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Washington Focus: A coalition of open government groups has sent a letter to Sen. John McCain (R-AZ) complaining about a provision in S. 2151, "Strengthening and Enhancing Cybersecurity by Using Research, Education, Information, and Technology Act (SECURE IT). The provision creates a FOIA exemption for information shared with or to a cybersecurity center. In its letter, the coalition noted that "as drafted, S. 2151 cuts off ***all*** *public access to information in cybersecurity centers before the public has the chance to understand the types of information that are covered by the bill. . .Unnecessarily wide-ranging exemptions of this type have the potential to harm public safety and the national defense more than they enhance those interests." . . . As part of Sunshine Week coverage, Josh Gerstein of Politico has written an overview of the access community's disappointment in the failure of the Obama administration's written transparency policies to bring real change in the way FOIA is implemented. David Sobel, counsel for EFF, summed up those feelings by noting that "cultural change within a bureaucracy is difficult. And you don't make it happen just by issuing proclamations, and that appears to be all they've done."*

NARA Has No Duty To Retrieve Clinton Tapes

In a thoughtful opinion that underscores the lack of any practical enforcement mechanism in federal record-keeping statutes, Judge Amy Berman Jackson has ruled that Judicial Watch cannot force the National Archives and Records Administration to make available 79 audiotapes containing discussions historian Taylor Branch had with President Bill Clinton throughout his two terms as President because there is no legal redress available under the Administrative Procedure Act. Jackson pointed out that "NARA does not have the authority to designate materials as 'Presidential records,' NARA does not have the tapes in question, and NARA lacks any right, duty, or means to seize them. In other words, there has been no showing that a remedy would be available to redress plaintiff's alleged injury even if the Court agreed with plaintiff's characterization of the materials. Since plaintiff is completely unable to identify anything the Court could order the agency to do that the agency has any power, much less, a mandatory duty to do, the case must be dismissed."

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The case started when Judicial Watch requested the tapes from the Clinton Library under FOIA. NARA ultimately denied the request and told Judicial Watch that it did not have physical custody or control of the tapes and that they were not presidential records under the Presidential Records Act, but were, instead, the personal records of former President Clinton. Judicial Watch then brought suit, arguing that NARA's inaction was arbitrary and capricious under the APA and asking the court to declare that the tapes were Presidential records under the PRA, to order NARA to assume control of the records, and to deposit them in the Clinton Library and make them available under FOIA.

Jackson first examined whether judicial review was available under the PRA, since the crux of Judicial Watch's argument was that NARA had violated its duty under the PRA to take control of the tapes and make them publicly available. Both parties argued that *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991) (*Armstrong I*) and *Armstrong v. Bush*, 1 F.3d 1274 (D.C. Cir. 1993) (*Armstrong II*) supported their position. The *Armstrong* litigation originally began as an attempt to prohibit the incoming administration of George H.W. Bush from deleting several weeks of emails left behind by the departing Reagan administration. The district court concluded that under the APA a court could review presidential compliance with both the PRA and the Federal Records Act. On its first time at the D.C. Circuit, the court reversed, holding the PRA precluded judicial review of presidential recordkeeping practices and decisions." When the case arrived at the D.C. Circuit for a second appeal, the court clarified its position and indicated that not all PRA decisions were immune from judicial review. Rather, initial classification of existing materials was subject to judicial review, but creation, management and disposal decisions of the President were not.

Jackson pointed out several applicable holdings from *Armstrong*, noting that "since the President is completely entrusted with the management and even the disposal of Presidential records during his time in office, it would be difficult for this Court to conclude that Congress intended that he would have less authority to do what he pleases with what he considers his personal records." She observed that "in the *Armstrong* decisions, the D.C. Circuit did not consider the question of whether an individual decision to exclude private materials from the set of Presidential records transmitted to the Archivist could be subject to review." Indeed, "the thrust of the *Armstrong II* opinion was the differentiation between agency records and Presidential records — not as, in this case, between personal records and Presidential records." She noted that "the D.C. Circuit did *not* insist: 'We did not hold in *Armstrong I* that the President could designate any material he wishes as *personal* records.' In other words, *Armstrong II* did not announce that there was any limit to the President's discretion to segregate materials as personal even though it did conclude that the courts could play some role in overseeing the decision to classify agency records as presidential." Recognizing that the possibility of judicial review in this case raised a host of questions, Jackson indicated that "the Court has serious doubts about whether the former President's retention of the audiotapes as personal is a matter that is subject to judicial review."

She next turned to the matter of whether a remedy existed. Pointing out that Judicial Watch failed to specify which provision of the APA had been violated, Jackson explained that "the Court will construe the claim as one to 'compel agency action unlawfully withheld.'" Judicial Watch argued that the Archivist was required to assume custody and control of all materials that fell within the definition of Presidential records. But Jackson observed that the statute only instructed the Archivist to assume responsibility for the Presidential records of a particular President. She explained that "the Court construes this language as requiring the Archivist to take responsibility for records *that were designated as Presidential records during the President's term*. Even plaintiff tentatively agreed that the obligation to assume custody and control arises *after* a determination has been made that the documents are Presidential records. If certain records are not designated as Presidential records, the Archivist has no statutory obligation to take any action at all, and there is nothing to compel under the APA." She added that "the only reference in the entire statute to the designation of records as personal versus Presidential also calls for the decision to be made by the executive, and to be made during,

and not after, the presidency. . .The PRA contains no provision obligating or even permitting the Archivist to assume control over records that the President 'categorized' and 'filed separately' as personal records."

Judicial Watch contended that the very nature of the audiotapes supported its claim that they were presidential records. Jackson was not so sure. "[T]he classification depends not upon what the tapes contain, but what the President prepared them for and what he did with them. Plaintiff has alleged no facts that would suggest that the tapes were circulated to anyone beyond the former President and the historian, or that they were used (as opposed to generated) in the course of transacting official business."

But Jackson noted that even if she agreed with Judicial Watch's characterization of the records, there was nothing she could do to force NARA to take custody and control of the tapes because such action was completely discretionary. She explained that "the PRA authorizes NARA to invoke the same enforcement mechanism embodied in the Federal Records Act, which begins with a request to the Attorney General to institute an action for the recovery of missing records. The statute does not mandate that NARA invoke this enforcement scheme but rather vests complete discretion with the agency to utilize that mechanism." She observed that "by asking the Court to order defendant to 'assume custody and control' of the audiotapes, plaintiff essentially asks the Court to compel defendant to determine that a violation has occurred and enforce the PRA. This is not permissible under the APA."

Finally, Jackson rejected Judicial Watch's contention that because its FOIA request had been denied, FOIA might also provide an enforceable remedy. However, she noted that "to the extent that plaintiff is seeking relief related to the availability of documents under FOIA, that claim is governed by the Supreme Court's holding in *Kissinger v. Reporters Committee*, 445 U.S. 136 (1980). In that case, the Court held that FOIA does not give rise to a private right of action to compel an agency to retrieve documents that are not in its possession, even if one assumes that the documents were wrongfully withheld under the Federal Records Act. . .The same reasoning applies here. There is no indication that Congress intended to supplant the limited remedies available in the PRA with FOIA." (*Judicial Watch, Inc. v. National Archives and Records Administration*, Civil Action No. 10-1834 (ABJ), U.S. District Court for the District of Columbia, Mar. 1)

Views from the States…

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

Iowa

The supreme court has ruled that an internal audit conducted by Mark Hall, the pharmacist in charge of the pharmacy at Broadlawns Medical Center, is a public record that should be disclosed to the *Des Moines Register* under the public records act. After an admission by a pharmacist at Broadlawns that she had improperly diverted prescription drugs, including controlled substances, the Iowa Board of Pharmacy began an investigation. The Board contacted Hall and asked for pharmacy records so that it could conduct an audit. Meanwhile, Hall conducted his own internal audit to try to get to the bottom of the problem more quickly. After Hall completed the audit, he shared it with Broadlawns officials and the Pharmacy Board. About a year later, the Pharmacy Board filed charges against Broadlawns and Hall. Hall was charged with lack of competency and the Board's statement of charges referred to Hall's internal audit. The *Register* then requested the audit. The trial court found the audit was protected because of the confidential nature of

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proceedings before the Pharmacy Board. The newspaper appealed and the supreme court reversed. While the supreme court admitted that it made little sense to protect records when in the possession of the Board, but not when at the originating source, the court pointed out that the audit in this case was not protected because it was not created as part of the investigation. The court noted that Hall's "purpose *in providing* the document to the board may have been to provide it with complete information, but his purpose *in creating* the document in the first place was not related to the board's investigation." Hall argued that various other exceptions to disclosure tied to reasons for closing a public meeting applied, but the court rejected them all. Addressing Hall's allegation that the audit pertained to evaluating his performance as an employee, the court observed that 'under Hall's argument, a myriad of documents in a public agency would no longer be public documents because they 'relate' to some employee's performance and might at some unspecified time in the future be considered in a closed meeting. We decline to create through interpretation a virtually unlimited exception to our public records law." (*Mark D. Hall v. Broadlawns Medical Center*, No. 10-0971, Iowa Supreme Court, Mar. 9)

Kentucky

A court of appeals has upheld the trial court's ruling that Leonard Lawson, former owner of Mountain Enterprises, a company that contracted with the state on road projects, failed to show that a proffer written for the Office of the Attorney General as part of an antitrust settlement in 1983 was protected by the personal privacy exemption. The proffer contained a narrative statement by Lawson in which he answered questions regarding Mountain Enterprises' business practices. Lawson sold his interest in Mountain Enterprises in 2005, but in 2008 he was indicted on federal charges of conspiring to obtain confidential state cost estimates for certain road protects. Shortly thereafter, several reporters asked the OAG to disclose the 1983 proffer. When the OAG indicated it would disclose the record, Lawson filed suit to block disclosure, pleading an invasion of his personal privacy. Upholding the trial court's conclusion, the appeals court noted that "Lawson contends that because the proffer contains his words regarding his life, the proffer is inherently personal. However, the proffer contains information given by Lawson on behalf of Mountain Enterprises regarding its participation in bid-rigging for state road contracts. Though Lawson may not want his words to be made public, our review of the proffer reveals that it does not contain any information that 'touches upon the personal features of private lives,' or 'would be likely to cause serious personal embarrassment or humiliation.'" As to the public interest in disclosure, the court observed that "despite Lawson's argument that the passage of time devalues any worth the proffer has to the public, due to the lack of any privacy interest to be accounted for, even the slightest public interest requires disclosure." (*Leonard Lawson v. Office of the Attorney General*, No. 2011-CA-000210-MR, Kentucky Court of Appeals, Mar. 2)

Ohio

The supreme court has ruled that Cuyahoga County cannot charge $2 per page for electronic records, but instead can only charge the actual cost of the CDs used to store the records, which comes to about $1 a CD. Both Data Trace Information Services and Property Insight brought county property records in bulk. Commercial users originally paid $50 for a copy of the Master CD then paid a $5,000 annual fee for updates. In 2008 a new county recorder changed the policy and increased the annual fee to $7,500. In 2010 the recorder told the brokers it would no longer provide the $50 Master CD but instead would provide paper printouts at $2 a page. The data brokers then filed suit, alleging that the increased charge violated the Public Records Act. The county argued that it could charge more for the property records because they did not constitute public records under the statute. The court disagreed, noting that "the instruments that the county recorder's office electronically records and places into the office's computer system reflect the office's compliance with its many statutory duties and its exercise of discretion over the recording process. The electronic records manifestly document the organization, functions, policies, decisions, operations or other

activities of the recorder's office. Without these recorded instruments, the recorder's office could not perform its preeminent functions." The county had taken the $2 per page fee from a statutory provision allowing a county recorder to charge $2 per page for "photocopying" a document. The court pointed out, however, that "the plain meaning of 'photocopying' does not encompass relators' requests that the fiscal officer copy onto a CD electronically recorded instruments. There is no conflict, much less an irreconcilable one, between [the two fee requirements] for the requested records. In cases in which photocopying physical pages of recorded documents is requested, a county recorder shall charge $2 per page. In cases in which CDs containing electronically recorded documents are requested, the county recorder shall charge the actual cost of the copies." (*The State ex rel. Data Trace Information Services, et al. v. Cuyahoga County Fiscal Officer*, No. 2010-2029, Ohio Supreme Court, Feb. 29)

Pennsylvania

A court of appeals has ruled that Chester Community Charter School has failed to show that records requested by *Philadelphia Inquirer* reporter Daniel Hardy are protected from disclosure under the Right to Know Law. Hardy made his request after the Charter School had sued him and the *Inquirer* for defamation based on a series of articles. In responding to his request, Charter School alleged the request was a blatant and improper attempt to circumvent discovery, indicated that some of the records were not subject to disclosure, and released 28 pages. Hardy then appealed to the Office of Open Records, which, with Hardy's agreement, extended its review. It then ruled against Charter School. Charter School appealed and the trial court upheld the OOR decision. At the court of appeals, Charter School first contended that it was not consulted about OOR's request for an extension and because OOR had not issued a determination within 30 days the request was deemed denied under the law. The court pointed out that the law allowed OOR to extend its determination with the permission of the requester. It noted that "the relevant Right-to-Know Law provisions are directed at protecting the requester's rights, not the agency's." It added that "any taint or procedural irregularity caused by the appeals officer's *ex parte* communication was cured by the hearing before the trial court." The court then found Charter School had waived any claims by failing to make them when it denied Hardy's request. The court indicated that "Charter School waived its right to argue that the documents in the possession of [the School] are not public records. The requirements of Section 903 are mandatory. Charter School was required to specify the grounds for its denial, with specific reference to legal authority. Charter School's March 9, 2009 letter did not do so, and it has waived the right to raise this issue now." Charter School also complained that since the *Inquirer* was currently in bankruptcy proceedings, the School's defamation suit had been temporarily halted. It argued that it was unfair to expose it to Hardy's request while the newspaper did not have the same obligations to provide records in discovery. But the court noted that "unfortunately for Charter School, it matters not. A requester's motive under the Right-to-Know Law has been made irrelevant by the legislature. Charter School is an 'agency.' As such, it is bound by the directives of the legislature for all agencies, and whether those directives are fair or wise is beyond the court's proper field of inquiry." (*Chester Community Charter School v. Daniel Hardy*, Pennsylvania Commonwealth Court, Feb. 29)

Texas

A court of appeals has ruled that Boeing failed to show that cost information in its lease with the Port Authority of San Antonio to use much of the former Kelly Air Force Base as a maintenance facility qualifies as a common law trade secret and is not protected from disclosure by the Public Information Act. After Boeing decided to shut down its maintenance facility in Tulsa, Oklahoma in 1995, it began to search for an alternative site. It ultimately settled on the site of the former Kelly Air Force Base in San Antonio. To induce Boeing, the City of San Antonio secured a $32.5 million loan from the U.S. Department of Housing and Urban

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Development for property improvements at Kelly, which it then turned over to the Port Authority to complete the improvements. In 1998, Boeing signed a lease with the Port Authority for an initial period of 20 years. The Port Authority indicated that it used the money from the lease with Boeing to help pay back the loan to the City of San Antonio. When the lease was requested under the PIA in 2005, Boeing notified the Attorney General that it objected to disclosure of cost information. The Attorney General determined the cost information was not protected under the PIA and Boeing filed suit to block disclosure. The trial court upheld the Attorney General's determination and Boeing appealed to the court of appeals. The appellate court started its analysis by noting that the PIA requires disclosure of certain "core" information, including public contracts, unless a specific exception applies. Boeing argued the cost information in the lease was protected as a common law trade secret. The court found that Boeing had limited the availability of the lease within its own corporation, but had failed to take measures to protect its confidentiality to third parties. The court observed that "there is no evidence that the Port was contractually obligated to Boeing to protect the Lease information, such as through a confidentiality agreement. Further, the evidence does not establish, nor has Boeing argued, that the Port had a confidential relationship with Boeing or any other legal duty to protect the Lease information. . .Rather, the attorney general presented evidence that the Port gave members of the news media access to the Lease and that some of the Lease terms, including the range of rent expected to be paid, were discussed in an article printed in the San Antonio Business Journal. Further, [the Port provided testimony] that the Port's annual financial reports, containing the amounts that Boeing has paid annually to the Port under the Lease, are available to the public." Boeing also argued that disclosure would put Boeing at a competitive disadvantage by allowing its competitors to better locate suitable airfield space. The court rejected the claim, noting that "this argument fails to take into account the myriad of other factors that might influence the cost of any lease a competitor might obtain from other municipalities, such as size and location of the property. This argument also assumes that lease cost is the sole determining factor in bids for a government contract." Boeing claimed that another exception for information that would "give an advantage to a competitor" applied. But the court pointed out that the exception applied only to the governmental body and explained that "if [the exception] applies to information—even core public information—the exception from disclosure may be waived by the governmental body, unless disclosure is 'prohibited by law' or the information is 'confidential under law.'. . The Port can waive, and in effect has waived, any claim to withhold the information under [the exception]." (*Boeing Company v. Greg Abbott, Attorney General of Texas*, No. 03-10-00411-CV, Texas, Court of Appeals, Austin, Mar. 9)

Vermont

Even though the pro se litigant had pursued claims of police wrongdoing in both state and federal courts without success, the supreme court has ruled that Stephen Bain can continue to pursue his claim that the Windham County Sheriff's Office failed to provide radio dispatch and unit logs for the specific dates for which he request them. Acknowledging its obligation to accept any plausible claim made by a pro se litigant, the court pointed out that the Sheriff's Office after seven years had still not definitively explained whether or not it had the requested records. The court noted that "defendants take no position in their briefs on the existence of these records. We are thus left to wonder, do these records exist? If not, why haven't defendants relied on this position to defeat Bain's claim? If they do exist, why did the Sheriff's Office say otherwise in 2004? These types of questions go to the heart of the [Public Records Act] and they raise issues that free disclosure of public documents can put to rest." The court concluded that "because the evidence in this case has not yet been fully developed, we cannot discern if police radio and dispatch unit logs are the type of records that the Legislature intended to shield from view under the [law enforcement exemption]." (*Stephen Robert Bain v. Windham County Sheriff Keith Clark*, No. 2009-468, Vermont Supreme Court, Mar. 2)

The Federal Courts…

Judge Royce Lamberth has ruled that the EPA improperly charged Hall & Associates to review records for segregability after being ordered to do so by the agency's administrative appeals authority. Hall requested records on the agency's current and historical position on whether states with approved discharge programs under the Clean Water Act could authorize bacteria mixing zones in freshwater lakes and rivers. After an extensive database search, the agency charged Hall $372 in search, duplication, and review costs, disclosed 30 documents, and withheld 300 documents under **Exemption 5 (deliberative process privilege)**. Hall appealed the denial of documents under Exemption 5 as well as complaining about the agency's failure to indicate what documents were responsive to which part of Hall's request. The Office of General Counsel granted Hall's appeal and remanded the request to the Office of Science and Technology for a review of whether any releasable information could be reasonably segregated from exempt material. The letter indicated it was the agency's final determination on the appeal and did not include a statement regarding the need for further payment from Hall. The Office of Science and Technology then assessed the costs of reviewing and redacting segregable material and asked Hall to pay an additional $3,280. EPA also told Hall it would cost an additional $615 to provide a categorical summary of its response. Hall ultimately agreed to pay $205 for the categorical response, but refused to pay the fees for the segregability review. Hall then filed suit. Hall argued the agency could charge fees only for initial review and pointed to EPA regulations specifically prohibiting fees as the result of an administrative appeal. Noting that there was no D.C. Circuit case law on the issue, Lamberth found Hall's citation to *AutoAlliance International v. U.S. Customs Service*, (E.D. Mich., July 31, 2003), a case in which the court found the agency could not charge for review as the result of an appeal, was persuasive. In contrast, he rejected the agency's reliance on *Gavin v. SEC*, (D. Minn. 2006), in which the court allowed the agency to charge for a search the agency conducted as a result of the court's order. Lamberth noted that "the Court sees EPA's argument as a meritless attempt to skirt the plain meaning of 'initial review' as contemplated by the FOIA statute and EPA regulation governing these fees. The administrative appeal determination—conspicuously silent on this fee issue—found that EPA's initial response to Hall's FOIA request was deficient and mandated that the Agency conduct a segregability analysis that it should have performed initially. EPA takes that finding to mean that because EPA improperly withheld documents in its first response, it is now allowed to charge Hall additional fees for the time needed to cure its deficient response. But when the Agency's FOIA response is deemed inadequate on appeal, the Agency cannot make its production of the originally improperly withheld documents contingent upon further payment from the requester under the theory that the work done in an effort to cure its initial inadequate response is still part of the 'initial review.'" Lamberth rejected EPA's claim that Hall had failed to **exhaust administrative remedies** by not appealing the agency's various requests for further payment. He found Hall had appealed EPA's initial determination on its request, but pointed out that "all other EPA correspondence with Hall surrounding Hall's FOIA request, including those [other] communications between the parties pertaining to fees, were void of [the right to appeal] language." Hall contended EPA's response had been inadequate because it failed to provide a categorical summary of the responsive records. But Lamberth pointed out that "Hall cannot dispute the adequacy of EPA's response without simultaneously disputing the adequacy of EPA's search, because the Agency's response is necessarily the result of its search—they are two sides of the same coin. If Hall does not challenge the adequacy of EPA's search, as it maintains, then it is unclear what Hall does argue—that EPA improperly categorized responsive documents in the summary, or that EPA located responsive documents in the course of its search but failed to turn those documents over to Hall. Neither argument is developed in Hall's pleadings." (*Hall & Associates v. Environmental Protection Agency*, Civil Action No. 10-1940 (RCL), U.S. District Court for the District of Columbia, Mar. 7)

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Judge James Boasberg has become the second district court judge in recent weeks to rule that the Justice Department improperly declined to identify and process records pertaining to the investigation of a congressional member. In January Judge Gladys Kessler ruled the agency could not decline to neither confirm nor deny the existence of records concerning its investigation of Rep. Don Young (R-AK) because the investigation was already a matter of public record and, more importantly, issues of legislative integrity were clearly a matter of public interest. Now Boasberg has reached the same conclusion concerning an investigation of Rep. Jerry Lewis (R-CA) on charges of corruption. Boasberg first noted that "although his is not the only privacy interest allegedly implicated here, the existence and extent of Rep. Lewis's interest in these documents remaining undisclosed is the primary focus of both parties. Before addressing his privacy interest in the materials at issue, it is worth noting that Lewis's status as a public official operates to reduce his cognizable interest in privacy as a general matter." CREW argued that the fact that Lewis himself had publicly acknowledged the investigation's existence diminished his privacy interest. Boasberg agreed, noting that "when the fact of an investigation 'is already a matter of public record,' the target's privacy interest in that information has 'far less force.'" But he pointed out "while CREW may well be correct that by virtue of its public disclosure Lewis does not retain a significant privacy interest in the *fact* of an investigation, he nevertheless retains a privacy interest in the *substance* of that investigation. Despite the fact that it is a matter of public record that an investigation took place, the details of that investigation have not been publicly disclosed." Boasberg found that any third parties mentioned in the investigatory files retained a significant privacy interest in non-disclosure. Turning to the public interest in disclosure, Boasberg noted that the fact records pertained to an individual's activities did not necessarily suggest that there was no public interest in disclosure. He indicated that "CREW maintains that disclosure of the files in question 'would shed light on the conduct of DOJ and the FBI in conducting the investigation or Rep. Lewis, and DOJ's decision to close the investigation without bringing charges against him." Boasberg pointed out that "against the backdrop of broader public concerns about the agency's handling of allegations of corruption leveled against high-ranking public officials, the public has a clear interest in documents concerning DOJ's handling of Lewis's investigation." DOJ argued there was no evidence of agency misconduct. But Boasberg observed that "because CREW has not attempted to justify its request on the ground of agency misconduct (indeed, the decision not to prosecute is a discretionary one), it need not produce the compelling evidence of illegal activity that would be required if it had done so." Balancing the interests, Boasberg noted that "in light of the strong public interest at stake in the requested records, the Court is not persuaded that the balance will favor privacy with respect to *each document* that concerns the Lewis investigation." He added that "the weights of those interests, furthermore, may vary with respect to each document within the responsive file. Determining whether withholding is justified, therefore, requires a more nuanced analysis than can be undertaken without an account of the records in the Government's possession." Boasberg pointed out CREW's limited success. "The Court does not decide whether the Government need turn over anything at all in response to CREW's request. It may well turn out that it need not. . .[However], the court at this juncture simply finds that it cannot resolve this dispute at the altitude DOJ desires." (*Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice*, Civil Action No. 11-1021 (JEB), U.S. District Court for the District of Columbia, Mar. 2)

A federal court in California has ruled that the FBI improperly redacted personal information about a well-known individual involved in a traffic violation whose records were part of FBI files on Ronald Reagan. The FBI claimed the document was compiled as part of its investigation into Reagan's involvement with the Communist Party. But Judge Edward Chen noted that "an alleged investigation of the Communist Party is insufficient to constitute a legitimate law enforcement purpose in view of the relevant time frame." He indicated that the document "was generated in 1975, nearly 20 years after the benchmark date of 1957 [when the Supreme Court ruled that existing laws only allowed prosecution of members of the Communist Party who actively advocated the forcible overthrow of the U.S. government]. Thus, Defendants' reliance on Ronald

Reagan's alleged connection to Communism does not constitute a sufficient law enforcement purpose for this document to satisfy the rational nexus test." He added that "Defendants' assertion that the document is related to Ronald Reagan's connection to the Communist Party is wholly unbelievable. . .Given Ronald Reagan's status as an informant for the FBI [in the 1940s], the FBI would have no reason to investigate Ronald Reagan for his involvement in the Communist party during the 1960s and 1970s, and certainly not so in 1975 after his term as Governor of California." After examining the document himself, Chen added that it "has no apparent connection to any investigation into Ronald Reagan's purported Communist ties. The document is concerned with the investigation of the traffic violations of an individual closely associated with Ronald Reagan. The document has no apparent connection with national security or any other legitimate law enforcement purpose." Assessing the privacy interest, Chen noted that the age of the traffic violations diminished the expectation of privacy. He pointed out that "the fact that the documents concern old traffic violations as opposed to more serious criminal prosecutions decreases the likely stigma that would follow such a disclosure. As the likely stigma of disclosure falls, so too does the privacy interest at issue." Chen also pointed out that the individual had written a number of books, was a radio personality, and had written about the current Republican nomination. Chen observed that "such activities make clear that the subject has placed himself in the public light, writing and speaking about his life experiences while getting heavily involved in recent political events." Turning to the public interest in disclosure, Chen rejected the agency's argument that the document said nothing about the government's performance. Instead, he observed that "Plaintiff persuasively argues that the investigation of the subject's old traffic violations has no conceivable purpose other than to aid Ronald Reagan's political career by providing advance notice of any issues of potential embarrassment that might affect any future political campaign. The disclosure of this document thus enhances the public's understanding of whether the FBI used public resources to benefit a private citizen for non-law enforcement purposes." (*Seth Rosenfeld v. U.S. Department of Justice*, Civil Action No. C-07-3240 EMC, U.S. District Court for the Northern District of California, Mar. 5)

A federal court in Virginia has ruled that the Board of Supervisors of Prince William County failed to **exhaust administrative remedies** when the Board did not appeal responses from Immigration and Customs Enforcement and Citizenship and Immigration Services to its request concerning the identity of aliens being held on immigration charges in the Prince William County jail. ICE responded to the Board's request by disclosing a redacted spreadsheet, making a number of exemption claims, and referring another part of the Board's request to CIS. CIS said it was still working on the request and needed the Board to provide written consent and verification of identity for the aliens. The Board then filed suit, contending that the responses it received from both agencies did not constitute determinations triggering the need to administratively appeal. The court first noted that "the [ICE] response to items (1) and (3) of the FOIA request was clearly a 'determination' which the Board was obligated to administratively appeal. The response informed the Board that records responsive to items (1) and (3) of the FOIA request had been located, stated the reasons for the redactions in the attached spreadsheet, and notified the Board of its right to appeal. Thus, ICE properly responded to items (1) and (3) of the Board's FOIA request before the filing of this suit, and the Board is not entitled to constructive exhaustion as to this portion of its claim." The court then noted that "compliance with both FOIA and agency requirements is necessary before the agency can release the requested records." In this case, this included both the need to better describe the records sought by providing verification information as well as securing the consent of the aliens to disclosure of personal information. The court observed that "the Board asserts that it is challenging the lawfulness of [Homeland Security's] consent requirement, and that prudential considerations therefore weigh against exhaustion. Such a challenge turns on statutory interpretation, which does not lie in the judiciary's areas of expertise." The court indicated that "the Board neglects to explain why or how CIS should have been able to determine which alien files correspond with individuals taken into custody in Prince William County without the aid of the additional information it

requested. Whether this request for additional information was reasonable is a question that is fact-based and agency-specific. It is therefore appropriate to require the Board to seek further administrative review before pursuing judicial intervention." (*Board of Supervisors of Prince William County v. United States Department of Homeland Security*, Civil Action No. 1:11cv819 (JCC/JFA), U.S. District Court for the Eastern District of Virginia, Mar. 1)

The Eighth Circuit has ruled that the district court failed to consider the implied assurance of confidentiality when it found that the DEA improperly claimed **Exemption 7(D) (confidential sources)** to redact identifying information about a source in a 1990 report. In 2009, Tony Hulstein was charged with dealing firearms without a federal firearms license. In preparation for the case, Hulstein learned the DEA had previously investigated him for drug activities. The agency redacted information from both reports under a variety of exemptions, including 7(D). The district court found the information in the 1990 report was not protected by 7(D) and ordered the agency to disclose it. The agency appealed. The Eighth Circuit disagreed with the district court. The appeals court noted that "the DEA is not required to make a detailed explanation regarding the alleged confidentiality of each source." The court pointed out that "the risk of retaliation against the sources is supported by the unredacted portion of the 1990 report and the nature of the alleged crime the DEA was investigating. Such a risk still exists, and warrants an implied grant of confidentially, even after the passage of time and whether or not the allegations were acted upon by the authorities. In addition, the redacted portion of the 1990 report independently supports the DEA's argument that there was an implied assurance of confidentiality with the sources." (*Tony Hulstein v. Drug Enforcement Administration*, No. 11-2039, U.S. Court of Appeals for the Eighth Circuit, Mar. 2)