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Washington Focus: Public Citizen filed a petition with the FDA Sept. 19 asking the agency to abandon its "minor deletions" policy, which it routinely invokes to redact information without giving the requester administrative appeal rights. Instead, the agency requires requesters to file for "reconsideration" of the deletions before being allowed to appeal. Public Citizen Attorney Julie Murray noted that "the agency's current policy is contrary to law, unnecessary to serve FOIA requesters, and ultimately does a disservice to FOIA's commitment to transparency." The minor deletions policy was challenged nearly 20 years ago by the House Government Information Subcommittee after a GAO report recommended rescinding the policy, noting that it "creates a procedure for requesters that is not authorized by FOIA." . . .The Justice Department's Office of Information Policy has issued new guidance on the use of the three exclusions contained in subsection (c) of FOIA. Agencies will be required to consult with OIP before using an exclusion, will publicly report the number of times an exclusion is invoked each year, will include on their websites a brief description of the exclusions, and for agencies with criminal law enforcement records will include a notification in their response letters that certain records are excluded from FOIA and the agency's response addresses records that are subject to FOIA.

Subsequent Duplicative Request Fails Exhaustion Requirement

Judge Beryl Howell has ruled that a requester cannot resurrect a request after the time limit for filing an administrative appeal has passed by simply making the same request again, but, rather, is bound by the parameters of the original agency decision. Howell concluded that "when *withholding decisions* are made in an unexhausted request, a subsequent, identical request cannot cure a prior failure to exhaust because withholding decisions in particular 'involve [the] exercise of the agency's discretionary power [and] allow the agency to apply its special expertise.'" She added that "the alternative would be to require an agency faced with a duplicative FOIA request to reassess any previous withholding

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decisions made within the scope of the duplicative request. Yet, withholding decisions are often the most labor-intensive and complicated aspect of an agency's FOIA response efforts. Thus, after agency employees have already processed a FOIA request and made withholding decisions, requiring the same or yet another agency employee to plow the same ground all over again, while a backlog of requesters remain waiting for attention, is not an efficient use of agency resources. Holding otherwise would potentially allow a small group of FOIA requesters to hold an agency's resources hostage with a constant barrage of FOIA spam in the form of duplicative requests, compelling *de novo* reassessment of the same withholding decisions *ad infinitum*. Agency resources are not unlimited, and thus allowing requesters to monopolize scarce agency resources in this way—through filing duplicative requests where the records are static—would also disservice the purpose of the FOIA because every minute spent giving *de novo* reassessment to a duplicative request is a minute not spent processing new requests and disclosing new, previously undisclosed records."

The case involved a series of FOIA requests stretching over a period of three and a half years submitted by the husband/wife attorneys Joseph diGenova and Victoria Toensing. The two were involved in representing Thomas Gordon, the Executive of New Castle County, Delaware, who was being investigated by the Delaware Attorney General for misuse of government funds. In September 2002, the U.S. Attorney for the District of Delaware opened an investigation of Gordon and Sherry Freebery, a New Castle County administrative officer. Toensing and diGenova were subpoenaed to testify. The two attorneys moved to quash the subpoenas, which were eventually vacated as moot. Toensing and diGenova alleged the U.S. attorney engaged in prosecutorial misconduct during the investigation, particularly an attempt to secretly record a conversation that Toensing had with a New Castle County employee.

Toensing and diGenova's first FOIA requests were sent to EOUSA and the Justice Department's Criminal Division in June 2007 seeking all records pertaining to their subpoenas. EOUSA found 675 pages and released 306 of them. The Criminal Division located 410 pages and disclosed 18 pages. Toensing and diGenova did not file an administrative appeal for either request. In February 2008, Toensing submitted a request to EOUSA for records pertaining to any tapes made during the investigation of Toensing. EOUSA forwarded this request to the U.S. Attorney in Delaware, which responded that it had no records. Again, Toensing did not file an administrative appeal. In February 2009, the two attorneys submitted requests to EOUSA and the Criminal Division asking for records pertaining to the subpoena. The two acknowledged that these requests were duplicative of their prior requests. The agencies conducted another search and told Toensing and diGenova that no further records were found. This time the two attorneys appealed the agency's decision, which was upheld by the Office of Information Policy. In December 2010, the two attorneys once again requested the subpoena records from EOUSA, the Criminal Division, and the FBI. This time, EOUSA and the Criminal Division did not respond before Toensing and diGenova filed suit. The two attorneys appealed the FBI's no records response, but OIP closed the appeal once the case went to litigation.

Howell first considered whether Toensing and diGenova had sufficiently exhausted their administrative remedies to allow her to consider the entire scope of their requests. Finding the two attorneys had not adequately exhausted their administrative remedies, she pointed out that "allowing the plaintiffs now to use their 2010 requests as the vehicle to challenge the adequacy of the EOUSA's searches performed in response to the 2007 and 2008 requests and the propriety of the defendant's 2007 and 2008 withholding decisions—in spite of the plaintiffs' failure to file administrative appeals of the agency's responses to their identical 2007 and 2008 FOIA requests—would clearly frustrate the FOIA administrative scheme generally, as well as the defendant's particular scheme for processing FOIA requests." She added that "indeed, the course taken by the plaintiffs could be viewed as an end run around the FOIA's and the defendant's administrative exhaustion requirements because, if the plaintiffs' course were generally available, FOIA requesters who failed to exhaust their administrative remedies the first time around could routinely cure any failure to exhaust by simply filing a subsequent duplicative request seeking the same records." She indicated that "the plaintiffs waived their right

to object to the agency's responses in 2007 and 2008 by failing to file a timely (or even untimely) administrative appeal, and a minor change to administrative policy guidance such as [the 2009 Holder memorandum] does not serve as a *post hoc* antidote to such a waiver."

After reviewing *Hidalgo v. FBI*, 344 F.3d 1256 (D.C. Cir. 2003) and *Wilbur v. CIA*, 355 F.3d 675 (D.C. Cir. 2004), the two leading D.C. Circuit decisions on exhaustion, Howell explained that "from *Wilbur* and *Hidalgo*, a clear principle emerges: Failure to exhaust administrative remedies is not a mere technicality, and a court must decline to decide the merits of an unexhausted FOIA claim when the plaintiff fails to comply with procedures for administrative review, denying the agency an opportunity to review its initial determination, apply its expertise, correct any errors, and create an ample record in the process."

Howell found that the plaintiffs' 2009 appeal to OIP related back to the adequacy of DOJ's original searches in 2007 and 2008 and that, since OIP had implicitly found those searches adequate, Toensing and diGenova had properly exhausted their administrative remedies related to the search. But she concluded that because the 2009 appeal did not consider any withholding decisions made in 2007 or 2008, those issues were not properly before the court. She pointed out that "the plaintiffs *failed to cure* the procedural defects in their 2007 and 2008 requests; namely, in their 2009 and 2010 FOIA requests, the plaintiffs never identified the defendant's 2007 and 2008 withholding decisions as a basis for their appeals. Therefore, the defendant never reviewed the merits of those withholding decisions through an administrative appeal—a fundamental prerequisite for judicial review." She observed that "allowing the plaintiffs now to challenge the defendant's 2007 and 2008 withholding decisions (and the sufficiency of the resulting *Vaughn* indices) when the agency did not have the opportunity for *de novo* administrative review, due to the plaintiff's failure to appeal the 2007 and 2008 withholding decisions, would directly undermine the purposes and policies underlying the administrative exhaustion doctrine. Inexplicably, the defendant does not raise exhaustion as a basis for dismissing any of the plaintiffs' claims. Nevertheless, the Court holds that the plaintiff's claims in this action may not extend beyond the issues properly appealed to and decided by the agency in conjunction with the 2009 and 2010 requests." (*Victoria Toensing and Joseph E. diGenova v. U.S. Department of Justice*, Civil Action No. 11-1215 (BAH), U.S. District Court for the District of Columbia, Sept. 13)

Views from the States…

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

Ohio

The supreme court has ruled that Columbus State Community College correctly concluded that former employee Sunday Zidonis's request for complaint, litigation files, and emails for an indeterminate period of time between herself and her supervisor was overbroad and vague. The College's records retention schedule described complaint files as dealing with student and staff grievances, arranged alphabetically, and listed a category for litigation files, but did not describe them Both types of files were to be retained for six years after they were last active. The College told Zidonis her request was overbroad, but she never took steps to narrow it. The College retrieved from its disaster recovery system emails between Zidonis and her supervisor back to 2008. Zidonis sued and the lower court upheld the College's decision. During the litigation, the College released redacted copies of the emails to Zidonis. The supreme court agreed with the lower court, noting that "Zidonis's request, which sought whole categories of complaint and litigation files without any limitation as to

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content or time period, was overbroad." The court added that "requests for each of these record categories without any temporal or content-based limitation would likely be overbroad even though the categories are so named in the [retention] schedule. Manifestly, each request—and each retention category when the request is structured after such a category—must be analyzed under the totality of facts and circumstances." As to the emails, Zidonis argued the College was obligated to maintain emails so that they could be retrieved based on sender or recipient status. The court, however, pointed out that "while it may be preferable for public offices to include a program that would permit easier searching of work-related e-mails based on sender and recipient—which Columbus State eventually did here to retrieve pertinent e-mails responsive to Zidonis's request—we cannot require that they do so when [the Public Records Act] does not require it." (*State ex rel. Sunday Zidonis v. Columbus State Community College*, No. 2012-0202, Ohio Supreme Court, Sept. 19)

The supreme court has ruled that John McCaffrey, an attorney defending the Ohio Valley Mall Company on various criminal charges, is not entitled to most of the records he requested from the Mahoning County Prosecutor's Office. The court first noted that although McCaffrey had submitted a multi-part request, his suit only challenged the Office's response to five categories of records. The court dismissed his claim for metadata, noting that "he requested that the prosecutor's office 'make available at cost copies of the following categories of *documents*.'. . .[H]e did not specify that the 'documents' were to include metadata." The court found that calendars of several individuals in the prosecutor's office must be disclosed. The court observed that "the calendars here. . .were used by [the individuals] to make work-related entries, like hearing dates and deadlines for briefs. Work-related calendar entries are manifestly items created by Mahoning County Prosecutor's Office employees that serve to document the organization, functions, policies, decisions, procedures, operations or other activities of the office. These portions of the requested calendars consequently are records for purposes of [the Public Records Act]." The court also found the prosecutor's office had properly redacted copies of civil-case logs by various individuals in the prosecutor's office, noting that "insofar as McCaffrey requested the duties performed by these attorneys, the narrative portions of respondents' opinion and miscellaneous logs were properly redacted based on attorney-client privilege." (*State ex rel. John McCaffrey v. Mahoning County Prosecutor's Office*, No. 2010-1642, Ohio Supreme Court, Sept. 20)

Tennessee

A court of appeals has ruled that a trial court erred when it failed to award Rebecca Little attorney's fees for a Public Records Act request she made to the City of Chattanooga concerning sewer services for an area that had been annexed by the City in 1972. Because Little's father had a pending suit challenging the annexation of his property, the head of the City's Public Works Office asked if the City could seek an injunction against Little's use of the Public Records Act. Because the City had not responded to her request, Little filed suit and the City later brought boxes of records to court in an attempt to show that it was trying to respond to Little's request. The trial court found the City had acted in good faith, told Little to cooperate with the City to look for other responsive records, and denied her attorney's fees. The appeals court reversed. The appeals court noted that at the time of its court production, "the City improperly represented to the trial court . . .that all documents had been produced when it knew the search for responsive emails had not even been initiated. Thus, at the time the records were not disclosed, the City knew it was obligated to produce and willfully did not." The court added that "the trial court abused its discretion when it did not award fees to Little. . . It appears the court focused on the amount of documents produced, especially those brought into court, rather than on whether the proper procedure was followed or the withholding was justified . . . The record supports the conclusion that the City acted consciously to withhold the records with a dishonest purpose. Little complied with the Public Records provisions. . .Little must be compensated for having to expend time and money to enforce her right to access." (*Rebecca Little v. City of Chattanooga*, No. E2011-027-COA-R3-CV, Tennessee Court of Appeals, Sept 25)

Texas

The federal Fifth Circuit has ruled that the Texas Open Meetings Act does not violate the First Amendment by requiring public bodies to meet in public. Although a previous Fifth Circuit panel had ruled the penalties for holding improperly closed meetings impacted members' free speech rights, that ruling was vacated by the full court and the case was reheard by the district court, which found TOMA was content-neutral and did not violate members' free speech rights. This time a new Fifth Circuit panel agreed. Rejecting the plaintiffs' argument that penalizing public bodies that held improperly closed meetings violated members' First Amendment rights, the court noted that "here, government is not made less transparent because of the restriction of private speech about public policy: Transparency is furthered by allowing the public to have access to government decisionmaking. This is true whether those decisions are made by cogent empirical arguments or coin-flips. The private speech itself makes the government less transparent regardless of its message. The statute is therefore content-neutral." The plaintiffs argued that the Supreme Court's decision in *Citizens United* supported their claim, but the court pointed out that the concern in *Citizens United* was "about public attitudes toward particular ideas and speakers. It is aimed at regulations that keep speech from reaching the marketplace of ideas, and it is therefore inapplicable to statutes that restrict only private speech. Thus, TOMA's application to only members of public bodies does not raise. . .the concerns expressed in *Citizens United*." The plaintiffs argued TOMA penalized private speech. But the court indicated that was "a distinction without a difference. To enforce a disclosure requirement of certain speech, the government must have the ability to punish its nondisclosure. If there is no punishment for nondisclosure, the speaker would have no incentive to disclose until the enforcer of the statute prosecuted him or obtained an injunction. That would render any disclosure requirement so arduous to enforce that it would be ineffective." The plaintiffs also argued TOMA was so complicated that it suffered from being standardless and was therefore unconstitutionally vague. The court pointed out that "plaintiffs' complaints arise from TOMA's complexity rather than its vagueness or lack of standards. A great deal of training may be required to predict the interpretation of the tax code, for example, but that is not because it is standardless or arbitrary. In fact, the vast body of law that causes TOMA to be so complex arguably makes it less vague by providing the necessary standards." (*Diana Asgeirsson, et al. v. Greg Abbott*, No. 11-50441, U.S. Court of Appeals for the Fifth Circuit, Sept. 25)

The Federal Courts…

The Second Circuit has ruled that its decision in *National Council of La Raza v. Dept of Justice*, 411 F.3d 350 (2d Cir. 2005), in which it found a Justice Department memorandum had been incorporated by reference because high-level DOJ officials had publicly identified the memo as the basis for a policy change, applies to at least one memo from the Office of Legal Counsel to the Department of Health and Human Services, and the U.S. Agency for International Development concerning the constitutionality of two statutes as applied to U.S. non-governmental organizations was adopted by reference when USAID officials identified it as the basis for the agency's policy. However, unlike the district court, the Second Circuit also concluded that two subsequent memos in which OLC reversed its original position had not been publicly incorporated regardless of whether or not they may have caused USAID and HHS to change their policy. Congress passed two statutes in 2003—the United States Leadership Against HIV/AIDS, Tuberculosis, Malaria Act and the Trafficking Victims Protection Reauthorization Act. Both contained a pledge requirement obligating all organizations receiving funding under the statutes to have a policy explicitly opposing prostitution and sex trafficking. In February 2004, HHS asked OLC to quickly provide an opinion on the constitutionality of the

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pledge requirement. The initial one-page memo from OLC concluded that the pledge requirement would be unconstitutional if applied to U.S. organizations. USAID and HHS publicly announced they would require the pledge for foreign or international organizations, but not U.S. organizations. A footnote in a USAID document explained that OLC "in a draft opinion determined that this provision only may be applied to foreign non-governmental organizations and public international organizations because of the constitutional implications of applying it to U.S. organizations." In July 2004, OLC provided a 30-page memo to USAID and HHS reversing its original position and finding the pledge requirement could constitutionally be applied to U.S. organizations as well. In September 2004, the acting head of OLC wrote to HHS confirming that the OLC had changed its mind. In March 2005, a USAID official testified before a House Subcommittee that OLC had originally concluded that the pledge was unconstitutional when applied to U.S. organization, but had changed its mind in September 2004. After examining the case law on when a privileged document was incorporated by reference, the Second Circuit agreed that the USAID publication, coupled with the later public testimony of a USAID official, constituted incorporation by reference. The court noted that "any agency faces a political or public relations calculation in deciding whether or not to reference what might otherwise be a protected document in explaining the course of action it has decided to take. In many cases, as here, the agency is not required to explain its reasons publicly. Nonetheless, where it determines there is an advantage to doing so by referencing a protected document as authoritative, it cannot then shield the authority upon which it relies from disclosure." But as to the July 2004 memo in which OLC changed its position, the court found that the only public reference to the change came in OLC's September 2004 letter, which did nothing more than confirm the changed position and provided no further details. The court observed that "the lack of any specific reference to the July 2004 memoranda by either USAID or HHS are further indications that the July memoranda were in fact parts of the predecisional and deliberative process that yielded the September 2004 letter." The court rejected the government's argument that the memo was still protected by the attorney-client privilege. The court pointed out that "*La Raza* establishes that when a document has been relied upon sufficiently to waive the deliberative process privilege, that reliance can have the same effect on the attorney-client privilege. We conclude that it does so here." (*Brennan Center for Justice at New York University School of Law v. United Sates Department of Justice, et al.*, No. 11-4599, U.S. Court of Appeals for the Second Circuit, Sept. 19)

Judge Amy Berman Jackson has ruled the CIA properly withheld 11 reports prepared by its Inspector General concerning the use of unauthorized interrogation techniques on detainees held abroad under **Exemption 1 (national security)** and **Exemption 3 (other statutes).** The ACLU requested the reports and argued they could not be withheld because since the techniques were unauthorized they did not qualify as intelligence sources and methods. The ACLU relied on *CIA v. Sims*, 471 U.S. 159 (1985), where the Supreme Court had observed that "the phrase 'intelligence sources and methods'—though broad—does not encompass conduct that falls outside of the CIA's mandate." But, analyzing the agency's Exemption 3 claim, Jackson noted that "*Sims* does not stand for that broad proposition. As long as the withheld information pertains to methods of collection that the agency used to perform its 'statutory duties with respect to foreign intelligence,' it is irrelevant whether the actual techniques were unauthorized." The ACLU, however, contended that "the techniques at issue here are not merely illegal, but were unauthorized at the time they were used. . .[I]t draws the conclusion that unauthorized conduct cannot be within the CIA's mandate, and therefore falls outside the definition of 'intelligence methods and sources' under *Sims*." Jackson responded by noting that "this argument misconstrues *Sims* just the way that the D.C. Circuit rejected in *ACLU v. Dept of Defense*, 628 F.3d 612 (D.C. Cir. 2011). The D.C. Circuit found that under *Sims*, what matters is that the activity was conducted for intelligence purposes, not that it was illegal or unauthorized." Jackson indicated the analysis was the same under Exemption 1. She pointed out that "although aspects of the techniques in question may not have been authorized at the time of their use, the Court cannot find it unreasonable for the government to believe that disclosure of information about their use would reveal details about interrogation methods that could assist

foreign terrorist organization and foreign governments, and thereby damage national security." The ACLU also argued that much of the information had already been made public in prior FOIA releases. After an *in camera* review, Jackson found that the CIA needed to re-review one document for further consideration of whether some material might already be public. Jackson also found the documents contained some information protected by **Exemption 5 (deliberative process privilege)**. She concluded the information was predecisional, but found the agency's affidavits had not substantiated whether they were deliberative as well. However, she observed that after *in camera* review, "the Court finds that the withheld documents are deliberative reports recommending certain actions. To the extent there are certain limited purely factual portions in one or more of them, the Court need not determine whether they are non-deliberative or segregable because it has already found that they are covered by Exemption 1 and 3." (*American Civil Liberties Union v. Central Intelligence Agency*, Civil Action No. 11-0933 (ABJ), U.S. District Court for the District of Columbia, Sept. 25)

Judge Barbara Rothstein has ruled that most records related to contracts awarded by the Department of Homeland Security for the development of body scanners are protected by **Exemption 4 (confidential business information)** and **Exemption 5 (deliberative process privilege)**. But because the agency provided EPIC with a large number of documents during the litigation, she concluded the public interest organization was entitled to **attorney's fees**. The agency located 2,300 pages of responsive records, but released only 15 pages in full and 158 pages in part. The agency failed to respond to EPIC's administrative appeal and the organization filed suit. DHS then disclosed 151 pages in full and 21 pages in part, claiming it had done so to "narrow the issues for judicial review." EPIC argued that pricing information for Rapiscan, one of the companies that had been awarded a DHS contract, had been made public by the company on a website related to its contract with New York State. Rothstein disagreed and noted that "the public documents that EPIC cites contain generic performance information distinct from the specific data included in the document in dispute. . . [A]ccording to [Rapiscan's affidavit] the 2009 pricing document contained in the contract with New York State has nothing to do with the pricing under any other contract because Rapiscan's pricing is unique to each procurement. Thus, EPIC's contention that the public New York contract price list demonstrates that DHS does not generally treat its unit pricing as confidential falls flat." EPIC argued that agency discussions with Rapiscan and Northeastern University—the other contractor—were not protected by Exemption 5 because the contractors had interests that were adverse to the agency. The agency, however, contended the exchanges were protected because the contractors served as outside consultants. Rothstein agreed with the agency. She pointed out that "self-advocacy is not a dispositive characteristic and does not control Exemption 5's scope in this case. In order to be excluded from the exemption, the contractors must assume a position that is 'necessarily adverse' to the government. Even though NEU and Rapiscan's positions are competitive and self-interested, they are not adverse to DHS, and EPIC has proffered no evidence suggesting as much. To the contrary. NEU and Rapiscan are bound in contract to provide information and analysis to DHS." EPIC claimed some of the information was factual. Rothstein, however, referring to one contested document, indicated that "strengths and weaknesses are not necessarily facts. Nor are they 'straightforward explanations of agency regulations,' or headers at the top of meeting minutes that courts have ordered disclosed. Rather, as represented here, they are the contractors' subjective assessment of DHS's options. As such, they form part of the department's deliberative process and fall within the scope of Exemption 5." Although she ruled for the agency on the merits of its exemption claims, Rothstein nonetheless concluded EPIC was entitled to attorney's fees. She noted that the agency had released several documents during litigation. "The sequencing of DHS's disclosures as well as the department's change of position as to the propriety of withholding them suggests that this lawsuit was the catalyst for the record release." DHS argued that some of the media coverage cited by EPIC predated the litigation. But Rothstein observed that "as the media coverage indicates, the *subject matter* contained in the records released as a result of the present action is newsworthy, and the disclosures in

this case have added to the body of public knowledge on this issue of public importance." Assessing whether the agency's withholding was reasonable, she noted that "these releases came *after* EPIC filed suit. DHS's purported justification for such disclosure—*i.e.* to 'narrow the issues for judicial review'—is not accompanied by any argument as to why the initial withholding had any legal basis." (*Electronic Privacy Information Center v. United States Department of Homeland Security*, Civil Action No. 11-945 (BJR), U.S. District Court for the District of Columbia, Sept. 14)

A federal court in California has ruled that the FBI, Immigration and Customs Enforcement, and the Secret Service properly withheld records concerning the use of social media as part of law enforcement investigations under **Exemption 5 (privileges)** and **Exemption 7(E) (investigative techniques and procedures)**, although the court ordered the FBI to provide further justification as to whether disclosure of some of the information it was withholding under 7(E) would actually risk circumvention of law or regulation. The case involved multiple requests by EFF concerning the use of social media in law enforcement investigations. EFF argued that since the use of social media for investigatory purposes had been the subject of public discussions many of the techniques for which the agencies were claiming Exemption 7(E) were both routine and publicly known. Judge Susan Illston found that ICE and the Secret Service had substantiated their claims that disclosure of the withheld information would risk circumvention of law or regulation. But, while she questioned the FBI's justifications, she gave the agency another chance to explain how disclosure of its records could lead to circumvention of law or regulation. Discussing the agency's claims concerning the names of FBI divisions and locations of field offices, Illston noted that "disclosing that certain divisions are involved in or supervise the use of social networking sites in investigations does not disclose exactly how the FBI is expending its resources in this area. Similarly it is not readily apparent to the Court why disclosure of the physical location of a field office or task force involved with these investigations—which are focused on *online* activity—risks circumvention of the FBI's efforts." Illston upheld all of the agencies' claims under Exemption 5. EFF argued that some FBI records appeared to deal with the application of established policies rather than legal advice. Illston disagreed, pointing out that "the FBI has redacted information from email conversations from or to counsel, and withheld attached documents, regarding 'discussions' and questions as to whether certain policies 'apply' to new situations. . .and otherwise seeking legal advice that is not a 'neutral' application of established policies." Although she upheld the **adequacy of ICE's search**, she agreed with EFF that the agency had not sufficiently explained why it only searched individuals' computers rather than agency-wide servers. She observed that "the Court cannot tell, however, whether ICE's search was reasonable in light of ICE's failure to address why certain employees searched only their own computer files, whether there are other unit or agency-wide record systems that exist that might contain responsive documents, and whether these systems were searched or were not searched because it was determined that they were unlikely to contain responsive records." (*Electronic Frontier Foundation v. Department of Defense, et al.*, Civil Action No. 09-05650 SI, U.S. District Court for the Northern District of California, Sept. 24)

Judge Colleen Kollar-Kotelly has ruled the DEA must disclose the identity of a DEA informant who was publicly acknowledged during his testimony at Jeffrey North's trial as well as any information the informant revealed at trial. The agency originally told North it would neither confirm nor deny the existence of records on Gianpaolo Starita. Kollar-Kotelly originally ruled in favor of the agency, but vacated that judgment based on North's motion for reconsideration. She told the agency to respond to trial transcripts furnished by North indicating that Starita had been publicly acknowledged as an informant. The agency relied on *Moore v. CIA*, 666 F.3d 1330 (D.C. Cir. 2011), in which the D.C. Circuit concluded that an FBI reference to a CIA document did not constitute an official confirmation that it had records on a third party. Indicating that the agency's reliance on *Moore* was "misplaced," Kollar-Kotelly criticized the agency's behavior, noting that "the *Moore* case did not address any issues remotely relevant to the DEA's arguments, and therefore

cannot be considered new legal authority requiring reconsideration of the Court's prior Order. The Court is perplexed as to why the DEA requested multiple extensions of time and ultimately took over three months to file a renewed summary judgment motion when the DEA did not perform any additional searches and cites absolutely no legal authority in support of its [claims]. . .To the contrary, several [decisions] in this Circuit clearly demonstrate the DEA's arguments are incorrect." She observed that "the only evidence before the Court is the un-rebutted evidence submitted by the Plaintiff indicating the DEA publicly acknowledged Starita as an informant during Plaintiff's criminal trial. . .Plaintiff satisfied his burden of production on this issue, with no substantive argument or evidence to the contrary from the DEA." She added that "the DEA must confirm whether or not responsive documents exist, and then either release the documents or establish the contents of the documents are exempt from disclosure. The DEA is further advised that the DEA is obligated to disclose any information previously disclosed by Starita and other witnesses, as indicated in the transcripts submitted by the Plaintiff, despite the fact certain FOIA exemptions might otherwise protect disclosure of certain documents." (*Jeffrey North v. United States Department of Justice*, Civil Action No. 08-1439 (CKK), U.S. District Court for the District of Columbia, Sept. 26)

Judge Emmet Sullivan has ruled that the Transportation Security Administration properly withheld information pertaining to whether or not Ryan Skurow was on the "No Fly List" under **Exemption 3 (other statutes)**. Skurow, an American citizen residing in Israel, was stopped and detained on several occasions when he flew to the United States after 2007. When he was stopped in 2009 at Atlanta, he was told by a Customs and Border Patrol officer that he was stopped because he was on the "No Fly List." In an attempt to clarify his situation, he contacted Rep. Jean Schmidt (R-OH), his father's representative, as well as the Traveler Inquiry Program at the Department of Homeland Security. He finally submitted a FOIA/Privacy Act request to TSA for records concerning himself. When there was no progress on his request, his counsel contacted DHS, which told him it could do nothing until TSA provided a substantive response. Skurow then filed suit and TSA began responding to his request by invoking Exemption 3. The agency told Skurow it could neither confirm nor deny the existence of records concerning whether or not he was on the "No Fly List" based on 49 U.S.C. § 114(r), which protects sensitive security information. Skurow filed a pro se opposition to the withholdings, which was subsequently ratified by his counsel. Skurow challenged the **adequacy of the search**, but Sullivan noted that "Defendants properly rely on a detailed, non-conclusory declaration that demonstrates the adequacy of the search." Skurow argued the search was inadequate because it did not uncover correspondence sent to DHS by Schmidt and his counsel. Sullivan pointed out that Schmidt's letter went to CBP, not TSA. As to some of the correspondence with counsel, Sullivan indicated that "TSA responds that these documents post-date plaintiff's FOIA request and are accordingly not considered part of his request, which the TSA interpreted as seeking information in existence at the time of the request. The Court finds this approach reasonable and also notes there is also no particular need to produce to plaintiff documents that plaintiff or his counsel already have." While Skurow admitted that 49 U.S.C. § 114(r) qualified as an Exemption 3 statute, he argued the agency had waived its right to assert it because it had already publicly identified him as being on the Watch List. Pointing out that such a waiver would occur only as the result of an official acknowledgement, Sullivan observed that "the alleged disclosure was made by an unnamed CBP employee while plaintiff was stopped at an airport. There is nothing official about it, nor was it documented." Sullivan noted that he did not have jurisdiction to consider whether TSA had properly identified the information as sensitive security information since by statute such a remedy fell within the jurisdiction of a court of appeals. However, he explained that he could decide whether or not the information fell within the parameters of the non-disclosure statute. Finding that the information was covered by 49 U.S.C. § 1149(r), he pointed out that "the TSA's *Glomar* response to plaintiff's FOIA request was entirely proper and squarely within the realm of its authority." (*Ryan B. Skurow v. U.S. Department of Homeland*

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Security and U.S. Transportation Security Administration, Civil Action No. 11-1296 (EGS), U.S. District Court for the District of Columbia, Sept. 26)

Judge Richard Leon has ruled that an opinion prepared by the Justice Department's Office of Legal Counsel on behalf of the FBI is protected by **Exemption 1 (national security)** and **Exemption 5 (deliberative process privilege)**. In preparation for the reauthorization of the Patriot Act, DOJ's Office of the Inspector General examined the FBI's practice of obtaining phone records without obtaining a new National Security Letter. While the OIG study was in progress the FBI asked OLC to provide legal advice concerning the practice and OLC provided an 11-page memorandum containing its legal analysis and advice. EFF requested a copy of the opinion and the agency denied the request under Exemption 1 and Exemption 5. Leon first noted that "utilizing such classified factual information to render its guidance, OLC followed its standard practice and marked as classified 'those portions of the [OLC] Opinion which reflect classified factual information provided to OLC by the FBI.'" Pointing out that "while this Court's review is *de novo*, our Circuit has consistently emphasized its deferential posture to the executive in FOIA cases involving national security concerns," Leon indicated that "conferring substantial weight and deference to the DOJ's declarations, I find that the Department has explained with sufficient detail why the withheld information in the OLC Opinion qualifies as 'intelligence sources or methods' and adequately described the potential harm to national security that could result from the information's public disclosure." EFF argued that "the DOJ failed to provide a detailed justification of its withholdings, tied to the particular part of the OLC Opinion to which it applied, and thus failed to sustain its burden regarding FOIA Exemption 1 on summary judgment." Leon rejected that claim, indicating that the agency "is asserting Exemption 1 only as to certain paragraphs of the OLC Opinion, which have been marked as classified in accordance with the classification markings included in the FBI's two letters to OLC requesting legal advice." He added that "the Department's submitted declarations are sufficiently specific to satisfy its burden without going so far as to disclose protected information." Turning to the deliberative process privilege claim, Leon observed that "it is apparent that the OLC Opinion is both predecisional and deliberative in nature, and thus subject to the deliberative process privilege. The OLC Opinion as described in the Department's declarations contains inter-agency material that was generated as part of a continuous process of agency decision-making, namely how to respond to the OIG's critique of the FBI's information-gathering methods in certain investigations. . .Indeed, it is not hard to imagine how disclosure of the OLC Opinion would likely interfere with the candor necessary for open discussions on the FBI's preferred course of action regarding the OIG evaluation." Leon also upheld the agency's **segregability** claims. He noted that "the DOJ's declarations explicated that, although only portions of the OLC Opinion were withheld under Exemption 1, the entirety of the OLC Opinion was withheld under Exemption 5, leaving nothing significant that could be disclosed in a redacted format." (*Electronic Frontier Foundation v. Department of Justice*, Civil Action No. 11-939 (RJL), U.S. District Court for the District of Columbia, Sept. 21)

Judge James Boasberg has ruled that information about the number of dogs bought and sold by breeders and dealers as reported to the Animal and Plant Health Inspection Service annually is not protected by either **Exemption 4 (confidential business information)** or **Exemption 6 (invasion of privacy)**. The Humane Society had requested the information concerning Missouri dog breeders and dealers. At first, APHIS decided that Block 8, which provides the number of dogs bought and sold and the gross revenue from dog sales for the previous year, should be withheld. However, the agency reconsidered its position and changed its mind, concluding that much of the relevant information was already public and that the information was stale for competitive purposes because it was from the previous year. The Missouri Pet Breeders Association and several individual breeders filed a reverse-FOIA suit challenging the agency's decision. The breeders asserted that there was no evidence that the fees paid by dealers are public. But

Boasberg noted that "the facts, however, are directly to the contrary: even with the redactions that Plaintiffs seek, the Forms at issue in these very FOIA requests reveal the fee amount paid." The breeders also argued APHIS had not taken into consideration that the Humane Society was trying to run them out of business. But APHIS pointed out that "these comments have nothing to do with substantial competitive harm because they do not allege any injury that would 'flow from the affirmative use of proprietary information *by competitors*.'" Boasberg observed that "there *would* be competitive harm if competitors could complete the 'financial puzzle' by combining the Block 8 information with other pieces of information to determine how a dealer prices its dogs. Yet there is no indication there that competitors have those other puzzle pieces. So [APHIS] was not arbitrary and capricious in concluding on the facts of this case that crude price-per-dog estimates would not offer competitors much help." The breeders also insisted that the information was protected by Exemption 6. Finding that there was more than a *de minimis* privacy interest, Boasberg indicated that APHIS had identified several public interests in disclosure – whether the fees levied against breeders were reasonable and equitable, whether the agency's inspections were effective, and whether the agency was properly assessing licensing fees. The breeders argued that the Humane Society had made none of these claims in its request and that they were unrelated to the actual information contained in Block 8. Boasberg first noted that "when the agency itself provides a sufficient public interest, it makes no sense to reject that interest on the ground that it came from the agency's mouth." As to the relevance of the Block 8 information to the public interest, Boasberg pointed out that "although the Forms paint only a partial picture, that peek could still help the public assess the [agency]. The Forms disclose amounts that determine the license fee—that is, the dealer's revenue (for a breeder) and the dealer's revenue minus the amount paid for the dogs (for most other dealers). . .So just from the Forms, the public can check whether an initial payment by a dealer complies with the fee schedule. . . [APHIS] was not unreasonable in concluding that disclosure here will at least help the public evaluate whether it is properly assessing fees." Boasberg concluded that [APHIS] considered the private interests here fairly slight and the public interests more substantial. As [APHIS's] balancing was not arbitrary or capricious, the Court cannot find that Exemption 6 protects against disclosure." (*Carolyn Jurewicz, et al. v. United States Department of Agriculture*, Civil Action No. 10-1683 (JEB), U.S. District Court for the District of Columbia, Sept. 20)

Judge Rosemary Collyer has ruled the FBI properly denied a **fee waiver** to Curtis Monroe-Bey, a prisoner serving a life sentence in state prison in Maryland, because he did not show why disclosure of previously disclosed information about the FBI laboratory scandal would be in the public interest. Monroe-Bey argued that he edited several publications that were disseminated to prisoners throughout the country and that disclosure would shed light on the State of Maryland's mishandling of his own prosecution. Collyer noted that "the FBI properly denied Mr. Monroe-Bey's fee waiver request on the basis that (1) he had not satisfied [various] factors of the public interest prong because the requested information was already in the public domain and (2) he had not demonstrated that his release of the same information would add anything more to the public's understanding of the agency's performance. Mr. Monroe-Bey's reliance on the Washington Post article to show that 'others have been provided said responsive documents, presumably without costs,' virtually concedes the FBI's first finding." She rejected Monroe-Bey's claim that disclosure was in the public interest because it would shed light on Maryland's actions. She pointed out that "the regulation governing the FBI's decision specifically states that the subject of the request 'must concern identifiable operations or activities of the *federal government*. . ." She indicated that Monroe-Bey "does not identify what findings [he would disseminate from the records] and the source of such findings. Mr. Monroe-Bey simply has not demonstrated his ability to 'effectively convey' the requested information to the public." (*Curtis Monroe-Bey v. Federal Bureau of Investigation*, Civil Action No. 11-1915 (RMC), U.S. District Court for the District of Columbia, Sept. 13)

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