accordingly, because regulation counsel is a part of the judicial branch, it likewise is not part of the state or a state agency for purposes of CORA." However, the court pointed out that based on supreme court precedent, court records were subject to limited disclosure under court rules. But Judicial Watch had specifically argued that it had a right of access under CORA and that the court rules were not applicable. The court observed that "we take no position on whether Judicial Watch would be entitled to the records it seeks under these court rules or the Chief Justice's Directive because it has expressly waived that argument." (*John Gleason v. Judicial Watch, Inc.*, No. 11CA0930, Colorado Court of Appeals, Division VI, Apr. 26)

Connecticut

The court of appeals has upheld a decision by the FOI Commission finding that Thomas Germain's portable flatbed scanner did not qualify as a "hand-held" scanner under the ptovision allowing individuals to copy public records with a hand-held scanner. Although the town clerk of the Town of Manchester had allowed Germain to use his portable flatbed scanner starting in 2002, he was informed by the clerk in 2009 that he could no longer use the scanner because it was not a "hand-held" scanner as required in the statute. When Germain complained to the FOI Commission, the Commission upheld the town clerk's position. A trial court upheld the decision as well and Germain appealed. The appeals court rejected Germain's argument that "hand-held" described a type of portable scanner and did not limit the use of a flatbed scanner and noted that "under the plaintiff's interpretation of the plain language of [the statute], the word 'hand-held' in effect is written out of the statute. . .[T]he plaintiff's interpretation of [the statute] would render meaningless the word 'hand-held' which was included expressly by the legislature." Germain also argued the Commission had impermissibly overturned an earlier decision in which it allowed the use of a flatbed scanner. But the appeals court observed that "the phrase 'hand-held scanner'. . .is generally understood to refer to a particular type of scanner that is held in one's hand and is moved by hand across the document being scanned. The commission set forth its interpretation of [the statute] by concluding that the permissible scanners must be 'hand-held' within the common and ordinary meaning of the term and, accordingly, overruled [the earlier decision]." (*Thomas Germain v. Town of Manchester*, No. 33163, Connecticut Appellate Court, May 1)

New Jersey

A court of appeals has ruled that Middlesex County must pay Lois Lebbing's attorneys $43,000 for their work in suing a number of counties for their failure to charge copying fees that reflected actual costs to the agency as required under the Open Public Records Act. As part of a class-action suit, Lebbing sued Middlesex County for charging 25 cents a page for copies from a computer printer and a vendor-operated copying machine. While the County argued that its fees did not violate OPRA, the court stayed proceedings in the case pending a ruling in a class-action suit, *Smith v. Hudson County Register*, challenging the fee issue state-wide. The court in *Smith* ruled that counties charging 25 cents per page violated OPRA's requirement that fees not exceed actual costs. In compliance with *Smith*, Middlesex County lowered its fees to five cents a page, a per page cost that was subsequently codified by the legislature. The County then moved to dismiss Lebbing's pending suit. The trial court ruled that Lebbing had substantially prevailed and that the County was required to pay her attorney's fees. The appeals court upheld the trial court's decision, noting that "a plaintiff who was charged excessive copying fees for public records is a prevailing party under OPRA." The court added that "plaintiff was a catalyst for the change and should not be deprived of attorney's fees by the County's eleventh hour unilateral change of its copying fee policy." The court rejected the County's challenge that it changed its policy because of the *Smith* decision and not because of Lebbing's suit. The court pointed out that "had the County not asked to delay this matter and, instead, proceeded independently to litigate this case, it would have run the risk of an unfavorable independent adjudication. The County sought to avoid that risk by joining in *Smith* as amicus and then changing its copying fee policy at the eleventh hour in compliance with *Smith*. . . This is precisely the kind of unilateral action to avoid paying attorney's fees that [the supreme court] targeted in adopting the prevailing party catalyst theory under OPRA for purposes of awarding attorney's fees and costs." (*Lois Lebbing v. Middlesex County Clerk's Office*, No. A-2738-10, New Jersey Superior Court, Appellate Division, May 4)

New York

A court of appeals has ruled that the Department of Transportation did not waive its exemption claims when its Poughkeepsie office inadvertently allowed Vincent Mazzone to view some documents concerning a

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bridge replacement project in the Town of Clarkstown that it later decided to withhold. The court noted that "we do not agree with petitioner that respondent waived its right to claim that these documents were exempt from disclosure simply because it had previously made them available to him for inspection. Respondent claims that this disclosure was inadvertent, and notes that petitioner was allowed to inspect these documents before it had issued a determination on his FOIA request regarding the documents stored at its Poughkeepsie facility. In such a circumstance, 'when documents are inadvertently disclosed, the agency's right to claim an exemption is not waived by such disclosure.'" (*In the Matter of Vincent Mazzone v. New York State Department of Transportation*, No. 513623, New York Supreme Court, Appellate Division, Third Judicial Department, May 3)

Washington

A court of appeals has ruled that invoices for payments to attorneys involved in defending Thurston County in an employment discrimination lawsuit are not agency records for purposes of the Public Records Act because they were paid by the Washington Counties Risk Pool, a self-insurer for contracting counties. Thurston County had a $250,000 deductible in its policy with the Risk Pool. The county was defended by Risk Pool-appointed attorneys, who ran up bills totaling almost $1.9 million. The Risk Pool paid the first $250,000, but forwarded copies of those invoices to the county for reimbursement. Once the county had met its deductible, the Risk Pool paid the remaining bills, but no longer forwarded them to the county since it was not responsible for paying them. Arthur West filed suit in Mason County when Thurston County told him it would not disclose the records. It eventually disclosed most of the records in its possession with some redactions, but argued that the invoices above the county's deductible that were paid by the Risk Pool were not in the possession of the county and as such were not public records. The litigation dragged on for several years and the county finally obtained copies of the other invoices and released them to West. The trial court ruled that the Risk Pool's invoices were not agency records and that the county had properly responded to West's requests by the time it released the records originally in its possession. West appealed. The court of appeals affirmed the trial court's decision. It rejected West's claim that the Risk Pool invoices were prepared for the county because the Risk Pool attorneys were acting as agents of the county. The court noted that "we assume that the legislature intended to exclude from [the designation of public record] an agency's insurer-appointed lawyers who prepare documents that the agency never physically possesses." The court easily concluded the county neither owned, used, or retained the records. Turning to the award of a penalty for delay in responding, the court observed that "the County's delay in disclosing invoices for law firms' billings both below and above its deductible amount was due in large part to difficult and unresolved legal issues concerning the PRA, not bad faith." As to the number of days before the county responded, the court pointed out that "because the law firms' invoices exceeding the County's deductible were not public records under the PRA, the County had disclosed all required public records by July 9, 2008. . .for a total of 534 days." Finally, West argued the trial court had improperly paid awarded attorney's fees to his former attorney rather than himself. The court indicated that "West is not an attorney and, thus, he neither earned attorney fees nor is entitled to such an award under the PRA." (*Arthur S. West v. Thurston County*, No. 41085-1-II, Washington Court of Appeals, May 8)

The Federal Courts…

Judge Amy Berman Jackson has ruled that the NIH properly invoked a *Glomar* response to a request from People for the Ethical Treatment of Animals concerning an investigation of three researchers at Auburn University for mistreatment of lab animals. In response to PETA's request for records concerning the investigation and the existence of an agency-required confidentiality agreement concerning the investigation,

NIH claimed it could neither confirm nor deny the existence of records because to do so would constitute an unwarranted invasion of privacy under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. PETA argued that the researchers did not have a privacy interest because the alleged investigation concerned their professional, not personal, conduct. Jackson noted that "plaintiff mischaracterizes the nature of the privacy interest that has been asserted in this case. This Circuit has recognized that a member of the public has a privacy interest in information that might suggest that the individual was the target of a law enforcement investigation. [The Circuit case law does not] make a distinction between whether the alleged investigation concerns an individual's personal or professional conduct—what matters is that there is a privacy interest in a person's identity being associated with the investigation. If the Court were to accept plaintiff's theory that a person never has a personal privacy interest in investigations into their professional conduct, it would mean that no target of a white collar criminal grand jury investigation would have a privacy interest in that fact, which cannot be true." PETA contended that the existence of the investigation was already publicly known. But Jackson pointed out that "plaintiff has failed to point to anything indicating that the *government*, as opposed to some other organization or source, has acknowledged the existence of the investigation." PETA provided an interoffice memo from the Agriculture Department indicating that PETA's complaints against the Auburn researchers were partially valid. Jackson observed that "it cannot be said that a non-authenticated interoffice memo is tantamount to public acknowledgement of the existence of an investigation relating to the three named individuals." PETA argued that there was a public interest in knowing whether researchers using federal funding were treating lab animals humanely. Finding that this was not a valid public interest under *Reporters Committee*, Jackson responded that "here, the release of the information plaintiff has requested would reveal nothing about the government's own conduct, as opposed to the conduct of individual researchers or recipients of government funding." The agency had asserted that PETA **failed to exhaust administrative remedies** because it filed its administrative appeal after the time for doing so had expired. But Jackson rejected the claim, noting that "PETA did not attempt to bypass the administrative review process; instead, it reiterated its requests in a document sent to NIH six months later. NIH then processed that complaint and responded to those requests. As a result, this Court will review PETA's [request] because there are not prudential considerations that would militate in favor of dismissal." (*People for the Ethical Treatment of Animals v. National Institutes of Health, Department of Health and Human Services*, Civil Action No. 10-1818 (ABJ), U.S. District Court for the District of Columbia, Apr. 10)

Judge Reggie Walton has ruled that the Department of Homeland Security has so far failed to show that it conducted an **adequate search** for records pertaining to survey of illegal immigrants conducted by the Border Patrol in January 2004. After Judicial Watch filed suit in June 2004, the agency searched a handful of offices it believed most likely to have responsive documents, which yielded 965 pages. It subsequently agreed to conduct a much broader search, which located an additional 125 pages. Criticizing the agency for its failure to address some of Judicial Watch's claims, Walton indicated that "nonetheless, based upon its independent review of the record in this case, the Court finds that the [agency's] declaration adequately describes the searches of some offices, but that other descriptions are insufficient to meet its burden at the summary judgment stage." He pointed out that the search descriptions of several offices failed to provide information about who conducted the search, how it was conducted, or what search terms were used. He explained that "under the law of this Circuit, the omission of such information from the agency declaration precludes the entry of summary judgment in the DHS's favor." While he found the search descriptions of other offices were adequate, he indicated that "the inadequacy of the search descriptions for other components. . .precludes the entry of summary judgment in favor of the DHS." Walton rejected Judicial Watch's claims that the absence of records concerning the decision to conduct the survey and to end it cast doubt on the adequacy of the search. Walton noted that "the DHS has. . .submitted a declaration explaining that the records Judicial Watch seeks either never existed or could not be located through a reasonable search. Because this declaration is 'accorded

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a presumption of good faith, which cannot be rebutted by "purely speculative claims about the existence and discoverability of other documents,"' Judicial Watch's position on this point must be rejected." However, Walton found that the agency had failed to explain why it had not searched for records from San Diego County that were clearly encompassed by Judicial Watch's request. He observed that "the DHS's admitted failure to appreciate the scope of Judicial Watch's clearly defined request casts doubt on the adequacy of its search. This failure is particularly perplexing considering that the DHS *did* release 'border statistics' for a time period well outside the scope of Judicial Watch's FOIA request while overlooking statistics that were actually responsive to the request. In addition, the DHS's statement is essentially an admission that the agency possessed responsive records that would have been uncovered through a reasonable search, but that it nonetheless failed to provide to Judicial Watch." Walton ordered the agency to conduct an additional search and provide a supplemental affidavit describing the search. He added that "the DHS must also produce forthwith to Judicial Watch any records within its possession that it has already identified as responsive to the foregoing FOIA request." (*Judicial Watch, Inc. v. United States Department of Homeland Security*, Civil Action No. 04-907 (RBW), U.S. District Court for the District of Columbia, Apr. 30)

Judge James Boasberg has ruled that CREW has **standing** to pursue its Federal Records Act claims against the SEC for destroying records of preliminary investigations, but that its challenge to the agency's policy is **moot** because the agency had already agreed to change it. After the agency admitted in a letter to Congress that it destroyed preliminary investigatory records when the agency decided not to pursue an investigation, CREW filed two FOIA requests asking for records pertaining to the closed investigation of Bernie Madoff and other high-profile companies involved in the financial debacle. CREW ultimately filed suit under the FRA, alleging that the agency's record retention policies violated the statute and requesting the agency to initiate action to recover the deleted records. The SEC argued that there was no basis for concluding that a response to CREW's requests would involve deleted records. But Boasberg noted that "this argument, however, ignores the agency's own admission that at least some documents from the closed [investigatory records] were destroyed and are thus no longer available. While it is possible that some preliminary investigatory materials may still be found in response to CREW's request, it is hard to understand how the agency's ability to respond to CREW's request will not in some way be impaired. Because Defendants' search for records in response to CREW's request is very likely compromised by the admitted destruction of documents, the Court finds that Plaintiff has alleged a sufficient injury-in-fact." The agency's alternative argument was that CREW did not have a remedy because under the FRA the Attorney General is required to take action to force an agency to comply. Boasberg pointed out that "this argument, however, is misguided. Plaintiff's Complaint does not seek an order from this Court requiring the Attorney General to undertake a specific action. Instead, Plaintiff seeks an order requiring the *Defendants to ask* the Attorney General to initiate legal action." Boasberg then found that there was sufficient evidence to indicate that the agency was in the process of changing its policy to comply with the FRA. CREW challenged that evidence, but Boasberg explained that "while Plaintiff argues that the 'second-hand representations in the IG Report' are insufficient to establish that a new policy is in effect, [the letter sent by the agency to Congress] (*submitted by Plaintiff*) provides first-hand representations from the SEC regarding the new policy. Plaintiff itself relies on [the letter] throughout its Complaint and Opposition for other propositions, and it does not question the accuracy of the SEC's representations regarding the 'new policy' as set forth in the letter. The Court need not take judicial notice of the contents of the Office of Inspector General report to determine that Defendants have abandoned the prior policy regarding preliminary investigative materials; however, the existence of the report provides the Court with additional comfort that the SEC is taking seriously Plaintiff's concerns with the prior policy and is undertaking efforts to ensure that any unlawful destruction is discontinued." Rejecting CREW's assertion that there was a possibility of recurrence of the old policy, Boasberg indicated that "although Plaintiff's speculations about potential recurrence might be sufficient were Defendants private litigants, such conjecture is insufficient here, where the SEC is a governmental entity." The SEC attacked CREW's claim to

force the agency to recover deleted records by arguing that a private party only had standing if no action had been taken by either the agency or the National Archives. Boasberg disagreed, noting that "defendants point to the agency's suspension of the challenged document-retention policy, the investigation by SEC's OIG, and the ongoing collaboration with NARA to develop a new disposition schedule. While this may all be true, these efforts concern the *document-retention policy*, not any attempt to *restore or recover documents*, which is the issue that underlines [CREW's claims]. As CREW notes, '[W]hatever ongoing collaboration is occurring. . . does not include steps to retrieve and restore the destroyed investigative files.'" (*Citizens for Responsibility and Ethics in Washington v. U.S. Securities and Exchange Commission*, Civil Action No. 11-1732 (JEB), U.S. District Court for the District of Columbia, May 2)

Judge Reggie Walton has ruled that the Department of Labor conducted an **adequate search** for a 2001Application for Alien Employment Certification filed on behalf of Carol Ahanmisi. The agency searched the two databases most likely to have the record and found nothing. Ahanmisi argued that the search was inadequate because the agency had spent so little time conducting the database search. But Walton noted that "the time and reasonableness of a search depends less on the time it takes to conduct the search and more on the thoroughness with which it was conducted. Moreover, the results of a search are not determinative of whether the search was adequate." Ahanmisi also claimed the agency should have conducted a search of hard copy records at the National Archives after it could not find an electronic copy of the record. Walton responded that "the defendant was not compelled to search for a hard copy of the document in the Federal Records Center in the absence of any reasonable likelihood that it would be found there." (*Carol Ahanmisi v. U.S. Department of Labor*, Civil Action No. 11-1118 (RBW), U.S. District Court for the District of Columbia, May 7)

Judge Colleen Kollar-Kotelly has ruled that Ralph Schoenman's consistently late-filed challenges to her previous rulings are inadequate to convince her to reconsider those earlier decisions—including her earlier acceptance of the circumvention prong of **Exemption 2 (internal practices and procedures)**. Kollar-Kotelly first explained that she was rejecting Schoenman's most recent request to late file certain documents because "he makes no attempt to explain how consideration of those documents would affect the Court's bottom-line conclusion on the merits—that is, that the CIA properly invoked FOIA Exemptions 1 and 3 as a basis for non-disclosure." She added that "Schoenman's argument both misses the point and misconceives his burden. Regardless of how the CIA might have responded to his proposed statement of material facts, Schoenman still has not explained how his proffered factual allegations, *if undisputed or not genuinely disputed*, would have any meaningful bearing on the Court's decision on the merits." She rejected Schoenman's claims of 'excusable neglect" and pointed out that "this Court did not err by finding that Schoenman's admission that he knew he would be unable to meet the Court-ordered deadline before it expired, and yet nonetheless proceeded to wait five more days before petitioning the Court for relief, was inconsistent with a finding of excusable neglect under the circumstances." Recognizing that the Supreme Court's decision in *Milner v. Dept of Navy*, 131 S. Ct. 1259 (2011), had done away with the circumvention prong of Exemption 2, Kollar-Kotelly nonetheless noted that "*Milner* was decided on March 7, 2011, and yet Schoenman offers no explanation for why he waited an extraordinary *eleven months and two weeks*, and until after the Court entered final judgment, before he sought reconsideration on this basis. . .[A]t a bare minimum, a party acting with reasonable diligence would have alerted the Court to the potential issue *sometime* in the eleven months and two weeks between the issuance of the *Milner* decision and the entry of a final judgment in this case. . .Under these circumstances, the Court declines to exercise its discretion to grant relief under Rule 59(e)." She pointed out that the FBI had also relied on **Exemption 7(D) (confidential sources)** in conjunction with Exemption 2. Schoenman argued that the FBI's use of Exemption 2 raised a question as to whether the agency had done a careful review under

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Exemption 7(D). Kollar-Kotelly disagreed, noting that "an argument of this kind—speculative, unsupported, and contradicted by all the competent evidence in the record—is insufficient to warrant relief under Rule 59(e). It is also nonsensical: the FBI did not know, when it made its withholding decisions, whether the Court was ultimately going to sustain its reliance on Exemption 2." (*Ralph Schoenman v. Federal Bureau of Investigation*, Civil Action No. 04-02204 (CKK), U.S. District Court for the District of Columbia, Apr. 30)