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Washington Focus: Bloomberg News reporters Danielle Ivory and Jim Snyder have taken a look at aspects of the Obama administration's FOIA policies and found them wanting. Bloomberg conducted an unscientific experiment to gauge the problem of time delays by requesting travel records for the heads of 57 agencies, records they had been told by Melanie Pustay at the Office of Information Policy should routinely be releasable in the public interest. Of 20 cabinet-level agencies, only the Small Business Administration released the records within the 20 day time limit. Altogether, 30 agencies had responded to the Bloomberg request within the two weeks before the reporters published their results. . .Ivory also reported about the increasing use of contractors by agencies to process FOIA requests. She found that at least 25 agencies are using contractors for FOIA work and that the government awarded $26.5 million in FOIA-related contracts in 2012, up from $19.1 million in 2009.

Court Affirms EPA Decision In Climate Change FOIA Suit

Occasionally, the subject matter of a request is so controversial or fraught with political or legal implications that the agency's processing procedures and exemption claims are likely to be more highly scrutinized than if the topic was more routine. A good example comes in Magistrate Judge Deborah Robinson's recommendations in a case filed by the Attorney General of Utah for EPA records concerning climate change.

After the Supreme Court ruled in 2007 that the EPA had jurisdiction to regulate greenhouse gases, the agency issued an Endangerment Finding on the public health risks of greenhouse gases in December 2009. The agency considered assessments conducted by the Intergovernmental Panel on Climate Change, an international body that produces multi-volume assessment reports to which the U.S. government is a significant contributor.

In July 2010, Utah requested documents concerning the development of the Endangerment Finding. The request was

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forwarded to the agency's Climate Change Division as the coordinating lead office for conducting the search. The Division sent search instructions to eight employees in its own office, who were told to send the instructions to other agency staff that might have responsive records. Ultimately, the instructions were sent to 73 employees. The Climate Change Division also sent the search instructions to 24 employees in other agency departments. These were also disseminated to a total of 65 staff members. Finally, the Division sent the instructions to 29 other employees throughout the agency; this further dissemination ultimately went to 105 employees. The agency collected 19,000 potentially responsive records. The agency made its first document release in October 2010, sending the State records that had already been released in response to a previous FOIA request, and telling the State that records responsive to three subsections of the State's request were publicly available on the agency's website. The State filed suit in November 2010 and the agency completed its release of records in April 2011. Ultimately, nearly 13,000 records were deemed responsive, or which 8.200 were released in part, 4,445 in full, and 342 were withheld in full. The agency claimed Exemption 4 (confidential business information), Exemption 5 (privileges), and Exemption 6 (invasion of privacy) as the bases for withholding information.

Utah argued that the search was inadequate, claiming that the agency had failed to identify the search terms it used. Robinson pointed out that "the court recognizes that a lack of search terms can often be a primary consideration in assessing the adequacy of the affidavits. Given the case-by-case determination of reasonableness, however, 'there is no uniform standard for sufficiently detailed and nonconclusory affidavits.'" She explained that the cases on which Utah was relying to undermine the adequacy of the search dealt with "significantly vaguer descriptions than the ones provided in this matter." She indicated that "the EPA instructed employees as to the search parameters to uncover documents responsive to Plaintiff's FOIA request. While each instruction was not in the format of specific search terms, the agency's descriptions of the search parameters are sufficiently detailed to determine what agency employees were tasked with searching for."

The agency withheld a proposal voluntarily submitted by Dr. Kristie Ebi to solicit interest in developing a model of the health risks related to climate change under Exemption 4. Ebi said she had received no funding for her proposal, but that because her model had not been developed by other researchers, she contended disclosure would harm her ability to get future funding. Rejecting the agency's claim, Robinson observed that "other than noting that she works as an 'independent contractor,' the agency has not demonstrated the commercial nature of Dr. Ebi's development of health risk models and has thus not met its burden."

The agency fared better with its Exemption 5 claims. The State argued that deliberative materials pertaining to the IPCC reports were not protected because the IPCC is not a governmental agency. But Robinson pointed out that "the deliberative process privilege, however, does not turn on the agency's ability to 'identify a specific decision' in connection with the documents prepared. The United States government adopted a policy, in offering its official comments after conducting a governmental review of the IPCC reports. Defendant has described the review process that was involved and what role the documents played in that process." The State also argued that briefing materials and talking points regarding the Endangerment Finding were not protected because they were neither memorandums nor letters. Robinson observed that they were protected because "they were created by agency staff prior to finalization of the agency's policies and reflect the deliberations that occurred during development of the agency's policies regarding its response to the Endangerment Finding. . ."

The agency withheld some materials under the attorney-client privilege. But, as to some of them, Robinson agreed with Utah that the agency had failed to show that the confidentiality of the communications had been preserved. She noted that the agency's affidavit explained the information was shared with those who had a need to know, including EPA staff working on the Endangerment Finding. Robinson pointed out

that the "use of the word 'including' implies that the information was potentially shared with others. The agency has not demonstrated that the information maintained its confidential status, in that it was only shared with those who were 'authorized to speak or act' in relation to the subject matter of the communication." The State also challenged the agency's attorney work product claim, arguing the agency had not shown that litigation was pending at the time the records were created. But Robinson observed that "the records at issue provided attorney advice and revisions to the agency's position in light of the critical comments received. While not dispositive, subsequent challenges to the Endangerment Finding support the fact that the agency had a subjective belief that litigation was a real possibility, and that the belief was objectively reasonable."

The State argued the agency improperly directed it to the agency's website for some documents rather than producing the documents themselves. Upholding the agency's action, Robinson pointed out that "Defendant directed Plaintiff to alternative sources in lieu of producing the responsive records for the Plaintiff. Defendant directed Plaintiff to the record for the Endangerment Finding and also noted its availability at the EPA's docket office in Washington, D.C. Further, Defendant provided the URLs to documents on the EPA's website. These alternative sources to the requested documents were disclosed by the EPA itself. In providing this information online, the agency has made it available for public inspection and copying." (*Mark L. Shurtleff v. United States Environmental Protection Agency*, Civil Action No. 10-2030 EGS/DAR, U.S. District Court for the District of Columbia, Sept. 25)

Views from the States…

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

Connecticut

The supreme court has ruled that a federal regulation prohibiting the disclosure of information about federal detainees held in state facilities qualifies as a withholding provision under the applicable exemption in the Freedom of Information Act, preventing the Department of Correction from disclosing information it received about Rashad El Badrawi, who was held in a state facility after he was picked up on federal immigration charges. El Badrawi left the country after he was released from custody. However, he requested his records from the Department of Correction, which declined to disclose information it had received from the federal NCIC indicating El Badrawi was listed in the violent gang and terrorist organization file. He filed a complaint with the FOI Commission, which found the federal regulation applied only to detainees currently in custody and ordered the NCIC record disclosed. The Department appealed and the United States intervened. The trial court remanded the case to the FOI Commission, which ruled once again that the record was not exempt. The trial court agreed with the Commission and told the U.S. to redact the record so that no investigatory techniques would be disclosed. Both parties then appealed to the supreme court. The supreme court first indicated that the federal government's interpretation of the reach of the regulation carried more weight than the FOI Commission's interpretation. The court noted that "the commission has no special expertise in federal immigration law, in federal criminal law enforcement policies and procedures, or in questions of national security, which matters are the subject of the regulation. . .If the *promulgating agency* intended the federal regulation to apply to information about former detainees, then such information clearly falls within the 'otherwise provided by any federal law' exemption [in the FOIA]." The FOI Commission and the trial court had concluded that because the federal statute was written in the present tense, it only applied to detainees currently in custody. By contrast, the U.S. argued that "the use of the present tense 'merely

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describes a triggering event, not a temporal limitation with a beginning and an end.'" The court pointed out that "the regulation was intended to ensure that the disclosure of information about detainees would be subject to a uniform federal policy, to protect the privacy of detainees, and, most significantly, to prevent adverse impacts on ongoing investigation and investigative methods. All of these purposes would be undermined by allowing state and local entities to disclose information about a detainee after the detainee had been released from custody. . ." The FOI Commission argued the federal regulation was promulgated in direct response to a New Jersey state court decision requiring that state to disclose information about federal detainees being held in state facilities. But the court pointed out that "the fact that the plaintiffs' requests for information in [the New Jersey case] may have triggered the need for the regulation does not compel the conclusion that the promulgating agency narrowly tailored the regulation to address only the problems resulting from that specific request, without giving any thought to other problems that disclosure of information about detainees, both those currently detained and those released from detention, might produce." (*Commissioner of Correction v. Freedom of Information Commission*, No. 18622, No. 18623, and No. 18624, Connecticut Supreme Court, Sept. 27)

Illinois

A court of appeals has affirmed a trial court's decision that Rockford Public School District 205 acted in bad faith when it tried to withhold a letter it received from a school principal providing his version of his termination from the *Rock River Times*, but that the newspaper was not entitled to attorney's fees because it was not the prevailing party. The school district tried to rebuff the newspaper's request by citing the privacy exemption and the Personnel Records Review Act. The Public Access Counselor in the Attorney General's Office rejected the applicability of both exemptions, but rather than release the letter, the School District claimed it was protected by yet a third exemption. By this time, the newspaper had filed suit and the Public Access Counselor declined to rule any further. The School District then released the letter, claiming its action came as a result of an informal oral opinion by the PAC. The trial court levied a $2,500 penalty against the School District for its behavior, but found that the newspaper was not entitled to attorney's fees because of a recent amendment to the FOIA's attorney's fees provisions, which changed the threshold for eligibility from "substantially prevail" to "prevail" and made a fee award mandatory rather than discretionary once a plaintiff was found to be entitled to an award. Upholding the civil penalty, the appellate court noted that the PAC denied that the School District asked it for an oral opinion. The appeals court pointed out that "not only did the school willfully and intentionally violate the FOIA by raising a third exemption after the first two were denied, it 'looked for a way to save face' rather than simply admit it was wrong." But both the trial court and the appellate court seem to have misinterpreted the attorney's fees amendments. While the original fee provision largely tracked the federal provision, the federal provision was amended in 2007 to reverse the effects of the Supreme Court's *Buckhannon* decision finding attorney's fees provisions applied only when a court issued a ruling in the plaintiff's favor. The amended federal attorney's fees provision specifically codified the catalyst theory—that filing suit was the crucial factor in an agency's decision to disclose the record. But, although the catalyst theory had been recognized in prior state cases interpreting the original attorney's fees provision, the appellate court indicated that "the legislature did not adopt this language or even retain the 'substantially prevail' language when amending the Illinois FOIA." The court concluded that "by deleting the word 'substantially,' which modified the verb 'prevail,' the legislature evinced an intent to require nothing less than court-ordered relief in order for a party to be entitled to 'attorney' fees under the FOIA." This conclusion was based on the court's statutory construction assumption that "an amendment is intended to change the law as it formerly existed, rather than to reaffirm it. When the legislature amends a statute by deleting certain language, it is presumed to have intended to change the law in that respect." As sound as this principle of statutory construction may be generally, the legislature actually changed nothing in the provision except to lower the threshold for entitlement to fees by establishing that a party needed to "prevail" rather than "substantially prevail." Since the courts admitted the newspaper would have qualified under the prior

"substantially prevail" test, it makes absolutely no sense that they would no longer qualify when the entitlement test was made easier. (*Rock River Times v. Rockford Public School District 205*, No. 2-11-0879, Illinois Appellate Court, Second District, Oct. 3)

A court of appeals has ruled that a recent amendment to the FOIA setting separate fee criteria for electronic records as opposed to paper records requires the chief county assessment officer of Franklin County to charge data broker Sage Information Services no more than the costs of providing the county's property assessment records by email. Sage requested the records electronically, but county assessor Cynthia Humm charged the company $1,600 under Section 9-20 of the Property Tax Code, claiming that the more specific statute applied over the general FOIA provisions. But the appeals court noted that Humm had relied on two earlier cases that had been rendered moot by the recent FOIA fee amendment. The court observed that "by its own terms, the current version of section 6 of the FOIA does not allow a fee in excess of the cost of the electronic medium for the reproduction of electronic records unless another statute expressly provides that the fees for producing paper records also apply to electronic copies. Section 9-20 of the Property Tax Codes does not so provide. Section 6(b) of the current version of the FOIA applies to the production of *paper* records and still allows for reference to another statute, such as the Property Tax Code, to allow a fee in excess of the actual cost of reproduction for *paper* records. With respect to electronic records, the language allowing cross-referencing to other statutes, such as the Property Tax Code, no longer exists." (*Sage information Services v. Cynthia K. Humm, Chief County Assessment Officer, Franklin County, Illinois*, No. 5-11-0580, Illinois Appellate Court, Fifth District, Oct. 5)

New Jersey

A court of appeals has ruled that the Port Authority of New York and New Jersey is not an agency for purposes of the Open Public Records Act because it is statutorily controlled by both states. Vesselin Dittrich argued that OPRA and New York's Freedom of Information Law were substantially similar in terms of access rights. But the court noted that "the definitions contained in OPRA do not suggest any intent on the part of the Legislature to extend its application to bi-state agencies. . . OPRA fails to reflect any intent to exercise unilateral control over a bi-state agency's procedures to provide public access to its records." The court also rejected Dittrich's argument that the Port Authority should be bound by OPRA because it had accepted and processed his request. But the court pointed out that "the stated goal of following a policy that is consistent with that of the creator states does not equate with consent to submit to the jurisdiction of either state." (*Vesselin Dittrich v. Port Authority of New York and New Jersey*, No. A-1289-11T1, New Jersey Superior Court, Appellate Division, Oct. 4)

Pennsylvania

A court of appeals has ruled that the Delaware Valley Regional Planning Commission is not subject to the Right to Know Law because it does not perform an essential government function. The case involved John Scott's access request to DVRPC for emails. DVRPC denied the request, claiming it was both overbroad and that any emails would be protected under the deliberative process privilege. Scott then filed a complaint with the Office of Open Records. OOR found that several emails were not protected and ordered DVRPC to release them. It also concluded that DVRPC's status as a public agency had already been determined in a previous complaint and that DVRPC had not appealed from OOR's finding that it was a public agency subject to the Right to Know Law. Both parties appealed. Scott claimed DVRPC was collaterally estopped from challenging its agency status because it had failed to appeal the previous OOR determination. But the court noted that "if [the OOR determination] had been a decision of this Court, then this Court might be persuaded

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by Scott's argument. However, decisions of administrative boards or tribunals have no precedential value on this Court." The court pointed out that DVRPC was "a metropolitan planning organization authorized by the United States Congress to cooperate with state and public transportation operators to develop long-range transportation plans and transportation improvement plans in metropolitan areas." The court concluded that DVRPC did not qualify as an independent agency under the statute. The court observed that "DVRPC was established by statute. In [a decision under the previous version of the RTKL], this Court determined that DVRPC did not perform an essential governmental function. This Court agrees with DVRPC that it is not a 'commonwealth agency' under the Law because it does not perform an essential governmental function." One judge dissented, noting the majority misinterpreted the concept of collateral estoppel. The judge pointed out that "the issue of whether the DVRPC is subject to the RTKL was determined by the OOR in [a previous decision] and the DVRPC did not appeal the OOR's determination. The DVRPC is the relevant party in both proceedings and there is no assertion that it did not have the full and fair opportunity to previously litigate the applicability of the RTKL to it." (*John Scott v. Delaware Valley Regional Planning Commission*, No. 1553 C.D. 2011 and No. 1666 C.D. 2011, Pennsylvania Commonwealth Court, Oct. 3)

Tennessee

A court of appeals has affirmed a trial court's ruling that Kimberly Custis was not entitled to attorney's fees for her suit against the Nashville Police Department. Custis asked for records concerning an investigation conducted by the police with federal immigration officials at the Clairmont Apartment Complex. Her request was sent to several components and after further urging by Custis' attorney, the department responded. The trial court concluded that the department had not acted in bad faith and denied attorney's fees. The appeals court agreed. The court noted that previous case law dealing with bad faith concerned cases in which the agency refused to produce records. The court pointed out that "it is our opinion that a mere delay in answering a voluminous records request, such as in the case before us, is a far less egregious act and is less likely to be prejudicial to the party making the request." The court added that "the finding of willfulness on the part of the governmental entity requires more than mere negligence, inadvertence or mistake. Rather, the finding of willfulness requires evidence that the withholding entity acted consciously in further of a dishonest purpose." (*Kimberly Custis v. Metropolitan Nashville Police Department*, No. M2011-02169-COA-R3-CV, Tennessee Court of Appeals, Oct. 10)

Washington

The supreme court has ruled that neither victim impact statements nor special sex offender sentencing alternative evaluations qualify as investigative records and must be disclosed. The court rejected Thurston County's attempts to analogize the records to mitigation recommendations prepared in death penalty cases. Instead, the court noted that "when applying the investigatory records exemption, a court must find that an investigative entity is compiling and using the relevant record to perform an investigative function. It is not enough that a prosecutor consider a document or even that the document may be useful in making a sentencing recommendation to the court. A victim impact statement is primarily a communication between a victim and a judge and the SSOA evaluation principally provides a basis for the court to impose sentencing alternatives. Neither of these records is part of an investigation into criminal activity or an allegation of malfeasance." The court concluded that "because the [Public Records Act] requires the exemptions be narrowly construed, we decline to protect documents that are created to aid a court in its sentencing decision." (*David Koenig v. Thurston County*, No. 84940-4, Washington Supreme Court, Sept. 27)

The Federal Courts…

A federal court in Michigan has ruled that the FBI properly withheld most records pertaining to the use of race and ethnicity in investigations in Michigan under **Exemption 1 (national security), Exemption 7(A) (interference with ongoing investigation or proceedings)**, and **Exemption 7(E) (investigative methods and techniques)**. The agency withheld domain intelligence notes—FBI analysts' methods of collecting and recording information gathered on a particular group—electronic communications, and maps. Approving of the agency's descriptions of the documents and the reason their disclosure would harm national security, the court noted that the agency affidavits "fairly describe the content of the material withheld" and "state the FBI's grounds for nondisclosure" which are "reasonable and consistent with the criteria in the [Executive Order on Classification]." The court also agreed that 7(A) applied. The ACLU of Michigan argued that information on race and ethnicity was public and could not be withheld. But the court agreed with the agency, noting that "releasing demographic information about specific ethnic groups in specific areas, compiled in the course of an investigation, could reasonably be expected to alert a criminal organization that it may be the subject of an investigation." (*American Civil Liberties Union of Michigan v. Federal Bureau of Investigation*, Civil Action No. 11-13154, U.S. District Court for the Eastern District of Michigan, Southern Division, Sept. 30)

Ruling on the same request for the use of race and ethnicity in FBI investigations, this time in New Jersey, a federal court in New Jersey has ruled the FBI withheld those records for essentially the same reasons cited by the court in Michigan. In one instance, the New Jersey court found the FBI had not justified its claim that a map was properly classified under **Exemption 1 (national security)**. The court noted that "Defendants have not provided this Court with enough information to assess whether [the map] would fall into Exemption 1." However, the court allowed the agency to withhold maps under **Exemption 7(A) (interference with ongoing investigation or proceeding)**, pointing out that "the maps are used as a tool by special agents to pinpoint areas of concern, by analysts to establish areas of focus and by the field office to allocate resources." As for records withheld under **Exemption 7(E) (investigative methods and techniques)**, the court agreed with the agency that the records "contain investigative techniques and procedures, and the events triggering the FBI's use of such techniques and procedures. While the public may know that some of these techniques and procedures exist, it does not know the manner in which the FBI uses them." (*American Civil Liberties Union of New Jersey v. Department of Justice*, Civil Action No. 11-2553 (ES), U.S. District Court for the District of New Jersey, Oct. 2)

A federal court in Missouri has ruled that the EPA properly withheld information about whether emissions from four coal-powered plants owned by Ameren Missouri violated the Clean Air Act under **Exemption 5 (privileges)** and **Exemption 7(A) (interference with ongoing investigation or proceeding)**. After the Justice Department filed suit against Ameren for violating the CAA, the company submitted a request to EPA for information concerning how it calculated whether the emissions from its plants constituted a violation of the statute. The agency disclosed the raw data it used to make its calculations, but refused to provide calculations along with records containing discussions between EPA scientists and agency and DOJ attorneys. Although the agency claimed records were protected by both the attorney-client privilege and the work product privilege, the company argued that most of the data was factual and could not be considered privileged. The court noted that "plaintiff's characterization of the Numerical Information as 'purely factual' fails to take into account that the seemingly straightforward numeric results of Defendant's assessments of Plaintiff's compliance with the CAA are not 'purely factual,' but rather derive from raw data (that has been disclosed to Plaintiff) selected and analyzed pursuant to its own formulas by Defendant's technical staff, scientists, and engineers, working in conjunction with or at the direction of attorneys. Therefore, the

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Numerical Information, albeit numeric, constitutes 'mental impressions, conclusions, opinions, or legal theories' so as to satisfy the requirements of the work product privilege." On the 7(A) claim, the company argued that the agency was disregarding its statutory obligation to encourage compliance with environmental laws by withholding its enforcement strategies, and the direction and scope of the investigation. The court disagreed, observing that "this argument ignores another of Defendant's obligations—the enforcement of those laws and regulations. Disclosure of enforcement strategies and the direction, scope, and limits of investigations interferes with this law enforcement activity by permitting Plaintiff and other regulated entities to violate the CAA, but evade detection. It is not for Plaintiff to decide the best method for Defendant to fulfill its enforcement obligations." (*Ameren Missouri v. United States Environmental Protection Agency*, Civil Action No. 4:11CV02051 AGF, U.S. District Court for the Eastern District of Missouri, Eastern Division, Sept. 25)

A federal court in South Dakota has ruled that 7 U.S.C. § 2018(c) is an **Exemption 3 statute** that protects redemption data, which includes the amount of money qualified stores are reimbursed for participating in the federal food stamp program. The *Argus Leader* submitted a request to the Food and Nutrition Service for information about the food stamp program, including the amounts reimbursed to specific stores. The agency provided some of the information, but withheld the redemption data under § 2018(c). Noting that whether or not § 2108(c) qualified as an Exemption 3 statute had never been litigated before, the court indicated that "the only time that it is acceptable to release information under the statute is if it is either for administrative or enforcement purposes or to investigate criminal activity. That restriction and the statutory language that discusses safeguarding or punishment for releasing information is the type of language that, on its face, is indicative of a withholding statute." The newspaper contended that the redemption data did not qualify under the statutory provision. The court disagreed, pointing out that the information required to be submitted by stores accepting food stamps "allows the government to determine if the applicant qualifies or continues to qualify for participation in the [food stamp] program. This type of information, especially to determine if a retailer *continues to* qualify for [food stamp] participation, includes the amount of income (redemption data) each retailer derives from [the program] and the federal government." The court concluded that "under the plain language of § 2018, not only is the statute a withholding statute, but Congress intended to exempt redemption data from disclosure." (*Argus Leader Media v. United States Department of Agriculture*, Civil Action No. 11-4121-KES, U.S. District Court for the District of South Dakota, Southern Division, Sept. 27)

A federal court in Oregon has awarded the Audubon Society of Portland $64,000 in **attorney's fees** for successfully challenging the Natural Resources Conservation Service's interpretation of the withholding provision in the Food, Conservation, and Energy Act. The court found the Society's requested amount of $111,000 was unreasonable in light of the amount of time it should have taken two experienced attorneys to litigate the scope of the definition of "agricultural commodities" in the FCEA. Even though the issue had never been litigated before, the court noted that "the primary issue was one of statutory interpretation—whether 'agricultural commodities,' as used in the FCEA, included wood, timber, and forest products. . . The facts of the case were not complicated and the rules for statutory interpretation are well established." The court dissected the Society's fee claim, frequently finding that the number of hours claimed for certain activities was excessive. At one point, the court observed that, in limiting the amount of research time claimed, "the ordinary, dictionary meaning of the word dictated the analysis. . .[I]n this day of electronic research, one can pull up search results for a particular term within an act in a matter of minutes. I recognize that reviewing the search results would take additional time. But Plaintiff's analysis of different parts of the FCEA involved quoting verbatim how relevant terms were used in the statute or comparing the descriptive name of titles within the FCEA—arguments that were neither complex, nor required much effort to explain." (*Audubon Society of Portland v. United States Natural Resources Conservation Service*, Civil Action No. 3:10-CV-01205-HZ, U.S. District Court for the District of Oregon, Oct. 8)

Judge Ellen Segal Huvelle has ruled that the CIA, NSA, Department of Defense, and Department of State responded properly to a broad request submitted by Freedom Watch for all records allegedly leaked to various reporters on a number of topics. The CIA and the NSA both responded that they could neither confirm nor deny the existence of the records, while both Defense and State rejected the requests as failing to describe the records in such a way that they could actually be located. Freedom Watch declined to appeal any of the agencies' decisions and filed suit instead. Freedom Watch argued that it had not appealed the denials because it was apparent that it would be futile to do so. Huvelle pointed out that "it is simply not sufficient to argue that [an appeal would be futile]." She indicated that all four agencies had provided extensive reasons for denying the request and observed that "such responses give no grounds for arguing that exhaustion of administrative remedies would be futile." Addressing the issue of whether the request sufficiently described the records sought, Huvelle noted that "Freedom Watch's complaint demonstrates on its face that its FOIA requests were virtually incomprehensible. . .[Responsive material] might include anything 'relating to' the individual nations referenced in two *New York Times* articles and the *Foreign Policy* article, which include Iran, Israel, Iraq, North Korea, Russia, Azerbaijan, and others." She pointed out that "Freedom Watch's request, with its references in 42 items to alleged 'leaks'—a term that Freedom Watch does not define—would impermissibly require defendants 'to undertake an investigation and then draw legal conclusions based on the investigation's findings'. . .It is thus evident that Freedom Watch intends for federal employees to make complicated determinations about whether crimes have been committed. While 'the central purpose of FOIA is to "open up the workings of government to public scrutiny,'" it is not intended to force a federal agency to undertake grand-jury style investigations." (*Freedom Watch, Inc. v. Central Intelligence Agency*, Civil Action No. 12-0721 (ESH), U.S. District Court for the District of Columbia, Oct. 5)

Judge Robert Wilkins has ruled that the Bureau of Prisons must disclose a copy of Peter Varley's1991 Sentence Monitoring Computation Data form after finding that the record did not fall under BOP's policy allowing prisoners to view such documents but not to retain a copy of them. The agency relied on *Martinez v. Bureau of Prisons*, 444 F.3d 620 (D.C. Cir. 2006), in which the D.C. Circuit upheld the Bureau's policy because prisoners might be subjected to physical harm if other inmates knew the details of their sentences. But Wilkins pointed out that the policy was meant to protect dissemination of a prisoner's financial information and the SMCD contained nothing more than the crime for which the individual was convicted. Wilkins observed that "there is no evidence before the Court that the SMCD contains information that falls within the stated basis for the BOP policy, and consequently, *Martinez* does not control the outcome here." The agency's fallback position was that the record was protected by **Exemption 7(F) (harm to safety of an individual)**. Wilkins indicated that "the record in the present case does not support a finding that there is a nexus between disclosure and any possible harm because the nature of Varley's conviction has already been disclosed." He added that "the BOP has not disputed Varley's assertion that [the facility] operates a sex offender treatment program and that inmates who must participate, 'including [Plaintiff],' are notified of the time and location for the meeting by means of a publicly-posted list identifying that inmate's name and register number." (*Peter Varley v. Federal Bureau of Prisons*, Civil Action No. 1:11-507 (RLW), U.S. District Court for the District of Columbia, Sept. 30)

A federal court in West Virginia has ruled that Jeff Corr is not entitled to a copy of the complaint he filed against his two supervisors at the Bureau of the Public Debt because the file was retrievable only by the names of the supervisors and was not indexed to Corr's name. Corr reported a series of incidents of alleged misconduct by his supervisor, which led the agency to initiate an investigation and create an Administrative Inquiry File. As part of the investigation, Corr submitted his version of the incidents and asked that the two supervisors be disciplined. This document was made part of the Administrative Inquiry File. After the conclusion of the investigation of the two supervisors, Corr asked for a copy of the file. The agency

concluded that since Corr had not proceeded under the agency's grievance policy, he was not entitled to access. It also found that he had no **Privacy Act** right of access because the file was not indexed under his name, but under the names of the supervisors. Corr filed suit and a magistrate judge recommended that Corr be given limited access under the Privacy Act because the file could be retrieved doing a Boolean word search. The court, however, rejected the magistrate judge's recommendations. The court first noted that since Corr had failed to proceed under the agency's grievance policy he was not entitled to access under it. The court pointed out that "the [System of Records Notice] only provides a right of access to a grievance file when an aggrieved employee first properly complies with the procedural requirements of the Administrative Grievance Procedure. Plaintiff cannot claim the benefit of this system after failing to comply with the requirements that would have brought his complaints within the scope of the SORN in the first place." As to the Privacy Act, the agency told the court that "its administrative inquiry files are kept exclusively in paper format and indexed only by the name of the person under investigation." The court observed that "the method of retrieval of a record, rather than its substantive content, implicates the coverage of the Privacy Act. Plaintiff has a right of access to the Administrative Inquiry file only if that file 'is retrieved' by Plaintiff's name or personal identifier. The Administrative Inquiry file is not contained in a system of records retrievable by Plaintiff's name. Defendant located the requested file only after it broadened its search to look for records classified under the name of Plaintiff's supervisors. This paper file was indexed and retrievable only under the names of [the two supervisors]. The issue is retrievability; there is no evidence that Defendant retrieved the file by use of Plaintiff's name." (*Jeff Corr v. Bureau of the Public Debt*, Civil Action No. 6:11-00865, U.S. District Court for the Southern District of West Virginia, Sept. 26)