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Washington Focus: The Office of the Inspector General at the State Department has published a scathing critique of the Office of Information Programs and Services, which is responsible for FOIA, privacy, and declassification. Addressing problems with the FOIA program, the IG noted that "the Department's FOIA process is inefficient and ineffective" and pointed out that "fifty-four percent of the FOIA requests received by the Department in FY 2011 were invalid. The Department's FOIA Web site does not provide information for a requester that is clear enough to avoid mistakes. The process of assessing and responding to such requests is a drain on IPS staff time." Examining the process for conducting searches, the IG observed that "the Department is too complex for analysts to rely on their knowledge of the myriad programs administered by so many bureaus and offices. The absence of a single systematic and reliable reference to enable analysts to identify which bureaus should receive search taskers results in misrouted taskers and processing delays." The report added that "personnel in Department bureaus who serve as liaisons to IPS are normally staff assistants or others for whom FOIA responsibilities are a small part of their job. Their lack of responsiveness indicates that performance in handling FOIA requests is not a significant factor in their evaluations. . .To improve the Department's FOIA performance, the Department must fix responsibility at all stages of the process."

Court Discusses Improper Requests And Other Procedural Issues

In a wide-ranging decision that touches on a host of procedural issues, Judge Beryl Howell has ruled that various practices of the CIA do not violate the FOIA but the fact that many of them expose the agency to judicial challenges may lead the agency to be somewhat more forthcoming during the administrative stages of processing. In a suit brought by National Security Counselors challenging 12 CIA policies the organization claimed violated FOIA or the APA, Howell substantively analyzed such issues as the scope of requests, the distinction between electronic searches and creating a new record, and the equitable remedies available under FOIA.

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She also sharply criticized the conclusion of one of her district court colleagues on the issue of whether or not the right to pursue a pending FOIA request could be assigned to another interested party.

National Security Counselors presented Howell with a frontal assault on CIA policies and urged her to find that they violated either the letter or spirit of the law. NSC attacked the agency's policy of refusing to provide an administrative appeal when it rejected a request as improper. Howell began by pointing out that NSC's claim "can survive only if a determination that a request is improper qualifies as an 'adverse determination' under the FOIA." She noted that NSC's complaint was the flip side of the issue settled in *Oglesby v. Dept of Army*, 920 F.2d 57 (D.C. Cir. 1990), in which the D.C. Circuit ruled that a requester was required to file an administrative appeal if the agency responded to his or her request before suit was filed. "*Oglesby* and the instant case reside on opposite sides of the same coin—*Oglesby* deals with when a requester must *pursue* an administrative appeal, and the instant case deals with when an agency must *provide* an administrative appeal." She explained that "upon any [proper] request. . .the agency 'shall. . .determine within 20 days. . .*after the receipt of any such request* whether to comply with such request.' This language makes clear that an agency has no duty to make any 'determination' with regard to a FOIA request unless that request is proper. Thus, it is reasonable to conclude that the term 'adverse determination' only contemplates agency decisions that are in response to a proper FOIA request. In other words, the FOIA does not require agencies to provide administrative appeals on the issue of whether a request is proper in the first place." But Howell emphasized that the CIA's policy came with a price. She pointed out that "the unavailability of an administrative appeal would not preclude a requester from seeking *judicial* review of an agency's decision that a request is improper. . .In such a circumstance, a requester's failure to exhaust its administrative remedies does not bar judicial review because, when an agency makes a conscious choice not to provide a party with administrative process, the agency constructively waives the requirement of administrative exhaustion." She added that "a party appearing before an administrative body cannot be punished for the agency's choice to shoot itself in the foot by refusing to review its own decisions. In this way, the refusal of the CIA to provide administrative appeals in these circumstances could be viewed as a boon to FOIA requesters because it expedites a requester's ability to seek judicial review of an agency's decision that a particular request does not reasonably describe records sought or otherwise fails to comply with the agency's FOIA regulations."

NSC also challenged the agency's policy concerning requests for aggregate data. The CIA contended that requests asking for database listings would require both the creation of new records and would require research as opposed to merely searching. Howell observed that "the distinction between searching and either performing research or creating records remains somewhat muddled. . .When points of data are stored in a database, that data can often be manipulated in myriad ways, only some of which are likely to qualify as mere 'searching' within the meaning of the FOIA." She continued: "Although the act of searching or sorting an electronic database is clearly not the creation of a record under the FOIA, the question remains whether producing a *listing* of database search results involves the creation of a record. First, it is important to note that it is not unprecedented for a federal agency to produce entire fields of data from particular electronic databases in response to a FOIA request and such requests could certainly be considered requests for 'aggregate data.' Producing a listing or index of records, however, is different than producing particular points of data (*i.e.*, the records themselves). This is because a particular listing or index of the contents of a database would not necessarily have existed prior to a given FOIA request." Howell distinguished between a list of records and the records themselves. She pointed out that "if a FOIA request sought 'an inventory of all non-electronic records created in 1962 regarding the Cuban Missile Crisis,' an agency need not create an inventory if one did not already exist, though the agency would need to release any such non-electronic records themselves if they were requested and were not exempt from disclosure. Therefore, a FOIA request for a listing or index of a database's contents that does not seek the contents of the database, but instead essentially seeks information about those contents, is a request that requires the creation of a new record, insofar as the agency has not previously created and retained such a listing or index."

Howell recognized that her conclusion still had a potential downside for the agency. She observed that "although the CIA may not be required to produce an index of database listings in response to a FOIA request, it *can* be required to hand over the contents of entire databases of information to the extent those contents are not exempt from disclosure. Although producing the contents of a database would likely involve the same search burden upon an agency as producing a database listing, the production of a database listing would entail a substantially lighter *production* burden upon the agency. Despite the fact that the CIA can continue to escape the production of database listings under the FOIA if it wishes, the CIA may nevertheless find it more efficient to begin producing such database listings upon request because failing to do so may prompt requesters to seek the reams of data underlying such listings instead."

The agency argued that many of NSC's procedural challenges could not be addressed under FOIA because most of them did not deal with the agency's denial of records. But Howell noted that the court's equitable powers under *Payne Enterprises v. U.S.*, 837 F.2d 486 (D.C. Cir. 1988), were substantial. She pointed out that "remedying procedural violations of the FOIA may not necessarily lead to the production of withheld responsive records, yet it is concomitantly reasonable to interpret the jurisdictional grant in 5 U.S.C. § 552(a)(4)(B) to include the power to enjoin procedural violations of the FOIA when they are connected to specific requests for records."

Attorney Kel McClanahan had filed one of the requests at issue when he worked at the James Madison Project. When he left to start National Security Counselors, the James Madison Project assigned all its rights in the request to him. The CIA argued that an assignment of rights was not appropriate under FOIA and cited to *Feinman v. FBI*, 680 F. Supp. 2d 175 (D.D.C. 2010) a ruling by Judge Ellen Segal Huvelle that supported its position. Finding that McClanahan's relationship to the request in this case was substantially greater than the proposed assignment in *Feinman*, Howell concluded the request could be assigned. She pointed out that "the *Feinman* court was nevertheless concerned that [the process of validating a new requester's entitlement] would be 'greater than the minimal burden on any given assignee to make her own FOIA request.' That balancing of equities, however, does not fully account for the realities of FOIA litigation and the central animating purposes of the FOIA. The burden imposed by requiring an assignee to file a new request and wait at the back of the FOIA line is not 'minimal' in most cases. Although filing a new FOIA request may often involve a small amount of effort or resources, it exacts a *temporal* cost on FOIA requesters that should not be discounted, considering that the FOIA was intended to promote not merely disclosure, but *timely* disclosure." (*National Security Counselors v. Central Intelligence Agency*, Civil Action No. 11-443, No. 11-444, and No. 11-445 (BAH), U.S. District Court for the District of Columbia, Oct. 17)

Thoughts from the Outside…

The following is one in a series of views and perspectives on FOIA and other information issues. The views expressed are those of the author.

Can FOIAOnline Break the Backlog?

By Amy Bennett

On October 1, a new system that makes it easy for members of the public to make and track requests at participating agencies for government records under the Freedom of Information Act (FOIA) opened for the public. FOIAOnline, which can be found at https://foiaonline.regulations.gov, was developed by

the Environmental Protection Agency (EPA) with assistance from the Department of Commerce and the National Archives and Records Administration's (NARA) Office of Government Information Services (OGIS). At this point it is a fairly small project (in addition to the EPA, NARA, and Commerce, the Department of Treasury, the Merit Systems Protection Board, and the Federal Labor Relations Authority are participating), but it is a promising development for people who are frustrated by long delays in response and a lack of transparency about what the government is doing with a request once it is submitted.

One of FOIAOnline's primary benefits for requesters is how easy the system makes it to manage requests at any participating agency. Any requester who creates a FOIAOnline account can log-in at any time to see an easy-to-read, sortable chart showing the tracking number of each request, whether or not it has been assigned to the "simple" or "complex" track, the expected due date, and more. Requesters can also use the system to modify or withdraw a request, or to file an appeal. All correspondence between the requester (with an account) and the agency can be handled on-line. Since the system also stores basic information like email, telephone number, and address when an account is created, there is no need to re-enter the information in order to make a new request.

Another advantage is that anyone can log-on to FOIAOnline to see what government records have been requested at participating agencies, and should be able to see records released as a result. Users can search for key words to find requests, appeals, and released documents that might be of interest. The fact that all of the information in the system is to be made publicly available by default should cut out any confusion over whether or not a record should be considered "frequently requested" and therefore be posted on the agency's Reading Room. It also should cut down on the number of identical requests that participating agencies must process. It is up to the agencies to actually post released records, however, and it may take vigilance on the part of FOIA advocates to make sure it becomes a true default.

FOIAOnline is a holistic effort to harness the power of technology to reduce the amount of time it takes for a participating agency to process a FOIA request and, it is hoped, bring down the size of agency backlogs. At its heart, FOIAOnline is a management tool created to help agencies manage their FOIA work-flow. FOIA personnel use the system to correspond with requesters and move documents through the process. The system also makes it easy for managers to run reports to figure out where bottlenecks are occurring and where extra attention must be placed.

Access to better data through FOIAOnline is not just limited to agency managers, however. Anyone can visit FOIAOnline to find out how many FOIA requests or appeals an agency received, how many times each exemption was used to withhold information, how long it took to process requests, how many fee waivers were granted, and more. The data available via FOIAOnline is very similar to the kind of data users can access via the Department of Justice's (DOJ) FOIA.gov. The reports users can run on FOIAOnline have two benefits over those on FOIA.gov, however. First, users on FOIAOnline can choose any time frame, whereas data on FOIA.gov is only available on an annual basis. The added granularity of the data on FOIAOnline makes it easier for users to monitor agency compliance, and spot troubling or positive trends. The other advantage to the data on FOIAOnline is that it is drawn directly from the system. The data on FOIA.gov, on the other hand, is generated from the annual FOIA reports each agency prepares for DOJ. As some of these reports are prepared by hand, and humans make mistakes, the data on FOIA.gov is not necessarily 100% reliable.

The primary challenge for FOIAOnline right now is that the number of agencies participating in the system is still relatively small. The project is funded via a cost-sharing model similar to Regulations.gov. Agencies who elect to participate in the system share the cost of operating and upgrading it. Given

today's budget-tightening environment, agencies are understandably worried about joining the system. However, according to NARA, the project is projected to save as much as $200 million over the next five years assuming government-wide adoption of FOIAOnline.

From a requester's perspective, the current FOIA system clearly is not working for a lot of people – certainly not journalists and academics who are on deadline and not for people who in the age of Google expect immediate access to information. Can FOIAOnline be the solution for fixing it? Maybe, and at this point it is the most promising, cost-effective solution out there.

Amy Bennett is deputy director of openthegovernment.org, which advocates for policies that promote greater openness in government.

Views from the States…

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

Alaska

The supreme court has ruled in the litigation fostered by the discovery that former Gov. Sarah Palin was conducting state business using private email accounts by finding that records created using private email accounts are public records if they qualify for preservation under the Records Management Act, but that the use of private email accounts for conducting state business is not a per se violation of the Public Records Act. Andree McLeod asked for all records pertaining to state business that were sent or received through private email accounts used by Sarah or Todd Palin or any other state employees. She also asked for a declaration that such records were public records and that the use of private email accounts violated the Public Records Act. The trial court initially ruled that because government employees were responsible for deciding what records should be preserved, if they decided not to preserve certain records they did not qualify as public records. It also ruled that the use of private email accounts did not constitute a per se violation of the Public Records Act. However, the court clarified its initial ruling by concluding that if a record qualified for preservation under the Records Management Act, it was a public record regardless of whether it was sent or received via a private email account. The court also found that the State was entitled to attorney's fees as the prevailing party. McLeod appealed. The supreme court agreed with the trial court's clarification and noted that "State agency records preserved or appropriate for preservation under the Records Management Act are public records subject to review under the Public Records Act. But not every record a state employee creates, and certainly not every state employee email, is necessarily appropriate for preservation under the Records Management Act." The court also affirmed the trial court's finding that use of private email accounts were not per se violations of the Public Records Act. But the court added that "we emphasize the narrowness of the legal issue decided by the [trial] court and affirmed here: This appeal does not present questions that might arise from a determination that state employees used private email accounts to conduct state business outside of the state's record preservation system and deliberately failed to preserve the email appropriate for preservation for public record review." The court reversed the trial court's finding that McLeod had failed to prevail on any issue. Instead, the court observed that "McLeod established that the duty to preserve emails exists as to both official accounts and private accounts, and that the duty cannot be extinguished by a public official's unreviewable decision simply not to preserve them." As a result, the court sent the case back to the trial court for a further determination on the issue of a fee award. (*Andree McLeod v. Sean Parnell*, No. S-13861, Alaska Supreme Court, Oct. 12)

Kentucky

A court of appeals has ruled that the *Lexington Herald-Leader* and the *Louisville Courier-Journal* are entitled to attorney's fees for their successful challenge of the Cabinet for Health and Family Services' blanket policy not to disclose records concerning child fatalities or near fatalities. When a reporter from the *Herald-Leader* requested records on the death of 20-month-old Kayden Branham, the Cabinet invoked several exemptions, including one that gave the Cabinet discretion to release fatality and near-fatality records. When the reporter appealed to the Attorney General, that office concluded the Cabinet acted appropriately because release was discretionary, not mandatory. The *Herald-Leader* sued and the *Courier-Journal* joined the suit after its reporter was denied access to the same records. The trial court ruled the Cabinet was required to disclose the records because the discretionary exception meant they were not covered by the claimed exemption. During the litigation, the Cabinet admitted that it had a blanket policy that such records would be disclosed. The appeals court noted that "the Cabinet's assertion of a blanket policy of nondisclosure plainly contradicts the [Open Records] Act's preference for open disclosure and in no way satisfies the Cabinet's burden of justifying an exemption from that policy. The Cabinet admitted before the [trial] court that [the confidentiality provision] granted it the discretion to disclose the information requested by Appellees, yet it declined to do so not only in this case but in *all* similar cases as a matter of policy, regardless of the circumstances of each case." Agreeing with the trial court that the Cabinet acted in bad faith, the court pointed out that "the Cabinet's failure to disclose the requested records in this case constituted a 'willful' violation of the Open Records Act. Had the Cabinet considered Appellees' requests on their merits and denied disclosure upon a reasonable basis, perhaps our opinion would be different. However, it is apparent that the Cabinet failed to make a particularized analysis and instead relied on an all-encompassing policy of nondisclosure despite the purpose of the Act and despite the acknowledged applicability of the [exception to non-disclosure] under these circumstances." (*Cabinet for Health and Family Services v. Lexington H-L Services, Inc.*, No. 2010-CA-002194-MR, Kentucky Court of Appeals, Oct. 19)

Oregon

A court of appeals has ruled that a Multnomah County Circuit Court judge did not have jurisdiction to overturn the decision of a County Family Court judge who denied *The Oregonian* access to a shelter care order in a juvenile case. After the newspaper's request was denied by the family court, it filed suit in Circuit Court arguing the record was subject to the Public Records Law and asking for a declaratory judgment ordering its disclosure. The circuit court judge agreed with the newspaper and ordered the family court judge to disclose the order. The circuit court also awarded the newspaper $70,000 in attorney's fees. The family court judge appealed and the court of appeals reversed, finding the circuit court judge did not have jurisdiction to rule on the issue. Acknowledging that administrative court records were subject to the Public Records Law, the appellate court noted that "nothing that we are aware of in the Oregon Public Records Law authorizes a requester to sue a judge who has made an adverse public records ruling on a request confided to her authority, merely because the requester is dissatisfied with the adjudication." The court pointed out that "plaintiff's argument is not based on the Oregon Public Records Law; rather it depends on the premise that [the statutory confidentiality of juvenile records] is unconstitutional under Article I [of the State constitution] to the extent that it expressly prohibits public disclosure of the juvenile court order in this case or, alternatively, accords the juvenile court discretion not to publicly disclose the order. . .Thus, the Oregon Public Records Law could not furnish a basis for disclosure of the order unless plaintiff is entitled under [the State constitution] to a declaratory judgment. . ." Finding that the newspaper was not entitled to declaratory judgment, the court observed that "circuit court judges have the power to review the decisions of lower tribunals, but they have no authority to review the decisions of other circuit court judges—let alone the decisions of circuit court judges on whom a particular decisional authority has been exclusively conferred—in the absence of some overriding

statutory or constitutional authority. No statute of which we are aware has changed that proposition in a way that is relevant to this case." The court added that the newspaper could have appealed the family court's decision to the state supreme court but chose not to. (*Oregonian Publishing Company v. Honorable Nan G. Waller*, No. A148488, Oregon Court of Appeals, Oct. 24)

Pennsylvania

The supreme court has ruled that an exception in the Coroner's Act allowing coroners to charge a fee for immediate access to manner of death records requires the Cumberland County Coroner to disclose the manner of death record for a Shippenburg college student. The coroner denied a local television reporter's request for the death record based on the Coroner's Act, which specifies that coroner's records for the previous year must be made public within 30 days after the beginning of the next year. The reporter appealed to the Office of Open Records, which upheld the denial. OOR concluded that the provision providing immediate access for a fee was discretionary and not required. Both the trial court and the appeals court affirmed the decision. But at the supreme court, the majority pointed out that the apparent conflict between the specified future time for public disclosure under the Coroner's Act, and the general policy of unrestricted access to public records embodied by the Right to Know Law was not really a conflict at all. Rather, because the Coroner's Act also included a provision for immediate access to records for a fee, the future disclosure provision did not serve to prohibit such access. The majority explained that "subsection (a) of this section vests discretion in the coroner to decide whether to comply with requests for examinations or professional services made by other counties or persons, and subsection (b) permits the coroner to establish fees for such examinations and professional services. The release of reports is addressed in subsection (c), which permits the coroner to establish fees for, specifically, autopsy reports, toxicology reports, inquisition or coroner's reports, and 'other reports and documents requested by nongovernmental agencies,' which includes cause and manner of death records. There is no mention in subsection (c) of discretion. By its plain terms. . .subsection (c) allows the coroner to charge fees for records, but does not afford the coroner any discretion with regard to releasing such records." The court concluded that "the RTKL and section (c) of the Coroner's Act each provide immediate access to cause and manner of death records. The RTKL provides the procedure for accessing those records that are available for immediate release for a fee pursuant to subsection (c). . .Because the requested record is not exempt from disclosure under the RTKL, it must be provided to Requester consistent with subsection (c)." (*Hearst Television, Inc. v. Michael L. Norris, Coroner of Cumberland County*, No. 112 MAP 2011, Pennsylvania Supreme Court, Oct. 17)

The Federal Courts…

Judge Beryl Howell has ruled that the Justice Department properly relied on **Exemption 7(C) (invasion of privacy concerning law enforcement records)** in issuing a *Glomar* response to neither confirm nor deny a decision not to prosecute Omar Ahmad for allegedly providing material support to Hamas. Ahmad, co-founder of the Council on American Islamic Relations, had been named on a "List of Unindicted Co-Conspirators and/or Joint Venturers" containing the names of 246 individuals and organizations. The list had initially been publicly available but was subsequently placed under seal by a Texas district court. Blogger Patrick Poole posted several articles asserting that "high-ranking" DOJ officials told him the decision not to prosecute Ahmad was political and showed him a copy of a March 2010 memo concerning the decision. Rep. Peter King (R-NY) then sent a letter to Attorney General Eric Holder accusing the Department and indicating that he had been "reliably informed" that DOJ had declined to prosecute Ahmad over the protests of FBI agents and the U.S. Attorney's Office in Texas. A reporter asked Holder at a press conference to respond to

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King's allegations. Holder explained that the decision not to prosecute Ahmad had been made during the Bush administration and that decision was affirmed after review by the Obama DOJ. Judicial Watch then requested the 2010 memo along with other responsive records. While DOJ produced copies of King's letter and Holder's response, it claimed it could neither confirm nor deny the decision not to prosecute Ahmad. Judicial Watch then filed suit. Judicial Watch argued that the agency's interest in Ahmad was publicly known and that, therefore, a *Glomar* response was inappropriate. Judicial Watch further argued that a *Glomar* response was only appropriate if it constituted the first time the individual had been identified as having been associated with criminal activity. Howell rejected such a reading, noting that "under the FOIA, however, Ahmad's alleged status as a person who has engaged in prior criminal acts is meaningfully distinct from whether or not he has been the target of criminal prosecution. . .The revelation that a prosecutor has formally considered criminal prosecution of an individual gives an official imprimatur to that individual's association with criminal activity, which is different—and more intrusive of personal privacy interests—than being publicly associated with criminal activity through individual pieces of information presented in the media or in the criminal prosecutions of others." Howell noted the King and Poole allegations did not amount to a "'meaningful evidentiary showing,' particularly considering that [they] are directly contradicted by evidence submitted by the plaintiff itself. . ." Distinguishing the public interest in disclosing the existence of a record from its contents, Howell observed that ""the plaintiff has not articulated how [the] public interest would be served by merely acknowledging the existence of the March 2010 declination memorandum or other internal correspondence relating to the alleged decision not to prosecute Ahmad. That is, after all, the relevant question when an agency issues a *Glomar* response under FOIA Exemption 7(C): whether the public interest in merely acknowledging the existence or non-existence of a record outweighs any privacy interests implicated by that acknowledgement. It is a completely separate question whether disclosing the *contents* of those alleged records would further any public interest, just as it is a separate question whether the records sought by the plaintiff would be subject to disclosure at all." Howell found that an alleged leak to Poole did not constitute an official acknowledgement of the decision not to prosecute Ahmad. She pointed out that "indeed, a statement by an anonymous agency insider is the exact opposite of an 'official acknowledgement' because an anonymous leak is presumptively an unofficial and unsanctioned act." (*Judicial Watch, Inc. v. U.S. Department of Justice*, Civil Action No. 11-1121 (BAH), U.S. District Court for the District of Columbia, Oct. 12)

A federal magistrate in California has awarded Mirsad Hajro and James Mayock **attorney's fees** of $320,000 in their suit challenging U.S. Citizenship and Immigration Services' continued inability to respond to FOIA requests within the statutory deadline. Mayock, an immigration attorney, also sought to enforce a settlement agreement with the agency stemming from his 1992 lawsuit against the INS. The court relied on the 2010 Ninth Circuit ruling in *Prison Legal News v. Schwarzenegger*, 608 F.3d 446 (9th Cir. 2010), in which the appeals court concluded that attorney's fees could be awarded to parties for monitoring compliance with a settlement agreement obtained in an earlier action in which they substantially prevailed. Here, the magistrate judge pointed out, "although *Prison Legal News* dealt with 42 U.S.C. § 1983, not FOIA, the reasoning applies here with equal force. Mayock prevailed in the earlier litigation with INS by obtaining a Settlement Agreement. This case was brought to ensure Defendants' compliance with the Settlement Agreement. Mayock, like the plaintiff in *Prison Legal News*, was monitoring Defendants' compliance, and therefore is permitted to recover attorneys' fees under FOIA's provisions. That Mayock brought a successful action to force compliance—unlike the plaintiff in *Prison Legal News* who neither brought an action nor obtained further enforcement—is merely additional evidence that Mayock is eligible for attorneys' fees." But the magistrate rejected the plaintiffs' claim that they could recover for violation of due process rights as well. The court indicated that "the legislative history, to be sure, supports a policy of authorizing attorneys' fees awards when violations of FOIA occur, most notably when agencies improperly withhold documents or act in an 'obdurate' manner. But nothing in this history suggests the intrusion of parallel rights, like due process,

resulting from the same set of actions that violate FOIA—namely, withholding or delaying the production of documents—sustains recovery under Section 552(a)(4)(E)." As to Hajro's entitlement to fees, the magistrate judge noted that "defendants failed to comply with its obligations under both FOIA and the Settlement Agreement to ensure FOIA requesters with rights at risk were given high-priority status. Hajro was just one victim of that pattern or practice." The magistrate judge added that "Hajro was forced to initiate this action to obtain from Defendants an admission that evidence upon which his naturalization application was denied was not within its records. Defendants may seek to claim that this is the result of bureaucratic inefficiency, but the evidence suggests its actions teeter on the edge of obduracy." (*Mirsad Hajro and James R. Mayock v. United States Citizenship and Immigration Services*, Civil Action No. 08-1350-PSG, U.S. District Court for the Northern District of California, San Jose Division, Oct. 15)

A federal court in California has awarded investigative journalist Seth Rosenfeld nearly $500,000 in two FOIA suits he brought against the Justice Department for records related to the FBI's investigation of the free speech movement at the University of California and the agency's involvement in fostering Ronald Reagan's political career. The FBI argued that Rosenfeld's suit did not cause it to disclose nearly 7400 more records after it was filed. But the court noted that "there is no indication in the record here that the Defendants would have searched back through their files 'or released any of the contents thereof in the absence of this litigation.' Prior to filing suit, Rosenfeld timely appealed the FBI's conclusion that it had released all the requested files as required under FOIA. . .The record indicates that Rosenfeld had exhausted his administrative remedies and received what amount to final determinations that the government had met its obligation under FOIA. . . Seeing no alternative way of obtaining the documents, Rosenfeld turned to the courts for relief." Noting that it had largely rejected the FBI's arguments in four separate opinions in the case, the court pointed out that "while it is true that 'the FBI engaged in extensive efforts to respond to Plaintiff's FOIA requests,' and that the FBI prevailed on some of its claims in this case, on balance the record does not support the FBI's argument that it 'had a reasonable basis for its initial search and disclosures.' For the most part, the FBI had no such reasonable basis." After rejecting some of the fees requested by Rosenfeld, including a ten percent reduction to account for billing judgment, the court awarded him $363,217 in fees. In a companion case based on litigation going back to the 1990s, the court awarded an additional $107,000. (*Seth Rosenfeld v. U.S. Department of Justice*, Civil Action No. C-07-3240 EMC and No. C-90-3576 EMC, U.S. District Court for the Northern District of California, Oct. 17)

A federal court in New York has chipped away at the expansive reading traditionally given by the State Department to 8 U.S.C. § 1202(f), which provides for confidentiality of information pertaining to the issuance or refusal of visas. In challenging her deportation proceedings, Yongchu Core requested records about herself. The agency withheld a document containing biographical data and information about Core's activities while in immigration detention, which was contained in its Consular Lookout and Support System database. Agreeing that § 1202(f) was an **Exemption 3** statute, the court however pointed out that "the document must also fall under the category of documents that the statute withholds. In the instant case, [the disputed document] does not. It is not a document that pertains to the issuance or refusal of a visa because there is no past or pending visa application." The court observed that "the statute refers to records pertaining to 'issuance' or 'refusal' of visas. The statute does not speak to documents held by the State Department that have not been used in determining whether to issue or refuse a visa. Nor does § 1202 (f) refer to all files placed in a database that is used to store visa-related documents." The court continued: "The structure of § 1202, which governs 'Applications for visas,' indicates that the confidentiality provision in § 1202(f) contemplates an actual visa application process. . .It does not concern other aspects of visas or immigration, such as visa revocations or other adjustments or changes to one's immigration status." The court noted that "the Government cannot rely

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on § 1202(f) to withhold information that was neither gathered, used, nor is being used to determine an actual past or pending visa application." However, the court pointed out that "today's decision is a narrow one. . .It is not a broad mandate that the Government's CLASS database is by definition subject to general disclosure." (*Immigration Justice Clinic of the Benjamin N. Cardozo School of Law v. United States Department of State*, Civil Action No. 12-1874 (GBD), U.S. District Court for the Southern District of New York, Oct. 18)

A federal court in California has ruled that the number of pieces mailed during a political campaign does not qualify as commercial information under 39 U.S.C. § 410(c)(2), an **Exemption 3** statute used by the Postal Service. During its investigation of allegations of that a recalled state official violated California's Political Reform Act, the Fair Political Practices Commission subpoenaed the records from the Postal Service. The agency's policy was to release records pursuant to a subpoena if they were disclosable under FOIA. In this case, the agency decided that forms recording the number of pieces mailed qualified as commercial information and denied the Commission's request. The Commission then filed suit. The agency argued the information was commercial because it pertained to its relationship with a customer and because it would cause the Postal Service competitive harm if available to competing delivery services. The Commission called the agency's arguments "completely unsupported" and the court agreed. The court indicated that "the USPS has not supported its conclusion that the mere disclosure of the number of documents mailed in the situation at issue here constitutes 'information of a commercial nature' within the meaning of § 410(c)(2)." The court added that "the USPS concedes that the sender 'is not a commercial enterprise,' the documents were 'mailed in connection with an election campaign that is not over,' and the only information sought is 'the number of pieces delivered on October 9th, 10th, and 22nd in 2008 using Permit No. 2058.' The USPS has not shown that the requested information is within the realm of what is considered to be commercial information; nor has it shown how the disclosure of the requested numerical information could potentially impair the relationship between the USPS and its customers." The court also concluded that disclosure would not cause competitive harm because the Commission had the legal authority to subpoena such information from competitors as well. (*Fair Political Practices Commission v. United States Postal Service*, Civil Action No. 2:12-00093-GEB-CKD, U.S. District Court for the Eastern District of California, Oct. 16)

A federal magistrate judge in Florida has ruled that Section 1202(f) of the Immigration and Nationality Act, an **Exemption 3 statute** commonly used by the State Department to deny access to visa records, does not pertain to visa revocation records. Enrique Puyana Mantilla, a Colombian citizen, sued the agency after it withheld records pertaining to him, arguing that § 1202(f) did not cover visa revocation records. He based his claim on *El Badrawi v. Dept of Homeland Security*, 583 F. Supp. 2d 285 (D. Conn. 2008), a case in which the district court concluded that the plain language of § 1202(f) restricted its coverage to records "pertaining to the issuance or refusal of visas. The agency argued that the Supreme Court's ruling in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), justified a more expansive reading of "pertaining to." But the magistrate judge noted that "construing the words 'pertaining to' broadly the documents the government seeks to preclude from disclosure still need to relate to the 'issuance or refusal of visas.' The 'pertaining to' language of Section § 1202(f) does not relate to visa revocations." (*Enrique Puyana Mantilla v. United States Department of State*, Civil Action No. 12-21109, U.S. District Court for the Southern District of Florida, Sept. 24)

Judge Richard Leon has ruled the FBI properly told Joseph Seme that it would neither confirm nor deny the existence of information concerning an individual who testified at Seme's trial, including whether or not he was an FBI informant. Seme originally requested information about whether Osmin Desanges was an FBI informant prior to and after Seme's arrest. The FBI said it would neither confirm nor deny that it had

records on Desanges, citing **Exemption 7(C) (invasion of privacy concerning law enforcement records)** as the basis for its claim. Seme made several more requests for information about Desanges and got the same response. The agency argued that "an individual's association with a criminal investigation, as a suspect, victim, witness or source, tends to stigmatize the individual,' and even if that individual has been 'a witness on the record, an official acknowledgement of that association. . .is likely to lift that association out of practical obscurity (particularly if the testimony occurred a significant numbers of years ago) and into the forefront of public awareness, further aggravating the stigma associated with such a disclosure.'" Seme replied that he already knew Desanges was an informant because of his court testimony. But Leon pointed out that "a third party may testify in open court and still maintain an interest in his personal privacy. The individual maintains this interest even if the requester already knows, or is able to guess, his identity. This is so even here, where Desanges' status as an FBI informant may have been disclosed in deposition testimony." (*Joseph Seme v. Federal Bureau of Investigation*, Civil Action No. 11-2066 (RJL), U.S. District Court for the District of Columbia, Sept. 20)

Judge Ellen Segal Huvelle has declined to grant the Navy summary judgment in a **Privacy Act** suit filed by Timothy Reed because there are still too many facts in dispute. Reed served in the Navy from 1990 to 1998. From March 1998 through May 2009, he served in the Navy Reserve. During this time he was also employed as a police officer by the Charleston Police Department. In January 2009, Reed was mobilized in anticipation of being deployed to Iraq. During training he was accused of several instances of misconduct, leading the Navy to commence disciplinary proceedings. Command Master Chief David Carter contacted the Charleston Police to confirm Reed's employment and during several phone calls made disclosures concerning the pending allegations against Reed. Reed contacted several people at the police department to let them know generally that there were "issues in his training." The police department decided to wait until the Navy's investigation was completed. In March 2009, Reed was found guilty, demoted, and honorably discharged from the Navy Reserve. Reed then indicated he planned to return to work at the Charleston Police Department. Police Department Attorney Mark Bourdon emailed Navy Lt. Commander Aimee Cooper to find out more about Reed's separation from the Navy. Cooper told him the allegations against Reed, that he had undergone a psychological exam, and the disciplinary action taken against him. Bourbon asked Cooper to consider his email a FOIA request. Cooper sent Bourdon records on its investigation of Reed and the results. She noted that the release was okay but conceded that her supervisors did "not think so." Reed was reinstated as a police officer, but after an internal affairs investigation he agreed to resign. Huvelle noted that the reasons for the Navy's disclosures to the police were still in dispute. She pointed out that "there are unanswered questions about what precisely [Cooper] disclosed to Bourdon and when she made those disclosures. Additionally, there is some dispute as to whether her supervisors authorized, or would have authorized the disclosures, and whether she was authorized to make the disclosure without approval from her supervisors." The agency also argued Reed had not shown that he was terminated by the police department as a result of the disclosure of information about the investigation. The agency asserted that since Reed had initially been put on administrative leave, he had not been fired as a result of the Navy's investigation. But Huvelle observed that "this does not, however, answer plaintiff's assertion that at the CPD an administrative leave inevitably precedes firing." Huvelle also found a causal link between the incidents. She pointed out that "it is reasonable to infer that Carter's call acted as a catalyst in the process that ultimately led to plaintiff's constructive discharge." She added that "defendant's [suggestion] that it was plaintiff's dishonesty during the CPD investigation that led to an adverse finding against him [ignores] that the investigation might never have been opened if Carter had not made the initial disclosures." (*Timothy M. Reed v. Department of the Navy*, Civil Action No. 10-1160 (ESH), U.S. District Court for the District of Columbia, Oct. 19)

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