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Washington Focus: In recognition of the 46th anniversary of the passage of the Freedom of Information Act, Sen. Patrick Leahy (D-VT) has urged passage of the "Faster FOIA Act," co-sponsored by Sen. John Cornyn (R-TX), which would create a commission to recommend fixes for chronic backlogs. Noting the crucial role FOIA has played in making government information public, Leahy pointed out that "open government is neither a Democratic issue, nor a Republican issue—it is truly an American value and virtue that we all must uphold. It is in this bipartisan spirit that I will continue to work to fulfill FOIA's promise of openness in our government and that I join all Americans in celebrating the 46th anniversary of the Freedom of Information Act."

Court Rejects Privilege Claims For Deportee Records

After an *in camera* review of a sampling of documents for which Immigration and Customs Enforcement claimed a variety of privileges, U.S. District Court Judge Jed Rakoff has largely eviscerated the agency's claims that the records are actually privileged and has ordered the agency to apply his findings to the entire universe of documents currently being withheld from a coalition of public interest groups.

The case involved a request for records pertaining to the agency's announced policy that individuals who had been deported as the result of an administrative proceeding would have their previous status restored if the order was subsequently reversed by an appellate court. This included informing the individual of the status change and facilitating his or her re-entry into the United States. Because the public interest groups were skeptical about the agency's implementation of such a policy, they requested all records discussing it.

In initially processing the request, ICE produced 587 pages of email records primarily from the Office of the Principal Legal Advisor. ICE subsequently located over 3,900

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pages of responsive records, which it agreed to produce at a rate of 500 pages every two weeks. As of the time of Rakoff's ruling, the agency had produced approximately 3,400 pages. In its *Vaughn* index covering some but not all of the responsive records, the agency redacted 45 documents under Exemption 5 (privileges). This included 30 documents for which the deliberative process privilege was claimed, 29 documents for which the attorney work-product privilege was claimed, and 15 documents for which the attorney-client privilege was claimed. Most of the redacted documents contained discussions between OPLA and other government attorneys. Based on the reasonably small number of documents, the parties agreed to an *in camera* review.

Rakoff first addressed the applicability of the deliberative process privilege. The agency claimed the privilege applied to deliberations concerning specific cases. But Rakoff pointed out that "such material, which focuses on how existing policy applied to 'specific case[s],' is not, however, predecisional, because it consists entirely of 'opinions about the applicability of existing policy to a certain a state of facts.' Indeed, the Government—without ever identifying when it adopted its general policy of returning deportees who prevail on appeal and restoring their status—has consistently represented that the core practice has existed for some time."

Nevertheless, the agency argued the privilege still applied. The agency claimed that other staff made the ultimate determination and that, thus, the attorneys were only providing advice. Rejecting the claim, Rakoff explained that "this argument, however, cannot overcome the fact that the decisions described in the documents at issue, regardless of who has ultimate authority to make them, are not the types of decisions to which the deliberative process privilege applies, *i.e.*, decisions about the formulation, rather than the application of policies." The agency next argued that the advice was informal rather than formal. But Rakoff pointed out that "the Government's proposed distinction, if accepted, would have the absurd result of giving agencies greater protection against FOIA disclosure when they expound their working laws haphazardly than when they follow written directives. The Government does not explain why the public has a diminished interest in knowing that an agency applies its existing policies to specific factual situations in an *ad hoc* and unguided manner." The agency contended that disclosure would harm the free flow of advice. However, Rakoff indicated that "this argument proves too much. While the deliberative-process privilege protects agencies from the type of scrutiny that might interfere with policy formulation, overly broad protection from all scrutiny would frustrate the very purposes of FOIA. Without some account—not here proffered—of how disclosure will adversely affect the formulation of policy, rather than the process of interpretation and exposition which constitutes an 'agency's effective law and policy,' ICE cannot invoke the deliberative-process privilege with respect to the documents in question."

Turning to the attorney work-product privilege, Rakoff pointed out that the privilege was not applicable because there was no pending litigation involved. The agency argued that "the appellate reversals that trigger ICE's efforts to return removed aliens and to restore their previous statuses also remand the aliens' cases for further proceedings before the [agency]." But Rakoff noted that "the mere fact that two occurrences share a common cause says nothing about any causal relationship between the two. The mailman's visit may excite my dog, but my dog is not excited *because* I have received the information. Neither does the fact that the mailman's visit always excites my dog make a causal relationship any likelier. . . Because this overbroad argument fails as a matter of logic, it cannot carry the Government's burden." Rakoff explained that "upon analyzing the relationship between the return of an alien, the restoration of her status, and the continuation of her removal proceedings before [the agency], the Court finds that the relationship is merely coincidental. . . Nowhere in [its policy] does ICE indicate that its attorneys' 'legal theories' and 'strategies' influence the decision to return an alien. . . [R]evealing how ICE returns a deported alien and restores status does not divulge what ICE's work-product doctrine protects, namely, ICE's legal strategies in that alien's future removal proceedings." He pointed out that "ICE's participation in ongoing removal proceedings simply coincides with

its implementation of [its] policy and ICE cannot invoke the work-product privilege with respect to communications that merely describes the implementation of its policy."

Rakoff rejected the agency's claims under the attorney-client privilege as well after concluding that they did not impart any confidential information about the agency. The agency argued that the attorney's were not the final decision-makers and that their advice was informal. Rakoff responded that "however, an attorney's authority and formality are irrelevant to the determination of whether a client communicates confidential information." The agency also argued the documents were not widely distributed within the agency. Rakoff pointed out that "but even a showing that ICE kept documents confidential by restricting their distribution cannot relieve the Government of the burden of showing that the documents initially contained confidential information." (*National Immigration Project of the National Lawyers Guild v. United States Department of Homeland Security*, Civil Action No. 11-3235 (JSR), U.S. District Court for the Southern District of New York, June 25)

Views from the States…

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

Connecticut

The appellate court has ruled that former Enfield police officer Duane Tompkins failed to show that disclosure of emails and instant messages recovered from a thumb drive he prepared for another officer would constitute an invasion of his personal privacy. Tompkins prepared the drive while he was still an Enfield police officer for use by another officer in the canine unit. In the process of preparing the drive, Tompkins deleted records from his personal emails and instant messages pertaining to his off-duty activities. The original canine officer left the department and his replacement continued to use the drive for about a year until it stopped working. He took the drive to a technology specialist, who found some files were corrupted and recovered them, including Tompkins' previously deleted emails and instant messages. When the current canine officer found these messages, he reported them to his supervisors. As a result, Tompkins was dismissed, but was given the right to contest any potential disclosure of the records as an invasion of his personal privacy. Several reporters requested the records of Tompkins' termination and the FOI Commission ruled they should be disclosed with information about Tompkins' address deleted, as well as some more sexually graphic exchanges. After the trial court upheld the Commission's decision, Tompkins appealed. Tompkins argued the Commission should have considered his constitutional privacy interest. But the court rejected his claim, noting that "the constitutional inquiry under the fourth and fourteenth amendments as to the reasonableness of governmental access to private information simply has no bearing on the potential of such information, if disclosed, to offend reasonable persons or to shed light on matters of legitimate public concern." The court then turned to balancing Tompkins' privacy interests against the public interest in disclosure. The court pointed out that "in the present case, however, the commission's findings demonstrate that the plaintiff's conduct did implicate his job as a public official. . .[T]he commission found that disclosure of the instant message conversations was 'necessary to facilitate the public's understanding and evaluation of the [department's] investigative process. . .'" The court added that "as to the records' description of the plaintiff's off duty conduct, the commission implicitly determined that the conduct was egregious when it noted that 'the more egregious the specific behavior, the more a finding of legitimate public concern is

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warranted. . .'" (*Duane Tompkins v. Freedom of Information Commission*, No. 32932, Connecticut Appellate Court, July 3)

Hawaii

The Office of Information Practices has found that personally identifying information about individuals who were rescued by the Hawaii County Fire Department may be withheld if disclosure is either prohibited by the privacy rule under the Health Insurance Portability and Accountability Act or if it falls within the privacy exemption under the Uniform Information Practices Act. The Hawaii *Tribune-Herald* requested identifying information about individuals rescued by the department. The agency indicated it was willing to disclose gender and ages of persons rescued, but not other identifying information, particularly the hometown of individuals rescued. OIP noted that "HCFD must determine on a case by case basis whether HIPAA or the Privacy Rules allow or prohibit disclosure of a person's identify. HCFD must also determine on a case by case basis whether the disclosure of hometowns of persons rescued, especially along with other information such as gender and age, could lead to the discovery of the identity of an individual whose identity is protected under HIPAA. If so, then disclosure of the hometown is prohibited under HIPAA rules. If not, then disclosure is not prohibited by the HIPAA rules, and as the UIPA's privacy exception does not apply to de-identified information, HCFD would have no basis to withhold the hometown under the UIPA." OIP added that "for HCFD functions that are not subject to HIPAA or the HIPAA rules, the UIPA requires that in instances when the names of persons rescued by HCFD carry a significant privacy interest, the individual's privacy interest must be balanced against the public interest in disclosure on a case by case basis to determine whether disclosure of that person's identity is appropriate. An individual does not have an inherent privacy interest in his or her hometown, and thus where there is no basis under the UIPA's privacy exception to withhold the name of the rescued person, there is likewise no basis to withhold the name of the person's hometown. . . When disclosure of a hometown could lead to actual identification of an individual whose identity is protected from disclosure under the UIPA's privacy exception, HCFD may also withhold the person's hometown to protect the individual's identity." (OIP Opinion Letter No. 12-01, Office of Information Practices, State of Hawaii, June 29)

Ohio

A court of appeals has ruled the Bureau of Motor Vehicles properly refused to provide an unredacted copy of the driving record of a driver employed by Motor Carrier Service because the disclosure of the full record was protected by the federal and state Drivers' Privacy Protection Acts. Although Motor Carrier Service was eligible to use an exception to non-disclosure for commercial carriers, it chose to challenge the state's rules requiring such requests to be submitted separately subject to a $5.00 certification fee. The court pointed out that "here, the release of the requested driving record was prohibited by the state and federal DPPAs unless relator could certify an authorized use." The court added that "to protect driver confidentiality and avoid the civil penalties for wrongfully disclosing such information, the BMV has promulgated a rule requiring a requester to provide specific information regarding the purpose of the intended use accompanied by a certification of truthfulness. Relator did not follow these procedures, but instead made a general public records request –under the Public Records Act], which only allows access to redacted records. Because relator failed to certify a permissible use through the procedure outlined, we agree with the magistrate that relator failed to demonstrate that it was authorized to retain unredacted copies of the driving record." (*State ex rel. Motor Carrier Service , Inc. v. Carolyn Y. Williams, Ohio Bureau of Motor Vehicles*, Ohio Court of Appeals, Tenth District, Franklin County, June 12)

Oklahoma

The supreme court has ruled that Rogers County is not required to provide County Records, an Internet seller of land records, with a land tract index under the Open Records Act. Rogers County refused County Records' request under a provision in the Open Records Act prohibiting disclosure of such records for purposes of resale. A trial court ruled in favor of County Records, but the supreme court reversed. The supreme court noted that "when the Open Records Act is read with the Abstractor Act, the legislative intent becomes apparent. Production of the official tract index for inspection and copies of the official tract index and instruments of record affecting real estate are not limited unless the request for information for the county records is for the sale of that information. The tract index provision in the Open Records Act extends the prohibition on sale of the county land record information to any person who intends to profit from such a sale." The court added that "the policy underlying the restriction on production of the official tract index is the prevention of the sale of the public records for private profit." The court indicated that the tract index "does not exist as a discrete electronic document that can be provided in electronic form" because it becomes part of the system run for the state by a company called KellPro. The court observed that "because the tract index data are not entered into the system as a document, they cannot be retrieved as a document. Outside the KellPro software, the official tract index information exists as a paper document only." (*County Records, Inc. v. Peggy Armstrong*, No. 109049, Oklahoma Supreme Court, June 19)

South Carolina

A court of appeals has ruled that the Saluda County Council violated the FOIA when it routinely amended its agenda during public meetings. When Dennis Lambries sued the council for the violation, the trial court ruled that the statute did not require publication of an agenda so it would not be a violation to amend it during a public meeting. However, the appeals court disagreed. The court noted that "the [trial] court determined the 'if any' language [in the statute's open meeting provisions] means that nothing requires Council to have an agenda for a regularly scheduled meeting. However, this interpretation is inconsistent with the requirement that agendas be posted twenty-four hours prior to a meeting. Applying such a construction, Council could circumvent the notice requirement by simply not preparing a formal agenda and then discussing matters on an ad hoc basis at the meeting. Such conduct would not be in keeping with the purpose of FOIA, and we will not construe a statute in a way that defeats the legislative intent." The court then pointed out that "if 'agenda' is not viewed narrowly as only a formally prepared piece of paper but instead represents the impactful actions and business the paper memorializes, the statute can be read harmoniously. Then, the 'if any' language simply recognizes that regularly scheduled meetings of public bodies may occur during which no formal action or discussion takes place." As to whether the council's habit of amending its agenda violated the FOIA, the court observed that "this is a close question, because no provision appears to prohibit such action. However, to allow an amendment of the agenda regarding substantive public matters undercuts the purpose of the notice requirement. A narrow construction of FOIA may support the position that so long as regularly scheduled meetings are open to the public, they are conducted in compliance with FOIA. However, such a construction would be inconsonant with the agenda notice requirement for regularly scheduled meetings and would go against the instruction that FOIA is to be liberally construed." (*Dennis N. Lambries v. Saluda County Council*, No. 4989, South Carolina Court of Appeals, June 13)

Wisconsin

The supreme court has ruled that the Milwaukee Police Department is not allowed to charge two reporters from the *Milwaukee Journal Sentinel* the costs of redacting information from incident reports. When the police required the reporters to pay several thousand dollars for the cost of redacting the records, the newspaper sued. The trial court sided with the police department and the newspaper appealed. The supreme

court reversed. The court noted the Public Records Law enumerated four categories for which agencies could recover actual costs. Although the court pointed out that none of them encompassed redaction, the police argued that they could be considered part of either "locating" a record or "reproduction" costs since a record was not releasable until the redactions had been made. The court rejected the argument, noting that "but under an ordinary understanding of the word 'locate,' the process of reviewing and deleting parts of a record has nothing to do with 'locating' the record. Reviewing a record and deleting parts of a record are separate processes that begin *after* the record has been located." Turning to the "reproduction" claim, the court pointed out that "the process of redacting information from records does not fit within the meaning of 'reproduction.' Redaction is a process that alters the record. Reproduction, in contrast, is a process that copies the record to produce an unchanged counterpart." The police argued that two earlier supreme court decisions expanded the concept of actual costs. But the court observed that in both cases it had done nothing more than to state the obvious conclusion that an agency was entitled to charge for costs specifically recoverable under the terms of the statute, not that actual costs could be expanded to include items not included in the statute. The court concluded that "the time spent redacting information from the requested records does not fit into [the] four statutory tasks. We decline to expand the range of tasks for which fees may be imposed. To do so would be in direct contravention of the text of the Law and our legislatively imposed duty to construe the Public Records Law 'with a presumption of complete public access.'" (*Milwaukee Journal Sentinel v. City of Milwaukee*, No. 2011AP1112, Wisconsin Supreme Court, June 27)

The Federal Courts…

Judge John Bates has ruled that a Bureau of Prisons video of the cell extraction of prisoner Robert Zander is protected by **Exemption 7(F) (physical safety of an individual)**. Magistrate John Facciola had recommended the video be disclosed to Zander with the faces of the extraction team obscured so they could not be recognized. But Bates agreed with the agency that the entire video was protected. He noted that "removing prisoners from their cells presents clear dangers to the law enforcement officers who are charged with the task. Disclosure of a recording of a 'cell extraction' presents the possibility that other prisoner will learn the methods and procedures utilized by BOP officials, and that this information might be used to thwart the safe application of these techniques in the future." Zander argued such extractions were videotaped so that there would be a record of possible abuses. But Bates pointed out that "the policy as represented by Zander need not be construed to demand public disclosure in order to be effective. . .[T]he disclosure of videos during litigation may be possible without broader dissemination to the public, through the use of, for example, sealed docket entries or protective orders. These mechanisms ensuring the limited distribution of information, and therefore the protection of the safety of prison staff, are not available in the FOIA context." Facciola had also recommended disclosure of documents pertaining to Zander's lawsuit against prison staff, finding that most of the information was already publicly available. Bates rejected the agency's claim that the records were protected by **Exemption 5 (privileges)**. Bates pointed out that "the statute's plain text seems to indicate that the attorney-client privilege ought to be fully incorporated in the FOIA context. But since the D.C. Circuit's decision in *Mead Data* has not been revisited, the Court will accept the Report and Recommendation's basic premise that the letters and forms must be disclosed, with appropriate redactions for non-public information under the rationale of *Mead Data*." Bates rejected the agency's claim that two emails constituted attorney work product. Instead, he noted that "the documents at issue here *relate* to litigation—Zander's case in North Carolina—but, in the Court's view, after having reviewed the documents, it would not be fair to say they constitute 'preparation' for litigation, as they merely summarize the case very generally in lay terms and instruct BOP employees on how to receive representation in the case. Such communications do fall under the broader attorney-client privilege, but they are not the 'work product' of an attorney contemplated for protection by that doctrine." Zander argued he was entitled to a *Vaughn* index, but Bates observed that an *in*

camera review had obviated the need for a *Vaughn* index. He pointed out that "the reason why an agency must provide a *Vaughn* index is to enable a FOIA requestor to challenge the withholdings in court. Here, that function has been served by *in camera* review and the Report and Recommendation, as well as this Memorandum Opinion." (*Robert A. Zander v. Department of Justice*, Civil Action No. 10-2000 (JDB), U.S. District Court for the District of Columbia, June 20)

Judge Richard Roberts has ruled the Treasury Department properly invoked several exemptions to withhold information from Island Film, a Cuban company, concerning the blocking of a $30,000 transaction under the sanctions currently in place against Cuba. However, Roberts found the agency's claims under **Exemption 7(D) (confidential sources)** and **Exemption 7(E) (investigative methods and techniques)** had not been adequately supported. Roberts initially dismissed the agency's claims under the circumvention prong of **Exemption 2 (internal practices and procedures)**, which the agency had claimed prior to the Supreme Court's ruling in *Milner v. Dept of Navy* finding that Exemption 2 did not include a circumvention prong. In the aftermath of *Milner*, Roberts pointed out the agency would either have to release tracking numbers or find another exemption to protect them. Turning to **Exemption 4 (confidential business information)**, the Office of Foreign Assets Control primarily argued that "public disclosure of the documents submitted by license applicants would impair OFAC's ability to obtain information in the future." Roberts agreed with the impairment claim and indicated as well that "release of the specified information such as contractual terms and banking information, could cause the applicants competitive harm by revealing customer identities and transaction details, and cause the customers to seek the services of competitors who may seem better able to protect their financial privacy." The agency withheld financial transactions details under Exemption 7(D) it claimed were submitted in confidence. But Roberts found that "Treasury has not provided express evidence that its sources drafted the correspondence under a promise of confidentiality. Because the act is economic in nature and not inherently violent, providing information regarding sanctions violations is more closely analogous to providing information on computer crimes than to providing information about rebellion or insurrection, drug trafficking or terrorism. Additionally, OFAC's assurance that it generally 'treats such correspondence' as confidential is insufficient to warrant an inference that it provided such an assurance for the correspondence that is at issue here." The agency withheld screen printouts from various databases used during investigations under Exemption 7(E). Roberts indicated that "the documents themselves do not describe OFAC's procedure for accessing certain databases in the course of its investigations. Neither the *Vaughn* index nor Treasury's affidavit provides a sufficiently specific link between disclosing the particular database printouts that Treasury seeks to withhold and revealing when, how, and to what extent OFAC relies on these databases in its investigations. . . In the absence of such an explanation linking disclosure to the risk of circumventing the law, Treasury has not provided a sufficient basis for withholding these documents under Exemption 7(E), and it will be ordered to supplement its affidavit and *Vaughn* index with respect to these documents." (*Island Film, S.A. v. Department of Treasury*, Civil Action No. 08-286 (RWR), U.S. District Court for the District of Columbia, June 26)

Judge Royce Lamberth has ruled that various agencies properly applied a number of exemptions in withholding records from Charles Miller concerning his international extradition for drug trafficking. Although Miller's request was sent to the FBI, the agency eventually referred 312 pages to other agencies. Lamberth was first faced with the FBI's claim that Miller had **failed to exhaust administrative remedies** because he had not yet paid $41.40 in copying charges. Lamberth pointed out that "this lawsuit was filed in June 2005, more than two years after plaintiff's initial FOIA request, at which time plaintiff did not owe any fees. In 2004, the FBI released 191 pages without requesting prepayment and asked for Miller to pay $9.10. But Lamberth, noting that the agency's policy was not to charge fees less than $14, explained that "because

the cost in excess of duplication of the first 100 pages was $9.10, defendant's request was unfounded. Therefore, its argument that plaintiff failed to exhaust his administrative remedies prior to his filing of this lawsuit in 2005 is unpersuasive. This lawsuit was not a premature interference with agency processes. In fact, it has prodded DOJ into making the appropriately extensive searches that it did not conduct prior to this suit being filed." As to various exemption claims, the Air Force withheld a document under **Exemption 1 (national security)** and Miller argued that the individual named in the document could be redacted. But Lamberth agreed with the agency that "exemption 1 protects more than just a source's identity. The document is classified at the Secret level and contains foreign intelligence sources and information." The State Department had disclosed the names of the Ambassador and Chief of Mission, but withheld the names of lower-ranking employees under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Lamberth observed that "in light of the employees' privacy interests, the violent nature of the crimes being investigated, and the lack of legitimate public interest in the names of clerical employees, defendant properly withhold the State Department documents under Exemption 7(C)." Lamberth also approved the use of **Exemption 7(D) (confidential sources)** to protect other State Department records. He noted that "for all withheld documents, the source provided information related to plaintiff's drug trafficking, and for some documents, there was an indication of fear of retaliation. Regardless of whether an express fear of retaliation was documented, this Court will uphold its precedent of implying confidentiality to sources who provide information about violent crimes." (*Charles Miller v. United States Department of Justice*, Civil Action No. 05-1314 (RCL), U.S. District Court for the District of Columbia, July 3)

Judge Richard Leon has ruled that the Bureau of Alcohol, Tobacco and Firearms properly redacted information concerning its investigation of Andre McRae for selling an illegal firearm and a small quantity of cocaine. Although McRae alleged that an ATF agent in Charlotte, North Carolina, had used his best friend as a confidential source and orchestrated his arrest and conviction on trumped up charges, Leon found the agency's claims under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** were appropriate. McRae argued that much of the identifying information was in the public domain. But Leon pointed out that "speculation as to the content of the withheld information in the context of open court proceedings does not establish that it has entered the public domain. Furthermore, a third party may testify in open court and maintain an interest in his personal privacy and he maintains an interest in his personal privacy even if the requester already knows, or is able to guess, his identity." Leon interpreted McRae's brief as asserting a public interest in knowing how the ATF agent had improperly orchestrated his arrest and conviction. But he pointed out that "it is the requester's obligation to articulate a public interest sufficient to outweigh the individual's privacy interest, and the public interest must be significant. Here, plaintiff produces no such evidence, and, therefore, the third parties' privacy interests prevail. To the extent that plaintiff believes his allegedly wrongful conviction is a matter of public interest, he is mistaken." The agency also invoked **Exemption 7(D) (confidential sources)** as the basis to withhold information. But McRae contended that he was not a violent criminal and that his crimes had been relatively petty. Leon noted that "the [agency's] declaration is silent, however, as to the confidential source's relationship to or knowledge of plaintiff's criminal activities. In sum, it fails to link plaintiff to 'notoriously violent' activities, such as gang-related murder or violent acts of retaliation for witnesses' cooperation with law enforcement or any other circumstances under which an assurance of confidentiality can be implied. Without more, the ATF cannot show that its decision to withhold information pertaining to this confidential source or the information he provided is justified under Exemption 7(D)." (*Andre L. McRae v. United States Department of Justice*, Civil Action No. 09-2052 (RJL), U.S. District Court for the District of Columbia, June 27)

A federal court in Ohio has ruled that the Defense Department properly invoked **Exemption 7(A) (ongoing investigation or proceeding)** to withhold records from Mario Simbaqueba even though his

investigation had ended with his conviction. The court pointed out that "the DoD here has not invoked Exemption 7(A) based on the status of Plaintiff's criminal case but rather based on the status of the investigation and expected prosecution of the individual indicted as his coconspirator. Accordingly, nothing in the [Department of Justice's] declaration persuades the Court that there was any clear error of law in its grant of summary judgment." (*Mario Alberto Simbaqueba v. United States Department of Defense*, Civil Action No. 2:11-cv-62, U.S. District Court for the Southern District of Ohio, Eastern Division, June 11)

A federal court in North Carolina has ruled that Ronia Weisner is not eligible for **attorney's fees** in her suit against the Animal and Plant Inspection Service because she did not substantially prevail. United Airlines lost Weisner's dog, which was never recovered. She then requested records from APHIS concerning the dog's disappearance. The agency responded that it was involved in an administrative action against United and withheld the records on the basis of **Exemption 7(A) (interference with ongoing investigation or proceeding)**. Weisner filed suit and after the administrative action against United was settled, the agency disclosed the records. Weisner then asked for attorney's fees. The court noted that "Defendant withheld the records only as long as was necessary under Exemption 7(A), releasing them promptly when the exception ceased to apply." The court added that "if, as Plaintiff seems to suggest, Defendants were intent on withholding the records unreasonably, the Court fails to see why Defendants would have voluntarily released the records at any point and it stands to reason that the matter would currently be before [the court] not as to [attorney's fees], but on Plaintiff's motion for an order directing Defendants to release the records on the basis of a continuing improperly claimed exemption." The court concluded that it found "Plaintiff's position that she 'substantially prevailed' and that Defendants released the records only as a result of the instant action to be unconvincing and, therefore, finds that Plaintiff is not eligible for attorney fees in the instant action." (*Ronia Weisner v. Animal and Plant Health Inspection Service*, Civil Action No. 5:10-CV-00568-FL, U.S. District Court for the Eastern District of North Carolina, Western Division, June 29)

The D.C. Circuit has ruled that the district erred in refusing to stay Richard Convertino's **Privacy Act** suit because his discovery efforts to find the source that leaked information about an Office of Professional Responsibility investigation of him had proved fruitless. Convertino, a former Assistant U.S. Attorney in Detroit, had prosecuted several individuals as terrorists shortly after 9/11. However, the conviction fell apart and Convertino was instead investigated for unethical behavior. *Detroit Free Press* reporter David Ashenfelter wrote an article about the investigation based on anonymous sources. Convertino filed a Privacy Act suit in district court in Washington against the Justice Department, but when he filed in district court in Detroit to enforce a discovery motion against Ashenfelter, the reporter successfully asserted his Fifth Amendment privilege against testifying. Because of this apparent stalemate, the district court in Washington granted DOJ summary judgment in his Privacy Act case, but noted that he might still be successful in enforcing his discovery request in Detroit. Convertino appealed the dismissal and the D.C. Circuit reversed. The court explained the district court was mistaken in its belief that Convertino could continue to maintain his motion to enforce discovery in federal court in Detroit because once the Privacy Act suit in Washington had been dismissed, there was no longer any pending litigation to support the discovery request. The court noted that Convertino had satisfied the requirement to show what facts he was trying to discover and why they were necessary to his case. As to the third element – showing that discovery would likely produce the needed facts – the D.C. Circuit pointed out that "we believe that Convertino submitted ample evidence to suggest that additional discovery could reveal the source's identity." Convertino asserted that because of the paper's policy on use of anonymous sources required approval of an editor, an unidentified editor might also know the

identity of the source. The court observed that "while its reporter invoked his Fifth Amendment privilege against self-incrimination, the Free Press—as a corporation—enjoys no Fifth Amendment privilege." (*Richard G. Convertino v. United States Department of Justice*, No. 11-5133, U.S. Court of Appeals for the District of Columbia Circuit, June 22)

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