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Washington Focus: The Defense Department has identified a new Exemption 3 statute—10 U.S.C. Section 130e, part of the 2012 National Defense Authorization Act, designed to protect critical infrastructure security information. According to the FOIA Blog, blogger Bob McCarty requested a copy of an Army handbook entitled "Inside the Wire Threat – Afghanistan." DOD told McCarty that the handbook was protected by § 130e and offered him an opportunity to make a public interest argument in favor of disclosure. Instead, McCarty, frustrated by the administrative obstacles, cancelled his request. FOIA Blog author Scott Hodes noted that § 130e "was largely in response to the Milner decision which cut back the use of Exemption 2 for this material."

CDC Reviews of Research Studies Protected Under Exemption 5

Judge Amy Berman Jackson has ruled the Center for Disease Control and Prevention properly withheld portions of written correspondence regarding two Danish studies on the connection between vaccines containing thimerosal and the occurrence of autism under Exemption 5 (privileges). In so doing, Jackson made several interesting observations concerning the coverage of Exemption 5 as well as the responsibilities of an agency to search for archived emails.

The multi-part request involved in the case was submitted by Brian Hooker, a parent whose son was autistic and had a case pending before the judicial body commonly referred to as the "Vaccine Court." Jackson made clear that "the merits of the scientific dispute of great significance to parents and medical professionals alike are not at issue here, and the Court will not undertake to resolve it." She added that "even if plaintiff's frustration with the agency's position on the science is well founded, he has not identified any facts that would demonstrate bad faith in the defendants' response to his FOIA request."

Although the agency referred the requests to several components, the primary office involved was the National

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Immunization Program. Hooker's requests encompassed correspondence with former CDC employee Dr. Thomas Verstraeten as well as email records that had been sent to Dr. Robert Chen. While the agency relied primarily on Exemption 5; it also withheld some records under Exemption 6 (invasion of privacy).

Jackson first addressed the agency's search. The agency had told the court that NIP had searched its records pertaining to the two studies and had found no responsive records. Jackson pointed out that "this description of the search is too cursory to persuade the Court that the search was adequate. Although the declaration identifies the offices to which the request was forwarded, it fails to explain either why those offices were the reasonably likely locations of the records sought or describe with specificity the search methodology used, including what records were searched, by whom, and using what process or search terms." She told the agency "to amend or supplement [its] declarations with additional detail—including a description of the search methods employed by CDC, the names and roles of the individuals who performed the searches, and a list of the search terms used—so that the Court can determine whether defendants have met their obligations under FOIA."

But Jackson agreed the agency had adequately searched for emails sent to Chen, who apparently had not retained them. The agency argued that it kept emails for only two weeks and then permanently deleted them and re-used the storage space. Accepting the agency's explanation, Jackson noted that "FOIA does not require a perfect search, only a reasonable one. Here, defendants' affidavits adequately explain why no emails were located from Dr. Chen. Plaintiff's challenge that more emails should be available is based only on speculation. By conducting multiple searches for emails responsive to plaintiff's request and submitting a declaration addressing the existence of an email archival system or central server defendants have demonstrated that their search was reasonably calculated to uncover all relevant documents."

The agency claimed most of the information withheld fell within Exemption 5. Hooker argued the agency could not withhold documents exchanged between CDC and the Danish outside researchers and between CDC and Dr. Verstraeten because they did not qualify as intra-agency records. Jackson initially noted the agency had disclosed the materials concerning the Danish researchers during the course of the litigation so they were no longer at issue. As to the Verstraeten records, Hooker contended that although Verstraeten was the author of a relevant manuscript written while he worked at CDC, once he left the agency he was no longer sufficiently involved with the agency to qualify as a consultant. Jackson disagreed. She pointed out that "although Dr. Verstraeten may not have directly conducted or instigated additional analyses after leaving CDC, [a letter he wrote] demonstrates that he played the same role in the agency's process of deliberation after his departure that he would have played had he remained: reviewing, revising, and finalizing the draft. Indeed, he was named as a CDC employee on a manuscript finalized and published after he left CDC." Jackson added that "the fact that Dr. Verstraeten may have had a new employer is not dispositive. . .The Court's review of the records supports Dr. Verstraeten's claim that he was not promoting his personal interests or those of his private employer, but that he was working to ensure 'the scientific and public health merit' of the published studies in which he was involved."

Hooker argued the withheld records were neither predecisional nor deliberative. He claimed that some of the records were essentially subsequent justifications for the agency's 1999 decision to support the use of thimerosal vaccines. But Jackson observed that Hooker's request specifically asked for information about the agency's response to a 2003 article and explained that "the D.C. Circuit has found that where a plaintiff requests records of correspondence surrounding or leading up to an agency publication, the relevant agency decision for purposes of applying the deliberative process privilege is the decision to publish. Having chosen to focus his FOIA inquiry on correspondence surrounding the agency's 2003 publication of the thimerosal manuscript, plaintiff cannot now point to an earlier agency decision to attempt to argue that the withheld documents were actually post-decisional." Turning to the deliberative nature of the records, Jackson noted that

"while the documents here included some discussion of factual matters, such as test results and which tests should be run again, they involve deliberation and discussion about the data, not mere summaries." She added that "here, the draft manuscript referenced by plaintiff—though initially rejected for publication in certain journals—was never finalized or approved as a reflection of agency policy in its draft form. . .The Court finds that the withheld documents can best be described as an ongoing, collaborative dialogue about the manuscript."

Hooker also challenged the withholding under Exemption 6 of personal information about Danish researcher Poul Thorsen because he had been indicted for fraudulently obtaining more than $1 million in CDC grants, which, Hooker charged, cast doubts on the veracity of his work. Rejecting Hooker's claim, Jackson pointed out that "plaintiff has not articulated any significant public interest in the disclosure of a comment about Dr. Thorsen's personal life." She added that "the disclosure of a comment relating to Dr. Thorsen's personal life would not improve the public's understanding of how the government operates. There is no indication that CDC, the alleged victim, was complicit in the charged scheme to defraud the agency of over $1 million of research grant funds. So, the mere fact that Dr. Thorsen has been indicted does not transform his personal information into information about what the government 'is up to.'" (*Brian S. Hooker v. U.S. Department of Health and Human Services*, Civil Action No. 11-1276 (ABJ), U.S. District Court for the District of Columbia, Aug. 21)

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 the Colorado Parks and Wildlife Board cured three violations of the Open Meetings Law when it subsequently held a public meeting at which it heard from key constituent groups, received public comments and then ratified proposed changes in how fees were expended under the Off-Highway Vehicle Act. The Colorado Off-Highway Vehicle Coalition had sued the Board for the three violations, which included two email exchanges among board members, arguing the violations required that the Board's changes on how fees would be spent should be invalidated. Although the Open Meetings Law does not address whether or not a public body could cure a prior violation, the trial court concluded that state case law, as well as out-of-state case law, supported the proposition that a public body could cure a violation of the Open Meetings Law as long as it did more than just rubber-stamp the previous decisions. The Coalition then appealed. The appeals court agreed with the trial court. The appeals court noted that "the purpose of the OML is to require open decision-making, not to permanently condemn a decision made in violation of the statute. Because the focus of the OML is on the *process* of governmental decision making, not the *substance* of the decisions themselves, it follows that the OML would permit the ratification of a prior invalid action, provided the ratification complied with the OML and was not a mere 'rubber stamping' of an earlier decision made in violation of the act." The court added that "we reject plaintiffs' contention [that the meeting only rubber-stamped the previous action] because the record, which includes the minutes of the [subsequent meeting], amply supports the trial court's finding that the meeting 'did not merely constitute a "rubber stamping" of a prior decision.' At the meeting, the Board heard additional comment from several 'key players,' including a [Coalition] representative, heard public comment from many interested parties, and engaged in renewed deliberations before announcing its ultimate decision." (*Colorado Off-Highway Vehicle*

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Coalition v. Colorado Board of Parks and Outdoor Recreation, No. 11CA1988, Colorado Court of Appeals, Division V, Aug. 30)

Connecticut

A trial court has ruled that the Town of Windsor did not violate FOIA when it failed to notify Bradshaw Smith that it did not have any records pertaining to a state leash law. The court pointed out that previous decisions had concluded that "nothing in [the FOIA] requires a public agency to provide a written response to a request for records informing the requester that there are no public records." The court observed that the statute "provides that the requester has to wait four days and if the respondent does not reply, then the requester may elect to bring a complaint to the [Freedom of Information Commission]. The four-day deadline insures that the plaintiff does not have to wait indefinitely for a response from the town and the FOIC will resolve the issue whether the agency has a record 'maintained or kept on file.'" In a subsequent decision in the case, the court affirmed the Commission's conclusion that Smith's request was frivolous and assessing a civil penalty of $25. (*Bradshaw Smith v. Freedom of Information Commission*, No. CV 115015510S and No. CV 115015511S, Connecticut Superior Court, Judicial District of New Britain, Aug. 30 and Sept. 11)

District of Columbia

The court of appeals has ruled that an award of attorney's fees is discretionary on the part of the trial court and that the four-factor test used under federal law is appropriate for determining whether or not a plaintiff is entitled to fees. The case involved a request by the Fraternal Order of Police for all emails to or from Police Chief Cathy Lanier that referenced the union. The union sued four months later and although the District denied it had violated the FOIA, it gave no indication that it was processing the union's request. Six months later, the union moved for summary judgment. For the first time, the District indicated it was processing the union's request and blamed the union for not keeping on top of its progress. After further prolonged delays, the trial court finally told the District to disclose the emails. The union also asked for attorney's fees, but after considering the four factors used in federal case law, the trial court concluded the union was not entitled to fees. The union appealed that decision, arguing for the first time that it was automatically entitled to fees as the prevailing party. The appeals court rejected that claim because the union had not raised it until appeal. It then examined the legislative history of the attorney's fees in the federal law and the D.C. law. The court pointed out that "although Congress and the D.C. Council started in very different places with respect to fee award provisions—Congress omitting it entirely; the District Council including a mandatory fee award provision—they ended up in the same place. They both resolved to leave fee awards to the trial courts' discretion. Moreover, both were animated by the desire to promote open government and combat government resistance to the same. Given these parallel objectives, it makes sense then that the four factors initially identified by Congress and subsequently adopted by the federal courts to guide discretionary fee awards so as to promote open government and penalize government obduracy should likewise apply when trial courts are making fee award assessments under D.C. FOIA." The union challenged the trial court's application of the four factors, arguing particularly that the District had no basis for its failure to respond for more than a year. But the appeals court observed that "here there was no indication that the FOP's request benefitted the public interest. Moreover, although the request was not made in pursuit of any obvious commercial benefit, it did seem self-interested in nature. On the other side of the balance, the record clearly demonstrates the District's complete disregard for its disclosure obligations. Although the trial court could have found an award of fees was warranted under these circumstances, it was not an abuse of discretion for it to conclude that obduracy alone was not enough to justify an award of fees in this case." (*Fraternal Order of Police, Metropolitan Police Department Labor Committee v. District of Columbia*, No. 11-CV-545, District of Columbia Court of Appeals, Aug. 23)

Kentucky

A court of appeals has ruled that the Kentucky Community and Technical College System must disclose performance evaluations for two vice presidents of Owensboro Community and Technical College who were named in a defamation suit filed by Paula Gastenveld after she was dismissed as president of the college and reassigned. Paxton Media Group requested performance evaluations for Kevin Beardmore and Cindy Fiorella. KCTCS withheld the employment records under the privacy exemption in the Open Records Act. But the court pointed out that "the KCTCS is a public institution supported by public funding. As president, Gastenveld allegedly came under fire—at least in part—because of her performance evaluations of Beardmore and Fiorella. Her removal as president was clearly linked to those documents, thus subjecting them to a heightened public interest. The lawsuit that Gastenveld filed naming Beardmore and Fiorella as defendants underscored their involvement in the highly public matter of her termination as college president." The court noted that "in light of the particular facts of this case, we hold that the [trial court] properly balanced the competing interests of individual privacy *versus* the public interest and that it correctly determined that disclosure of the performance evaluations was appropriate." (*Kentucky Community Technical College System v. Paxton Media Group*, No. 2011-CA-000816-MR and No. 2011-CA-000817-MR, Kentucky Court of Appeals, Aug. 31)

Washington

A court of appeals has ruled that the Arlington School District Board of Directors did not violate the Open Public Meetings Act when it held frequent study sessions before its regular bi-monthly business meetings. Notice of the business meetings was given in accordance with the statutory provisions for regular meetings, but notice of the study sessions was given 24 hours in advance and only to interested parties, as required under the statute for special meetings. The Center for Justice sued, contending the study sessions were really regular meetings and that notice should be given accordingly. The trial court agreed with the District that the study sessions qualified as special meetings and CFJ appealed. The court of appeals affirmed the trial court's decision on the status of the meetings. The court noted that "the OPMA distinguishes meetings only by the type of notice that the agency provides. Nothing in the OPMA specifies time, location, or periodicity considerations for determining the type of notice. The OPMA thereby permits a public agency to choose the meeting type and the corresponding notice requirements as it wishes, so long as the agency provides some type of notice in accordance with the Act. Thus, the term 'regular meetings' is not ambiguous in the context of other provisions of the statute." Rejecting CFJ's claim that the notice provisions for regular meetings better informed the public of scheduled meetings, the court pointed out that "the notice requirements for special and regular meetings have different benefits, simply reflecting two sets of alternatives that the legislature considered adequate. . .[T]he higher burdens and more specific requirements necessary for special meeting notice indicate that greater notice may be provided. . .In this way, although the public arguably receives less notice of the time at which special meetings will be held, it receives more notice of the specific topics to be discussed." (*Center for Justice v. Arlington School District*, No. 67263-1-I, Washington, Court of Appeals, Division I, Sept. 4)

The Federal Courts…

The Second Circuit has ruled that OPM may withhold the names and duty-station information of more than 800,000 federal employees under **Exemption 6 (invasion of privacy)**. Susan Long and David Burnham of the Transactional Records Access Clearinghouse at Syracuse University had requested access to OPM's

Central Personnel Data File, a database containing approximately 100 data elements concerning the federal civilian workforce. Although OPM previously made the database available, it changed its policy in February 2005 to withhold duty-station information pertaining to over 800,000 federal employees. OPM withheld names and duty-station information for five sensitive agencies: Bureau of Alcohol, Tobacco and Firearms, Drug Enforcement Administration, the Department of Defense, Secret Service, and the U.S. Mint. It also withheld the information for employees throughout the government in 24 sensitive occupational categories, which included, among others, law enforcement and nuclear engineering. When Long and Burnham filed suit, the trial court found the names could be withheld but not all the duty-station information. When the case reached the Second Circuit, the appeals court upheld the trial court's decision to withhold the names, but found that all duty-station information could be withheld as well. The government argued that "disclosure of names could permit the targeting of individual federal employees and their families outside the workplace." The Second Circuit agreed, noting that "OPM's submissions demonstrate that, by and large, federal employees in the sensitive agencies and occupations face an increased risk of harassment or attack." Long and Burnham argued that OPM must assess the privacy interests in each record rather than by broad categories. The court, however, pointed out that "this argument is not serious. Plaintiffs seek millions upon millions of data elements. FOIA does not require an agency to mobilize its full resources for compliance with FOIA requests." Long and Burnham argued that there was a public interest in names because "Government work is done by people." But the court replied that "if that were weighed in the balance of the Exemption 6 inquiry, little would be left to FOIA's protection for personal privacy." The court rejected the notion that being able to contact employees was a public interest. The court observed that "such a use is an example of the 'derivative theory' of public interest and actually facilitates the invasion of the employee's personal privacy." The court added that "plaintiffs have identified no appreciable public interest militating in favor of the wholesale disclosure of names of employees in the sensitive agencies and sensitive occupations. OPM therefore need not identify any compelling privacy interest in order to 'clearly outweigh' the nonexistent public interest." Turning to whether all duty-station information could be withheld, the court pointed out that "a primary reason for the protection afforded by Exemption 6 is to protect individuals' physical safety. That is the risk that the OPM attests will arise from disclosure of the duty-station information." The court concluded that "redaction of employee names does not allay the threat of harassment or attack of federal employees. We therefore hold that federal employees have a more than *de minimis* privacy interest in safeguarding the disclosure of their duty-station information when a risk of such harm is present." (*Susan Long and David Burnham v. Office of Personnel Management*, No. 10-1600 and No. 10-1618 (XAP), U.S. Court of Appeals for the Second Circuit, Sept. 5)

Judge Reggie Walton has ruled that the Justice Department properly invoked **Exemption 5 (deliberative process privilege)** to withhold records concerning the United States-European Union High Level Contact Group created to develop U.S. positions for negotiations with the European Union on a set of common principles for protection of personal information in the trans-national law enforcement context. The HLCG negotiations consisted of internal agency deliberations to develop U.S. negotiating positions and external deliberations with EU officials concerning the common data protection principles. The HLCG positions were developed by consensus between DOJ, Homeland Security, and State. When the HLCG principles were completed, they were presented and accepted by the ministers, whose work on a binding international agreement is still ongoing. EFF requested records on the work and deliberations of the HLCG. Many of the records were withheld under Exemption 5, but Walton's first ruling in the case found DOJ had failed to justify its exemption and segregability claims. He ordered the agency to supplement its affidavits and this time around ruled they were adequate. Although DOJ found some records that might not be covered by the privilege because they had been shared with the EU, the agency told Walton those records had been referred to State and Homeland Security for a direct response to EFF. EFF argued some records reflected the government's final negotiating positions and were not predecisional. But Walton noted that "there is no

indication that the agencies that participated in the HLCG negotiations formally or expressly adopted the United States HLCG experts' negotiating positions in any publicly-available document or publication, nor does the plaintiff contend that is the case. And regarding *informal* adoption, this is not a case where the withheld information sought by plaintiff was used as the agencies' 'working law' or 'secret law.'" EFF also argued that significant amounts of information were likely disclosed to EU officials and contended the agency had the burden of showing the information had not been disclosed. Walton disagreed, pointing out that "it is the plaintiff, not the agency, who carries the burden of producing at least some evidence that the deliberative process privilege has been waived. The plaintiff has not carried that burden here. It instead offers only speculation. . .Because there is no proof that specific 'documents or information' withheld as privileged by the DOJ were voluntarily disclosed to 'unnecessary third parties,' and because waivers of the deliberative process privilege 'should not be lightly inferred,' the plaintiff's contention must be rejected." While EFF argued that factual material in the records was required to be released, Walton found that much of what EFF considered factual revealed the impressions of agency officials. Referring to one document concerning a draft proposal from the EU, he noted that "the plaintiff seeks only factual information concerning the 'draft proposal from the EU,' a request which assumes, of course, that the writers' opinions can be extricated neatly from the parts of the document discussing the E.U. proposal. The [DOJ] declaration states, however, that 'this material contains extensive edits and comments from U.S. HLCG experts as they work to refine draft language and statements or share their candid assessments of the implication for various draft language options under consideration in ongoing negotiations'. . ." Walton also rejected EFF's view of what constituted predecisional records. He noted that "the plaintiff takes a restrictive view of the 'predecisional' requirement, one which would require the DOJ to pinpoint a decision of the senior officials to which the briefing materials contributed. The Circuit, however, long ago rejected such an interpretation of the deliberative process privilege." Walton also upheld the agency's **segregability** analysis, particularly in light of his ruling concerning the deliberative nature of many of the factual references, except for a single document he found had not yet been adequately described. (*Electronic Frontier Foundation v. United States Department of Justice*, Civil Action No. 10-641 (RBW), U.S. District Court for the District of Columbia, Sept. 10)

Judge Rudolph Contreras has declined to rule on whether or not Judicial Watch failed **to exhaust its administrative remedies** based on the current record. Judicial Watch requested records on Solyndra from the Energy Department. The agency told Judicial Watch its Loan Program Office was conducting a search and three weeks later the agency provided two CDs to Judicial Watch and indicated that other responsive records existed and were being reviewed. Judicial Watch filed suit two months later claiming the agency had failed to provide the rest of the documents within the statutory time limits. Contreras noted that "because the defendant here produced some responsive records in October of 2011, before the plaintiff brought suit in December of 2011, the defendant 'cured' any alleged initial failure to timely respond." But he pointed out that "the plaintiff contends that because the defendant's response failed to notify the plaintiff of its right to administratively appeal the agency decision, constructive exhaustion has occurred. The court is not satisfied with the parties' scant briefing on the issue of whether the October 7 letter's failure to include a notice of the right to appeal makes the letter inadequate to trigger the plaintiff's requirement to file an administrative appeal. Consequently, the court denies the defendant's motion for judgment on the pleadings without prejudice to refiling it with further briefing on this issue." (*Judicial Watch, Inc. v. U.S. Department of Energy*, Civil Action No. 11-2140 (RC), U.S. District Court for the District of Columbia, Aug. 31)

A federal court in New York has ruled the FBI failed to show that **Exemption 1 (national security)**, **Exemption 6 (invasion of privacy)**, **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(D) (confidential sources)** apply to certain portions of records pertaining to the

agency's investigation of Deidre McKiernan Hetzler's father for allegedly helping the IRA. Hetzler, who is writing a book about her father, requested information about the investigation. The agency located 187 pages and withheld 21 pages in full and 67 pages in part. After reviewing the Exemption 1 claims *in camera*, the court upheld most of the claims, but rejected the agency's claims for declassified portions that related to the agency's findings and observations pertaining to Dr. McKiernan. The court indicated its conclusion was based on the age of the document, the fact that the investigation had been closed for some time, the fact the McKiernan was dead, and the fact that the Provisional Irish Republican Army "with which Dr. McKiernan was believed to sympathize, is not on the Department of State's Foreign Terrorist Organization list as a group that currently poses a threat to the United State or its interests." As to other records withheld under Exemption1, Hetzler argued that she needed to know if Great Britain was the country that had provided information regarding her father. The court found her reason inadequate to force disclosure of the record, but concluded the agency had failed to show why disclosure of the intelligence methods contained in the document would harm national security. The agency had withheld the names of several clergymen under the privacy exemptions. However, the court found that one individual was now deceased. As to another clergy member, the court indicated that "the Court cannot see what possible stigma could inure to this person if his identity were released. In addition, there is a high probability that this individual is already dead." Hetzler had indicated she was not interested in the identities of confidential sources and the court agreed the agency had properly withheld such names. However, the court observed that the confidential information they supplied was not protected. The court told the agency to re-process such records "to remove the redactions with regard to the information provided by the strictly confidential foreign source, and re-release these documents to Plaintiff." (*Deidre McKiernan Hetzler v. Record/Information Dissemination Section, Federal Bureau of Investigation*, Civil Action No. 07-6399 (MAT), U.S. District Court for the Western District of New York, Sept. 6)

Judge Richard Leon has ruled that the FBI properly invoked **Exemption 7(E) (investigatory methods and techniques)** as the basis for refusing to either confirm or deny the existence of records related to Juan Vazquez from the National Crime Information Center. The case was before Leon on remand from the D.C. Circuit, which had found that in light of the *Milner* decision the agency could no longer base its *Glomar* response on **Exemption 2 (internal practices and procedures)**. Showing the simplicity with which law enforcement agencies have been able to substitute 7(E) for the circumvention prong of Exemption 2, Leon noted that "defendants have established the threshold requirement that responsive records be compiled for law enforcement purpose and have shown that utilization of the NCIC database constitutes a 'procedure for law enforcement investigations' covered by exemption 7(E)." The agency argued that "with this information, individuals could modify their criminal behavior, thereby preventing detection by law enforcement agencies and risking circumvention of the law." Leon agreed and pointed out that "this Court previously found 'that DOJ justified its *Glomar* response by showing how a substantive response to plaintiff's FOIA request could cause [similar] harm addressed by exemption 2.' Since exemption 7(E) is designed to prevent the same type of harm, the Court finds no reason to depart from that earlier finding." (*Juan Antonio Vazquez v. U.S. Department of Justice*, Civil Action No. 10-0039 (RJL), U.S. District Court for the District of Columbia, Aug. 24)

Judge John Bates has ruled that Rafael Perez-Rodriguez, a Mexican citizen currently serving a 57-month prison term for stealing the identity of Indiana resident Arthur Louis Guajardo, failed to **exhaust administrative remedies** when he made broad requests to EOUSA and the Social Security Administration for records about him. Perez-Rodriguez requested any records from EOUSA, but when the agency asked him to indicate where he thought responsive records might be located, he filed suit. He requested earnings information from SSA, but since he provided the agency with all his earnings-related information when he

filed the request, the agency asked him to identify any other information he believed the agency might have. He then filed suit against the agency. Bates noted that "in neither case did plaintiff respond with a meaningful clarification of his request. Nor did plaintiff seek an administrative appeal of the initial determination. It was not enough that plaintiff identify himself; it was his obligation to identify the records he sought." Bates explained that EOUSA had queried Perez-Rodriguez before the 20-day time limit expired requiring him to file an administrative appeal. As to the SSA request, Bates pointed out that "the SSA requested clarification of the nature and purposes of plaintiff's FOIA request, and plaintiff declined to provide one. Hence, plaintiff failed to exhaust his administrative remedies on his SSA request." Perez-Rodriguez had also requested records pertaining to the investigation by Immigration and Customs Enforcement pertaining to his identify theft. He had identified himself under his real name and his alias, but ICE searched only under his real name. Finding the agency's **search was inadequate**, Bates indicated that "the Certificate of Identity that accompanied plaintiff's FOIA request provides two names, and information about plaintiff conceivably might be located under either name. Under these circumstances, a search for records pertaining to 'Rafael Perez Rodriguez' alone is not reasonable." Bates also questioned the agency's invocation of **Exemption 7(E) (investigatory methods and techniques)**. He noted that "none of the information described in the *Vaughn* Index is itself a law enforcement technique or procedure or a guideline for law enforcement investigations. It is unclear, then, whether and how such information falls within the scope of Exemption 7(E)." (*Rafael Perez-Rodriguez v. United States Department of Justice*, Civil Action No. 11-0556 (JDB), U.S. District Court for the District of Columbia, Aug. 31)

Judge Richard Leon has ruled the Department of Veterans Affairs conducted an **adequate search** for service treatment records on Stan Hunt. Hunt requested copies of all service treatment records from November 1, 1977 through September 14, 1984 that were used to deny him veterans disability benefits. The agency initially indicated it found no records, but after Hunt filed suit the agency found one STR from September 30, 1977, which the agency considered outside the time period of the request but released to Hunt anyway. Leon rejected the agency's claim that the action was moot because it had disclosed all responsive records. He noted that "since an inadequate search for records would constitute an improper withholding under the FOIA, the Court denies defendant's motion to dismiss the FOIA claim as moot premised on its complete release of responsive records." He went on to point out that the agency had provided a "reasonably detailed description of the files searched and the search methods employed." He indicated that "plaintiff has not seriously challenged defendant's declarations or proffered any evidence to call into question the demonstrated reasonableness of defendant's searches or the agency's good faith." Hunt also claimed the agency had violated subsection (e)(5) of the **Privacy Act** by failing to maintain accurate, relevant and timely records. But Leon observed that "plaintiff's Privacy Act claim is predicated on his speculation that defendant relied upon 'non-existent' records to deny his application for veterans benefits." He added that "since plaintiff has not identified an agency record subject to testing for accuracy, the Court must deny his motion for summary judgment because he has not proffered any probative evidence of a Privacy Act violation." (*Stan Hunt v. U.S. Department of Veterans Affairs*, Civil Action No. 11-1210 (RJL), U.S. District Court for the District of Columbia, Aug. 27)

Judge Reggie Walton has ruled that the Justice Department has shown that it conducted an **adequate search** for records pertaining to Elwood Cooper's arrest and prosecution. Cooper's suit filed against several components of the agency was first decided by Judge Thomas Penfield Jackson in 2003. On appeal to the D.C. Circuit, the appeals court found that Cooper had presented evidence of the existence of cashier's checks that had been transferred by the DEA to the Marshals Service but had not been located in response to Cooper's request. On remand, Jackson dismissed the case after neither party showed up for a scheduled conference call

and because he believed the agency had disclosed the disputed cashier's checks. After Jackson retired, the case was reassigned to Judge Ricardo Urbina, who denied Cooper's motion for reconsideration. Cooper appealed that decision to the D.C. Circuit again. The second time, the D.C. Circuit vacated Jackson's dismissal order and remanded the case for consideration of the adequacy of the Marshals Service's search. By this time, Urbina has also retired and the case was reassigned to Walton. This time, the agency explained that it "did not search for documents related to seized assets (which would include the cashier's checks at issue here) because 'seized asset records are not routinely searched, unless a requester specifically asks for information on seized assets or there is some indication within other records that assets were seized,' and Cooper 'did not ask in his initial request for information on seized assets,' nor did the 'records located and previously released. . .specify any reference to seized or forfeited property.'" Once alerted to the existence of the checks, the agency searched its offices in the Southern District of Florida and found three responsive checks. Walton accepted this explanation, noting that "even if the initial failure to search for seized asset information was unreasonable, the Marshals Service's supplemental declaration shows that it acted diligently in following 'clear and certain' leads after receiving additional information from Cooper" regarding the cashier's checks. Walton added that "in short, the Marshals Service's search may not have been perfect, but it has now demonstrated that its search was reasonable." (*Elwood J. Cooper v. United States Department of Justice*, Civil Action No. 99-2513 (RBW), U.S. District Court for the District of Columbia, Sept. 11)

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