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Washington Focus: Bruce Brown has been named executive director of the Reporters Committee for Freedom of the Press, replacing Lucy Dalglish, who after 12 years heading the Reporters Committee was recently named dean of the Philip Merrill School of Journalism at the University of Maryland. Brown was most recently a partner at Baker & Hostetler, a leading media law firm. He has also worked as a court reporter for Legal Times.

OIP Lauds Agencies For Progress on FOIA

The Justice Department's Office of Information Policy published its summary of the 2011 Chief FOIA Officers Reports Aug. 7 and followed that up with its summary of the 2011 Annual FOIA Reports on Sept. 6. Both reports present a rose-colored picture of FOIA government-wide that reflects a determined belief on the part of OIP that agency FOIA progress is always a glass half-full rather than half-empty.

According to OIP, agencies reported receiving 644,165 requests in FY 2011, an eight percent increase of over 46,000 requests from the 597,415 requests received in FY 2010, and nearly 40,000 more than the high water mark set in FY 2008. The Department of Homeland Security received far more requests—175,656—than any other agency. The Defense Department was second with 74,117; the Department of Health and Human Services received 67,431 requests and the Justice Department received 63,103 requests.

In the summary of the Chief FOIA Officers Report, OIP noted that 74 of the 99 agencies subject to FOIA released records in full or part 90 percent of the time. As if that wasn't astounding enough, 24 of those had a 100 percent disclosure rate. Since most agencies routinely withhold all or most personally identifying information, it is likely that the vast majority of these disclosures are partial grants.

Agencies processed 631,424 requests, an increase of five percent over the 600,849 requests processed the previous year. The OIP summary of the annual reports noted that agencies receiving the most requests were also those processing the most requests. This included Homeland Security, which led with

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145,631 requests processed. Defense processed 75,648 requests, Health and Human Services processed 70,179 requests and Justice processed 63,992 requests. With the exception of Homeland Security, which received an increase of 45,000 more FOIA requests than the previous year, these agencies processed more requests than they received. However, records were located and processed for only 69.5 percent of FOIA requests. Agencies closed a rather large 30.5 percent for other reasons. The only reason OIP cites is when no responsive records are found, but agencies tend to invalidate a significant number of requests for rather minor administrative reasons.

Backlogs increased 20 percent, from 69,526 in FY 2010 to 83,490 in FY 2011. OIP pointed out that at 66 agencies the backlog either decreased or remained the same. The usual suspects – Homeland Security (42,417), the State Department (8,078) and the National Archives (8,011) accounted for more than 70 percent of the total backlog. However, State also reported a 61 percent reduction in its FY 2010 backlog, which consisted mostly of requests transferred to State from Homeland Security.

The use of some exemptions changed from FY 2010 to FY 2011. Not surprisingly, the use of Exemption 2 (internal practices and procedures) dropped significantly after the Supreme Court abolished the circumvention prong in *Milner v. Dept of Navy*. While the circumvention prong of Exemption 2 was one of the most commonly overused exemptions, according to OIP, agencies went from citing it 64,261 times in FY 2010 to a still rather large 24,440 times in FY 2011. The exemption that has become the fall-back for the loss of the circumvention prong of Exemption 2 is Exemption 7(E) (investigatory methods and techniques). Exemption 7(E) emerged in FY 2011 as the third most frequently invoked exemption and was cited 56,491 times. But because 7(E) is restricted to law enforcement records, its coverage does not extend to agencies that have no law enforcement functions. OIP noted that Exemption 9 (information about wells) was cited only 26 times. However, Exemption 7(B) (interference with fair trial), a very infrequently litigated exemption, was cited 357 times. Exemption 8 (bank examination records), an exemption that has seen more use in the wake of the financial collapse, was used only 462 times.

Exemption 6 (invasion of privacy) and Exemption 7(C) (invasion of privacy concerning law enforcement records) remained the most commonly cited exemptions. OIP reported that Exemption 6 was cited 115,140 times and Exemption 7(C) was cited 102,568 times. Even those numbers seem low since most agencies routinely withhold personally identifying information and the only basis for such claims is the two privacy exemptions. OIP touted the fact that Exemption 5 (privileges) had been used only 53,267 times in FY 2011, a 13 percent decrease from 64,668 times it was cited in FY 2010 to suggest that agencies were making more discretionary releases of records that qualified for various privileges.

OIP found the average processing time government-wide for simple requests was 23.65 days, down from the previous year's 28.34 days. The Department of Veterans Affairs completed simple requests in 1.48 days and the Department of the Interior completed them in three days. At the other end of the spectrum, State reported it took 155 days for simple request. Since most requests sent by regular mail don't get to the appropriate office for 2-3 days at best, the ability to complete requests more quickly seems almost too good to be true. The average processing time for complex requests was 103.74 days, down from last year's 118.07 days. Seven departments—Agriculture, Commerce, Homeland Security, Housing and Urban Development, Interior, Treasury and Transportation—reported average processing times between 27 and 80 days. Veterans Affairs had the lowest processing time for complex requests at 16.3 days while the Department Labor was the highest at 214.9 days. Nevertheless, these time frames seem quite good, but if expressed in terms of months, the seven departments ranged from one month to three months, which is probably pretty good.

In a blog post, Nate Jones, FOIA coordinator for the National Security Archive, complained OIP had practiced "grade inflation" in its passing grades for many agencies' FOIA implementation. He pointed out the

CIA had been congratulated for putting new materials on its website and noted that "the Agency has drawn the ire of intelligence historians for its extremely slow rate of posting documents on its website. At one point this year, the CIA did not release a single new document on its website for more than eight months." He also criticized the good grade awarded the State Department for its ability to receive email requests. He noted that "the Department will not provide documents in an electronic format, as required by the Freedom of Information Act. Neither will the CIA. I know that the DOD does; as such, claims that the classification system requires that FOIA documents only be printed appear specious."

Views from the States…

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

Connecticut

The court of appeals has ruled that the Department of Public Safety provided reporter Michelle Tuccitto Sullo adequate access to a police incident in the Town of Derby when it disclosed a press release that contained the name of the accused, the date, time and location of the incident, and the charges for which the accused was arrested. When Sullo complained to the FOI Commission that the Department was required to provide more information than a press release, the Commission found that the statutory requirement to disclose the press release did not excuse law enforcement agencies from disclosing other pertinent records unless they were exempt. The Department appealed the Commission's ruling and the trial court, after relying on the legislative history of the provision agreed with the Department that a law enforcement agency was required only to provide a certain amount of information. The appellate court found the legislature had amended the police incident report requirements in 1994 in response to a State Supreme Court decision in *Gifford v. FOI Commission* 631 A.2d 252 (1993), but that "the legislature only wanted to alter the *Gifford* court's ruling insofar as to how much information the law enforcement agency must disclose. In other words, we conclude that the 1994 amendment. . .only added the requirement to disclose a single additional document, to be designated by the law enforcement agency" and that it did not mean to overrule the *Gifford* decision. The court pointed out that "the department made available to the complainants a single document that it labeled as a press release. . .The press release also contained a two paragraph narrative that included additional information about the arrest. We conclude that additional information contained in the two paragraphs satisfied the [amended version of the statutory] requirements, specifically, the additional information contained in the two paragraphs constituted a news release." (*Commissioner of Public Safety v. Freedom of Information Commission*, No. AC 32246, Connecticut Appellate Court, Aug. 7)

A trial court has ruled that the Department of Emergency Services and Public Protection must allow a requester to view a copy of an accident report free of charge. The Department argued another statute allowed it to charge $16 for an accident report, which reflected the costs of searching for the records. But the court noted that "under the methodology for construction of statutes. . ., the court finds that [the provision claimed by the Department] plainly and unambiguously provides that the charge for a search is permitted when one requests a *copy* of an accident report. Indeed [the provision], mirroring FOIA, states that accident reports 'shall be open to public inspection.'" The court observed that "having determined the plain meaning of the statute, the court cannot turn to the department's references to extratextual materials or presumptions drawn from legislative history." (*Department of Emergency Services and Public Protection v. Freedom of*

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Information Commission, No. CV 11 60123708, Connecticut Superior Court, Judicial District of New Britain, Aug. 10)

Illinois

A court of appeals has ruled that several taxing districts have shown that they may be entitled to a preliminary injunction to block further meetings of Pollution Control Board meetings which could change the tax status of WRB Refining, one of the largest property-tax payers in the districts. After installing new pollution abatement controls, WRB Refining sought a preferential tax treatment for the improvements. Pollution control facilities are assessed by the Department of Revenue rather than the taxing districts. The districts brought suit, alleging WRB Refining's meetings with the PCB violated the Open Meetings Act. The appeals court noted that "the Open Meetings Act expressly provides for injunctive relief where justified. Considering the Open Meetings Act's purpose of ensuring that meetings of public bodies are accessible to the public, we find the provision allowing injunctions gives rise to a presumption that the violation of this statute causes a distinctly public harm. Moreover, an injunction against violations of the Open Meetings Act restrains officials from breaching their statutory duty to conduct their public business openly. For these reasons, the limited pleading requirements for injunctions expressly authorized by the statute apply in this case." The trial court found the taxing districts could not bring a suit to block the meetings because they had a personal interest in the outcome. But the appeals court pointed out that "here, plaintiffs brought this action specifically to protect their perceived interest in the proceedings through which WRB Refining sought to abate its property-tax liability. Nevertheless, they made an appropriate showing (in light of the state of these proceedings and our deference to the trial court's findings) that the PCB's proceedings interfered with the public's interest in the accessibility of governance." (*Roxana Community Unit School District No. 1 v. WRB Refining, L.P.*, No. 4-12-0331, Illinois Appellate Court, Fourth District, Aug. 10)

Indiana

The supreme court has ruled that Shepherd Properties, a third party that intervened in an Access to Public Records Act suit to block disclosure of payroll records requested by the International Union of Painters and Allied Trades, is liable for its share of attorney's fees after the Union substantially prevailed in the litigation. The Union requested the payroll records of ShepCo Commercial Finishes, a subcontractor on a public works project, from the Warren Township School District. Both ShepCo and the Union asked the Public Access Counselor for an opinion and that office concluded the records were non-disclosable trade secrets. The Union filed suit against the Township and ShepCo intervened. The trial court ordered the payroll records disclosed and awarded attorney's fees against both the Township and ShepCo. ShepCo appealed the trial court's conclusion that it was liable for attorney's fees. The appeals court concluded that the APRA did not provide for a fee award against a private entity and that the Township was solely liable. The supreme court reversed the appellate court's decision. The court noted that, while the APRA provided for attorney's fees, it "is silent as to who is liable for the attorney's fees. . .[T]his silence leave the statute open to at least two different interpretations—that only public agencies are liable for prevailing plaintiffs' attorney's fees or that both public agencies and private parties involved in the litigation may be liable. Because the provision is susceptible to more than one interpretation, it is ambiguous and open to statutory construction." The court pointed out that "to shield private entities from liability for attorney's fees would thwart, rather than further, the public policy underlying the APRA. . .[T]he legislature clearly contemplated the involvement of private parties in APRA litigation. Removing from private entities any fear of liability for attorney's fees would deter persons seeking to inspect public records from filing APRA actions, as the private entities could assert non-meritorious defenses to avoid disclosure and drive up litigation costs." The court concluded by indicating that "when determining the allocation of attorney's fees liability between a public agency and a private entity, court should consider various factors, such as whether a party acted in good or bad faith; whether a party

played a nominal or active role; and whether a party was partisan or neutral in the cause of action. This is precisely what the trial court did in this case when evaluating the respective roles of ShepCo and Township in the litigation." (*Shepherd Properties Co. v. International Union of Painters and Allied Trades, District Council 91*, No. 49S04-1112-PL-697, Indiana Supreme Court, July 31)

A court of appeals has ruled that the Fort Wayne Police Department properly responded to Michael Jent's request for incident reports containing the crimes of abduction and sexual assault committed by an individual identified by witnesses as a Hispanic man with a tattoo. The police department contended Jent had failed to describe the records he sought in such a way that they could be found using the agency's software. The court explained that "while Jent's request describes the records sought in some detail, the level of detail does not necessarily satisfy the 'reasonable particularity' requirement of the statute. In response to a request under APRA, a public agency is required to search for, locate, and retrieve records. Depending upon the storage medium, the details provided by the person making the request may or may not enable the agency to locate the records sought." The court observed that "whether a request identifies with reasonable particularity the records being requested turns, in part, on whether the person making the request provides the agency with information that enables the agency to search for, locate, and retrieve the records." The court added that the agency's affidavit that "the FWPD could not access the requested records with the parameters given. . . satisfied its burden to make a prima facie showing that Jent's request lacked reasonable particularity and that the FWPD was entitled to summary judgment." (*Michael R. Jent v. Fort Wayne Police Department*, No. 02A03-1108-MI-388, Indiana Court of Appeals, Aug. 15)

Kentucky

The Attorney General's Office has ruled that even though the discussions that took place at a meeting of the University of Louisville's University Student Grievance Committee dealt with information that was protected by FERPA the Committee still was required to publish a notice of the meeting and to take the appropriate procedural steps before going into a closed meeting. Christopher Grande was dismissed from the School of Law after a proceeding before the law school's Honor Council. Grande then filed a grievance with the law school's student academic grievance committee to contest his dismissal. The committee declined to hold a hearing and forwarded its report to the University Provost, who disagreed and stated that the law school committee should have held a hearing on Grande's grievance. He then filed a grievance at the next level—the University Student Grievance Committee—which also ruled in his favor and found the law school committee should have held a hearing. He ultimately filed a complaint with the Attorney General's Office arguing that he should have been notified of meetings of the USGC pursuant to the Open Meetings Act so that he could attend them. The USGC argued that its "only purpose and competence is to deal with 'matters related to a specific situation involving a particular student'" and that "meetings of the USGC would never be public because the committee never discusses 'public business.'" But the AG noted that "this argument does not take into account the fact that the USGC ultimately 'takes action' by holding a vote or making a collective decision as to its recommendation to the President. It is not necessary that 'action taken' relate to public business to bring a meeting within the provisions of the Act; [the Open Meetings Act] requires a public meeting whenever '*any* action is taken by the agency.'" The AG then found the subject matter of most USGC meetings would be protected under FERPA. The AG pointed out that "since Grande's grievance before the USGC pertains directly to academic matters, the information that would be discussed in the meetings is even more clearly 'education records.' . . . The University would be within its authority to go into closed session to discuss the matter in order to comply with federal law." The AG rejected the committee's claim that its meeting did not require notice, finding instead that "the applicability of an exception permitting discussion in closed session does not. . .take the committee entirely outside the scope of the Open Meetings Act. Any meeting of a quorum of the committee where public business is discussed or action is taken, must still be convened in open session.

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. .Such meetings are subject to the notice provisions for special meetings, or if and when regular meetings are ever held, the schedule provisions. . .” (Order 12-OMD-140, Office of the Attorney General, Commonwealth of Kentucky, Aug. 2)

Pennsylvania

The supreme court has ruled that the Office of Open Records qualifies as an indispensable state party for purposes of challenging its determination that home addresses of school employees are disclosable under the Right to Know Law. The Pennsylvania State Education Association asked the Office for an advisory opinion after the Office had issued several determinations that school employees could not establish a constitutional right of privacy in home addresses. After finding that many school districts would not challenge the OOR ruling, the PSEA sued the OOR seeking a permanent injunction prohibiting the disclosure of home addresses. The Commonwealth Court granted a preliminary injunction against disclosure of home addresses which was affirmed by the supreme court subject to appeal. OOR then filed its objections to the preliminary injunction. The Commonwealth Court ruled that the trial court lacked jurisdiction because the PSEA had failed to name an indispensable state party. This time, after reviewing the jurisdictional argument, the supreme court ruled the OOR could serve as an indispensable party. The OOR argued it was the school districts, as custodians of the disputed records that were the required indispensable state party. But the supreme court pointed out that “plainly, the RTKL, as presently implemented by the OOR, does not provide public school employees with a reliable administrative or judicial method by which to seek redress for action that they believe violates the statutory scheme and/or their constitutional rights. In these unique circumstances, we have no difficulty in concluding that it is just and proper for the OOR to be haled into court to address core and colorable issues connected with such treatment at the behest of affected persons and their associations.” (*Pennsylvania State Education Association v. Department of Community and Economic Development*, No. 59 MAP 2010, Pennsylvania Supreme Court, Aug. 21)

A court of appeals has ruled that the Office of Open Records exceeded its jurisdiction when it ruled the City of Pittsburgh had failed to show that correspondence between an assistant city solicitor and the estate of Curtis Mitchell regarding settlement of pending litigation over Mitchell’s death was protected by the attorney-client privilege because the applicability of legal privileges was under the sole jurisdiction of the judiciary. The appellate court noted that “our Supreme Court’s sole jurisdiction over the practice of law includes the conduct of litigation which necessarily includes lawyers’ efforts to settle litigation. Allowing anyone to make ongoing requests under the [Right to Know Law] concerning all correspondence regarding settlement impermissibly intrudes into the conduct of litigation because it would lessen the frank exchange of information between the parties thereby adversely affecting the ability for litigation to settle” The court added that “the conduct of litigation could be affected because other parties to the litigation could constantly seek information about settlement discussions to discern the other parties’ belief as to the strength or weakness of their case. Allowing an administrative agency to order the release of documents would interfere with the courts’ sole control over the conduct of litigation.” The court pointed out that “because the Supreme Court regulates the release of any information relating to the presentation of a client, including a proposed settlement agreement, any provision of the RTKL that purports to require such disclosure again unconstitutionally infringes upon the Supreme Court’s exercise of its authority under. . .the Pennsylvania Constitution.” (*City of Pittsburgh v. Jonathan D. Silver and the Pittsburgh Post-Gazette*, No. 1658 C.D. 2011, Pennsylvania Commonwealth Court, Aug. 16)

A court of appeals has ruled that the Department of Environmental Protection improperly characterized reporter Laura Legere’s request for all determination letters indicating that well operators may have polluted public or private water supplies as insufficiently specific. The Department provided some records but argued Legere’s request was not sufficiently specific. The court disagreed, noting that “Legere has

requested a clearly-defined universe of documents. . .The documents either are or are not determination letters [issued under Section 2008 of the Oil and Gas Act]. . .The fact that Legere is requesting copies of 'all' of these ascertainable letters and orders does not render her request insufficiently specific." The court rejected the department's claim that the request was overbroad because the responsive records could not easily be located. The court indicated that "the fact that DEP does not catalogue or otherwise organize Section 208 determination letters or corresponding orders in a way that permits them to be easily located does not render the request overbroad." The department also argued that because the determination letters were difficult to locate it would be forced to create responsive records, something not required by the Right to Know Law. The court responded that "it cannot be inferred from [the section relieving agencies of any obligation to create records to respond to a request] that the General Assembly intended to permit an agency to avoid disclosing existing public records by claiming, in the absence of a detailed search, that it does not know where the documents are, and that to require the agency to locate and produce them would implicate [the section concerning creating a record]." (*Department of Environmental Protection v. Laura Legere*, No. 3 C.D. 2012, Pennsylvania Commonwealth Court, July 31)

A court of appeals has ruled that the Pennsylvania Convention Center Authority improperly withheld information pertaining to complaints filed by workers against their union for work done for exhibitors at the Convention Center. The Convention Center contended the records fell under an exemption for grievance and disciplinary matters. But the court noted that the provision "exempts information about *individual agency employees*, not labor disputes. Simply because 'grievance materials' is mentioned in [the provision] does not mean that all grievance material in every situation, including a union's jurisdictional grievance' under a labor management agreement is exempt. The Section is meant to protect information relating to individual or personal grievances. The Section is not meant to exclude information pertaining to union or policy-type grievances initiated by the union on behalf of workers which involve a grievance over basic contract principles such as seniority, vacation, etc." The court also rejected the Convention Center's claim that the records were protected because they were complaints provided to the agency that could lead to non-criminal investigations. The court pointed out that "in this instance, the PCCA acted solely in the context of its status as a party to the [management agreement] and pursuant to the procedures outlined in the [management agreement], a labor services agreement, to determine if a breach occurred." (*Geoffrey Johnson v. Pennsylvania Convention Center Authority*, No. 1844 C.D. 2011, Pennsylvania Commonwealth Court, Aug. 1)

Vermont

The supreme court has ruled that the Town of Hartford Police must disclose records concerning its use of considerable force to subdue an alleged burglar, who turned out to be the homeowner who was disoriented because of a medical condition, because the detention of the homeowner constituted an arrest. After the man failed to comply with an order to lie on the ground, the police beat him with a baton and eventually handcuffed him and dragged him out of the house. After about fifteen minutes, the police realized the man was the homeowner, who suffered from a medical condition that caused him to occasionally lapse into an unresponsive state. He was taken to the hospital and not charged. Reporter Anne Galloway asked for the records and the police denied her request claiming they were investigatory records. The supreme court reversed, noting that "we hold that the facts of this case support a finding of an arrest. . .[T]he police used a considerable amount of force; the homeowner was pepper-sprayed and struck repeatedly with a baton. His freedom of movement was entirely restrained for fifteen minutes." The court then pointed out that "under the plain language of the [Public Records Act], 'records reflecting the initial arrest of a person. . .shall be public.' Our holding here is consistent with the balancing that courts must do to weigh competing interests in determining whether a record is public. The privacy interest of the person arrested, the public interest in encouraging transparent government as a foundation of a free democracy, and a separate public interest in ensuring that police can keep

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us safe, are all factors courts must evaluate." (*Anne Galloway v. Town of Hartford*, No. 2011-211, Vermont Supreme Court, Aug. 3)

The Federal Courts…

Judge Royce Lamberth has ruled that the CIA has so far failed to conduct an **adequate search** for records pertaining to prisoners of war or soldiers missing in action from the Vietnam War as part of a multi-part request submitted by Roger Hall. One of Hall's requests asked for responsive records on 1,711 names, each of whom was an alleged Vietnam War POW/MIA. The agency claimed such a search was too burdensome, although it later agreed to search for 31 names for which Hall furnished further identifying information. Lamberth found the agency's claim unpersuasive and noted that "the CIA is not asked to determine responsiveness on name alone—if the record is regarding an individual as a POW or MIA, it is responsive. Therefore, the CIA's argument that 'it is extremely difficult or impossible to determine responsiveness based on name alone' carries little weight. Also, the CIA does not state that responsiveness would be impossible for all documents, just that it may be impossible to determine for *some* documents. That would mean that some responsive records, perhaps even a vast majority, could be determined to be responsive." He added that "the CIA has remained silent on the issue of estimating the man-hours involved, even after plaintiffs raised the issue. This Court will not find a search unduly burdensome on conclusory statements alone." Lamberth was no more convinced by the agency's lengthy description of how it would have to search through boxes of records. He noted that "despite the CIA's detailed tutorial on how to get a file out of a box, again it fails to provide the Court with an estimate of how many man-hours are necessary to fulfill the search. The Court will not find a search unduly burdensome simply because of the level of description shown and the number of steps used to describe looking into a box." Hall argued the agency had failed to search for any responsive records that had ever been submitted to Congress. However, the agency contended the request encompassed any search it ever conducted pertaining to POW/MIAs. Lamberth pointed out that "the CIA appears to have used the language from a [previous] 2009 Order [in the case]—which appears to misquote Hall's 2003 letter request—to excuse them from the full extent of plaintiff's' FOIA request." Since "the CIA has made no claims that it is unable to conduct the search in question," Lamberth instructed the agency to do so. The agency had told Hall that he was responsible for following up on records referred to other agencies for direct response. Considering that claim, Lamberth pointed out that "the CIA's response is not only baffling, but the failure to produce the documents amounts to an improper withholding." He indicated that "because the CIA is responsible for responsive records, even when those records originated with other agencies, this Court holds that the CIA must take immediate affirmative steps to be sure that each referral is being processed, which it shall describe in its supplemental filing." Lamberth rejected many of Hall's challenges to the agency's search. He pointed out that a search was inadequate when limited to those locations "most likely" to contain responsive records, but, here, the agency had satisfied its burden of proof by showing the searches were based on whether the locations were "likely" to contain responsive records. He agreed with Hall "where specific records, photographs, or attachments are reference in CIA documents, it is no longer 'mere speculation' that the files exist." He observed that "the fact that the CIA maintained and controlled the documents that reference other documents, many of them attachments, provides support for the proposition that the CIA maintains and controls those missing records." Lamberth upheld the agency's **Exemption 1 (national security)** and **Exemption 3 (other statutes)** claims. He also agreed that discussions between FOIA staff and agency attorneys pertaining to Hall's request were protected by **Exemption 5 (privileges)**. But he disagreed with the agency that various names could be withheld under **Exemption 6 (invasion of privacy)**. He agreed with the agency that further identifying information could be withheld, but noted that "the CIA has failed to respond to [Hall's] argument, either by explaining that no deceased individual's names have been withheld, or by explaining why the privacy interest still exists for those

deceased, some supposedly for several decades. Therefore, in regard to the names—not including the names of CIA employees, which were granted summary judgment under exemption 3—of individuals themselves, and withheld photographs, the Court denies summary judgment to the CIA for the exemption 6 claims and grants summary judgment to plaintiffs." (*Roger Hall v. Central Intelligence Agency*, Civil Action No. 04-00814 (RCL), U.S. District Court for the District of Columbia, Aug. 3)

Judge Royce Lamberth, while agreeing with most of the exemption claims made by the CIA and several other agencies pertaining to deceased drug cartel leader Pablo Escobar, has ruled the CIA cannot use a *Glomar* response for records on Escobar because it had already publicly acknowledged that the agency had records when it initially provided previously disclosed records to the Institute for Policy Studies. In response to the Institute's 2004 request for records on PEPES (People Persecuted by Pablo Escobar) and/or records pertaining to his death, the agency provided previously released records located by searching the terms "pepes" and "Escobar." The Institute finally filed suit, arguing the agency had improperly limited its search to only those records previously disclosed. The Institute argued that the agency "has previously publicly acknowledged that records do exist. Additionally, [the Institute] notes that documents that have already been released to plaintiff and the Court as well as noted in the *Vaughn* Index from defendant pertain to Escobar." The CIA contended that it had only released open source materials. But Lamberth noted that "defendant's argument that they only released 'open source' records is inaccurate. It is undisputed and defendant even shows, through its declarations that it has released information from other directorates within the agency. Additionally, defendant ran multiple searches for plaintiff using the term "Escobar" and not only disclosed responsive documents, but also created Vaughn Indices explaining their withholding of certain information. The Court finds it hard to believe that this was done solely for open source material that is open to the public. Because defendant has demonstrated the existence of documents pertaining to 'Pablo Escobar,' this Court finds that defendant has acknowledged their existence. The Court holds that defendant's *Glomar* response is invalid. . ." Lamberth then went on to affirm exemption claims made by the CIA and to claims made for records referred to the DEA under **Exemption 1 (national security)**, **Exemption 3 (other statutes)**, and **Exemption 7 (law enforcement records)**. Both agencies claimed **Exemption 2 (internal practices and procedures)** for some records. The CIA claimed the exemption for the signature of an officer as well as internal filing instructions and administrative routing information. Lamberth pointed out that "narrow construction of § 552(b)(2), particularly the phrase 'personnel rules and practices of an agency' would include the signature of a CIA officer, internal filing instructions and an internal cover sheet with administrative routing information." However, the DEA had claimed Exemption 2 to withhold office phone numbers. Here, Lamberth observed that "narrow construal of §552(b)(2). . .demands that phone numbers fall out of its ambit. . .Since the phone numbers are neither 'rules' nor 'practices,' exemption 2 is [not applicable]." Since the Institute had previously indicated it was not interested in office phone numbers, Lamberth allowed the agency to withhold them anyway. (*Institute for Policy Studies v. Central Intelligence Agency*, Civil Action No. 06-960 (RCL), U.S. District Court for the District of Columbia, Aug. 14)

A federal court in Nevada has ruled the Department of Homeland Security failed to show that information about allegations of misconduct made by Jeffrey Black concerning his supervisors at the Federal Air Marshal Service are protected by either **Exemption 6 (invasion of privacy)** or **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. The court first noted that to show that an agency's investigation of its own employees was for law enforcement purposes, the agency must show there was a rational nexus between its law enforcement duties and the records. The court rejected the agency's supporting affidavit, pointing out that "the declaration does not make any effort to show that the [Office of Professional Responsibility] investigation was conducted pursuant to OPR's law enforcement duty to investigate

allegations of misconduct which would constitute violations of state or federal criminal law. Thus, the court is left with no basis upon which to find that the OPR investigation was conducted pursuant to OPR's duties to investigate allegations of misconduct which 'would jeopardize or undermine the agency's ability to perform its mission.'" The court then found the public interest in disclosure outweighed the privacy interests of individual third parties. The court observed that "the instant case contains allegations of official misconduct and retaliatory actions by three supervisory managers in the Federal Air Marshal Service, which were investigated by OPR and resulted in the records at issue. The public interest in these documents is strong because they would shed light on what the government is up to." (*P. Jeffrey Black v. United States Department of Homeland Security*, Civil Action No. 2:10-CV-2040 JCM (VCF), U.S. District Court for the District of Nevada, Aug. 2)

Editor's Note: *Access Reports* will take a summer break after this issue. The next issue will be v. 38, n. 18, September 12, 2012.