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Washington Focus: Peter Swire, former chief counselor for privacy at OMB during the Clinton administration, told the Senate Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, that Congress should legislatively overturn the Supreme Court's recent decision in FAA v. Cooper, in which the Court found the Privacy Act did not permit recovery for emotional distress. Telling the subcommittee that the Court's interpretation of the Privacy Act was "more narrow than intended," he added that "I think emotional harms that are proven to a judge are real harms here, and we should put that back in the law." Chris Calabrese, legislative counsel for the ACLU, agreed. He told the subcommittee that "this decision is particularly harmful because the damage from privacy disclosures is often embarrassment, anxiety and emotional distress, precisely what the Court forecloses."

WikiLeaks Disclosures Not Official Acknowledgement

In a decision that was certainly expected based on the case law and the significant degree of deference courts afford agencies on matters of national security, Judge Colleen Kollar-Kotelly has ruled that the State Department can continue to withhold 23 cables under Exemption 1 (national security) even though they were admittedly made public by WikiLeaks. Although government classification policy should not be dictated by unauthorized disclosures, the widespread availability of the WikiLeaks documents, including publication of a large amount of the cables' contents in the *New York Times* and several other respected European publications, has severely undercut the government's credibility concerning the sanctity of the documents and leaves information policy in an Alice Through the Looking Glass world where the government gets to pretend that these documents have never been disseminated and remain under classification lock and key.

In the first opinion concerning the effect of the WikiLeaks disclosures on the FOIA status of the underlying documents, the ACLU's only challenge concerning the cables was that the

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Harry A. Hammitt
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434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

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WikiLeaks disclosures had irrevocably placed them in the public domain.

Kollar-Kotelly first addressed whether the State Department had met its burden of showing that the cables remained classified. She explained that "in this case, the State Department relies upon Executive Order 13526 which prescribes a uniform system for classifying and safeguarding national security information. To show that it has properly withheld information on this basis, the State Department must demonstrate that the information was classified pursuant to proper procedures and that the withheld information falls within the substantive scope of E.O. 13526." She then observed that "the ACLU simply offers no rejoinder to the State Department's affirmative showing that all the information at issue (1) was classified by an original classification authority, (2) is owned, produced, or controlled by the United States and (3) falls within one or more of the eight relevant [withholding] categories [in the Executive Order]. . .In the absence of a response, the Court treats as conceded the State Department's argument that it has satisfied the first three requirements under E.O. 13526. But even absent such a concession, the record is clear that all three have been met."

Kollar-Kotelly indicated that the only dispute centered on whether the agency had sufficiently shown that disclosure could harm national security or foreign relations. But she readily admitted that she was subject to some rather specific constraints in reviewing such a claim. "In this context," she noted, "the district court 'must accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record,' keeping in mind 'that any affidavit or agency statement will always be speculative to some extent, in the sense that it describes potential future harm.'. .In the end, the 'agency's justification. . .is sufficient if it appears "logical" or "plausible."'"

The State Department had withheld several cables on the basis that they contained information concerning military plans or intelligence activities. Kollar-Kotelly noted that "the State Department's original classification authority explains that the disclosure of this information has the potential to, among other things, inhibit the United States' ability to successfully carry out military operations and enable foreign government or persons hostile to the United States' interests to develop countermeasures to the United States' intelligence activities, sources, or methods. It is both plausible and logical that the official disclosure of this kind of information "reasonably could be expected to result in damage to the national security.' The Court therefore defers to the considered judgment of the Executive."

The agency had withheld other cables because they contained foreign government information or information about the foreign relations or activities of the United States. Here, Kollar-Kotelly observed that "the State Department's original classification authority explains that the disclosure of this information has the potential to, among other things, degrade the confidence in the United States' ability to maintain the confidentiality of information; inhibit the United States' ability to access sources of information essential to the conduct of foreign affairs; and damage the United States' relationship with foreign governments, agencies and officials. It is both plausible and logical that the official disclosure of this kind of information 'reasonably could be expected to result in damage to the national security.' The Court again defers to the considered judgment of the Executive."

She then turned to a consideration of whether the cables had entered the public domain. She noted that "when the specific information sought by a plaintiff is already in the public domain by an official disclosure, an agency cannot be heard to complain about further disclosure. Critically, public disclosure alone is insufficient; the information in the public domain must also be 'officially acknowledged.'" The ACLU asserted that the cables had entered the public domain through the WikiLeaks disclosures and that the State Department had acknowledged their authenticity. But Kollar-Kotelly pointed out that "the ACLU couches this basic contention in a variety of forms, but this much is clear: the ACLU has not met the exacting standard demanded by settled precedent. No matter how extensive, the WikiLeaks disclosure is no substitute for an

official acknowledgement and the ACLU has not shown that the Executive has officially acknowledged that the specific information at issue was a part of the WikiLeaks disclosure. Although the ACLU points to various public statements made by Executive officials regarding the WikiLeaks disclosure, it has failed to tether those generalized and sweeping comments to the specific information at issue in this case—the twenty-three embassy cables identified in its request. Nor did the State Department acknowledge the 'authenticity' of the WikiLeaks disclosure in this litigation by failing to issue a *Glomar* response. Because the ACLU's request made no mention of the WikiLeaks disclosure and instead identified each cable by date, subject, originating embassy, and unique message reference number, the State Department made no admission by producing responsive documents." She concluded that "in the end, there is no evidence that the Executive has ever officially acknowledged that the specific information at issue in this case was part of the WikiLeaks disclosure (or any other public disclosure)."

Kollar-Kotelly also declined the ACLU's invitation to conduct an *in camera* review of the cables. Instead, she noted that "because the State Department's declarations are sufficiently detailed and the Court is satisfied that no factual dispute remains, the Court declines to exercise its discretion to review the embassy cables *in camera*." (*American Civil Liberties Union v. Department of State*, Civil Action No. 11-01072 (CKK), U.S. District Court for the District of Columbia, July 23)

Views from the States…

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

Colorado

A court of appeals has ruled that emails exchanged between members of the Public Utilities Commission pertaining to proposed legislation for the Clean Air—Clean Jobs Act did not constitute a meeting under the Open Meetings Law. The email exchanges preceded passage of the law and pertained to suggested language in an earlier version of the bill that was circulated by a member of the Governor's staff to the chair of the PUC. The emails discussed the bill in regard to various topics, including the PUC's ratemaking obligations. Intermountain Rural Electric Association sued the Commission, claiming the email exchanges constituted an improper meeting. The trial court found the exchanges were gatherings under the Open Meetings Law, but that they were not held to discuss public business. The appeals court agreed and noted that "a commission does not engage in policy-making by providing input on proposed legislation because passing legislation falls exclusively under the policy-making functions of the General Assembly and the Governor. The PUC is not empowered to pass legislation. While the proposed legislation clearly had a potential effect on the PUC's future regulatory actions *generally*, forming an opinion about the legislation had no demonstrable connection to any pending regulatory action of the PUC here. Nor does the record indicate any pending action connected to the e-mails with regard to a rule, regulation, ordinance, or other formal action within the policy-making powers of the PUC." (*Intermountain Rural Electric Association v. Colorado Public Utilities Commission*, No. 11CA1398, Colorado Court of Appeals, July 19)

Florida

A court of appeals has ruled that the name of a student who filed a complaint about an instructor's classroom performance is not protected by the Family Educational Rights and Privacy Act because it does not pertain to the student but is instead about the teacher. Darnell Rhea, an adjunct instructor at Santa Fe College,

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was given a copy of the email complaint, but was not allowed to know the identity of the student. He alleged that, as a result of the incident, the college did not rehire him. The trial court ruled in favor of the college and Rhea appealed. The appellate court reversed the FERPA ruling, noting that "we conclude that the e-mail before us is not an 'education record' because it does not contain information directly related to a student. The e-mail focuses on instructor Rhea's alleged teaching methods and inappropriate conduct and statements in the classroom, and only incidentally relates to the student author or to any other students in the classroom." The court added that "the fundamental character of the e-mail relates directly to the instructor; the fact that it was authored by a student does not convert it into an 'education record.' FERPA was not intended to protect from disclosure such records primarily questioning an instructor's teaching methods or criticizing the teacher's classroom demeanor and comments." (*Darnell Rhea v. District Board of Trustees of Santa Fe College*, No. 1D11-3049, Florida District Court of Appeal, First District, July 19)

Iowa

The supreme court has ruled that disciplinary records for two employees of the Atlantic Community School District who conducted a strip search of five female students while looking for $100 reported missing by another student are exempt from disclosure because they fall within the statutory category of personal records. The court noted that it had previously ruled that "performance evaluations contained in an employee's confidential personnel file were exempt from disclosure under the Act without performing a balancing test," because "performance evaluations [are] 'in-house, job performance documents exempt from disclosure.'" Applying that ruling, the majority observed that "disciplinary records and information regarding discipline are nothing more than in-house job performance records or information." The court added that "to suggest that a balancing test should be applied in this case undermines the categorical determination of the legislature and rewrites the statute. It also creates a logical problem. Can it be that discipline in employee A's personnel file may be treated differently than the exact same discipline in employee B's file, based on the degree of public interest? Can it be that identical discipline for the son or daughter of a public official, which might create something of a media frenzy if released, is entitled to less protection under the statute than a child with a less public family background?" The dissent criticized the majority's decision to abandon the balancing test for most personal information. The dissent pointed out that "after thirty-two years of consistent law to the contrary, the majority concludes the term 'personal information' is actually clear, precise, and specific, which enables courts to decide what information in a confidential personnel file is exempt as 'personnel information' by doing nothing more than looking at the information and deciding it is 'personal.'" The dissent noted that "whole some conclusions may be easier to reach than others, the balancing test is still applied to the thought process, even if subtly, because the balancing test is the only principled way to distinguish between personal information and public information." (*American Civil Liberties Union Foundation of Iowa, Inc. v. Records Custodian, Atlantic Community School District*, No. 11-0095, Iowa Supreme Court, July 27)

The supreme court has ruled that a group of filmmakers who submitted applications to the Iowa Department of Economic Development to qualify for tax credits if they made a movie in Iowa failed to show that disclosure of their films' final budgets would cause them substantial competitive harm. In the fall of 2009, certain irregularities in the state-funded program came to light and several media requests were made for the budget information. When IDED decided to disclose the budget information, several filmmakers filed suit, arguing the budgets were confidential and that disclosure could cause them competitive harm. Several filmmakers testified that disclosure of the amount of tax credits would allow competitors to draw conclusions about the size of their budgets as well as the salaries paid to recognized actors who might take salary cuts to appear in an independent film. The supreme court noted that the confidential business information exemption had been amended by the legislature to require that a submitter show that the information had an independent economic value. The court pointed out that "the Producers' evidence of independent economic value was more theoretical than real." The court added that "a confidentiality commitment is not enough to establish

independent economic value." The court observed that "the Producers failed to carry their burden of showing that the information in the [budget summaries] 'derives independent economic value. . .from not being generally known to, and not being readily ascertainable by proper means by a person able to obtain economic value from its disclosure or use.'" (*Iowa Film Production Services v. Iowa Department of Economic Development*, No. 10-1719, Iowa Supreme Court July 27)

Kentucky

The Attorney General has ruled that the Oldham County Public School District improperly withheld public comments submitted to the district following a superintendent candidate public forum. The school district withheld the comments claiming that submitters were not given notice that their comments could be made public and characterized the comments as exempt "correspondence with private individuals other than correspondence intended to give notice of a final action of a public agency." The AG noted that "regardless of whether the comments are characterized as 'correspondence' or 'submissions,' they do not enjoy protection under the [correspondence exemptions] because. . .they were submitted with the goal of advocating or recommending the board take a particular course of action, here the selection of the superintendent candidate for whom they expressed support. Notwithstanding the fact that other factors drove the board's ultimate selection, the comments were submitted to the board with the expectation that the board would rely on them." (Order 12-ORD-134, Office of the Attorney General Commonwealth of Kentucky, July 27)

New Jersey

The supreme court has ruled that although a meeting of the Board of Governors of Rutgers University violated both notice and closed meeting provisions of the Open Public Meeting Act, Frances McGovern, a Rutgers alumnus who routinely attended such public meetings, does not have a remedy. McGovern had complained that the Board's notice was too vague in describing what actually happened at the meeting, that the Board's policy of immediately going into closed session for an extended period of time discouraged public attendance, and that the Board's claim that the meeting was covered by attorney-client privilege was improper. While the trial court had ruled in favor of the Board, the appellate court reversed, siding with McGovern in finding that the Board had failed to provide as complete a description of the actual meeting agenda as possible. The supreme court found the appeals court had mixed up the requirements for notice of a meeting, which was published to announce the meeting, with the requirements for notification of what topics would be discussed in a closed session, a determination that was made at the actual meeting. The court pointed out that "public bodies are often confronted with fluid, ongoing situations, and it is often difficult, if not impossible, to determine at a later juncture whether the public body provided 'as much knowledge as possible' of the intended scope of discussions at a closed session." The court added that the statute 'requires a public body to include in its notice of an upcoming meeting the agenda of that meeting 'to the extent known.' We decline to impose a greater burden on public bodies than what the Legislature has required." However, applying that requirement to the Board's notice, the court pointed out that "by the time this notice was prepared and published, more was known about the extent of the proposed agenda than what was conveyed by the generic references to 'contract negotiation and attorney-client privilege.' . . .The Board had an obligation to include as part of the notice of the meeting the agenda of that meeting to the extent it was known." Reviewing the record of the closed meeting, the court found the attorney-client privilege did not apply. The court observed that "we reject the argument of defendant that so long as topics discussed in this closed session 'indirectly relate' to subjects that are properly the subject of a closed meeting, there is no violation of OPMA." As to the Board's habit of immediately going into closed session, the court noted that "a public body must be afforded discretion in determining the most advantageous and efficacious manner of proceeding through its agenda items. Absent proof of bad motive, courts should be loathe to intervene in such highly individualized decisions and to impose

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rigid mandates that could prove unworkable." (*Francis J. McGovern v. Rutgers, the State University of New Jersey*, July 25)

Pennsylvania

A court of appeals has ruled that appointment calendars and similar documents used for creating daily schedules for the Mayor of Philadelphia and City Council members are exempt under the working papers exception. A reporter for the *Philadelphia Inquirer* requested the records and the city withheld them. The reporter then appealed to the Office of Open Records, which found the City had failed to support its argument. The City then appealed to the trial court, which agreed with the City that *Bureau of National Affairs v. Dept of Justice*, a 1984 D.C. Circuit decision under the federal FOIA distinguishing between appointment calendars that were used solely by an individual and those disseminated to others in the agency, applied to the City officials' calendars. At the appellate level, the court noted that under the working papers exception "a public official is not the only person required to prepare or see the calendar because the exception specifically includes within the definition of working papers' papers prepared by or *for* the public official.'" The court pointed out that the exception "covers those documents necessary for that official that are 'personal' to that official in carrying out his public responsibilities." Finding that *Bureau of National Affairs* was on point, the court observed that "after reviewing the affidavits, we agree with the trial court that the requested documents are appointment calendars because they were created solely for the convenience of the Mayor's and City Council Members' personal use in scheduling daily activities and were not circulated outside of the official's office." (*City of Philadelphia v. Philadelphia Inquirer*, No. 944 C.D. 2011, Pennsylvania Commonwealth Court, July 25)

The Federal Courts…

In a per curiam decision, the D.C. Circuit has attempted to unravel unnecessary complexities remaining in two FOIA cases brought by UtahAmerican Energy against the Department of Labor for records pertaining to the investigation of a fatal mine collapse at the company's Crandall Canyon Mine. The accident was investigated by both the Mine Safety Health Administration, a component of the Labor Department, and an independent review team set up by the Labor Department. In the process of trying to get all the records, UtahAmerican first filed suit against MSHA, and, later, filed a second suit against the Labor Department. The judge hearing the suit against the Labor Department found that neither **Exemption 5 (privileges)** nor **Exemption 7(A) (interference with ongoing investigation or proceeding)** protected the IRT transcripts, but at the same time accepted the agency's **Exemption 7(C) (invasion of privacy concerning law enforcement records)** claim covering the transcripts. The judge also initially concluded that issues concerning the disclosure of the MSHA transcripts should be decided by the other judge hearing UtahAmerican's suit against MSHA. However, seven months later, the judge changed his mind and ruled that the agency must disclose the MSHA transcripts because it had failed to justify that they were protected by an exemption. Labor appealed. By the time the case got to the D.C. Circuit, the investigation had been concluded by a plea agreement and Labor indicated it was longer claiming Exemption 7(A). The D.C. Circuit first noted that "we need not decide whether Exemption 5 extends to the transcripts of the 12 remaining witnesses. As the Labor Department points out, it appears that the district court granted summary judgment in its favor as to another exemption for records compiled for law enforcement purposes, FOIA Exemption 7(C), a ruling that UtahAmerican has not appealed. The court pointed out that the transcripts seemed to be caught between the district court's ruling that Exemption 5 did not apply and its ruling in the same opinion that Exemption 7(C) did apply. The D.C. Circuit observed that "it is unclear whether the court intended to order the Department to disclose them. UtahAmerican maintains that the court did so intend. But if that were what the court intended, it would appear

the court acted without warrant: the government, after all, 'need prevail on only one exemption.'" The appellate court sent that portion of the case back to the district court for clarification. The D.C. Circuit then found that "the [district] court abused [its] discretion when it ordered the government to release the MSHA transcripts." The court explained that when two cases between the same parties on the same cause of action are commenced in two different federal courts, the one which is commenced first is allowed to proceed to its conclusion first. The court pointed out that "the rationale for allowing the first court to proceed to its disposition is fully applicable here: we should not expend judicial resources—and potentially produce contradictory decisions—by allowing the same FOIA plaintiff multiple bites at the apple." The court added that such a problem was "particularly acute in FOIA cases, where multiple components of the same agency may withhold the same documents on the same grounds, thus potentially generating multiple lawsuits and appeals raising the same issues. We see no reason to permit FOIA litigation to proceed down that path. Nor do we see any reason to permit one court to preempt another in the same district from resolving an issue that was first raised in the other's courtroom." (*UtahAmerican Energy, Inc. v. Department of Labor*, No. 10-5434, U.S. Court of Appeals for the District of Columbia, July 24)

Judge Amy Berman Jackson has ruled that the Justice Department properly applied **Exemption 5 (privileges)** and **Exemption 7(E) (investigative methods and techniques)** to withhold information from academic Christopher Soghoian, who had requested records related to certain electronic surveillance practices of federal law enforcement agencies. Soghoian indicated he was particularly looking for records from the Office of Enforcement Operations and the Computer Crime and Intellectual Property Section. The Criminal Division located 186 pages and EOUSA found 418 pages. Criminal discovered a 299-page manual was available on the Internet and disclosed the slightly redacted publicly available version, but decided to withhold all the rest of the records. Soghoian appealed to OIP, but filed suit after it missed the statutory deadline for responding. Soghoian argued the agency had withheld too much information under Exemptions 5 and 7(E) and had failed to **segregate** non-exempt information. He asserted that the attorney work-product privilege did not apply to some records because there was no pending litigation. However, Jackson noted that "here, the legal strategies and issues addressed in the withheld documents are protected because they relate to foreseeable litigation arising out of the government's criminal investigations. . .The Court finds these documents are covered by the attorney work product privilege because they present the legal strategies of the DOJ attorneys who will be required to litigate on behalf of the government." Jackson had reviewed the documents *in camera* and she agreed with the agency that other documents were protected by the deliberative process privilege. She indicated that some documents contained "draft material for an OEO manual and analysis and commentary by DOJ attorneys. The [documents are] deliberative because attorneys are considering and debating language that will ultimately be embodied in a policy manual. . .These documents are pre-decisional because they were drafts that had not yet been adopted as agency policy at the time they were written." She also affirmed the agency's application of 7(E). She pointed out that "knowing what information is collected, how it is collected, and more importantly, when it is *not* collected, is information that law enforcement might reasonably expect to lead would-be offenders to evade detection." Agreeing that the agency had conducted an adequate segregability analysis, she pointed out that the D.C. Circuit had ruled in *Judicial Watch v. Dept of Justice*, 432 F.3d 366 (D.C. Cir. 2005), that the segregability requirement did not apply to records protected by the attorney work-product privilege. (*Christopher Soghoian v. United States Department of Justice*, Civil Action No. 11-1080 (ABJ), U.S. District Court for the District of Columbia, July 31)

Judge Gladys Kessler has ruled that the Department of Homeland Security properly invoked **Exemption 5 (deliberative process privilege)** to withhold most of 20 documents related to a request from

Judicial Watch for records pertaining to suspending deportation proceedings. After a search by both Homeland Security and Immigration and Customs Enforcement, the agency found 4,235 responsive records. Those were winnowed down to the final 20 and Judicial Watch challenged the agency's application of Exemption 5. Judicial Watch claimed some of the documents were not privileged because they dealt with public relations rather than policy issues. But Kessler noted that "in this District, however, courts have routinely found that drafts and discussions relating to how to respond to press inquiries are covered by the deliberative process privilege." She indicated that "the fear of public scrutiny may affect an agency's consideration of whether to provide a statement to a television news program just as it may affect consideration of the underlying substantive policy." She added that "the documents at issue here, including drafts and communications relating to press inquiries, are predecisional to the agency's determination of how to present its policy in the press." Judicial Watch contended two other documents were largely factual lists. But Kessler pointed out that they were lists of draft questions and observed that "Judicial Watch simply ignores applicable case law in this District that draft questions prepared for a presentation are protected by the deliberative process privilege." (*Judicial Watch, Inc. v. U.S. Department of Homeland Security*, Civil Action No. 11-606 (GK), U.S. District Court for the District of Columbia, July 30)

Judge Reggie Walton has ruled that Judicial Watch is both eligible and entitled to **attorney's fees** for its suit against the Justice Department for records pertaining to the agency's investigation of charges of voter intimidation by the New Black Panther Party, but because of the organization's relative lack of success on the merits, has reduced its requested amount by more than 90 percent. In response to Judicial Watch's original request, DOJ indicated it would withhold the records under Exemption 5 (privileges). However, the Civil Rights Division disclosed some records in response to Judicial Watch's administrative appeal. After Judicial Watch filed suit, the agency disclosed a few more records. Walton ruled in favor of the agency's Exemption 5 claims, but also found the agency had failed to provide an adequate description of the records and ordered it to further address the issue of **segregability**. As a result, the agency released redacted records previously withheld in full. Judicial Watch then filed a motion for attorney's fees. DOJ argued Judicial Watch was not eligible for fees because its claim was "clearly insubstantial" because only a handful of documents had been disclosed. But Walton noted that "for purposes of determining fee eligibility, the DOJ's 'discretionary' disclosure of documents that it had previously withheld as exempt plainly constitutes 'a voluntary or unilateral change in position by the agency' caused by this litigation. It follows, then, that Judicial Watch is a substantially prevailing party eligible for attorneys' fees and costs." Although DOJ argued the later disclosures did not constitute a public interest benefit, Walton pointed out that "the documents reveal that political appointees within DOJ were conferring about the status and resolution of the New Black Panther Party case in the days preceding the DOJ's dismissal of claims in that case, which would appear to contradict Assistant Attorney General Perez's testimony that political leadership was not involved in that decision. Surely the public has an interest in documents that cast doubt on the accuracy of government officials' representations regarding the possible politicization of agency decisionmaking." DOJ argued that much of the information disclosed was already in the public domain. But Walton pointed out that "the Court is perplexed as to why the DOJ believes that its withholding of these documents was legally correct. If anything, the fact that the information was already in the public domain indicates that the DOJ was legally required to *disclose* the documents. . .The DOJ therefore has not discharged its burden of showing that its withholding of documents that were already in the public domain was legally correct or even had a reasonable basis in law." Judicial Watch had asked for more than $20,000 for litigating the case. But Walton agreed with the agency that Judicial Watch had only prevailed on a small number of issues and reduced its request to $1,040, or 5.3 percent of the requested amount. (*Judicial Watch, Inc. v. United States Department of Justice*, Civil Action No. 10-851 (RBW), U.S. District Court for the District of Columbia, July 23)

Judge Richard Leon has ruled that the Office of Science and Technology Policy properly invoked **Exemption 4 (confidential business information)** and **Exemption 5 (deliberative process privilege)** to withhold records pertaining to the Agricultural Biotech Working Group and the cultivation of genetically engineered crops on national wildlife refuges. In responding to two requests from Public Employees for Environmental Responsibility, the agency disclosed about 100 pages with redactions. PEER argued that records sent to the agency by the trade association BIO concerning its internal advocacy strategy were not protected by Exemption 4 because BIO had not shown the information was generated by its for-profit members. Leon noted, however, that "whether BIO's for-profit members generated the information is irrelevant. The issue is whether BIO or its for-profit members have a commercial interest in the information. There is no doubt that both BIO and its members have a commercial interest in BIO's advocacy strategy, which is at the core of BIO's competitive value to itself and its members." Because the information had been submitted voluntarily, Leon pointed out that BIO need only show that it was the kind of information that was not customarily made public by the submitter. PEER questioned whether BIO had made the necessary showing, but Leon observed that "BIO's representation that the information concerns a 'recommendation for BIO's *internal strategy*' is sufficient to conclude that the information is confidential." PEER challenged the Exemption 5 withholding by arguing that the some of the material appeared to be factual. But Leon indicated that "information about the deliberative process that reveals what the agency is considering should still be exempt from disclosure, even if it could be characterized as 'facts.'" PEER also argued that, since the Working Group had no authority over the other agencies with which it was meeting, its discussions could hardly be considered deliberative. But Leon pointed out that "non-decision-makers can take part in the decision-making process either by providing recommendations or by debating at a lower level about what course of action to recommend." (*Public Employees for Environmental Responsibility v. Office of Science and Technology Policy*, Civil Action No. 11-1583 (RJL), U.S. District Court for the District of Columbia, July 30)

Judge Ellen Segal Huvelle has ruled that Steven Jean-Pierre failed to exhaust **his administrative remedies** when he requested records concerning his transfer to another cell at Schuykill Federal Camp. His request asked for information concerning who ordered the transfer, the reason for the transfer, and the date on which a federal agent was instructed to visit him. He sent the request to EOUSA, which transferred it to the Bureau of Prisons. When he had not heard from BOP within 30 days, he appealed to OIP, which affirmed EOUSA's decision to transfer his request. BOP denied his request four months later on the grounds that it did not constitute a valid FOIA request. Huvelle first rejected BOP's claim that it was not a proper defendant and that Jean-Pierre was required to bring suit against the Justice Department. She observed that "although a small number of decisions hold that only the DOJ, and not its subcomponents, may be sued under FOIA, the weight of authority is that subcomponents of federal executive departments may, at least in some cases, be properly named as FOIA defendants." However, Huvelle agreed with the agency that Jean-Pierre had failed to exhaust his administrative remedies. Jean-Pierre had failed both to provide his date and place of birth and to submit either a notarized or penalty of perjury statement. Huvelle pointed out that "even small failures to comply with FOIA regulations can mean the attempted request is improper." She also found he had not reasonably described the records he sought. She indicated that "a request for an explanation is not covered by the FOIA because it does not reasonably describe an actual record." Huvelle also rejected Jean-Pierre's claim that he had already appealed to OIP, noting instead that even though he was told his first appeal was premature and that he could appeal a final adverse decision by BOP, he had failed to appeal the final decision. (*Steven Jean-Pierre v. Federal Bureau of Prisons*, Civil Action No. 12-00078 (ESH), U.S. District Court for the District of Columbia, July 30)

A federal court in California has rejected the Justice Department's request to **stay** a FOIA suit brought by the First Amendment Coalition for the legal analysis contained in a memo by the Office of Legal Counsel pertaining to the government's ability to take lethal action against terrorists abroad who are U.S. citizens. The agency argued the disclosure of the memo was already being litigated in two cases in the Southern District of New York—one brought by the *New York Times* and the other by the ACLU. DOJ argued that separate conflicting decisions could compromise its ability to protect privileged information. But the court noted that "the government, however, does not explain how multiple FOIA cases 'unnecessarily compromise' its 'ability to protected privileged information. The only way that these proceedings will compromise the government's ability to withhold information is if a court determines that the information is not subject to a FOIA exemption, in which case the government does not have a legitimate interest in withholding it from public disclosure." Relying on the Supreme Court's ruling in *Taylor v. Sturgell*, 553 U.S. 880 (2008), in which the Court found that *res judicata* did not prevent a requester that was not a party to the original suit from litigating over the same document in a subsequent suit, the court pointed out that "the Supreme Court has clearly stated that 'conflicting decisions,' such as those described by the government, are acceptable in FOIA cases." The court explained that "because DOJ has already filed a summary judgment motion in the SDNY cases. . .it should not be difficult for DOJ to file a cross-motion for summary judgment here." However, the court said it would stay ruling on the case until the Southern District ruled. The court observed that "if the SDNY orders disclosure of the memorandum, this case may be rendered moot. However, as DOJ acknowledges, if the SDNY declines to require disclosure of the memorandum, this Court will be required to address separately the merits of this suit." (*First Amendment Coalition v. U.S. Department of Justice*, Civil Action No. 12-1013 CW, U.S. District Court for the Northern District of California, July 24)

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Organization: ____ Fax#: (____) _____-______
Street Address: ____ email: _____________________
City: ________________________ State:____________________ Zip Code: _________________