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## In this Issue



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*Washington Focus: The Virginia citizenship case, McBurney v. Young--in which the Fourth Circuit rejected the argument that the State's citizens-only requirement in its Freedom of Information Act violated the privileges and immunities clause of the U.S. Constitution—has been petitioned to the Supreme Court. In 2006, the Third Circuit ruled in Lee v. Minner that Delaware's citizens-only requirement violated the privileges and immunities clause because it prevented journalist Matthew Lee from obtaining information about Delaware corporations that was critical to his ability to report on corporate developments. Based on Lee, McBurney and Roger Hurlbert sued Virginia under the privileges and immunities clause. But at the Fourth Circuit, the court found that neither plaintiff had shown that their right to advocate had been constitutionally impaired. A district court in Tennessee, in Jones v. City of Memphis, later ruled that the plaintiff there had also not shown an impairment of his right to advocate when he challenged Tennessee's citizens-only requirement.*

## Court Issues Guidance on Searching Electronic Records

In the most recent ruling in a case pertaining to the Department of Homeland Security's Secure Communities program, District Court Judge Shira Scheindlin has provided a detailed discussion of the problems agencies face when they search for electronic records. Even after finding that many components of Homeland Security and the Department of Justice involved in the search for records had either justified, or failed to justify, the adequacy of their searches, Scheindlin explained that the government generally had not shown that it understood how to conduct an electronic search that would maximize the likelihood of locating responsive records. She pointed out that "most custodians cannot be 'trusted' to run effective searches because designing legally sufficient electronic searches in the discovery or FOIA contexts is not part of their daily responsibilities. Searching for *an* answer on Google (or Westlaw or Lexis) is very different from searching for *all* responsive documents in the FOIA or e-discovery context. Simple keyword searching is often not enough. . ."

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Scheindlin prefaced her discussion of electronic searches by pointing out that "it is impossible to evaluate the adequacy of an electronic search without knowing what search terms have been used. In earlier times, custodians and searchers were responsible for familiarizing themselves with the scope of a request and then examining documents individually in order to determine if they were responsive. Things have changed. Now custodians can search their entire email archives, which likely constitute the vast majority of their written communications, with a few key strokes. The computer does the searching. But as a result, the precise instructions that custodians give their computers are crucial."

The importance of constructing the search, Scheindlin noted, is key to how successful it will be. She indicated that "at the most elementary level are simple mistakes: a search for secure commmunities' (with three 'm's) may yield no results despite the presence of thousands of documents that contain the phrase 'secure communities.' Seemingly minor decisions—whether intentional or not—will have major consequences. Choosing 'subject field' rather than 'subject field and message body' during a search using Microsoft Outlook email client will dramatically change its scope and results. Boolean operators are also consequential: a search for 'secure communities opt-out' may yield no results while a search for 'secure communities' and 'opt-out' yields one hundred results and a search for 'secure communities' or 'opt-out' yields ten thousand. . . '[S]earch results will change dramatically depending on which logical connectives—such as 'and,' 'or,' 'w/10,'—are used. Thus, '[i]n order to determine adequacy, it is not enough to know the search terms. The method in which they are combined and deployed is central to the inquiry.'"

Scheindlin compared the original paper record world with the current electronic one. "Describing searches with this level of detail was not necessary in the era when most searches took place 'by hand.' Then, as now, a court largely relied on the discretion of the searching parties to determine whether a document was responsive; but at least in that era, courts knew that the searching parties were actually looking at the documents with their eyes. With most electronic searches, custodians never actually look at the universe of documents they are searching. Instead, they rely on their search terms and the computer to produce a subset of potentially responsive records that they then examine for responsiveness." She pointed out that "yet the FBI, to take one example, has given the Court no specific information about the search that it conducted beyond explaining that much (but not all) of it was 'manual.' For the portions that were not manual, I do not know what search terms were used, let alone how they were combined. I do not even know if any search terms were *recommended*." She continued: "Defendants argue that I should grant the agencies' motion on the adequacy of the search even though I do not know what search terms—let alone what Boolean operators, search fields, and time frames—were used by a very large portion of the custodians."

She noted that the agencies argued that they need not set out meticulous detail concerning the searches and that they should be trusted to run effective searches of their own records since they did such searches on a daily basis. Scheindlin responded by pointing out that "custodians cannot 'be trusted to run effective searches,' without providing a detailed description of those searches, because FOIA places the burden on defendants to *establish* that they have conducted adequate searches." She chided the government by noting that "somehow, DHS, [Immigration and Customs Enforcement], and the FBI have not gotten the message. So it bears repetition: the government will not be able to establish the adequacy of FOIA searches if it does not record and report the search terms that it used, how it combined them, and whether it searched the full text of documents."

She pointed out that "there are emerging best practices for dealing with these shortcomings," including closer cooperation between requesters and agencies concerning the proper keywords to be used in searches. She added that parties could also rely on "latent semantic indexing, statistical probability models, and machine learning tools to find responsive documents." Such techniques "allow humans to teach computers what documents are and are not responsive to a particular FOIA or discovery request and they can significantly

increase the effectiveness and efficiency of searches. In short. . . a court cannot simply trust the defendant agencies' unsupported assertions that their lay custodians have designed and conducted a reasonable search."

She wondered how courts could reliably evaluate such searches, noting that "even courts that have carefully considered defendants' search terms have generally not grappled with the research showing that, in many contexts, the use of keywords without testing and refinement (or more sophisticated techniques) will in fact not be reasonably calculated to uncover all responsive material." The plaintiffs had enlisted an e-discovery expert to analyze the agencies' searches and he had found them wanting. Scheindlin observed that while she accepted the expert's conclusions, "the question, however, is whether the shortcomings on the part of the agencies made their searches 'inadequate' under FOIA. Surely, the agencies have failed to establish the adequacy of the searches for which they have specified no search terms. But for those searches for which terms were specified, a determination is more difficult."

She then indicated that "it is impossible for me to assess the adequacy of most of the keyword searches used by defendants. But it is also unnecessary for me to do so" because conducting further searches of the voluminous documents just to ensure the adequacy of the search would be a waste of resources. But she noted that "nevertheless, FOIA requires the government to respond adequately to requests from the public and defendants must learn to use twenty-first century technologies to effectuate congressional intent." She then told the agencies that "a sample of the custodians who conducted searches but failed to provide the Court with any details about those searches will also need to conduct new, fully-documented searches; so will a smaller sample of the custodians who listed the search terms that they used but provided no evidence about the efficacy of those terms. These repeat searches will permit the parties and the Court to efficiently evaluate whether the initial searches were adequate."

She cautioned that "the parties will need to agree on search terms and protocols—and, if necessary, testing to evaluate and refine those terms. If they wish to and are able to, then they may agree on predictive ending techniques and other innovative ways to search. Plaintiffs will need to be reasonable in their demands—aware of the real cost that their massive FOIA request has imposed on the agencies—and will be restricted to seeking records from only the most important custodians on only the most important issues." (*National Day Laborer Organizing Network v. United States Immigration and Enforcement Agency*, Civil Action No. 10-3488 (SAS), U.S. District Court for the Southern District of New York, July 13)

# Views from the States…

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

## Iowa

The supreme court has ruled that records pertaining to University of Iowa football players who pled guilty to the sexual assault of a female student-athlete in 2007 are protected by the federal Family Educational Rights and Privacy Act, particularly since the Iowa Open Records Act allows state agencies to withhold records when disclosure could jeopardize federal funding. Although the University commissioned an independent report of the incident and the names of the football players were widely publicized, it balked at disclosing further student records, even when redacted, arguing such disclosure was prohibited by FERPA. After the trial court ordered disclosure of several categories of student records disclosed to the Iowa City

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*Press-Citizen*, the University appealed to the supreme court. Reversing the trial court's decision pertaining to the student records, the supreme court noted that the Open Records Act provision allowed an agency to withhold records when federal funds that would otherwise definitely be available would be jeopardized as a result of the disclosure. The *Press-Citizen* argued the University had not shown the funds were "definitely" available, but the court pointed out that "the statute does not have. . .language requiring that the *loss* be definite," The newspaper also argued that a disclosure pursuant to a court order did not constitute a policy or practice as required by FERPA. The court explained that the provision that could lead to loss of funding was the Open Records Act itself, not just an occasional court-ordered disclosure under the statute. The court observed that "as we read the [section of the Open Records Act pertaining to loss of funding] it requires us to withhold legal effect from a provision of the Open Records Act if it appears that provision (not just an isolated application of the provision) would result in a loss of federal funding for a state agency." The *Press-Citizen* argued that FERPA did not prevent disclosure of non-identifiable student records and, as such, the records of the football players could be disclosed once they were stripped of all identifiers. The court disagreed. It noted that "the statute forbids federal funding of institutions that have a policy or practice of releasing 'education records (or personally identifiable information contained therein. . .)' without parental permission. This either-or language, as we read it, is at least subject to the interpretation that an entire record can be withheld where redaction would not be enough to protect the identity of a student." Three justices dissented, pointing out that FERPA required an educational agency or institution to have a policy or practice of disclosing student records and that occasional court-ordered disclosure of records did not constitute a policy of the educational institution itself. (*Press-Citizen Company, Inc. v. University of Iowa*, No. 09-1612, Iowa Supreme Court, July 13)

## Kentucky

A court of appeals has ruled that the trial court was not clearly erroneous when it found that the Cabinet for Health and Family Services was precluded by *res judicata* from continuing to litigate on a case-by-case basis the confidentiality of fatal or near-fatal child abuse records. After the trial court concluded that an exception to the rule of confidentiality for child abuse records required the disclosure of records concerning fatal or near-fatal incidents of child abuse, the Cabinet continued to claim that such cases must be reviewed on a case-by-case basis, an argument the trial court rejected. On appeal, the appellate court agreed that the trial court's decision was clearly not erroneous. The appeals court noted that "the [trial] court correctly determined that the Cabinet's claimed authority to redact [the records] cannot be reconciled with its duty to disclose under the Open Records Act. The Cabinet fails to point this Court to anything in the [trial] court's findings which could be labeled as being without evidentiary support. Nor has the Cabinet demonstrated that the [trial] court's ultimate decision is erroneous as a matter of law." One judge dissented, noting that "the harm is in the releasing of the information, not in the possible uses that may be made of the information. While the information the Cabinet has been ordered to disclose is not subject to the attorney/client privilege, it is confidential. Like the privileged information in [previous precedents], the confidential information contained in the child fatality or near fatality records cannot be recalled once released. Therefore, as with privileged information, the releasing of the confidential information is the harm and that harm is immediate and irreparable." (*Commonwealth of Kentucky, Cabinet for Health and Family Services v. Courier-Journal, Inc.*, No. 2012-CA-000179-MR, Kentucky Court of Appeals, July 9)

## New Jersey

The supreme court has ruled that the records related to cases at public law school clinics are not subject to the Open Public Records Act. The case involved a request from Sussex Commons, which was trying to develop an outlet mall. The Rutgers Environmental Litigation Clinic represented a coalition of groups trying to block development of the mall. Sussex filed a suit against the Chelsea Property Group, alleging it had tried to interfere with its ability to obtain tenants. As part of its lawsuit against Chelsea, Sussex

filed an OPRA request with the environmental clinic at Rutgers asking for a variety of records pertaining to its involvement with the litigation. The trial court ruled the law school clinic was not subject to OPRA, but the appeals court reversed. At the supreme court, the court concluded that, while Rutgers University, and the law school, was subject to OPRA, the law school clinic, in its role representing private clients, was not. The supreme court noted that "by its very terms, OPRA seeks to promote the public interest by granting citizens access to documents that record the working of government in some way. That important aim helps serve as a check on government action." By contrast, "clinical legal programs, though, do not perform any government functions. They conduct no official government business and do not assist in any aspect of State or local government. Instead, they teach law students how to practice law and represent clients. In addition, not even the University, let alone any government agency, controls the manner in which clinical professors and their students practice law. As a result, we do not see how it would further the purpose of OPRA to allow public access to documents related to clinical cases." Pointing out the serious disadvantages of allowing access to clinical case records, the court observed that "even if documents were protected under one of OPRA's exemptions, law school clinics would still have to shoulder the administrative burden of preparing for, responding to, and possibly litigating over each item requested." The court added that "the consequences are likely to harm the operation of public law clinics and, by extension, the legal profession and the public." The court indicated that "nothing suggests that the Legislature intended those results when it enacted OPRA, and we do not believe the Legislature meant to harm clinical legal programs when it drafted that important law." The court concluded that "the Legislature is free to act if we have misread its intent." (*Sussex Commons Associates, LLC v. Rutgers, the State University*, No. A-97-067232, New Jersey Supreme Court, July 5)

## The Federal Courts…

The D.C. Circuit has ruled that an agency's privacy *Glomar* response—refusing to either confirm or deny the existence of records on third parties—does not absolve the agency from its obligation to search for and determine if the records are actually exempt. The issue was before the court under rather unusual circumstances involving whether or not the district court should have dismissed prisoner Carlos Marino's FOIA suit two months after he missed the deadline for responding to the Justice Department's summary judgment motion. Marino had asked for records that had already been made public during the trial of Jose Lopez, a co-conspirator who had testified against him at trial. The agency responded that it would neither confirm nor deny the existence of records. Marino filed suit, arguing the records were in the public domain. Marino failed to respond, due to what he characterized as "gross negligence" on the part of his attorney. The district court dismissed the case two months later, after concluding Marino had not asserted a meritorious defense. Marino then appealed to the D.C. Circuit, asking to have the suit reinstated. Circuit Judge Thomas Griffith started his analysis by noting that "to clear the 'meritorious defense' hurdle, Marino need not provide 'reason to believe that vacating the judgment will not be an empty exercise or a futile gesture.'. . .Because a genuine dispute over material facts defeats a motion for summary judgment, Marino can show a 'meritorious defense' with only a hint of a suggestion that key facts in the record aren't yet entirely clear." Although Marino had submitted more than 500 pages of attachments, the district court had dismissed his public domain claim because he had not pointed to evidence showing that the records he sought had actually been disclosed previously. But Griffith pointed out that "yet in the context of a *Glomar* response, the public domain exception is triggered when 'the prior disclosure establishes the *existence* (or not) of records responsive to the FOIA request,' regardless whether the contents of the records have been disclosed. Marino's complaint alleged not only that some of the contents of Lopez's file had been released, but more particularly that the DEA had revealed publicly the link between Lopez and [his file]. The exhibits attached to his complaint, which Marino used as support for his Rule 60(b) motion, support this theory as well." The DEA argued that

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Marino's attachments only showed at most that the U.S. Attorney, not the DEA, had disclosed the link with Lopez. Griffith rejected the argument, noting that "a federal prosecutor's decision to release information at trial is enough to trigger the public domain exception where the FOIA request is directed to another component *within* the Department of Justice." The agency also argued that while Marino may have shown the existence of records, it did not vitiate the agency's ability to withhold the records under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Griffith, however, observed that "this concern is misplaced. The DEA did not rely upon 7(C) to withhold some or all of the contents of the file but to avoid confirming its existence. The only information the DEA has claimed a legal basis to withhold is whether [the file] exists and belongs to Lopez, and Marino has raised a plausible suggestion that this information has already been disclosed. Even if later in litigation the DEA showed legitimate grounds to withhold every document in [the file], Marino has raised a meritorious defense that the DEA's justification for refusing even to confirm the file's existence has been undermined by prior public disclosure." (*Carlos Marino v. Drug Enforcement Administration*, No. 10-5354, U.S. Court of Appeals for the District of Columbia Circuit, July 13)

The D.C. Circuit has ruled that 10 U.S.C. § 130, which allows the Defense Department to withhold certain technical data with military or space application that cannot be exported without a license, qualifies as a withholding statute under **Exemption 3 (other statutes)**. Under the provisions of § 130(b), the agency issued Directive 5230.25, which established a policy allowing the agency to provide technical data to "qualified U.S. contractors" for "legitimate business purposes." Newport Aeronautical Sales, a qualified U.S. contractor whose primary business was to sell government contract information to other qualified contractors, requested 155 technical orders concerning care, maintenance, and/or repair of military equipment from the Air Force. When the Air Force failed to respond, Newport sued. During the course of the litigation, the Air Force released all 155 orders under Directive 5230.25 rather than FOIA itself. Nevertheless, Newport continued its suit, arguing that technical orders pertaining to non-critical data should be available under FOIA. The agency initially argued that the case was moot because it had disclosed the technical orders. Relying on *Payne Enterprises v. United States*, 837 F.2d 486 (D.C. Cir. 1988), Newport argued it was challenging the validity of the agency's policy of withholding technical data. The court agreed, noting that "Newport has. . .shown that it will suffer continuing injury from this allegedly unlawful policy: its business depends on continually requesting and receiving documents that the policy permits the Air Force to withhold in the absence of bid or contract information that Newport cannot always provide; and the Air Force has no intention of abandoning that policy because it does not believe the policy violates FOIA. This is enough to avoid mootness under *Payne*." The court easily found that § 130 qualified under both prongs of Exemption 3. The court noted Newport had not seriously contended otherwise, but instead argued that Congress had intended that the agency provide less restrictive access to certain types of data. The court pointed out that "there is nothing in the text of §130(b) that evidences a congressional intent to restrict by regulation the broad authorization to withhold data from FOIA disclosure that § 130(a) grants the Secretary of Defense. Subsection 130(b) does direct the Secretary to promulgate regulations, but the only regulations it mentions concern 'releases of technical data *to allies of the United States and to qualified United States contractors*.' This cannot be a reference to disclosure under FOIA because that statute requires agencies to make nonexempt records 'available to any person. . . Accordingly, a provision that contemplates releases only to U.S. allies and contractors cannot be read as limiting the Defense Department's withholding authority under FOIA." Arguing that the court should treat Directive 5230.25 as the actual withholding statute rather than § 130, Newport asserted that *Wisconsin Project on Nuclear Arms Control v. Dept of Commerce*, 317 F.3d 275 (D.C. Cir. 2003), held that an executive regulation could qualify as an Exemption 3 statute. The court pointed out that *Wisconsin Project* involved the unique circumstance under which withholding provisions of the Export Administration Act were kept in place through an executive order after the statute expired. The court observed that "here, 10 U.S.C. § 130 is in full effect, and there is no reason to look elsewhere to assess the Air Force's withholding authority." (*Newport*

*Aeronautical Sales v. Department of the Air Force*, No. 10-5037, U.S. Court of Appeals for the District of Columbia Circuit, July 17)

Magistrate Judge Alan Kay has ruled that the State Department properly invoked **Exemption 5 (deliberative process privilege)** and **Exemption 6 (invasion of privacy)** to withhold names of proposed attendees at a briefing on the regulatory process for Canadian business groups pertaining to the Keystone Pipeline project. Judicial Watch requested records pertaining to Transcanada lobbyist Paul Elliott, a former deputy campaign manager for Hillary Clinton. After Judicial Watch filed suit, the litigation narrowed to a single document containing a chain of 12 emails exchanged over 17 days between members of government agencies, including State, discussing potential attendees at the meeting. Judicial Watch argued that the names were purely factual. But Kay agreed with the agency that "in the emails, the withheld names are not purely factual information because the agencies are in the process of deciding who will attend the meeting. The emails do not merely state a confirmed list of attendees, but rather a series of views and opinions on the potential attendees. Here, the presence or absence of a name conveys an agency or employee's opinion about a potential attendee's value to the meeting. The Department has adequately shown the deliberation that was occurring between the agencies." Kay added that "disclosure of potential invitees would also have a chilling effect on the sort of inter-agency discussions taking place in these emails. Disclosing these discussions in full would likely have the effect of forcing agency employees to question whether to express opinions about who should attend a meeting." State also withheld the names of two White House employees involved in the email chain. He noted that "the emails here, which contain names, titles, offices and phone numbers, qualify as similar files because they contain personal information about the named government personnel." Kay then observed that "there is a substantial [privacy] interest in bits of personal information where there is a justified and articulable risk of media harassment. The risk of media harassment and undesired contact for these two individuals is substantial and not *de minimis*. The issue of the Keystone XL Pipeline continues to receive substantial press coverage. While lobbyists like Mr. Elliott may be prepared to weather intense media attention, the same may not necessarily be said for the White House Security Staff." Turning to the public interest, he pointed out that "learning who was involved in the planning of this meeting would provide insight into the authorization process. The public would better understand the agency's decision-making process by learning the names of individuals who recommended possible attendees. However, the Department has disclosed most of the responsive emails. The staffers' titles, offices, and text of emails minus the recommended attendees have all been disclosed." Weighing the public interest against the individuals' privacy interest, Kay observed that "as redacted, the emails describe the extent of the individuals' involvement without subjecting them to harassment. The White House Security Staff's involvement in the decision-making process is already apparent. Disclosing the names of two staffers, where the format and nature of their involvement have already been disclosed would accomplish little for the public interest. The risk of intrusion on the two remaining individuals' privacy is too high, and 'clearly unwarranted' given the context provided by the Department." (*Judicial Watch, Inc.v. United States Department of State*, Civil Action No. 11-1152 (AK), U.S. District Court for the District of Columbia, July 12)

After finding the State Department had not yet shown that its **search was adequate**, Judge Amy Berman Jackson has ruled the Department properly withheld transcripts of two meetings of the Cultural Property Advisory Committee under **Exemption 3 (other statutes)** and that references to requester Arthur Houghton in the transcripts did not qualify them as records under the **Privacy Act**. Houghton, who served on the Cultural Property Advisory Committee from 1983 to 1987, requested any Committee records referencing him prepared by committee member Professor Joan Connelly, who represented the interests of the archeological community when she served on the Committee. The agency's first search found no records, but

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a second search located two transcripts, which the agency withheld. While the agency described its search, Jackson found it had failed to explain whether Connelly had an agency email account that might have responsive records. Jackson pointed out that Houghton's description of Connelly as a special government employee had not been contested by the agency. She then noted that "that description suggests that Connelly may have been treated as an employee of State in some ways, so the Court cannot rule out the possibility that she might have held a State Department email account. State's vague statements. . .do not clearly illuminate that question. . .[S]ince the Court is required to draw all inferences in favor of the non-moving party at this stage of the litigation, the Court cannot infer from State's declarations that Connelly's emails are not agency records." State claimed the two committee meeting transcripts were protected by section (h) of the Cultural Property Implementation Act, which exempts the Committee from the public access provisions of FACA and allows the withholding of records when disclosure could compromise the government's negotiating objectives or bargaining positions. Jackson agreed and noted that "under the withholding statute, once the President or his designee at State has determined that a CPAC proceeding is closed pursuant to section 2605(h), all materials 'involved in' such proceedings are exempt from FOIA. . .Therefore, the full transcripts of the meetings are exempt from FOIA as materials 'involved in' the proceedings." Jackson then found the transcripts were not Privacy Act records because they were not "about" Houghton. Instead, she explained that "the documents at issue in the instant case are 'about' the two Memoranda of Understanding that the CPAC members were discussing. Even the parts that mention plaintiff are 'about' the letter that plaintiff had written. . .[T]he mere fact that the transcripts contain reference to or quote from plaintiff's written work is not sufficient to make it a 'record.' The CPAC transcripts are therefore not records about Houghton for purposes of the Privacy Act, and State is not required to disclose them to Houghton." (*Arthur Houghton v. U.S. Department of State*, Civil Action No. 11-0869 (ABJ), U.S. District Court for the District of Columbia, July 12)

Judge Royce Lamberth has rejected reporter George Lardner's motion that he reconsider his earlier ruling concerning the **adequacy of the FBI's search** for records pertaining to mobsters Sam Giancana and Aniello Dellacroce. Lardner argued the agency had told him it had located 1,790 pages on Giancana in its JFK Assassination Records collection at the National Archives. Lardner inferred from this that the agency probably had retained copies of those records itself. But, Lamberth agreed with the FBI that the agency never said the 1,790 pages at NARA referred to Giancana. As a result, he pointed out that "in the present case, the record reflects that the documents that Lardner seeks 'are open to the public and researchers many access the original documents [at NARA].' Although the FBI should have released these documents to Lardner in a timely fashion, since they are now publicly accessible, plaintiff has the ability to review the records." Lardner also argued the agency had publicly confirmed that Dellacroce was an FBI informant and that it was improperly invoking a *Glomar* response to deny that fact. However, Lamberth pointed out that "the FBI did not release any information regarding Dellacroce's status as an informant, nor can plaintiff cite to any evidence in the record that would support his argument. Indeed, plaintiff asks this Court to 'determine whether' [informant] T-3 is in fact Dellacroce and would thereby qualify as an FBI informant. Lardner fails to appreciate that, mere speculation, or deduction on his part, does not constitute official acknowledgment on the part of an agency." Lardner also complained the agency had provided photocopies of photographs. Lamberth indicated that "plaintiff's argument fails—an agency satisfies its obligations under FOIA if it provides records in *any* format. Here, the FBI provided photocopies of the records plaintiff requested, thus fulfilling plaintiff's FOIA request." (*George Lardner v. Federal Bureau of Investigation*, Civil Action No. 03-0874 (RCL), U.S. District Court for the District of Columbia, July 13)

Judge Royce Lamberth has dismissed claims by Timothy Brown that the FBI improperly withheld a number of records pertaining to his investigation and conviction on drug trafficking charges. The agency had

withheld the phone numbers of its agents, and Lamberth reviewed its claims under **Exemption 2 (personnel practices and procedures)**, **Exemption 6 (invasion of privacy)**, and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Under Exemption 2, Lamberth noted that "defendant asserts that the public interest in these numbers is non-existent, and that releasing them could expose FBI [Special Agents] to harassment. This explanation of why exemption 2 is appropriate does not comport with *Milner*. In that case, the [Supreme] Court emphasized that the 'practice of "construing FOIA exemptions narrowly" stands on especially firm footing with respect to Exemption 2.' Narrow construal of § 552(b)(2), particularly the phrase 'personnel rules and practices of an agency' demands that phone numbers fall out of its ambit." The agency had no better luck under Exemption 6. Lamberth observed that "there must be *some* personal information that relates to a particular individual for exemption 6 protection to be warranted." He added that "the phone number is, by defendant's admission, a *work* number. It is not a personal number. Because the phone numbers are not 'similar files,' exemption 6 is also inappropriate." However, the agency struck gold with Exemption 7(C). There, Lamberth pointed out that "because the purpose of the FBI is law enforcement, it is clear that the special agents' phone numbers were also created for law enforcement. There is simply no other plausible purpose." He indicated that "while the likelihood of disruptive and harassing phone calls is debatable, the Court need not decide exactly how much privacy is being invaded. *Any* amount of privacy expectation outweighs the virtually nonexistent public interest." (*Timothy Brown v. Federal Bureau of Investigation*, Civil Action No. 10-1292 (RCL), U.S. District Court for the District of Columbia, July 10)

A federal court in Oregon has granted Stephen Raher **discovery** on the issue of whether the Bureau of Prisons violated the Federal Records Act when it destroyed emails that were responsive to his FOIA request concerning contracts for facilities to house convicted foreign nationals. The agency admitted that it routinely deleted email accounts of former employees shortly after they stopped working at the agency. But the agency claimed that the Supreme Court's decision in *Kissinger v. Reporters Committee* held that an agency was not obligated to retrieve documents it no longer had. But the court noted that "here, unlike *Kissinger*, Raher seeks documents that the BOP destroyed after receiving his FOIA requests." The agency also argued that Raher did not have a cause of action under the FRA. The court explained that "the lack of a private right of action under the FRA misses the point. Raher is not seeking to use the FRA as a basis for this court's jurisdiction. Instead he is seeking to conduct discovery under the FOIA regarding any applicable record retention policies. That discovery is relevant. . .to the award of attorney fees on whether the BOP has violated the FRA by destroying and, hence, withholding records from production." (*Stephen Raher v. Federal Bureau of Prisons*, Civil Action No. 09-526-ST, U.S. District Court for the District of Oregon, July 9)

## Price Increase

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